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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 matters King County Superior Court No. 06-2-16933-6 SEA and King County Superior Court No. 06-2-16675-2 KNT)

(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.

(King County Superior Court No. 06-2-16675-2 KNT)
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.

MOTION FOR DISCRETIONARY REVIEW
BY THE COURT OF APPEALS

ORIGINAL

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

A. Identity of Petitioners 1

B. Decision 1

C. Issues Presented for Review 2

D. Statement of Case 3

E. Argument Why Review Should be Accepted 6

F. Conclusion 26

A. IDENTITY OF PETITIONERS

Petitioners Master Builders Association of King and Snohomish Counties, Building Industry Association of Washington, and City of Kent respectfully request this Court to accept review of the parts of the decision designated in Part B of this motion.

B. DECISION

The "Final Decision and Order" ("Decision") issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, related to, in part: (1) the City of Kent's decision to adopt a three-tier wetland rating system instead of the four-tier system advocated by the Department of Ecology; (2) the City of Kent's decision to adopt certain standards for wetland buffer widths and other regulations and programs besides buffers which provide protection for wetlands; and (3) the City of Kent's alleged failure to support Ordinance No. 3746 with "best available science."

The Board's Decision is significantly flawed and raises numerous broad issues of substantial statewide importance including, but not limited to, the following: (1) various errors in which the Board improperly shifted the burden of proof to the City and/or ignored the presumption of validity of the City's Ordinance No. 3746; (2) the Board's findings and conclusions that the City's continued use of the 3-tier wetland rating

system was clearly erroneous, did not include or was not based upon best available science, or was otherwise not in compliance with the GMA; (3) that the City's wetland buffers, codified at Kent City Code Sec. 11.06.660, do not meet best available science requirements, are clearly erroneous or otherwise do not comply with GMA planning goals; (4) challenges to various findings and conclusions that the City did not utilize or rely upon "best available science" in its adoption of Ordinance No. 3746; (5) that various existing City projects and regulations failed to justify a downward departure from best available science requirements; and (6) that the City failed to balance GMA planning goals or failed to give preeminence to environmental protection as demanded by the State Agencies.

On June 22, 2006, the King County Superior Court entered an Order of Certification for Direct Review by the Court of Appeals and a Stipulation and Order of Consolidation consolidating the above causes of action into King Superior Court No. 06-2-16675-2 KNT. *See*, Declaration of Darrell S. Mitsunaga in Support of Motion for Discretionary Review by the Court of Appeals ("Mitsunaga Declaration"), Exhibits A-B. Notice for Discretionary Review to the Washington State Court Of Appeals, Division I, was filed on June 30, 2006. (*See*, Mitsunaga Declaration, Exhibit C.)

C. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept direct review of this matter pursuant to RCW 34.05.518 where the King Superior Court has entered an

Order of Certification for Direct Review by the Court of Appeals and (1) fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination; (2) delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest; (3) an appeal to the Court of Appeals would be likely regardless of the determination in superior court; and (4) the appellate court's determination in the proceeding would have significant precedential value.

D. STATEMENT OF CASE

On April 19, 2005, the City of Kent ("Kent") adopted Ordinance No. 3746, its updated Critical Area Ordinance, following extensive discussion and deliberation at numerous public meetings and public hearings. On June 22, 2005, the Board received a petition for review from the Washington State Department of Ecology and the Washington State Department of Community, Trade, and Economic Development challenging portions of Kent Ordinance No. 3746 on various grounds. *See*, Declaration of Robert D. Johns in Support of Direct Review by the Court of Appeals[1] ("Johns Declaration").

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[1] Mr. Johns' Declaration has been previously served on all parties herein and will therefore not be re-served on the parties in conjunction with this motion to reduce paper resources due to the voluminous nature of the pleading and exhibits. A copy of Mr. Johns' Declaration, however, is being provided to the Court with this motion.

On April 19, 2006, the Board issued its Decision. (*See*, Johns Declaration, Exhibit 1). Therein, the Board determined that certain aspects of Kent Ordinance No. 3746 were clearly erroneous and non-compliant with the requirements of RCW 36.70A.040(3)(b), 060(2), .170, and .172.(10), were not guided by GMA goals RCW 36.70A.020(9) and (10), and remanded Kent Ordinance No. 3746 to Kent directing it to take legislative action to comply with the requirements of the GMA as set forth in the Board's Decision. (*See*, Johns Declaration, Exhibit 1).

Petitioners Master Builders Association of King and Snohomish Counties ("MBA") and Building Industry Association of Washington ("BIAW") thereafter sought judicial review of the Board's Decision by filing in King County Superior Court, under Cause No. 06-2-16675-2 KNT, a Petition for Judicial Review of an Administrative Decision on May 16, 2006, and an Amended Petition for Judicial Review of an Administrative Decision on May 17, 2006 (collectively referred to as "Petition"). (*See*, Johns Declaration, Exhibits 2, 3.)

The Petition sought review of those portions of the Decision related to the Board's rejection of: (1) Kent's decision to adopt a three-tier wetland rating system instead of the four-tier system advocated by the Department of Ecology; and (2) Kent's decision to adopt certain standards for wetland buffer widths and other regulations and programs besides

buffers which provide protection for wetlands. (*See*, Johns Declaration, Exhibits 2, 3).

On May 18, 2006, Kent also sought judicial review of the Board's Decision by filing in King County Superior Court, under Cause No. 06-2-16933-6 SEA, a separate Petition for Judicial Review of State Agency Administrative Decision, raising similar and additional issues. (*See*, Johns Declaration, Exhibit 4).

On June 14, 2006, Petitioners MBA and BIAW filed pursuant to RCW 34.05.518 (1) an Application for Certification by the King County Superior Court for Direct Review by Court of Appeals and (2) a Request to the Central Puget Sound Growth Management Hearings Board for Issuance of a Certificate of Appealability in Cause No. 06-2-16675-2 KNT. (*See*, Mitsunaga Declaration.) On June 16, 2006, Kent filed a similar application and request in Cause No. 06-2-16675-2 KNT.[2] (*See*, Mitsunaga Declaration.)

The State agencies in this matter, the Washington State Department of Ecology and the Washington State Department of Community, Trade, and Economic Development, have agreed that direct review by the Court of Appeals is appropriate. (*See*, Mitsunaga

[2] As of the filing of this motion, the Board had not yet responded to the petitioners' requests to the Central Puget Sound Growth Management Hearings Board for issuance of a Certificate of Appealability.

Declaration.) No other party has raised an objection to direct review by the Court of Appeals. (*See*, Mitsunaga Declaration.)

On June 22, 2006, the King County Superior Court in Cause No. 06-2-16675-2 KNT entered an Order of Certification for Direct Review by the Court of Appeals on June 22, 2006, relative to all petitions for review of the Board's Decision. (See, Mitsunaga Declaration, Exhibit A.) Also, on June 22, 2006, the King County Superior Court entered a Stipulation and Order of Consolidation consolidating both causes of action into King Superior Court No. 06-2-16675-2 KNT. (See, Mitsunaga Declaration, Exhibit B.)

On June 30, 2006, petitioners timely filed a Notice for Discretionary Review to the Washington State Court Of Appeals, Division I. (*See*, Mitsunaga Declaration, Exhibit C.)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. RCW 34.05.518 Authorizes Direct Review by the Court of Appeals.

Direct review by an appellate court of the Board's Decision is authorized under RCW 34.05.518, which provides:

> (1) The final decision of an administrative agency in an adjudicative proceeding under this chapter may, except as otherwise provided in chapter 43.21L RCW, be directly reviewed by the Court of Appeals **either** (a) upon certification by the superior court pursuant to this section or (b) if the final decision is from an environmental board as defined in subsection (3) of this section, upon acceptance by the Court of Appeals after a certificate of appealability

has been filed by the environmental board that rendered the final decision.

(2) For direct review upon certification by the superior court, an application for direct review must be filed with the superior court within thirty days of the filing of the petition for review in superior court. The superior court may certify a case for direct review only if the judicial review is limited to the record of the agency proceeding and the court finds that:

(a) Fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination;

(b) Delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest;

(c) An appeal to the Court of Appeals would be likely regardless of the determination in superior court; and

(d) The appellate court's determination in the proceeding would have significant precedential value.

Procedures for certification shall be established by court rule.

(3) (a) For the purposes of direct review of final decisions of environmental boards, environmental boards include those boards identified in RCW 43.21B.005 and growth management hearings boards as identified in RCW 36.70A.250.

(b) An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

(i) Fundamental and urgent statewide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

(4) The environmental board shall state in the certificate of appealability which criteria it applied, explain how that criteria was met, and file with the certificate a copy of the final decision.

> (5) For an appellate court to accept direct review of a final decision of an environmental board, it shall consider the same criteria outlined in subsection (3) of this section, except as otherwise provided in chapter 43.21L RCW.
>
> (6) The procedures for direct review of final decisions of environmental boards include:
>
> (a) Within thirty days after filing the petition for review with the superior court, a party may file an application for direct review with the superior court and serve the appropriate environmental board and all parties of record. The application shall request the environmental board to file a certificate of appealability.
>
> (b) If an issue on review is the jurisdiction of the environmental board, the board may file an application for direct review on that issue.
>
> (c) The environmental board shall have thirty days to grant or deny the request for a certificate of appealability and its decision shall be filed with the superior court and served on all parties of record.
>
> (d) If a certificate of appealability is issued, the parties shall have fifteen days from the date of service to file a notice of discretionary review in the superior court, and the notice shall include a copy of the certificate of appealability and a copy of the final decision.
>
> (e) If the appellate court accepts review, the certificate of appealability shall be transmitted to the Court of Appeals as part of the certified record.
>
> (f) If a certificate of appealability is denied, review shall be by the superior court. The superior court's decision may be appealed to the Court of Appeals.

(Emphasis added.)

Accordingly, a request for direct review by the Court of Appeals is initiated by either: (1) obtaining certification by the Superior Court; or (2) the filing by the Board of a certificate of appealability and subsequent acceptance by the Court of Appeals. RCW 34.05.518(1). This is done by

filing, within 30 days of filing of the petition for review, an application for certification for direct review with this Superior Court and serving such application upon the environmental board, here the Board, and all parties of record, requesting the Board to file a certificate of appealability. RCW 34.05.518(6)(a).

Once the Superior Court enters an order of certification for direct review by the Court of Appeals, notice of discretionary review may be sought with the Court of Appeals. RAP 6.3 provides:

> **RULE 6.3 DIRECT REVIEW OF A FINAL DECISION OF AN ADMINISTRATIVE AGENCY**
>
> The appellate court accepts direct review of a final decision of an administrative agency in an adjudicative proceeding under RCW 34.05.518 and RCW 34.05.522 by entering an order or ruling accepting review. In requesting direct review, the parties shall follow the procedures set forth in rule 6.2.[3]

RCW 34.05.522 further provides:

> The court of appeals may refuse to accept direct review of a case pursuant to RCW 34.05.518 if it finds that the case does not meet the applicable standard in RCW 34.05.518(2) or (5). Rules of Appellate Procedure 2.3 do not apply in

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[3] RAP 6.2 states:

DISCRETIONARY REVIEW

(a) Generally. The appellate court accepts discretionary review of a trial court decision by granting a motion for discretionary review.

(b) Time To Make Motion. The party seeking discretionary review must file in the appellate court a motion for discretionary review within 15 days after filing the notice for discretionary review. . . . .

(c) Regular Motion Procedure Governs. A motion for discretionary review is governed by the motion procedure established by Title 17.

(d) Notice of Decision on Motion. The clerk of the appellate court will promptly give written notice to the parties and the trial court of the appellate court's decision on the motion for discretionary review.

this instance. The refusal to accept such review is not subject to further appellate review, notwithstanding anything in Rule 13.3 of the Rules of Appellate Procedure to the contrary.

2. The Issues Raised in the Petitions for Review Filed Herein Fully Meet the Requirements of RCW 34.05.518(2) for Acceptance of Direct Review

RCW 34.05.518(2) provides, in part:

> (2) For direct review upon certification by the superior court, an application for direct review must be filed with the superior court within thirty days of the filing of the petition for review in superior court. The superior court may certify a case for direct review only if the judicial review is limited to the record of the agency proceeding and the court finds that:
>
> (a) Fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination;
>
> (b) Delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest;
>
> (c) An appeal to the Court of Appeals would be likely regardless of the determination in superior court; and
>
> (d) The appellate court's determination in the proceeding would have significant precedential value.

The applications for direct review were timely filed, *i.e.*, within 30 days of the filing the petitions for review, and judicial review is limited to the record of the Board. (*See*, Johns Declaration, Exhibits 1, 4.)

Moreover, fundamental and urgent issues affecting the future administrative process or the public interest are involved which require a prompt determination. The Board's Decision found several important elements of Kent's updated critical areas ordinance non-compliant with

the Growth Management Act and creates substantial uncertainty regarding development requirements, permit processing, and related expense since it is unknown what version of the ordinance will ultimately be upheld. This significantly impacts the property rights, financial interests, and development rights of members of petitioners MBA and BIAW and the public in general, the ability of Kent to properly review, condition, and approve development applications, and the public interest in the orderly processing, public comment, and public meeting and hearings on development applications based on known regulatory requirements. Until a final determination of the issues is reached in this case, property owners as well as Kent are in limbo as to what development can occur. (See, Johns Declaration).

The Board's Decision also has a particular impact on the property rights of private citizens. Given the number of wetlands and other critical areas in our State, and in the Central Puget Sound specifically, any judicial decision on those issues has a broad and direct impact on the way private landowners can use their property, as well as the way in which a city may control and regulate development and protect the environment within its jurisdiction. In that respect, this case presents far more significant local, regional, and statewide issues than most cases heard by the Board. For example, the Board has jurisdiction over cases involving permit processing, tree-cutting ordinances, general comprehensive plan

procedural compliance, and a host of other issues with typically limited application and importance. In contrast, this case deals directly with private property rights and the right of local control over land use regulations – issues that have far broader and far more important application both to governmental entities and the public at large than the typical case.

The issues of critical statewide importance which will be resolved by this case include:

1. Is the Board correct when it ruled local jurisdictions must adopt significantly larger buffers for wetlands based on the Department of Ecology's version of best available science?

2. Is the Board correct when it ruled that local jurisdictions cannot rely on other methods of protecting wetland functions and values as an alternative to increasing the size of wetland buffers?

3. Is the Board correct when it ruled that wetland regulations must be made more restrictive even if there is no evidence that current regulations fail to adequately protect wetland functions and values and there is no evidence that more stringent regulations will provide increased environmental protection?

4. Is the Board correct when it ruled that local jurisdictions must adopt DOE's new wetland rating system even though DOE admits it has no evidence that the new rating system will result in increased protection of wetland functions and values?

Moreover, although this case involves a specific ordinance adopted by Kent, the Board's Decision will greatly impact and delay the implementation of similar ordinances by other cities and counties faced in similar situations as well as significantly impacting their long-range urban planning policies and processes. A number of local jurisdictions have adopted critical area provisions comparable to those which the Board has

determined were non-compliant. The Board's ruling creates substantial uncertainty about the validity of those regulations, many of which were adopted without challenge by the Department of Ecology or the Department of Community Trade and Economic Development. (*See*, Johns Declaration).

Many cities around the State, and particularly in the central Puget Sound region, are experiencing the type of rapid growth that Kent is currently experiencing. Given this exponential growth in cities, many of which are recently incorporated, and many of which have traditionally been rural and agricultural areas, these cities are increasingly being confronted with many of the same environmental, planning, and land use decisions that are implicated in this case. These cities, like Kent, are struggling to balance the competing goals presented by their new-found growth: reaching the proper balance between environmental protection and private property rights, between localized and state-imposed decision making, and determining the extent to which local decisions based on local conditions will receive the proper deference at regional and state levels.

Kent is aware of other cities across the state that are interested in the outcome of this case. Representatives from these other cities have indicated that the outcome in this case may impact their own actions, policies, and decisions in the future. The issues raised herein clearly

present fundamental issues of regional and statewide concern. Prompt determination of the issues under review is therefore essential.

Also, ***delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest.*** It has been clear from the outset of this case, and continuing through to the present, that delays in the final determination of the issues involved here have been, and will continue to be, highly detrimental to both the parties and the public interest. The City's critical areas ordinance, Ordinance No. 3746, has been rendered ineffective by the Board's decision and, therefore, important critical areas and other environmental regulations and requirements to protect the public health, safety and welfare of the citizens of Kent and even those in other surrounding jurisdictions, are in limbo. Effectively, the City cannot enforce this ordinance and its important environmental protections.

It is important to note that the parties involved in this case are not mere interested observers, or special interest groups formed for the sole purpose of litigating these issues. The parties involved each have separate, direct and significant interests in the swift resolution of this case, as it deeply affects the parties themselves, and the constituents those parties represent. For example, the members of the MBA and BIAW own property in Kent, have pending permit applications in Kent, which are subject to Kent Ordinance No. 3746 (key provisions of which have been

deemed non-compliant by the Board's Decision), and plan to purchase and develop properties in the City of Kent, which are subject to Ordinance No. 3746 on a regular basis. The Board's Decision and Order has had and will continue to have direct adverse impact upon the ability of the members of MBA and BIAW and the public to use and develop their property in Kent and the ability of Kent to meaningfully process and approve applications. Any delay in obtaining a final and prompt determination of the issues would therefore be extremely detrimental to the Petitioners, Kent, and other members of the public. (*See*, Johns Declaration).

Other respondents in the City's Petition for Review to the Superior Court include the Washington Association of Realtors, Citizens' Alliance for Property Rights and Livable Communities Coalition. The Washington Association of Realtors, like MBA and BIAW, have members which either own or are attempting to develop property in the City of Kent, or who have otherwise taken action through purchasing or selling property which is subject to Ordinance No. 3746. These people are directly and immediately affected by the Board's Decision. The Citizens' Alliance for Property Rights and the Livable Communities Coalition, amicus interest groups, have members who have direct stakes in the City's critical areas ordinance, the Board's Decision, and the ultimate outcome of the issue raised herein.

The Board's Decision significantly affects the property rights, financial interests, and development rights of all of these organizations, and the tens of thousands of individuals whom these associations directly represent. The businesses of the MBA, BIAW and Realtors depend almost solely on the interpretation and application of local land use and zoning laws. Consequently, the final decision on the important land use and property rights issues presented in this litigation will have a direct and significant impact on the financial interests of these entities and their members. Members of these associations have permit applications pending before Kent, and will undoubtedly represent a large number of the development/permit applications filed with Kent in the future. Additional members of these associations own property in Kent for the sole purpose of future development. Each of these pending and future applications is subject to Kent's critical areas regulations, which have been deemed non-compliant by the Board's Decision. Any delay in obtaining final and prompt determination of the issues presented herein will, therefore, be detrimental to Kent, the MBA and BIAW, intervenors, the amicus parties and the public in general, all of whom have a significant stake in the outcome of court review of the Board's Decision.

The detriment to Kent is just as great. The "City of Kent" is not simply the City Council, the City's Planning Commission, or City employees; Kent represents the nearly 90,000 citizens of Kent whose

property rights and financial interests are directly and significantly implicated in the outcome of this litigation. These rights and interests can only be protected when Kent's laws are well-defined and well-settled. As with the MBA, BIAW, the Realtors and the amici, the citizens of Kent are now left in limbo about the current and future status of Kent's important critical areas regulations for as long as this litigation drags on.

Its is also important that the issues herein be resolved as quickly and efficiently as possible for purposes of Kent's administration and processing of permits and other land use related applications. Under the Board's Decision, Kent's wetland regulations were deemed "not in compliance" with the GMA; however, those regulations remain technically enforceable until a final resolution of the issues (either through voluntary compliance or a final court decision). If the regulations are amended through voluntary compliance, the resulting regulations will clearly be more stringent than those in Ordinance No. 3746, and will almost certainly allow for less utilization of private property. The prospect of more stringent regulations in the near future has resulted in a rush to the Kent's Planning Department as property owners clamor to vest their development rights under the current regulations prior to a possible prospective change. This straining of Kent's citizen-funded services will continue as long as the issues in this litigation remain undecided.

Additionally, the delay in a final determination of these issues is a tremendous detriment to Kent since its eligibility for millions of dollars in available State-sponsored grants for a variety of environmental, public works and other State improvement projects depends on Kent being in compliance with the GMA. Because the Board determined that Kent's critical area regulations *were not* in compliance with the GMA, Kent is no longer eligible for such State grants, and will remain ineligible until either voluntary compliance or a final determination of the issues in this litigation. If this litigation proceeds through Superior Court, then is appealed to the State Court of Appeals and/or the Supreme Court, Kent will likely lose out on several years worth of vital and likely irretrievable State funding. Being denied such vital and extensive funding as a result of unnecessarily litigating this case at the Superior Court level is highly detrimental to Kent and its citizens.

Delay in a final determination of this case is not only detrimental to the interests of the parties in this case, but is also detrimental to the public interest in general. First, as shown above, the citizens of Kent depend on it to establish and maintain discernible and enforceable guidelines for the use and development of private property, as well as to provide for the protection of critical areas. Until the many important issues in this case are given a final determination, Kent is unable to fulfill either of these vital tasks, and it is thus unable to provide the public with

the necessary concrete knowledge of their important rights under Kent's Code.

Second, the issues in this case themselves are issues of vital public interest. The outcome of this case will determine the extent to which private property owners may use their property, and also the extent to which Kent's and the region's critical areas are protected by Kent's regulations. Consequently, any delay in determining the legal issues in this case is clearly detrimental to the public's interest in discerning its rights and responsibilities regarding the use and development of private property, and how and to what extent environmental regulations are applied.

The issues herein therefore raise many substantial issues of broad State-wide significance. This fact is emphasized by the number of parties involved at the Board level, and the fact that many jurisdictions across the State are watching these proceedings with a critical eye, waiting to see the ultimate result before making changes to their own critical areas regulations. The issues in this case go far beyond Kent and its citizens; the issues involve all GMA-communities, property owners, developer associations, environmental organizations, public policy interest groups and State residents.

Finally, but perhaps most importantly, it is the strong public policy of this State to obtain expeditious review of land use matters, and to avoid

unnecessary, litigation-based delays. *See, e.g.: National Homeowners v. Seattle*, 82 Wn. App. 640, 644-45, 919 P.2d 615 (1996); *City of Federal Way v. King County*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991); *Jewell v. City of Kirkland*, 50 Wn. App. 813, 820-21, 750 P.2d 1307 (1988); and *Deschenes v. King County*, 83 Wn.2d 714, 716-17, 521 P.2d 1161 (1974). Long recognized and strongly worded public policy favors expeditious judicial review of land use decisions and regulations so that "legal uncertainties" can be promptly resolved. *Id.*; *Bellewood No. 1, LLC v. Loma*, 124 Wn. App. 45, 49, 97 P.3d 747 (2004). Judicial review of land use matters must be "prompt" because

> [t]he consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays.

National Homeowners v. Seattle, supra., 82 Wn. App. at 644 (quoting *City of Federal Way v. King County*, 62 Wn. App. at 538). A court " ... ***must consider the judicial policy in this state of expeditious review of land use regulatory decision so that legal uncertainties can be promptly removed and land development not slowed or defeated by unnecessary delays.***" *Jewell v. City of Kirkland, supra.*, 50 Wn. App. at 820-21 (emphasis added) (quoting *Deschenes v. King County, supra.*). Allowing direct review of the Board's Decision by this Court not only

furthers this strong public policy, it avoids the many costs and problems which result from unnecessary litigation-based delays.

Further, ***an appeal to the Court of Appeals is likely regardless of the determination in superior court.*** Review in this particular matter is appropriate and a more efficient use of judicial time and resources. Petitioners fully intend to file an appeal to the Court of Appeals in the event of an adverse decision by the Superior Court. Petitioners also fully expect respondents Washington State Department of Ecology and the Washington State Department of Community, Trade, and Economic Development and/or other parties to similarly file an appeal in the event that they receive an adverse decision in Superior Court. This review proceeding raises substantial issues of state-wide significance as reflected by the parties herein, which include developer, real estate, citizen, and property rights associations and coalitions. An appeal to the Court of Appeals is therefore inevitable regardless of the Superior Court's ruling. (*See*, Johns Declaration).

Finally, ***the appellate court's determination in the proceeding would have significant precedential value.*** The Board's Decision significantly and dramatically changed the appropriate requirements for compliance with the Growth Management Act, RCW 36.70A.010, et. seq. This includes, but is not limited to:

1. The improper shifting of the burden of proof to Kent contrary to RCW 36.70A;

2. The improper elevation of environmental concerns to a position of priority and superiority over all other Growth Management Act issues in violation of RCW 36.70A.3201 and other provisions of RCW 36.70A;

3. The elevation of provisions of WAC ch. 365-190 from advisory positions of the Department of Community Trade and Economic Development to mandatory requirements which Kent must follow;

4. The violation of applicable constitutional principles, including but not limited to, the Fourth Amendment to the United States Constitution when the Board determined that the City not only had the authority, but was required to adopt more stringent regulations of private property even though there is no evidence that current regulations are causing any harm to the public health, safety and welfare, and no evidence that the more stringent regulations would provide better protection to the public health, safety and welfare;

5. The Board's misinterpretation and misapplication of numerous legal precedents regarding the interpretation and implementation of the Growth Management Act, including but not limited to, *Ferry County vs. Concerned Friends*, 155 Wn.2d 824 (2005); *Quadrant Corp. vs. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224 (2005); *HEAL v. Seattle*, 96 Wn.App. 522 (1999); and *WEAN v. Island County*, 122 Wn.App. 156 (2004); and

6. The Board's misinterpretation and misapplication of the Best Available Science provisions of RCW 36.70A.172.

(See, Johns Declaration).

The Court of Appeals decision will therefore have significant precedential value to Kent, cities and counties throughout the state, and property owners by clarifying and resolving the Growth Management Act's requirements on these and other issues.

It was clear throughout the proceedings before the Board that many of the important issues in the case would be decided based on the Board's choice among competing interpretations of various court cases.

Throughout the litigation, the parties presented radically differing views of cases like *WEAN*[4], *HEAL*[5], and *Viking Properties*[6]. As evidenced by the briefs and arguments of the parties, those cases – and others – were a source of contention throughout the Board proceedings because each of them dealt with only a small piece of the broad legal principles at issue in this case. Consequently, the narrow and specific holdings in those cases were artificially broadened and molded to fit the issues here. In contrast, the issues and principles involved in this case are more broadly applicable, and the Board's decision here addressed a much wider array of issues than the prior cases. Given that fact, the confusion of the prior cases, and the lack of clear law regarding the role and application of best available science, this case presents a logical opportunity for the Court of Appeals to condense and clarify its rulings in these other cases. Rather than have the parties argue over the interpretation of appellate court opinions in the trial court, this case should be transferred directly to the source of those opinions.

Finally, the prospective appellate decision on the issues presented in this case would have precedential value because of the significant and expanded ruling issued in the Board's Decision. There are at least two examples of this. First, the Board's Decision was uniquely expansive in

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[4] *Whidbey Environmental Action Network ("WEAN") v. Island County*, 122 Wn. App. 156 (2004).
[5] *Honesty in Environmental Analysis (HEAL) v. CPSGMHB*, 96 Wn. App. 522 (1999).
[6] *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.2d 322 (2005).

that it not only addressed the procedure for decision-making, but also issued a ruling specifically disapproving of a particular regulation (the 3-tier wetland rating system) that remains in use by many other jurisdictions around the State. It is important to recognize that the Board did not simply rule that the 3-tier system was inappropriate or insufficient *for the City of Kent*; rather, the Board specifically held that the 3-tiered wetland ratings system was simply not scientifically supportable *in general*. Given that ruling, this issue is clearly one of intense interest not only in the unique central Puget Sound area, but statewide, as indicated by the fact that the system remains in use State-wide.

Second, the Board also held that Kent's references to its particular localized geography, hydrology, and planning policies were not "unique circumstances" because other cities in the central Puget Sound Area also shared those characteristics. In other words, the Board has essentially held that the "uniqueness" of a local jurisdiction's particular situation would not be judged from a State-wide level, despite the fact that the law establishing "unique local circumstances" as justification for departure from certain guidelines is a *statewide* law. *See, WEAN, supra*. Instead, the Board held that Kent had not demonstrated sufficient indicia of uniqueness because the characteristics identified as unique were shared with other cities in the immediate area. So, the Board therefore decided that "unique local circumstances" would only be sufficiently unique if

they were not shared by other jurisdictions *in the same region*, even if that particular region itself was completely unique when compared to the entire rest of the State. Assessing uniqueness from a regional rather than State-wide level is a new and expansive principal established in this case, and one that will certainly have extensive and important precedential value when applied State-wide.

A decision by the Court of Appeals will, therefore, have substantial precedential value to hundreds of cities and counties throughout the State, and give much-needed clarity and security to property owners and other groups and organizations involving the Growth Management Act's requirements. And, as previously noted, this furthers the strong public policy of this State in obtaining expeditious judicial review of land use regulations, and avoiding litigation-based delays. *See, e.g., Bellewood No. 1, LLC v. Loma, supra., National Homeowners v. Seattle, supra., City of Federal Way v. King County, supra. Jewell v. City of Kirkland, supra.,* and *Deschenes v. King County, supra.*

///

///

F. CONCLUSION

Petitioners therefore respectfully request that this Court accept direct review of the Board's Decision as challenged by petitioners in the above-captioned cause of action.

Respectfully submitted this 12th day of July, 2006.

JOHNS MONROE MITSUNAGA, PLLC

By _____
Robert D. Johns, WSBA #7086
Darrell S. Mitsunaga, WSBA #12992
Attorneys for Petitioner MBA

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

By _____
for Timothy Harris, WSBA # 29906
Attorney for Petitioner BIAW
Per e-mail authority - July 11, 2006

CITY OF KENT

By _____
for Tom Brubaker, WSBA #18849
Attorneys for Petitioner City of Kent
Per e-mail authority - July 11, 2006

KEATING BUCKLIN & McCORMACK, INC. PS

By _____
for Michael C. Walter, WSBA #15044
Jeremy W. Culumber, WSBA #35423
Attorneys in Association for Petitioner City of Kent
Per e-mail authority - July 11, 2006

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 matters King County Superior Court No. 06-2-16933-6 SEA and King County Superior Court No. 06-2-16675-2 KNT)

(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.

(King County Superior Court No. 06-2-16675-2 KNT)
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.

DECLARATION OF DARRELL S. MITSUNAGA IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW BY THE COURT OF APPEALS

ORIGINAL

DECLARATION OF DARRELL S. MITSUNAGA IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW BY THE COURT OF APPEALS

I, Darrell S. Mitsunaga, declare under the penalty of perjury under the laws of the State of Washington, as follows:

1. I am an attorney and member with the Johns Monroe Mitsunaga PLLC law firm, counsel of record for petitioner Master Builders Association of King and Snohomish Counties, am competent to testify, and have personal knowledge of the matters asserted herein. This declaration is made in support of Petitioners' Motion for Discretionary Review by the Court of Appeals.

2. Attached as Exhibit A is a true and accurate copy of the Order of Certification for Direct Review by the Court of Appeals entered by the King County Superior Court on June 22, 2006.

3. Attached as Exhibit B is a true and accurate copy of the Stipulation and Order of Consolidation consolidating the above causes of action into King Superior Court No. 06-2-16675-2 KNT entered by the King County Superior Court on June 22, 2006.

4. Attached as Exhibit C is a true and accurate copy of the Notice for Discretionary Review to the Washington State Court of Appeals, Division I, filed on June 30, 2006.

5. On June 14, 2006, Petitioners MBA and BIAW filed pursuant to RCW 34.05.518 (1) an Application for Certification by the King County Superior Court for Direct Review by Court of Appeals and (2) a Request to the Central Puget Sound Growth Management Hearings Board for Issuance of a Certificate of Appealability in Cause No. 06-2-16675-2 KNT. On June 16, 2006, Kent filed a similar application and request in Cause No. 06-2-16675-2 KNT.[1]

6. The State agencies in this matter, the Washington State Department of Ecology and the Washington State Department of Community, Trade, and Economic Development, have agreed that direct review by the Court of Appeals is appropriate. No other party has raised an objection to direct review by the Court of Appeals.

DATED this 12th day of July, 2006 in Bellevue, Washington.

DARRELL S. MITSUNAGA

[1] As of the filing of this motion, the Board had not yet responded to the petitioners' requests to the Central Puget Sound Growth Management Hearings Board for issuance of a Certificate of Appealability.

JUN 26 2006

THE HONORABLE BRIAN GAIN

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, Petitioner, vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF ECOLOGY, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, an agency of the State of Washington; LIVABLE COMMUNITIES COALITION; CITY OF KENT, WASHINGTON ASSOCIATION OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY RIGHTS, Respondents.	**NO. 06-2-16675-2 KNT** **ORDER OF CERTIFICATION FOR DIRECT REVIEW BY THE COURT OF APPEALS**

THIS MATTER having come on for hearing before the Honorable Brian Gain of the above entitled court upon Petitioners Master Builders Association of King and Snohomish Counties' and Building Industry Association of Washington's application to this court for certification for direct review by the Washington State Court of Appeals, Division 1, of the final order entitled "Final Decision and Order" ("Decision") that was issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, and the decisions and actions contained in or related to said Decision, the Court being fully advised

COPY

EXHIBIT A

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of the premises thereto, having considered the arguments and briefing of counsel, having reviewed the pleadings on file herein, and having reviewed the following pleadings and exhibits:

1. Petitioners' (1) Application for Certification by the King County Superior Court for Direct Review by Court of Appeals and (2) Request to the Central Puget Sound Growth Management Hearings Board for Issuance of A Certificate of Appealability;

2. Declaration of Robert D. Johns in Support of Direct Review by the Court of Appeals, dated _____, and exhibits attached thereto.

3. state agency's response;

4. _____;

5. _____;and

6. _____;

The Court hereby finds that:

1. Petitioners' application for direct review was filed with this Superior Court within thirty days of the filing of the petition for review in this Superior Court.

2. Petitioners' petition for review is limited to the record of the agency proceedings of the Board.

3. Fundamental and urgent issues affecting the future administrative process or the public interest are involved in this matter which require a prompt determination since the Board's Decision effectively invalidates key portions of Kent's updated critical areas ordinance and creates substantial uncertainty regarding development requirements, permit processing, and related expense since it is unknown what version of the ordinance will ultimately be upheld. This significantly impacts the property rights, financial interests, and development rights of members of Petitioners and the public in general, the ability of Kent to properly review, condition, and approve development applications, and the public interest in

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the orderly processing, public comment, and public meeting and hearings on development applications based on known regulatory requirements. Until a final determination of the issues is reached in this case, property owners as well as Kent are in limbo as to what development can occur. While this case involves a specific ordinance adopted by Kent, the Board's Decision is further likely to greatly impact and delay the implementation of similar ordinances by other cities and counties faced in similar situations as well as significantly impacting their long-range urban planning policies and processes. Prompt determination of the issues under review is therefore essential.

4. Delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest since members of Petitioners own property in Kent, have pending permit applications in Kent, which are subject to Kent Ordinance No. 3746 (key provisions of which have been deemed non-compliant by the Board's Final Decision and Order), and plan to purchase and develop properties in the City of Kent, which are subject to Ordinance No. 3746 on a regular basis. The Board's Decision has had and will continue to have direct adverse impact upon the ability of the members of Petitioners and the public to use and develop their property in Kent and the ability of Kent to meaningful process and approve applications. Any delay in obtaining a final and prompt determination of the issues would therefore be extremely detrimental to the Petitioners, Kent, and other members of the public.

5. An appeal to the court of appeals will be likely regardless of the determination in superior court since Petitioners intend to file an appeal with the court of appeals in the event of an adverse decision by the Superior Court as will respondents Washington State Department of Ecology, Washington State Department of Community, Trade, and Economic Development, and/or other parties herein, which include developer, real estate, citizen, and property rights associations and coalitions due to the issues raised in this matter that are of

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critical statewide importance. An appeal to the court of appeal is therefore inevitable regardless of the Superior Court's ruling.

6. The appellate court's determination in the proceeding would have significant precedential value to Kent, cities and counties throughout the state, the courts, and property owners by clarifying and resolving the Growth Management Act's requirements on several issues, including, but not limited to, the following issues of critical statewide importance:

a. Is the Board correct when it ruled local jurisdictions must adopt significantly larger buffers for wetlands based on the Department of Ecology's version of best available science?

b. Is the Board correct when it ruled that local jurisdictions cannot rely on other methods of protecting wetland functions and values as an alternative to increasing the size of wetland buffers?

c. Is the Board correct when it ruled that wetland regulations must be made more restrictive even if there is no evidence that current regulations fail to adequately protect wetland functions and values and there is no evidence that more stringent regulations will provide increased environmental protection?

d. Is the Board correct when it ruled that local jurisdictions must adopt DOE's new wetland rating system even though DOE admits it has no evidence that the new rating system will result in increased protection of wetland functions and values?

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NOW THEREFORE, the Court hereby Orders, Adjudges and Certifies for direct review by the Washington State Court of Appeals, Division 1, ~~the~~ all petitions for review filed in this matter challenging the final order entitled "Final Decision and Order" ("Decision") that was issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, and the decisions and actions contained in or related to said Decision.

ENTERED THIS 22nd day of June, 2006.

KING COUNTY SUPERIOR COURT

THE HONORABLE BRIAN GAIN

Presented by:

JOHNS MONROE MITSUNAGA PLLC

By: _____
Robert D. Johns, WSBA #7086
Darrell S. Mitsunaga, WSBA #12992
Attorneys for Petitioners

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

By: Timothy Harris by RDJ
Timothy Harris, WSBA # 29906
Attorney for Petitioner BIAW

1300-15 Order Certifying Direct Review by the Court of Appeals 06-13-06F

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RECEIVED
JUN 28 2006
JOHNSMONROEMITSUNAGA pllc
ATTORNEYS AT LAW

THE HONORABLE DEAN LUM

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

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

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,
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.

NO. 06-2-16675-2 KNT
06-2-16933-6 SEA

STIPULATION AND ORDER OF CONSOLIDATION

Clerk's Action Required
Consolidate Under 06-2-16675-2 KNT

EXHIBIT B

COPY

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STIPULATION

1. Two appeals have been filed in King County Superior Court for review of the final order entitled "Final Decision and Order" that was issued by the Central Puget Sound Growth Management Hearings Board on April 19, 2006

2. The two actions raise virtually the same issues and involve the same parties.

3. The interests of justice would be served by consolidating the two actions in a single appeal.

4. The parties agree to consolidation of the two actions under Cause No. 06-2-16675-2 KNT.

Stipulated to this 21st day of June, 2006.

JOHNS MONROE MITSUNAGA PLLC

By _____
Darrell S. Mitsunaga, WSBA #12992
Robert D. Johns, WSBA #7086
Attorney for Master Builders Assoc. of King and Snohomish Counties

BUILDING INDUSTRY OF WASHINGTON

By _____
for Timothy Harris, WSBA # 29906
Attorney for Building Industry Association of Washington

ATTORNEY GENERAL OF WASHINGTON

By _____
for Alan Copsey, AAG, WSBA # 23305
Attorney for Resp. Wash. State Dept. of Community, Trade and Economic Development

ATTORNEY GENERAL OF WASHINGTON

By _____
for Thomas Young, AAG, WSBA # 17366
Attorney for Resp. Wash. State Dept. of Ecology

ATTORNEY GENERAL OF WASHINGTON

By _____
for Martha Lantz, AAG, WSBA # 21290
Attorney for Resp. Growth Management Hearings Board

LIVABLE CITIES COALITION

By _____
for John Zilavy, WSBA # 19126
Attorney for Resp. Livable Cities Coalition

KEATING BUCKLIN & MCCORMACK

By _____
for Michael Walter, WSBA # 15044
Attorneys for Resp/Pet. City of Kent

BUCK & GORDON

By _____
for Jay P. Derr, Esq.
Attorneys for Washington Assoc. of Realtors

JOHNS MONROE MITSUNAGA PLLC
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1601 114th Ave. SE, Suite 110
Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

PACIFIC LEGAL FOUNDATION

(All signatures are per email and telephone authorization)

By _____
Russell C. Brooks, Esq.
Andrew C. Cook, Esq.
Attorneys for Citizens Alliance for Property Rights

ORDER

Based on the foregoing Stipulation, the undersigned Judge of the King County Superior Court hereby orders the two proceedings identified above be consolidated in a single action under King County Cause No. 06-2-16675-2 KNT.

DONE IN OPEN COURT this 22nd day of June, 2006

JUDGE DEAN S. LUM

CHIEF CIVIL JUDGE

Presented By:
JOHNS MONROE MITSUNAGA PLLC

By _____
Darrell S. Mitsunaga, WSBA #12992
Robert D. Johns, WSBA #7086
Attorney for Master Builders Assoc. of King and Snohomish Counties

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
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Tel: (425) 451 2812 / Fax (425) 451 2818

Copy Received, Notice of Presentation Waived:

ATTORNEY GENERAL OF WASHINGTON

By _____
Alan Copsey, AAG, WSBA # 23305
Attorney for Resp. Washington State Department of Community, Trade and Economic Development

BUILDING INDUSTRY OF WASHINGTON

By _____
Timothy Harris, WSBA # 29906
Attorney for Building Industry Association of Washington

ATTORNEY GENERAL OF WASHINGTON

By _____
Martha Lantz, AAG, WSBA # 21290
Attorney for Resp. Growth Management Hearings Board

ATTORNEY GENERAL OF WASHINGTON

By _____
Thomas Young, AAG, WSBA # 17366
Attorney for Resp. Washington State Department of Ecology

KEATING BUCKLIN & MCCORMACK

By _____
Michael Walter, WSBA # 15044
Attorneys for Resp/Pet. City of Kent

LIVABLE CITIES COALITION

By _____
John Zilavy, WSBA # 19126
Attorney for Resp. Livable Cities Coalition

BUCK & GORDON

By _____
Jay P. Derr, Esq.
Attorneys for Washington Assoc. of Realtors

PACIFIC LEGAL FOUNDATION

By _____
Russell C. Brooks, Esq.
Andrew C. Cook, Esq.
Attorneys for Citizens Alliance for Property Rights

(All signatures are per email and telephone authorization)

1300-15 Stipulation and Order of Consolidation 6-19-06

JOHNS MONROE MITSUNAGA PLLC
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THE HONORABLE BRIAN GAIN

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES, and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, Petitioners, 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, Respondents.	**NO. 06-2-16675-2 KNT** ***Consolidated*** **NOTICE FOR DISCRETIONARY REVIEW TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I** ***CLERK'S ACTION REQUIRED***
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.	**NO. 06-2-16933-6 SEA**

EXHIBIT C

COPY

JOHNS MONROE MITSUNAGA PLLC
ATTORNEYS AT LAW
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Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

Petitioners, Master Builders Association of King and Snohomish Counties, and Building Industry Association Of Washington, by and through their undersigned counsel, seek direct review by the designated appellate court of the final order entitled "Final Decision and Order" ("Decision") that was issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, related to: (1) the City of Kent's decision to adopt a three-tier wetland rating system instead of the four-tier system advocated by the Department of Ecology; and (2) the City of Kent's decision to adopt certain standards for wetland buffer widths and other regulations and programs besides buffers which provide protection for wetlands.

The King County Superior Court entered an Order of Certification for Direct Review by the Court of Appeals on June 22, 2006, and a Stipulation and Order of Consolidation was entered on June 22, 2006 consolidating the above causes of action into King Superior Court No. 06-2-16675-2 KNT.

A copy of the Decision, the Order of Certification for Direct Review by the Court of Appeals, and the Stipulation and the Order of Consolidation is attached to this notice.

DATED this 30th day of June, 2006.

JOHNS MONROE MITSUNAGA, PLLC

By _____

Robert D. Johns, WSBA #7086
Darrell S. Mitsunaga, WSBA #12992
Duana T. Koloušková, WSBA #27532
Attorneys for Petitioner MBA

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

_____

Timothy Harris, WSBA # 29906
Attorney for Petitioner BIAW

JOHNS MONROE MITSUNAGA PLLC
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Bellevue, Washington 98004
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COUNSEL / PARTIES OF RECORD

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Washington State DOE

Timothy Harris, WSBA # 29906
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Michael C. Walter, WSBA #15044
Jeremy W. Culumber, WSBA #35423
Keating Bucklin & McCormack, Inc. PS
800 Fifth Avenue, Suite 4141
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Tel: 206-623-8861
In Association with Brubaker, Kent City Attorney for City of Kent

---

Alan D. Copsey, AAG, WSBA #23305
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Agriculture & Health Division
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P. O. Box 40109
Olympia, WA 98504-0109
Wash St DCTED
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Washington State DCTED

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Andrew C. Cook, Esq., WSBA #34004
Leslie Lewallen, WSBA #
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Attorneys for Washington Assoc. of Realtors
Tel: 206-382-9540

1300-15 Notice for Discretionary Review 6-30-06

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ORDER OF CERTIFICATION FOR DIRECT REVIEW

JUN 26 2006

THE HONORABLE BRIAN GAIN

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, Petitioner, vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF ECOLOGY, an agency of the State of Washington; WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT, an agency of the State of Washington; LIVABLE COMMUNITIES COALITION; CITY OF KENT, WASHINGTON ASSOCIATION OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY RIGHTS, Respondents.	**NO. 06-2-16675-2 KNT** **ORDER OF CERTIFICATION FOR DIRECT REVIEW BY THE COURT OF APPEALS**

THIS MATTER having come on for hearing before the Honorable Brian Gain of the above entitled court upon Petitioners Master Builders Association of King and Snohomish Counties' and Building Industry Association of Washington's application to this court for certification for direct review by the Washington State Court of Appeals, Division 1, of the final order entitled "Final Decision and Order" ("Decision") that was issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, and the decisions and actions contained in or related to said Decision, the Court being fully advised

COPY

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Bellevue, Washington 98004
Tel: (425) 451 2812 / Fax (425) 451 2818

of the premises thereto, having considered the arguments and briefing of counsel, having reviewed the pleadings on file herein, and having reviewed the following pleadings and exhibits:

1. Petitioners' (1) Application for Certification by the King County Superior Court for Direct Review by Court of Appeals and (2) Request to the Central Puget Sound Growth Management Hearings Board for Issuance of A Certificate of Appealability;

2. Declaration of Robert D. Johns in Support of Direct Review by the Court of Appeals, dated _____, and exhibits attached thereto.

3. state agency's response;

4. _____;

5. _____;and

6. _____;

The Court hereby finds that:

1. Petitioners' application for direct review was filed with this Superior Court within thirty days of the filing of the petition for review in this Superior Court.

2. Petitioners' petition for review is limited to the record of the agency proceedings of the Board.

3. Fundamental and urgent issues affecting the future administrative process or the public interest are involved in this matter which require a prompt determination since the Board's Decision effectively invalidates key portions of Kent's updated critical areas ordinance and creates substantial uncertainty regarding development requirements, permit processing, and related expense since it is unknown what version of the ordinance will ultimately be upheld. This significantly impacts the property rights, financial interests, and development rights of members of Petitioners and the public in general, the ability of Kent to properly review, condition, and approve development applications, and the public interest in

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the orderly processing, public comment, and public meeting and hearings on development applications based on known regulatory requirements. Until a final determination of the issues is reached in this case, property owners as well as Kent are in limbo as to what development can occur. While this case involves a specific ordinance adopted by Kent, the Board's Decision is further likely to greatly impact and delay the implementation of similar ordinances by other cities and counties faced in similar situations as well as significantly impacting their long-range urban planning policies and processes. Prompt determination of the issues under review is therefore essential.

4. Delay in obtaining a final and prompt determination of such issues would be detrimental to any party or the public interest since members of Petitioners own property in Kent, have pending permit applications in Kent, which are subject to Kent Ordinance No. 3746 (key provisions of which have been deemed non-compliant by the Board's Final Decision and Order), and plan to purchase and develop properties in the City of Kent, which are subject to Ordinance No. 3746 on a regular basis. The Board's Decision has had and will continue to have direct adverse impact upon the ability of the members of Petitioners and the public to use and develop their property in Kent and the ability of Kent to meaningful process and approve applications. Any delay in obtaining a final and prompt determination of the issues would therefore be extremely detrimental to the Petitioners, Kent, and other members of the public.

5. An appeal to the court of appeals will be likely regardless of the determination in superior court since Petitioners intend to file an appeal with the court of appeals in the event of an adverse decision by the Superior Court as will respondents Washington State Department of Ecology, Washington State Department of Community, Trade, and Economic Development, and/or other parties herein, which include developer, real estate, citizen, and property rights associations and coalitions due to the issues raised in this matter that are of

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critical statewide importance. An appeal to the court of appeal is therefore inevitable regardless of the Superior Court's ruling.

6. The appellate court's determination in the proceeding would have significant precedential value to Kent, cities and counties throughout the state, the courts, and property owners by clarifying and resolving the Growth Management Act's requirements on several issues, including, but not limited to, the following issues of critical statewide importance:

a. Is the Board correct when it ruled local jurisdictions must adopt significantly larger buffers for wetlands based on the Department of Ecology's version of best available science?

b. Is the Board correct when it ruled that local jurisdictions cannot rely on other methods of protecting wetland functions and values as an alternative to increasing the size of wetland buffers?

c. Is the Board correct when it ruled that wetland regulations must be made more restrictive even if there is no evidence that current regulations fail to adequately protect wetland functions and values and there is no evidence that more stringent regulations will provide increased environmental protection?

d. Is the Board correct when it ruled that local jurisdictions must adopt DOE's new wetland rating system even though DOE admits it has no evidence that the new rating system will result in increased protection of wetland functions and values?

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NOW THEREFORE, the Court hereby Orders, Adjudges and Certifies for direct review by the Washington State Court of Appeals, Division 1, ~~the~~ all petitions for review filed in this matter challenging the final order entitled "Final Decision and Order" ("Decision") that was issued by the Central Puget Sound Growth Management Hearings Board ("Board") on April 19, 2006, and the decisions and actions contained in or related to said Decision.

ENTERED THIS 22nd day of June, 2006.

KING COUNTY SUPERIOR COURT

THE HONORABLE BRIAN GAIN

Presented by:

JOHNS MONROE MITSUNAGA PLLC

By: _____
Robert D. Johns, WSBA #7086
Darrell S. Mitsunaga, WSBA #12992
Attorneys for Petitioners

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

By: Timothy Harris by RDJ
Timothy Harris, WSBA # 29906
Attorney for Petitioner BIAW

1300-15 Order Certifying Direct Review by the Court of Appeals 06-13-06F

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ORDER ON CONSOLIDATION

RECEIVED
JUN 28 2006
JOHNS MONROE MITSUNAGA pllc
ATTORNEYS AT LAW

THE HONORABLE DEAN LUM

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

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

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,
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.

NO. 06-2-16675-2 KNT
06-2-16933-6 SEA

STIPULATION AND ORDER OF CONSOLIDATION

Clerk's Action Required

Consolidate Under 06-2-16675-2 KNT

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STIPULATION

1. Two appeals have been filed in King County Superior Court for review of the final order entitled "Final Decision and Order" that was issued by the Central Puget Sound Growth Management Hearings Board on April 19, 2006

2. The two actions raise virtually the same issues and involve the same parties.

3. The interests of justice would be served by consolidating the two actions in a single appeal.

4. The parties agree to consolidation of the two actions under Cause No. 06-2-16675-2 KNT.

Stipulated to this 21st day of June, 2006.

JOHNS MONROE MITSUNAGA PLLC

By _____
Darrell S. Mitsunaga, WSBA #12992
Robert D. Johns, WSBA #7086
Attorney for Master Builders Assoc. of King and Snohomish Counties

BUILDING INDUSTRY OF WASHINGTON

By _____
for Timothy Harris, WSBA # 29906
Attorney for Building Industry Association of Washington

ATTORNEY GENERAL OF WASHINGTON

By _____
for Alan Copsey, AAG, WSBA # 23305
Attorney for Resp. Wash. State Dept. of Community, Trade and Economic Development

ATTORNEY GENERAL OF WASHINGTON

By _____
for Thomas Young, AAG, WSBA # 17366
Attorney for Resp. Wash. State Dept. of Ecology

ATTORNEY GENERAL OF WASHINGTON

By _____
for Martha Lantz, AAG, WSBA # 21290
Attorney for Resp. Growth Management Hearings Board

LIVABLE CITIES COALITION

By _____
for John Zilavy, WSBA # 19126
Attorney for Resp. Livable Cities Coalition

KEATING BUCKLIN & MCCORMACK

By _____
for Michael Walter, WSBA # 15044
Attorneys for Resp/Pet. City of Kent

BUCK & GORDON

By _____
for Jay P. Derr, Esq.
Attorneys for Washington Assoc. of Realtors

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PACIFIC LEGAL FOUNDATION

(All signatures are per email and telephone authorization)

By _____
Russell C. Brooks, Esq.
Andrew C. Cook, Esq.
Attorneys for Citizens Alliance for Property Rights

ORDER

Based on the foregoing Stipulation, the undersigned Judge of the King County Superior Court hereby orders the two proceedings identified above be consolidated in a single action under King County Cause No. 06-2-16675-2 KNT.

DONE IN OPEN COURT this 22nd day of June, 2006

JUDGE DEAN S. LUM
CHIEF CIVIL JUDGE

Presented By:
JOHNS MONROE MITSUNAGA PLLC

By _____
Darrell S. Mitsunaga, WSBA #12992
Robert D. Johns, WSBA #7086
Attorney for Master Builders Assoc. of King and Snohomish Counties

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Copy Received, Notice of Presentation Waived:

ATTORNEY GENERAL OF WASHINGTON

By _____
Alan Copsey, AAG, WSBA # 23305
Attorney for Resp. Washington State Department of Community, Trade and Economic Development

BUILDING INDUSTRY OF WASHINGTON

By _____
Timothy Harris, WSBA # 29906
Attorney for Building Industry Association of Washington

ATTORNEY GENERAL OF WASHINGTON

By _____
Martha Lantz, AAG, WSBA # 21290
Attorney for Resp. Growth Management Hearings Board

ATTORNEY GENERAL OF WASHINGTON

By _____
Thomas Young, AAG, WSBA # 17366
Attorney for Resp. Washington State Department of Ecology

KEATING BUCKLIN & MCCORMACK

By _____
Michael Walter, WSBA # 15044
Attorneys for Resp/Pet. City of Kent

LIVABLE CITIES COALITION

By _____
John Zilavy, WSBA # 19126
Attorney for Resp. Livable Cities Coalition

BUCK & GORDON

By _____
Jay P. Derr, Esq.
Attorneys for Washington Assoc. of Realtors

PACIFIC LEGAL FOUNDATION

By _____
Russell C. Brooks, Esq.
Andrew C. Cook, Esq.
Attorneys for Citizens Alliance for Property Rights

(All signatures are per email and telephone authorization)

1300-15 Stipulation and Order of Consolidation 6-19-06

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JUN 28 2006
JOHNS MUNROE MITSUNAGA plic
ATTORNEYS AT LAW

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Master Builders Association of King County **Pet/ Pltf** **Vs** **Central Puget Sound Growth Management Hearings Board** **Resp/Def**	**No. 06-2-16933-6 KNT** **Order of Assignment** **CLERK'S ACTION REQUIRED**

For the reason cited below:

_____ Recusal of Judge

__X__ Judicial Assignment /Consolidation

_____ Affidavit of Prejudice Filed by a -party to the action

_____ Order of Reassignment

This case is assigned from Judge jay White to Judge Brian Gain. The case schedule shall remain the same. All pending motions shall be heard by the newly assigned Judge.

DATED: June 26th 2006

Chief Civil Judge Dean S. Lum

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KING COUNTY SUPERIOR COURT
516 THIRD AVENUE
SEATTLE, WASHINGTON 98101

APRIL 19, 2006
Central Puget Sound Growth
Management Hearings Board

FINAL DECISION AND ORDER

APR 20 2006

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF ECOLOGY and WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT,	)	Case No. 05-3-0034
Petitioners,	)	*(DOE/CTED)*
and	)	
LIVABLE COMMUNITIES COALITION,	)	
Intervenor,	)	**FINAL DECISION AND ORDER**
v.	)	
CITY OF KENT,	)	
Respondent,	)	
and	)	
MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,	)	
Intervenors,	)	
and	)	
WASHINGTON ASSOCIATION OF REALTORS, and CITIZENS ALLIANCE FOR PROPERTY RIGHTS,	)	
Amici Curiae.	)	

SYNOPSIS

On April 19, 2005, the City of Kent adopted Ordinance No. 3746, its updated Critical Areas Ordinance. The Ordinance readopted Kent's previous wetland rating system and buffers. Washington State Departments of Ecology and Community, Trade, and Economic Development, which had participated in Kent's public process for adoption of the Ordinance, challenged three components of the regulations concerning wetlands -- a

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wetlands exemption, the wetland ranking system, and wetland buffer requirements – as non-compliant with various provisions of the GMA. [Petitioners allege failure to comply with RCW 36.70A.040(3)(b), .060(2), .170(1)(d), .030(21), and .175; failure to consider the guidelines established pursuant to RCW 36.70A.050, as required by .170(2); failure to include the use of best available science as required in RCW 36.70A.172(1); and failure to be guided by the GMA goals in RCW 36.70A.020(9) and (10).]

In this Final Decision and Order, the Board delineates the statutory requirements concerning designation and protection of critical areas, in particular, wetlands. In deciding the issues presented here, the Board relies primarily on case law, rather than on its own prior rulings.

The Board finds that Kent's exemption for accidentally/unintentionally-created wetlands impermissibly expands the statutory exemption and therefore does not comply with the GMA mandate to protect critical areas. [Relying on City of Bellevue v. East Bellevue Community Municipal Corporation ***(Bellevue)***, 119 Wn.App. 405, 81 P.3d 148 (2003)].

The Board finds that wetlands are now known to provide three groups of functions related to hydrology, water quality and habitat. Kent's wetland rating system is based on a 1979 wetland classification study that does not accurately assess two of the three generic wetland functions: hydrology and water quality. Current science, some of it specific to the Central Puget Sound urban and urbanizing area, allows assessment of factors relevant to all three groups of functions. The Board finds that Kent's retention of its obsolete wetland rating system does not comply with the GMA mandate to protect the functions and values of critical areas. [Relying principally on Whidbey Environmental Action Network v. Island County ***(WEAN)***, 122 Wn.App. 156, 93 P.3d 885 (2004)].

Kent retained its existing buffer widths as well as its rating system. Both the City's wetlands consultant and City staff informed the City that the buffers were below the range indicated by best available science and recommended an increase of at least 25 feet for each wetland category, which the City rejected. The Board finds that Kent's wetland buffer regulations do not comply with the GMA mandate to protect the functions and values of critical areas. [Relying on WEAN].

To determine compliance with the GMA requirement to include best available science, the Board applies the three criteria set forth in the Supreme Court's recent Ferry County ruling: (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the best available science as directed by RCW 36.70A.172(1). The Board finds that Kent's wetland regulations do not fall within the parameters of the best available science in the City's record. [Relying on Ferry County v. Concerned Friends of Ferry County, et al. ***(Ferry County)***, 155 Wn.2d 824, 123 P.3d 102 (2005).]

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A set of Recitals in the Ordinance[1] purport to justify Kent's deviation from the wetland protections afforded by best available science. Applying the principles set forth by the Court of Appeals in WEAN, the Board concludes (1) that the City's record fails to demonstrate any "unique local circumstances" justifying downward departure from BAS and (2) that the City's reliance on other programs, projects, and regulations for wetlands protection is not supported by any BAS analysis. [Relying on WEAN].

The City attempted to "balance" GMA goals in its adoption of the Ordinance - in particular, the goals of housing, economic development and property rights versus environmental protection and open space. The Board notes that the GMA mandate to designate critical areas and protect their functions and values using BAS is a ***requirement, not a goal;*** *pursuant to the admonition of the Supreme Court in Quadrant, goals do not override requirements. The Board concludes that the Ordinance does not comply with the Act. [Relying on King County v. Central Puget Sound Growth Management Hearings Board* ***(King County)****, 142 Wn.2d 543, 14 P.3d 133 (2000), and Bellevue, supra, 119 Wn.App. 405; see Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board* ***(Quadrant)****, 154 Wn.2d 224, at 245, 110 P.3d 1132 (2005) (affirming King County analysis).]*

The Board enters an Order of Noncompliance with respect to the challenged provisions of Kent Ordinance 3746, remands the Ordinance, and schedules a Compliance Hearing.

I. BACKGROUND[2]

On June 22, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development (**Petitioners** or **DOE/CTED**). The matter was assigned Case No. 05-3-0034, and is hereafter referred to as *DOE/CTED v. City of Kent*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Kent (**Respondent** or **City**) adoption of Ordinance No. 3746, which amends the City's critical areas ordinance, as noncompliant with the Growth Management Act (**GMA or Act**).

Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington (**MBA/BIAW**) intervened, jointly, on the side of the City, and Livable Communities Coalition (**LCC**) intervened on the side of Petitioners. Washington Association of Realtors (**WAR**) was granted permission to participate as *Amicus Curiae,* in support of the City, to address the legal issues concerning affordable housing and economic development goals of the GMA. [Legal Issue No. 6] Citizens Alliance for Property Rights (**CAPR**) was granted permission to file a brief *Amicus Curiae,* also in support of the City.

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[1] Recitals from Ordinance 3746 referenced in this FDO are set out in Appendix B.

[2] A complete chronology of CPSGMHB Case No. 05-3-0034 is set out in Appendix A.

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At the Prehearing Conference held on July 28, 2005, Petitioners and Respondent indicated that they were pursuing settlement discussion. The Board subsequently received a Joint Motion to Extend Case Schedule requesting a ninety-day extension for purposes of settlement discussions. The settlement period was renewed for an additional thirty days at the request of all the parties. On December 9, 2005, the Board received Petitioners' Status Report which indicated that "settlement has not been achieved and Petitioners intend to proceed with the case."

On December 9, 2005, Petitioners filed a Motion to Supplement the Record with eight documents. The City responded, and the Board's Order on Motions to Supplement the Record was issued on January 2, 2006.

The prehearing briefs of all parties were timely filed. Due to the illness of a key party, Petitioners requested, and with consent of all parties, were granted an extension of time to file their reply. The Hearing on the Merits was rescheduled accordingly.

The briefs are referenced in this decision as follows:

- Petitioners' Opening Brief – **DOE/CTED PHB**
- Intervenor LLC's Joinder – **LLC Joinder**
- City of Kent's Pre-Hearing Brief with Exhibits – **City Response**
- Hearing Brief of Intervenors Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington – **MBA/BIAW Response**
- Brief of Amicus Curiae Citizens' Alliance for Property Rights – **CAPR Amicus**
- Brief of Amicus Curiae Washington Association of Realtors in Support of Respondent City of Kent, with Appendices A-J - **WAR Amicus**
- State Agencies' Reply Brief – **DOE/CTED Reply**

The City and Intervenor MBA/BIAW moved to strike certain references in Petitioners' prehearing brief, and Petitioners responded. The briefs on this matter are referenced herein as follows:

- City of Kent's Motion to Strike Documents and Statements in Petitioners' Pre-hearing Brief - **City Motion to Strike**
- MBA/BIAW Motion to Strike Portions of Petitioners' Brief – **MBA/BIAW Motion to Strike**
- State Agencies' Response to Motions to Strike – **DOE/CTED Response to Motion.**

In response to a request from the Board, the City provided display-sized copies of two maps from the Comprehensive Plan for use at the Hearing on the Merits.

The Hearing on the Merits was convened at 10:00 a.m. and adjourned at approximately 1:30 p.m. on March 7, 2006, in the Training Center adjacent to the Board's offices at 900 Fourth Avenue in Seattle. Present for the Board were Board Members Bruce Laing,

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Edward McGuire, and Margaret Pageler, Presiding Officer. Petitioners were represented by Thomas J. Young and Alan D. Copsey, Assistant State Attorneys General. The City of Kent was represented by Michael J. Walter and Jeremy W. Culumber, of Keating Bucklin & McCormack, Inc. Robert Johns of Johns Monroe Mitsunaga, PLLC, represented Intervenors MBA/BIAW. Reporting services were provided by Eva P. Jankovits of Byers and Anderson, Inc.

The Board ordered a transcript of the proceedings. The transcript was received on March 17, 2006, and is cited herein as **HOM Transcript**.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Petitioners challenge the City's adoption of Ordinance No. 3746 which updated the City's critical areas regulations. Comprehensive plans and development regulations, and amendments thereto, adopted by the City of Kent pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioners to demonstrate that the actions taken by the City are not in compliance with the Act. RCW 36.70A.320(2).

The Board shall find the City of Kent in compliance with the Act, unless it determines that the City's action was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Act. RCW 36.70A.320(3). As articulated most recently by the Supreme Court in *Ferry County v. Concerned Friends of Ferry County, et al.* ***(Ferry County),*** 155 Wn.2d 824, 833, 123 P.3d 102 (2005): "The Board adjudicates compliance with the GMA and must find compliance unless a county's or city's action is clearly erroneous. RCW 36.70A.280, 320(3)." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Pursuant to RCW 36.70A.3201 the Board will "apply a more deferential standard of review" to the City of Kent in how it plans for growth, so long as its action "is consistent with the goals and requirements of [the GMA]." The Supreme Court delineated this required deference in *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board* ***(Quadrant)***, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005), stating: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA ... cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." The Court in *Quadrant* noted that no deference is due a county or city when its proposed action violates a specific statutory mandate. *Quadrant*, at 240, fn. 8.[3]

[3] This is consistent with prior Supreme Court holdings: "[L]ocal discretion is bounded, however, by the goals and requirements of the GMA," *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000); and "deference is only given to policy choices that are

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The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.[4]

III. BOARD JURISDICTION AND PRELIMINARY MATTERS

A. PREFATORY NOTE

This Final Decision and Order begins by describing, in Section IV, the challenged aspects of the City of Kent's ordinance updating its critical areas regulations – specifically, its wetland regulations. The Board then lays out in Section V the GMA statutory framework and governing case law with respect to protection of critical areas. The Board's findings of fact follow in Section VI. Then the Legal Issues are discussed and analyzed in Section VII in the following order.

- Legal Issue No. 3 – Wetlands Definition
- Legal Issue No. 1 – Wetlands Rating System
- Legal Issue No. 2 – Wetlands Buffers
- Legal Issue No. 4 – Best Available Science
- Legal Issue No. 5 – Existing Projects and Regulations
- Legal Issue No. 6 – "Balancing"

The discussion of Legal Issue 4 – Best Available Science – applies the statutory and case-law legal principles [Section V] to the wetland ratings system and buffer widths analyzed in Legal Issues 1 and 2. In this section the Board also deals with several of the City's rationales for departure from best available science. Additional City explanation for departure is addressed under Legal Issues 5 and 6.

B. BOARD JURISDICTION

The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the challenged ordinance, which amends the City's development regulations for critical areas, pursuant to RCW 36.70A.280(1)(a).

C. MOTION TO STRIKE

Respondent City of Kent and Intervenors MBA/BIAW moved to strike five references and a footnote in the DOE/CTED Prehearing Brief. Petitioners acknowledged that the

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consistent with the goals and requirements of the GMA," *Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 14, 57 P.3d 1156 (2002).

[4] Petitioners in the present case have not challenged the City's regulations concerning wetlands mitigation, buffer reduction or buffer averaging; hence, the Board does not address those aspects of the Ordinance.

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footnote was inappropriate but defended the five challenged references. Petitioners did not move to supplement the record,[5] but they urged the Board to rely on other record documents if the references were stricken. The Board heard argument at the Hearing on the Merits and ruled as follows.

1. Petitioners reference a DOE website - www.coastaltraining-wa.org - [DOE/CTED PHB, at 14, fn.9] in support of statements about a DOE training program to familiarize practitioners with the four-tier wetlands rating system. The reference is germane to the City's assertion that the DOE rating system is complex and difficult to administer. The City does not claim that it is surprised or prejudiced by information about the availability of the training program. The Board takes **official notice** of this DOE program.

2, 3, 4. Petitioners reference three studies cited in *Wetlands I* [Ex. 81-B] and the Adolfson BAS reports.[6] In highlighting these studies, Petitioners do not seek to introduce new documents but to point out some of the work on which *Wetlands I* and Adolfson summaries are based. Petitioners in each case provide specific citations to *Wetlands I* for the propositions being asserted in the argument. The Board considers, on the one hand, that "the record" in these matters should not be construed to include everything in the bibliography of every document in the City's index [*see, Tahoma Audubon Society v. Pierce County*, CPSGMHB No. 05-3-0004c, Final Decision and Order (July 12, 2005), at 6] and, on the other hand, the Board understands that participants in a jurisdiction's CAO update process are not required to act as its scientific advisors, providing the jurisdiction with all relevant scientific information.

The Board will confine its review to the documents that were before the City and have been submitted as Exhibits. The Board accepts Petitioners' citations to the three underlying studies as merely demonstrative of the basis for findings in *Wetlands I.* The work by Azous and Horner, we note, is cited 78 times in *Wetlands I,* and also in Adolfson. The motion to strike is **denied.**

---

[5] RCW 36.70A.290(4) provides: "The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision."

[6] T. Hruby, et al., *Methods for Assessing Wetland Functions, Vol. I: Riverine and Depressional Wetlands in the Lowlands of Western Washington, Part 1: Assessment Methods* (1999) (available at http://www.ecy.wa.gov/programs/sea/wfap/westernwfapmethods.htm#Download), cited at p. 15, and fn. 11 of DOE/CTED PHB to support the statement: "More recently, studies have shown that size is important only to flood storage-related functions."

G. Bortleson and D. Davis, *Pesticides in Selected Small Streams in the Puget Sound Basin*, 1987-1995, (available at http://wa.water.usga.gov/pubs/fs/fs067/pest.a.html) U.S. Geological Survey Fact Sheet 067-97 (1997), cited on p. 21 and fn. 18 of DOE/CTED PHB to support claim that "urban runoff (...) typically is not collected and treated (...) as it moves in shallow surface and sub-surface flow to wetlands and streams."

A. Azous and R. Horner, *Wetlands and Urbanization: Implications for the Future* (2001), cited at p. 34 of DOE/CTED PHB to support a statement to the effect that stormwater regulations alone cannot eliminate the degradation of wetland functions from increases in runoff and loss of infiltration.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

5. Petitioners' footnote reference to a Brookings Institute study on the relationship between environmental regulation and housing affordability[7] is simply replication of a footnote in Exhibit 188, which is the document being quoted in the body of Petitioners' brief. Further, the reference is to a learned article which the Board may certainly consider. The motion to strike is **denied**.

Petitioners acknowledge that footnote 32, concerning the Oberto Sausage Company property, is outside the record and improper. Footnote 32, DOE/CTED PHB, at 42, is **stricken.**

IV. THE CHALLENGED ACTION

On April 19, 2005, the City of Kent adopted Ordinance No. 3746, its updated Critical Areas Ordinance (**CAO**). The Ordinance consolidated the City's development regulations for various classifications of sensitive areas and constituted the "update" required by the GMA. RCW 36.70A.130(1). The only portions of Ordinance No. 3746 at issue here are the regulations concerning wetlands.

With respect to wetlands, Ordinance No. 3746 retains the City's existing three-tier ranking system, without amendment, and retains the existing buffer widths. The City's decision not to change its wetlands protections was the outcome of a year's worth of consideration. The City hired Adolfson Associates, Inc., (**Adolfson**) as its wetlands consultants. Adolfson provided a *Best Available Science Issue Paper: Wetlands* in April 2003, updated April 2004. (Ex. 106) Adolfson continued to provide supplemental memoranda in response to the City's wish to reduce the proposed wetland development restrictions. (Ex. 112, Nov. 22, 2004; Ex. 116, Nov. 29, 2004; Ex. 113, Dec. 28, 2004; Ex. 114, Dec. 30, 2004; Ex. 115, Jan 12, 2005; Ex. 119, March 14, 2005).

Petitioner Washington State Department of Ecology (**DOE** or **Ecology**) participated throughout the consideration of the Kent wetlands regulations with comments and advice, urging first, that the Kent wetlands ranking system should be revised and updated and, second, that wider wetland buffers should be required. (Formal comment letters signed by Ecology wetlands specialist Richard Robohm: Ex. 67, Sept. 3, 2004; Ex. 79, Nov. 29, 2004; Ex. 86, Jan. 19, 2005; Ex. 95, March 21, 2005.)

Intervenors MBA/BIAW and Amicus WAR also provided written comments for the City's record and participated in the City's consideration of the Ordinance, supporting retention of Kent's existing wetland rating system and buffer widths.

This challenge by DOE and CTED followed Kent's re-adoption of its existing wetlands ranking system and buffer widths. Petitioners define the applicable GMA requirements as follows: the functions and values of critical areas must be protected by local CAOs, best available science (**BAS**) indicates how those functions can be protected, and any

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[7] A. Nelson, *The Link Between Growth Management and Housing Affordability: The Academic Evidence* (available at http:www.brookings.edu/metro/publications/growthmanagexsum.htm) (Brookings Institute, February 2002), cited at p. 41, fn 30 of DOE/CTED PHB.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

"downward departure" from BAS must be justified by supportable evidence of unique local circumstances that require the jurisdiction to give priority to another GMA goal. DOE/CTED PHB, at 6.

The City, in response, defines the GMA's BAS requirements for critical areas as consisting of three elements: 1) assembling the relevant science, 2) considering the science and its implications in an inclusive public process, and 3) "balancing" scientific indications against other GMA goals in an articulated rationale for any departures from what the best science requires. City Response, at 28-29.

Intervenors MBA/BIAW support the City with additional questions about the certainty of wetlands science. MBA/BIAW, at 16-25. *Amicus* WAR stresses the impact of environmental regulations on the price and availability of housing, on economic development, and on property rights. WAR Amicus, 19-27. *Amicus* CAPR argues that the City's choice among the GMA planning goals – particularly the choice to promote housing, economic development, and property rights over environmental protection – is entitled to special deference. CAPR Amicus, *passim*.

V. CRITICAL AREAS STATUTORY REQUIREMENT AND CONTROLLING PRECEDENT

Legislative Framework – Designate and Protect Critical Areas First

When the Green River Valley was first settled by Europeans over one hundred years ago, it was accepted practice to drain swamps and to corral rivers inside levees, first, to support agriculture, and later, to allow urban development. But in the last few decades, we have learned that wetlands and floodplains provide important environmental services which engineered solutions cannot fully replicate. Flood mitigation, aquifer recharge, filtration of pollutants and sediment, and bird and wildlife habitat are some of the wetlands functions now recognized. Saving and protecting the remaining wetlands has become a statutory priority and was so written into the GMA from the outset. The Board notes that much of the statutory language concerning critical areas, particularly wetlands, is mandatory.

The GMA requires all counties and cities, whether or not planning under the Act, to designate critical areas. RCW 36.70A.170(1)(d), .040(3).[8] [Parallel GMA provisions

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[8] RCW 36.70A.040(3):

> (3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: ... (b) the county and each city located within the county shall designate critical areas ... and adopt development regulations ... protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; ....

RCW 36.70A.170:

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

require early designation and conservation of agricultural, forest and mining lands.] Critical areas include wetlands, RCW 36.70A.030(5)(a)[9], which are specifically defined in the Act. RCW 36.70A.030(21).[10] In designating critical areas, cities and counties "shall consider" the minimum guidelines promulgated by CTED in consultation with DOE pursuant to RCW 36.70A.050(1) and (3); .170(2). In particular, wetlands "shall be delineated" pursuant to the DOE manual. RCW 36.70A.175.

Having designated critical areas, including wetlands, counties and cities must adopt development regulations to protect the identified critical areas. RCW 36.70A.040(3), .060(2).[11] The requirement to designate and protect critical areas applies to every city and county in the state of Washington, not just those required to fully plan under the GMA.

As this Board stated in *Bremerton, et al., v Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (Oct. 6, 1995):

> It is significant that the Act required cities and counties to identify and conserve resource lands and to identify and protect critical areas before the date that IUGAs [Interim Urban Growth Areas] had to be adopted. This sequence illustrates a fundamental axiom of growth management: **"the land speaks first."** Only after a county's agricultural, forestry and mineral resource lands have been identified and actions taken to conserve them, and its critical areas, including aquifers, are identified and protected, is it then possible and appropriate to determine where, on the remaining land, urban growth would be directed pursuant to RCW 36.70A.110.

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(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate: ... (d) Critical areas.

(2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

[9] RCW 36.70A.030(5):

(5)"Critical areas" include the following areas and ecosystems: (a) wetlands... .

[10] The GMA definition of "wetlands" has been variously numbered as the definitions section of the Act - RCW 36.70A.030 - has been amended; the "wetlands" definition has been subsection (20), (21), and (22) and is subsection (21) in the 2005 codification.

[11] RCW 36.70A.060(2):

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Id. at 31-32, (emphasis supplied). Therefore, designation and protection of critical areas *precedes* the development of comprehensive plans and the designation of urban growth areas.

There are several reasons for the Legislature's mandate for early designation and protection of critical areas – preclusion of urban development in areas unsuitable because of risks to human life and property, prevention of irreversible environmental harm such as species loss, avoidance of the high cost of substituting for lost hydrological and other environmental services. Regardless of reasons, the statutory priority is unambiguous.

In sum, the Legislature listed mandatory categories of critical areas to be protected [RCW 36.70A.030(5)], directed CTED to adopt guidance to assist local governments [RCW 36.70A.050, .190; see WAC Chapter 365-190], and required local governments to adopt regulations to protect functions and values of critical areas [RCW 36.70A.060(2), .172(1)].

GMA Goals and Requirements – Quadrant and King County

GMA *goals* provide guidance to local governments in the development of their plans and implementing development regulations. RCW 36.70A.020. Many goals are bolstered by specific GMA *requirements* that local governments must fulfill.

The GMA *goals* relevant to critical areas protection are Goal 9 – Open Space and Recreation - and Goal 10 – Environment.[12] The GMA *requirements* for critical area designation and protection, as cited above, are bound up in the same sections of the Act as the provisions for designation and conservation of natural resource lands for agriculture, forestry and mining. The Supreme Court's application of these parallel statutory provisions therefore provides compelling guidance in CAO cases.

The Board and, subsequently, the Supreme Court, discussed the importance of the relationship between GMA goals and requirements in the "soccer fields" case, which involved the parallel GMA provisions for preserving agricultural lands. *King County v. Central Puget Sound Growth Management Hearings Board* ***(King County)***, 142 Wn.2d 543, 14 P.3d 133 (2000) involved a challenge to King County's allowance of soccer fields as a "temporary" use of prime agricultural land. The Supreme Court reviewed the GMA provisions and found "a legislative mandate for conservation of agricultural lands" when .020(8), .060(1) and .170 are read together. [RCW 36.70A.060 and .170 have parallel provisions regarding critical areas protection.] In the soccer fields case, the Supreme Court noted, first, that "even before counties were obligated to adopt

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[12] RCW 36.70A.020

> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreational facilities.
>
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

comprehensive plans in compliance with the Act, the GMA required counties to designate agricultural lands for preservation." *Id.* 142 Wn.2d at 555. [The same is true for critical areas.] The Court noted that agricultural lands to be designated are specifically defined in the Act, and the Act then "required counties and cities to adopt development regulations to assure the conservation of the designated lands." *Id.* at 556. [Parallel GMA provisions apply to critical areas - RCW 36.70A.030(5) and .060(2).]

The *King County* Court contrasted the statutory priority and mandatory language concerning agricultural lands with the GMA provisions concerning recreational lands. The Court concluded the County "has a duty" to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry. Id. at 558. The Court then reviewed the County's discretion in light of this mandate.

> "Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." *Diehl*, 94 Wn.App at 651, 972 P.2d 543. Local discretion is bounded, however, by the goals and requirements of the GMA. In reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad discretion that may be exercised by counties and cities *consistent with the requirements of this chapter*" and to "grant deference to counties and cities in how they plan for growth, *consistent with the requirements and goals of this chapter*." RCW 36.70A.3201.

Id. at 561 (emphasis in original).

The Court concluded that King County's amendments allowing recreational uses on designated agricultural lands did not comply with the legislative mandate to conserve agricultural land. *Id.* at 562. Because recreational use was inconsistent with the requirement to conserve agricultural land, the Court did not defer to the County's discretionary balancing of GMA goals. Indeed, the Court suggested that the way to harmonize the recreation and natural resource land goals was to locate active recreational uses on non-agricultural land. *Id.* at 563.

Commenting on *King County* in *Quadrant*, the Court explained:

> In *King County*, this Court considered both the goals and the requirements of the GMA in determining whether allowing active recreation on designated agricultural lands violated the GMA. However, *King County* did not rely on the applicable goal in isolation nor did it hold the goals to independently create substantive requirements.

Quadrant, 154 Wn.2d at 246. The *Quadrant* Court stated that GMA requirements provide substance to GMA goals, *citing Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548, 958 P.2d 962 (1998). The Supreme Court explained that a city or county's discretion to balance GMA goals is not a license to ignore the GMA's

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

explicit requirements. Thus "balancing" and "deference" come into play when GMA mandates have been satisfied. *Quadrant,* 154 Wn.2d at 246-247.

In *City of Bellevue v. East Bellevue Community Municipal Corporation (Bellevue)*, 119 Wn.App. 405, 81 P.3d 148 (2003), the city had attempted to exempt a shopping center redevelopment from GMA transportation concurrency requirements because the project fulfilled other goals of the Act. The Court of Appeals upheld the Board's invalidation of the exemption, stating: "Bellevue argues that the concurrency requirement cannot trump all other goals of the GMA. ... But concurrency is *not a goal, it is a requirement.*" *Id.* at 414 (emphasis supplied).

The Board reads these decisions of the Supreme Court and Court of Appeals as establishing the rule that a jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements.

Best Available Science and CAO Updates – the HEAL and Ferry County Analysis

In 1995 the GMA was amended to add a new requirement for critical areas regulations: "best available science." Under RCW 36.70A.172(1), critical areas ordinances (**CAOs**) *shall* include best available science (**BAS**), must protect critical area "functions and values," and *shall* give special consideration to preservation of anadromous fisheries. RCW 36.70A.172(1).[13] Specific to wetlands, an additional mandate was added concurrently requiring that wetlands be delineated in accordance with the DOE manual. RCW 36.70A.175.

In 2002, Section .130 of the Act was amended to require review and update of plans, including critical areas regulations, on a regular cycle "to ensure these policies and regulations comply with the requirements of this chapter." RCW 36.70A.130(1)(a), (c).[14] These updates must include best available science.

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[13] RCW 36.70A.172(1):

> In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values* of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

(Emphasis supplied).

[14] RCW 36.70A.130(1):

> (a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.... (c) ...The review and evaluation required by this subsection *shall include,* but is not limited to, *consideration of critical area ordinances....*

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Two leading cases explain the BAS requirement: *Honesty in Environmental Analysis and Legislation v. Seattle (HEAL)*, 96 Wn.App. 522, 979 P.2d 864 (1999) explains the purpose of BAS, and the recent Supreme Court decision in *Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.2d 824, 123 P.3d 102 (2005) provides the framework for review.

The Court of Appeals in *HEAL* explained that the purpose of the best available science requirement is to ensure that critical areas regulations are not based on speculation and surmise, but on meaningful, reliable, relevant evidence. *HEAL*, 96 Wn.App. at 531. The *HEAL* Court explained that critical areas "are deemed critical because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development." *Id.* at 532-33. Substantive use of BAS not only ensures that local governments develop critical areas regulations that pass constitutional muster, but that such regulations are effective and fair. *Id.* at 533. The fundamental premise underlying the best available science requirement, according to the Court in *HEAL*, is that regulations based on science will be better protective of critical areas than ones that are not based on science; thus BAS is essential to an accurate decision about what policies and regulations are necessary to mitigate environmental effects of development. *Id.*

In addition to requiring that best available science be used substantively to develop critical areas regulations [.172(1)], the GMA requires that CAOs be updated on a regular cycle [.130(1)(c)]. Thus the GMA recognizes that science is a dynamic enterprise and that scientific understandings will grow over time. As the Supreme Court admonished in *Ferry County*: "a [city or county] cannot choose its own science over all other science and *cannot use outdated science* to support its choice." *Ferry County*, 155 Wn.2d at 837-838 (emphasis supplied).

In *Ferry County*,[15] the Supreme Court cited with approval the Western Washington Board's formulation of considerations for determining whether BAS was included in local CAO decisions. The Court noted that the Western Board recognized that local governments have discretion in making decisions within the structure of RCW 36.70A.172(1) and that the Board properly refused to establish a bright-line definition of BAS. Instead, the Western Board held that it would consider claims regarding BAS on an individual basis with these factors in mind:

> (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other

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[15] Without question, the City of Kent amassed a more credible and complete scientific record and engaged in a more thorough review process than Ferry County, as Petitioners readily acknowledge. See, HOM Transcript, at 113.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

> factors involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1)

Ferry County, supra, at 834, citing *1000 Friends of Washington v. City of Anacortes*, WWGMHB Case No. 03-2-0017 (Feb. 10, 2004); and *Clark County Natural Resource Council v. Clark County*, WWGMHB Case. No. 96-2-0017 (Dec. 6, 1996). This three-factor analysis is a case-by-case, rather than a bright-line, review.

Applying BAS to Buffer Requirements – the WEAN Analysis

With respect to critical areas buffers, the precedent most directly on point is *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn.App. 156, 93 P.3d 885 (2004). Though some of the science relied on for the buffer widths in *WEAN* has been superseded in the subsequent half-decade, the Board views the *WEAN* Court's analytic framework as controlling.

In *WEAN*, the Court of Appeals upheld the Western Washington Growth Management Hearings Board's determination that Island County's stream buffer widths for small, intermittent streams [Type 5] did not include best available science. In *WEAN*, the County's record included several stream buffer studies and specific recommendations from state resource agencies; however, the County chose to rely on its own consultant for a 25-foot buffer width for Type 5 streams. *WEAN*, 122 Wn.App. at 174. The Court noted that the consultant's stream recommendations were formulated based on water quality functions, rather than looking at "the entirety of functions attributed to stream buffers – including the protection of wildlife species other than fish." *Id.* Where wildlife studies had been done, the Court pointed out that the consultant's wildlife habitat study "was limited to the [marine] shoreline environment of Island County and has questionable application to interior stream buffer issues." *Id.* at 173.

In *WEAN*, as in the present case, the consultant hired by the respondent jurisdiction had at first recommended wider buffers to protect aquatic resources and subsequently testified for the jurisdiction that narrower buffers were adequate. In the *WEAN* case, the County argued that the 25-foot buffers were "within the range" of BAS. The Court disagreed:

> While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams. ... But the GMA requires that the regulations for critical areas must protect the "functions and values" of those designated areas. This means all functions and values.

WEAN, 122 Wn.App. at 174-75.

The Court in *WEAN* rejected the argument that inclusion of best available science is a mere procedural requirement:

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

> RCW 36.70A.172(1) requires that BAS shall be included 'in developing policies and development regulations to protect the functions and values of critical areas.' This Court held 'that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.'

WEAN, 122 Wn.App. at 171, citing *HEAL*, 96 Wn.App. at 532.

The Court rejected Island County's argument that its existing regulations would boost the effectiveness of its too-narrow stream buffers. The Court agreed with the Board's conclusion that "other regulations provided by the County ... and the County's 'holistic' approach, failed to provide assurances of "minimal effective protection." *Id.* at 175. The stream buffer regulations at issue in *WEAN* were not part of the required comprehensive CAO update, which the county would later undertake; however, the *WEAN* Court cautioned the County that it could not rely on preexisting regulations in an attempt to satisfy GMA critical areas requirements without actually conducting BAS analysis. *Id.* at 180.

According to the *WEAN* Court: "A departure downward from the buffer width requirements outlined in the scientific literature" would require the County "to point to any part of the record outlining the applicability of unique local conditions" justifying the departure. No such justification was found in the record. *Id.* at 172.

The *WEAN* Court rejected the County's argument that the Board should have deferred to the County's balancing of BAS with other GMA goals. However, because the record lacked supporting facts, the Court did not reach the issue of "balancing" goals of the GMA. *Id.* at 173.

Burden of Proof

The role of the Board is to adjudicate compliance with the GMA. *Ferry County*, 155 Wn.2d at 833. The Petitioners have the burden of demonstrating that Kent's ordinance does not comply with GMA mandates or disregards GMA goals. Petitioners need not show that what Kent has enacted does not work – only whether Kent has discharged its duties as mandated by the Act.

The *WEAN* Court made short shrift of the County's complaint that the Board had shifted the burden of proof by requiring supportable facts in the County's record.

> The County also argues that the Board improperly shifted the burden from WEAN to the County. The County is mistaken. The Board simply required that the County comply with the GMA and determined that it had not. This is not impermissible burden shifting.

WEAN, 122 Wn.App. at 184.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

The GMA mandate at issue in the present case, as in *WEAN*, is the requirement that local jurisdictions include best available science in designating critical areas and protecting their functions and values. Once a challenger has demonstrated that there is no science or outdated science in the City's record in support of its ordinance, or that the City's action is contrary to what BAS supports, it does not impermissibly shift the burden of proof for the Board to review the City's record to determine what science, if any, it relied upon. This is precisely the process undertaken in the *Ferry County* case. See generally, *Ferry County, supra*. It is Petitioners' burden to prove by clear and convincing evidence that the City's ordinance does not comply with the GMA because it does not include BAS for wetlands protection.

Petitioners in the present case also contend that the City's record does not support the City's deviations from the recommendations of best available science. That contention does not impermissibly shift any burden to the City; it is simply a reflection of the fact that, as held in *WEAN*, 122 Wn.App. at 184, the City must justify its actions in its record if it is going to deviate from BAS.

VI. FINDINGS OF FACT

Statutory Context

1. An initial requirement of the GMA was the requirement for all cities and counties, whether or not planning under the Act, to identify, designate and protect critical areas, specifically including wetlands. The Act's initial deadline for this requirement was 9/1/91 [.060(2)], and the critical areas protections were to precede by several years the enactment of GMA comprehensive plans.
2. The GMA required that upon adoption of comprehensive plans [due 7/1/94], a city or county must review critical area designations and development regulations and might alter them at that time [.060(3)]
3. Kent adopted its critical areas ordinances between 1982 and 1993. Ex. 174, 176. Kent's wetland regulations were based on a system developed by King County in the 1980's which in turn derived from Cowardin's 1979 *Classification of Wetlands*. See, Ordinance Section 11.06.580.
4. A 1995 amendment to the GMA added the best available science requirement for designation and protection of all critical areas and the specific requirement that wetlands be delineated in accordance with the DOE manual [.172 and .175].
5. In 2002, Section .130 was amended to require review and update of plans, including critical area regulations, by 12/1/04; the 2005 legislature extended the deadline for review and update of critical areas for one year, or until 12/1/05.
6. Ordinance No. 3746 is Kent's CAO update.

Wetlands in Kent

7. Because of its geographical location extending from the Green River up into the surrounding hills, the City of Kent has significant and diverse wetlands. Adolfson,

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Ex. 106, Section 3.0. Considering the degree of urbanization, Kent still contains a high number and acreage of wetlands, high diversity of wetland types, and high level functions. *Id.* The City's wetlands are located within three major drainage basins: (1) Soos Creek Basin, (2) Green River Valley, and (3) west hills tributaries draining to Puget Sound. Adolfson, Ex. 113, at 1.

8. Wetlands in Kent are especially important for flood management, protection of water quality, and waterfowl and salmonid habitat. Adolfson, Ex. 113, at 2.
9. There are approximately 336 wetlands in Kent, ranging in size from 310 acres to less than 0.5 acres. Adolfson, Ex. 113, at 1. Approximately 2400 acres of wetlands are mapped within Kent and its proposed PAA. *Id.* at 2; Kent Comprehensive Plan, at 4-10.
10. A wetland inventory map, included in the Kent Comprehensive Plan [Figure 4.4, at 4-13] was adopted in 2001. It depicts generalized location of wetlands and provides notice to developers and city staff.
11. The wetland inventory map does not rank wetlands nor does it exclude wetlands that may be exempt.[16] HOM Transcript, at 20. However, Adolfson indicates that a 2001 report for Kent by Shannon and Wilson ranked 16 wetlands as potentially Category 1. Ex. 113, at 1.
12. When property development is contemplated, the wetland inventory map is a starting point. If the project site is near a wetland on the map, the project proponent hires a wetlands specialist who specifically delineates and "ranks" the wetland. HOM Transcript at 18-22.
13. Wetland rating or ranking systems classify wetlands based on their ecological functions. The ranking of a particular wetland determines the level of buffer protection that will be required in connection with property development. *Rating System,* Ex. 81-A, at 1-2.

Wetlands Functions and Values

14. Some wetlands in Central Puget Sound urban areas have been destroyed or degraded by urbanization, but remaining wetlands continue to provide environmental services. See, Adolfson, Ex. 106, at 3-4.
15. Numerous peer-reviewed scientific studies specific to wetland protection in the Pacific Northwest are referenced in Adolfson's BAS report for Kent and in the other reports in the City's record. A number of these studies specifically address urbanization. Adolfson, Ex.106, at 9-10, 16-21; *Wetlands I*, Ex. 81-B, at R-1 to R-72.[17]
16. The three *functions* provided by wetlands broadly include hydrology, water quality, and habitat. *Wetlands I,* Ex. 81-B, at 2.4-2.4.4; *Rating System,* Ex. 81-A,

[16] At the Hearing on the Merits, the City indicated its wetlands had not been classified [HOM Transcript at 70]; however, Intervenors MBA/BIAW state that the primary reason the City decided to retain its three-tier ranking system was because "the City had already, at substantial public cost, done an inventory of the wetlands in Kent based on the old rating system." MBA/BIAW at 5.

[17] The Board counts over a hundred studies in these bibliographies where the titles indicate Pacific Northwest sources and a score or more where titles refer to urbanization. Some study titles are specific to the Central Puget Sound area.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

at 32. Adolfson specifies the following functions: Flood water attenuation and flood peak desynchronization; groundwater support and stream base-flow maintenance; water quality improvement; biological support and wildlife habitat; shoreline protection and erosion control. Adolfson, Ex. 106, at 3.

17. The functions of wetlands in providing groundwater recharge and base flow for streams, as well as reducing peak storm runoff, and in filtering pollutants and fine sediments are important for the survival of anadromous fish in urbanizing areas. Adolfson, Ex. 106, at 9.
18. Wetlands also provide *values*. Adolfson identifies recreation, education, and open space as some of the values of wetlands in an urban area. Ex. 106, at 7. Kent's Comprehensive Plan states regarding wetlands: "These natural features are valued by the community and must be protected. ... The protection of these areas will constrain development." Kent Comprehensive Plan, at 4-10.
19. Urbanization limits the effectiveness of wetlands in serving ecological functions; but conversely, paved surfaces and other urban development increase the importance of wetlands for groundwater recharge, flood storage, wildlife habitat and habitat corridors, filtering urban pollutants, and other functions. Adolfson, Ex. 106, at 3-4.
20. Wetland buffer areas infiltrate flood water and capture and retain sediments, nutrients, pesticides, pathogens and other pollutants in urban runoff. They provide wildlife habitat, and, depending on the vegetation, provide shade and separate wildlife habitat from noise, light and other human disturbances. Adolfson, Ex. 106 at 9; Ex. 112, at 2.
21. Appropriate buffer width for a given wetland is specific to the environmental setting and functions of that buffer. Buffer ranges derived from studies of forested or agricultural lands may not be adequate to protect the wetlands systems in urbanizing areas because of high levels of impervious surface and past disturbance. Adolfson, Ex. 106, at 10, citing studies.

Wetland Rating Systems

22. Rating systems are used to match protective regulations (usually buffers) to the set of functions at issue under particular circumstances. *Rating System*, Ex. 81-A, at 1-2.
23. Until recently, most wetland rating systems in western Washington have been based on either the three-tier model developed by King County in the 1980s or the four-tier model developed by Ecology and included in the 1993 guidelines [WAC 365-190-080(1)] adopted pursuant to RCW 36.70A.050. Adolfson, Ex. 106, at 8.
24. King County developed the original model for the three-tier wetlands ranking system used by the City of Kent. The major factors in the three-tier rating model developed by King County (and based on Cowardin's 1979 Classification of Wetlands) are total wetland size and the number of vegetation classes present. Ex. 79. The three-tier model does not rate wetlands for hydrological characteristics or water quality functions. Ex. 95, at 1. King County no longer uses the three-tier rating system. HOM Transcript, at 109.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

25. DOE's 1993 four-tier ranking system was developed in the late 1980's and is referenced in WAC 365-190-080(1)(a). This ranking system is no longer based on best available science because it fails to account for hydrogeomorphic characteristics of wetlands. *Rating System*, Ex. 81-A, at 1-10; *Wetlands I*, Ex. 81-B, at 2.3.1.
26. DOE revised its wetland rating system beginning in 2002 to incorporate current scientific measures to assess three groups of functions: hydrology, water quality, and habitat. DOE/CTED PHB, at 9; Ex. 81-A, *Rating System*, at 32. The revisions focused on new scientific understanding of hydrogeomorphic characteristics and aimed to assess functions such as flood storage, stream and groundwater recharge, removal of pollutants. *Id.* at 4, 24.
27. The new DOE wetlands analysis and recommendations are contained in three volumes: Washington State Wetland Rating System for Western Washington [*Rating System* - Ex. 81-A], Freshwater Wetlands in Washington State, Volume 1: a Synthesis of the Science [*Wetlands I* – Ex. 81-B], and Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands [*Wetlands II* – Ex. 81-C].
28. The new DOE rating system was developed with the challenges of subjectivity and complexity in mind. DOE/CTED PHB, at 11-12. While neither the 3-tier method nor the 1993 4-tier method were tested to ensure minimal subjectivity between users, the new system has been field-tested to ensure replicability of application. Ex. 81-A, *Rating System*, at 2.
29. Ecology's updated wetlands guidance was published in final form in August 2004. Adolfson, Ex. 116. Draft versions were made available to Kent and other jurisdictions at least as early as April 2004. Ex. 106, at 3.

Kent's CAO Update Process

30. On October 14, 2002, Kent Planner Kim Marousek provided the Kent Land Use and Planning Board (**LUPB**) with a briefing on the requirements for updating the city's Critical Areas Ordinance (**CAO**) including the requirement to include best available science. Ex. 9, Ex. 174.
31. Kent retained Adolfson Associates, Inc., (**Adolfson**) as their consultants to provide best available science review and advice concerning wetlands. City Response at 5.
32. Adolfson provided its *Best Available Science Issue Paper: Wetlands*, in April 2003 and updated the report in April 2004. Ex. 106.
33. Kent's public process for its CAO update began in March, 2004, and was completed upon the adoption of Ordinance 3746 on April 19, 2005.
34. By memorandum dated March 15, 2004, Kim Marousek notified the LUPB of the need to proceed with the CAO update, noting that the CAO update deadline had been legislatively postponed until December 1, 2004. Marousek's memo stressed the requirement to utilize best available science.[18] Ex. 175, at 1.

[18] "The requirement to utilize BAS was part of the 1995 GMA legislative changes. It was found that incorporating best available science was necessary to protect the functions and values of critical areas and was found to be especially beneficial to support salmon recovery efforts. Utilizing BAS to write critical

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

35. Early in the Kent review process, the City decided to retain its three-tier ranking system, based on familiarity and ease of use. City Response, at 5. The City staff memorandum and draft CAO of May 24, 2004, incorporates the three-tier ranking. Ex. 176.
36. The May 2004 draft CAO provides that the [continued three-tier] rating system "adopted for the purpose of determining the size of wetland buffers" is based on the U.S. Fish and Wildlife Service's Classification of Wetlands and Deepwater Habitats of the United States, FWS/OBS-79-31 (Cowardin, et al, 1979). Ex. 176, at 27.
37. Wetland buffers in the City's existing regulations were 25 feet for Category 3 wetlands, 50 feet for Category 2, and 100 feet for Category 1. Adolfson, Ex. 114, at 1; Staff memo, Ex. 176, at 1.
38. Adolfson advised the City that buffers in the City's existing CAO "are too low to adequately protect most wetland functions." Ex. 112, at 3.
39. City staff and Adolfson recommended adding 25 feet to each of the three buffer categories. With the 25-foot increase, wetland buffers in the May 24, 2004 draft CAO were 50 feet for Category 3, 75 feet for Category 2, and 125 feet for Category 1. Ex. 176, at 29.
40. Buffer widths proposed by Adolfson "based solely on the science" were wider than the 25-foot increases incorporated in the draft CAO. Ex. 112, at 2.
41. Kent extended its public review of wetland regulations, including convening a "focus group" or roundtable of key stakeholders, including Petitioners. City Response, at 15-17; HOM Transcript, at 76, 78, 87.
42. Ecology wetland specialist Richard Robohm participated in the Kent CAO process, providing at least four formal comment letters at various times: September 3. 2004, Ex. 67; Nov. 29, 2004, Ex. 79; January 19, 2005, Ex. 86; March 21, 2005, Ex. 95.
43. Robohm urged the City to either adopt DOE's revised four-tier wetland rating system based on best available science or to increase the protections to various classes of wetlands under the three-tier system. Ex. 67, Ex. 79.
44. By memorandum dated January 11, 2005, Councilman Les Thomas recommended that the draft CAO be revised to delete the additional 25-foot buffer widths. Ex. 84.
45. Adolfson judged the City's action to be a departure from best available science in three areas: (1) the wetland rating system, (2) wetland buffer widths, and (3) wetland buffer averaging criteria. Ex. 119, at 1.
46. Ordinance 3746 readopts Kent's previous wetland ranking system and buffer widths. The Ordinance 3746 wetland ranking system, at Section 11.06.580, is based on the 1979 classification scheme. FOF # 35-36. The Ordinance 3746 wetland buffers, at 11.06.660, are below the width supported by science in the record. FOF # 37-40.

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areas regulations will ensure that the most recent and appropriate scientific process and information are utilized to identify and analyze the natural resources; thereby, establishing the most appropriate and beneficial protection measures." Ex. 75, at 1.

Central Puget Sound
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900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Departure and Balancing

47. The Ordinance 3746 Recitals[19] identify various actions and circumstances to offset the low level of wetlands protection in the adopted ranking and buffer scheme. See, City Response, at 44-51.
48. Facts in the Recitals to Ordinance 3746 and in Respondent's argument do not demonstrate "unique local circumstances."
49. Most cities in Central Puget Sound are growing, and all have multiple responsibilities for public safety, public services, and a variety of economic and other needs. Compare, HOM Transcript, at 70-71, 113.
50. Kent's target for additional households for the next 20 years is 4,284. As of 2002, Kent had buildable land capacity for 6,814 households. King County Buildable Lands Report (Kent) 9/6/02; Kent Comprehensive Plan at 6-2.
51. Kent staff performed a CAO Capacity Analysis utilizing buffer widths of 125, 75, and 50 feet (i.e., 25 feet greater than existing buffer widths). Staff concluded that with these expanded buffer widths, the City had capacity for 6,275 households. Ex. 120; DOE/CTED Reply, at 22.
52. The CAO Capacity Analysis demonstrated that an increase in buffers does not adversely impact Kent's needed capacity to absorb projected growth. Ex. 120.
53. Most cities in Central Puget Sound have difficulty meeting the GMA goal of housing affordability. WAR Amicus, at 3, citing King County Countywide Planning Policies (2000).
54. The City of Kent has a number of comprehensive plan policies, zoning regulations, and programs of support for affordable housing. Kent Comprehensive Plan at 6-13 to 6-14; see Goals H-1, H-6, H-11.
55. Virtually all cities in Central Puget Sound contain wetlands in an urbanized setting. Many Central Puget Sound cities are built in flood plains, along rivers or at river deltas, or have other hydrogeological characteristics that resulted in formation of wetlands.
56. All cities in Central Puget Sound are subject to stormwater and other environmental requirements. DOE/CTED Reply, at 34, citing Ex. 81-B. Clearing and grading ordinances, steep slope protections, and construction mitigation regulations are commonly employed, as they are in Kent. DOE/CTED PHB, at 34. Kent uses standards equivalent to those adopted in the majority of NPDES jurisdictions. HOM Transcript, at 131; see City Response, at 45.
57. Review of proposed developments, enforcement of stormwater regulations, wellhead protection including water quality monitoring, solid waste, recycling and conservation services are normal municipal activities, particularly for a city with its own water supply system. DOE/CTED PHB, at 34.
58. All cities within floodplains are subject to FEMA floodplain restrictions. DOE/CTED PHB, at 34.
59. Kent's maintenance of city-owned wetlands, use of volunteers for native plant restoration, support for citizen environmental education and Eagle Scout programs, while laudable, is not unique to the Central Puget Sound area.

[19] Ordinance Recitals referenced in this decision are set out in Appendix B.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Similarly, Kent's participation in regional organizations such as Cedar River Council and Green River Flood Control District is by definition not a unique local circumstance.

VII. LEGAL ISSUES AND DISCUSSION

In this Section the Board addresses first the definition of Wetlands – Legal Issue No. 3. The Board then addresses Petitioners' contention that the substantive elements of Kent's wetlands rating system and buffer widths are not supported by the science in the City's record – Legal Issue Nos. 1 and 2.

Under Legal Issue No. 4 – Best Available Science – the Board applies the legal framework for BAS [defined above at Section V] to Kent's wetlands ranking system and buffer widths. The Board then takes up the City's rationale for departure from BAS.

Under Legal Issue Nos. 5 and 6, the Board addresses the City's reliance on other projects and programs for wetlands protection and the City's "balancing" of CAO regulations with other GMA goals.

A. LEGAL ISSUE NO. 3 – Wetlands Definition

The Board's prehearing order states Legal Issue No. 3 as follows:

> *Legal Issue No. 3(a).* Whether the City failed to comply with the terms and requirements of RCW 36.70A.030(21), RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170 and/or RCW 36.70A.175 by adopting the definition of "wetland" or "wetlands" in Section 11.06.530 and by adopting the exemption in Section 11.06.040.A.12, each of which effectively redefines the GMA's definition of wetlands that must be protected?
>
> *Legal Issue No. 3(b).* Whether, read together, the definition of "wetland" or "wetlands" in Section 11.06.530 and the exemption in Section 11.06.040.A.12 constitute a failure to protect wetlands contrary to RCW 36.70A.172(1) and show that the City of Kent failed to be guided by the GMA goals in RCW 36.70A.020(9) and (10)?

Applicable Law

Wetlands are defined in the GMA at RCW 36.70A.030(21) (emphasis supplied):[20]

> (21) "Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration

[20] As previously noted, the GMA definition of "wetlands" has been variously numbered as RCW 36.70A.030 has been amended and is subsection (21) in the 2005 codification.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

> sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands *do not include* those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or *those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway.* Wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands.

RCW 36.70A.175 requires:

> Wetlands regulated under development regulations adopted pursuant to this chapter shall be delineated in accordance with the manual adopted by the department pursuant to RCW 90.58.380.

WAC 365-190-080(1) (emphasis supplied) provides:

> In designating wetlands for regulatory purposes, counties and cities *shall use the definition* of wetlands in RCW 36.70A.030(22).

Legal Issue No. 3 also cites to RCW 36.70A.040(3)(b), set out above at footnote 8, RCW 36.70A.170(1)(d), set out at footnote 8, the best available science requirement in RCW 36.70A.172(1), set out in footnote 13, RCW 36.70A.060(2), set out at footnote 11, and GMA planning goals (9) and (10), set out in footnote 12.

Discussion and Analysis

Positions of the Parties

Petitioners contend that the City's decision to exempt wetlands accidentally created by human actions **prior** to July 1st, 1990, conflicts with the GMA's definition of wetlands, which only exempts such wetlands when they were "unintentionally created as a result of the construction of a road, street, or highway" **after** 1990. DOE/CTED PHB at 26, citing RCW 36.70A.030(21). Petitioners argue that the City violated the GMA by failing to justify, with appropriate findings and evidence in the record, its exemptions from critical area protections for areas that otherwise meet the definition of critical areas. *Id.* at 26, citing *WEAN*, 122 Wn. App. at 183; *Evergreen Islands v. Anacortes*, WWGMHB No. 05-2-0016, Final Decision and Order (Dec. 27, 2005), at 20. According to Petitioners, given the extent of human alteration in the valley over the past hundred years, the scope of the exemption could be significant. *Id.* at 26. Without findings and evidence in the record setting forth the reasons for such a broad exemption, and its consistency with BAS, according to Petitioners, the action cannot be sustained. DOE/CTED PHB at 27. Petitioners conclude that the exemption thus results in a failure to accurately designate wetlands under RCW.70A.170, does not protect wetlands as required by RCW

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

36.70A.172(1), and is not guided by the goals of RCW 36.70A.020(9) and (10). DOE/CTED PHB at 26.

The City responds that Petitioners' argument is conclusory and should be deemed unbriefed, abandoned, and dismissed. City Response at 54-55, citing *Tupper v. City of Edmonds,* CPSGMHB No. 03-3-0018, Final Decision and Order (March 19, 2004); and *Sky Valley v. Snohomish County,* CPSGMHB No. 95-3-0068c, Final Decision and Order (March 12, 1996). According to the City, there is no basis for Petitioners' argument that a single exemption to a single definition in a 157-page ordinance constitutes a failure to be guided by two of the 13 GMA planning goals. City Response, at 53.

The City argues that since RCW 36.70A.030(21) is merely a definition of what "wetlands" means in the context of the statute, there is simply no statutory rule to "comply" with. City Response at 53. The City claims that it has discretion to define wetlands differently than the statute and is not required to use the statutory definition verbatim. HOM Transcript at 116. Similarly, the City contends, RCW 36.70A.040(3)(b) lacks a substantive requirement for compliance. City Response, at 53. The fact that the City's exemption is different from the statutory definition does not lead to the conclusion that the City fails to comply with the law. *Id.*

Finally, the City argues that Petitioners have not met their burden of proving that the expanded exemption will result in circumventing the GMA requirement to protect wetlands. HOM Transcript at 117. The City explains that the expanded exemption has no practical effect, because, according to City staff, in the past 6 years, not a single landowner has received this exemption, City Response, at 55; therefore there is no reason to think there is any risk of abuse in expanding the exemption. HOM Transcript, at 117.

Board Discussion

City of Kent Ordinance No. 3746, Sec. 11.06.040A.12, exempts from critical areas protections:

> ... wetlands accidentally created by human actions *prior to July 1, 1990* ... documented through photographs, statements, and/or other conclusive evidence and ... agreed to by the director.

(Emphasis supplied).

The exemption contained in the GMA definition of "wetlands" - RCW 36.70A.030(21) – excludes:

> ... those wetlands created *after July 1, 1990*, that were unintentionally created as a result of the construction of a road, street, or highway.

(Emphasis supplied.)

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

The statutory exemption is limited to wetlands unintentionally created *after 1990* as a *result of road construction.* The Kent exemption includes all wetlands accidentally created *before 1990.*

On their face the exemptions are not consistent. By showing the diverging language Petitioners have met their burden and have not abandoned this issue as Kent suggests in its response. The City acknowledged at the Hearing on the Merits that the exemptions are inconsistent but went on to argue that the GMA definitions are guidance and not binding – that there is "local discretion to define a wetland in a different manner." HOM Transcript, at 116.

This Board has frequently held that GMA definitions do not, in themselves, create enforceable obligations. See, e.g., *Hanson v. King County,* CPSGMHB No. 98-3-0015c, Final Decision and Order (Dec. 16, 1998), at 7-8. In this case, the enforceable obligation is the duty to designate and protect critical areas, which include wetlands. RCW 36.70A.170; .030(5). The definition in the Act has substance since it defines what wetlands are critical areas that must be designated and protected – it is not a suggestion.

The Supreme Court's *Ferry County* opinion advised the Boards, when evaluating challenges to critical areas regulations, to look to the guidelines prepared by state agencies pursuant to GMA. *Ferry County*, 155 Wn.2d at 835, fn.9; 838-39. WAC 365-190-080(1) states: "In designating wetlands for regulatory purposes, counties and cities *shall use the definition* of wetlands in RCW 36.70A.030(22)."

Significantly, the conflicting language is a statutory exemption from the Act – those wetlands unintentionally created after July 1, 1990 as a result of road building are exempt from the Act. The effect of Kent's amendment is to substantially expand the exemption in the GMA, both by having it include wetlands unintentionally created prior to July 1, 1990 and by deleting the limitation that they were created due to road building.

Wetlands are defined in Section .030(21) and are required to be delineated according to Ecology's manual: RCW 36.70A.175. WAC 365-190-080(1) states that city and county designation of wetlands "shall use the definition" in Section .030(21). Expanding the statutory exemption results in a failure of accurate designation and, thus, a failure to protect the functions and values of these critical areas, as required by RCW 36.70A.172(1). *See, Larson Beach Neighbors v. Stevens County,* EWGMHB No. 03-1-0003, Final Decision and Order (Feb. 10, 2004), at 5 (county conceded that exemption for wetlands unintentionally created before 1990 was inconsistent with RCW 36.70A.030(21)).

The *WEAN* Court held that any exemption from critical areas protection for areas that otherwise meet the statutory definition of critical areas must be justified by appropriate findings and evidence in the record documenting the need for and extent of the exemption. *WEAN*, 122 Wn.App. at 183 (disallowing an exemption for agriculture in the rural area). There are no findings in Kent's Ordinance No. 3746 supporting the expanded exemption, and the City does not point to any evidence in its record. The City's primary

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

argument is that its ordinance is long -- 157 pages - and should not be faulted for one minor inconsistency with the statute. City Response, at 53. Further, the City states that the exemption has not been applied for in the past. HOM Transcript, at 117. The Board agrees with Petitioners that neither the length of the Ordinance nor prior inaction provides a basis for allowing this potentially-expansive loophole, in the face of the GMA mandate for wetlands protection.

Finally, the City of Kent may not point to the GMA planning goals to support its proposed exemption of certain wetlands from GMA protection requirements. In *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn.App. 405, 81 P.3d 148 (2003), the Court of Appeals upheld this Board's determination that a city ordinance exempting a shopping center redevelopment from the city's transportation concurrency requirements was invalid as conflicting with the GMA. In the *Bellevue* case, the city attempted to exempt the shopping center from concurrency because the project fulfilled other goals of the Act. The Court made short shrift of the city's exemption, noting that concurrency is a GMA mandate under a statutory provision that "does not allow for exceptions." *Id.* at 413.

> Bellevue argues that the concurrency requirement cannot trump all the other goals of the GMA. ... But concurrency *is not a goal, it is a requirement*....Under the clear and plain language of [.070(6)(b)], the City *cannot create exemptions* to its concurrency ordinance.

Id. at 414 (emphasis supplied).

Identifying and designating wetlands in order to protect their functions and values is a requirement of the GMA. Jurisdictions are not free to rewrite the statutory definition where its terms are explicit, as they are with respect to the exemption for accidentally-created wetlands. It is immaterial whether Kent has ever identified an exempt wetland under either definition.

The Board is persuaded that Kent's action was a mistake and is **clearly erroneous.** To hold otherwise would allow local jurisdictions to circumvent *requirements* of the statute by the device of rewriting *definitions.*

Conclusion

Petitioners have met their burden of proving Legal Issue No. 3. The Board is left with the firm and definite conviction that a mistake has been made by the City of Kent in its expansion of the statutory exemption for accidentally-created wetlands in Sections 11.06.040.A.12 and 11.06.530 KCM. The Board concludes that, with respect to this expanded exemption, Ordinance No. 3746 exempts wetlands that are required by RCW 36.70A.060(2) and .172(1) to be designated and protected as critical areas. The Board concludes that Ordinance 3746, specifically Sections 11.06.040.A.12 and 11.06.530, is contrary to the specific language of RCW 36.70A.030(21), and therefore **does not comply** with .060(2), .170, .172(1), and .175 requiring designation and protection of

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

wetlands as critical areas, and was not guided by the GMA goals of environmental and open space protection – RCW 36.70A.020(9) and (10).

B. LEGAL ISSUE NO. 1 – Wetlands Rating System

The Board's prehearing order states Legal Issue No. 1 as follows:

> *Legal Issue No. 1.* Whether the City, in adopting the wetlands rating system in Section 11.06.580 of the Ordinance, a) failed to accurately designate wetlands as required in RCW 36.70A.040(3)(b) and 36.70A.170(1)(d); b) failed to consider the guidelines established pursuant to RCW 36.70A.050, as required in RCW 36.70A.170(2); and c) failed to include best available science as required in RCW 36.70A.172(1)?

Applicable Law

Legal Issue No. 1 cites to RCW 36.70A.040(3)(b), set out above at footnote 8, RCW 36.70A.170(1)(d), set out at footnote 8, the best available science requirement in RCW 36.70A.172(1), set out in footnote 13, and the department's guidelines referenced in RCW 36.70A.050 and RCW 36.70A.170(2), below.[21]

Discussion and Analysis

Positions of the Parties

Petitioners contend that the City rejected the science in its record and instead chose to retain a wetlands rating system that is too outdated to ensure meaningful protection of wetland functions and values. DOE/CTED PHB at 3, 5. Petitioners point out that there are basically three groups of wetland functions: hydrology, water quality, and habitat. Petitioners argue that Kent's wetland rating system fails to include many indicators important to assessing wetland functions, and does not even attempt to assess the important wetland functions of decreasing flooding (hydrology) or improving water quality. By relying on factors that recent science has shown fail to accurately characterize wetland functions, Petitioners assert, the ordinance is also inconsistent with guidelines set forth in WAC 395-190-080(1). *Id.* at 5.

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[21] RCW 36.70A.170(2) states: "In making the [critical areas] designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

RCW 36.70A.050(1) requires CTED to adopt guidelines "to guide the classification of ... critical areas" and specifies that in developing these guidelines "the department [CTED] shall consult with ... the department of ecology regarding critical areas."

RCW 36.70A.050(3) states:

> The guidelines ... shall be minimum guidelines that apply to all jurisdictions. ... The intent of these guidelines is to assist counties and cities in designating the classification of ... critical areas under RCW 36.70A170.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Petitioners point out that Kent's own consultant concluded that Kent's 3-tier system "does not fully consider all wetland functions such as flood control, water quality improvement, etc." but maintained that it was still "scientifically based." *Id.* at 14, citing Adolfson, Ex.116. The method used by Kent, which was developed in 1979, relies upon only 6 indicators: size; number of vegetation classes; presence of open water; presence of listed wildlife species; presence of heron rookeries or raptor nests; and presence of bogs or fens. *Id.* at 14, citing Ordinance Section 11.06.580. According to Petitioners, these are but a handful of the most important factors in assessing wetland functions. DOE/CTED PHB at 15.

Petitioners conclude that because the ranking system relies on characteristics that have been shown to have little correlation with wetland functionality, the Ordinance does not accurately designate wetlands, as required by RCW. 36.70A.060 and .172; in combination with the inadequate buffers provided in the Ordinance, the result is a failure to protect wetlands. *Id.* at 16.

The City responds that RCW 36.70A.040(3)(b) and .170(1)(d) merely require the City to designate critical areas and to adopt development regulations to protect them. Neither statutory provision, in the City's view, provides any basis for specific relief by this Board, as the City has in fact designated its wetlands and adopted regulations to protect them. City Response at 37. Similarly, the City asserts, DOE guidelines are merely advisory, and do not create any mandatory duties. Id. at 38.

The City claims that its three-tiered rating system and wetland classifications were created via a thoughtful, balanced approach that considered all of the GMA goals. *Id.* at 1. While the City acknowledged Ecology's preference for a four-tiered system, it chose to retain its three-tiered system, including buffer width and buffer ranking, because it felt it was consistent with BAS. *Id.* at 9, citing Staff Matrix, Ex. 108. The City gave two reasons for its preference for retaining its existing wetlands rating system: first, the DOE update of its four-tier rating was completed too late for inclusion by Kent (*id.* at 5), and, second, that its three-tier ranking system is simpler, easier to understand, and more cost effective for the City to enact, evaluate, and utilize, and more cost-effective for property owners as well. *Id.* at 1.

Intervenor MBA/BIAW joins with the City in arguing that the four-tier system is too complicated. MBA/BIAW Response, at 6. Intervenors state that the GMA doesn't require that wetlands rating systems be accurate, therefore deference to the City's choice of rating system is appropriate. *Id.* MBA/BIAW rely on the Ordinance Recitals O, P, and Q[22] that Kent's existing system is simpler, less subjective, and has served Kent well for

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[22] Full text of Recitals O, P, and Q may be found in Appendix B.

O. ....Although the city's classification system does not fully consider all wetland functions such as flood control, water quality improvement, etc., the city's three-tiered rating system is scientifically based, does rank wetlands from higher to lower function and value, and meets the requirements under WAC 365-190-180....

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

20 years. *Id.* at 12-13. They argue that there is no evidence the four-tier system will produce better results in the field. *Id.* at 28.

Petitioners reply that the Legislature did not grant local governments unbridled discretion to determine which wetlands functions and values must be protected and how; rather, the Legislature imposed a requirement that local governments include the best available science when making this determination. DOE/CTED Reply, at 4. Absent science, the City is merely guessing about its ability to protect wetland functions, according to Petitioners. *Id.* Petitioners point out that the 3-tier rating system "relies on factors that scientists now know are not related to the functions and values of wetlands that must be protected under the GMA." *Id.* at 13. For example, the 3-tier system places a great emphasis on wetland size, but recent studies have shown that size is important only in terms of flood storage-related functions, which the Kent rating system does not even attempt to assess. *Id.*

Petitioners assert that the State is not attempting to issue a "one-size-fits-all" solution by recommending the function-based four-tier system. *Id.* at 2, 8-9. Petitioners agree that the City was free to adopt any wetland rating system that was based on BAS; the new four-tier system was recommended because 1) it uses factors that, based on BAS, are related to the functions and values to be protected, and 2) it has been extensively field-tested and peer-reviewed for its ability to protect wetland functions and values. *Id.* at 12. The Petitioners suggested at least three alternative ways to address the shortcomings of the City's system, while retaining three tiers, all of which the City rejected. *Id.*; see, Ex. 86, 95.

Petitioners reject as inaccurate the City's claim that Ecology published its updated rating system "late" in the process. DOE/CTED PHB at 11. Ecology points out that the final document was available eight months before the City passed the CAO, and a draft had been made available to the City at the start of its process in May, 2004. *Id.* According to the State, several other jurisdictions in Washington adopted the new four-tier system prior to the publication of its final version, and many others adopted it in the latter months of 2004. *Id.*

Petitioners further contend the City offers no information to support its statements that the new rating system is too complex, results in too much subjectivity between users, or that Kent has less diversity of wetland types, making the recommended rating system unnecessary. DOE/CTED PHB at 11,12. In fact, according to Petitioners, the diversity of

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P. ...[D]ue to the higher level of complexity in the rating form and increased ability for subjectivity between evaluators using the form, we have decided to continue to use the city's three-tiered system....

Q. ...This ranking system addresses wetland function, value, and uniqueness in our local environment, and has the added benefit of providing for a rating system that is consistent with past practice, is easily applied and understood, and accordingly minimizes staff and developer misinterpretation....

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

the City's wetlands, which include both high and low functioning wetlands, makes it even more important that they be classified accurately. *Id.* at 13.

Board Discussion

The GMA imposes a requirement to protect critical area functions and values based on best available science. Wetland classification schemes are not necessary, but if used, they must be based on BAS in order to ensure that the related buffer requirements provide the needed protections. Wetland rating or ranking systems classify wetlands based on their ecological functions.[23] Rating systems are used to match protective regulations (usually buffers) to the set of functions at issue under particular circumstances.

Wetlands serve a number of *functions* in the urban landscape.[24] These functions may generally be grouped into three categories:

- hydrologic [reduce flooding, water retention, detention, erosion control and aquifer recharge],
- improving water quality [sediment retention, nutrient and toxic removal], and
- habitat [wildlife, fish and plant habitats and migration corridors].

Wetlands I, at 2.4-2.4.4; Adolfson, Ex. 106, at 3; HOM Transcript, at 44. Wetlands and their buffers may also provide urban *values* such as open space, noise barriers, recreation and educational opportunities.

Kent's wetlands serve a range of hydrologic, water quality and habitat functions. Adolfson advised the City at the outset of its consultancy that wetlands in Kent provide control of stormwater flow by intercepting rain runoff ["flood water attenuation and flood peak desynchronization"]; stream base flow maintenance and groundwater recharge [particularly important to support stream flow in local salmon streams in late summer]; removal of sediments and other pollutants from storm water; wildlife habitat, especially for "special status species;" and erosion control and shoreline protection, particularly adjacent to rivers and other waterbodies. Ex. 106, at 4-7.

The science of wetlands protection in urban areas focuses on establishing vegetative buffers which protect wetlands from the disturbance and degradation of function caused by urban development so that they may continue to provide the vital functions of water quality, hydrology, and habitat.

While it is likely true that most wetland functions in urban areas could be maintained, without the trouble and dispute of classification systems, if mandatory buffers were set at

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[23] Adolfson explains: "The term function is generally used to refer to ecological functions and is defined as the ecological benefit derived from the resource. Generally recognized wetland functions include: flood control, groundwater support, water quality improvement, and biological support. ... While each wetland provides beneficial function, not all wetlands perform all functions, nor do they perform all functions equally well." Ex. 106, at 3.

[24] "Wetlands assist in the reduction of erosion, siltation, flooding, ground and surface water pollution, and provide wildlife, plant, and fisheries habitats." WAC 365-190-080(1).

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

"300 feet or greater" for all wetlands regardless of function or value, the Board and the parties concur that this draconian approach would interfere substantially with other urban land use and is more protection than is necessary in all cases. DOE/CTED Reply at 8, fn.5; HOM Transcript, at 41-42, 57. At the opposite end of the administrative spectrum, the parties agree that a case-by-case evaluation of each wetland/buffer complex would allow the most precisely-tailored and effective regulation to ensure protection of functions and values, but would be impracticable. Adolfson, Ex. 112, at 2. At the practical middle, administratively, according to Adolfson, "if case-by-case wetland regulation/protection is not used, a prescriptive approach (the approach where standard buffers are applied to broad categories of wetlands) must protect the most vulnerable systems and should therefore err on the side of protecting *more rather than less* in terms of both acreage and function." Adolfson, Ex. 112, at 2 (emphasis supplied).

Classifying or ranking wetlands based on their primary functions is a first step in tailoring protective regulations below that "300 foot" buffer. A scientifically-based classification system uses BAS to identify functions and values of wetlands to be protected, and then uses indicators related to those functions and values for classifying wetlands into categories. DOE/CTED Reply at 10. This then allows the choice of narrower buffer widths based on scientifically-demonstrated protection of specific functions.

WAC 365-190-080(1)(a), promulgated in 1993, provides the agency guidance on wetlands rating systems:

> Counties and cities ... shall consider a wetlands rating system to *reflect the relative function, value and uniqueness* of wetlands in their jurisdictions. In developing rating systems, counties and cities should consider the following: (i) the Washington state four-tier wetlands rating system; (ii) *wetlands functions and values*; (iii) degree of sensitivity to disturbance; (iv) rarity; and (v) ability to compensate for destruction or degradation.

The Board notes, first, that the original CTED guidelines, recommending Ecology's four-tier rating system, date from 1993. Thus a system of four classes of wetlands is not new. However, Petitioners acknowledge that the 1993 four-tier system has been superseded due to better scientific understanding of wetland functions. DOE/CTED PHB 8-10.

The three-tier wetland rating system readopted by Kent in Ordinance 3746, rates wetlands primarily on wetland size and vegetation types, adjusted for observed presence of certain wildlife species. Ordinance Section 11.06.580. The Cowardin Classification of Wetlands on which Kent's 3-tier rating system is based was developed to map wetlands from aerial photographs, not to identify how they should be protected. DOE/CTED Reply at 8, citing Ex. 81-B (*Wetlands*, Vol. 1 §2.4.1.1); Cowardin et al., *Classification of Wetlands and Deepwater Habitats of the United States* (1979), cited in Adolfson, Ex. 106. King County further developed the system and adopted it in 1989. According to Petitioners, this methodology was based on assumptions that have since changed, as a result of new scientific information. DOE/CTED Reply at 8. Petitioners assert that the

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

rating system fails to account for important hydrological and water quality functions. *Id.* Ecology's September 2004 comment letter to Kent stated the problem clearly: "The wetland classification system [in Kent's CAO] is inconsistent with the best available science. The thresholds for wetland size and number of vegetation classes are *not related to performance of functions and should not be used as a basis for differentiating wetlands for applying varying protection methods*." Ex. 67, at 3 (emphasis added).

The City argues that wetland size is a proxy for water quality and hydrologic functions but provides no corroborating science. City Response at 16-17. Petitioners point to "the most advanced function assessment methods"[25] and state that neither case-by-case assessment nor the function-based 4-tier system use size as a criteria for these functions; they use a set of criteria (inlet/outlet configuration, soil characteristics, live storage, hydroperiod, etc.) that relate specifically to water quality and hydrologic function. DOE/CTED Reply at 14, fn. 9.

Not surprisingly, given City staff's preference for the existing rating system, which had been used in a comprehensive 2001 wetlands inventory, Adolfson's April 2004 BAS report did not propose to change the Kent rating system, and noted that Ecology's update of its wetlands rating system was not yet available in final form.[26] Adolfson, Ex. 106, Ex. 116. Adolfson did, however, propose significantly larger buffer widths based on its science review.[27] Ex. 112, attachments.

In *WEAN*, the Court of Appeals rejected stream buffer recommendations that were formulated based solely on water quality functions, rather than by analysis of "the *entirety of functions* attributed to stream buffers." *WEAN*, 122 Wn.App. at 175 (emphasis added). The Court noted that the buffer recommendations were developed "only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams." *Id.* at 174-75. The Court reasoned: "The GMA requires that the regulations for critical areas must protect the 'functions and values' of those designated areas. *This means all functions and values*." *Id.* (emphasis supplied).

Here the Petitioners have met their burden of proof by demonstrating that the City's record lacks a current scientific basis for its wetlands rating system and that the three-tier system is designed "with specific and narrow functions in mind," rather than protecting "the entirety of functions" of the City's wetlands. The Board does not find in the City's record any current science supporting the truncated wetland rating system or indicating how wetland functions will be identified and protected with this system. The City points

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[25] Hruby, et al, *Methods for Assessing Wetlands Functions, Volume I; Riverine and Depressional Wetlands in the Lowlands of Western Washington, Part I, Assessment Methods* (1999), cited in Adolfson, Ex. 106 and in *Wetlands I*, Ex. 81-B.

[26] The Board notes that Ecology's updated rating system was provided to Adolfson in draft form in March, 2004 [see City Response, at 31], was reviewed and cited by Adolfson in its April 2004 BAS updated report, and was released in final form in August, 2004. Kent did not complete its review process and enact its CAO until April, 2005.

[27] See *WEAN*, 122 Wn.App. at 172, 174, for difficulties around consultant efforts to serve local jurisdictions consistent with scientific professionalism.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

to two references in its record: a September, 2004 staff outline - stating that "the three-tiered system is consistent with best available science" and recommending retaining it for "consistency with existing regulations" [Ex. 108, at 3], and a November 29, 2004, memorandum from Adolfson opining that although the three-tiered system "does not fully consider all wetland functions such as flood control, water quality improvement, etc.," the ranking system is "scientifically based" [Ex. 116]. However, no foundation is laid in the record for the "scientific basis" of the three-tier system other than reference to the 1979 Cowardin classifications, and the City acknowledges that the ranking "does not fully consider all wetlands functions." Ordinance Recital O. Petitioners agree that Kent's 3-tier system is "scientifically-based," but point out that "it is based on scientific information available in the 1980s that has since been disproved or superseded." DOE/CTED Reply, at 14, fn. 9.

In reenacting its three-tier wetlands ranking system, Kent failed to account for the full range of wetland functions and therefore failed in its GMA obligation to protect critical area functions and values. [As clarified in the following section, protection of functions could possibly have been provided, even under a three-tier system, with wider required buffers and other adjustments.] Retaining this outdated system ignores the advances of science and understanding of wetland functions and values that have occurred over the last decade. Retention of an obsolete, albeit "comfortable" system makes a mockery of, and totally ignores, the requirement of RCW 36.70A.130(1) that local cities and counties must update CAOs based upon BAS, which is continually being refined.

Finally, Kent's argument about the complexity of the function-based four-tier rating system is unpersuasive. In the first place, wetlands are biologically and hydrologically complex – that is one reason why their preservation became and remains a statutory imperative. In the second place, Petitioners have demonstrated that wetlands consultants and city staff throughout the Puget Sound region are being trained to apply the newfour-tier system which has been field-tested for replicability.[28] And third, Kent was offered and rejected several options for retaining its three-tier system and adjusting it in various ways, including the use of wider buffers, to adequately protect wetland functions and values. Petitioners suggested an array of alternatives if Kent chose to retain its three-tier rating [see, e.g., Ex. 86, 95],[29] and Adolfson repeatedly recommended to the City that wider buffers were needed to effectively protect wetland functions.

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[28] At the Hearing on the Merits, Intervenors MBA/BIAW acknowledged that wetlands are typically rated by wetlands consultants who work throughout the region and are hired by developers for specific projects. HOM Transcript, at 133. The Board reasons that the new 4-tier rating, having been adopted by King and Pierce Counties, is likely to become the professional standard or one of the common standards in the region.

[29] DOE suggested: (1) Retain the three tiers but recognize that "substantially larger buffers than those proposed are necessary to ensure protection of the functions and values of the higher-quality wetlands in Kent;" (2) Revise the 3-tier system so that it puts all wetlands with moderate and high habitat value into Category 1, and provide adequate buffers for each of the three wetlands tiers; or (3) Keep the 3-tier system and provide adequate buffers for each category, i.e., similar buffer widths for Category 1 and 2 wetlands, as high quality wetlands will fall into each of these categories. Ex. 86, at 2; DOE/CTED Reply, at 12; Ex. 95.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

The Board finds and concludes that the City of Kent's wetlands rating system is outdated, does not adequately assess wetland functions such as water quality and hydrologic functions, and is not supported by BAS in the record. Therefore Section 11.06.580 of the Ordinance does not comply with the GMA requirements to designate and protect the functions and values of critical areas through the inclusion of best available science. The Board is left with the firm and definite conviction that a mistake has been made.

Conclusion

Petitioners have met their burden of proving Legal Issue No. 1. The Board is left with the firm and definite conviction that a mistake has been made by the City of Kent in its readoption of the wetlands rating system in Section 11.06.580 of the Ordinance. The Board concludes that, with respect to this rating system, Ordinance No. 3746 fails to accurately designate wetlands because the rating system is based on a 1979 classification methodology that does not account for or accurately assess key wetland functions and has been superseded by better scientific understandings; thus it **does not comply** with the requirements of RCW 36.70A.040(3)(b) and .170(1)(d) to designate critical areas. The Board concludes that the City of Kent, in readopting its wetlands rating system based on obsolete science, failed to consider the guidelines established pursuant to RCW 36.70A.050, as required in RCW 36.70A.170(2); thus the action of the City is **clearly erroneous.** The Board further concludes that the City of Kent failed to include best available science when it readopted its wetlands rating system based on outdated science and therefore Ordinance 3746, Section 11.06.580 **does not comply** with the requirements of RCW 36.70A.172(1).

C. LEGAL ISSUE NO. 2 – Wetlands Buffers

The Board's prehearing order states Legal Issue No. 2 as follows:

> *Legal Issue No. 2.* Whether the City, in adopting the wetland buffers, setback lines and other provisions of Section 11.06.600, together with the wetlands rating system of Section 11.06.580, a) failed to protect wetlands as required in RCW 36.70A.040(3)(b), RCW 36.70A.060(2) and RCW 36.70A.172(1); b) failed to include best available science as required in RCW 36.70A.172(1); and c) failed to be guided by the GMA goals in RCW 36.70A.020(9) and (10)?

Applicable Law

Legal Issue No. 2 cites to RCW 36.70A.040(3)(b), set out above at footnote 8, RCW 36.70A.060(2), set out at footnote 11, the best available science requirement in RCW 36.70A.172(1), set out in footnote 13, and GMA goals 9 and 10, set out in footnote 12.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Discussion and Analysis

Positions of the Parties

Petitioners assert that the wetland buffers the Ordinance maintains, which are the same as those of the old ordinance, do not incorporate BAS and fail to protect wetland functions and values. DOE/CTED PHB at 16-17. In most instances, Petitioners assert, the buffers set by the City will be inadequate to protect the wetland functions of filtering fine sediments, nutrients, or toxic substances, and will not provide the wetland functions necessary to protect the wildlife that depends on wetland habitat.[30] *Id.* at 19.

Petitioners dispute the City's claim in Recital G[31] that the research was not relevant to Kent because it was conducted in different geographic areas. Petitioners point out that, in fact, considerable wetland buffer research has been conducted in the Puget Sound area, and much of the remaining science on buffers is applicable, because the relevant factors that must be applied are the same. *Id.* at 20, citing *Wetlands and Urbanization* as cited in Ex. 81-B (*Wetlands I*); see also Ex. 188.

Similarly, according to Petitioners, the City's emphasis on a perceived disagreement among scientists over buffers is wrong—the scientific literature is remarkably consistent on the issue of wetland buffers. DOE/CTED PHB at 19, citing Ex. 81-B (*Wetlands I*, Sec. 5.5.6) (summarizing the literature regarding buffer widths).The range of size for effective wetland buffers is not the result of any scientific disagreement, but is simply the result of applying the relevant factors under different conditions. *Id.* at 19-20.

Petitioners reject the City's reliance on the enhancements listed in Recital T[32] of the Ordinance. *Id.* at 24-25. The City's assertion that these measures will offset any risks posed by minimal buffer requirements is without merit, say Petitioners, because (1) the increased mitigation ratios have nothing to do with buffers—they address only wetlands lost through permitted actions; (2) the City's requirement that existing degraded wetland buffers be enhanced when new development occurs does not render buffers of inadequate

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[30] For example, according to Petitioners, the City's argument in Recital T that its adopted buffers pose the highest risk to Category 2 wetlands that are not among the highest functioning in that category, implying that other wetlands are not at risk, is refuted by other wetland consultants and the information submitted in the record by the State which detail risks to category 1 and 3 wetlands. DOE/CTED PHB at 23, referring to Ex. 86, 115, 119.

[31] See full text of Recital G in Appendix B: "...Additional interpretation is required to apply research that was conducted in widely disparate environments, much of it from outside this state. Moreover, most of this scientific research was not conducted in urban settings like Kent's...."

[32] See full text of Recital T in Appendix B: "... [T]he city's selected buffers will protect the functions and values of wetlands under the new regulatory framework provided here in part because the city also is adding buffer enhancement requirements, increased mitigation ratios, and an increased buffer incentive program as part of the overall regulation. For example, on the highly built-out and developed Kent valley floor, this ordinance focuses on enhancing vegetation within the wetlands buffers, rather than just creating larger, poorly vegetated wetland buffers...."

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

width adequate; and (3) the City's voluntary buffer incentive program provides no assurance that buffer widths will be increased to provide adequate protection. *Id.*

In response, the City claims it rightly gave preference to local studies of wetlands protections. When the City was considering its CAO update, it relied on Adolfson's recommendations, in part because Adolfson's research gave more weight to wetland protection studies done under local conditions, as opposed to studies done in different areas of the country. City Response at 5, 6, citing letter and attachments from King County Realtors Association, Ex. 61.

The City points out that CTED has acknowledged that the science of buffers widths is "complex and contentious." *Id*, at 4, fn. 1, citing CTED in Ex. 188, at 1. Buffer recommendations involve wide ranges, leaving wide scope for local government discretion. *Id.* at 4, fn.1. The City argues that it fully considered Adolfson's BAS analysis and buffer-width proposal, noting that its draft CAO contained an across-the-board increase in buffer widths consistent with Adolfson's recommendations. *Id.* at 6, citing Ex. 176, at 1, and p. 29 of the draft ordinance; Ex. 106, at 9-10. Although these increases were stricken in the final version of the CAO, their inclusion in the draft indicates that the City considered Adolfson's review of the BAS. City Response at 6.

Intervenors MBA/BIAW raise a series of rhetorical questions and argue that the "host of unanswered questions" and "host of issues which have not been addressed by scientific analysis" require deference to Kent's choices in this case. MBA/BIAW Response, at 26-27. Again Intervenors argue that Petitioners haven't provided proof that Kent's existing system is "actually causing significant damage to wetlands in Kent." *Id.* at 28.

Board Discussion

The Petitioners have clearly demonstrated that the City's adopted buffers, particularly when applied to wetlands rated under an inadequate ranking system, do not meet the scientific standards for protection of functions of wetlands. The City makes, at best, a *pro forma* response on the merits. The Board addresses the City's BAS compliance in Section D [Legal Issue 4], its "departure" rationale in Section E [Legal Issue 5], and its "balancing" process in Section F [Legal Issue 6] to follow.

Kent's wetland consultants repeatedly cautioned the City that the existing buffers did not utilize BAS. Adolfson, Ex. 112, at 2; 113, at 4; 114, at 1-2; 115, at 3; 119, at 3. Adolfson cited the following risks posed by Kent's current buffer system: Degradation of wildlife habitat; degradation of salmonid habitat; continued water quality degradation in wetlands due to increased deposition of fine sediments from urban development; continued pollutant loading in wetlands (especially those in categories 2 & 3); a reduction in stormwater and floodwater storage capacity in wetlands receiving sediment loading over time; and continued water quality degradation in streams within the City of Kent, which are already documented on the State 303(d) list of impaired waters. Ex. 115, p. 3-4. Even the recommended addition of 25 feet to buffers for each of the three wetlands categories was adjudged by Adolfson to be "at the lowest end of the range recommended in the

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

scientific literature," such that "any further reduction of these buffer widths may result in a departure from best available science ... and may lead to degradation of wetlands within the City over time."[33] Ex. 114, at 2.

Ecology's wetlands specialist provided the same advice, both in written and oral testimony. Robohm, Ex. 79, 86, 95. In participating in Kent's public process, Petitioner Ecology repeatedly offered that Kent could comply with the GMA wetlands protection standard, notwithstanding its truncated rating system, if adequate buffer widths were established to protect functions and values not accounted for in the rating system. Ex. 86, 95. Kent rejected Ecology's advice.

The City's staff agreed with Ecology's scientist and with Adolfson that the adopted regulations posed a risk to wetland functions and values and represented a departure from BAS. Ex. 175, 176, 177, and 186 (memos from staff).

The Board understands Kent's preference to rely on local studies, but notes that there are many local studies in the bibliographies referenced by both Adolfson and *Wetlands I*.[34] These include studies in Western Washington and Oregon, the Central Puget Sound area, and specifically urban or urbanizing areas.

More importantly, while Kent professes a preference for local studies, the City was unwilling to enact the protective measures indicated by the study results. For example, Adolfson's BAS report indicated that urbanizing areas should provide *more* protection for remaining wetlands, because of the intensity of use and existing hydrological and biological degradation. Adolfson, Ex. 106, at 10. Kent's reenactment of its former regulations disregards this scientific guidance. And Kent has cited to no current local science that it relied on in reducing the recommended buffers.

The City and Intervenors MBA/BIAW make much of DOE/CTED's statement that the science of wetlands buffers is "complex and contentious." Citing, Ex. 188, at 1. The Board notes that where science deals with complex, multi-faceted phenomena, scientific analysis and findings are likely to be complex. And where private economic interests or deeply-held beliefs are impacted, scientific conclusions are sure to be contentious.

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[33] As summarized by Adolfson: "Wetland buffers proposed [in the draft CAO] are 125 feet, 75 feet and 50 feet for Category 1, 2, and 3 wetlands, respectively. These buffers would be an increase of 25 feet from existing wetland buffers (e.g., 100, 50, and 25 feet). ... [T]hese [enlarged] buffers fall within the lowest end of the range of effective buffers described in the scientific literature and are thereby likely to provide minimal to adequate protection of wetland resources in the City. ... Buffers larger than 100-200 feet are necessary to protect water quality improvement functions of the wetland (i.e., removal of fine sediment, for example) and habitat for certain species (i.e., amphibians). Buffers less than 50 feet are generally thought to be ineffective over time." Ex. 114, at 1.

[34] Based on the titles alone, Adolfson's bibliography references at least 26 sources of science based in the Pacific Northwest region, as well as at least 15 sources discussing wetland management in the context of urbanization. Adolfson, Ex. 106, at 16-21. *Wetlands I* cites no less than 106 scientific sources based on Pacific Northwest area studies, along with at least 55 sources discussing wetland management in urban areas. Ex. 81-B, at R-1 to R-72.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

As pointed out previously, the complexity of wetlands protection is a function of the interplay between land uses, the specific wetland functions at risk, the degree of effectiveness, and other factors that might be more accurately assessed on a case-by-case basis. Where prescriptive regulation is enacted, a first step is designing a ranking system that reflects the full range of wetland functions and so addresses the protection of all functions. This Kent did not do. The second step is requiring effective buffer widths to protect those functions. This Kent did not do.

The Intervenors' appeal to the many as-yet-unanswered scientific questions [MBA/BIAW Response, at 19-27] adds force to the GMA requirement for cities and counties to update their CAOs every seven years based on BAS. The Legislature determined that scientific understanding of the necessary critical area protections would improve over time; thus, cities do not have to answer *all* the scientific questions they can think of but only need to apply the *best science available* at a particular time and place. See, generally, *Ferry County, supra.*

As to the actual on-the-ground impact of science-based protections, Petitioners correctly note:

> It is not [Petitioners'] burden to show that the use of a rating system that complies with best available science will make a difference on the ground compared with one that doesn't comply with best available science. Our burden is to show that the City's system does not include best available science and that there's insufficient evidence in the record to justify a departure from that best available science.
>
> It is not the state agencies' assumption that an ordinance based on best available science will be better protective of wetlands than one that is not based on best available science. That is the fundamental premise that underlies the best available science requirement when the legislature enacted it.

HOM Transcript, at 110-111.

The Board finds and concludes that the City of Kent's readoption of its wetland buffer widths, in combination with reenactment of its outdated wetlands rating system, does not comply with the GMA requirements to designate and protect the functions and values of critical areas through the inclusion of best available science. The Board is left with the firm and definite conviction that a mistake has been made.

Conclusion

Petitioners have met their burden of proving Legal Issue No. 2. The Board finds and concludes that the action of the City of Kent in its readoption of the inadequate wetland buffer provisions of Section 11.06.600, together with the outdated wetlands rating system of Section 11.06.580, is **clearly erroneous**. The Board concludes that, with respect to the

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

wetland buffer requirements of Section 11.06.600, Ordinance No. 3746: a) failed to protect wetlands as required in RCW 36.70A.040(3)(b), RCW 36.70A.060(2) and RCW 36.70A.172(1); b) failed to include best available science as required in RCW 36.70A.172(1); and c) was not guided by the GMA goals in RCW 36.70A.020(9) and (10).

The Board finds and concludes that the challenged buffer provisions [applied pursuant to the inadequate rating system] **do not comply** with the requirements of RCW 36.70A.040(3)(b), .060(2); and .172(1) for critical areas protection. The Board further concludes that the City of Kent failed to include best available science when it readopted its wetlands buffer provisions based on outdated science, and therefore Ordinance 3746, Section 11.06.600 **does not comply** with the requirements of RCW 36.70A.172(1). In reenacting its prior wetland buffer provisions, the City of Kent **was not guided** by GMA goals RCW 36.70A.020(9) and (10).

D. LEGAL ISSUE NO. 4 – Best Available Science

The Board's prehearing order states Legal Issue No. 4 as follows:

> *Legal Issue No. 4.* Whether the City of Kent's findings and conclusions that it included best available science in developing the Ordinance – [set forth in "Recitals" paragraphs A, F through L, M through V, and KK] – are unsupported by and contrary to the evidence in the record, so that the wetlands protection sections of the Ordinance that rest on those findings and conclusions – [Sections 11.06.020.B.1, 11.06.580, and 11.06.600] – do not comply with the requirements in RCW 36.70A.172(1) and are not guided by the GMA goals in RCW 36.70A.020(9) and (10)?

Applicable Law

RCW 36.70A.172(1) is the "best available science" requirement of the GMA:

> In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

The referenced GMA goals (9) - Open space and recreation - and (10) – Environment - are set forth above in footnote 12.

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Discussion and Analysis

Position of the Parties

Petitioners contend that, while the City' staff and consultants presented a fair summary of BAS to the City Council, including the risks of failing to update its wetlands rating system, the Council largely ignored the recommendations of their own staff and adopted wetland regulations that fail to include the BAS. DOE/CTED PHB at 29-30. Petitioners allege that the evidence the City chose to rely upon (testimony and comments from stakeholder interest groups such as MBA and realtors) disputed the scientific information presented by the State and the City's consultants without providing any credible science to back up their claims. *Id.* at 28-29. Petitioners assert that under the GMA the City may disregard or disagree with the scientific information provided by its consultants and state agencies, but only if it otherwise develops or obtains valid, current scientific information. *Id.* at 32, citing *Ferry Cty,* 155 Wn.2d at 836 (the City "cannot choose its own science over all other science and cannot use outdated science to support its choice").

Kent responds that the BAS requirement found at RCW 36.070A.172(1) consists of three components: (1) to include BAS in the record; (2) to consider BAS when drafting ordinances; and (3) when departures are made from what BAS supports, as they can be, those departures are justified by the City. City Response at 28-29.

First, the City points out that it undertook a thorough process involving extensive public comment and participation, environmental review, a planning process (including public hearings, public meetings, focus groups, public workshops, etc.), and regular communication and coordination with other government agencies. For example, the City convened a specially-appointed group with representatives from several regional businesses, employers, developers, and some of the City's planning staff, evincing its dedication to creating an integrated CAO that made extensive use of public participation to take into account an entire range of economic, political, social, and environmental issues facing a city of its size. *Id.* at 7-8, citing Ex. 70 and 72.

Second, the City asserts that BAS was not only included in its record, but also considered by the City. *Id.* at 26-27, citing *HEAL,* 96 Wn.App.at 531 and *WEAN,* 122 Wn.App. at 172-73. And third, Kent identified its reasons for departing from any of the BAS in the record, and stated what risks such departure might entail, as required by the CTED guidelines in WAC 365-195-915(c). City Response, at 28.

Amicus CAPR contends that the State here is trying to "replace the GMA's bottom-up planning approach with top-down command and control." CAPR Amicus at 1. "[I]f local governments do not apply the onerous science the State considers to be the best available, then they are not in compliance with the GMA." *Id.* at 2. CAPR argues that, because the GMA does not define "best available science," the City's choice of science must be affirmed under the RCW 36.70A.3201 deference standard. *Id.* at 5-7.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

In reply, Petitioners assert that most of the written correspondence and oral testimony cited throughout the City's Response in support of its decisions contain no reasoned, scientific analysis of the issues. DOE/CTED Reply at 21. Petitioners characterize the evidence relied upon by the City to deviate from recommendations based on BAS as consisting of nothing more than the same kinds of "generalized complaints" that the Courts have found inadequate in permit cases.[35] *Id.*

Board Discussion

The Board reviews this case under the framework laid down by the Supreme Court last year in *Ferry County.* In *Ferry County*, the Court cited with approval the Western Board's case-by-case review of BAS challenges under the following framework:

> (1) The scientific evidence contained in the record;
> (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and
> (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1).

Ferry County, 155 Wn.2d at 834.

The Board adds a fourth consideration based on *WEAN* and on the CTED guidelines at WAC 395-195-915(c):

> (4) Whether there is justification for departure from BAS.

Was BAS included in the record?

There seems to be no dispute that Kent's record contains ample reputable science concerning the functions of wetlands and protection of those functions. Kent's record contained basically one science concerning wetlands ranking and buffers – In fact, there is only one science here – an evolving set of wetland studies and findings concerning wetland functions and effective buffers to protect those functions. Adolfson's April 2004 *Best Available Science Issue Paper: Wetlands* [Ex. 106] incorporates by reference Ecology's draft *Wetlands I* [Ex. 81-B] and the October 2003 King County draft *Best Available Science,* prepared for update of the County's critical areas ordinances. Adolfson said, "We have determined that these recent documents generally support the

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[35] Petitioners cite *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995); *Dept. of Corrections v. City of Kennewick*, 86 Wn.App. 521, 533, 937 P.2d 1119 (1997); *Marantha Mining v. Pierce Cty.*, 50 Wn.App. 795, 804, 801 P.2d 985 (1990), for the Washington rule, in permit cases, that decisions may not be based on "generalized complaints" of the community. Petitioners argue the rule should apply here, since it is rooted in the requirement that local decisions be based on facts and evidence rather than speculation and conjecture. DOE/CTED Reply at 21, citing *HEAL*, 96 Wn.App. at 531.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

conclusions in this report." Ex. 106, at 3. It is not disputed that Kent's record included all relevant BAS.

Was BAS substantively considered?

There is no question that BAS was considered *procedurally.*[36] However, Kent's early elimination of consideration of a science-based wetlands rating system addressing all wetland functions and its later rejection of the overwhelming scientific advice that protection of wetland functions required wider buffers, makes it impossible to assert that Kent *substantively* considered BAS.

The City decided early in its public process not to give further consideration to the DOE wetland ranking scheme but to continue to rely on 1979 science for its wetland classifications. City Response, at 5; Ex. 176, at 27. As previously noted, the suggestions from Ecology of ways to overcome the deficiencies in the three-tier system and bring it into compliance with BAS were repeatedly rejected by the City. DOC/CTED Reply, at 12, Ex. 86, at 2; Ex. 95. The City also rejected recommendations from Adolfson and from City staff to increase buffer widths to protect wetland functions consistent with BAS. E.g., Adolfson, Ex. 112, 119.

Was the City's action within the parameters of BAS?

In order to determine compliance, the Board must determine whether Kent's wetland regulations fall within the parameters of best available science. Kent's articulation of the BAS standard simply omits this third element from the *Ferry County* framework. Kent invites the Board to jump from "procedural consideration" of BAS to justifications for divergence. As Petitioners correctly point out, the City's contention that it need only (1) include BAS in the record, (2) consider BAS when the ordinance is being developed, and (3) justify its departure from BAS, "converts the BAS requirement from a substantive mandate into a procedural show." DOE/CTED Reply at 4. Neither *Ferry County* nor *WEAN* allow this short-circuiting of the RCW 36.70A.172(1) requirement.

Amicus CAPR invites this Board to read the present case as one of competing science, with the State attempting to impose a "top-down" science and the City choosing to apply some other science. However, neither CAPR nor any of the other parties – not even the City – point to competing current scientific theories or findings.

The City's wetland ratings system is not within the parameters of the BAS in the City's record as acknowledged by Adolfson, Ex. 119, at 1: it does not account for two of the three primary functions of wetlands – hydrology and water quality. FOF # 24. Adolfson reported that the "city's classification system does not fully consider all wetland functions such as flood control, water-quality improvement, etc." Adolfson, Ex.116; Ordinance Recital O. If there was current science supportive of continuation of the three-tier ranking, the City failed to produce it. This pivotal question rates only a footnote in

[36] See detailed summary, City Response, at 3-18.

Central Puget Sound
Growth Management Hearings Board
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Tel. (206) 389-2625 Fax (206) 389-2588

the City's responsive brief, where the City indicates that Intervenors MBA and BIAW will address the issue of the science behind Kent's readoption of its three-tier ranking system. City Response, at 32, fn. 14. Intervenors, however, have nothing to say about the underlying science concerning wetland functions. See, MBA/BIAW at 4-15.[37]

Particularly when applied in conjunction with the obsolete rating system, the City's wetland buffers are not within the range of BAS in the City's record. FOF # 38, 40, 45. The City staff March 21, 2005 report states: "Based on the analysis provided to staff from the City's consultants, retaining the existing wetland buffers would represent a departure from Best Available Science." Ex. 186, at 4.
The City asserts in Recital T[38] of the Ordinance that its wetlands buffers "lie within the range of effective buffer widths in the scientific record, albeit at the lower end of that range." Ordinance, Recital T. The City makes this assertion after conflating, in two preceding recitals, the range of buffers indicated as effective to protect the differing functions of wetlands. Ordinance, Recitals R and S. Recital T thus begs the question of the outdated wetland rating system to which those minimal buffer widths will be applied. Recital T is also at odds with the scientific advice repeatedly provided by the City's consultants.

In *WEAN*, the Court of Appeals rejected the County's argument that its buffers fell within the range of some of the scientific evidence, noting that they did so "only with specific and narrow functions in mind, rather than the entirety of functions" to be protected. *WEAN*, 122 Wn.App. at 174-75. The Court stressed that the GMA requirement for protection of "functions and values" of critical areas "means all functions and values." *Id.*

The Board is persuaded that the City's wetland regulations, taken together, are not within the parameters of the science in the City's record.

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[37] Intervenors argue that the three-tier system is simpler, familiar, easy to administer, while the new system is subjective and complex. MBA/BIAW at 5, 9. They assert that the burden is on Petitioners to demonstrate appreciable improvements in wetland protections that would result from adoption of the four-tier system, and that Petitioners improperly seek to shift the burden to the City. *Id.* at 11.

[38] Recitals R, S, and T are set out in full in Appendix B.

R. ... There continues to be considerable discrepancy in the scientific literature regarding wetland buffer widths. For example, the scientific research generally indicates that buffers no smaller than 25 feet and as large as 350 feet are needed to protect most wetland functions and values (Sheldon et al., 2003). ...

S. Because of the dramatic spread in buffer width for habitat and other purposes that is shown in the scientific record, the city must select from the range of buffer widths needed to protect the variety of species that may use these habitat buffers. ... The city has done just that, after extensive public comment and dispute over the appropriate buffer widths.

T. The wetland buffer widths proposed by the city lie within the range of effective buffer widths in the scientific record, albeit at the lower end of that range. ...

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Is there justification for departure from BAS?

The Court of Appeals in *WEAN* opined that Island County might "justify a departure downward from the [stream] buffer width requirements outlined in the scientific literature" by pointing to facts in the record "outlining the *applicability of unique local conditions*" and "identifying the other goals of the GMA which it is implementing by making such a choice." *WEAN*, 122 Wn.App. at 172 (emphasis added).[39] In *WEAN*, the Court upheld the Board's finding that no evidence in the record showed unique local circumstances that would serve to justify the departure. *Id.*

The Board finds *no unique local conditions* in the City's record here which justify departure. All Central Puget Sound jurisdictions are reviewing substantially the same recent scientific findings as they update their CAOs. Many Central Puget Sound cities are built in river valleys and flood plains; many jurisdictions struggle with the need to protect the natural hydrology and at the same time allow property development. All Central Puget Sound cities have stormwater regulations; most have salmon protection programs and wetland or stream enhancement projects. If anything, Kent's location in the Green River Valley, its floodplain valley floor areas, its critical wetlands in the upper reaches of Soos Creek and other significant salmon streams suggest unique local need for extraordinary protection of remaining wetlands. Kent Comprehensive Plan, at 4-10, Figure 4.4; Adolfson, Ex. 106, at 1, 2, and 14. Kent's Plan recognizes this with Comprehensive Plan Framework Policy, Environment-6: "The City shall use the best available science when considering and implementing measures to protect and enhance the natural environmental functions of critical areas and habitats."

Under Legal Issue Nos. 5 and 6, that follow, the Board reviews with due deference the City's reference to its programs and regulatory processes and its balancing of other GMA goals. However, applying *WEAN*'s standard, the Board concludes that the City has neither identified unique local conditions nor shown in its record how it is implementing other GMA goals by its choice to disregard the requirements of RCW 36.70A.172(1).

Conclusion

Petitioners have met their burden of persuading the Board that the City of Kent's wetland regulations, taken as a whole, are **not within the range of best available science** for protection of the functions and values of wetlands. The City of Kent's findings and conclusions that it included best available science in developing the wetland protection provisions of Ordinance 3746 are **clearly erroneous**, so that the wetlands protection regulations – [Ordinance Sections 11.06.020.B.1, 11.06.580, and 11.06.600] - **do not comply** with the requirements of RCW 36.70A.172(1) and **are not guided by** GMA goals RCW 36.70A.020(9) and (10).

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[39] The Board accepts *WEAN* as controlling, Petitioners argue that there is no language in the Act that requires, or even permits, critical areas protection to be reduced to meet other goals of the Act. DOE/CTED PHB, at 38. The Board notes that *WEAN*'s "downward departure" and "balancing" language is not pegged to any specific statutory provision except RCW 36.070.020 and is not found in the *Ferry County* formulation of the BAS analysis. However, *WEAN* is the governing precedent.

Central Puget Sound
Growth Management Hearings Board
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Tel. (206) 389-2625 Fax (206) 389-2588

E. LEGAL ISSUE NO. 5 – Existing Projects and Regulations

The Board's prehearing order states Legal Issue No. 5 as follows:

> *Legal Issue No. 5.* Whether the City of Kent's findings and conclusions that planned and existing projects and regulations apart from the Ordinance were intended to protect the functions and values of wetlands and in fact protect the functions and values of wetlands – [set forth in "Recitals" paragraphs F through L, T through V, DD, and KK] – are unsupported by and contrary to the evidence in the record, so that the wetlands protection sections of the Ordinance that rest on these findings and conclusions – [Sections 11.06.020.B.1, 11.06.580, and 11.06.600] – do not comply with the requirements in RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172(1) and are not guided by the GMA goals in RCW 36.70A.020(9) and (10)?

Applicable Law

Legal Issue No. 5 cites to RCW 36.70A.040(3)(b), set out above at footnote 8, RCW 36.70A.060(2), set out at footnote 11, RCW 36.70A.170, set out at footnotes 8, 21, the best available science requirement in RCW 36.70A.172(1), set out in footnote 13, and GMA goals 9 and 10, set out in footnote 12.

Discussion and Analysis

Positions of the Parties

The City's Ordinance points to a set of environmental actions undertaken by Kent, including capital projects and regulatory programs, "which are intended to preserve the functions and values" of certain critical areas. Ordinance Recitals H, I, and J.[40]

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[40] H. The city has in place a number of programs and regulatory processes that supplement protection of the functions and values of critical areas in Kent. Most of these processes are monitored by the city's Environmental Engineering section within the Public Works Department. This group's purpose and task is to facilitate the restoration, enhancement and protection of environmental resources in Kent. The Parks Department, Planning Department and Public Works Operations division also help implement these programs. The most significant of these additional programs and regulatory processes include the following:

... [listing thirteen regulatory programs and other activities]

I. Concurrent with these additional regulatory processes and programs, the city has committed hard dollars to a variety of environmental restoration/enhancement and flood remediation/protection projects that will benefit the local environment. These include the following:

... [listing sixteen capital projects or groups of projects]

J. In addition, the city council has determined, through its various capital improvement plans, to implement the following projects in the future:

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Petitioners contend that the City has failed to establish in the record any quantitative, or even qualitative, benefits to wetlands functions from the listed regulations, projects and programs, or how any such activities offset the expected degradation of wetland functions from the inadequate CAO. DOE/CTED PHB, at 33.

The City responds that its many listed policies, regulations, and activities supplement the regulations in Ordinance No. 3746, and further identify, preserve, and enhance wetlands, buffers, and wildlife habitat. City Response at 2. The City asserts that the Board should defer to Kent in its choice of how to apply the science in the record, and that the burden is on Petitioners to demonstrate in what respect the City's existing wetland regulations have resulted in environmental damage. *Id.* at 36.

Intervenor MBA/BIAW points to Ordinance Recitals T, U, and V[41] as evincing Kent's "balanced approach" of lowered requirements for wetlands protection in connection with new development and increased commitment to capital programs and redevelopment enhancements to improve wetlands in the majority of the city that is already built out. MBA/BIAW Response, at 31-33.

In reply, Petitioners assert that, while it may be possible for a jurisdiction to adopt a CAO that interacts with other regulations, programs, and projects in such a way as to protect the functions and values of wetlands using alternatives to generally-accepted rating systems and buffers, this interaction must be explicated using a reasoned analysis supported by evidence in the record. DOE/CTED Reply at 27. The City's record contains no such assessment or evidence, according to Petitioners.

Board Discussion

The GMA imposes on local governments a requirement to designate critical areas, including wetlands, and to develop [and regularly update] regulations to protect their functions and values using best available science. The Court in *WEAN* tells us that if other regulations, beyond those labeled "CAOs," are relied on to protect critical area functions, they must be supported by BAS analysis.

> If the County were relying substantively on [preexisting regulations] to satisfy its obligations under RCW 36.70A.172..., those preexisting regulations must be subject to the applicable critical areas analysis to ensure compliance with GMA requirements. Otherwise, a county could use myriad preexisting regulations in an attempt to satisfy GMA critical areas requirements without actually having to include BAS analysis. This would contravene RCW 36.70A.172.

WEAN, 122 Wn.App. at 180; see further, at 184 (no evidence in the record supported County's reliance on a best management practices exemption, where BMPs had not been subject to BAS analysis). *WEAN* rejected the County's argument that its existing

[41] See Appendix B for the text of these Recitals.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

regulations were effective, agreeing with the Western Board that "other regulations provided by the County ... and the County's 'holistic' approach, failed to provide assurances of 'minimal effective protection.'" *Id.*

Additionally, *WEAN* allows departure from protections within the range of best available science where the jurisdiction demonstrates "the applicability of unique local conditions." 122 Wn.App. at 172. In either case – reliance on existing regulations or on unique local conditions – the *WEAN* Court says we must look to the information in the jurisdiction's record.

Is there anything in the City's record to demonstrate that the other regulations, programs or projects are supported by BAS to protect the functions and values of wetlands? The Board finds staff recommendations in the record that the City would need to adopt a series of new, more stringent stormwater and other requirements in order to mitigate risks to wetlands if the inadequate rating system and buffers are reenacted. Staff report, Ex. 186, at 5. None of these recommendations, except the requirement that existing degraded buffers should be revegetated, was incorporated in the Ordinance. *Id.* In short, the record in this case fails to meet the *WEAN* standard of an analysis that would justify reliance on other regulations to support deviation from a scientifically-based wetland CAO.

The Board applauds the City's involvement in the protection, preservation, and restoration of streams and City-owned wetlands listed under Ordinance Recitals H, I and J. The programs, projects and regulations are undoubtedly important elements of Kent's environmental stewardship. However, many of the programs that the City lists are not unique to Kent and do not reduce the need for buffers or mitigate risks to unprotected wetlands.

Ordinance Recital H list "programs and regulatory processes that supplement protection of the functions and values of critical areas in Kent." Petitioners correctly note that stormwater regulations [H-1] are used by every jurisdiction in the Puget Sound region, but they do not reduce the need for buffers to perform additional, wetland-specific functions. DOE/CTED PHB at 34, citing Ex. 81-B (*Wetlands I*) and *Azous & Horner: Wetlands and Urbanization*, cited in *Wetlands 1*. Similarly, according to Petitioners, the City's compliance with FEMA [H-7] and NPDES [H-9] regulations may provide marginal benefits to wetlands, but they do not replace the need for the City to take additional actions, as required by the GMA, to protect wetlands. *Id.* at 34-35. And while the City's Wetland Maintenance Program [H-11] may ensure that wetlands in City ownership are protected, it does not protect the many wetlands in private ownership covered by the CAO. *Id.* In addition, water quality via monitoring [H-2] and wellhead protection [H-6], through adherence to rules regarding sanitary control areas (SCA) during development review [H-4], is an issue addressed on a statewide level, not a "unique local circumstance" justifying lowered standards for wetlands protections. *Id.* Further, there is no information on whether or how the City's solid waste/recycling/conservation [H-5], educational activities [H-8], and an Eagle Scout program [H-13], which are cited by the City, demonstrate any wetland-related benefits. *Id.* at 34.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

Ordinance Recital I lists "a variety of environmental restoration/enhancement and flood remediation/protection projects that will benefit the local environment." These include establishing a large nature preserve, replacing leaky water mains and rehabilitating sewers, improving or replacing culverts, and a number of stream restoration projects.

Ordinance Recital J lists a future projects in the City's various capital facilities plans that will restore creeks, replace culverts, improve the stormwater system, benefit fish habitat and provide flood remediation.

The Board notes that, in connection with the federal listing of Chinook salmon, cities and counties in the Central Puget Sound have undertaken scores of projects to restore streams and wetlands and enhance habitat for fish. The Board readily acknowledges, and Petitioners do not dispute, Kent's valuable contributions to this effort. DOE/CTED, at 35.

However, under *WEAN*, some analysis is required to demonstrate how the various regulations, projects and programs, together or separately, protect the specific hydrologic, water quality and habitat functions and values of Kent's wetlands. The Board finds no evidence of this in the record; rather, the distinct impression created by the memoranda, reports, and documents in the record, is that Recitals H, I, and J were prepared as a post-facto rationale after the City had virtually decided not to upgrade its wetlands protections to be consistent with best available science.

Conclusion

Petitioners have met their burden of proving Legal Issue 5. The Board finds and concludes that the City of Kent's Recitals H, I, and J in Ordinance 3746 - that various planned and existing projects and regulations apart from the Ordinance will protect the functions and values of wetlands - are **not supported by evidence in the record**, and in particular, are not supported by analysis for protection of the functions and values of critical areas. The Board is persuaded that the action of the City in relying on existing projects, programs and regulations in substitution for wetland regulations within the scope of best available science is **clearly erroneous.** The Board finds and concludes that the wetlands protection sections of the Ordinance that rest on these Recitals – [Sections 11.06.020.B.1, 11.06.580, and 11.06.600] – **do not comply** with the requirements in RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172(1) and **are not guided by** the GMA goals in RCW 36.70A.020(9) and (10)?

F. LEGAL ISSUE NO. 6 – "Balancing"

The Board's prehearing order states Legal Issue No. 6 as follows:

> *Legal Issue No. 6.* Whether the City of Kent's findings and conclusions that reduced wetlands protection is justified by the need to balance such protection against other goals of the GMA – [set forth in "Recitals" paragraphs CC through JJ, and LL through NN] – are unsupported by and

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

contrary to the evidence in the record, so that any downward departure from the best available science in the wetland protection provisions of the Ordinance – [Sections 11.06.020.B.1, 11.06.580, and 11.06.600] – is not in compliance with the requirements in RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172(1) and is not guided by the GMA goals in RCW 36.70A.020(9) and (10)?

Applicable Law

Legal Issue No. 6 cites to RCW 36.70A.040(3)(b), set out above at footnote 8, RCW 36.70A.060(2), set out at footnote 11, RCW 36.70A.170, set out at footnotes 8 and 21, the best available science requirement in RCW 36.70A.172(1), set out in footnote 13, and GMA goals 9 and 10, set out in footnote 12.

Discussion and Analysis

Positions of the Parties

Noting that there is no language in the Act that requires—or even permits—critical areas protection to be reduced or abolished to meet other goals of the act, Petitioners urge that the Board must require that there be concrete evidence in the record of actual conflict between goals and a showing of how reduced critical areas protection is necessary to the fulfillment of another goal. DOE/CTED PHB at 38-39, citing *WEAN*, 122 Wn. App. at 183-84, and WAC 365-195-915(1)(c) (suggesting the type of evidence that should be contained in the record).

With respect to affordable housing (Ordinance Recital HH),[42] Petitioners point out that the only evidence in the record that examined the effect of larger wetland buffers on

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[42] HH. Our Housing Needs and Affordable Housing Goals and Policies, pp. 6-12 to 6-15, argue in favor of flexibility in our land use regulations in order to fulfill those goals and policies. Many real estate development representatives spoke strongly and convincingly that the environment should not receive greater emphasis than the need to create additional residential housing in our community, which has become an area that has seen significant single family residential construction.

II. Nor can this council ignore its economic development goals and policies, pp. 12-1 through 12-8. This city is committed to supporting its manufacturing and warehouse distribution center as a significant employment and commercial activity center not just in the greater Seattle area, but along the entire West Coast. The city has, over many years, committed considerable time and effort through land use planning and capital infrastructure projects to facilitate and enhance this center of commercial activity and significant employment source. The city has an equally important commitment to downtown revitalization. Excessive environmental regulation can have a distinct downward effect on this commercial activity, which in many ways is the lifeblood of our city. The goals of environmental protection must be balanced against its impacts on commercial growth and the individuals and organizations that have invested so much in our community's future.

JJ. Finally, though little is discussed about this goal in our Comprehensive Plan, we must consider the effect of environmental regulation on property rights. This in fact could be the one most significant factor calling out for a balanced approach to regulating our natural environment. Although we recognize the need for regulation in order to preserve the public health, safety, and welfare, we also recognize that

Central Puget Sound
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900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

the City cannot ignore BAS in favor of the GMA goals it prefers simply because the latter supports the decision it wants to make. DOE/CTED Reply at 5. The City's obligation to balance competing goals is not a license to ignore the GMA's explicit requirements. *Id.* citing *Quadrant,* 154 Wn. 2d at 245-47.

Board Discussion

In deciding this issue, the Board is governed by the Supreme Court's reasoning in the "soccer fields case" – *King County, supra,* 142 Wn.2d 543, as recently reaffirmed in *Quadrant, supra,* 154 Wn.2d at 240, fn. 8. Recall that, as discussed in Section V, above, *King County* involved a dispute based on the GMA requirements for designation and conservation of agricultural resource lands. The County had identified a need for active sports fields and had amended its comprehensive plan to allow temporary use of designated agricultural land by soccer leagues. The County argued that its action balanced the GMA goals of conserving agriculture and providing recreational opportunities. The Court reviewed the Act's provisions concerning agriculture and recreation and found that conservation of agricultural lands was a statutory requirement, not simply a goal, and furthermore, a requirement with primacy [i.e., agricultural lands were to be designated and conserved prior to enactment of comprehensive plans or urban growth areas]. The Court considered the special level of deference to local governments that RCW 36.70A.3201 mandates and noted, with emphasis, that "broad discretion" may be exercised by cities and counties "*consistent with the requirements of this chapter*" and that "deference" must be granted to actions "*consistent with the goals and requirements of this chapter.*" *Id.* at 561. The Court concluded that the County's action "undermine[d] the Act's agricultural conservation mandate" and was invalid. *Id.*

As previously noted [Section V, above], the critical areas provisions of the GMA parallel its natural-resource-land provisions, and in many cases are included in the same sections of the statute. RCW 36.70A.040(3), .050, .060, .170. Critical areas designation and protection is a mandate, not a goal. Cities and counties may exercise broad discretion consistent with GMA requirements, that is, within the parameters of best available science for protection of the functions and values of critical areas. Deference is accorded to local government choices consistent with GMA goals *and requirements.* RCW 36.70A.3201. See also, *Bellevue, supra,* 119 Wn.App. at 414 (when City sought to exempt large redevelopment project from concurrency standards, relying on GMA economic development goal, the Court of appeals ruled the exemption invalid, saying "concurrency is not a goal, it is a requirement").

The Board concludes that GMA goals provide a framework for plans and regulations, and many of the goals are backed and furthered by specific and directive GMA requirements and mandates. Therefore cities and counties may not merely rely upon GMA goals, standing alone, to dilute or override GMA requirements.[43]

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[43] This cannot be a surprise. The two members of this Board who are former elected officials know from experience that a host of legal requirements, running the full gamut of local government operations, are imposed on local governments by various state statutes, and that local governments are expected to comply

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Growth Management Hearings Board
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Alternatively, the Board acknowledges the language used by the Court of Appeals in both the *HEAL* case and subsequently in *WEAN* that apparently allows "balancing" in the context of critical areas regulation. In the CAO context, such "balancing" is clearly appropriate if GMA requirements are in conflict, but there is no hard evidence here to support such a divergence from wetland ranking and buffers based on best available science. The Board notes that neither *HEAL* nor *WEAN* actually reached the question of "balancing" as part of its holding. In upholding the Western Board's invalidation of Island County's exemption to its critical areas regulations for agricultural activities in rural [i.e., not designated agricultural] lands, the *WEAN* Court looked to the County's record and said:

> ...[T]here should be some evidence in the record to support the need for the exemption. ...
>
> The County fails to cite to anything in the record to support the claim that the exemption is necessary [to further another goal]....
>
> There is simply no evidence to support the County's assertion that the [competing] goal ... is furthered by the application of the exemption.

WEAN, 122 Wn.App. at 183-184. Plainly, mere recitals on the part of the local government that it "considered" BAS and chose to depart from it in the service of other GMA goals are inadequate. The justifications for departure must be supported by evidence in the record.

The Board finds no evidence here of unique local circumstances with respect to affordable housing, economic development or property rights – the same conditions hold true for all Central Puget Sound cities. In fact, the housing scenarios provided by *Amicus* WAR were not local to Kent but came from the City of Sammamish and other locations, emphasizing that many or all Central Puget Sound cities face similar challenges. While environmental regulations have some impact on housing costs, those impacts are likely to be the same in the Central Puget Sound area, as all cities must apply BAS to protect their wetlands and other critical areas. Economic development in the Central Puget Sound area is likely to be equally impacted, and property rights will be protected, as they are in Kent's code, through reasonable use provisions.

The City's record demonstrates that expanding its wetland buffer widths as recommended by City staff and Adolfson would not adversely affect the City's ability to meet its GMA growth target. Kent Planner Gloria Gould-Wesson provided a March 22, 2005 analysis of Kent's Buildable Lands Capacity under two wetland buffer scenarios. The memorandum indicated that Kent's 20-year household growth target is 4,284 additional households; its 20 year capacity is 6,814 new households with existing wetland buffers; and its 20-year

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with state requirements notwithstanding more general local policies and priorities or community controversy.

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capacity with 25-foot wider wetland buffers is 6,275 new households. Ex. 120. There is no evidence that wider wetland buffers will negatively impact urban growth in Kent.

The City of Kent has a strong commitment to "encourage housing affordable to low and moderate-income households" [Comprehensive Plan Goal H-6, at 6-13] backed by eleven policy statements. While these policies suggest a range of financing and other subsidies and incentives, relaxation of environmental protections is not one of them. Nor is there anything in the City's record on its wetlands ordinance that links reduced wetland buffer requirements to commitments to develop housing for the low or moderate-income markets.[44] There is no evidence that reduced wetland protection is necessary to achieve affordable housing goals in Kent.

As Petitioners point out:

> Kent is not unique. Every jurisdiction has to address other needs. Every jurisdiction has other ordinances that may affect wetlands. ... [T]he City cannot simply cite to its other obligations and to its other ordinances, but instead must demonstrate a necessity to lessen critical areas protection or must demonstrate that in some way, those other ordinances and those other obligations require a lessening or allow a lessening of a critical area protection because they provide additional protection otherwise.

HOM Transcript at 113.

Conclusion

The Board is persuaded that the City's attempt to justify its non-compliance with the GMA requirement to use BAS to protect the functions and values of wetlands by appealing to other goals of the GMAS, specifically housing, economic development, and property rights, is **clearly erroneous**. The Board finds and concludes that the GMA requirements for designation and protection of critical areas may not be overridden by appeals to GMA goals, and that the City's attempts to do so, in Ordinance Recitals HH, II, and JJ, are **clearly erroneous**.

Alternatively, giving deference to the City of Kent's concern for GMA goals concerning housing, economic development, and property rights, the Board fails to find specific facts in the City's record that would support a finding that disregard of BAS for wetlands is necessary or will materially contribute to achieving those goals. The Board is left with the firm and definite conviction that a mistake has been made.

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[44] At the request of the Board, the City provided display copies of Comprehensive Plan maps – Figure 4.4 Inventoried Wetlands and Figure 4.6 Vacant and Redevelopable Land. While the maps do not allow precise analysis, the larger wetlands or wetland complexes appear to be located in single-family vacant or redevelopable areas and to be designated Single Family 1 Unit/Acre or 3 Units/Acre on the Land Use Map [Figure 4.8].

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

The Board concludes that the action of the City of Kent in readopting the provisions of its wetlands regulations that are inconsistent with statutory definitions and not within the parameters of best available science **does not comply** with the requirements RCW 36.70A.040(3)(b), .060(2), .170, and .172(1) and **is not guided** by GMA goals RCW 36.70A.020(9) and (10).

VIII. ORDER

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

1. The City of Kent's adoption of Ordinance No. 3746, Sections 11.06.020.B.1, .040.A.12, 11.06.580, and 11.06.660, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A. 040(3)(b), .060(2), .170, and .172(1) and **is not guided** by GMA goals RCW 36.70A.020(9) and (10).
2. Therefore the Board **remands** Ordinance No. 3746 to the City of Kent with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.
3. The Board sets the following schedule for the City's compliance:
   - The Board establishes **October 19, 2006,** as the deadline for the City of Kent to take appropriate legislative action.
   - By no later than **November 2, 2006**, the City of Kent shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the City shall also file a "**Compliance Index,**" listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
   - By no later than **November 16, 2006,**[45] the Petitioners may file with the Board an original and four copies of Response to the City's SATC.
   - By no later than **November 27, 2006**, the City may file with the Board a Reply to Petitioners' Response.
   - Each of the pleadings listed above shall be simultaneously served on each of the other parties to this proceeding, including intervenors, and upon *amici*, at their request.
   - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **December 11, 10:00 a.m. , 2006,** at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Kent takes the required legislative action prior to the October 19, 2006, deadline set forth in this Order, the

[45] November 16, 2006, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 19th day of April 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[46]

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

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

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

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

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

APPENDIX A

Chronology of Proceedings in CPSGMHB Case No. 05-3-0034

On June 22, 2005,[47] the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development (**Petitioners** or **DOE/CTED**). The matter was assigned Case No. 05-3-0034, and is hereafter referred to as *DOE/CTED v. Kent*. Board member Margaret Pageler is the Presiding Officer for this matter.[48] Petitioners challenge the City of Kent (**Respondent** or **City**) adoption of Ordinance No. 3746 amending its critical areas ordinance. The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**).

On June 24, 2005, the Board received a Notice of Appearance from Tom Brubaker, Kent City Attorney, on behalf of the City.

On June 27, 2005, the Board issued its Notice of Hearing setting a prehearing conference and establishing a tentative case schedule.

On June 29, 2005, the Board received a Motion to Intervene – Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington – seeking to intervene on the side of the City. The Motion was accompanied by the Affidavit of Garrett Huffman in Support of Motion to Intervene. On July 6, 2005, the Board received "State Agencies' Response to Motion to Intervene filed by Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington." The state agencies asked that the Board clarify that MBA and BIA are intervening jointly.

On July 20, 2005, the Board received the Motion of Washington Association of Realtors Requesting Permission to Participate as an *Amicus Curiae*. The motion asked for permission to address the legal issues concerning affordable housing and economic development goals of the GMA. [Legal Issue No. 6]

On July 22, 2005, the Board received Respondent's Index of Documents.

On July 27, 2005, the Board received a Motion to Intervene – Livable Communities Coalition.

On July 28, 2005, at 10:00 a.m., the Prehearing Conference was convened in the Board's offices, Suite 2470, 900 Fourth Avenue, in Seattle. Present for the Board were Board

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[47] The PFR was received electronically on June 22, 2005, and in hard copy on June 23, 2005. Where pleadings and case materials have been submitted by e-mail or fax as well as in hard copy, this chronology indicates only the date first received.

[48] Board member Bruce Laing was designated the presiding officer at the outset, but the case was reassigned to Board member Pageler prior to the prehearing conference.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

members Bruce Laing, Ed McGuire, and Margaret Pageler, presiding officer. At the prehearing conference the Petitioners and Respondent indicated that they were pursuing settlement discussions. The Board subsequently received a Joint Motion to Extend Case Schedule, signed by Petitioners and Respondent, requesting a ninety-day extension for purposes of settlement discussions.

On August 3, 2005, the Board issued its Prehearing Order and Order Granting Settlement Extension. The Prehearing Order granted motions to intervene by Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington (**MBA/BIAW**) on the side of the City and a motion to intervene by Livable Communities Coalition (**LCC**) on the side of Petitioners. The Prehearing Order also granted the motion by Washington Association of Realtors (**WAR**) to file a brief *amicus curiae* regarding certain matters of housing affordability and economic development involved in Legal Issue No. 6. WAR's brief will be filed in accordance with the schedule set for Respondent (January 17, 2006). The Prehearing Order restated the Legal Issues in the case, as discussed at the prehearing conference. The Prehearing Order granted a settlement extension of 90 days for discussions directed toward resolution of some or all the issues in this matter and established the subsequent schedule for the case.

On September 26, 2005, the Board received the Motion of Citizens Alliance for Property Rights to File a Brief *Amicus Curiae*. The motion referenced a letter of consent from Petitioners, which was received by the Board on October 7, 2005. On October 10, 2005, the Board issued its Order Granting *Amicus* Status to Citizens' Alliance for Property Rights (**CAPR**).

On October 26, 2005, the Board received a Notice of Appearance and Association of Counsel from Michael C. Walter and Jeremy W. Culumber of Keating, Bucklin and McCormack, Inc., P.S., associating as counsel for the City of Kent with City Attorney Thomas Brubaker.

On November 7, 2005, the Board received a Joint Motion to Extend Case Schedule signed by Petitioners, Respondent, the three intervenors, and the two *amicus* parties. The Joint Motion requested a thirty day extension of proceedings to allow new counsel for the City time to better understand the issues. On November 8, 2005, the Board issued its Order Granting Second Settlement Extension, requiring a status report concerning settlement discussions at the end of the 30-day extension. On December 9, 2005, the Board received Petitioners' Status Report which indicated that "settlement has not been achieved and Petitioners intend to proceed with the case."

On November 30, 2005, the Board received a Notice of Substitution of Counsel, substituting Andrew C. Cook of Pacific Legal Foundation for Leslie L. Lewallen as counsel for Amicus Curiae CAPR.

On December 9, 2005, the Board received State Agencies' Motion to Supplement the Record, attaching eight documents requested for supplementation and eight exhibits concerning the inclusion of these documents in the City's record. The documents requested for supplementation are the following:

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

1. Thomas Hruby, *Washington State Wetland Rating System for Western Washington, Revised*, Washington State Department of Ecology Publication #04-06-025 (April 2004) [**Wetland Rating System**]
2. Dyanne Sheldon et al., *Freshwater Wetlands in Washington State – Volume 1: A Synthesis of the Science, Draft*, Washington State Department of Ecology Publication #03-06-016 (August 2003) [**Wetlands Vol. 1**]
3. Thomas Hruby et al., *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands, Draft*, Washington State Department of Ecology Publication #04-06-024 (August 2004) [**Wetlands Vol. 2**]
4. Andrew J. Castelle et al., *Wetland Buffers: Use and Effectiveness*, Washington State Department of Ecology Publication #92-010 (February 1992) [**Wetland Buffers**]
5. Jane Ruby, *Exploring Wetlands Stewardship: A Reference Guide for Assisting Washington Landowners and Local Communities*, Washington State Department of Ecology Publication #96-120 (Second Revision, January 2004) [**Exploring Wetlands Stewardship**]
6. Letter to Mr. Dow Constantine, Chair of the Growth Management Committee, King County Council, from Leonard Bauer, Managing Director of Growth Management Services, CTED, and Gordon White, Manager of the Shorelands and Environmental Assistance Program, Ecology, dated September 14, 2004 [**9/14/04 letter from CTED/DOE**]
7. "Buffer Requirements for Birds in Washington and Oregon" (undated) [**Buffers for Birds**]
8. "Buffer Requirements for Amphibians and Reptiles in Washington and Oregon" (undated) [**Buffers for Amphibians/Reptiles**]

City of Kent's Response to State Agencies' Motion to Supplement the Record was filed on December 22, 2006.

On January 3, 2006, the Board issued its Order on Motions to Supplement the Record, finding that items 1-5 are already in the record, adding item 6 to the record as Index # 188, and admitting items 7 and 8 as Supplemental Exhibit Nos. 1 and 2.

On January 26, 2006, the Board received Petitioners' Opening Brief – **DOE/CTED PHB** - and Intervenor LLC's Joinder – **LLC Joinder** - electronically. The following day Petitioners' Opening Brief and exhibits were delivered in hard copy. A Case Appendix with Table of Exhibits was filed on February 2, 2006,

On February 9, 2006, the Board received the following briefs from Respondent, Respondent Intervenors and Amicus:

- City of Kent's Pre-Hearing Brief with Exhibits – **City Response**
- City of Kent's Motion to Strike Documents and Statements in Petitioners' Pre-hearing Brief - **City Motion to Strike**

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

- Hearing Brief of Intervenors Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington – **MBA/BIAW Response**
- MBA/BIAW Motion to Strike Portions of Petitioners' Brief – **MBA/BIAW Motion to Strike**
- Notice of Substitution of Counsel, substituting Russell C. Brooks of Pacific Legal Foundation for Robin L. Rivett as counsel for *Amicus* CAPR.
- Brief *Amicus Curiae* of Citizens' Alliance for Property Rights – **CAPR Amicus**
- Brief *Amicus Curiae* of Washington Association of Realtors in Support of Respondent City of Kent, with Appendices A-J - **WAR Amicus**

On February 14, 2006, the Board received Petitioners' Unopposed Motion to Extend Hearing Date to March 7, 2006, and the Declaration of Thomas J. Young with attached e-mail train indicating concurrence of each of the parties. The reason for the requested extension is the illness of the key Department of Ecology staff person responsible for the matters at issue in these proceedings.

On February 15, 2006, the Board issued an Order Rescheduling Hearing on the Merits, setting the HOM over to March 7, 2006, and extending the deadline for Petitioners' Reply Brief to February 28, 2006.

The Presiding Officer by letter requested the City of Kent to provide display-sized copies of two maps from the City's Comprehensive Plan:

- Inventoried Wetlands – Figure 4.4 at 4-13
- Vacant and Redevelopable Land – Figure 4.6 at 4-19

The maps were received on March 2, 2006.

On February 28, 2006, the Board received State Agencies' Reply Brief – **DOE/CTED Reply** - and State Agencies' Response to Motions to Strike – **DOE/CTED Response to Motion**.

The Hearing on the Merits was convened at 10:00 a.m. and adjourned at approximately 1:30 p.m. on March 7, 2006, in the Training Center adjacent to the Board's offices at 900 Fourth Avenue in Seattle. Present for the Board were Board Members Bruce Laing, Edward McGuire, and Margaret Pageler, Presiding Officer. Petitioners were represented by Thomas J. Young and Alan D. Copsey, Assistant State Attorneys General. The City of Kent was represented by Michael J. Walter and Jeremy W. Culumber, of Keating Bucklin & McCormack, Inc. Robert Johns of Johns Monroe Mitsunaga, PLLC, represented Intervenors MBA/BIAW. Also present were Tom Brubaker, Teresa Vanderburg, Kelly Peterson, Garrett Huffman, Duncan Greene, Kelly Fahl, Matt Mead, Sara Springer, Justin Titus, Erin Glass, John Hendrickson, Sandra Adix, Erik Stockdale, and Richard Robohm.

Reporting services were provided by Eva P. Jankovits of Byers and Anderson, Inc. The Board ordered a transcript of the proceedings. The transcript was received on March 17, 2006, and is cited herein as **HOM Transcript**.

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

APPENDIX - B

SELECTED RECITALS from ORDINANCE 3476

PROCESS:

C. The following summarizes the course of events as the city developed this CAO, as well as the numerous occasions' public comment and public participation was invited:

... [listing twenty dated events beginning May 29, 2004 to April 4, 2005 when the Ordinance was forward to full Council]

INTERPRETATION AND INCLUSION OF BEST AVAILABLE SCIENCE:

G. In particular, interpretation and application of this range of best available science must be applied to the real, natural and developed environment in our city. The range of results and findings are highly dependent upon both the specific research question asked and the specific site conditions where the study was conducted (i.e., slope, land use, degree of disturbance, etc.). Additional interpretation is required to apply research that was conducted in widely disparate environments, much of it from outside this state. Moreover, most of this scientific research was not conducted in urban settings like Kent's. Also, no research exists that takes into consideration other environmental regulations already in place, such as the city's existing stormwater protections, development standards, shoreline management regulations, and so forth. Finally, any review and inclusion of best available science must take into account the city's other environmental projects, which are intended to preserve the functions and values of those critical areas in Kent that staff and city council have identified as most deserving of protection.

H. The city has in place a number of programs and regulatory processes that supplement protection of the functions and values of critical areas in Kent. Most of these processes are monitored by the city's Environmental Engineering section within the Public Works Department. This group's purpose and task is to facilitate the restoration, enhancement and protection of environmental resources in Kent. The Parks Department, Planning Department and Public Works Operations division also help implement these programs. The most significant of these additional programs and regulatory processes include the following:

... [listing thirteen regulatory programs and other activities]

I. Concurrent with these additional regulatory processes and programs, the city has committed hard dollars to a variety of environmental restoration/enhancement and flood remediation/protection projects that will benefit the local environment. These include the following:

... [listing sixteen capital projects or groups of projects]

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

J. In addition, the city council has determined, through its various capital improvement plans, to implement the following projects in the future:

> ... [listing sixteen specific projects including stream restoration, culvert replacements, and property acquisitions]

WETLANDS REGULATIONS:

...

O. City staff considered the Department of Ecology's four-tiered wetland rating system and compared it to the city's current three-tiered wetland rating system. The system separates wetlands according to habitat function and value, degree of sensitivity to disturbance (i.e., presence of certain sensitive wildlife), rarity (i.e., bogs), and ability to compensate for degradation (i.e., presence or absence of habitat diversity). Although the city's classification system does not fully consider all wetland functions such as flood control, water quality improvement, etc., the city's three-tiered rating system is scientifically based, does rank wetlands from higher to lower function and value, and meets the requirements under WAC 365-190-180. In 2003 and 2004, Adolfson and Associates, the city's wetlands consultants, assisted the city with development of a full array of regulations and standards for wetlands, not all of which were accepted by this council. This array of regulations works interactively with the three-tiered wetland rating system currently in use and adequately addresses any lingering concerns that may be raised regarding the city's continued use of its three-tier rating system.

P. Moreover, it was not until August, 2004, that the Department of Ecology revised and published its final guidance on the new four-tiered wetland rating system. Although arriving late in the GMA update process, city staff and its environmental consultants reviewed the new Department of Ecology wetland rating system. However, due to the higher level of complexity in the rating form and increased ability for subjectivity between evaluators using the form, we have decided to continue to use the city's three-tiered system. While it is recognized that the Department of Ecology's new 2004 wetland rating system may be appropriate for ranking wetlands at a state or county level where there is a wide diversity of wetland types, urban areas such as Kent find that a simpler system adequately addresses wetland impacts and makes better practical and scientific sense given the lesser diversity of wetland types. Wetland functions and values will be protected, as mandated under the GMA, with the existing city rating system.

Q. As a result, the council has determined, based on consultation with city staff, the city's wetlands consultant, and with the community at large, that the existing three-tier system adequately addresses the requirements in the WAC. This ranking system addresses wetland function, value, and uniqueness in our local environment, and has the added benefit of providing for a rating system that is consistent with past practice, is easily applied and understood, and accordingly minimizes staff and developer misinterpretation. For these reasons, council has determined that continuation of the

Central Puget Sound
Growth Management Hearings Board
900 4th Avenue, Suite 2470, Seattle, WA 98164
Tel. (206) 389-2625 Fax (206) 389-2588

three-tier ranking system will not adversely affect the functions and values of critical areas in Kent.

R. In addition, the city and its consultant evaluated the scientific record related to determining appropriate and adequate wetland buffer widths to protect the functions and values of wetlands. There continues to be considerable discrepancy in the scientific literature regarding wetland buffer widths. For example, the scientific research generally indicates that buffers no smaller than 25 feet and as large as 350 feet are needed to protect most wetland functions and values (Sheldon et al., 2003). Buffer widths adequate to protect wetland wildlife, including waterfowl, vary dependent upon the type of wetland, adjacent land use, site conditions, and other site-specific factors. The scientific literature reflects that larger buffer widths (over 100 feet and for some species over 1600 feet) are shown to be needed to protect certain wildlife species that use wetlands habitat. The scientific literature also shows that larger buffers are useful to protect certain water quality improvement functions such as removal of fine sediment.

S. Because of the dramatic spread in buffer width for habitat and other purposes that is shown in the scientific record, the city must select from the range of buffer widths needed to protect the variety of species that may use these habitat buffers. Obviously, the city cannot fully protect all species habitat needs unless the city wants to set all buffers at 1600' or greater. Rather, the city must make a reasoned and measured decision, interpreting the scientific literature, taken in the context of the local environment and within the local regulatory framework. The city has done just that, after extensive public comment and dispute over the appropriate buffer widths.

T. The wetland buffer widths proposed by the city lie within the range of effective buffer widths in the scientific record, albeit at the lower end of that range. Although some participants have argued that smaller wetland buffers widths constitute a departure from state recommendations and from some of the scientific record, the council has determined, however, that this "lower end" is acceptable in light of all factors at play, which are discussed in detail in these recitals. The city has evaluated the potential risks to the functions and values of wetlands as a result of implementing these buffers and recognizes that the greatest risk to the functions and values of wetlands in our jurisdiction is likely to occur in those Category 2 wetlands that are among the most highly functioning within that category. However, the city's selected buffers will protect the functions and values of wetlands under the new regulatory framework provided here in part because the city also is adding buffer enhancement requirements, increased mitigation ratios, and an increased buffer incentive program as part of the overall regulation. For example, on the highly built-out and developed Kent valley floor, this ordinance focuses on enhancing vegetation within the wetlands buffers, rather than just creating larger, poorly vegetated wetland buffers. The purpose for this is to improve the functioning of existing buffers, which currently are highly degraded on the valley floor.

U. As part of this overall GMA enactment process, this council is concurrently passing a resolution authorizing the Mayor to develop and enact a critical areas Habitat Protection and Restoration Plan (Habitat Plan). The Habitat Plan will be put in place to

Central Puget Sound
Growth Management Hearings Board
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enhance critical area habitat and to offset any unintended past and present risk of degradation to existing wetland functions and values. Streams will also be included in the Habitat Plan since wildlife that utilize wetlands also utilize streams and their associated buffers. The Habitat Plan will use a "landscape approach" to understand the relationship between stormwater runoff, wetland functions, and fish and wildlife habitat. This plan could include projects to enhance fish and wildlife habitat, stormwater management, and wetland restoration.

V. Taken together, as these regulations pertain to wetlands, their classification, and their attendant buffers, the city council has determined that the regulatory framework enacted in this ordinance, particularly when viewed in the context of the city's other regulatory programs and critical areas enhancement projects, interprets, applies and includes best available science as provided for under law.

...

BALANCING GMA GOALS.

...

HH. Our Housing Needs and Affordable Housing Goals and Policies, pp. 6-12 to 6-15, argue in favor of flexibility in our land use regulations in order to fulfill those goals and policies. Many real estate development representatives spoke strongly and convincingly that the environment should not receive greater emphasis than the need to create additional residential housing in our community, which has become an area that has seen significant single family residential construction.

II. Nor can this council ignore its economic development goals and policies, pp. 12-1 through 12-8. This city is committed to supporting its manufacturing and warehouse distribution center as a significant employment and commercial activity center not just in the greater Seattle area, but along the entire West Coast. The city has, over many years, committed considerable time and effort through land use planning and capital infrastructure projects to facilitate and enhance this center of commercial activity and significant employment source. The city has an equally important commitment to downtown revitalization. Excessive environmental regulation can have a distinct downward effect on this commercial activity, which in many ways is the lifeblood of our city. The goals of environmental protection must be balanced against its impacts on commercial growth and the individuals and organizations that have invested so much in our community's future.

JJ. Finally, though little is discussed about this goal in our Comprehensive Plan, we must consider the effect of environmental regulation on property rights. This in fact could be the one most significant factor calling out for a balanced approach to regulating our natural environment. Although we recognize the need for regulation in order to preserve the public health, safety, and welfare, we also recognize that these regulations sometimes negatively affect property values or restrict, and sometimes eliminate, certain

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uses on a person's property. The city must consider the negative impacts to individual property rights when implementing its critical areas regulations.

...

Central Puget Sound
Growth Management Hearings Board
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CPSGMHB Case No. 05-3-0034
DOE/CTED v. City of Kent
DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Final Decision and Order** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **April 19, 2006.**

Signed: Linda Kenstons

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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 OF

ORIGINAL

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Darrell S. Mitsunaga, WSBA #12992
Duana T. Koloušková, WSBA #27532
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Attorney for Petitioner/Appellant Building Industry of Washington.

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly worn 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 legal messenger delivery, true and correct copies of: MOTION FOR DISCRETIONARY REVIEW; DECLARATION OF DARRELL S. MITSUNAGA IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW; AFFIDAVIT OF SERVICE OF NOTICE FOR DISCRETIONARY REVIEW TO COURT OF APPEALS DIVSN. I, and this AFFIDAVIT OF SERVICE; upon counsel of records at their addresses below.

Tom Brubaker, Esq., WSBA #
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220 Fourth Avenue S.
Kent, WA 98032

Attorneys for City of Kent

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Washington State DOE

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Via U.S. First Class Mail

Martha P Lantz AAG, WSBA #21290
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Office of Attorney General of Washington
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Attys for Respondent CPSGMHB

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Attys for Citizens Alliance for Property Rights

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Jay P. Derr, Esq.
Annette M. Messitt, Esq.
Buck & Gordon
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Seattle, WA 98121-3140
Attys for Washington Assoc. of Realtors

Dated this 13th day of July, 2006.

Evanna Charlot
EVANNA L. CHARLOT

SIGNED AND SWORN to (or affirmed) before me on 7-13-06 by Evanna L. Charlot.

Michael P. Monroe
Michael P. Monroe
Notary Public Residing at Edmonds, WA.
My Appointment Expires: 11-29-08

1300-15 Affidavit of Service 7-13-06

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 OF
NOTICE FOR DISCRETIONARY REVIEW TO COURT OF APPEALS, DIVISION 1

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 JUL 13 PM 1:55

ORIGINAL

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Attorney for Petitioner/Appellant Building Industry of Washington.

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly worn 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 June 30, 2006, this office filed with King County Superior Court under Cause No. 06-2-16675-2 KNT, a Notice for Discretionary Review to The Washington State Court of Appeals, Division I ("Notice"), on behalf of Petitioners MBA and BIAW. **Also filed with the Notice,** was my Declaration of Service of Notice For Discretionary Review, dated June 30, 2006 ("Declaration"), declaring that copies of both Notice and Declaration were served on counsel of record via facsimile and U.S. First Class Mail. Attached hereto is a true and correct copy of the Declaration of Service.

Dated this 13th day of July, 2006.

EVANNA L. CHARLOT

SIGNED AND SWORN to (or affirmed) before me on 7-13-06
by Evanna L. Charlot.

Darrell S. Mitsunaga
Notary Public Residing at Sammamish, WA.
My Appointment Expires: 1-28-09

DARRELL S. MITSUNAGA
NOTARY PUBLIC
COMMISSION EXPIRES 01-28-09
STATE OF WASHINGTON

1300-15 Affidavit of Service 7-12-06

RECEIVED
KING COUNTY, WASHINGTON
JUN 30 2006
KNT DEPARTMENT OF
JUDICIAL ADMINISTRATION

THE HONORABLE BRIAN GAIN

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES, and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, Petitioners, 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, Respondents.	**NO. 06-2-16675-2 KNT** ***Consolidated*** **DECLARATION OF SERVICE OF NOTICE FOR DISCRETIONARY REVIEW**
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.	**NO. 06-2-16933-6 SEA**

COPY

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I, Evanna L. Charlot, am a citizen of the United States, resident of the State of Washington, and declare under the penalty of perjury under the laws of the State of Washington, that on this date, I caused to be served via facsimile and U.S. First Class Mail, true and correct copies of: NOTICE FOR DISCRETIONARY REVIEW TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION. 1; and this DECLARATION, upon all counsel and parties of record at their addresses stated below.

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In Association with Brubaker, Kent City Attorney for City of Kent

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Dated this 30th day of June, 2006, in Bellevue, Washington.

Evanna Charlot

EVANNA L. CHARLOT

1300-15 Declaration of Service 6-30-06

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