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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, a Washington General
Partnership and TR CONTINENTAL PLAZA CORP., a Delaware
Corporation

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT
HEARINGS BOARD, an agency of the State of Washington; CITY
OF KIRKLAND, a municipal corporation; and TOUCHSTONE
CORPORATION, a Washington Corporation and TOUCHSTONE
KPP DEVELOPMENT, LLC

Respondents,

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

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR.....	3
III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR	3
IV. STATEMENT OF THE CASE	4
V. STANDARD OF REVIEW	13
VI. ARGUMENT	15
A. The GMHB Erred by Allowing to Remain Valid Actions Which the Board Itself Found to Violate SEPA.	15
1. SEPA compels the GMHB to exercise its invalidity authority in a manner that assures compliance with SEPA.	16
2. Invalidation is necessary to assure compliance with SEPA.	23
VII. CONCLUSION	29

APPENDIX

Final Decision and Order, CPSGMHB 09-3-0007c

TABLE OF AUTHORITIES

Cases

<i>Barrie v. Kitsap County</i> , 93 Wn.2d 843, 861, 613 P.2d 1148 (1980).....	26
<i>Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.</i> , 100 Wn.App. 341, 997 P.2d 380 (2000)	20
<i>Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission</i> , 449 F.2d 1109, 1114 (1971).....	27
<i>City of Redmond v. Central Puget Sound Growth Management Hearings Board</i> , 116 Wn.App. 48, 65 P.3d 337, rev. den. 150 Wn.2d 1007, 77 P.3d 651 (2003)	15
<i>Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.</i> , 131 Wn.2d 345, 932 P.2d 158 (1997)	26
<i>Eastlake Community Council v. Roanoke Assocs., Inc.</i> , 82 Wn.2d 475, 513 P.2d 36 (1973)	21, 26
<i>Juanita Bay Valley Community Ass'n v. City of Kirkland</i> , 9 Wn. App. 59, 68-69, 510 P.2d 1140 (1973).....	27
<i>King County v. Central Puget Sound Growth Management Hearings Bd.</i> , 142 Wn.2d 543, 558, 14 P.3d 133 (2000)	19
<i>Lassila v. City of Wenatchee</i> , 89 Wn.2d 804, 576 P.2d 54 (1978).....	26
<i>National Audubon Society v. Department of Navy</i> , 422 F.3d 174, 199 (4 th Cir, 2005)	27
<i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....	26
<i>Thurston Cy. v. Cooper Point Ass'n.</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002).....	13

Wenatchee Sportsmen Ass'n. v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000)..... 10

West Main Associates v. City of Bellevue, 49 Wn.App. 513, 742 P.2d 1266 (1982)..... 22

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 873 P. 2d 498 (1994)..... 25, 26

Constitutional Provision

Article IV, Section 6 of the State Constitution..... 9

Administrative Decisions

Kent CARES v. City of Kent, CPSGMHB No. 02-3-0015 (2002)10

Statutes

RCW 34.05..... 13
RCW 34.05.425..... 14
RCW 34.05.570..... 13, 14
RCW 34.12.050..... 14
RCW 36.70A.020 18, 19
RCW 36.70A.040 16
RCW 36.70A.280 1, 16, 19
RCW 36.70A.300 16, 17
RCW 36.70A.302 1, 17, 18
RCW 36.70A.480(1)..... 18
RCW 43.21C 16
RCW 43.21C.020 15, 20, 21, 22, 28
RCW 43.21C.030 15, 20, 22, 23, 24
RCW 90.58..... 16

Rules and Regulations

WAC 197-11-055(2)(c) 25
WAC 197-11-305..... 22
WAC 197-11-655..... 25
WAC 197-11-800..... 22
40 C.F.R. § 1502.2(g)..... 27

Other Authorities

Richard L. Settle, *The Washington State Environmental Policy Act: A Legal Policy and Analysis* ("Settle") § 1.15 at 1-18 (Matthew Bender & Co, December 2002) 20

I. INTRODUCTION

This appeal seeks direct review of the refusal by Central Puget Sound Growth Management Hearings Board in *Davidson Serles & Associates et al. v. City of Kirkland, et al.*, CPSGMHB No. 09-3-0007c (October 5, 2009) to invalidate zoning and planning amendments which the Board itself found to have been adopted in violation of the State Environmental Policy Act (SEPA) on account of the City's failure to prepare an adequate environmental impact statement.

Pursuant to its delegated authority under RCW 36.70A.280(1) of the Growth Management Act (GMA), the Growth Management Hearings Board (GMHB) found to violate SEPA planning and zoning amendments enacted by the City of Kirkland for an 11.5 acre parcel owned by the respondent Touchstone.¹ Although the Board has the authority under RCW 36.70A.302(1) to invalidate those actions, it refused to, thereby allowing to remain in effect ordinances that the Board itself found to be contrary to law. As a consequence, the City has continued its review of a development for the affected property even though the plan and

¹ The respondents Touchstone Corporation and KPP Development, LLC are referred to collectively as "Touchstone".

zoning designations under which it is being proposed were enacted in violation of state law. This result conflicts with nearly 40 years of well-established precedent under SEPA. Through this appeal appellants maintain that the GMHB is bound by that precedent and that it acted unlawfully by allowing to remain valid actions which the Board itself found to violate SEPA.

The issue raised in this appeal is interrelated with issue 3 in the companion appeal of *Davidson Serles, et al. v. City Of Kirkland, et al.*, Division No. 64072-1, in which appellants demonstrate that even if the GMHB is not bound by that SEPA precedent, the superior court and the Court of Appeals are so bound and therefore the governmental actions taken in reliance upon an inadequate EIS should be invalidated. See Opening Brief of Appellants Davidson Serles & Associates and TR Continental Plaza Corp. at 26-32 in No. 64072-1 (December 21, 2009).

Through these companion appeals Davidson and Continental seek a ruling that action taken in violation of SEPA is contrary to law and has no force or effect. Through the appeal of the GMHB ruling, appellants seek a remand with the direction that the GMHB invalidate the plan and zoning amendments approved in violation of SEPA. Through the appeal of the superior court ruling,

appellants seek a remand to the superior court with instruction to invalidate, *ab initio*, the plan and zoning amendments, as well as the planned action ordinance and design review guidelines adopted in reliance upon the same, inadequate environmental impact statement.²

II. ASSIGNMENT OF ERROR

Appellants assign error to that portion of the Final Decision and Order rendered by the Central Puget Sound Growth Management Hearings Board in *Davidson Serles & Associates et al. v. City of Kirkland, et al.*, Case No. 09-3-0007c denying appellants' request for an order of invalidity for failure of the City of Kirkland to prepare a legally adequate environmental impact statement (EIS). The portion of the Board's ruling at issue in this appeal is set forth at pages 19-21 of the Final Decision and Order. A copy of the Board's decision is set forth in the Appendix to this brief.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where longstanding judicial precedent establishes that planning and zoning decisions are void when based upon

² Through the appeal of the superior court action, appellants also seek a remand with direction that appellants' spot zoning claims be tried.

inadequate environmental review under SEPA, was the Board's decision allowing Kirkland's planning decisions to remain valid, despite an inadequate EIS, a clearly erroneous interpretation or application of the law?

IV. STATEMENT OF THE CASE

The appellants, Davidson Serles and Continental Plaza, own separate, adjacent properties within the Central Business District of downtown Kirkland. Consistent with the five story height limitation in effect at the time, an office building was constructed on the Continental site in 1990 and on the Davidson site in 1995. Directly to the west and downslope of the Davidson and Continental properties is the 11.5 acre site owned by Touchstone that is at issue in this appeal.³ Under the prior 2004 comprehensive plan and zoning, all three of these properties were within CBD 5 zoning district, a classification that allowed up to five story buildings with design review.⁴

In April 2007 -- only three years after the prior updates and

³ Administrative Record (AR) 00307(site plan) and AR 01124(Davidson Declaration). In this matter the administrative decision record was prepared by the Central Board and forwarded directly to the Court of Appeals without Clerk's Papers or exhibit numbers. Therefore references will be to the document and page numbers within the Administrative Record.

⁴ See also Statement of the Case within the appellants' Opening Brief at 6-9 in the companion appeal under Cause No. 64072-1.

with no intervening change in conditions -- Touchstone applied to amend Kirkland's Comprehensive Plan and Zoning Code to allow re-development of its 11.5 acre site. Also known as the Park Place site, this property presently includes such uses as a QFC grocery, other retail stores, restaurants, a movie theater, and a six story office building. AR 01601 (Draft Environmental Impact Statement (DEIS) at 3.1-1). The City combined the Touchstone application with applications submitted by two other landowners, Orni and Altom. AR 01332 *et seq.*

Presently, the Touchstone site holds 238,450 square feet of office and commercial space and 742 parking spaces. If fully built-out under present zoning, the Touchstone site could support 838,700 square feet of office and commercial space and, with Design Review Board approval, it could be constructed to 5 stories. AR 01597 (DEIS at 2-21).

Touchstone's plan and zoning amendment requests would allow up to 1.8 million square feet of office and commercial space in buildings constructed to a height of 8 stories. AR 01597 (DEIS at 2-21). Of this, 1.2 million sq. ft would be developed into offices and another 592,700 sq. ft. would be in commercial use. *Id.*

Touchstone also proposes to reduce on-site parking by

approximately 30% below requirements otherwise set by city code. AR 01728 (DEIS at 3.4-45). Touchstone's proposal would add about 1.1 million more square feet of office space than presently exists and about 600,000 more square feet than could be built out under present zoning. AR 01597 (DEIS at 2-21). To place this number into perspective, on its site alone Touchstone is proposing to nearly double the total general office inventory for the entire City of Kirkland.⁵

In April 2008, the City of Kirkland issued a Draft Environmental Impact Statement for an action termed the "Downtown Area Planned Action Ordinance", which provided environmental review of the three private amendment requests and the City's proposed Planned Action Ordinance. AR 01527 *et seq.* The initial scope of review for the EIS provided for the analysis of three alternatives for the Touchstone site: Touchstone's proposal for 1.8 million sq. ft. developed in 8 story buildings; a "no action" alternative; and an intermediate alternative. AR 01443 (Scope of Services). However, between the draft and final contracts for preparation of the EIS, consideration of an intermediate alternative

⁵ AR 04398, FEIS comments (The 2007 total general office inventory was 1,248,531 square feet, or roughly equal to the proposed additional area of office space proposed by touchstone.)

was eliminated. AR 01459 (revised Scope of Services). Thus, for the Touchstone site the Draft EIS considered no other proposals than that proposed by Touchstone. AR 01591 and 01594 (DEIS at 2-15 and 2-18)

On October 16, 2008, the City of Kirkland issued the Final EIS for the Downtown Area Planned Action Ordinance through which it purported to respond to comments submitted on the Draft EIS. AR 04039.⁶ The FEIS also set forth for the first time an alternative not presented in the Draft EIS. This alternative, denominated the “FEIS Review Alternative”, provided for increased building setbacks from Peter Kirk Park on the west and for portions of buildings above 100' from Central Avenue on the north, but it still provided for 1,792,700 square feet of mixed use development, maximum building heights of 8 stories across the site and a reduction of on-site parking requirements by approximately 30%. AR 04124 – 28 (FEIS at 2-24 – 2-28). Because it had been presented for the first time within the Final EIS, that alternative was not subject to review or comment within the Draft EIS.

⁶ A listing of those commenting on the EIS appears in the FEIS at 5-1 to 5-4, AR 04185. The comments to the EIS of the FEIS begin at AR 04216. Massing drawings showing the bulk of Touchstone's proposed buildings are set forth at AR 04421.

The Kirkland Planning Commission held public hearings on the Planned Action Ordinance and the private amendment requests and eventually adopted recommendations to approve the Planned Action Ordinance, the plan and zoning amendment requests, and the proposed design guidelines for the Touchstone site. AR 01479 Among other things, the Planning Commission recommended for the Touchstone site approval of 1,792,700 square feet of mixed use, maximum building heights of 8 stories across the site and a reduction of on-site parking by approximately 30%. Even though the EIS presented no other alternatives to the Planning Commission for consideration, it nonetheless compared Touchstone's proposal to another, slimmed down proposal for the Touchstone site with a total of 1.2 million square feet that had never been analyzed within the EIS. AR 01479.

At meetings and hearings held in December 2008, the City Council considered the Planning Commission recommendations. On December 16, 2008, the City Council adopted the following ordinances (as relevant to these companion appeals):

Ordinance 4170, amending the Kirkland Comprehensive Plan to create a new Design District 5A for the Touchstone property;

Ordinance 4171, amending the Kirkland Zoning Code to create a new CBD 5A zone, also for the Touchstone

property;

Ordinance 4172, adopting a Mixed Use Development Master Plan and Design Guidelines for the Touchstone Property; and

Ordinance 4175, approving Planned Actions for the Touchstone property and another parcel, Planned Area C.⁷

On account of overlapping jurisdiction, Davidson and Continental brought appeals of the City's actions before both the superior court and the GMHB. They appealed the plan and zoning amendments, the planned action ordinance and the design review guidelines to superior court, on claims that each of those ordinances had been enacted in violation of SEPA and on grounds that the plan and zoning amendments amounted to spot zoning. More specifically, the superior court action sought review of the plan and zoning amendments under Article IV, Section 6 of the state constitution and rulings that the actions were taken in violation of SEPA and void *ab initio*. Davidson and Continental also challenged the planned action ordinance and design guidelines in superior court, rather than before the GMHB, because neither enactment had been adopted pursuant to requirements or

⁷The Council also approved Ordinances 4173 and 4174, amending the zoning text and map for the Altom and Orni sites, which are not at issue in either of the companion appeals. Copies of Ordinances 4170 and 4171 are set forth at AR 01395 and 01423, respectively. The Planned Action Ordinance 4175 is set forth at AR 01495.

standards under the GMA.⁸ The superior court ruled that it lacked jurisdiction to review any of petitioners' claims and dismissed the action. An appeal of that decision is pending before this court in *Davidson Serles, et al. v. City Of Kirkland, et al.*, Division No. 64072-1.

On February 20, 2009, Davidson and Continental appealed to the Central Puget Sound Growth Management Hearings Board the plan and zoning amendments approved under Ordinances 4170 and 4171. Among other grounds, Davidson and Continental challenged those actions for failure of the City to prepare a legally adequate EIS that gave full consideration to on-site and off-site alternatives as required by SEPA.

On October 5, 2009, the GMHB rendered its Final Decision and Order in the appeal of the plan and zoning amendments. Among other rulings, the Hearings Board found the EIS to be

⁸ In *Kent CARES v. City of Kent*, CPSGMHB No. 02-3-0015 Order on Motions at 6 (November 27, 2002), the Board held that it lacked subject matter jurisdiction to review a planned action ordinance. Although the design guidelines may be development regulations, they are not appealed within this action because they have not been adopted pursuant to any requirements or standards under GMA. See *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 178, 4 P.3d 123 (2000) ("...unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition."). Ordinances 4175 and 4172 are challenged within the companion appeal.

inadequate for failure to consider alternatives. Without prejudging the eventual selection of alternatives, the Board elaborated as follows:

Petitioners suggest that there may be other commercially zoned areas of Kirkland that could be studied. ... They also ask for a range of alternatives of less height and intensity on the same site. ... It seems reasonable to the Board that an alternative that included the *whole* of the superblock between 3rd and 6th might achieve both Touchstone's goals and the public's objectives with less negative impact on the environment and better synergies for the vibrant mixed-use destination the City envisions. However, the Board does not dictate the specific alternatives to be reviewed.⁹

Final Decision and Order at 16. Accordingly, the Board found Ordinances 4170 and 4171 to have been adopted without full compliance with SEPA. *Id.* The Board remanded the ordinances for

⁹ At footnote 20 to this passage, the Board further elaborated:

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

compliance with its order.¹⁰

However, the Board declined to invalidate the very actions that it found to be enacted in violation of SEPA. Even though the Board considered the SEPA violations to be “serious”, it indicated that it was “not persuaded that the GMA goal will be thwarted absent a ruling of invalidity.” See Final Decision and Order at 20. Consequently, the plan and zoning amendments remain in effect, allowing Touchstone to pursue design review under ordinances enacted in violation of SEPA. AR 01195 (Touchstone’s Design Review proposal).

Davidson and Continental initially appealed the Board’s decision to the superior court within the action of *Davidson Serles, et al. v. CPSGMHB*, King County Cause No. 09-2- 43060-8 SEA.¹¹ They subsequently sought and obtained from the GMHB a

¹⁰ The City has represented to this court that it has undertaken steps to comply with the Board’s order, including entering into a contract for preparation of a supplemental EIS. See Respondents’ Answer to Motion for Discretionary Review and Consolidation at 11.

¹¹ In a separate action, *City of Kirkland v. CPSGMHB*, King County Cause No. 09-2-43855-2 SEA, the City of Kirkland and Touchstone seek review of the Board’s finding of EIS inadequacy, as well as an issue related to transportation planning. Although the pleadings and papers in that proceeding are not before this court, as parties to that proceeding Davidson Serles and Continental Plaza can represent that at the request of the City and Touchstone the superior court has issued a stay of that appeal. See Order Granting Motion for Stay in KCSC No. 09-2-43855-2.

certification of appealability, based upon which they petitioned for and were granted a request for direct review by this court.¹² Within its order granting direct review of this instant appeal, the court also linked the two appeals for consideration by the same panel of judges.

V. STANDARD OF REVIEW

Because the Growth Management Hearings Board is an agency of the state, judicial review of its decisions is governed by the Administrative Procedures Act (APA), RCW 34.05. *Thurston Cy. v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002). Under the judicial review provision of the APA, the “burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity.” RCW 34.05.570(1)(a); *Id.* at 7-8. The validity of that decision is determined in accordance with the standards of review provided in RCW 34.05.570. Among the nine standards of review provided for under RCW 34.05.570(3)¹³, the

SEA.

¹² Commissioner Ruling of February 24, 2010.

¹³ RCW 34.05.570(3) provides as follows:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

Board's refusal to invalidate the City's plan and zoning amendments for violation of SEPA is reviewable under subsection .570(3)(d), because the Board's decision resulted from the erroneous application or interpretation of law, namely the failure to apply longstanding judicial precedent invalidating agency action taken in violation of SEPA as required by SEPA itself and the Board's duty to assure noninterference with the environmental protection goal of GMA. As a question of law, this issue is

- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

reviewable *de novo*. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn.App. 48, 54, 65 P.3d 337, *rev. den.* 150 Wn.2d 1007, 77 P.3d 651 (2003).

VI. ARGUMENT

A. **The GMHB Erred by Allowing to Remain Valid Actions Which the Board Itself Found to Violate SEPA.**

The GMHB's refusal to invalidate plan and zoning amendments is contrary to law because it produces the legally untenable result of allowing to remain valid actions which the Board itself found to be taken in violation of SEPA. The GMA grants the Board the authority to invalidate plans and development regulations found to violate SEPA. Because it is an agency of the state, the Board is also governed by SEPA's mandate that, *to the fullest extent possible*, its authority be exercised in a manner that carries out the policies and requirements of SEPA. RCW 43.21C.030(1) and .020(2). SEPA's policy of informed decisionmaking and its requirement that full environmental review precede governmental approval have been enforced through nearly 40 years of case law that have invalidated agency action for noncompliance with SEPA. The Board's refusal to follow that precedent by allowing the City to

continue to apply ordinances found to violate SEPA conflicts with both SEPA mandate and GMA's environmental protection goal.

This analysis begins with a review of the Board's authority under GMA and SEPA, it demonstrates that the GMHB is to exercise its authority in accordance with SEPA's policies of environmental protection, it addresses the forcefulness of the judicial enforcement of SEPA requirements and it concludes that the GMHB's refusal to grant invalidity is contrary to law because it conflicts with those statutory directives.

1. SEPA compels the GMHB to exercise its invalidity authority in a manner that assures compliance with SEPA.

The GMA at RCW 36.70A.280(1)(a) grants the GMHB the authority to review GMA plans and development regulations for noncompliance with GMA, and SEPA as it relates to GMA actions.¹⁴ Likewise, RCW 36.70A.300(1) grants the GMHB the

¹⁴ RCW 36.70A.280(1) provides in part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. ...

authority to enter final orders finding compliance or noncompliance with the GMA, and with SEPA regarding actions under GMA.

But under the provisions of GMA alone, a finding of noncompliance does not directly compel invalidation. RCW 36.70A.300(4) provides that “[u]nless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations” that may have been found to be noncompliant with GMA or SEPA.¹⁵ Under RCW 36.70A.302(1)(b),¹⁶ the GMA authorizes the

¹⁵ RCW 36.70A.300(4) provides:

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

¹⁶ RCW 36.70A.302(1) and (2) provide:

(1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the

Board to enter an order of invalidity upon a determination that:

The continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of [the GMA].

RCW 36.70A.302(1)(b). The goals of the GMA are of course the 13 goals listed at RCW 36.70A.020, together with the 14th goal of shoreline protection added by RCW 36.70A.480(1). Protection of the environment is among these goals:

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.020(10).

While the goals are listed in no priority, RCW 36.70A.020 (preamble), some goals have greater force than others, because they are phrased in more directive terms. For example, the Supreme Court has found that when coupled to its statutory requirements, Goal 8 to “maintain and enhance natural resource-

reasons for their invalidity.

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

based industries”, creates a mandate for the conservation lands. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). The environmental goal is stated in even more forceful terms than the goal for protection of resource lands; it calls for planning and zoning to “[p]rotect the environment and enhance the state’s high quality of life ...”¹⁷ By contrast, other goals are phrased in less directive terms, such as the goals to “encourage” multi-modal transportation and to “encourage” preservation of historic sites. RCW 36.70A.020(3) and (13).

But the Board’s authority is not limited to GMA alone. As noted above, the Board is also delegated the authority to review plans and regulations for compliance with SEPA. RCW 36.70A.280(1)(a). Board review of governmental action for

¹⁷ In an earlier ruling the Board in this case found the environmental goal to be among the most forceful:

Goal 10 is one of the most directive goals of the GMA, it states: “*Protect the environment* and enhance the state’s high quality of life, including air and water quality, and the availability of water.” RCW 36.70A.020(10). The language is not “promote the protection of the environment,” “encourage the protection of the environment,” it is simply “protect the environment!”

Davidson Serles v. City of Kirkland, CPSGMHB No. 09-3-0007c, Order on Motions at 9 (June 11, 2009)(emphasis in original; footnote omitted), AR 01274.

compliance with SEPA must as well conform to SEPA's broad policies and directives. SEPA is Washington's most fundamental and pervasive environmental law. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal Policy and Analysis* ("Settle") § 1.15 at 1-18 (Matthew Bender & Co, December 2002). It provides an overlay to all existing laws and authorities. *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, 100 Wn. App. 341, 353-354, fn 28, 997 P.2d 380 (2000)(citing to numerous authorities). By its terms, the SEPA overlay applies to the GMHB and the laws it administers.

SEPA expressly provides that it applies to "all branches of government, including state agencies" and it directs that

... to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, ...

RCW 43.21C.030(1) (emphasis supplied.) SEPA's policies are set forth at RCW 43.21C.020 and include the directive to "*all agencies of the state to use all practicable means . . . to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:*

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

RCW 43.21C.020(2)(emphasis supplied). Due to the forcefulness of its wording, SEPA has been given "broad and vigorous construction", as noted by the court in *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973):

To fulfill these purposes of restoring ecological health to our lives, SEPA *mandates* governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters. The procedural duties imposed by SEPA - - full consideration to environmental protection - - are to be exercised to the fullest extent possible to insure that

the "attempt by the people to shape their future environment by deliberation, not default" will be realized. ... In view of this clear legislative mandate ... SEPA [is to] be given a broad and vigorous construction.

(Emphasis in original.) See also, *West Main Associates v. City of Bellevue*, 49 Wn. App. 513, 518, 742 P.2d 1266 (1982).

The directive to interpret and administer its laws in accordance with SEPA's policies applies to the Growth Management Hearings because the Board is an agency of the state.¹⁸ Certainly, as a quasi-judicial body, the Board's decisions are exempt from SEPA's threshold determination and EIS requirements.¹⁹ But by its very terms, that exemption is limited to

¹⁸ RCW 43.21C.030(1) directs "all branches of the state, including state agencies ..." to administer their laws in accordance with SEPA's policies. RCW 43.21C.020(2) directs "all agencies of the state . . . to improve and coordinate plans, functions, programs and resources [etc.]"

¹⁹ The applicable exemption provides at WAC 197-11-800(preamble) and -800(11):

The proposed actions contained in Part Nine are categorically exempt from threshold determination and EIS requirements, subject to the rules and limitations on categorical exemptions contained in WAC 197-11-305.

* * *

(11) Judicial activity. The following shall be exempt:

(a) All adjudicatory actions of the judicial branch.

(b) Any quasi-judicial action of any agency if such action consists of the review of a prior administrative or legislative decision. Decisions resulting from contested cases or other

the two referenced SEPA documents and does not cover all provisions of the Act, such as the directives under section .030(1) for the Board to administer its laws in accordance with SEPA's policies.

Where the Board has both the policy directive under Goal 10 to "protect the environment" and the authority to invalidate governmental action taken in violation of SEPA, the statute's directive that the Board implement SEPA's policies "to the fullest extent possible" compels the Board to exercise its invalidity authority to enforce SEPA's requirements. Acting otherwise simply flouts SEPA's mandates.

2. Invalidation is necessary to assure compliance with SEPA.

As noted above, the GMHB found the City's EIS inadequate for failure to give any consideration to on or off-site alternatives, other than the no-action alternative and the scale of development proposed by Touchstone. The failure to consider alternatives is particularly destructive to the decisionmaking process, since the presentation of alternatives is what allows a decisionmaker to

hearing processes conducted prior to the first decision on a proposal or upon any application for a rezone, conditional use permit or other similar permit not otherwise exempted by this chapter, are not exempted by this subsection.

choose among a selection of possible actions. Unfortunately, the Board's refusal to grant invalidity effectively means that the outcome of any alternatives analysis prepared on remand is apt to carry only academic importance. This conflicts with SEPA's objective that the consideration of alternatives be part of the decisionmaking process.

As proposals for legislation, the collection of ordinances for the Touchstone site required review through an environmental impact statement. Under RCW 43.21C.030(2)(c):

The legislature authorizes and directs that, *to the fullest extent possible*:

* * *

(2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

* * *

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official. ...”

(Emphasis supplied.) Among other items, the required detailed statement must identify and analyze “alternatives to the proposed action[.]” RCW 43.21C.030(2)(c)(iii).

Because the alternatives analysis presents to the governmental agency the range choices available and drives the ultimate decision, it provides the keystone to the environmental

analysis within an impact statement. As our Supreme Court has observed, "[t]he required discussion of alternatives to a proposed project is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 42, 873 P. 2d 498 (1994).

The analysis of alternatives is essential because SEPA intends that that analysis shape the decision rendered. The SEPA rules require that the environmental analysis, and the alternatives analysis in particular, be considered in the decisionmaking on the proposal under review. In particular, WAC 197-11-055(2)(c) requires that "[a]ppropriate consideration of environmental information shall be completed *before* an agency commits to a particular course of action." (Emphasis added.); WAC 197-11-655(2) requires that environmental documents be prepared "so agency officials use them in making decisions[;]" and WAC 197-11-655(3)(a) provides that "[w]hen a decision maker considers a final decision . . . [t]he alternatives in the relevant environmental documents shall be considered."

Because of the essential role that environmental review plays in decisions that affect the environment, our courts have

uniformly set aside decisions rendered in violation of SEPA's requirements, including decisions rendered for lack of consideration of alternatives. Davidson and Continental have cited a number of those cases in their opening brief at 28-29 and the reply brief at 19 in the companion appeal, No. 64072-I. Those cases include: *Weyerhaeuser v. Pierce County*, 124 Wn.2d at 47, in which the court reversed the decisions rendered in reliance upon an inadequate EIS; *Barrie v. Kitsap County*, 93 Wn. 2d 843, 861, 613 P.2d 1148 (1980), in which the court invalidated a rezone due to an inadequate EIS; *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn. 2d at 487, where failure to prepare an EIS prior to renewal of a building permit rendered the permit void; *Lassila v. City of Wenatchee*, 89 Wn. 2d 804, 816-17, 576 P.2d 54 (1978), which vacated a comprehensive plan amendment for failure to prepare an EIS; and *Noel v. Cole*, 98 Wn. 2d 375, 655 P.2d 245 (1982), superseded by statute on other grounds, *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wn. 2d 345, 932 P.2d 158 (1997), where failure to prepare an EIS prior to awarding a contract for logging on public land rendered the contract *ultra vires*.

However, the Board's refusal to invalidate the plan and

zoning amendments here directly violates the above SEPA rules and runs totally contrary to the above precedents by allowing those amendments to stand while the alternatives analysis that should have informed those amendments is conducted later. As a result, the further alternatives analysis required by the Board is destined to become either a *post-hoc* rationalization of a decision already reached or nothing but an academic exercise, in either case defeating SEPA's requirement of informed decisionmaking. As the court in *National Audubon Society v. Department of Navy*, 422 F.3d 174, 199 (4th Cir, 2005) observed in construing the similar federal statute, "NEPA of course prohibits agencies from preparing an EIS simply to 'justify [] decisions already made.' 40 C.F.R. § 1502.2(g)."²⁰ Or, as more directly stated by Judge Skelley Wright, the law was not intended to be a "paper tiger." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (1971)(also construing the requirements of NEPA).

The Board's refusal to invalidate actions which the Board

²⁰ Because SEPA is patterned after NEPA, in construing SEPA, our courts have borrowed from the construction that the federal courts have placed upon NEPA. *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 68-69, 510 P.2d 1140 (1973).

itself found to violate SEPA is contrary to law because it conflicts with SEPA's directive to all state agencies, including the GMHB, to "use all practicable means ... to improve and coordinate plans, functions, programs and resources" to achieve a variety of ends, including the assurance of "aesthetically and pleasing surroundings", the avoidance of "undesirable and unintended consequences" and the maintenance of a "variety of individual choice[.]" RCW 43.21C.020(2)(b), (c) and (e).

Invalidation of noncompliant ordinances plainly lies within the Board's means. SEPA directs the Board to exercise that authority to assure the better coordination of planning and zoning decisions with the duties of environmental review, and more specifically, to carry out SEPA's requirement that the alternatives analysis shape the ultimate decision. The Board's refusal to do so produces a result contrary to SEPA's mandate and its own delegated authority to prevent interference with the GMA Goal of environmental protection.

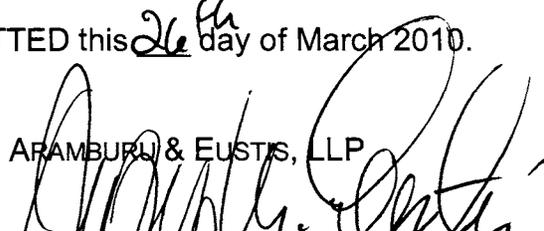
The Board's failure to invalidate the City's actions pending completion of the EIS amounts to clear error.

VII. CONCLUSION

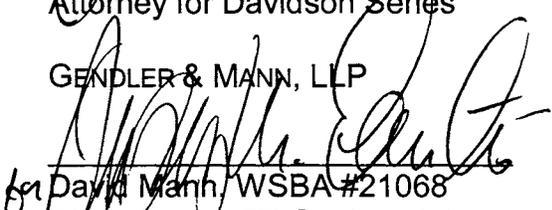
For the above reasons, the GMHB's refusal to invalidate the plan and zoning amendments was clearly erroneous and should be reversed and remanded with direction to order invalidity.

RESPECTFULLY SUBMITTED this 26th day of March 2010.

ARAMBURU & EUSTIS, LLP


Jeffrey M. Eustis, WSBA #9262
Attorney for Davidson Series

GENDLER & MANN, LLP


for David Mann, WSBA #21068
Attorneys for TR Continental

Plaza Corp. per authorization

DECLARATION OF SERVICE

I am an employee in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On the date written below, I served copies of the foregoing document upon the following parties of record by first class mail addressed to:

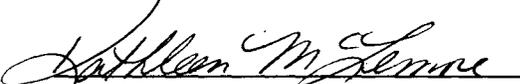
Robin S. Jenkinson
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123 Fifth Avenue
Kirkland WA 98033

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Assistant Attorney General
Attorney General of Washington
Licensing & Administrative Law Division
PO Box 40110
1125 SE Washington Street
Olympia WA 98504-0110

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

DATED: March 26 2010


Kathleen McLemore

Appendix

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD JEFFREY M. EUSTIS
STATE OF WASHINGTON

1)	
2)	
3)	
4)	
5)	
6)	
7	DAVIDSON SERLES, et al.,)	Case No. 09-3-0007c
8)	
9)	
10	Petitioner,)	(Davidson Serles)
11)	
12	v.)	
13)	
14)	
15	CITY OF KIRKLAND,)	FINAL DECISION AND
16)	ORDER
17	Respondent, and)	
18)	
19)	
20	TOUCHSTONE CORPORATION,)	
21)	
22	Intervenor.)	
23)	
24)	

SYNOPSIS

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

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

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

¹ 126 Wn.2d 356, 894 P2d 1300 (1995).

- 1 • *Petitioners' issue concerning public objectives for the proposal was not based on a*
2 *SEPA requirement;*
3 • *Short-term construction impacts were adequately addressed through Kirkland's*
4 *existing regulations;*
5 • *Petitioners failed to carry their burden on the adequacy of EIS consideration of*
6 *indirect impacts; and*
7 • *Conflicts in expert opinion as to trip generation rates and parking impacts were*
8 *within the City's authority to resolve.*
9

10
11 *The Board denied Petitioners' request for a determination of invalidity and remanded the*
12 *Ordinances to the City for compliance. [Keywords: Countywide Planning Policies,*
13 *Transportation Element- Financing Plan, SEPA.]*
14

15 I. PROCEDURAL HISTORY²

16

17 On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the
18 **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson
19 Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza
20 Corporation. The petitions were consolidated as Consolidated Case No. 09-3-0007c.³
21

22
23 Davidson Serles and Continental Plaza (collectively, **Petitioners**) challenge the City of
24 Kirkland's (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the
25 City's Comprehensive Plan and development regulations with respect to three downtown
26 properties, the largest of which is an 11.5 acre parcel of land owned by Touchstone
27 Corporation [**Touchstone** or **Intervenor**] which intervened in this matter.
28

29 Motions

30

31 The Board requested special briefing on questions of SEPA jurisdiction, SEPA standing, and
32 the availability of invalidity as a remedy for SEPA noncompliance. A hearing on motions
33 was held by teleconference. On June 10, 2009, the Board issued its Order on Motions,
34 finding that the Board has jurisdiction over the SEPA issues raised and granting Petitioners'
35 motion to supplement the record.
36

37 Hearing on the Merits

38

39 Each of the parties timely filed briefing on the merits as follows:
40

- 41
- 42 • Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners'**
 - 43 **PHB**]
 - 44 • City's Prehearing Brief [**City Response**]
 - 45 • Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
 - 46 • Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]
 - 47

48 ² The complete chronology of procedures in this matter is attached as Appendix A.
49

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

1
2 The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to
3 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney
4 Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson
5 Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson
6 represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone
7 Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone
8 Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill,
9 City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works
10 David Godfrey, and transportation engineer Thang Nguyen.

11
12
13 At the hearing each of the parties, without objection, provided the Board with illustrative
14 exhibits which were admitted as "HOM exhibits" and are listed in full in Appendix B below.
15 The hearing on the merits afforded the Board an opportunity to ask questions clarifying
16 important facts in the case and providing better understanding of the legal arguments of the
17 parties.

18
19 Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The
20 Board ordered a transcript of the hearing, which was received on August 18, 2009, and is
21 referenced herein as **HOM**. At the hearing, Board member Earling requested that the City
22 provide the Board with a listing of staff memoranda and power points provided to the City
23 Council after July 1, 2008. The City subsequently filed a set of documents received by the
24 Board on August 27, 2009.⁴

25 26 27 **II. STANDARD AND SCOPE OF REVIEW**

28 29 GMA Standard of Review

30
31 The Growth Management Boards are tasked by the legislature with determining compliance
32 with the GMA:

33
34 The Board is empowered to determine whether [city] decisions comply with
35 GMA requirements, to remand noncompliant ordinances to [the city], and
36 even to invalidate part or all of a comprehensive plan or development
37 regulation until it is brought into compliance.

38
39 *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488
40 at 498, fn. 7, 139 P.3d 1096 (2006).

41
42 The GMA creates a high threshold for challengers. A jurisdiction's GMA enactment is
43 presumed valid upon adoption. RCW 36.70A.320(1). "The burden is on the petitioner to
44 demonstrate that [the challenged action] is not in compliance with the requirements of [the
45 GMA]." RCW 36.70A.320(2).

46
47 In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management*
48 *Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court
49 summarized the Board's standard of review:

50
⁴ Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

1
2 The Board is charged with determining compliance with the GMA and, when
3 necessary, invalidating noncomplying comprehensive plans and development
4 regulations. The Board “shall find compliance unless it determines that the
5 action by the state agency, county or city is clearly erroneous in view of the
6 entire record before the board and in light of the goals and requirements of
7 [the GMA].” RCW 36.70A.320(3). An action is “clearly erroneous” if the
8 Board is “left with the firm and definite conviction that a mistake has been
9 committed.” “Comprehensive plans and development regulations [under the
10 GMA] are presumed valid upon adoption.” RCW 36.70A.320(1). Although
11 RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction],
12 the [jurisdiction’s] actions must be consistent with the goals and requirements
13 of the GMA.
14

15 161 Wn.2d at 423-24 (internal case citations omitted).

16
17 As to the degree of deference to be granted under the clearly erroneous standard, the
18 *Swinomish* Court stated:
19

20 The amount [of deference] is neither unlimited nor does it approximate a
21 rubber stamp. It requires the Board to give the [jurisdiction’s] actions a
22 “critical review” and is a “more intense standard of review” than the arbitrary
23 and capricious standard.
24

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

26
27 SEPA Standard of Review
28

29 Whether an environmental impact statement is adequate is subject to *de novo* review and is a
30 question of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993).
31 The adequacy of an EIS is tested under the ‘rule of reason,’ which requires a reasonably
32 thorough discussion of the significant aspects of the probable environmental consequences
33 of the agency’s decision. *Id.* The reviewing body does not rule on the wisdom of the
34 proposed development but rather on “whether the FEIS gave the city council sufficient
35 information to make a reasoned decision.” *Citizens’ Alliance v. City of Auburn (Citizens’*
36 *Alliance)*, 126 Wn. 2d 356, 362, 894 P.2d 1300 (1995).
37

38 In any action involving an attack on the adequacy of [an EIS] the decision of
39 the governmental agency shall be accorded substantial weight.
40

41 RCW 43.21C.090. See, *City of Burien v. City of SeaTac, et al.*, CPSGMHB Case No. 98-3-
42 0010, Final Decision and Order (Aug. 10, 1998), at 9.
43

44 Scope of Review
45

46 The scope of the Board’s review is limited to determining whether a jurisdiction has
47 achieved compliance with the GMA or SEPA only with respect to those issues presented in
48 a timely petition for review. RCW 36.70A.290(1).
49

50 **III. BOARD JURISDICTION AND PREFATORY NOTE**

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BOARD JURISDICTION

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

10
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PREFATORY NOTE

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

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

27
28 The challenged Ordinances increase building heights to eight stories, reduce building
29 setbacks along street frontages, increase allowable lot coverage, and provide for reductions
30 in parking requirements below the requirement of the parking code. The Ordinances allow
31 as much as 1.2 million square feet of office and 592,700 square feet of retail and other
32 commercial space (i.e., hotel, movie theater, athletic club, restaurants, supermarket) in the
33 Parkplace development.
34

35
36
37 ⁵ See Order on Motions, June 10, 2009.

38 ⁶ The complete package of ordinances:

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

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

1 Ordinance 4175, the Planned Action Ordinance, provides the required SEPA mitigations to
2 be implemented in the Parkplace redevelopment. Ordinance 4175 is not challenged by these
3 Petitioners, but its provisions are relevant to the ensuing analysis.
4

5 With this Final Decision and Order, the Board first considers the Petitioners' various
6 challenges arising from the internal and external consistency requirements of the GMA.
7 Then the Board takes up the SEPA issues raised by Petitioners, and finally, the Petitioners'
8 request for a determination of invalidity.
9

10 IV. LEGAL ISSUES AND DISCUSSION

11 **LEGAL ISSUES 1 and 2**

12 *Consistency with Transportation Plan and Capital Facilities Plan*

13
14
15
16 The Prehearing Order states Legal Issues 1 and 2 as follows:
17

- 18 1. *Do Ordinance Nos. 4170 and 4171 fail to guided by goals 1 and 12 (RCW*
19 *36.70A.020(1) and (12)), and fail to comply with the requirements of RCW*
20 *36.70A.070(preamble), and .070(6) by amending the City of Kirkland (City)*
21 *Comprehensive Plan and Zoning Code to create new planning and zoning districts*
22 *that would allow an intensity of development that would not be adequately served by*
23 *transportation and other public facilities?*
24
- 25 2. *Do Ordinance Nos. 4170 and 4171 fail to guided by goal 12 (RCW 36.70A.020(12)),*
26 *and fail to comply with the requirements of RCW 36.70A.070(preamble), .070(3) and*
27 *.070(6) by amending the City's Comprehensive Plan and Zoning Code to create new*
28 *planning and zoning districts that require transportation and other capital*
29 *improvements for which financing plans meeting the requirements of RCW*
30 *36.70A.070(3) and .070(6) do not exist?*
31
32

33 **Applicable Law**

34
35 The GMA requires consistency among plan elements. The preamble to RCW 36.70A.070
36 states:
37

38 The plan shall be an internally consistent document and all elements shall be
39 consistent with the future land use map.
40

41 In setting forth the requirements for the capital facilities plan element, the same section of
42 the GMA, at RCW 36.70A.070(3), requires
43

44 A capital facilities plan element consisting of:

- 45 (a) an inventory of existing capital facilities owned by public entities,
46 showing the locations and capacities of the capital facilities;
- 47 (b) a forecast of the future needs for such capital facilities;
- 48 (c) the proposed locations and capacities of expanded or new capital
49 facilities;
50

1 (d) at least a six-year plan that will finance such capital facilities within
2 projects funding capacities and clearly identifies sources of public money for
3 such purposes; and

4 (e) a requirement to reassess the land use element if probable funding falls
5 short of meeting existing needs and to ensure that the land use element capital
6 facilities plan element and financing plan within the capital facilities plan
7 element are coordinated and consistent....
8

9 The transportation plan element is laid out in RCW 36.70A.070(6). Again, the transportation
10 element "implements and is consistent with the land use element." *Id.* Specific sub-elements
11 of the transportation plan include (iii) facilities and services needs and (iv) finance.
12

13 (iii) Facilities and services needs, including:

- 14 ...
15 (E) Forecasts of traffic for at least ten years based on the adopted land use
16 plan to provide information on the location, timing and capacity needs of
17 future growth;
18 (F) Identification of ... local system needs to meet current and future
19 demands...
20

21 (iv) Financing, including:

- 22 ...
23 (B) A multiyear financing plan based on the needs identified in the
24 comprehensive plan, the appropriate parts of which shall serve as the basis
25 for the six-year [TIP] required by RCW 35.77.010 for cities
26

27 Discussion and Analysis

28
29 Petitioners contend that the new design district and zoning created by Ordinance Nos. 4170
30 and 4171 will allow a 7.5 fold increase in office and retail area which will generate more
31 vehicle traffic than can be accommodated by the existing road network at the adopted level
32 of service standards. Petitioners' PHB, at 13. Petitioners point to 18 intersection capacity
33 improvements identified in the FEIS at 3-16 and 3-17, estimated to cost more than \$13
34 million, and adopted as necessary mitigations for the Touchstone proposal. *Id.* at 15. The
35 Planned Action Ordinance – Ordinance No. 4175 – sets out these improvements in
36 Appendix B. Only one of the required improvements – restriping at the intersection of 85th
37 St. NE and 114th Ave. NE, at a cost of \$166,400 – is included as funded in Kirkland's
38 current 6-year Capital Facilities Plan (CFP). FEIS at 3-21. Petitioners argue that the
39 Ordinances are noncompliant with the GMA requirements for consistent land use, capital
40 facilities, and transportation plans, because the 18 transportation improvements necessary
41 for the Touchstone proposal are not fully listed and funded in the City's capital and
42 transportation plans.
43

44 In response, the City and Touchstone assert:

- 45
46 • The Petitioners have conflated the City's concurrency analysis (the basis for GMA
47 consistency) and its traffic impact analysis (the basis for developer impact fee
48 assessment under RCW 82.02).
49
50

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

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

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

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

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

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

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

1
2 Here, the Planned Action Ordinance requires that all 18 traffic improvements be constructed
3 to meet transportation concurrency and/or traffic impacts analysis.⁸ Ord. 4175, Ex. B. The
4 Planned Action Ordinance is effective for ten years, until December 31, 2018. Ord. 4175, ¶
5 7. The City and Touchstone assert that the developer will be assessed impact fees for a
6 substantial portion of the improvement costs, but there is no document in the record
7 requiring a particular level of payment. In short, there is nothing in the transportation
8 amendments adopted by Ordinance Nos. 4170 and 4171 that amounts to “a multiyear
9 financing plan based on the needs identified in the comprehensive plan” which arise from
10 “forecasts of traffic for at least ten years” and “identification of local system needs.” RCW
11 36.70A.070(6).⁹ The Board is left with a firm and definite conviction that a mistake has been made.

12
13 In sum, the Board finds and concludes that Ordinances 4170 and 4171 **fail to meet the**
14 **consistency requirement** of RCW 36.70A.070 (preamble), .070(3), and .070(6) because of
15 failure to amend the capital facilities plan to include all necessary capital improvements and
16 because of the lack of a “multi-year financing plan based on the [10-year transportation]
17 needs identified in the comprehensive plan.”

18
19 The Petitioners pose two additional objections that are readily disposed of. First, Legal
20 Issues 1 and 2 allege noncompliance with GMA Goal 12, Public Facilities and Services. The
21 GMA concurrency requirements are linked to GMA Planning Goal 12. Petitioners did not
22 argue this point in their briefing or at the hearing, and the Board finds no basis for a finding
23 of non-compliance with Goal 12 or the GMA concurrency requirements.

24
25 Second, the Petitioners argue that the City’s plans lack a provision for re-assessing land use
26 if funding for needed improvements falls short. The Board finds that there is a provision for
27 land use reassessment in Kirkland’s 2004 Comprehensive Plan, Capital Facilities Element,
28 at XIII-10, Policy CF-5.2, which satisfies this GMA requirement.

29
30 **Conclusion**

31
32 The Board concludes that the City’s adoption of Ordinance 4170 and 4171 was **clearly**
33 **erroneous** and **failed to comply** with RCW 36.70A.070 (preamble), .070(3), and RCW
34 36.70A.070(6). However, the Board concludes that Petitioners **have not carried their**
35 **burden** of demonstrating failure to provide for reassessment of the land use element if
36 funding falls short. The Board **remands** the Ordinances to the City to take legislative action
37 to comply with the GMA as set forth in this order.

38
39 **LEGAL ISSUE 3**
40 ***Consistency with County-wide Planning Policies***

41
42 The Prehearing Order states Legal Issue 3 as follows:
43
44

45
46 ⁸ The Board understands the difference between Kirkland’s transportation concurrency regulations (Title 25)
47 and traffic impact fees (Title 27), but is not persuaded that the distinction is relevant to the RCW
48 36.70A.070(6)(a)(iii) and (iv) analysis.

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

1 Does Ordinance No. 4170 fail to comply with the consistency requirements of RCW
2 36.70A.100 and .210 by amending the Kirkland Comprehensive Plan to create a new
3 planning district that would allow intensity of development inconsistent with the
4 County-wide Planning Policies, specifically CPPs FW 12(a) and LU 25a-25d, for
5 King County?
6

7 **Applicable Law**

8
9 RCW 36.70A.100 requires that city planning “shall be coordinated with and consistent with”
10 the comprehensive plans of the county and adjacent cities.
11

12 RCW 36.70A.210(3)(a) requires that county-wide planning policies must include policies to
13 implement the urban growth allocated pursuant to RCW 36.70A.110.
14

15 RCW 36.70A.110(2), in turn, establishes the application of population projections within
16 each GMA county:
17

18 Based upon the growth management population projections made for the
19 county by the office of financial management, the county and each city
20 within the county shall include areas and densities sufficient to permit the
21 urban growth that is projected to occur in the county or city for the
22 succeeding twenty-year period.
23

24 It is well-settled that a local comprehensive plan must be consistent with GMA-compliant
25 county-wide planning policies. *Children’s Defense Fund v. City of Bellevue I*, CPSGMHB
26 Case No. 95-3-0011, Order Partially Granting Bellevue’s Dispositive Motion (May 17,
27 1995), at 12; *Strahm v. City of Everett*, CPSGMHB 05-3-0042, Final Decision and Order
28 (Sep. 15, 2006), at 30.
29

30 **Discussion and Analysis**

31
32 In Legal Issue 3, Petitioners contend that Kirkland’s expansion of zoned capacity for
33 commercial development is inconsistent with the allocation of employment in the King
34 County County-wide Planning Policies (CPPs) and with the CPP goal of jobs/housing
35 balance.
36

37 The relevant facts are not disputed by the parties:
38

- 39
- 40 • The Countywide Planning Policies allocate Kirkland an employment growth target
41 of 8,800 jobs by 2022.
 - 42 • Kirkland’s zoned development capacity for employment growth under the 2004
43 comprehensive plan was 12,606, exceeding the CPP 2022 target by 3,806.
 - 44 • Ordinance 4170 allows for employment growth of 16,291, exceeding the CPP 2022
45 target by 7,491.
46

47 Petitioners argue that the intensity of development allowed by Ordinance 4170 is
48 inconsistent with the Countywide Planning Policies in violation of the GMA. The Board is
49 not persuaded.
50

1 First, the GMA requirements for population and employment allocations in cities and urban
2 growth areas are specifically directed to ensuring *sufficient capacity* to accommodate
3 growth.
4

- 5 • RCW 36.70A.110(2) provides that urban growth areas “shall include areas and
6 densities *sufficient to permit the urban growth* that is projected to occur.”
- 7 • The review and evaluation process of RCW 36.70A.215¹⁰ requires a comparison of
8 targets with actual growth patterns for the purpose of determining “whether a county
9 and its cities are *achieving urban densities* within urban growth areas.”
- 10 • Periodic review must be undertaken to ensure that adoption and amendments to
11 county and city plans and development regulations “*provide sufficient capacity* of
12 land suitable for development within their jurisdictions to accommodate their
13 allocated ... employment growth.” RCW 36.70A.115.
14

15
16 The Board reads these provisions together as indicating that the population and employment
17 targets allocated to cities by countywide planning policies are intended to require each city
18 to zone areas and densities sufficient to accommodate that growth; in other words, the
19 targets create a *floor* for zoned capacity, not a ceiling.
20

21 Petitioners have cited no GMA language suggesting that population and employment growth
22 allocations in urban areas create a cap on local planning. Nor have they cited any case law to
23 support their contention.
24

25 Second, Petitioners have pointed to no language in King County’s CPPs that indicates the
26 County’s population or employment targets are intended to impose caps or limits on zoned
27 development capacities for cities.
28

29 CPP LU-25a provides:
30

31 Each jurisdiction shall plan for and accommodate the household and employment
32 targets established pursuant to LU-25c and LU-25d. This obligation includes:

- 33 a. Ensuring adequate zoned capacity; and
- 34 b. Planning for and delivering water, sewer, transportation and other
35 infrastructure ... and
- 36 c. Accommodating increases in household and employment targets as
37 annexations occur.
38

39 The targets will be used to plan for and accommodate growth within each
40 jurisdiction. The targets do not obligate a jurisdiction to guarantee that a given
41 number of housing units will be built or jobs added during the planning period.
42

43 Again, the CPP emphasis is on ensuring zoned capacity and infrastructure to accommodate
44 projected growth. There is no suggestion that King County’s CPP targets are intended to
45 limit growth or establish a maximum capacity level.
46

47 Third, the objective of “jobs/housing balance” in the King County CPPs must be read in
48 context. The CPPs allocate growth to broad subareas. Kirkland and the Eastside cities¹¹ are
49
50

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

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

3
4 CPP FW-12 provides:

5
6 All jurisdictions within King County share the responsibility to accommodate
7 the 20-year population projection and job forecast. The population projection
8 shall be assigned to the four subareas of King County (Sea-Shore, East, South
9 and the Rural Cities) proportionate with the share of projected employment
10 growth. Anticipated growth shall be allocated pursuant to the following
11 objectives:

- 12
13 a. To ensure efficient use of land within the UGA by directing growth to
14 the Urban Centers and Activity Centers;
15 b. To limit development in Rural Areas;
16 c. To protect designated resource lands;
17 d. To ensure efficient use of infrastructure;
18 e. To improve the jobs/housing balance on a subarea basis;
19 f. To promote a land use pattern that can be served by public
20 transportation and other alternatives to the single occupancy vehicle;
21 and
22 g. To provide sufficient opportunities for growth within the jurisdiction.

23
24
25 The Board notes that the additional employment growth made possible by Ordinance 4170
26 meets a number of the FW 12 objectives: it directs growth to an Activity Center,¹² makes
27 efficient use of infrastructure, is well-served by public transportation and promotes other
28 alternatives to the single occupant vehicle.

29
30 As to jobs/housing balance, FW12 calls for improving jobs/housing balance “on a subarea
31 basis.” Petitioners have provided the number of additional jobs and housing units for the
32 City of Kirkland, but have not demonstrated that Kirkland’s comprehensive plan amendment
33 creates or contributes to an imbalance in the East subarea. Their argument that more jobs in
34 Kirkland will exacerbate pressure for housing development in rural and resource lands, thus
35 thwarting GMA Goals 1 and 2, is not supported by any facts in the record. The Board finds
36 and concludes that Petitioners **have not carried their burden** on this issue.

37
38 **Conclusion**

39
40 The Board finds and concludes that Petitioners have **failed to carry their burden** of
41 demonstrating that Ordinance 4170 is inconsistent with King County Countywide Planning
42 Policies FW 12(a) and LU-25 or fails to comply with the consistency requirements of RCW
43 36.70A.100 and .210.

44
45
46
47 ¹¹ Bellevue, Redmond, Issaquah, Mercer Island, Sammamish, Kirkland, Kenmore, Bothell, Woodinville,
48 Newcastle, Hunts Point, Medina, Yarrow Point, Clyde Hill.

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

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LEGAL ISSUE 4 – SEPA Compliance

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

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

A. Failure to identify the objectives of the proposal

The SEPA rules distinguish between “project actions” and “nonproject actions.” Project actions include permit decisions on a site specific project. WAC 197-11-704(2)(a). Nonproject actions are “decisions on policies, plans or programs [such as] the adoption or amendment of comprehensive land use plans or zoning ordinances.” WAC 197-11-704(2)(b). The City here acknowledges that Ordinances 4170 and 4171 were adopted as “nonproject actions.” See, e.g., HOM, at 46.¹⁴

Petitioners contend that the City's EIS was deficient because it failed to state the public objectives of the proposed comprehensive plan amendment. Petitioners' PHB, at 24-26. Instead, the EIS recites the project-specific objectives of proponents Touchstone, Orni, and Altom. DEIS at 2.5.¹⁵ In addition, Petitioners state that the City's objectives are only indicated in connection with the Planned Action Ordinance, which by definition aims to provide certainty in the permitting process. *Id.*¹⁶

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

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

¹⁵ Touchstone's project-specific objectives:

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

DEIS, at 2.5.

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

1
2 Upon review of the record, the Board discerns a number of public objectives referenced in
3 the City's review. These include, for example:
4

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

13
14
15 See, e.g., Ex. 569, Planning Commission Recommendation to City Council, Nov. 20, 2008.
16

17 The Board can readily surmise that an EIS process that began with a clear statement of the
18 chosen public objectives for review of the private proposals might have generated
19 alternative ways of meeting the City's goals with less negative environmental impact. See,
20 WAC 197-11-440(5)(b).
21

22 However, Petitioners have cited no authority on this issue other than the SEPA guidelines.
23 As the Board reads the relevant SEPA provisions, they are *permissive*, not mandatory. WAC
24 197-11-060(3) provides:
25

26 (ii) A proposal by a lead agency or applicant **may** be put forward as an objective, as
27 several alternative means of accomplishing a goal, or as a particular or preferred
28 course of action.

29 (iii) Proposals **should** be described in ways that encourage considering and
30 comparing alternatives. Agencies **are encouraged** to describe public and nonproject
31 proposals in terms of objectives rather than preferred solutions.
32

33 In the SEPA definitions, "'may' is optional and permissive and does not impose a
34 requirement." WAC 197-11-700(3)(b). Petitioners' argument is appealing, but they have not
35 identified a legal requirement that the City's EIS be based on a statement of public
36 objectives.
37

38 The Board therefore finds and concludes that Petitioners have **not carried their burden** of
39 proving Legal Issue 4A.
40

41 *B. Failure to consider alternatives*
42

43 Petitioners argue that the EIS is deficient in that only the "no action" alternative and the
44 applicants' proposals were evaluated. Petitioners cite numerous cases indicating the
45

46 The City's objective for the Planned Action designation ... is to provide for a streamlined
47 SEPA review process for future area-specific development proposals and to provide greater
48 certainty to potential developers, City decision-makers, and the public regarding the future
49 development pattern and likely impacts of the Planned Action area.
50

Ex. 442, FEIS at 5-11.

1 centrality of alternatives analysis in SEPA review. Petitioners' PHB at 26-31. They assert
2 that for non-project actions, alternatives may not be limited to just the proposed action or
3 only the properties owned by the applicants. *Id.*¹⁷
4

5 Here the City of Kirkland analyzed only the "no-action" alternative, which projected build-
6 out on the three parcels under the existing zoning, and the "proposed action," i.e., the
7 proponents' proposals for each of the three sites. The Planning Commission ultimately
8 developed a third alternative for the Touchstone site (the FEIS Review Alternative), but this
9 did not change the height, square footage, parking discounts, or other key elements of the
10 proposal.¹⁸
11

12 As Petitioners have pointed out, in the FEIS at issue here, no offsite alternatives were
13 reviewed, and no intermediate schemes were assessed.
14

15 Having reviewed the cases relied on by the parties, the Board finds *Citizens' Alliance to*
16 *Protect our Wetlands v. City of Auburn, et al (Citizens' Alliance)*, 126 Wn.2d 356, 894 P2d
17 1300 (1995) to be most on point. The Citizens' Alliance challenged the EIS developed by
18 the City of Auburn for a thoroughbred horseracing track development. Auburn undertook
19 the environmental review to support amendments to the zoning code to allow commercial
20 recreation, including animal racetracks, in the M-2 zone as a conditional use. The city
21 identified three potential sites within Auburn and included one of them as an alternative
22 throughout the EIS.
23

24 The Supreme Court held that the racetrack project itself "qualifies for the private project
25 exemption" from review of offsite alternatives. However, "because there is also a nonproject
26 action [code amendment] involved in this case, Auburn is obliged to review offsite
27 alternatives." 126 Wn.2d at 365.
28

29 While underscoring the difference between rezones and text amendments, the Court
30 explained:
31

32 Normally, under the private project exception, private projects which do not
33 require rezones will not compel lead agencies to examine offsite
34 alternatives....[N]onproject actions pose separate obligations under SEPA
35 which a lead agency must satisfy. The environmental significance of the
36 nonproject action creates the obligation to examine alternatives to the
37 nonproject action....In practice, Auburn had to look at reasonable, feasible
38 offsite alternatives to the building of a racetrack on lands zoned heavy
39 industrial.
40

41 *Id.* at 366.
42

43 This Board's recent ruling in *North Everett Neighbors Alliance v. City of Everett (NENA)*,
44 CPSGMHB Case No. 08-3-0005, Final Decision and Order (May 18, 2009), at 32-25, is
45 distinguishable. There the Board rejected petitioners' request for greater review of offsite
46
47

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

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

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

7
8 In the present case, therefore, in accord with the *Citizens' Alliance* holding, Kirkland cannot
9 limit its review to onsite alternatives. By looking beyond Touchstone's proposal for its own
10 property, could the City realize the same objectives¹⁹ at lower environmental cost? See,
11 WAC 197-11-440(5)(b).

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

20
21 The Board finds that Kirkland's FEIS for Ordinance 4170 and 4171 is insufficient for failure
22 to assess reasonable alternatives to the Touchstone proposal,²¹ including offsite alternatives
23 to the nonproject action. The Board **remands** Ordinances 4170 and 4171 to the City of
24 Kirkland to take the action necessary to fully comply with SEPA.

25
26 *C. Failure to consider the proposal's short term impacts*

27
28 WAC 197-11-060(4) requires the consideration of both short and long-term impacts of a
29 proposal.

30
31 The Petitioners assert that the DEIS for the Touchstone proposal failed to properly address
32 the short-term impacts of construction of the project. Petitioners' PHB, citing Comment
33 Letter 23 at 10, in FEIS. The Final EIS at 4-19, 4-20 and 4-28 acknowledges that
34 construction will disrupt traffic and lists generic measures that may be included in the
35 building permits, but it does not thoroughly analyze the likely impacts, according to the
36 Petitioners. Petitioners contend that, in light of adoption of a Planned Action Ordinance, no
37 further environmental review is available, so long as the development falls within the
38 adopted threshold (1,792,700 square feet for the Touchstone project). Petitioners' PHB at
39

40
41 ¹⁹ On remand, the City "may" and "is encouraged to" articulate its public objectives. WAC 197-11-060(3)(ii)
42 and (iii).

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

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

1 32. They conclude that impacts of “noise, vibration, dust, debris and disruption of adjacent
2 uses” are simply ignored. *Id.*
3

4 The City asserts that construction noise impacts were addressed in the Scoping checklist,
5 citing Ex. 442, FEIS at 5-14. The City states that visual impacts of construction are
6 referenced under “aesthetics,” with the comment that viewers “may not be accustomed to
7 seeing construction activities and equipment” and may be moderately sensitive. Ex. 92,
8 DEIS at 3.3-17. Construction impacts on vehicular and pedestrian traffic are acknowledged
9 as being “particularly disruptive.” Ex. 442, FEIS at 4-19.²² The City references the
10 conditions it may impose as part of the project permit process to address construction traffic
11 management. City Response, at 13.
12

13 The Board first notes that build-out to the prior zoning allowance (the no-action alternative)
14 would involve a protracted and disruptive period of construction on the Touchstone site. It is
15 not readily apparent that construction of the additional square-footage or building heights
16 under the new proposal would have significant additive negative impacts.
17

18 Second, the Board finds that, as part of the permit process, the City will apply its existing
19 ordinances to mitigate construction impacts, as SEPA allows. See RCW 43.21C.240. These
20 ordinances govern noise, heavy equipment, sedimentation, and the like.²³ Further, the FEIS
21 specifically provides that consideration of construction mitigation at time of permit
22 application may include such measures as designated parking for construction workers,
23 limitations on truck movements and materials delivery, traffic flaggers, temporary
24 sidewalks, and adjustment of traffic signal phasing. FEIS at 4-28.
25

26 The Board is not persuaded that the impacts of construction need further analysis in the
27 SEPA process in order to ensure appropriate application of the City’s existing ordinances.
28 The Board concludes that, with respect to short-term impacts, “the FEIS gave the city
29 council sufficient information to make a reasoned decision.” *Citizens’ Alliance*, 126 Wn.2d
30 at 362. Petitioners **have not carried their burden** with respect to Legal Issue 4C.
31

32 *D. Failure to consider the proposal’s long-term impacts*
33

34 Under WAC 197-11-060(4)(d) environmental review must consider both direct and indirect
35 effects of a proposal. Indirect impacts “include those effects resulting from growth caused
36 by a proposal, as well as the likelihood that the present proposal will serve as a precedent for
37 future actions.” *Id.*
38

39
40
41 ²² In addition, the Board notes that the DEIS addresses greenhouse gas emissions from construction activities
42 (DEIS Appendix D) and police and fire response times based on construction activities (DEIS 3.15-13, 3.15-
43 14).
44

45 ²³ Kirkland construction impacts ordinances:

- 46 • Chapter 115.25 KZC. Development Activities, Movement of Heavy Equipment
- 47 • Chapter 115.35 KZC Erosion and Sedimentation
- 48 • Chapter 115.75 KZC Land Surface Modification
- 49 • Chapter 115.95 Noise
- 50 • 115.140 KZC Temporary Construction Trailers
- Title 21 Kirkland Municipal Code, Building and Construction

1 The Petitioners assert that the EIS glosses over the land use impacts of the proposal. First,
2 the City's analysis considers only commercial development already constructed or in the
3 permitting pipeline, rather than full build-out of the whole downtown area under existing
4 zoning. Thus, Petitioners allege, consistency between planned land uses and the capital
5 facilities necessary to serve them is never fully assessed. Petitioners' PHB at 34. Further, the
6 impacts of housing the additional 3,600 employees are ignored, according to Petitioners.
7

8 The City and Touchstone respond that the indirect impacts suggested by Petitioners are
9 "merely speculative." Touchstone Response, at 23-24; City Response, at 13-14. The City
10 points to the DEIS discussion of the land use compatibility of the Proposed Action and the
11 No Action alternative in the study area.
12

13 The Board concurs that determining how an increase in zoned density in one location might
14 affect development patterns in adjacent areas may involve some "speculation." Generally,
15 however, the GMA refers to this exercise as "comprehensive planning," and requires that it
16 be thoughtfully undertaken based on the best data, experience, and professional planning
17 expertise available. The urban planning profession and planners in the greater Puget Sound
18 metropolitan area in particular have developed ample data on the residential demand
19 associated with commercial development and on the zoned capacity needed to accommodate
20 various levels of residential demand, as well as on commute trip variables.
21

22 Here the Board notes that the DEIS assesses the land use compatibility of the Proposed
23 Action and the No Action alternative on a study area which extends for just a few small
24 blocks around the subject properties. Ex. 92, DEIS at 3.1-1. The DEIS lists as "significant
25 unavoidable adverse impacts" the greater intensity of land use, concentration of
26 employment, and potential for land use incompatibility. DEIS at 3.1-22. The DEIS projects
27 an "overall redevelopment in the study area [that] will continue to increase office, retail and
28 multifamily portions of the mix of uses found in Downtown and its perimeter area." DEIS at
29 3.1-18. "Single family residential uses are expected to decrease in the land use pattern study
30 area as single-family structures located in multifamily and commercial zones redevelop." *Id.*
31

32 In brief, the DEIS projects the indirect land use effects of the proposal to include
33

- 34 • Commercial redevelopment of the adjacent blocks at greater intensity (within
35 existing zoned capacity), and
- 36 • Redevelopment of single-family property in the study area to commercial or
37 multifamily.
38

39 The DEIS looks at a narrow "study area" and provides no quantification of the likely
40 housing pressures caused by an added 3,600 job concentration. However, under the "rule of
41 reason," the City is not required to provide a detailed analysis of the full cascade of land-use
42 impacts from its action. The Petitioners have put no housing-demand formula into the
43 record. They propose, without any supporting data, that intense job growth in downtown
44 Kirkland will result in residential sprawl in rural areas. The Board therefore concludes that
45 Petitioners **have not carried their burden** of demonstrating a failure to consider the
46 indirect impacts of the Ordinances.
47

48 *E. Failure to adequately consider traffic and parking impacts*
49
50

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

11
12 The City responds that the EIS traffic and parking analysis took into consideration the mode
13 split (primarily carpooling) already embedded in the ITE trip rates; the analysis then
14 projected an increased mode split based on adjacency of the Kirkland Transit Center and
15 implementation of Transportation Demand Management. FEIS at 5-10 (Comment 1). The
16 City asserts it used current local commute trip reduction (CTR) data to help determine SOV
17 rates. The City notes that employers within the Touchstone development will be required to
18 adopt CTR programs and meet CTR goals. City Response, at 15-16. Finally, the City states
19 that it reasonably anticipates the required parking demand management program (controlled
20 access, paid parking, and ongoing monitoring and mitigation of off-site parking impacts)
21 will further reduce trip generation. *Id.* citing FEIS at 5-15 (Comment 18).

22
23 The Washington Courts have determined that resolving competing expert opinions is a task
24 for lead agency, not the reviewing body:

25
26 When an agency is presented with conflicting expert opinion on an issue,
27 it is the agency's job and not the job of the reviewing appellate body, to
28 resolve those differences.

29
30 *City of Des Moines v. Puget Sound Regional Council*, 108 Wn.App. 836, 852, 988 P.2d 27
31 (1999).

32
33 The Board finds that the City had before it both the ITE trip rates, as modified by the City's
34 expert IFC Jones & Stokes, and the Bernstein critique submitted by Petitioners in comment
35 on the DEIS. The City was within its authority to choose to rely on IFC Jones & Stokes and
36 to incorporate this analysis into the FEIS. The Board concludes that, with respect to parking
37 and traffic impacts, "the FEIS gave the city council sufficient information to make a
38 reasoned decision." *Citizens' Alliance*, 126 Wn.2d at 362. The Board concludes that the
39 Petitioners **have not carried their burden** with respect to Legal Issue 4E.

40 41 VI. INVALIDITY

42
43 The Board has previously held that a request for invalidity is a prayer for relief and, as such,
44 does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish*
45 *County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order (Oct. 13, 2003), at 18.
46 Here, Petitioners' Legal Issue No. 5 requests a determination of invalidity.

- 1
2 2. Petitioners' request for a determination of invalidity is **denied**.
3
4 3. The City of Kirkland's adoption of Ordinance Nos. 4170 and 4171 was **clearly**
5 **erroneous** in two respects:
6

- 7
 - 8 • The City did not comply with RCW 36.70A.070(preamble), .070(3)(b, c) and
 - 9 .070(6)(a)(iv) as set forth under Legal Issues 1 and 2.
 - 10 • The City's SEPA review is deficient as set forth in Legal Issue 4B.

- 11 4. Therefore the Board **remands** Ordinance Nos. 4170 and 4171 to the City of Kirkland
12 with direction to the City to take legislative action to comply with the requirements
13 of the GMA and SEPA as set forth in this Order.
14

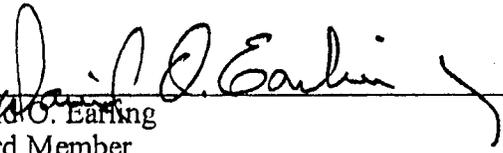
- 15 5. The Board sets the following schedule for the City's compliance:
16

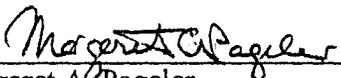
- 17
 - 18 • The Board establishes **April 5, 2010**, as the deadline for the City of Kirkland to take
19 appropriate legislative action.
20
 - 21 • By no later than **April 19, 2010**, the City of Kirkland shall file with the Board an
22 original and three copies of the legislative enactment described above, along with a
23 statement of how the enactment complies with this Order (**Statement of Actions**
24 **Taken to Comply - SATC**). The City shall simultaneously serve a copy of the
25 legislative enactment(s) and compliance statement, with attachments, on Petitioners
26 and Intervenor. By this same date, the City shall also file a "**Compliance Index**,"
27 listing the procedures (meetings, hearings etc.) occurring during the compliance period
28 and materials (documents, reports, analysis, testimony, etc.) considered during the
29 compliance period in taking the compliance action.
30
 - 31 • By no later than **April 30, 2010**,²⁴ the Petitioners may file with the Board an original
32 and three copies of Response to the City's SATC, simultaneously serving copies of the
33 Response on the City and Intervenor.
34
 - 35 • By no later than **May 7, 2010**, the City may file and serve a Reply to the Petitioners'
36 Response.
37
 - 38 • Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing
39 in this matter for **10:00 a.m. May 13, 2010**, at a location to be announced. If the
40 parties so stipulate, the Board will consider conducting the Compliance Hearing
41 telephonically. If the City of Kirkland takes the required legislative action prior to the
42 April 5, 2009, deadline set forth in this Order, the City may file a motion with the
43 Board requesting an adjustment to this compliance schedule.
44
45
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48

49 ²⁴ April 30, 2010, is also the deadline for a person to file a request to participate as a "participant" in the
50 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.

1 So ORDERED this 5th day of October, 2009.

2
3 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
4

5
6
7
8 
9 David O. Earling
10 Board Member

11
12 
13 Margaret A. Pageler
14 Board Member
15

16
17 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
18 files a motion for reconsideration pursuant to WAC 242-02-832.²⁵
19
20
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34 _____
35 ²⁵ Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

49 Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)
50

APPENDIX A

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

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

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

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

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

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

Prehearing Conference

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

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

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

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

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

3
4 The first matter of business was consideration of the Touchstone Motion to Intervene. None
5 of the parties objected to intervention and the Presiding Officer orally granted the motion.
6

7 The Board laid out a briefing schedule and date for a telephonic hearing to consider on
8 motions the threshold legal issues of jurisdiction and standing. The Board then reviewed its
9 procedures for the hearing, including the exhibits and supplemental exhibits; dispositive
10 motions; the Legal Issues to be decided; and a final schedule of deadlines.
11

12 The Board further discussed with the parties the possibility of settling or mediating their
13 dispute to eliminate or narrow the issues. The parties indicated that they were willing to
14 pursue settlement negotiations and requested a 45-day settlement extension. At the close of
15 the prehearing conference, the parties presented the Board with such a request signed by the
16 parties.
17

18
19 The Board issued its Order on Intervention, Order Granting Settlement Extension, and
20 Prehearing Order on March 30, 2009.
21

22 On May 14, 2009, the City of Kirkland filed an Amended Index to the Record and submitted
23 its Core documents as follows:
24

- 25 • Kirkland Comprehensive Plan
- 26 • Final Environmental Impact Statement
- 27 • Capital Improvement Program 2009-2014
- 28

29
30 *Motions*

31
32 The following cross-motions, responses, and rebuttals were timely filed:
33

- 34 • Memorandum by Davidson Serles and Continental Plaza on SEPA Jurisdiction and
35 SEPA Standing [**Petitioners' Opening**]
- 36 • City's Motion to Dismiss SEPA Claims [**City Motion – Dismiss**]
- 37 • Touchstone Motion to Dismiss SEPA Claims [**Touchstone Motion – Dismiss**]
- 38 • City's Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA
39 Standing [**City Response**]
- 40 • Touchstone Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA
41 Standing [**Touchstone Response**]
- 42 • Reply Memorandum by Davidson Serles and Continental Plaza in Opposition to
43 Motions to Dismiss SEPA Claims [**Petitioners' Reply**]
- 44 • City's Reply to Petitioners' Response on SEPA Standing [**City Reply**]
- 45 • Touchstone Reply to Petitioners' Response on SEPA Standing [**Touchstone Reply**]
- 46 • Motion to Supplement the Record by Davidson Serles and Continental Plaza
47 [**Petitioners' Motion – Supplement**]
- 48 • City's Opposition to Petitioners' Motion to Supplement Record [**City Opposition –**
49 **Supplement**]
- 50

- 1 • Reply by Davidson Serles and Continental Plaza in Support of Motion to
2 Supplement the Record [**Petitioners' Reply – Supplement**]
3

4 The Board conducted a hearing on motions by teleconference on June 1, 2009, from 10:00-
5 11:00 a.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney
6 Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson
7 Serles and David S. Mann represented Petitioner T.C. Continental. Robin Jenkinson
8 represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone
9 Corporation, assisted by Jessica Clawson. A.P. Hurd of Touchstone also attended. The
10 hearing provided the Board the opportunity to explore legal questions in the case.
11

12
13 On June 10, 2009, the Board issued its Order on Motions, finding that the Board has
14 jurisdiction over the SEPA issues raised and granting Petitioners' motion to supplement the
15 record.
16

17 *Briefing and Hearing on the Merits*
18

19 Each of the parties timely filed briefing on the merits as follows:
20

- 21 • Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners'**
22 **PHB**]
23 • City's Prehearing Brief [**City Response**]
24 • Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
25 • Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]
26
27

28 The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to
29 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney
30 Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson
31 Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson
32 represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone
33 Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone
34 Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill,
35 City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works
36 David Godfrey, and transportation engineer Thang Nguyen.
37
38

39 Each of the parties, without objection, provided the Board with illustrative handouts at the
40 hearing. The handouts were admitted as HOM Exhibits and are listed in Appendix B.
41

42 Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The
43 Board ordered a transcript of the hearing, which was received on August 18, 2009, and is
44 referenced herein as **HOM**. The hearing provided the Board the opportunity to explore legal
45 questions in the case.
46
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50

1 At the hearing, Board member Earling requested that the City provide the Board with a
2 listing of staff memoranda and power points provided to the City Council after July 1st. The
3 City subsequently filed a set of documents received by the Board on August 27, 2009.²⁹
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²⁹ Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

APPENDIX B

Handouts at the Hearing on the Merits

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

- A. Comprehensive Plan, p. IX-22 “Transportation Facility Plan”
- B. Planned Action Ordinance Mitigation Measures, Ordinance 4175, Ex. B (annotated by Petitioners to show projects listed in the Capital Facilities Plan)
- C. Excerpts from FEIS at 3-21 to 3-23; Excerpts from Ex. 672, at 2
- D. Excerpts from Ordinance 4175, section 3d(4)(e) and City impact fee ordinance, KZC 27.04.030
- E. RCW 82.02(2), (3), (4); citation to *Bothell v. Snohomish County*, CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sep. 17, 2007), at 21.
- F. Citation to *Strahm v. City of Everett*, CPSGMHB Case No. 05-3-0042, Final Decision and Order (Sep. 15, 2006), at 30; Excerpt from King County Comprehensive Plan Policies; Petitioners’ table of jobs and housing surplus capacity in the Kirkland Plan
- G. RCW 36.70A.215

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

- A. WAC 197-11-060
- B. Excerpts WAC 197-11-440(5)
- C. Excerpts RCW 43.21C.240

Handouts provided by Intervenor Touchstone – Admitted as HOM Exhibit 3

- A. RCW 36.70A.070(3) and (6) excerpts
- B. DEIS tables: 2014 Concurrency Assessment, 2022 Concurrency Assessment, and 2014 Traffic Impact Analysis
- C. DEIS Figure 3.4-2 and 3.4-2 (annotated by Intervenor)
- D. Kirkland 2004 Comprehensive Plan Capital Facilities Plan excerpts
- E. FEIS, Attachment 2 to Comment Letter 23

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

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

Signed: *Linda Eustis*

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