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No. 58433-2-I

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

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

Petitioners/Appellants,

v.

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

Defendants/Respondents.

CITY OF KENT,

Petitioner/Appellant,

v.

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

Respondents.

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REPLY BRIEF OF PETITIONER/APPELLANT CITY OF KENT

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I. INTRODUCTION

This case raises important, unresolved and on-going issues over control of local land use planning decisions made under the Growth Management Act, Ch. 36.70A. RCW (“the GMA”), the scope and application of State-mandated critical areas regulations, and the definition and application of “best available science” (“BAS”). The State Agencies (“DOE” and “CTED”) attempt to draw this Court’s attention away from these significant issues by interjecting an unexpected request for dismissal based on an inappropriate and unsupported mootness argument. Their Motion violates an agreement between the Agencies’ and City’s attorneys that the Agencies would not raise mootness as a defense in this appeal so that the City could take steps to simultaneously comply with the Board’s FDO. The Motion is unfair, lacks merit, and should be denied.

More importantly, the Agencies’ response on the merits of the City’s arguments is both woefully incomplete, and factually inaccurate. The Agencies provide a lengthy discourse on the law regarding critical areas requirements and mandates of the GMA, but very little actual analysis or application to the very significant, unique and undisputed facts presented here. The Board’s decision is in error and should be reversed.

II. RESPONSE TO MOTION TO DISMISS

A. Introduction

In filing their Motion To Dismiss based on mootness, the State Agencies have not only demonstrated a lack of confidence in the merits of their position in this action, but have also demonstrated an unfortunate and surprising lack of candor and goodwill toward both the Court and the other parties involved in this appeal.

Shortly after the GMHB issued its Final Decision and Order (“FDO”) in this case,¹ attorney Alan Copsey for CTED participated in a conference call with outside counsel for the City (Michael Walter and Jeremy Culumber), and other City representatives. During this call, the parties discussed the Board’s FDO, its effect, the City’s compliance schedule, and the likelihood of appeal by both the City and MBA/BLAW. Specifically, the City’s outside counsel indicated the City’s desire to move forward with an appeal, yet simultaneously develop an ordinance that would comply with the conditions imposed by the Board. This two-pronged action was designed to both protect the City’s legal interests and rights in exercising its discretion with respect to regulation of critical areas, while still preparing for a quick transition in the event the Court of Appeals upholds the Board’s FDO.² The City’s attorneys specifically

¹ The Board’s FDO was issued on April 19, 2006.

² On the one hand, the City is confident that this Court will overturn the Board’s unsubstantiated decision. On the other hand, however, the City also recognizes the

asked attorney Copsey whether moving forward in the compliance process would jeopardize the City's appeal. Recognizing that the City was voluntarily foregoing its right to petition the Board or the Court for a stay of the compliance proceedings, and voluntarily offering to comply with the Agencies' wishes during the pendency of the appeal, attorney Copsey orally agreed in this conversation *not to raise any mootness issues* if the City complied with the Board's FDO while the appeal was pending.

Then, on June 15, City Attorney Tom Brubaker had a telephone conference with Attorneys Copsey (for CTED), Tom Young (for DOE), Julie Wilkerson, Director of CTED, and Jay Manning, Director of DOE, in which the parties again specifically discussed the mootness issue. The issue was specifically discussed because all of the parties recognized the possibility of the defense of mootness, and attorney Brubaker made it clear that the City was not willing to amend its critical areas ordinance ("CAO") if it jeopardized the City's right to appeal the Board's decision. Jay Manning stated that if the City could pass the new ordinance quickly,

citizens' need for clarity and predictability concerning issues such as Critical Areas Regulations, which have an undeniable and important impact on their private property rights and the general development of the City as a whole. The City was also risking the loss of a substantial amount of State grant money if it did not immediately adopt a CAO that would satisfy the Board's FDO. *See, e.g.*, Appendix A, pp. 2-4, attached to this Brief. Consequently, the City moved forward with its appeal while simultaneously developing a revised Critical Areas Ordinance in compliance with the Board's FDO.

without using up a lot of DOE's staff time, he would have no objection to the City pursuing its appeal. There was clear oral agreement on this point.

Thus, the City's attorneys recognized early on that passing a substitute ordinance while the appeal was pending might raise mootness issues, and obtained the Agencies' oral agreement not to raise this issue during the appeal. In reliance, the City's attorneys reported the State's representations during various post-Board decision telephone calls. Attorneys for the City immediately informed MBA/BIAW of the agreement the City and State Agencies had reached: that the City would adopt a revised critical areas ordinance in conjunction with the Board's FDO and the State Agencies' CAO recommendations, but would simultaneously appeal the Board's FDO to the Court of Appeals. In exchange for the City's efforts at prompt compliance, the State Agencies agreed not to raise any mootness issues before the Court of Appeals.

The Kent City Council implicitly memorialized this "gentleman's agreement" in its new CAO, Ordinance No. 3805, adopted on August 15, 2006.³ In the recitals of Ordinance No. 3805, the City Council explained and confirmed the City's basis of and rationale for proceeding with this two-pronged "appeal" and "compliance" approach:

³ A copy of Ordinance No. 3805 is attached to this reply brief as *Appendix A*.

- E. “The city appealed the GMHB decision to the King County Superior Court. Subsequently, all parties sought direct review before the State Court of Appeals, Division I. That Court granted direct July 28, 2006. The Appeal of the GMHB decision is currently pending before the Court of Appeals, but a final decision is not expected for many months, and if appealed again by either party from the Court of Appeals to the Washington State Supreme Court, may not be finally resolved for a period of years. As a result, the controversy, and the firmly held beliefs of all parties remain active and under dispute.
- F. During the pending period of this Appeal, however certain state agencies have relied on the GMHB’s finding that the City does not comply with the GMA. ...
- G. Other City grant and loan resources were similarly threatened. ...
- H. Even though the City counsel maintains that its Ordinance No. 3946 did in fact comply with the GMA, and even though the City intends to vigorously appeal the GMHB decision, the City counsel, in an effort to maintain its eligibility with these agencies and in an effort to demonstrate its willingness to comply with the GMHB, with the direction of the DOE and CTED and with the Office of the Governor, has determined to amend its Critical Area Ordinance to Comply with the GMHB decision during the pendency of the City’s appeal of the decision.
- I. As a result the City council directed staff on, July 5, 2006, to consult with DOE and CTED, and to develop amendments to the City’s Critical Areas Regulations that would comply with the GMA. City staff has entered into these consultations with staff from the state agencies, and has obtained their

approval of the amendments contained in this ordinance, and by this ordinance, amends the City's Critical Areas regulations so as to comply with the GMHB decision and order and with the GMA."

Appendix A, pp. 2-3, ¶¶ E-I.

Based on the May and June communications with representatives of the State Agencies as well as their attorneys, it came as a surprise to both the City and MBA/BIAW that they have apparently disavowed all of their previous agreements by filing a Motion to Dismiss this case based on the mootness issues they specifically agreed not to raise.

However, despite the fact that the State Agencies' attorneys have violated what the City believes was a clear agreement with the City and MBA/BIAW, the fact remains that they have failed to even approach the standard for dismissing this appeal on mootness grounds. There is simply no doubt that (1) this appeal involves a continuing and substantial public interest, (2) an authoritative decision is desirable to provide guidance to public officials, and (3) this issue is likely to recur. *See Hart v. Dept. of Social & Health Serv.*, 111 Wn.2d 445, P.2d 1206 (1988). Therefore, the requested dismissal of this Appeal based on mootness should be denied.

B. Merits of the Mootness Argument⁴

⁴ As a preliminary matter, the Agencies' mootness argument should be deemed waived. The State Agencies could have asserted this claim before this Court accepted direct review of this case, and they did not. The Court should not hear it now.

The Agencies concede that the Court may rule on a moot case if it involves an issue of substantial public interest. *State v. Watson*, 155 Wn. 2d 574, 122 P.3d 903 (2005). As the party asserting mootness, the Agencies bear the burden of proving that this defense. *See, e.g., Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004). This case indisputably meets this exception to mootness and the three-part test in *State v. Watson* and *Hart v. Dept. of Social & Health Serv., supra*.

Regarding the second⁵ factor in the mootness analysis, the State Agencies make the surprising (and unsupportable) claim that “the central issues in this case are all factual.” *Response Brief*, p. 9. The State Agencies have taken a narrow view of this issue, which does not satisfy this second element of the mootness exception. *See, e.g., Dioxin Center, et. al. v Pollution Control Hearings Board, et. al.*, 131 Wn. 2d 345, 351, 932 P.2d 158 (1997). Unfortunately, this claim makes it clear exactly how disconnected the Agencies’ briefing is from the realities and issues presented in this case. Even a cursory review of the briefing before both the Growth Board and this Court makes it clear that there is virtually no disagreement whatsoever on the facts of this case. No one disputes the amount of public input the City received or the number of public hearings held. No one disputes exactly what science was included in the City’s

⁵ Because the State Agencies concede that the issues raised are public, rather than private (*Response*, p. 9) the first requirement is satisfied, and that issue will not be briefed here.

BAS review. No one disputes the advice and input received from all the various parties. No one disputes exactly what action the City took. No one disputes how the wetland ranking system or wetland buffers will be applied at the local level.⁶

The only disputes in this appeal are purely *legal*: For example, whether the Agencies have exceeded their limited advisory authority, and whether the State-appointed Growth Board has impermissibly seized the discretion that the State Legislature has explicitly given to duly-elected local officials on questions of growth management and the environment. Because the issues in this case are purely legal, the second prong of the Agencies' mootness argument fails.

Finally, the Agencies' mootness argument fails because it is clear that this Court's decision on the unresolved legal issues *will* provide guidance to public officers, and that without a decision from this Court the issue is likely to recur. *C.f., Dioxin Center, et. al. v Pollution Control Hearings Board, et. al., supra.*⁷ As indicated in the City's Motion for Direct Review to this Court, it was clear throughout the proceedings

⁶ The complete lack of factual issues in this case is clearly evident from the State Agencies' own Response Brief. In its *Opening Brief*, the City included more than 20 pages of facts, describing in detail the entire process by which the City's CAO update was adopted and implemented; the process that is at the very heart of this case. In response, the State Agencies mustered only three pages of facts, and completely failed to describe, address, or even cite to a single event in the entire CAO update process.

⁷ Finding that the uncertainty likely to result of other challenges are brought by new cases "... could take this court years to resolve, at tremendous expense to all those concerned." *Id.*, 131 Wn. 2d at 352.

before the Board that many of the important issues in the case would be decided based on the Board's choice among competing interpretations of various court cases. The parties presented radically differing views of seminal cases such as *WEAN*⁸, *HEAL*⁹, and *Viking Properties*¹⁰. Those cases – and others – were a source of contention throughout the Board proceedings because each of them dealt with only a small piece of the broad legal principles at issue in this case.¹¹ Given that fact – the confusion of the prior cases, and the lack of clear law regarding the role and application of “best available science” (“BAS”) – this case presents a logical and appropriate opportunity for this Court to condense and clarify its prior rulings, and provide direction to other GMA communities.

Moreover, many Washington cities, and particularly in the central Puget Sound region, are experiencing the type of rapid growth that Kent is currently experiencing. Given this exponential growth in cities, many of which are recently incorporated and many of which have traditionally been rural and agricultural areas, Washington cities are increasingly being confronted with the very same environmental, planning, and land use

⁸ *Whidbey Environmental Action Network (“WEAN”) v. Island County*, 122 Wn. App. 156 (2004).

⁹ *Honesty in Environmental Analysis (HEAL) v. CPSGMHB*, 96 Wn. App. 522 (1999).

¹⁰ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.2d 322 (2005).

¹¹ Consequently, the City believes the rather narrow and specific holdings in those cases were artificially broadened and mis-applied to fit the issues here. In contrast to those cases, the issues and principles involved in this case are more broadly applicable, and the Board's decision here addressed a much wider array of issues than were addressed in any of the prior cases.

decisions implicated in this case. These cities, like Kent, are struggling to balance the competing goals presented by their new-found growth: reaching the proper balance between environmental protection and private property rights; balancing localized and state-imposed decision-making; and determining the extent to which local decisions based on local conditions will receive the proper deference at regional and state levels.¹²

Finally, adopting, reviewing and updating Critical Areas Regulations is a State-wide and *on-going* mandate by the state legislature. *See, e.g.*: RCW 36.70A.040(3); .060(2); 130; .172. Every GMA city and community in this State must, on a scheduled basis, go through what the City of Kent has gone through in order to meet GMA and CAO mandates. *See, e.g.: Id.* Thus, every community planning under the GMA will necessarily be impacted by this Court's decision and guidance.

The State Agencies have failed to meet their burden on the mootness issue. This case involves purely legal issues, will most certainly to have extensive precedential effect, and will undoubtedly provide much-needed guidance to public officials across the State regarding critical areas ordinances and the issues involved.

III. REPLY TO ARGUMENTS ON THE MERITS

¹² In fact, many representatives from these other cities have specifically indicated to Kent officials that the outcome in this case will impact their own actions, policies, and decisions in the future.

A. **The Agencies’ “Relevant Facts” Are Insufficient, Misleading, and Outright Erroneous**

The State Agencies’ inability to comprehend and understand the nature and complexity of the overall regulatory and legal framework involved in a CAO is clear from the opening pages of their Brief. As indicated above, the City took great pains – and more than 20 pages – to give this Court a thorough review of the multi-year process involved in updating the City’s CAO. The process is highly complex, highly involved, and highly contentious. More importantly, that process and its outcome are at the very heart of this case, and must be understood before any decision can be reached. However, in contrast to the City’s in-depth review, the State Agencies responded with barely two-and-a-half pages of “Relevant Facts.” More importantly, they failed to cite even a single page of the record before the Growth Board. Instead, the Agencies’ version of the “facts” is simply a recitation of the various far-flung and unsubstantiated findings of the Board; *i.e.*, the *very decision* being appealed. It speaks volumes that the only document the Agencies can cite in support of their “facts” is the Board’s own decision, when the validity of that decision is the sole issue on appeal.¹³

¹³ In fact, this sort circular citation has been another constant issue in this litigation. For example, nearly every document DOE and CTED cite in support of their arguments about best available science (both here and before the Board) are *DOE’s own publications*.

This complete failure to even address the process by which the City adopted the regulations at issue is indicative of the Agencies' position and action throughout the process. The Agencies' Response is long on weighty academic review and analysis of legal principles and case law, but virtually devoid of application of that knowledge in the real world, or an understanding of how those principles will be applied at the ground level.

Another of the biggest points of contention throughout this litigation is the Agencies' continued misinterpretation and misrepresentation of the facts. The Agencies have done this, and continue to do this, in three specific ways: (1) by referencing non-existent exhibits; (2) by referencing second- and third-hand citations to documents rather than the source documents themselves; and (3) by altogether misrepresenting the contents of certain documents and arguments. There are examples of this throughout the Agencies' Statement of Facts.

For example, the Agencies allege that the City's wetlands expert, Adolfson Associates, reviewed the City's updated wetland regulations in the revised CAO and "advised the City that these buffers were too small to adequately protect most wetland functions." *Response*, p. 4 (citing Board Findings, which in turn cite to actual evidence in the record). That statement is simply false. In reality, the referenced letter was sent long before the *final version* of the CAO was *modified* and adopted. (Tab 34,

Ex. 112). The letter did *not* say that the updated regulations were inadequate. Rather, the letter clearly states that “the buffer widths for the wetlands *in the existing CAO* are too low to adequately protect most wetland functions.” *Id.* at p. 3. More importantly, however, the letter went on to describe how various non-buffer regulations adopted with the updated CAO would serve to alleviate such issues. Adolfson’s actual conclusion was: “We believe that the City’s proposed buffer reduction with enhancement and proposed modifications to its buffer averaging policy *are better grounded in science than is the existing code and improves protection of wetland functions and values as compared to the City’s existing Code.*” *Id.* (emphasis added). The Agencies cite this letter as evidence that the City’s CAO *does not* meet scientific standards, while the *explicit point* of the letter is that the CAO *does* meet those standards.

That point must be reiterated again and again because the Agencies’ briefing both here and before the Board consistently misrepresents the opinions and conclusions of Adolfson Associates, a well-respected scientific expert in its field. For example, the Agencies argue that Adolfson “considered the wetlands rating system and buffers in Ordinance 3746 to be a departure from Best Available Science.” *Response*, p. 4. This is flat-out false. When the actual documents are reviewed, Adolfson’s opinions are clear: “[U]se of a three-tiered wetland

rating system, *while appropriate for the local setting of Kent*, may also be viewed as a departure from science *provided by Washington State Department of Ecology*.” Tab 34, Ex. 12 (emphasis added).¹⁴

B. Protection of Critical Areas Does Not Have Priority Over Other GMA Goals

It has been clear since the onset of these proceedings that the Agencies, and DOE especially, believe that critical areas occupy a place of unique importance among and pre-eminence over the goals and requirements of the GMA. Before the Board, the Agencies merely hinted at this belief, drawing distinctions between GMA “requirements” and “goals” to urge the Board to conclude that protection of wetlands takes precedence over all other GMA planning goals and issues confronting cities like Kent. Based on their Response Brief, however, the Agencies now boldly and explicitly argue that “*priority* of critical areas protection is evident” in the GMA itself. *Response*, p. 17 (emphasis added).

For example, the Agencies argue that critical areas have clear priority because a city must designate critical areas *before* it designates interim or final growth areas. *Id.* at f.n. 11. However, that analysis fails for two reasons. First, the RCW sections cited are applicable only to the

¹⁴ This is yet another example of how Adolfsen expresses one viewpoint (that the 3-tiered rating system does comply with BAS, but DOE will likely complain that the City did not adopt DOE’s pet-system), yet the Agencies somehow cite that correspondence as indicating the complete *opposite* viewpoint (that the rating system *does not* comply with best available science, and the City should adopt DOE’s version).

original planning processes cities had to undergo when the GMA was first passed in the 1990s. The process at issue here is Kent's CAO *update*, not the original design and implementation of the City's comprehensive plan under the then-new and unique State law over a decade ago. The statutes that set deadlines in 1991-1994 are not at issue here.

Second, even if the sections cited by the Agencies *did* apply to the CAO update issues in this case, their conclusions about those sections do not. The cited sections merely establish a schedule for cities to comply with various provisions of the GMA. *See* RCW 36.70A.060(2), .170(1), .110(5), .040.3, *et al.* The fact that critical areas had to be designated *before* final growth areas – or the other 13 GMA planning goals -- does not mean one is more important than the other. It merely means that one should logically precede the other in time, the same way that a piece of wood should be measured before being cut. Neither is more important, and they are both necessary to complete the project at hand.

Finally, the Agencies' arguments that critical areas deserve some sort of priority when updating a CAO must fail based on the language of the GMA itself. The statute makes it clear that the various planning goals – including protection of critical areas – (1) “are *not* listed in order of priority,” and (2) “shall be used *exclusively* for the purpose of *guiding the development* of comprehensive plans and development regulations.” RCW

36.70A.020 (emphasis added). The statute plainly does not emphasize one of the goals or requirements at the expense of any other. Local jurisdictions must give equal and non-prioritized weight to all. In the inevitable case of conflict between various goals, the GMA gives the local jurisdiction broad authority to “balance” the competing interests, taking into account the *local* circumstances, *local* conditions, and *local* needs. In its decision, the Board utterly ignored the established rules about burden of proof and the broad deference to local government adoption and implementation of critical areas regulations. Instead, it simply adopted wholesale the arguments recommendations by the Agencies, including that they could force Kent to adopt wider wetland buffers and use the State’s preferred 4-tier versus the City’s expert’s recommended 3-tier wetland ranking system, without any legal authority and any evidence that such regulations make any difference on the ground.

The Agencies’ claim that critical areas have a special, prioritized place among GMA planning goals may be understandable given that DOE deals solely with *ecology*; however, the fact is that the GMA specifically provides that no goal has priority, and that local jurisdictions retain the discretion to balance the competing goals in developing their CAOs.¹⁵

¹⁵ See, e.g.: RCW 36.70A.3201 (cities have broad discretion in planning and implementing GMA programs and CAOs); *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000) (same).

C. The Agencies' Interpretation of the BAS Requirement is Erroneous

As indicated above, the Agencies have continuously misinterpreted and mischaracterized the City's arguments to both the Board and this Court. There is no better example of this than the Agencies' characterization of the City's BAS argument. The Agencies tell this Court as follows: "Kent continues to argue that the requirement to include BAS consists of three steps: (a) include BAS in the record; (b) consider BAS when the ordinance is developed; (c) *depart from BAS if departures can be justified...* Kent's approach effectively predetermines the result (*i.e.*, departure from BAS)." *Response*, pp 21-22.

The Agencies seem to have entirely ignored the City's briefing on this issue. *The City has never argued that a jurisdiction must depart from BAS before it can be justified.* As the City carefully explains on pages 40-45 of its Opening Brief, "the third requirement addresses what must be done *if a City adopts an ordinance that does not comply with* (adopt) the 'best scientific recommendations.'"¹⁶ *Opening Brief*, p. 43. The

Implementing regulations also provide broad discretion to cities in deciding what science to use and how it should be applied to the local environment. *See, e.g.*, WAC 365-195-205(2), (3) and *Heal v. CPSGMHB* ("HEAL"), 96 Wn. App. 522, 979 P.2d 864 (1999).

¹⁶ The City even emphasizes that "[o]bviously, this third requirement – justification for departure from BAS – is not necessary if the City's regulations actually comply with BAS." *Id.* at f.n. 24.

Agencies' argument on this issue makes no sense, and is in direct contrast to the City's actual statements throughout this litigation.

D. The State Agencies Continue to Over-state Their Authority

Throughout the CAO update process, the Agencies involved in this litigation continuously comported themselves as if they had regulatory, rather than mere advisory, authority over local critical areas regulations. This is simply false; the Agencies do not establish substantive regulations.

E. The Agencies Failed to Show Even A Single Negative Effect On the City's Wetlands

One of the major errors of the Board, and an issue barely addressed by the Agencies, is that the Board did not require the Agencies to reference in the record even a single negative impact on the City's wetlands as a result of either the 3-tier wetland rating system or the wetland buffers at issue here. As the City pointed out before the Board and again in its opening brief to this Court, the Agencies have been wholly unable to point to a single difference between their recommendations and the regulations actually adopted by the City in Ordinance No. 3746.¹⁷

The Agencies continue to argue that "it was not part of the State Agencies' burden here to show that use of a modern science-based wetlands rating system and buffers that comply with BAS will improve

¹⁷ For example, the Agencies never showed how an actual, real-life wetland in the City with a buffer with the State Agencies' recommended 4-tier rating system would be materially different than the buffer used as a result of the City's 3-tier system.

wetlands protection over an outdated system and buffers smaller than the range supported by science.” *Response*, p. 25. In fact, that sentence is a perfect indicator of the conclusory premises on which the Agencies have operated. Rather than actually apply the two competing systems to see how they would affect real-life situations, they use words like “modern” vs. “outdated”, and “science-based” vs. “smaller than recommended.” If the City’s system were truly “outdated,” “unscientific,” and as indefensible as the Agencies claim, surely they would be able to point to a single deleterious effect on a single wetland. The fact that they are unable to do so speaks volumes about the credibility of their arguments.

The Agencies make a passing attempt to look as if they have some idea of the real-world effects of their scientific recommendations. The City’s CAO is presumed valid, RCW 36.70A.320(1), the Agencies had the burden of proving it invalid, RCW 36.70A.320(2), and they utterly failed to meet this burden. For example, in one of their extended footnotes, they compare how an imaginary wetland greater of a certain size would be classified under the 3-tier versus 4-tier ranking systems, depending on various assumptions such as vegetation, intensity of adjacent land use, and wildlife habitat value. *See Response*, p. 33, f.n..28. What they fail to do, however, is identify a single wetland in the City of Kent that matches their description in any way.

In another example, the Agencies criticize the various other programs and regulations the City has instituted to protect critical areas.

The only wetland-related program in the City's list is its Wetland Maintenance Program, which maintains the wetlands owned by the City. This program may protect wetlands in the City ownership – although nothing in the record addresses the program's effectiveness – but it does not protect the many wetlands in private ownership.

Response, p. 43. While this may sound very logical and convincing, what the Agencies fail to address – because they have no *actual* information at all – is how many wetlands within the City are actually in private vs. City ownership. Without any analysis or investigation of these issues, the Agencies' allegations and arguments are pure speculation.

Such inability to identify any *actual* application of their theories is understandable, because the Agencies have no connection whatsoever with the City of Kent. They are forced to rely on *hypotheses*, *variables*, and *assumptions* about how an *imaginary* wetland *might* be ranked depending on a *variety of factors in different locales*, many of which would have no application to the physical environment in Kent. In contrast, the City Planning Staff and the City's wetland experts, Adolfson Associates, *have studied actual wetlands present in the City of Kent*, and are intimately familiar with both the operation and function of many of those wetlands in connection to the wider environmental conditions in the

City, and how *actual regulations* will *actually impact* these *actual wetlands*. Both the Planning Staff and Adolfson – the scientific experts who have actual knowledge about the Kent and its environment – agree that the City’s overall critical areas regulations offer adequate protection for critical areas when viewed in the overall scheme of City environmental and non-environmental realities. *See, e.g., Ordinance No. 3746, passim.*

F. **The GMA’s Best Available Science Requirement is Process-Oriented, Not Outcome-Oriented**

Both the Board and the State Agencies involved here have erroneously interpreted the GMA’s BAS requirements and have concluded that the GMA *requires* a certain outcome. For example, the Agencies argued before the Board, and continue to argue, that the City’s substantive regulations must themselves include BAS:

- “The GMA’s BAS requirement rests on the premise that *ordinances that include BAS* will better protect critical areas...” *Response* at 25 (emphasis added)
- “Kent could have made changes to its existing system... *so long as its system included BAS.*” *Id.*, 31 (emphasis added).
- “The GMA requires that cities ... develop their protective regulations *with the substantive inclusion of BAS.*” *Id.* at 37 (emphasis added).

As indicated in the City’s Opening Brief, however, the State Supreme Court has made it clear again and again that BAS must be

included *in the process* of updating a CAO, but does not require any specific outcome *in the ordinance itself*. In fact, however, the City did comply with BAS as recommended by the City's Planning Staff and its wetlands expert, Adolfson.¹⁸

In fact, however, the GMA itself explicitly allows cities to depart from BAS-based recommendations. A county or city departing from science-based recommendations should

- (i) Identify the information in the record that supports its decision to depart from science-based recommendations;
- (ii) Explain its rationale for departing from science-based recommendations; and
- (iii) Identify potential risks to the functions and values of the critical area or areas at issue and any additional measures chosen to limit such risks. State Environmental Policy Act (SEPA) review often provides an opportunity to establish and publish the record of this assessment.

WAC 195-365-915(c). The clearly supports that the City did this.

Despite this clear statutory authorization to depart from the strict scientific recommendations, the Agencies continue to argue that “the language of those statutory provisions *does not contemplate any departure from the BAS in the record.*” *Response*, p. 37 (emphasis added). It seems that, having participated in and developed a large part of the science in this area, DOE and CTED are utterly unable to contemplate that a City might

¹⁸ Notwithstanding this, the City did substantively comply with and incorporate in its CAO BAS as recommended by City Planning Staff and Adolfson Associates. See, e.g., CP 2, Exh. A (Ordinance No. 3746 passim)

actually make its own decision, rather than merely bowing to the will of these Agencies. The State Legislature, however, has vested the Agencies involved with *advisory*, rather than *substantive*, regulatory authority in comprehensive land use planning and regulation of critical areas.

The law is clear that BAS must be assembled and analyzed, and that the City must substantively and seriously consider critical areas regulations that fully adopts the recommendations of BAS. However, once those steps have been complied with, a local jurisdiction's elected officials have broad discretion regarding what regulations to actually adopt, as long as they are the result of a considered review of the assembled BAS. The Agencies claim that under this interpretation, a City's critical area regulations would be unchallengeable. In other words, there would be no point in giving the Board or the Courts authority to overturn a City's regulations if the requirements were merely process-oriented. However, that argument is misplaced for several reasons.

First, there are a myriad of regulations which are process-oriented, rather than outcome-specific. SEPA and the SMA are two such examples. These types of regulation require a jurisdiction to fulfill a certain contemplative and public process to ensure that a fully-informed decision is reached after assembly and review of all relevant data and information. The GMA requirements regarding BAS are similar. For example, the City is required to gather, analyze, and publicize the BAS on wetland buffers. Then the City must consider and debate the adoption of scientific recommendations. Once that is done, however, the GMA gives the

locally-elected officials the discretion to adopt different regulations, as long as those decisions are adequately explained and justified. The authority of the Board to overturn City action on the issue is the authority to demand that the City make a fully informed, fully public decision. The Board's authority is not intended to invalidate carefully crafted regulations in exchange for State-requested regulations, or any other regulations. No such pre-determined outcome is required. As the WEAN court made clear:

This does not mean that the local government is required to adopt regulations that are consistent with BAS because such a rule would interfere with the local agency's ability to consider the other goals of GMA and adopt an appropriate balance between all the GMA goals.

WEAN, supra., at 175 (emphasis added).

The Board and the Courts are given the authority to ensure that the City completes the proper process when updating its CAO. But the authority to pass judgment on the actual outcome of the process – the CAO as adopted – rests in the hands of the informed electorate, to whom the City officials adopting the ordinance must answer. If the community electorate, having been informed of the science, and having been allowed to participate in the public process, decides that the elected officials have not properly protected critical areas, they can hold those officials accountable at the ballot box.

IV. CONCLUSION

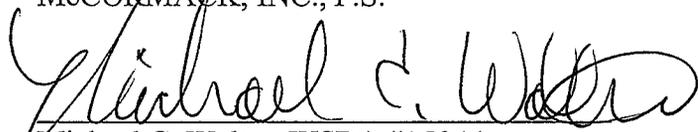
Ordinance No. 3746 was the culmination of nearly a year-long public participation process from the scientific, environmental, business

and development community. The Ordinance's 3-tiered wetland rating system, its balanced approach to wetland buffers, and its application of critical areas and BAS requirements, were based on a thoughtful, *balanced* consideration of *all* GMA planning goals and requirements. The Board ignored the deliberative process and balanced conclusions of the City's independent wetlands scientist who determined, after extensive analysis and significant challenges from both the environmental and development interests, that the City's wetland rating system and wetland buffers complied with the BAS requirements and implementing regulations, and demanded that the only way to comply was to adopt what the State believed was "correct," not what was appropriate for the City of Kent.

The Board's April 19, 2006 FDO should be reversed, and the City's CAO held GMA-compliant, valid and enforceable.

RESPECTFULLY SUBMITTED this 5th day of March, 2007.

KEATING, BUCKLIN &
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Ordinance No. 3805

(Amending or Repealing Ordinances)

CFN=961 – Capital Facilities Plan
Passed – 8/15/06
Critical Areas Ordinance - Revision

Amends Ords. 3439;3600;3643;3746;3770

Appendix A

ORIGINAL

ORDINANCE NO. 3805

AN ORDINANCE of the city council of the city of Kent, Washington, amending chapter 11.06 of the Kent City Code, entitled "Critical Areas," to provide for wetland categorization and wetland buffer widths as required pursuant to a decision by the Central Puget Sound Growth Management Hearings Board, making other related amendments, and amending Kent City Code section 15.08.400 for consistency with these critical areas amendments.

RECITALS

A. On April 19, 2005, the Kent City Council passed its Ordinance No. 3746, which enacted new city of Kent critical areas regulations, pursuant to the state Growth Management Act (GMA). The council passed these regulations only after an extended period of scientific study, regulatory review, and community participation. The recitals embodied in Ordinance No. 3746 describe this process in detail and are incorporated into this ordinance by this reference.

B. Subsequent to enactment of Ordinance No. 3746, the state of Washington, through the Department of Ecology (DOE) and the Department of Community, Trade, and Economic Development (CTED), filed an action before the Central Puget Sound Growth Management Hearings Board (GMHB) appealing certain aspects of the city's ordinance. The state's appeal centered on the city council's application of best available science requirements under the GMA with respect to the ordinance's 3-tiered wetlands classification system, wetland buffer widths, and also the ordinance's treatment of certain artificially created wetlands. The state argued that the city should have used a 4-tiered wetlands classification

system with larger wetland buffers and with a stronger focus on wetland and buffer habitat impacts.

C. The city opposed this appeal and argued that its ordinance was consistent with the GMA and adequately incorporated BAS, particularly when balancing other GMA goals.

D. One year after passage of the city's ordinance, the GMHB issued a decision and order on April 19, 2006, finding in favor of the state and specifically finding that the appealed portions of the city's critical areas ordinance did not comply with the GMA. The GMHB decided that the city should not have used the 3-tiered classification system, should have incorporated larger buffer widths, and should amend its treatment of artificially created wetlands to comply with GMA requirements.

E. The city appealed the GMHB decision to the King County Superior Court. Subsequently, all parties sought direct review before the state Court of Appeals, Division I. That court granted direct review on July 28, 2006. The appeal of the GMHB decision is currently pending before the Court of Appeals, but a final decision is not expected for many months, and if appealed again by either party from the Court of Appeals to the Washington State Supreme Court, may not be finally resolved for a period of years. As a result, the controversy, and the firmly held beliefs of all parties, remain active and under dispute.

F. During the pending period of this appeal, however, certain state agencies have relied on the GMHB's finding that the city does not comply with the GMA. In particular, the Washington State Public Works Board sent a letter to the city on May 24, 2006, stating that, because of the GMHB's finding of non-compliance, the city was not eligible to apply for grants from the Public Works Trust Fund. The city had, at that time, a pending application for a \$7 million dollar low interest loan, and city staff, based on previous history of applications and awards through this agency, had a firm belief that the Public Works Board would likely award most, if not all, the requested amount. Moreover, city staff intended to use this award as seed money to obtain another \$10 million from other state grant and loan funds through agencies like the Freight Mobility

Strategic Action Board (FMSIB) and the Transportation Improvement Board (TIB).¹

G. Other city grant and loan resources were similarly threatened. The InterAgency Committee (IAC) regularly authorized grants to the city's parks and recreation system. The IAC awards its grants on a point score formula based on the answers provided by applicant jurisdictions. These grants and the attendant scores are highly competitive, and score differences of as little as a few hundredths of a point can make a substantial difference in an applicant's final standing in the grant award queue. One of the questions asked in these standardized application forms is whether or not the applicant agency is in compliance with the GMA. An IAC determination that the city did not comply with the GMA based on the GMHB's decision and order would also severely affect the city's grant eligibility.

H. Even though the city council maintains that its Ordinance No. 3946 did in fact comply with the GMA, and even though the city intends to vigorously appeal the GMHB decision, the city council, in an effort to maintain its eligibility with these agencies and in an effort to demonstrate its willingness to comply with the GMHB, with the direction of DOE and CTED, and with the Office of the Governor, has determined to amend its critical areas ordinance to comply with the GMHB decision during the pendency of the city's appeal of the decision.

I. As a result, the city council directed staff, on July 5, 2006, to consult with DOE and CTED, and to develop amendments to the city's critical areas regulations that would comply with the GMA. City staff has entered into these consultations with staff from the state agencies, has obtained their approval of the amendments contained in this ordinance, and by this ordinance, amends the city's critical areas regulations so as to comply with the GMHB decision and order and with the GMA.

J. Having received staff approval of the amendments contained in this ordinance, the city council, after providing appropriate public notice, and

¹ Because of a technical error in the applicable Washington Administrative Code section, the board subsequently reversed this decision and allowed the city to apply. However, were it not for this technicality, the city could not have applied for Public Works Trust Fund loans

after completing appropriate State Environmental Policy Act (SEPA) review, has determined to enact this ordinance, which is intended to obtain compliance with the GMA during the period that the Ordinance 3946 appeal is under review.

K. The city conducted and completed environmental review under the State Environmental Policy Act (SEPA), issuing an Addendum to its Comprehensive Plan Environmental Impact Statement (EIS) on August 7, 2006. Additionally, on July 6, 2006, the city provided notification under RCW 36.70A.106 to the state of Washington on the city's proposed amendment to the critical areas ordinance, and sought expedited review under RCW 36.70A.106(3)(b). Expedited review was granted by the Department of Community Trade and Economic Development on July 24, 2006.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

ORDINANCE

SECTION 1. - Amendment. Chapter 11.06 of the Kent City Code, entitled "Critical Areas," is amended to read as follows:

Chapter 11.06

CRITICAL AREAS

Article I. Procedural & Administrative Provisions

...

Sec. 11.06.040. Exemptions.

A. The following activities performed on sites containing critical areas as defined by this chapter shall be exempt from the provisions of these regulations:

1. Conservation or preservation of soil, water, vegetation, fish, and other wildlife that does not entail changing the structure or functions of the critical area.

2. Existing and ongoing agricultural activities, as defined in this chapter.

3. Activities involving artificially created wetlands or streams intentionally created from non-wetland sites, including but not limited to, grass-lined swales, irrigation and drainage ditches, retention or detention facilities, and landscape features, except wetlands or streams created as mitigation or that provide critical habitat for anadromous fish.

4. Operation, maintenance, repair, and reconstruction of existing structures, roads, trails, streets, utilities, and associated structures, dikes, levees, or drainage systems; provided, that reconstruction of any facilities or structures is not "substantial reconstruction," may not further encroach on a critical area or its buffer, and shall incorporate best management practices.

5. Normal maintenance, repair, and reconstruction of residential or commercial structures, facilities, and landscaping; provided, that reconstruction of any structures may not increase the previous footprint, and further provided that the provisions of this chapter are followed.

6. The addition of floor area within an existing building which does not increase the building footprint.

7. Site investigative work and studies that are prerequisite to preparation of an application for development including soils tests, water quality studies, wildlife studies, and similar tests and investigations; provided, that any disturbance of the critical area shall be the minimum necessary to carry out the work or studies.

8. Educational activities, scientific research, and outdoor recreational activities, including but not limited to interpretive field trips, birdwatching, boating, swimming, fishing, and hiking, that will not have a significant effect on the critical area.

9. The harvesting of wild crops and seeds to propagate native plants in a manner that is not injurious to natural reproduction of such crops, and provided the harvesting does not require tilling of soil, planting of crops, or alteration of the critical area by changing existing topography, water conditions, or water sources.

10. Emergency activities necessary to prevent an immediate threat to public health, safety, property, or the environment which requires immediate action within a time too short to allow full compliance with this chapter as determined by the department.

11. Development of lots vested and/or legally created through a subdivision, short subdivision, or other legal means and approved prior to the effective date of the ordinance codified in this chapter.

~~12. Previously legally filled wetlands or wetlands accidentally created by human actions prior to July 1, 1990. The latter shall be documented through photographs, statements, and/or other conclusive evidence and be agreed to by the director.~~

123. Removal of invasive plants and planting of native vegetation in wetland and stream buffers for the purpose of enhancing habitat values of these areas pursuant to an approved mitigation plan.

134. Stabilization of sites where erosion or landsliding threatens public or private structures, utilities, roadways, driveways, or publicly maintained trails or where erosion or landsliding threatens any lake, stream, wetland, or shoreline. Stabilization work shall be performed in a manner which causes the least possible disturbance to the slope and its vegetative cover. This activity shall be performed in accordance with approved site stabilization plans.

145. Minor activities not mentioned above and determined in advance and in writing by the director to have minimal impacts to a critical area.

B. Notwithstanding the exemptions provided by this subsection, any otherwise exempt activities occurring in or near a critical area or its buffer shall comply with the intent of these standards and shall consider onsite alternatives that avoid or minimize significant adverse impacts. Emergency activities shall mitigate for any impacts caused to critical areas upon abatement of the emergency.

C. With the exception of emergency actions, and existing and ongoing agricultural activities, no property owner or other entity shall undertake exempt activities prior to providing fourteen (14) days' notice to the director and receiving confirmation in writing that the proposed activity is exempt. In case of any question as to whether a particular activity is exempt from the provisions of this section, the director's determination shall prevail and shall be confirmed in writing.

D. Legally established uses, developments, or structures that are nonconforming solely due to inconsistencies with the provisions of this chapter shall not be considered nonconforming pursuant to KCC 15.08.100. Reconstruction or additions to existing structures which intrude into critical areas or their buffers shall not increase the amount of such intrusion except as provided by KCC 11.06.100(A). Once a non-conforming use is discontinued for a period of one-year, that use cannot be re-established.

E. The exemptions established by this section shall apply only to activities that are otherwise permitted by federal, state, and/or local laws.

....

Article II. Definitions

...

Sec. 11.06.193. Corridor. *Corridor means a continuous strip of undisturbed vegetation connecting two (2) critical areas, protected in perpetuity from development via a restrictive covenant in the form of a Conservation Easement, Sensitive Area Easement, or Sensitive Area Tract.*

...

Sec. 11.06.387. Natural heritage wetland. *Natural heritage wetland means a wetland identified by the Washington State Department of Natural Resources Natural Heritage Program as either high quality undisturbed wetlands or wetlands that support state threatened, endangered, or sensitive plant species. Natural heritage wetland inventories are available from the Washington State Department of Natural Resources.*

...

Sec. 11.06.530. Wetland. *Wetland or wetlands means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of a road, street, or highway. However, wetlands include those artificial wetlands intentionally created to mitigate conversion of wetlands. For identifying and delineating wetlands, the Washington State Wetland Identification and Delineation Manual (Ecology, 1997) shall be used.* Wetlands determined prior converted cropland (PCC) by federal agencies may still be considered wetlands by the city of Kent. If these wetlands meet requirements of the Washington State Department of Ecology Manual, the wetlands shall be regulated, and the critical area shall be protected like any other wetland pursuant to this code.

Sec. 11.06.533. Wetland category. *Wetland category means the numeric designation (I through IV) assigned to a wetland to provide an indication of that wetland's overall function and value. Wetland categories rank the city's wetlands from highest (Category I) to lowest (Category IV).*

....

Article III. General Mitigation and Monitoring

Sec. 11.06.550. Mitigation standards.

A. Mitigation sequencing shall be avoidance, minimization, mitigation. Any proposal to impact a critical area shall demonstrate that it is unavoidable or will provide a greater function and value to the critical area.

B. Adverse impacts to critical area functions and values shall be mitigated. Mitigation actions shall be implemented in the preferred sequence identified in this chapter. Proposals which include less preferred and/or compensatory mitigation shall demonstrate that:

1. All feasible and reasonable measures have been taken to reduce impacts and losses to the critical area, or to avoid impacts where avoidance is required by these regulations; provided, that avoidance is not required where an applicant proposes to fill and replace a hydrologically isolated emergent Category III or IV~~class 3~~ wetland less than five thousand (5,000) square feet in size pursuant to KCC 11.06.610(C). For the purposes of this section a hydrologically isolated wetland shall be determined by the U.S. Army Corps of Engineers.

2. The restored, created, or enhanced critical area or buffer will at a minimum be as viable and enduring as the critical area or buffer area it replaces.

3. In the case of wetlands and streams, no overall net loss will occur in wetland or stream functions and values. The mitigation shall be functionally equivalent to the altered wetland or stream in terms of hydrological, biological, physical, and chemical functions.

....

Article IV. Wetlands

Sec. 11.06.580. Wetlands rating system.~~The following rating system is hereby adopted for the purpose of determining the size of wetland buffers and for the review of permits under this chapter. For the purposes of this section, the U.S. Fish and Wildlife Service's Classification of Wetlands and Deepwater Habitats of the United States, FWS/OBS-79-31 (Cowardin et al., 1979) contains the descriptions of wetland classes and subclasses.~~

A.~~Category 1 wetlands.~~ Wetlands which meet any of the following criteria:

~~1. The documented presence of species proposed or listed by the federal or state government as endangered, threatened, or other species identified by the State Department of Natural Resources through its natural heritage data or by~~

~~the State Department of Wildlife as a priority species, or the presence of critical or outstanding actual habitat for those species.~~

~~2. Wetlands equal to or greater than two (2) acres in size having forty (40) percent to sixty (60) percent permanent open water in dispersed patches with two (2) or more classes of vegetation.~~

~~3. Wetlands equal to or greater than ten (10) acres in size and having three (3) or more wetland classes, one of which is open water.~~

~~4. The presence of bogs or fens.~~

~~B. Category 2 wetlands. Wetlands which meet any of the following criteria, and which are not Category 1 wetlands:~~

~~1. Wetlands greater than one (1) acre in size.~~

~~2. Wetlands equal to or less than one (1) acre in size and having three (3) or more wetland classes.~~

~~3. Wetlands equal to or less than one (1) acre, but greater than 1000 square feet, that have a forested wetland class.~~

~~4. Wetlands that contain the documented presence of heron rookeries or raptor nesting sites.~~

~~C. Category 3 wetlands. Wetlands which meet the following criteria, and which are not Category 1 or 2 wetlands:~~

~~1. Wetlands that are equal to or less than one (1) acre in size and that have two (2) or fewer wetland classes.~~

A. Wetlands are classified as Category I, II, III, or IV based on the Washington State Wetland Rating System for Western Washington, Washington State Department of Ecology Publication 04-06-025, published August 2004.

B. Wetland rating categories shall not recognize illegal modifications that have been made to a wetland or its buffers.

Sec. 11.06.590. Determination of wetland boundary by delineation.

A. Delineations shall be required when a development is proposed on property containing wetlands identified on the city of Kent wetland inventory or when any other credible evidence may suggest that wetlands could be present. Delineations shall also be performed when the evidence suggests that buffers from wetlands on adjacent properties may impact the proposed development.

B. The exact location of the wetland boundary shall be determined through the performance of a field investigation applying the wetland definition of this chapter. An applicant may request the department to perform the delineation, provided the applicant pays the department for all necessary expenses associated with performing the delineation. The department shall consult with qualified professional scientists and technical experts or other experts as needed to perform the delineation. Where the applicant has provided a delineation of the wetland boundary, the department shall verify the accuracy of, and may render adjustments to, the boundary delineation. The decision of the department may only be appealed pursuant to procedures outlined in this chapter.

C. The delineation shall contain the following information:

1. A written assessment and accompanying maps of wetlands and buffers within ~~one hundred (100)~~ two hundred seventy-five (275)-feet of the project area, including the following information at a minimum: all known wetland inventory maps (including a copy of the city of Kent wetland inventory map); wetland delineations and required buffers; existing wetland acreage; wetland category; vegetative, faunal, and hydrologic characteristics; soil and substrate conditions; and topographic data.

2. A discussion of measures, including avoidance, minimization, and mitigation proposed to preserve existing wetlands and restore any wetlands that were degraded prior to the current proposed land use activity.

3. A habitat and native vegetation conservation strategy that addresses methods to protect and enhance onsite habitat and wetland functions.

D. A wetland delineation which has been confirmed by the department pursuant to SEPA review for a proposed project shall be binding upon the city and the applicant. If a wetland delineation report has not gone through SEPA review as a part of the application process, and the city has approved a wetland delineation report for another purpose, the wetland delineation report shall be valid for a period of two (2) years from the date of the approved report.

Sec. 11.06.600. Wetland buffers and building setback lines.

A. *Standard buffer widths.*

1. Standard buffers shall be determined by the wetland category pursuant to KCC 11.06.580 and the Habitat Score from the Washington State Wetland Rating System for Western Washington, Washington State Department of Ecology Publication 04-06-025, published August 2004. Standard buffers shall be applied to wetlands unless otherwise reduced pursuant to subsection (B) of this section, increased pursuant to subsection (C) of this section, or otherwise adjusted under other provisions of ch. 11.06 KCC. Standard buffers (in feet), and reduced buffers permitted pursuant to subsection (B) of this section, are provided in the following table:

Habitat Score (Points)	<20	<20 w/ 11.06.600(B)	20-28	20-28 w/ 11.06.600(B)	29+	29+ w/ 11.06.600(B)
Category I	125	100	150	125	225	200
Category II	100	75	125	110	200	175
Category III	75	60	125	110	n/a	n/a
Category IV	50	40	n/a	n/a	n/a	n/a

2. Wetland buffer zones shall be required for all regulated activities adjacent to wetlands. Any wetland created, restored, or enhanced as compensation for approved wetland alterations shall also include the standard buffer required for the category of the created, restored, or enhanced wetland. All buffers shall be measured from the wetland boundary as surveyed in the field.

The width of the wetland buffer zone shall be determined according to the rating assigned to the wetland.

Wetland Category	Standard Buffer
1	100 feet
2	50 feet
3	25 feet

3. Bogs shall have a standard buffer of two hundred fifteen (215) feet. However, a twenty-five (25) foot reduction is allowed with implementation of subsection (B) of this section.

4. Natural heritage wetlands shall have a standard buffer of two hundred fifteen (215) feet. However, a twenty-five (25) foot reduction is allowed with implementation of subsection (B) of this section.

B. Reduced buffer widths. Standard buffer widths as noted in subsection (A) of this section may be reduced, as provided in that subsection's table, if the applicant implements all applicable mitigation measures identified in the following table:

Examples of Disturbance	Activities and Uses that Cause Disturbances	Examples of Measures to Minimize Impacts
Lights	<ul style="list-style-type: none"> • Parking Lots • Warehouses • Manufacturing • Residential 	<ul style="list-style-type: none"> • Direct lights away from wetland
Noise	<ul style="list-style-type: none"> • Manufacturing • Residential 	<ul style="list-style-type: none"> • Locate activity that generates noise away from wetland
Toxic runoff*	<ul style="list-style-type: none"> • Parking lots • Roads • Manufacturing • Residential Areas • Application of Ag Pesticides • Landscaping 	<ul style="list-style-type: none"> • Route all new, untreated runoff away from wetland while ensuring wetland is not dewatered • Establish covenants limiting use of pesticides within 150-feet of wetlands • Apply integrated pest management
Change in water regime	<ul style="list-style-type: none"> • Impermeable surfaces • Lawns • Tilling 	<ul style="list-style-type: none"> • Infiltrate or treat, detain, and disperse into buffer new runoff from impervious surfaces and new lawns

<u>Pets and human disturbance</u>	<u>Residential areas</u>	<u>Use privacy fencing; plant dense native vegetation to delineate buffer edge and discourage disturbance; place wetland and buffer/corridor in a separate tract or easement</u>
<u>Dust</u>	<u>Tilled fields</u>	<u>Use best management practices to control dust</u>
<ul style="list-style-type: none"> <u>• These examples are not necessarily adequate for minimizing toxic runoff if threatened or endangered species are present.</u> <u>• This is not a complete list of measures. Other similar measures may be proposed by the applicant for approval by the director or his/her designee.</u> <u>• Applicant shall discuss all applicable mitigation measures in the mitigation plan, including benefits to the wetlands for those used and rationale for not including specific measures.</u> 		

CB. Increased buffer widths.

1. If a Category I or II wetland, with a habitat score greater than twenty (20) points is located within three hundred (300) feet of a Priority Habitat Area as defined by the Washington State Department of Fish and Wildlife, or as mapped by the city of Kent as a priority habitat area in accordance with the Washington State Department of Fish and Wildlife definitions, the buffer established in subsection (A) of this section shall be increased by fifty (50) feet unless:

a. The applicant provides a relatively undisturbed vegetated corridor at least one hundred (100) feet wide between the wetland and all Priority Habitat Areas located within three hundred (300) feet of the wetland. The corridor shall be protected for the entire distance between the wetland and the Priority Habitat Area pursuant to KCC 11.06.640; and

b. The applicant incorporates all applicable mitigation design criteria pursuant to KCC 11.06.600(B).

12. The director may require increased buffer widths on a case-by-case basis when a larger buffer is necessary to protect species listed by the federal government or the state as endangered, threatened, sensitive, or documented priority species or habitats. Such increased buffers shall be based on

recommendations by a qualified professional wetland biologist and, if applicable, best management practices for protection of the species adopted by an agency with jurisdiction.

32. Applicants for development permits may volunteer to provide increased buffers pursuant to the following procedures:

a. If an applicant provides a buffer which is permanently protected pursuant to the requirements of this chapter and is at least twenty-five (25) feet wider than the buffers required pursuant to subsection (A) of this section, the applicant may apply for a ten (10) percent increase in the number of residential units permitted per acre pursuant to the requirements of KCC 15.08.400, planned unit development, PUD.

b. If an applicant provides a buffer which is permanently protected pursuant to the requirements of this chapter and is at least fifty (50) feet wider than the buffers required pursuant to subsection (A) of this section, the applicant may apply for a twenty (20) percent increase in the number of residential units permitted per acre pursuant to the requirements of KCC 15.08.400, planned unit development, PUD.

DE. *Buffer averaging.*

1. Wetland buffer width averaging shall be allowed where the applicant demonstrates the following:

a. The ecological functions and values of the buffer after averaging is equivalent to or greater than the functions and values before averaging as determined by a qualified consultant and as approved by the city. Properly functioning buffers shall not be reduced through buffer averaging except in exceptional circumstances, such as a need to gain access to property or other similar circumstances, to be approved by the director.

b. Averaging will not adversely impact the wetland functions and values.

c. The total area contained within the wetland buffer after averaging shall be no less than the total area contained within the standard buffer prior to averaging.

d. At no point shall the buffer width be reduced by more than fifty (50) percent of the standard buffer or be less than twenty-five (25) feet.

e. The additional buffer shall be contiguous with the standard buffer and located in a manner to provide buffer functions to the wetland.

f. If the buffers are degraded pursuant to KCC 11.06.227, they shall be restored pursuant to an approved restoration/enhancement plan.

g. If restoration or enhancement of the buffer is required in order to establish a suitable growth of native plants, maintenance, and monitoring of the buffer for a period of at least three (3) years shall be provided pursuant to an approved monitoring plan as required by KCC 11.06.570.

ED. *Buffer restoration required.* If the buffers, including both standard buffers and buffers which are averaged, are degraded, they shall be restored during development pursuant to an approved restoration plan. If the plan includes establishing a suitable growth of native plants, maintenance and monitoring of the buffer for a period of at least three (3) years shall be provided pursuant to an approved monitoring plan as required by KCC 11.06.570. Where it can be demonstrated that there will be no impacts from the proposed development to the wetland or wetland buffer, the director shall have the authority to waive or modify this requirement.

FE. *Required report for buffer averaging and/or reduction.* A request to buffer average pursuant to subsection (ED) shall be supported by a buffer enhancement/restoration plan prepared by a qualified professional. The plan shall assess the habitat, water quality, storm water detention, groundwater recharge, shoreline protection, and erosion protection functions of the buffer; assess the effects of the proposed decreased or modified buffer on those functions; and address the applicable criteria listed in this section. A buffer restoration and/or enhancement plan shall also provide the following: (1) a map

locating the specific area of restoration and/or enhancement; (2) a planting plan that uses native plant species indigenous to this region including groundcover, shrubs, and trees; and (3) provisions for monitoring and maintenance throughout the monitoring period.

GF. *Buffer condition.* Except as otherwise allowed by this section, wetland buffers shall be retained in their natural condition. Where buffer disturbance has occurred during construction, re-vegetation with native vegetation shall be required pursuant to an approved restoration/enhancement plan consistent with this code.

HG. *Buffer utilization for landscape requirements.* Enhanced wetland buffers may be used to satisfy landscaping requirements in Ch. 15.07 KCC where all of the following criteria are satisfied:

1. The buffer, as enhanced by applicant, will provide equivalent or greater protection of wetland functions.

2. The enhanced buffer will meet the landscaping requirements as outlined in Ch. 15.07 KCC. The proposed landscape vegetation satisfies wetland buffer vegetation requirements.

3. The enhanced buffer is of the full landscape width required by Ch. 15.07 KCC.

IH. *Permitted uses in a wetland buffer.* Activities shall not be allowed in a buffer except for the following and then only when properly mitigated:

1. When the improvements are part of an approved enhancement, restoration, or mitigation plan.

2. For construction of new public or private roads and utilities, and accessory structures, when no practicable alternative location exists.

3. Construction of foot trails, according to the following criteria:
 - a. Constructed of permeable materials.
 - b. Designed to minimize impact on the stream system.

c. Of a maximum width of eight (8) feet.

d. Where feasible, located within the outer half of the buffer, i.e., the portion of the buffer that is farther away from the stream, except to cross a stream when approved by the city and all other applicable agencies and except as appropriate to provide outlook points or similar locations for educational, scientific, and other purposes which will not adversely affect the overall functions and values of the wetland.

4. Construction of footbridges and boardwalks.

5. Construction of educational facilities, such as viewing platforms and informational signs.

6. The construction of outdoor recreation such as fishing piers, boat launches, benches.

7. Maintenance of pre-existing facilities or temporary uses having minimal adverse impacts on buffers and no adverse impacts on wetlands. These may include but are not limited to: maintenance of existing drainage facilities, low intensity passive recreational activities such as pervious trails, nonpermanent wildlife watching blinds, short-term scientific or educational activities, and sports fishing.

8. Stormwater discharge outlets with energy dissipation structures as approved by the city of Kent. Unless otherwise approved by the director, these shall be located as close to the outer perimeter of the buffer as allowed by proper design and function of the discharge system. To the extent that construction of such outlets impacts vegetation in the buffer, restoration of the vegetation shall be required.

9. On-going city maintenance activities by ~~the city of Kent~~ vegetation management division ~~of its~~ public works and parks department vegetation and management divisions shall be permitted to continue general maintenance of wetlands and associated buffers. Maintenance shall include but not be limited to trash removal, removal of non-native vegetation, maintenance of existing

vegetation as necessary, restoration, enhancement, and sign and fence maintenance.

J. *Building setback lines.* A minimum building setback line of fifteen (15) feet shall be required from the edge of a wetland buffer provided the director may reduce the building setback limit by up to five (5) feet if construction, operation, and maintenance of the building do not and will not create a risk of negative impacts on the adjacent buffer area. Alterations of the building setback lines shall not be permitted to create additional lots for subdivisions. Approval of alterations of the BSBL shall be provided in writing by the director, or his/her designee, and may require mitigation such as buffer enhancement.

Sec. 11.06.610. Avoiding wetland impacts. Regulated activities shall not be authorized in Category I± wetlands except where it can be demonstrated that the impact is both unavoidable and necessary as described below, or that all reasonable economic uses are denied.

A. Where water-dependent activities are proposed, unavoidable, and necessary impacts may be permitted where no reasonable alternatives exist which would not involve wetland impacts; or which would not have less of an adverse impact on a wetland; and that would not have other significant adverse environmental consequences.

B. Where nonwater-dependent activities are proposed, the applicant must demonstrate that:

1. The basic project purpose cannot reasonably be accomplished using an alternative site in the general region that is available to the applicant.

2. A reduction in the size, scope, configuration, or density of the project as proposed; and all alternative designs of the project as proposed that would avoid or result in less adverse impacts on a wetland or its buffer will not accomplish the basic purpose of the project.

3. In cases where the applicant has rejected alternatives to the project as proposed due to constraints such as zoning, deficiencies of

infrastructure, or parcel size, the applicant has made a reasonable attempt to remove or accommodate such constraints.

C. Filling of a hydrologically isolated emergent Category III or Category IV wetland less than five thousand (5,000) square feet in size shall be permitted, provided a replacement wetland area is created pursuant to KCC 11.06.660(D)(3)(a). For the purposes of this section, a hydrologically isolated wetland shall be determined by the U.S. Army Corps of Engineers.

Sec. 11.06.620. Limits of impacts to wetlands.

A. For wetlands where buffers are not connected to riparian corridors, (Category IV~~3~~ wetlands, and Category III~~2~~ wetlands which score less than 20 points for habitat functions~~are not Category 3 wetlands only because they exceed one (1) acre in size~~) the following applies: regulated activities which result in the filling of no more than ten thousand (10,000) square feet of a wetland may be permitted if mitigation is provided consistent with the standards.

B. In computing the total allowable wetland fill area under this section, the director shall include any areas that have been filled since January 1, 1991. For example, if five thousand (5,000) square feet of a wetland were filled in February, 1991, future applicants would only be allowed a maximum of five thousand (5,000) additional square feet under this section. Any proposed fill over ten thousand (10,000) square feet must demonstrate unavoidable and necessary impacts.

...

Sec. 11.06.660. Compensating for wetland impacts.

A. *Condition of approval.* As a condition of any approval allowing alteration of wetlands and/or wetland buffers, or as an enforcement action, the director shall require that the applicant engage in the restoration, creation, or enhancement of wetlands and their buffers in order to offset the impacts resulting from the applicant's or violator's actions. The applicant shall develop a plan that provides for construction, maintenance, and monitoring of replacement wetlands and/or buffers and, as appropriate, land acquisition that re-create as

nearly as practicable or improves the original wetlands in terms of acreage, function, geographic location, and setting.

B. *Goal.* The overall goal of any compensatory mitigation project shall be no net loss of overall wetland acreage or function and to replace any wetland area lost with wetland(s) and buffers of equivalent functions and values. Compensation shall be completed prior to wetland destruction, where practicable. Compensatory mitigation programs shall incorporate the standards and requirements contained in KCC 11.06.550 and 11.06.560.

C. *Restoration and creation of wetlands and wetland buffers.* Any person who alters wetlands shall restore or create wetlands of equivalent functions and values to those altered in order to compensate for wetland losses. Any created or restored wetlands shall be protected by the provisions of this chapter.

D. *Acreage replacement and enhancement ratio.* Wetland alterations shall be replaced or enhanced using the formulas below; however, the director may choose to double mitigation ratios in instances where wetlands are filled or impacted as a result of code violations. The first number specifies the acreage of wetlands requiring replacement and the second specifies the acreage of wetlands altered. These ratios do not apply to remedial actions resulting from illegal alterations.

1. Compensation for alteration of Category ~~I~~ wetlands shall be accomplished as follows:

- a. By creation of new wetlands at a ratio of six (6) to one (1);
- b. By creation of new wetlands at a ratio of one (1) to one (1) and by enhancement of existing wetlands at a ratio of ten (10) to one (1); or
- c. By a combination of creation of new wetlands and enhancement of existing wetlands within the range of the ratios set out in subsections (D)(1)(a) and (b) of this section, so long as a minimum one (1) to one (1) creation ratio is met (for example, creation of new wetlands at a one and one-half (1.5) to one (1) ratio along with enhancement of existing wetlands at a ratio of five (5) to one (1) may be acceptable).

2. Compensation for alteration of Category ~~2II~~ wetlands shall be accomplished as follows:

a. By creation of new wetlands at a ratio of three (3) to one (1);

b. By creation of new wetlands at a ratio of one (1) to one (1) and by enhancement of existing wetlands at a ratio of four (4) to one (1); or

c. By a combination of creation of new wetlands and enhancement of existing wetlands within the range of ratios set out in subsections (D)(2)(a) and (b) of this section, so long as a minimum one (1) to one (1) creation ratio is met.

3. Compensation for alteration of Category ~~III3~~ wetlands shall be accomplished as follows:

a. By creation of new wetlands at a ratio of ~~two (2) one and one-half (1.5)~~ to one (1);

b. By creation of new wetlands at a ratio of one (1) to one (1) and by enhancement of existing wetlands at a ratio of ~~two (2) one (1)~~ to one (1); or

c. By a combination of creation of new wetlands and enhancement of existing wetlands within the range of ratios set out in subsections (D)(3)(a) and (b) of this section, so long as a minimum one (1) to one (1) creation ratio is met.

4. Compensation for alteration of Category IV wetlands shall be accomplished as follows:

a. By creation of new wetlands at a ratio of one and one-half (1.5) to one (1); or

b. By creation of new wetlands at a ratio of one (1) to one (1) and by enhancement of existing wetlands at a ratio of one (1) to one (1).

E. *Decreased replacement ratio.* The director may decrease the required replacement ratio where the applicant provides the mitigation prior to altering the wetland, and a minimum acreage replacement ratio of one (1) to one (1) is provided. In such a case, the mitigation must be in place, monitored for three (3) growing seasons and be deemed a success prior to allowing any alterations.

F. *Wetland/habitat bank.* Mitigation may be allowed within a wetland/habitat mitigation bank located within the city of Kent once a bank is formed. Proposed developments must continue to demonstrate avoidance, minimization, and mitigation prior to being allowed to mitigate using a wetland bank site. A review of the feasibility of onsite mitigation will be required to be prior to allowing mitigation credits from a mitigation bank.

G. *Wetland type.* In-kind compensation shall be provided except that out-of-kind compensation may be accepted where:

1. The wetland system to be replaced is already significantly degraded and out-of-kind-replacement will result in a wetland with greater functional value.

2. Technical problems such as exotic vegetation and changes in watershed hydrology make implementation of in-kind compensation impracticable.

3. Out-of-kind replacement will best meet identified regional goals (e.g., replacement of historically diminished wetland types).

H. *Location.* Onsite compensation shall be provided except where the applicant can demonstrate that:

1. The hydrology and ecosystem of the original wetland and those who benefit from the hydrology and ecosystem will not be substantially damaged by the onsite loss.

Onsite compensation is not feasible due to problems with hydrology, soils, or other factors.

2. Compensation is not practical due to potentially adverse impacts from surrounding land uses.

3. Existing functional values at the site of the proposed restoration are significantly greater than lost wetland functional values.

4. Adopted goals for flood storage, flood conveyance, habitat, or other wetland functions have been established and strongly justify location of compensatory measures at another site.

I. *Offsite compensation.* Offsite compensation shall occur within the same drainage basin as the wetland loss occurred, unless the applicant can demonstrate extraordinary hardship.

J. *Offsite compensation site selection.* In selecting compensation sites for creation or enhancement, applicants shall pursue siting in the following order of preference:

1. Upland sites which were formerly wetlands and/or significantly degraded wetlands. Such wetlands are typically small; have only one (1) wetland class; and have one (1) dominant plant species or a predominance of exotic species.

2. Idle upland sites generally having bare ground or vegetative cover consisting primarily of exotic introduced species, weeds, or emergent vegetation.

3. Other disturbed upland.

K. *Timing.* Where feasible, compensatory projects shall be completed prior to activities that will disturb wetlands, or immediately after activities that will temporarily disturb wetlands, or prior to use or occupancy of the activity or development which was conditioned upon such compensation. Construction of compensation projects shall be timed to reduce impacts to existing wildlife and flora.

L. *Completion of mitigation construction.* On completion of construction, any approved mitigation project must be signed off by the applicant's qualified

consultant and approved by the department. A signed letter from the consultant will indicate that the construction has been completed as approved, and approval of the installed mitigation plan will begin the monitoring period if appropriate.

SECTION 2. - Amendment. Section 15.08.400 of the Kent City Code, entitled "Planned unit development, PUD," is amended to read as follows:

15.08.400 Planned unit development, PUD. The intent of the PUD is to create a process to promote diversity and creativity in site design, and protect and enhance natural and community features. The process is provided to encourage unique developments which may combine a mixture of residential, commercial, and industrial uses. The PUD process permits departures from the conventional siting, setback, and density requirements of a particular zoning district in the interest of achieving superior site development, creating open space, and encouraging imaginative design by permitting design flexibility. By using flexibility in the application of development standards, this process will promote developments that will benefit citizens that live and work within the city.

...

C. *Development standards.* The following development standards are minimum requirements for a planned unit development:

...

2. *Minimum site acreage.* Minimum site acreage for a PUD is established according to the zoning district in which the PUD is located, as follows:

//

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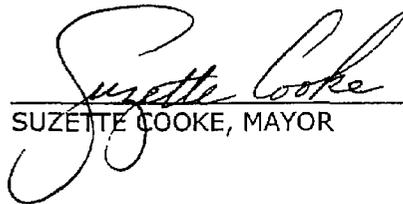
Zones	Minimum Site Acreage
Multifamily (MR-D, MR-G, MR-M, MR-H, MRT 12, MRT 16)	None
Commercial, office and manufacturing zones	None
SR zones (SR-1, SR-2, SR-3, SR-4.5, SR-6, SR-8) consisting entirely of detached single-family dwellings as defined in KCC 15.02.115	5 acres
SR zones (SR-1, SR-2, SR-3, SR-4.5, SR-6, SR-8) consisting entirely of detached single-family dwellings as defined in KCC 15.02.115 and if providing increased wetland buffers pursuant to KCC 11.06.600(B)(2)(C)(3).	0 acres
SR zones (SR-1, SR-2, SR-3, SR-4.5, SR-6, SR-8) not comprised entirely of detached single-family dwellings as defined in KCC 15.02.115	100 acres

....

SECTION 3. - Savings. The existing chapters and sections of the Kent City Code, which are repealed and amended by this ordinance, shall remain in full force and effect until the effective date of this ordinance.

SECTION 4. - Severability. If any one or more section, subsections, or sentences of this ordinance are held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance and the same shall remain in full force and effect.

SECTION 5. - Effective Date. This ordinance shall take effect and be in force thirty (30) days from and after its passage as provided by law.


 SUZETTE COOKE, MAYOR

ATTEST:


 BRENDA JACOB, CITY CLERK



APPROVED AS TO FORM:

Tom Brubaker
TOM BRUBAKER, CITY ATTORNEY

PASSED: 15 day of August, 2006.

APPROVED: 15 day of August, 2006.

PUBLISHED: 19 day of August, 2006.

I hereby certify that this is a true copy of Ordinance No. 3805
passed by the city council of the city of Kent, Washington, and approved by the
mayor of the city of Kent as hereon indicated.

Brenda Jacober (SEAL)
BRENDA JACOBER, CITY CLERK

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No. 58433-2-I

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

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

Petitioners/Appellants,

v.

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

Defendants/Respondents.

CITY OF KENT,

Petitioner/Appellant,

v.

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COALITION; MASTER BUILDERS ASSOCIATION OF KING AND
SNOHOMISH COUNTIES and BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON; WASHINGTON ASSOCIATION
OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY
RIGHTS,

Respondents.

CERTIFICATE OF SERVICE

Michael C. Walter, WSBA No. 15044
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Tom Brubaker, WSBA No. 18849
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CERTIFICATE OF SERVICE

I certify that I e-mailed and mailed, via U.S. mail, postage pre-paid, copies of the below listed documents no later than March 5, 2007 as follows:

DOCUMENT: REPLY BRIEF OF PETITIONER/APPELLANT
CITY OF KENT

TO: Ms. Linda Kerr Stores
Clerk, Central Puget Sound Growth
Management Hearings Board
900 – 4th Avenue, Suite 2470
Seattle, WA 98164

Tom Brubaker, Kent City Attorney
220 Fourth Avenue South
Kent, WA 9803

Thomas J. Young, Assistant Attorney General,
Counsel for Washington State Department of
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Timothy Harris, General Counsel, Building Industry
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Olympia, WA 98507

Martha P. Lantz, Assistant Attorney General,
Counsel for the Central Puget Sound Growth
Management Hearings Board
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PO Box 40110
Olympia, WA 98504-0110

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR -6 PM 4:05

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Counties
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Bellevue, WA 98004

DATED THIS 5th DAY OF MARCH, 2007


NICOLE F. FERRAND

No. 58433-2-I

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RIGHTS,

Respondents.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR -5 PM 4:36

CERTIFICATE OF SERVICE

ORIGINAL

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DATED THIS 5th DAY OF MARCH, 2007


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