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No. 58433-2-I

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

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

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

Petitioners/Appellant,

vs.

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

Defendants/Respondents.

CITY OF KENT,

Petitioner,

vs.

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

Respondents.

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

ORIGINAL

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INTRODUCTION

The MBA occupies a rather unique position in this litigation because, while it is concerned about the provisions of the Kent Critical Areas Ordinance regarding wetlands, it is much more interested in obtaining resolution of several major legal issues which affect the adoption and review of critical areas in Kent, as well as in all of the numerous cities and counties where the MBA and its members buy and sell property and construct homes. As a result, this Reply Brief will focus primarily on identifying and analyzing these larger issues so that the Court of Appeals may provide guidance not only to the City of Kent and the Central Puget Sound Growth Board, but also to the numerous other jurisdictions that are grappling with the same issues.

At the heart of this appeal are several major policy issues:

- Who defines what constitutes “best available science” regarding wetlands?
- Who has the burden of proving that a local government’s wetland protection standards do or do not adequately protect the functions and values of wetlands?
- Are local jurisdictions allowed to “deviate” from best available science by requiring less than ideal wetland protection in order to comply with other Growth Management goals and policies?

- If local jurisdictions are allowed to balance wetland protection against other GMA goals and policies, who has the burden of proving that local government's exercise of that discretion was or was not consistent with the Growth Management Act?

In the specific context of this appeal, resolving the following questions will allow the Court to address these issues:

1. Is the appeal moot?

As a threshold issue, the State Agencies have asked that the Court dismiss this appeal on the theory that it is moot. It is the position of the MBA that this case should not be dismissed for two reasons. First, the Court needs to understand the context in which the City agreed to temporarily amend its critical areas ordinance in a manner that the State Agencies now contend makes this appeal moot. The City and the MBA, under intense pressure from the State Agencies, agreed to temporary amendments of Kent's critical areas ordinance in order to avoid a threat by the State Agencies to cut off state funding to the City for water quality and other environmental programs. The City, the MBA and the State Agencies agreed to this based on an understanding that this appeal would be allowed to proceed to final resolution, an agreement the State Agencies now seek to ignore.

Second, this case raises a host of issues of statewide importance that need to be answered by the courts. Under these circumstances, dismissal for

mootness is not in the public interest. The Court should deny the motion to dismiss.

2. **What constitutes the Best Available Science regarding wetlands – the actual scientific analyses which have been reported regarding wetlands, or DOE’s “Guidance” document which is DOE’s political recommendation on what wetland rules that agency would prefer be adopted in local regulations?**

It is very important that the Court recognize that there are two distinct parts to DOE’s *Wetlands in Washington State Report*,¹ (“the DOE Wetland Report”) which is cited frequently by all parties in their Briefs in support of various arguments about what constitutes “best available science.” The first volume of the DOE Wetland Report is a compilation of scientific studies regarding various issues affecting wetlands and mitigation of impacts on wetlands, aptly titled “*A Synthesis of the Science*.”² The second volume of the DOE Wetland Report is “DOE’s Guidance”³ which the State Agencies, throughout their Brief, repeatedly cite as “best available science.”⁴ **The DOE Guidance is not a scientific study.** Rather, it is an opinion piece

¹ *Freshwater Wetlands in Washington State*, CP Vol. 2, Tab 28, Attachments 2 and 3.

² *Freshwater Wetlands in Washington State, Volume 1, A Synthesis of the Science*, CP Vol. 2, Tab 28, Attachment 2.

³ *Freshwater Wetlands in Washington State, Volume 2, Guidance for Protecting and Managing Wetlands*, CP Vol. 2, Tab 28, Attachment 3.

⁴ See, e.g., page 36, fn. 32 in the State Agencies’ Brief, which goes on at length claiming that the “science in the record does establish a clear range of buffer widths,” and then cites DOE’s Guidance document as “proof” of this claim. The State Agencies would love to have this Court bless their op-ed piece, the Guidance document, as “best available science” because it would allow them to force local governments to adopt the DOE preferred version of wetland protection rules. The Court should reject this request and recognize the Guidance for what it is – a political statement of DOE’s vision of the way to regulate wetlands.

authored by DOE administrators describing their preferred approach to wetland protection. Notably, the Guidance Document itself warns:

The options and recommendations presented in Volume 2 [the DOE Guidance] are advisory only. Local governments are not required to use this guidance. The information presented in this document is not, in and of itself, the best available science. Rather, it represents the recommendations of the Departments of Ecology and Fish and Wildlife as to how a local government could incorporate the best available science into policies, plans and regulations to protect wetlands.⁵ [Emphasis added]

It is critical to distinguish the two parts of the DOE Wetland Report because only the first volume of the DOE Wetland Report is scientific data.

Despite the fact that the DOE Guidance document disclaims any attempt to treat its recommendations as best available science, the State Agencies now repeatedly refer to the Guidance's recommendations regarding the new DOE wetland rating system and the size of wetland buffers as best available science and argue that any deviation from its recommendations is a departure from best available science.⁶ The Court should not be deceived by the State Agencies' repeated references to the recommendations in their Guidance document as "best available science."

3. Who has the burden of proof regarding compliance with best available science requirements?

While the State Agencies' Brief initially concedes that they bear the burden of proof pursuant to RCW 36.70A.320(2) when asserting that the

⁵ *Freshwater Wetlands in Washington State, Volume 2, Guidance for Protecting and Managing Wetlands*, CP Vol. 2, Tab 28, Attachment 3, page 1-2.

⁶ See particularly, State Agencies' Brief at pp. 35-36 in which they refer to the Guidance as best available science and site Ex. 81-C (an excerpt from the "Guidance" as best available science.

City's wetland regulations do not comply with the requirements of the Growth Management Act, they quickly abandon any pretense of attempting to meet this burden when dealing with specific issues.

For example, the State Agencies repeatedly claim that their newly invented wetland rating system is better than the existing wetland rating system used by Kent and many other jurisdictions. DOE's own scientific report concedes that there is no evidence that the new rating system provides any improved protection for wetlands but the State Agencies continue to insist that the City has the burden of proving the existing system is as good as, or better than, the new DOE system. This argument, which the Growth Hearings Board accepted, completely ignores the rule that the burden of proof is on the State Agencies, not the City. The Court should make it clear that the burden of proof is on the State Agencies and that the burden does not shift to the City simply because the State Agencies assert, without evidence,⁷ that some other regulation would provide better wetland protection.

The same fatal flaw pervades the State Agencies' argument about the width of critical area buffers. The State Agencies' central premise is that the buffer widths that are recommended in their Guidance document are the only "best available science" and that the City has the burden of proving that anything less meets requirements for best available science, or is a permitted

⁷ The State Agencies did argue that the DOE Guidance does express a preference for the new DOE rating system. However, as noted above, the DOE Guidance is not factual evidence of best available science, but simply a compilation of DOE's preferences for wetland regulation.

departure from best available science. That argument is inconsistent with and violates both the burden of proof requirements of the GMA and the GMA's central premise that state agencies are required to defer to the policy decisions adopted by local governments who are responsible for implementation of the GMA. The Growth Board impermissibly shifted the burden of proof to the City by assuming that the buffer recommendations in DOE's Guidance were best available science and requiring the City to justify any departure from those recommendations.

4. Does the GMA's Best Available Science Rule require that all functions and values of every wetland be protected at all times or may the City deviate from such ideal wetland protection standards in order to satisfy other requirements of the Growth Management Act?

The State Agencies' position in this case is based on a presumption that GMA requires that all wetland functions and values for all wetlands must be protected at all times and that wetland requirements cannot be modified under any circumstances if such modifications would result in less than full protection for all functions and values. The MBA contends, based on *HEAL*⁸ and *WEAN*,⁹ that deviations from standards which would otherwise protect all wetland functions and values are permitted if the local government, in its discretion, determines that such deviations are needed to comply with other goals and policies of the GMA.

⁸ *Honesty in Environmental Analysis and Legislation v. Seattle*, 96 Wn.App. 522, 979 P.2d 864 (1999).

⁹ *Whidbey Environmental Action Network v. Island County*, 122 Wn.App. 156, 93 P.3d 885 (2004).

5. Are local jurisdictions required to adopt more stringent restrictions on development in the absence of any evidence that existing regulations are causing environmental damage or that stricter regulations will produce any benefit?

The State Agencies contend that the GMA Best Available Science rule allows them to force local governments to impose more restrictive limitations on land development even when there is no evidence that compliance with current regulations is causing wetland degradation or other adverse environmental consequence. It is the position of the MBA that more stringent regulations can be imposed only if there is a problem that is not addressed or mitigated by current regulations. Moreover, the State Agencies challenging the City's wetland regulations bear the burden of proving that such additional restrictions are required.

The State Agencies argue:¹⁰

It is 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 wetland protection.

The MBA contends that interpreting the GMA to require local governments to impose new restrictions regardless of whether they are necessary or will actually provide any environmental benefit is irresponsible and at odds with the basic constitutional substantive due process principle that the state may exercise its police power only if there is an identified public problem and the proposed legislation will tend to solve the problem. Amazingly, the State Agencies admit they have no evidence there is a

¹⁰ State Agencies' Brief at p. 26.

problem to solve that requires more stringent wetland regulations and argue that they do not even need to prove there is a problem, let alone that more restrictive wetland regulations will tend to solve it. Instead, the State Agencies argue that the best available science rule (a legislative creation) somehow overrides constitutional substantive due process requirements by mandating stricter regulations regardless of whether a problem exists. The Court should reject this attempt to ignore basic constitutional requirements based on a narrow reading of a statutory provision.

LEGAL ANALYSIS

A. The Appeal Should Not be Dismissed Based on Mootness.

The State Agencies request that this appeal be dismissed based on the theory it is moot because Kent has adopted revisions to its critical areas ordinance that the Agencies find acceptable. The City, in its Reply Brief, will address the legal standards for hearing an appeal in spite of its alleged mootness, but the MBA must respond to this disingenuous argument by the State Agencies that fails to disclose important facts related to this issue.

Shortly after this appeal was certified to the Court of Appeals, the State Agencies contacted the City of Kent and threatened to withhold DOE funding of various water quality projects in the City of Kent unless the City immediately amended its wetland regulations to conform to the Growth Board's decision. The City, the MBA and the State Agencies discussed this and ultimately agreed that the City would do so, as long as such action would not cause the City or the MBA to lose their right to pursue this appeal.

The MBA agreed to not object to passage of a temporary amendment to the wetland regulations in order to prevent a loss of state funding for the City's water quality program so long as it was recognized that this appeal would proceed and the parties understood that if the Court ruled in favor of the City and the MBA, the City would be entitled to re-adopt its original version of the critical areas ordinance. Agreement was reached and the City adopted the temporary ordinance without protest from any party.¹¹ The State Agencies now conveniently have "forgotten" their agreement with the other parties and want the appeal dismissed as moot in order to avoid a decision on the merits.

Quite apart from the fact that the Court ought not promote the bully tactics of the State Agencies' use of a threat to withhold funding for water quality projects as a weapon to prevent parties from pursuing legal appeals, the State Agencies should not be rewarded for breaching an agreement reached with counsel in this case.

For this reason and the reasons set forth in the City's Reply Brief, the MBA requests that the State Agencies' motion to dismiss be denied.

B. DOE's Guidance Document is Not Best Available Science Regarding Wetlands.

¹¹ Obviously, the MBA, which has spent several years and a considerable amount of time and money participating in the process for review, adoption and appeals related to the Kent CAO, would not have simply stood aside and allowed the temporary ordinance to be adopted without protest if the State Agencies had not agreed to allow the appeal to proceed. Attached as Appendix A is an email from the City Attorney to the counsel of record in this case memorializing this understanding.

RCW 36.70A.172(1) requires local agencies to “include” best available science when adopting critical area regulations, including regulations related to wetlands. This legislative directive does not, however, define or explain what “best available science” is. Since the adoption of the GMA, various courts have addressed this issue and have generally acknowledged that while there is no precise answer to this question, local governments must review the available scientific information and may select any option that which falls within the “range of best available science.”¹²

In an effort to assist local jurisdictions in meeting the requirement that they review available scientific information as part of their critical area ordinance updates, the Department of Ecology published a two-volume report entitled DOE’s *Wetlands in Washington State*,¹³ (“the DOE Wetland Report”) which is cited frequently by all parties in their Briefs in support of various arguments about what constitutes “best available science.” Portions of this Report are routinely used by jurisdictions throughout Western Washington as the source document for best available science on wetlands in the review and adoption of critical area ordinances.

However, as noted above, it is important to realize that the DOE Wetland Report has two distinct sections. The first volume of the DOE Wetland Report is the compilation of scientific studies regarding wetlands and

¹² *HEAL*, *Ibid.*; *WEAN*, *ibid.*

¹³ *Wetlands in Washington State*, CP Vol. 2, Tab 28, Ex. 8, Attachment 2.

mitigation of impacts on wetlands. This part of the Report is widely acknowledged to constitute a reliable summary of “best available science.”

The second volume of the DOE Wetland Report is “DOE’s Guidance.” The DOE Guidance is not a scientific study. Rather, it is simply a recommendation prepared by DOE administrators describing that agency’s preferred approach to generic wetland protection in Western Washington. As noted above, **the Guidance specifically states that it is not best available science and that local governments are not required to follow its recommendations.**

An example of the importance of this issue is as follows: In its Opening Brief, the MBA cited an admission in Volume 1, the *Synthesis of the Science*, that there is no scientific evidence that DOE’s new wetland rating system provides better environmental protection than the existing rating system used by Kent. The State Agencies’ response is that their Guidance recommending the new DOE rating system is best available science.¹⁴ They do not cite any scientific evidence to support this claim.

Also, as noted in the MBA’s Opening Brief, the scientific studies in the DOE Wetland Report conclude that buffers as small as 6.6 feet provide significant water quality protection for wetlands.¹⁵ In response, the State

¹⁴ State Agencies Brief at p. 32, in which the State Agencies claim “the science reviewed in Ecology’s wetlands guidance is unequivocal about the importance of ...modern wetland rating systems.” The State Agencies are simply citing their own opinions as scientific authority and ignoring the information in the actual scientific studies about wetlands which they compiled.

¹⁵ *Wetlands in Washington State*, CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, p. 5-31. Other functions and values of wetlands are also analyzed in the scientific portion of the

Agencies ignore the scientific studies in Volume 1 of the DOE Wetland Report and instead cite the “Guidance” to support their opinion that buffers of 100 to 300 feet are necessary.¹⁶

As noted in the MBA’s Opening Brief, the State Agencies’ approach is consistent with a political philosophy that “bigger buffers are better” but is not consistent with actual scientific evidence. The range of buffer widths that various scientific studies indicate will provide wetland protection is much broader than the range proposed in DOE’s Guidance as its “preferred” buffer widths. This distinction is critical to this case because the State Agencies argued and the Growth Board agreed that the range of wetland buffers that was “best available science” was the narrower range identified in the DOE Guidance and not the much broader range of buffer widths identified in the scientific literature. Resolution of this issue is vital to this case because the State Agencies argued (and the Growth Board agreed) that the DOE Guidance was “best available science” and that anything outside the ranges recommended in the DOE Guidance was a deviation from best available science.

DOE Wetland Report, including stormwater storage and wildlife habitat. The scientific studies of the range of wetland buffers that address these concerns is even wider than the range applicable to water quality protection. See, e.g., CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, pp. 5-41 to 5-42 in which DOE reports a range of buffers that can protect wildlife habitat ranging from 49 feet to 3280 feet, depending on a host of issues including the type of wildlife likely to occur in the area, decisions about which species to protect, and so on.

¹⁶ State Agencies’ Brief at pp. 35-36. The State Agencies are attempting to use this appeal as a vehicle to elevate the status of their “Guidance” recommendations to “best available science” even though their own document disavows such a conclusion.

The Court should specifically reject the claim of the State Agencies that their Guidance document has somehow been elevated to the status of best available science.

C. The Burden of Proof that Kent's Wetland Regulations are Non-Compliant is on the State Agencies and was Impermissibly Shifted to the City by the Growth Board.

While the State Agencies' Brief initially concedes that they bear the burden of proof pursuant to RCW 36.70A.320(2) when asserting that the City's wetland regulations do not comply with the requirements of the Growth Management Act, they argue throughout their brief that the burden is on the City. The Growth Board agreed with the State Agencies, impermissibly shifting the burden of proof on all of the substantive issues to the City.

For example, the State Agencies repeatedly claim that their newly invented wetland rating system is better than the existing wetland rating system used by Kent and many other jurisdictions. DOE's own scientific report concedes that there is no evidence that the new rating system provides any improved protection for wetlands. The City's evidentiary record also included evidence about the scientific basis for its existing rating system (which is summarized in the Growth Board decision), including the opinion of the City's expert wetland consultant that the system was within the range of best available science.¹⁷ However, the Growth Board ignored all of the

¹⁷ Board decision, CP Vol. 5, Tab 59, pp. 32-33. Interestingly, after reciting the scientific basis for Kent's wetland rating system and admitting that the City's expert

evidence indicating that the wetland rating system was consistent with best available science and simply concluded that the new DOE system must be better because it is newer and considers more variables.

By ignoring the evidence in the record supporting the City's decision to retain its existing wetland rating system and by relying on the DOE Guidance as "best available science," the Growth Board was able to jump to the conclusion that the City failed to include any current science in the record to support its decision to keep its existing wetland rating system. This "analysis" impermissibly shifted the burden of proof to the City. The Court should make it clear that the burden of proof is on the State Agencies and that the burden does not shift to the City simply because the State Agencies assert, by ignoring contrary evidence, that some other regulation could theoretically provide better wetland protection.¹⁸

The same fatal flaw pervades the State Agencies' argument about the width of critical area buffers. The State Agencies' central premise is that the buffer widths recommended in their Guidance document are the only "best available science" and that the City has the burden of proving that anything less meets requirements for best available science or is a permitted departure from best available science. That argument is inconsistent with and violates both the burden of proof requirements of the GMA and the GMA's central

witness supported retention of the existing rating system, the Board then cavalierly ignores that evidence based on the State Agencies assertion that the City's system is not "current."

¹⁸ As noted above, the State Agencies assertion that the new DOE rating system is superior is pure conjecture since they have no evidence at all that supports the claim.

premise that state agencies are required to defer to the policy decisions adopted by local governments who are responsible for implementation of the GMA.

The State Agencies, in an effort to avoid relying exclusively on the DOE Guidance as “proof” that the City’s buffers are not within the range of best available science, cite a letter written by the City’s wetland consultant which suggested that the City’s buffers did not comply with best available science.¹⁹ The Growth Board also relied heavily on this letter as “proof” that the City’s buffers were outside the range of best available science.²⁰ What neither the State Agencies nor the Growth Board bother to point out is that the letter in question was a comment on an early draft of the Kent Critical Area Ordinance, written long before the City convened a stakeholder group that included DOE and DCTED, as well as the City’s wetland consultant, to review its draft CAO, and long before that group recommended a series of additional requirements and restrictions on wetlands and development near wetlands, all of which were added to the final ordinance. The wetland regulations ultimately adopted by the City were not the same as those which were the subject of the consultant’s early letter. The State Agencies’ attempt to use that letter as evidence that the version of the ordinance that was

¹⁹ See, State Agencies’ Brief at p. 34.

²⁰ Board decision, CP Vol. 5, Tab 59, pp. 33, 37

ultimately adopted does not fall within the range of best available science is misleading and should be ignored by the Court.²¹

Review of the City's final wetland regulations must occur based on the GMA's standards for review: A City's development regulations are presumed valid upon adoption. RCW 36.70A.320(1). The burden of proof is on the party filing an appeal to the Growth Board. RCW 36.70A.320(2). In this case, the burden of proof was on the State Agencies to prove that Kent's CAO did not comply with the Growth Management Act. The standard of proof that the State Agencies were required to meet was the "clearly erroneous" standard. RCW 36.70A.320(3). The Growth Board is **required** to defer to the policy decisions of local jurisdictions. RCW 36.70A.3201.

The Growth Board impermissibly refused to defer to the policy decisions of the City of Kent and shifted the burden of proof to the City by assuming that the buffer recommendations in DOE's Guidance were best available science and requiring the City to justify any departure from those recommendations. This was error and the Growth Board decision should be reversed.

D. The GMA's Best Available Science Rule Does Not Require that All Functions and Values of Every Wetland be Protected at All Times.

²¹ Ironically, although both the State Agencies and the Growth Board cite the City's wetland consultant's opinion as "proof" on the issue of buffer width, they both chose to ignore her opinion that the City's existing wetland rating system was best available science. The State Agencies selective use of such testimony is further evidence of their attempt to failure to meet the "clearly erroneous" standard of proof. RCW 36.70A.320(3).

The State Agencies' position in this case is based on a presumption that the GMA requires that all wetland functions and values for all wetlands must be protected at all times and that wetland requirements cannot be modified under any circumstances if such modifications would result in less than full protection for all functions and values. The MBA contends, based on *HEAL* and *WEAN*, that deviations from standards which would otherwise protect all wetland functions and values are permitted if the local government, in its discretion, determines that such deviations are needed to comply with other goals and policies of the GMA.²²

This Court, in *WEAN*, clearly ruled that local jurisdictions were permitted to deviate from the range of options allowed by best available science in order to balance the protection of wetlands against the requirements of other Growth Management goals and policies.²³

The County is correct when it asserts that, under the GMA, it is required to balance the various goals of GMA set forth in RCW 36.70A.020. It is also true that when balancing those goals in the process of adopting a plan or development regulation **under GMA, a local jurisdiction must consider BAS regarding protection of critical areas. This does not mean that the local government is**

²² It is important to note that the City and Kent do not concede that the Kent CAO deviates from best available science. The State Agencies' brief is based on the presumption that the Ordinance deviates from best available science because it is not consistent with the DOE Guidance and, as a consequence, the City must justify its "deviations." As noted in the Opening Briefs, the City Council, recognizing that it is extremely difficult to predict what will later be determined to constitute best available science, adopted an ordinance which, in the Council's opinion, did include best available science, but in an abundance of caution also included findings explaining why it was also balancing its policy decisions against other GMA goals and policies. The State Agencies attempt to use the inclusion of these findings as "proof" the City knew it was deviating from best available science. The Court should ignore this misleading argument.

²³ *WEAN v. Island County*, 122 Wn. App. 156, 173, 93 P.3d 885 (2004).

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. [emphasis added]

The Court in *WEAN* also held that if a local agency did adopt regulations which were not consistent with best available science, it was required to “provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice.”

Despite this clear statement of the law, the State Agencies continue to argue that *WEAN* holds that wetland regulations must fall within the range of best available science in order to protect the functions and values of wetlands.²⁴ This argument is based on the fact that, in *WEAN*, Island County did not adopt findings to explain why it adopted a wetland buffer outside the range of the best available science. In that circumstance, the Court held that a buffer outside the range of best available science was not proper and remanded the matter back to the County to either adopt new buffers or to adopt findings explaining the departure from best available science. The Court did not, as the State Agencies claim, rule that the revised buffer could not deviate from best available science. In fact, such an interpretation would contradict the explicit holding that such deviations are permitted if findings explaining the departure are provided.

²⁴ See, State Agencies Brief at pp. 22-23.

The MBA requests that the Court clarify its ruling in *WEAN* for the benefit of those continue to ignore its central holding and argue that the *WEAN* decision held that deviations from best available science are never allowed when local agencies adopt wetland protection regulations.

E. The GMA Best Available Science Rule does not override Constitutional Substantive Due Process Requirements.

The State Agencies contend that the GMA best available science rule requires local governments to impose more restrictive limitations on land development even when there is no evidence that compliance with current regulations is causing wetland degradation or other adverse environmental consequences.

The State Agencies concede there is no evidence in the record indicating that the City of Kent's existing critical area requirements for wetlands are causing any environmental harm or loss.²⁵ As an explanation for their failure to provide any evidence of environmental damage as a justification for imposing more restrictive wetland regulations, the State Agencies disingenuously argue that evidence of environmental damage only becomes apparent after the passage of time and the 60 day appeal period of RCW 36.70A.290 is too short for the State Agencies to determine if a critical areas ordinance is causing environmental damage.²⁶ This argument completely misses the point. The question is whether Kent can be required to adopt more restrictive wetland regulations if there is no evidence that its

²⁵ See, State Agencies Brief at pp. 25-26.

²⁶ See, State Agencies Brief at p. 26, fn 16.

existing regulations, which have been in effect for many years, have caused damage. Contrary to the argument of the State Agencies, they have had years to determine whether the City's wetlands are being damaged by development in spite of the City's existing stormwater regulations, wetland requirements (including buffers and setbacks), and so on. The State Agencies admit they have no evidence of a problem that needs to be solved. Under these circumstances, there is no justification for requiring larger buffers and other restrictions on property simply because the science of wetland study has more information than it did when the existing rules were adopted.

Substantive due process requires proof that a problem exists.²⁷ In the absence of such evidence, the government lacks the legal authority to regulate private property.

Moreover, the State Agencies also concede there is no evidence in the record proving that the imposition of more restrictive wetland regulations will provide any environmental benefit. The State Agencies' only response to this argument is to argue that more restrictive regulations "tend to solve" a problem (assuming of course that they have already proved a problem exists). While it is true that substantive due process does not require that a regulation perfectly solve a problem, this does not mean, as the State Agencies suggest, that regulations can be imposed in the complete absence

²⁷ *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 300, 787 P.2d 907 (1990); *Robinson v. Seattle*, 119 Wn.2d 34, 51, 830 P.2d 318 (1992).

of evidence that they will make any difference (other than further restricting development opportunities for private property owners).

The State Agencies admit they cannot prove there is a problem in Kent and that the additional wetland regulations they advocate will make any difference. In the absence of such proof, there is no police power authority to impose additional restrictions.

CONCLUSION

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

DATED this 5th day of March, 2007.

JOHNS MONROE MITSUNAGA, PLLC

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BUILDING INDUSTRY ASSOCIATION
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By Timothy Harris for
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Attorney for Appellant Building
Industry Association of Washington

1300-15 Reply Brief 022807

Bob Johns

From: Brubaker, Tom [TBrubaker@ci.kent.wa.us]
Sent: Thursday, July 06, 2006 12:14 PM
To: Copsey, Alan (ATG); Young, Tom (ATG)
Cc: Michael C. Walter; Jeremy W. Culumber; Bob Johns; Duana Kolouskova
Subject: Kent City Council Action to Amend Critical Areas Ordinance

Alan and Tom--

Last night, after a lengthy, passionate, respectful, but somewhat polarized discussion, the city council voted to begin the process to amend its critical areas ordinance consistent with what has been described as the "King County Hybrid" set of wetland and wetland buffer regulations. This includes a 4 tier wetlands classification system, larger buffers, and an amendment of the artificially created wetlands provision. A more complete description of council's direction, described as "Option 3," can be found in the attached memo from Mike Mactutis.

Here is a copy of the motion passed last night on a 4-3 vote:

OPTION 3 MOTION:

To direct the Mayor and staff

- to begin the process to amend the city's critical areas ordinance consistent with Option 3 as described by staff,
- to coordinate with the state Department of Ecology and Department of Community, Trade and Economic Development when making these proposed revisions,
- to provide all required notice,
- to draft the necessary ordinance,
- to hold a public hearing on the revised ordinance proposal, and
- to schedule the revised ordinance for consideration and passage at the earliest possible date.

Here is a copy of the memo that describes the various options city staff presented to council, including the selected Option 3:

<<Council Wetland Options 6-29-06.pdf>>

The council will continue its appeal, as discussed earlier during our telephone conference with Jay Manning and Julie Wilkerson. However, please note that, per Mr. Manning's specific request on June 15th that we resolve this matter within 2-4 weeks, our council exercised good faith when it moved quickly to wrap this up and begin the process to pass an ordinance that was acceptable to the State. Last night's action was as close as we could come to Jay's 2-week timeframe preference, as this was the first council meeting to occur after Ecology staff and city staff met to discuss possible options.

I thank you for your understanding and assistance in this matter. City staff will remain in contact and work with Ecology and CTED staff as we develop this ordinance, though it is our expectation that we all are agreed on the specific changes to be made at this time.

Regards, --Tom

Tom Brubaker

City Attorney

City of Kent

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Kent, WA 98032

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FILED
COURT OF APPEALS DIVISION 2
STATE OF WASHINGTON
2007 MAR -5 PM 3:37

No. 58433-2

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

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

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

vs.

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

Defendants/Respondents.

CITY OF KENT,

Petitioner,

vs.

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

Respondents.

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*Attorney for Petitioner/Appellant
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STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

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

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

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

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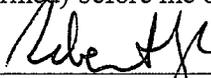
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By Messenger*

Dated this 5th day of March, 2007.


EVANNA L. CHARLOT

SIGNED AND SWORN to (or affirmed) before me on March 5, 2007 by
Evanna L. Charlot.


Robert D. Johns
Notary Public Residing at Seattle, WA.
My Appointment Expires: 4-19-2010

1300-15 Affidavit of Service 03-05-07