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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/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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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

Petitioner/Appellant's Opening Brief

PETITIONER/APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In its Final Decision and Order (“FDO”), the Central Puget Sound Growth Management Hearings Board (“GMHB” or “Board”) makes three fatal errors with respect to the City of Kent’s Critical Areas Ordinance (“CAO”).¹ First, the Board erroneously found and concluded that the City’s “3-tier” wetland rating system is not the product of “Best Available Science” (“BAS”) and that the City should have adopted the State’s new “4-tier” rating system instead. Second, the Board held that the City’s wetland buffers fail to include best available science and that the City, once again, should have acquiesced to the State’s universal prescriptive recommendations for larger buffers. Third, throughout its decision the Board, in contravention of the Growth Management Act (“GMA” or “Act”), disregarded the broad discretion granted to local governments to plan under the Act and to adopt regulations that best fit the local community, thus substituting its judgment for that of the Kent City Council and the mandates of the citizens of Kent.²

In reality, the factual record shows that at the culmination of nearly a year-long public participation process from the scientific, environmental, business and development community, the City’s 3-tiered wetland rating system, its balanced approach to wetland buffers, and its application of

¹ The CAO was adopted via Kent City Ordinance No. 3746 on April 19, 2005. Throughout this brief, the Ordinance is referred to generally as the “CAO.”

² Within these three main issues there are several other points of contention, such as (1) the specific parameters of the “best available science” requirement under the GMA, (2) the extent to which the City can – and must – balance the various GMA planning goals, and (3) whether the City’s existing projects and regulations justify any alleged deviation from the recommendations urged by the State Agencies.

critical areas and BAS requirements, are the culmination of a thoughtful, *balanced* approach in consideration of *all* GMA planning goals and requirements. The State Agencies and the Board ignored the deliberative conclusion 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. The City's wetland protections are generally more conservative than the 2004 State rating system and, in general, rank wetlands higher than that system. Finally (and again, bringing all this back to reality, as applied "on the ground", the regulations – particularly the 3-tier ranking system – are simpler and easier to understand, more cost effective for the City to enact, evaluate and utilize, and are more cost effective for property owners as well.

The Board's April 19, 2006 Final Decision and Order wrongfully determined the City's CAO to be "non-compliant" with the GMA, and it should be reversed, as set forth below. The City's CAO should be held GMA-compliant, valid and enforceable.

II. ASSIGNMENT OF ERRORS

1. Balancing of GMA Planning Goals: The Board erred in elevating environmental protection above the entire range of GMA planning goals. The City assigns error to the following statements, findings, and conclusions by the Board regarding the GMA planning goals:

...the only evidence in the record that examined the effect of larger wetland buffers on Kent's future housing production was performed by the City's own planning department, which concluded that an increase in wetland and creek buffers would not adversely impact Kent's ability to absorb the anticipated 20-year growth target.

CP 59, p. 50-51.³

Cities and counties may exercise broad discretion consistent with GMA requirements, that is, within the parameters of best available science for protection of the functions and values of critical areas.

Id., p. 52.

The Board finds no evidence here of unique local circumstances with respect to affordable housing, economic development or property rights – the same conditions hold true for all Central Puget Sound cities.

Id., p. 53.

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

Id., p. 54. (emphasis in original).

³ All citations to the Clerk's Papers ("CP") refer to the Tab Number found in the five notebooks assembled by the Board and submitted to this Court as the Record on Review. For example, CP 59 refers to Tab 59 in the notebooks.

2. Wetland Rating System: The Board erred in finding that the City failed to comply with the GMA's BAS requirement when adopting the 3-tiered wetland rating system as part of the City's CAO. The City assigns error to the following statements, findings, and conclusions by the Board regarding the wetland rating system:

The Board does not find in the City's record any current science supporting the truncated wetland rating system or indicating how wetland functions will be identified and protected within this system.

CP 59, p. 33.

Not surprisingly, given City Staff's preference for the existing rating system, which had been used in a comprehensive 2001 wetlands inventory, Adolfson's April 2004 BAS report did not propose to change the Kent rating system, and noted that Ecology's update of its wetland rating system was not yet available in final form.

Id., p. 33.

Retaining this outdated system ignores the advances of science and understanding of wetland functions and values that have occurred over the last decade. Retention of an obsolete, albeit 'comfortable' system makes a mockery of, and totally ignores, the requirement of RCW 36.70A.130(1) that local cities and counties must update CAOs based on BAS, which is continually being refined.

Id., p. 34.

The Board concludes that, with respect to this rating system, Ordinance No. 3746 fails to accurately designate wetlands because the rating system is based on a 1979 classification methodology that does not account for or accurately assess key wetland functions and has been

superseded by better scientific understandings; thus it **does not comply** with the requirements of RCW 36.70A.040(3)(b) and .170(1)(d) to designate critical areas. The Board concludes that the City of Kent, in readopting its wetlands rating system based on obsolete science, failed to consider the guidelines established pursuant to RCW 36.70A.170(2); thus the action of the City is **clearly erroneous**.

Id., p. 35 (emphasis in original).

As to the actual on-the-ground impact of science-based protections, Petitioners correctly note: “It is not [Petitioners’] burden to show that the use of a rating system that complies with best available science will make a difference on the ground compared with one that doesn’t comply with best available science.”

Id., p. 39.

The City’s **wetland ratings system is not within the parameters of the BAS** in the City’s record as acknowledged by Adolfson, Ex. 119, at 1...

Id., p. 43 (emphasis in original).

Petitioners have met their burden of persuading the Board that the City of Kent’s wetland regulations, taken as a whole, are **not within the range of best available science** for protection of the functions and values of wetlands. The City of Kent’s findings and conclusions that it included best available science in developing the wetland protection provisions of Ordinance 3746 are **clearly erroneous**...

Id., p. 45 (emphasis in original).⁴

However, Kent’s early elimination of consideration of a science-based wetlands rating system addressing all wetland functions and its later rejection of the

⁴ This conclusion also applies to Error #3 (“Wetland Buffers”).

overwhelming scientific advice that protection of wetland functions required wider buffers, makes it impossible to assert that Kent *substantively* considered BAS.

Id., p. 43 (emphasis in original).⁵

3. Wetland Buffers: The Board erred in finding that the City failed to comply with the GMA's BAS requirements when adopting the wetland buffers included in the City's CAO. The City assigns specific error to the following statements, findings, and conclusions by the Board regarding the buffers adopted by the City:

The Ordinance 3746 wetland buffers, at 11.06.660, are below the width supported by the science in the record.

Id., p. 21.

The City makes, at best, a *pro forma* response on the merits...Kent's wetland consultants repeatedly cautioned the City that the existing buffers did not utilize BAS.

Id., p. 37.

And Kent has cited to no current local science that it relied on in reducing the recommended buffers.

Id., p. 38.

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

⁵ This conclusion also applies to Error #3 ("Wetland Buffers").

Id., p. 39.

Petitioners have met their burden of proving Legal Issue No. 2. The Board finds and concludes that the action of the City of Kent in its readoption of the inadequate wetland buffer provisions of Section 11.06.600, together with the outdated wetlands rating system of Section 11.06.580, is *clearly erroneous*. The Board concludes that, with respect to the wetland buffer requirements of Section 11.06.600, Ordinance No. 3746: a) failed to protect wetlands as required in RCW 36.70A.040(3)(b), RCW 36.70A.060(2), and RCW 36.70A.172(1); b) failed to include best available science as required in RCW 36.70A.172(1); and c) was not guided by the GMA goals in RCW 36.70A.020(9) and (10).

Id., p. 40 (emphasis in original).

The Board finds and concludes that the challenged buffer provisions [applied pursuant to the inadequate rating system] **do not comply** with the requirements of RCW 36.70A.040(3)(b), .060(2); and .172(1) for critical areas protections. The Board further concludes that the City of Kent failed to include best available science when it readopted its wetlands buffer provisions based on outdated science, and therefore Ordinance 3746, Section 11.06.060 *does not comply* with the requirements of RCW 36.70A.172(1). In reenacting its prior wetland buffer provisions, the City of Kent *was not guided* by GMA goals RCW 36.70A.020(9) and (10).

Id., p. 40 (emphasis in original).

4. Deviation from BAS: The Board erred in ruling that any perceived deviation from strict adherence to BAS was not justified by the City. The City assigns error to the following statements, findings, and conclusions by the Board regarding such justification:

Applying the principles set forth by the Court of Appeals in WEAN, the Board concludes (1) that the City's record fails to demonstrate any 'unique local circumstances' justifying downward departure from BAS and (2) that the City's reliance on other programs, projects, and regulations for wetlands protection is not supported by any BAS analysis.

Id., p. 3.

Facts in the Recitals to Ordinance 3746 and in Respondent's argument do not demonstrate 'unique local circumstances'.

Id., p. 22.

Kent's maintenance of city-owned wetlands, use of volunteers for native plant restoration, support for citizen environmental education and Eagle Scout programs, while laudable, is not unique to the Central Puget Sound area.

Id.

In short, the record in this case fails to meet the WEAN standard of an analysis that would justify reliance on other regulations to support deviation from a scientifically-based wetland CAO.

Id., p. 48.

However, many of the programs that the City lists are not unique to Kent and do not reduce the need for buffers or mitigate risks to unprotected wetlands.

Id., p. 48.

Ordinance Recital H list(s) "programs and regulatory processes that supplement protection of the functions and values of critical areas in Kent." Petitioners correctly note that stormwater regulations [H-1] are used by every

jurisdiction in the Puget Sound region, but they do not reduce the need for buffers to perform additional, wetland-specific functions.

Id., p. 48.

Further, there is no information on whether or how the City's solid waste/recycling/conservation [H-5], educational activities [H-8], and an Eagle Scout program [H-13], which are cited by the City, demonstrate any wetland-related benefits.

Id., p. 48-49.

...the distinct impression created by the memoranda, reports, and documents in the record, is that Recitals H, I, and J were prepared as a post-facto rationale after the City had virtually decided not to upgrade its wetlands protections to be consistent with best available science.

Id., p. 49.

The Board finds and concludes that that the City of Kent's Recitals H, I, and J in Ordinance 3746 – that various planned and existing projects and regulations apart from the Ordinance will protect the functions and values of wetlands – are ***not supported by evidence in the record***... The Board is persuaded that the action of the City in relying on existing projects, programs and regulations in substitution for wetland regulations within the scope of best available science is ***clearly erroneous***.

Id. (emphasis in original).

III. STATEMENT OF FACTS

The GMA requires all cities to identify State-defined “critical areas,” then adopt regulations to protect the “functions” and “values” of those critical areas, and then, pursuant to a statutory schedule, update

those regulations.⁶ The City of Kent began the official process of updating its Critical Areas Ordinance in late 2002, two-and-a-half years before Ordinance No. 3746 was adopted. During the ensuing 30 months, the City exhaustively reviewed and researched the best available science from around the country, held extensive public hearings, heard a wide range of testimony from diverse individuals, scientists, citizens, advocacy groups, and other interested parties, and had heated, well-reasoned debates among the members of various boards, committees, focus groups, and the City Council itself. Eventually, the City settled on a comprehensive, well-drafted CAO that intelligently balances *all* the required GMA planning goals based on the unique needs and interests of the City.

A. **Public and Scientific Involvement and History of the City's Critical Areas Ordinance Update Process**

On October 7, 2002, the City Planning Services staff notified the Kent Land Use and Planning Board (“LUPB”) that the City was required to begin the five-year update of its CAO. CP 41, Exs. 9 and 41. Planning Staff made it clear that “[o]ne key component of this update is to analyze the existing critical area regulation relative to best available science (BAS).” *Id.*, Ex. 174, p.1. Planning staff noted that analysis of BAS was an integral and necessary part of “establishing the most appropriate and beneficial protection measures” for local critical areas and also included the WAC sections regarding the BAS requirement. *Id.* Even at this early

⁶ See, e.g., RCW 36.70A.030(5), .040(3), .060(2), and .170.

stage (two-and-a-half years before the final CAO was adopted), analysis and consideration of BAS was a top priority for the City.

Over the next 30 months, the City hired outside consultants who, along with City staff, provided reviews of the BAS for every facet of the City's critical areas (wetlands – CP 34 at Ex. 106; fish & wildlife habitat – CP 41. at Ex. 107; frequently flooded areas – *Id.* at Ex. 105; critical aquifer recharge – *Id.* at Ex. 104). These well-recognized and highly regarded consultants in their fields provided neutral, comprehensive analysis of the entire range of scientific literature in each critical area.

Regarding wetlands specifically, the City hired well-known Seattle-based Adolfson Associates to perform the BAS review. Adolfson completed its initial review in April 2003, then updated its research again in April 2004. CP 34 at Ex. 106. Adolfson's BAS report analyzed all aspects of the wetland science, and gave the City a comprehensive, scientifically-supported overview of wetland buffers in various jurisdictions, both locally and nationally. Adolfson reviewed and evaluated a wide range of scientific literature and included references to nearly 70 separate scientific documents, "including relevant studies from the [State's] Office of Community Development's 'Citations of Recommended Sources for Designating and Protecting Critical Areas.'" *Id.* at p. 2. Adolfson noted that "higher preference has been given to science and research conducted in the Pacific Northwest as compared to research from other areas of the United States." *Id.*

On March 22, 2004, the LUPB held another workshop to discuss the progress of the CAO update. CP 41 at Ex. 175. Planning Staff's pre-meeting memo updated the LUPB on the status of expert BAS review, submitted draft language for the updated ordinance, and made it clear that "[a]ll consultants will provide technical assistance through the public involvement process." *Id.* at 1. Staff laid out the expected timeline for Board approval of a draft ordinance, and attached WAC sections addressing critical areas requirements. *Id.*

At the March 22 meeting, Principal Planner Kim Marousek again reviewed the CAO update process, emphasized the required inclusion of BAS in the process, and explained that expert consultants were currently conducting scientific reviews for each category of critical areas. In particular, she explained the process of "gap analysis," which compares critical area needs versus current regulations. Based on the wide variation of conclusions among scientists in different locations and disciplines, Ms. Marousek explained there could be a host of different options available for protecting critical areas in Kent. She also emphasized to the LUPB that State law allows departure from the recommendations of BAS as long as the City includes a legitimate rationale for such departures, and balances GMA planning goals. *Id.* See, e.g., WAC 195-365-915(c)

On May 24, 2004, the LUPB held another workshop to address the CAO update. CP 34 at Ex. 176. In its pre-workshop memo, City Staff indicated that "[d]iscussions at the staff level regarding the potential buffer widths and recommendations with regards to BAS are on-going. Within

this discussion, staff is evaluating the Department of Ecology's 4-tiered wetland system which would create four wetland categories rather than three (which currently exist in code)." *Id.* at 1. Once again, BAS, buffer widths, and wetland ratings were the City's primary concerns when updating its CAO. This is also clear from the Power Point presentation by Kim Marousek at that meeting, the first half of which was devoted *solely* to BAS and wetland buffers. CP 41 at Ex. 157.

Regarding the Draft CAO update submitted to the LUPB, several sections are relevant on this appeal. First, even at this stage, the City had decided, based on Adolfson's review of BAS, to use the 3-tier wetland rating system which relies, in part, on wetland habitats described in the U.S. Department of Fish and Wildlife Service's Classification of Wetlands and Deepwater Habitats. CP 34 at Ex. 176 (p. 27 of draft ordinance). The decision to use the City's existing 3-tier system, rather than DOE's new 4-tier system, was consistent with Adolfson's BAS review, which indicated that DOE was still revising their 4-tier system: "Ecology's new wetland rating system is projected to be complete in the fall of 2004 and is not yet available for public review." *Id.* at Ex. 106, p. 9. Thus, the State's proposed 4-tier system (which the Board erroneously found the City should have adopted) was not even developed at the time the City was actively considering its CAO update and was untested and unproven.⁷ Moreover, the City's preference for the more localized standard was

⁷ The City, in a good faith effort to meet its GMA deadline of December 1, 2004, could not delay its process to wait for new information from DOE.

supported by Adolfson's recommendation that science based on local conditions be given precedence in the protection of critical areas. *Id.* at 2.

Also, the draft CAO increased buffer widths, *Id.* at Ex. 175 (p. 2, 29 of draft ordinance), consistent with Adolfson's buffer width recommendations. *Id.* at Ex. 106, p. 9-10. Although these expanded buffers were eventually reduced in exchange for other protections in the final version of the CAO, their inclusion in the initial draft is clear evidence of the City's awareness of the issue, and thoroughness and independence of Adolfson's BAS review.⁸

Also in May of 2004 came the public's formal critiques of the CAO update. On May 19, the first official public comment came in the form of a letter from the King County Realtors Association on behalf of more than 6,500 realtors in King County. CP 41 at Ex. 61. The depth and breadth of information presented in this letter reflects the keen interest and sincere involvement the public had -- and would continue to have -- in the CAO update process. The Realtors' comments addressed wetland functions and values, fish and wildlife habitat protection, stream basin and watershed rankings, GMA planning goals, and a host of other issues.⁹ *Id.*

In July 2004, the City began a series of informal "open house" events to explain the process and gather public input. At the first of these (July 22, 2004), the City distributed a 2-page summary of the proposed

⁸ Based on the fact that this original proposal included expanded buffers, there can be no argument that the City did not fully consider wider buffers as part of its CAO update.

⁹ The letter also provided a myriad of references to scientific studies supporting their concern that localized scientific data be given precedence over data extrapolated from studies in dissimilar, non-urbanized settings across the country. *Id.*

changes to the CAO, and invited attendees to offer their comments and suggestions. *Id.* at Ex. 121. City Staff and expert consultants were on hand to answer questions and provide information on the overall process. That initial public open house had a surprisingly positive turnout, and more than 25 citizens representing varying interests and viewpoints recorded their names as official parties of record. *Id.* at Ex. 27.

On August 9, 2004, the LUPB held yet another workshop on the CAO. *Id.* at Ex. 10. In its pre-workshop memo, Staff reviewed the overall CAO process, addressed prior public comments, and attached an updated draft ordinance. *Id.* at Ex. 177. Several citizens attended this meeting and established themselves as parties of record (*Id.* at Ex. 28), and Principal Planner Marousek gave another presentation on the CAO update, including BAS, wetland ranking, and wetland buffers. *Id.* at Ex. 158.

Less than a month later, on September 3, 2004, the City received DOE's comments to the Draft CAO. CP 34 at Ex. 67.¹⁰ DOE made clear its opinion that "[t]he wetland classification system proposed in the current draft of your CAO is inconsistent with the best available science." *Id.* at p. 3. Mr. Robohm clearly outlined what *DOE believed* to be the BAS and why DOE's proposed standards should be strictly adhered to in Kent's CAO. *Id.* He even enclosed several draft DOE documents

¹⁰ DOE's comments came in the form of a letter by wetland specialist Richard Robohm.

explaining various methods under which DOE believed buffer widths can be calculated to best protect various functions and values.¹¹

On September 8, 2002, the City formed a special focus group with representatives from regional businesses, employers, developers, and City Planning Staff. CP 41 at Ex. 29. The group examined the proposed CAO update in light of a wide variety of community goals and made recommendations based on the reactions and concerns. The formation of this group is yet another example of the City's commitment to make the CAO update a fully integrated – and openly *public* – process addressing the *entire range* of economic, political, social, and environmental concerns confronting a city of its size.

Five days later, on September 13, 2004, the LUPB held yet another public hearing to gather community input on the draft CAO update. *Id.* at Exs. 16, 30, and 141. The pre-hearing memo from Planning Staff gave an overview of the key changes to the existing CAO, including the 3-tiered rating system and expanded buffers, plus an updated COA draft based on additional BAS review, internal assessment, and public comment. CP 34 at Ex. 178.

During this time, public comment continued to pour in. Citizen comments urged the City to consider the entire range of GMA planning goals, and not to sacrifice adherence to the spirit of the GMA by over-

¹¹ In light of this nearly 40-page document, it is obvious that Kent clearly understood DOE's position, and clearly understood how the City's draft CAO update comported with (and departed from) DOE's position.

emphasizing wetland ranking and buffers. *See* CP 41 at Exs. 70 (9/11/04) and 72 (9/13/04). In contrast, a few citizens argued for expanded buffers or adherence to the DOE-recommended 4-tier ranking system. *Id.* at Ex. 73. These in-depth, knowledgeable public comments went far beyond the surface-level objections or comments often received by cities during land use planning, and made clear that Kent's citizenry was highly informed, and highly involved in the issues surrounding the CAO update.

At the September 13, 2004 meeting, the LUPB heard testimony from at least 10 separate individuals and presentations by City staff. *Id.* at Ex. 141. The Staff's presentation again outlined the important requirements for updating critical areas regulations pursuant to the GMA. *Id.* at Ex. 159. As before, this presentation included an in-depth comparison of the proposed wetland buffers to the then-existing buffers, and a review of the BAS requirements *Id.* at Ex. 141. Nearly all of the public comments at this hearing specifically addressed wetland ranking and buffer widths. *Id.* Some citizens argued for expanded buffers, while others argued for smaller buffers. Some urged adoption of the 4-tier ranking system, while others argued for retention of the 3-tier system. *Id.* However, given that the CAO update is a lengthy, comprehensive treatment of *every type* of critical area, it is important to note that nearly every public comment, and nearly every point of debate at every public

hearing, workshop, and Planning Board, Committee and City Council meeting dealt *specifically with wetland buffers and wetland BAS*.¹²

One clear indication of the City's awareness of the issues is the "Errata and Response to State Agency Comments." *Id.* at Ex. 108. In this document, Staff clearly recognized that DOE did not approve of the 3-tier ranking system or the proposed buffers. *Id.* However, regarding other DOE concerns, the City acknowledged DOE's position, then offered justification for departure from those recommendations.¹³ *Id.* However, Staff concluded that "[b]ased on the City's analysis, the three-tiered system is consistent with best available science. Staff recommends retaining the three-tiered system to retain some consistency with the currently adopted regulations." *Id.*

B. City Council Begins Review and Evaluation of Options and Alternatives for its CAO

On October 4, 2004, the Planning and Economic Development Committee ("PEDC") of the City Council addressed the draft CAO forwarded by the LUPB. *Id.* at Ex. 11. During that meeting, Ms. Marousek gave the PEDC a full update on the proposed CAO, including her *fourth* Power Point presentation on the subject, and explained that Staff proposed increasing wetland buffers by 25 feet beyond those in the existing code (CAO). *Id.* at Ex. 142 and 160.

¹² This is important because it clearly shows that wetland buffers was the most debated, closely scrutinized, and over-analyzed portion of the entire CAO.

¹³ For example, staff recognized DOE's recommendation that the "City should adopt the Department of Ecology's wetland rating system (August 2004) to be consistent with BAS." *Id.* at p. 3.

After the presentation, Committee members voiced several concerns about the proposed CAO, centering largely around the proposed expanded wetland buffers and their impact on all of the other GMA planning goals.¹⁴ *Id.* at p. 3. In addition, the PEDC also heard considerable testimony from City Attorney Tom Brubaker, Environmental Engineering Manger Bill Wolinski, Public Works Wellhead Engineer Kelly Peterson, and Wetland Biologist Teresa Vanderburg. *Id.* At the end of this meeting, the PEDC forwarded the draft to the City Council. *Id.*

On October 19, 2004, the full City Council held its own workshop to examine and discuss the CAO update (*Id.* at Exs. 17 and 180), then considered the CAO at its November 2, 2004 meeting. *Id.* at Exs. 23 and 143. The Council then referred the draft back to the PEDC for continued analysis and development. *Id.* at Ex. 143.

Prior to the next PEDC meeting, staff member Kelly Peterson circulated a memo that analyzed the proposed wetland buffers and was intended “to make sure everyone is on the same page with regards to getting the CAO updated.” *Id.* at Ex. 111, p. 1. Peterson noted that “Adolfson is looking at options of how much the City may be able to reduce buffers, with enhancement, and still be consistent with BAS.” *Id.* Again, the City was fully aware of prescriptive buffers under BAS and what was required to deviate from those prescriptions. In fact, Peterson

¹⁴ For example, Councilmember White expressed concern that expanded buffers would further reduce the buildable lands inventory when the GMA expressly requires denser urban development in the Urban Growth Boundary. He also expressed concern that wetland buffers are an ever-increasing burden on the private property rights of Kent citizens. *Id.*

gave an outline of what “staff and consultants will explain to the Committee” at the upcoming November 15 meeting:

- 1) Brief introduction (Kim)
- 2) Describe BAS (Richard)
- 3) The steps the City has completed to recommend the wetland buffers in the proposed draft CAO (Adolfson)
- 4) The results of the additional BAS analysis since the last council meeting (Adolfson)
- 5) The absolute minimum buffers, with enhancement, the consultants feel they can defend from a BAS perspective given concerns expressed by the council. (Adolfson)
- 6) *Describe the steps to deviate from BAS or to balance all GMA goals. What additional work will be required from staff and consultants to do this deviation or GMA goal balance. (Richard)*
- 7) *Describe the potential risks of these changes. (Richard)*

Id. p. 1 (emphasis added).

C. Comprehensive Wetland Review at PEDC Meeting

On November 15, 2004, the PEDC took up the issue once again.

Id. at Exs.12, 144, and 181. Staff’s pre-meeting memo again indicated the centrality of buffers and BAS to the Council’s decision-making process:

While remanding the ordinance to the P&ED Committee, the Council indicated that *the issue of greatest concern was that of wetlands and wetland buffers*. As drafted, the ordinance proposed an increase in buffer widths of 25-feet for all three classes of wetlands. This increase was based upon ‘best available science.’ However, *there was concern that standards such as this were not flexible enough to respond to the individual or unique circumstances which may be present in the everyday administration of the regulations*. Therefore, the Council sent the ordinance

back to the P&ED Committee *to focus on the wetland buffer issue and identify options, if any.*

Id. at Ex. 181 (emphasis added).

At the meeting, Ms. Marousek addressed the Council's concerns on buffer issues, explained the existing buffer proposals, and also discussed alternatives proposed by Staff. *Id.* at Ex. 144, p. 1. Consultant Richard Weinman then spoke to the PEDC about the BAS requirements under the GMA, and the compliance process. *Id.* Next, wetland scientist Lizzie Zemke from Adolfson addressed the proposed buffer widths, buffer averaging, and responded to various questions from Councilmembers. *Id.*

These experts, including Environmental Engineering Manager Bill Wolinski, then answered question from the Committee. Again, the discussion focused almost solely on the issue of wetland buffer widths and inclusion of BAS. For example, Mr. Weinman addressed Councilmember White's concerns about the balancing of BAS with the goals of the GMA, and how various jurisdictions have approached these issues. Ms. Zemke addressed questions on the effects of buffer enhancement on highly degraded buffers in the City. Mr. Wolinski addressed questions and concerns about the effect of buffers on flood storage volume, erosion control, water quality, storm water runoff treatment, and maintenance of base flow in area streams. Finally, Ms. Marousek and Mr. Wolinski addressed the concerns on buffer differential between the East Hill and Valley Floor areas of the City.¹⁵ *Id.* In the end, the Council Committee

¹⁵ Again, wetland buffers continued to be the central subject of the entire CAO process.

unanimously voted to hold another public hearing “with the express purpose to consider the proposed wetland buffer modifications to the draft Critical Areas Ordinance.” *Id.* at 1.

D. Special Committee of the City Council (PEDC) Holds Additional Public Hearings and Meetings on Buffers and BAS

The special public hearing of the PEDC was held two weeks later, on November 22, 2004. *Id.* at Exs. 13, 32, 145, and 182. Staff’s pre-hearing memo to the PEDC included a report from Adolfson Associates on options for percentage-based buffer reduction in degraded areas. CP 34 at Ex. 112. In addition, Adolfson wrote that “use of a three-tiered wetland ranking system, while appropriate for the local setting of Kent, *may also be viewed as a departure from science by Washington State Department of Ecology.*” *Id.* at 4. Importantly, Adolfson specifically noted that “[d]epartures from science will need to be documented in a concluding statement, referred to as the Findings of Fact, that the City will submit to the Washington State Department of Community, Trade, and Economic Development (CTED) as part of the GMA update process.” *Id.*

At the November 22nd special meeting, 33 people recorded themselves as parties of record, and the PEDC heard live testimony and comments from more than 20 separate individuals, all addressing the sole issue of wetland buffer widths. CP 41 at Ex. 145. As had been true since the process had begun years prior to this meeting, the citizen comments were nearly universally opposed to expanded wetland buffers. *Id.* After a

two-hour public hearing followed by Committee debate, a motion to approve the draft ordinance and forward it to the full Council failed, 2-1.

The next week, Adolfson Associates provided the City with yet another memo examining the City's interest in retaining the localized 3-tier wetland rating system, rather than the 4-tier system demanded by DOE and CTED. *Id.* Adolfson's expert conclusion was that:

While it is recognized that the State's new 2004 wetland rating system may be appropriate for ranking wetlands at a state or county level where there is wide diversity of wetland types, *urban areas such as Kent find that a more simplistic system makes better practical and scientific sense given the lesser diversity of wetland types. Adolfson and staff feel that wetland functions and values will be protected, as mandated under the GMA, with the existing City rating system.*

Id. at p. 2 (emphasis added).

The CAO was next addressed at the January 19, 2005 PEDC meeting. *Id.* at Exs. 19, 33, 147, and 184. Prior to that meeting, the City continued to receive a large amount of written public comment to the proposed CAO update. One such communication came from Councilmember Les Thomas. *Id.* at Ex. 84. His main request was "that staff prepare for our immediate consideration an ordinance that would update the City's critical area protection consistent with the earlier draft ordinance ***BUT with the modification: make no changes to the City's existing buffer requirements.***" *Id.* at p. 1 (emphasis added). Thomas' 11-page memo addressed *the full range of GMA planning goals*, and how

wetland buffers either promote or hamper those goals. *Id.* Addressing the requirements of BAS, Mr. Thomas reminded the Committee that:

I was the vice chair of the Government Ops Committee in Olympia when we made the substantive changes in the GMA... The text in question reads “must include BSA”. It does not read “must strictly adhere to BSA” or even “must use BSA”... *In 1995, we left the language vague... on purpose. We didn’t want to necessarily put strict parameters on communities, recognizing that all communities are not the same, and that each community should have some say in the direction that it wants to take in planning its own future rather than having the state dictate its future.*

Id. (emphasis added).

In its pre-meeting memo, City Staff presented two separate buffering options. *Id.* at Exs. 161 and 184. Option 1 incorporated the expanded buffers originally proposed, while allowing for 10%, 15%, or 20% reduction in exchange for the enhancement of degraded buffers. *Id.* at Ex. 161, p.1 and Ex. 184, p. 1. Option 2 retained the then-existing buffers. Regarding Option 2, Staff made it clear that re-adoption of the smaller buffers “would present a departure from Best Available Science (BAS). WAC 365-195-915 defines a process should a jurisdiction opt to depart from BAS when adopting regulations for the protection of critical areas.” *Id.* at Ex. 184, p. 2. In fact, staff went so far as to prepare and attach a revised SEPA addendum as recommended by the GMA. *Id.*

After the presentation outlining the two buffer options, Community Development Director Fred Satterstrom presented a third option. *Id.* at Ex. 147. He indicated DOE had contacted him to suggest that the issue be

postponed to allow DOE time to meet with the development community and City staff in hopes of reaching a consensus for wetland buffering. This option was referred to as “Option 3.” *Id.* When Mr. Satterstrom concluded, the Committee opened the floor for public comment. *Id.* Again, the majority of comments urged the PEDC to consider alternatives to buffer expansion. At the end of the hearing, the PEDC voted unanimously to hold a public hearing on Option 3. *Id.* at p. 2. The PEDC further instructed Staff to form a focus group of community and environmental representatives to discuss buffer options, and to present the findings of that group at the next PEDC meeting. *Id.*

E. Focus Group Established to Address Wetland Buffers, BAS and GMA Goals Compliance

Staff assembled the focus group to address the wetland buffers, and between January 19 and February 22, 2005 that focus group met on three occasions, and formed a subcommittee “to propose new language based on the discussions from these meetings.” *Id.* at Ex. 185. Prior to the February 28 PEDC meeting, the group asked to continue their work beyond the February deadline, and present their findings at the March 21, 2005 PEDC meeting. *Id.*

On March 14, 2005, Adolfson Associates produced yet another report, this time focusing specifically on the recommendations of the focus group, which had held additional meetings and recommended what it called “Option 3.” CP 34 at Ex. 119. Option 3 retained the then-existing buffers (*i.e.*, rejecting the expanded buffers), and added incentives for

expanding buffers, buffer enhancement regulations, and implementation of a unique “wildlife habitat protection plan.” *Id.* Adolfson outlined the specific ways that Option 3 buffers would deviate from the strict recommendations of DOE, and how various other regulations, such as the habitat protection plan, would alleviate potential risks. *Id.* As had been true throughout the entire process, the City was fully informed of the potential benefits, impacts, and risks involved in the CAO update.

Adolfson’s March 14, 2005 report also addressed the use of the City’s 3-tier wetland rating system and how it meets the requirements of WAC 365-190-080(1) (a).¹⁶ The City’s 3-tier rating system is based on diversity of habitats, wetland area, vegetation, and the presence or absence of bogs, significant waterfowl or priority species. The system separates wetlands according to the factors listed above with highly diverse, larger wetlands being higher in function and value, recognizing those wetlands sensitive to disturbance or rare (*e.g.*, wetlands equal to or greater than 10 acres in size, bogs, habitat for waterfowl or priority species), and the ability to compensate for destruction (*e.g.*, presence of habitat diversity).¹⁷ Adolfson concluded that the City’s rating system is scientifically based, meets the requirements of WAC 365-190-080(1) (a), and would result in no risks to wetland functions and values.

¹⁶ Per this section, a local jurisdiction should *consider* the following: (1) Washington State 4-tiered wetland rating system; (2) wetland functions and values; (3) degree of sensitivity to disturbance; (4) rarity; and (5) the ability to compensate for destruction or degradation.

¹⁷ Wetland size is used as a proxy to rank the ability of the City’s wetlands to provide area-related functions such as stormwater storage, flood storage and water quality improvement.

At the March 21 hearing, Ms. Marousek gave another presentation to the PEDC and the public on the options. This presentation also included an “Option 4” which was identical to Option 3 except it included the expanded buffers from Option 1. CP 41 at Ex. 162. Ms. Marousek again made it clear that the wetland buffers in Options 2 and 3 were considered *departures from the recommendations of BAS*, and would need to be explained and justified if adopted. *Id.* at Ex. 162 and CP 34 at Ex. 186. A pre-hearing memo to the Committee even included full draft versions of the CAO for *each separate option presented*. CP 34 at Ex. 186.

Prior to opening the hearing for public comment, the PEDC had a closed-door executive session with the City Attorney to discuss risks and mitigation issues that would arise under the various options. CP 41 at Ex. 149. This meeting saw the highest public turnout yet, including 28 parties of record that personally addressed the council. *Id.* at Ex. 35. Once again, the majority of public input urged the adoption of reduced buffers in exchange for other mitigation measures as embodied in Option 3. *Id.* at Ex. 149. After closing the public hearing and discussing the options, the PEDC took the matter under advisement and scheduled a final vote. *Id.* On April 4, 2005, the PEDC unanimously approved Option 3, and forwarded the complete proposed ordinance to the City Council for its review and final decision-making. *Id.* at Ex. 150.

F. Council Adopts Ordinance No. 3746 With 3-tiered Rating System and Retaining Existing Wetland Buffers

On April 19, 2005, after more than two and one-half years, more than a dozen public meetings, two focus groups, various workshops, hundreds of comments from citizens, businesses, property owners, environmentalists, State agencies, City Staff, and others, the Kent City Council officially adopted Ordinance No. 3746, the CAO ordinance, including “Option 3” for wetland buffers. *Id.* at Ex. 153.

Ordinance No. 3746 repealed Chapter 11.05 of the Kent City Code (relating to wetlands management), created a new Chapter 11.06 (“Critical Areas”), amended Chapter 14.09 (regulating flood hazard regulations), amended Section 15.08.260 (Green River corridor special interest district regulations), amended Section 15.08.400 (regarding planned unit development), amended Chapter 11.03 (adding SEPA substantive authority), and made various other related critical area amendments. The Ordinance, 157 pages long, includes detailed recitals explaining the basis for the changes, the process and procedures followed by the City in adopting the Ordinance, a detailed explanation of the process and documents considered, and extensive findings on interpretation and inclusion of BAS in both the process and the final product. CP 2, Ex. A. The Ordinance explained the Council’s goals in adopting the Ordinance and in utilizing BAS. As one example, the Ordinance provides:

We have identified, collected, and assessed the available scientific information offered by staff, the City’s environmental consultants, by state agency representatives, and by the public in order to interpret the nature, scope, and

application of best available science to protect the functions and values of the City's critical areas, which exist in a highly complex, natural, and built urban environment. Although the Council believes it has developed these regulations in accord with the range of best available science, the buffers adopted in these regulations exist on the low end of the range in order to balance the needs of the natural environment against other GMA goals, including maintaining urban densities by encouraging urban growth, reducing sprawl, protecting property rights, and encouraging economic development.

Throughout this process, the City Council's intent has been to develop and implement a comprehensive, balanced, and fair regulatory program that requires avoidance, minimization, and mitigation of critical areas and their buffers, in that order of preference, by anyone whose activities affect critical areas. To that end, the City Council has also endeavored to protect the public from injury, loss of life, or loss of property or other financial impact.

Id., p. 2 (emphasis added).

G. Proceedings Before The Growth Board

Soon after the City adopted the updated CAO, the State Agencies (DOE and CTED) filed a petition for review with the Board. CP 2. First, the Agencies alleged that the 3-tiered wetland rating system and wetland buffers adopted in the CAO were not consistent with BAS, and that the departure from BAS was not justified by the City's other environmental regulations or the need to balance all 13 GMA planning goals.¹⁸

The Master Builders Association ("MBA") and the Building Industry Association of Washington ("BIAW") both intervened on behalf

¹⁸ The issues not being appealed here are not discussed in this Brief.

of the City (CP 7), the Livable Communities Coalition intervened on behalf of the State Agencies (CP 13), and the Washington Association of Realtors and Citizens Alliance for Property Rights both requested permission to participate as *Amicus* (CP 9 and 21). All parties filed briefs, and the Board held its hearing on March 24, 2006. CP 58. The Board issued its Final Decision and Order (“FDO”) on April 19, 2006. CP 59.

In its FDO, the Board essentially adopted the arguments of the State Agencies *in toto*. *Id.* The Board ruled against the City and MBA/BIAW on every single issue presented. *Id.* The City and the MBA/BIAW separately appealed the Board’s FDO to the Superior Court, where each appellant was given a separate case number. In addition, each party requested both the Board and the Superior Court to certify the appeal directly to the Court of Appeals. Eventually, the Superior Court appeals were consolidated, both the Superior Court and the Board authorized the direct appeal, and this Court accepted discretionary review.

IV. STANDARD OF REVIEW

The legislature enacted the GMA to minimize threats that uncoordinated and unplanned growth pose to the environment, economic development, and public welfare. RCW 36.70A.010. In doing so, “[t]he Legislature granted wide latitude to local governments to customize their comprehensive plans according to local growth patterns, resources, and needs.” *WEAN v. Island County*, 122 Wn. App 156, 163, 93 P.3d 885 (2004). Under this framework, the law is clear that the City of Kent has broad discretion in planning for and implementing its growth management

programs. RCW 36.70A.320(1). *See also, King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000). In proceedings before the Board, the City's actions under the GMA were entitled to a presumption of validity, and the State Agencies bore the burden of showing that Ordinance No. 3746 is "clearly erroneous." The Supreme Court has made this crystal clear:

The Growth Management Act limits the purview of the Growth Management Hearings Board. *In reviewing the City's actions, the Board is required to presume that comprehensive plans and development regulations are valid. The burden is on the petitioner to show a city's actions do not comply with the GMA, and the Board must find compliance unless the City's action is clearly erroneous.*

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 116 Wn. App. 48, 55, 65 P.3d 337 (2003). The Board is only allowed to find non-compliance if the City's actions are "clearly erroneous;" thus, only if the Board is left with "the firm and definite conviction that a mistake has been made." *Dept. of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Pursuant to RCW 36.70A.320(1) and .3201, the Board was required to grant deference to the City in how it plans for growth and how it complies with GMA mandates, provided that its policy choices are consistent with the goals and requirements of the GMA. RCW 36.70A.320(1). The Board cannot substitute its judgment as to the best public policy for the City of Kent – or any other government entity. It is

not for the State Agencies, or the Board, to make or second-guess policy choices for and by the City in meeting its GMA obligations. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.2d 322 (2005). These important choices – including those underlying the City’s determination of the most appropriate wetland rating system, the most appropriate wetland buffers, and the application of BAS to meet GMA planning goals and the City’s needs and interests – are for the City Council to make. As the State Supreme Court recently noted:

[T]he growth management hearings boards do not have authority to make “public policy” even within the limited scope of their jurisdictions, let alone to make *statewide* public policy. The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute. [citations omitted].

Viking Properties, Inc., 155 Wn.2d at 129.

On appeal, this Court reviews the Board’s conclusions *de novo*, and applies the standards of the Administrative Procedures Act (“APA”) (RCW 34.05, *et seq.*) directly to the record before the Board. *Diehl v. Mason County*, 94 Wn.App 645, 652, 972 P.2d 543 (1999). Of the nine possible grounds for relief under the APA, three apply here:

- (d) The [Board] has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court...
- (i) The order is arbitrary and capricious.

RCW 34.05.570(3).

Although the City initially bears the burden of proving that the Board's order is invalid, this Court has repeatedly made it clear that "because the legislature has clearly stated its intent to give [cities] considerable discretion in land use planning under the GMA, we give no deference to a board's ruling that fails to apply this more deferential standard of review to a [city's] action" *Clallam County v. WWGMHB*, 130 Wn. App 127, 133, ___ P.3d ___ (2005). In this case, the Board has far overstepped its limited role under state law, and substituted its judgment for that of the City of Kent. The Board's decision makes it clear that it gave no deference whatsoever to the City's reasoned, thoughtful and well-balanced approach to growth planning in its own jurisdiction as allowed – and in fact mandated – by the GMA. The Board has misinterpreted and misapplied the law under the GMA, and issued an arbitrary and capricious Order (FDO) that is not supported by substantial evidence. Consequently, the Court should overturn the Board's April 19, 2006 FDO and hold that the City is in compliance with the requirements of the GMA.

V. ARGUMENT AND AUTHORITY

The issues on appeal can be divided into two major areas. First, that the Board and the State Agencies have improperly elevated wetland protection above the entire range of planning goals the City is required to address under the GMA, and by doing so substituted its judgment and discretion for that of the Kent City Council. And second, that the Board

wrongfully found and concluded that the City failed to “include best available science” when adopting (1) the 3-tiered wetland rating system and (2) the wetland buffers included in the CAO.¹⁹

A. Framing the Issues: (1) Overall GMA Requirements and (2) “Best Available Science”

To frame the issues in this appeal, it is necessary to understand and appreciate two main principles: (1) the GMA’s overall requirements for designating and protecting critical areas, and (2) the specific requirement to “include best available science” when doing so. These are the principles that must guide any decision on the merits of this case.

1. The GMA’s General Requirements for Designating and Protecting Critical Areas

The first statute implicated in this case is RCW 36.70A.020, which lays out the 13 distinct goals that a City must consider when developing comprehensive plans and development regulations.²⁰ Typically, parties rely heavily on these stated goals to justify their decisions. The same is true here. The State Agencies claimed, and the Board agreed, that the City failed to properly analyze, balance, rely on, or implement these planning goals. However, two things must be kept in mind when addressing these planning goals in the current context. First, while the 13 GMA planning

¹⁹ The various other issues addressed by the Board and challenged by the City are subsumed within these two main areas.

²⁰ These goals are: (1) promotion of urban growth, (2) reduction of urban sprawl, (3) transportation, (4) affordable housing, (5) economic development, (6) protection of private property rights, (7) timely and fair permit processes, (8) maintenance of natural resource industries, (9) open space and recreation, (10) environmental protection, (11) citizen participations and coordination, (12) adequate public facilities and services, and (13) historic preservation. *Id.*

goals are important in the development of a City's CAO, they must be given their proper place in the equation. The statute itself makes it clear that these various goals (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." *Id.* (emphasis added). Thus, the GMA requires local jurisdictions to consider and be guided by "environmental protection" *as well as all of the other 12 GMA goals*. The statute does not emphasize one of the goals at the expense of any other. Local jurisdictions must give equal weight to *all* and, where they may conflict, GMA gives the local jurisdiction very broad authority to "balance" the goals, taking into account local circumstances, local conditions, and local needs. Unlike the State's "one issue" (wetland protection) and "one-size fits all" (4-tier rating system) approach, the City, pursuant to the GMA, gave due consideration to and was guided by *all* of the GMA planning goals – not just wetland protection.

Moreover, these goals, while important, are process-oriented, and not outcome-oriented. To comply with the GMA, a City must *understand* the goals, must *analyze* the goals, and must *be guided by* the goals. These goals, however, do not require a specific outcome of any particular development regulation.²¹

²¹ Any argument that the end-result of a specific regulation violates RCW 36.70A.020 must be viewed skeptically, since these planning goals do not compel any specific result.

The second issue involves the nature of a CAO in particular. A critical areas ordinance deals *solely* with critical areas. Critical areas, by their very nature, clearly implicate the two “environmentally-based” planning goals.²² However, the fact that a critical areas ordinance deals exclusively with environmental regulations does not mean that only environmental planning goals are implicated. In fact, the opposite is true. Since a CAO is so clearly natural-environment-based, a City must take even greater pains to ensure that the *non-environmental* planning goals are adequately addressed and analyzed, and that the environmental planning goals are not given greater weight or importance. In adopting Ordinance No. 3746, the City of Kent clearly recognized that it was obligated to protect the functions and values of its critical areas to be compliant with the GMA. However, the GMA does *not* require protection of critical areas to the maximum extent possible, or above other GMA planning goals.

The requirement to identify and adopt regulations to protect the functions and values of critical areas stems from RCW 36.70A.040(3), .060(2), .170(1)(d). Once adopted, cities are required to review the regulations at regular intervals, and to revise them if necessary to ensure continuing compliance with the goals and requirements of the GMA. RCW 36.70A.130(1)(c). Thus, while the GMA requires local planning to take place within a framework of State goals, “the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter,

²² RCW 36.70A.020(9) “open spaces;” and RCW36.70A.020(10) “environment.”

and implementing a county's or city's future rests with that community.” RCW 36.70A.3201; *Whidbey Environmental Action Network* (“WEAN”) *v. Island County*, 122 Wn. App. 156.²³

The importance of maintaining the proper perspective on these issues applies in other aspects of this case, and cannot be over-emphasized. For example, while DOE is certainly skilled and capable in its area of expertise, it is indisputably a “single-issue” government agency. In contrast, the City of Kent does not have the luxury of focusing on a single issue when governing a city with a population of more than 80,000 citizens. The Kent City Council is responsible to *all* of its citizens, and must take into account *all* issues, including *all* 13 GMA planning goals.

Similarly, in considering this appeal, and the hundreds of pages of public record and exhibits before the City and the Board, the Court must keep in mind that the wetland regulations are only a small slice of the entire 157-page Critical Areas Ordinance. The CAO, in turn, is only a small slice of the City's entire comprehensive plan and development regulations. And, the Comprehensive Plan, in turn, is only a small slice of the policy-making and regulatory environment of the City of Kent. So, while the City's wetland regulations will be exhaustively analyzed in this appeal, these regulations are merely a small subset, of a subset, of a subset, of the policy and regulatory environment of the City. With that in

²³ Implementing regulations also provide broad discretion to the local government in deciding what science to use and how it should be applied to the local environment. *See*, WAC 365-195-205(2), (3); *HEAL v. CPSGMHB* (“HEAL”), 96 Wn. App. 522.

mind, it becomes even more clear that the exhaustive and seemingly endless process of public hearings, discussions, meetings, focus groups, workshops and debates on the narrow issues of wetland rankings and buffers was far beyond what is expected, much less *required*, of the City as it went about the process of amending its critical areas ordinance.

2. “Best Available Science”

The second concept that must be understood to properly analyze this case is the “best available science” requirement of 36.70A.172(1):

In designating and protecting critical areas under this chapter, counties and *cities shall include the best available science in developing policies and development regulations* to protect the functions and values of critical areas..

Id. (emphasis added). No provision of the GMA clearly defines BAS, and only a few court cases have analyzed the requirement. *See, Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 834 (2006). While CTED has established non-binding *advisory* guidelines regarding BAS (*see*, WAC 365-190-900, *et. seq.*), those guidelines do not answer the question of exactly what science is the best available, the quantum of science needed to satisfy the statutory requirement, or exactly how the science is applied. Accordingly, based on the broad deference granted to cities under GMA, and the mandatory requirement to “balance” the 13 non-weighted GMA goals, the ultimate decision of what it means to include BAS in designating and protecting critical areas is left to elected government officials. *See, e.g.*, RCW 36.70A.320, RCW 36.70A.3201;

HEAL, 96 Wn. App. at 531-32. The court in *HEAL* made clear that the Legislature intended that cities and counties have the broad authority to review scientific evidence and to “balance” that evidence among the many goals and factors to fashion “... locally appropriate regulations based on the evidence not on speculation and surmise.” *Id.*, 96 Wn. App. at 532.

One of the State’s Assistant Attorneys General in this case emphasized this very point in a 1999 Law Review article:

Local diversity has an impact in determining what is the ‘best’ science. The goals of the Act, the practicality of the ‘science’ and the fiscal impact, relating to the availability of information and to the ultimate decision, must be balanced by a local government in determining how to designate and how to protect critical areas.

The wider the dispute of the scientific evidence, the broader the range of discretion allowed to local governments. Ultimately, a local government must take into account the practical and economic application of the science to determine if it is the ‘best available.’

Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas under the Growth Management Act*, 23 Seattle U. L. Rev. 97, 104 (1999) (emphasis added). This thoughtful balancing, taking into account the “practical” and the “economic” application of the science to determine if it is the “best available” is precisely what the City did when it enacted Ordinance No. 3746.

Based on the cases and Board decisions addressing the issue, RCW 36.70A.172(1) has three general components. If the City meets each of

these three standards, then it has complied with the statute, and its BAS obligations.

Requirement #1: The first important component of the BAS requirement is to accurately interpret the term “include” as used in the statute. This is especially important in this case because the State argued below that the City failed to “incorporate,” or “implement,” or “utilize,” BAS in adopting Ordinance No. 3746. This is not a distinction without a difference. Washington courts have consistently held that the requirement to “include” BAS is specifically *not* a requirement to “incorporate” that science into the final product (*i.e.*, the CAO).

For example, in *HEAL v. CPSGMHB*, *supra*, this Court asked “what meaning to ascribe to the best available science requirement found in RCW 36.70A.172(1).” *Id.* at 528. The Court found:

The Board correctly concluded the best available science was to be part of the *process* of developing critical areas regulations... The Board rejected the idea that the statute required any particular substantive outcome or product. The Board is correct.

Id. at 531 (internal quotations omitted). In the end, neither the RCW nor the WAC required a City to actually *incorporate* that science into the final ordinance. *Id.* This interpretation was upheld again in 2004 in *WEAN v. Island County*, *supra*. The *WEAN* Court held:

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.

Id. at 173 (emphasis added). Based on these cases, the first requirement of RCW 36.70A.172(1) is that the “[b]est available science must be *included in the record* ...” *HEAL*, 96 Wn. App. at 532 (emphasis added). The City is not required to include (or “incorporate”) the best available science into the ordinance or regulations itself. Consequently, it is not important that the City may not have “included,” “incorporated,” or “utilized” BAS in its CAO (Ordinance No. 3746) itself.

With respect to this first requirement, to assemble the BAS for the record, WAC 365-195-910, “Criteria for Obtaining Best Available Science,” offers guidelines for ensuring that the City is accurately able to identify and assemble the best available science on any given issue. As the record before the Board and this Court clearly establishes, Ordinance No. 3746 followed the guidelines set forth in WAC 365-195-910 and is properly based upon the requirement that BAS be “included” in the record. Even the Board had to agree that BAS was properly included in the record.

Requirement #2: Having decided that the City must – and did – assemble BAS and include it in the record of a CAO (requirement #1), the next step is to determine to what extent that BAS must actually be considered or adopted when drafting the regulation. In *HEAL*, this second aspect was the main point of contention:

[E]veryone agrees the best available science must be included in the process. The disagreement is in *how much* best available science controls the substantive outcome of the policy making process under this statute.

Id. at 530, (emphasis added). In *HEAL*, the City argued that “ ... this statute creates a procedural requirement – and only a procedural requirement.” *Id.* In other words, as it gathered the appropriate science, and included that science in the public record, the City claimed, it did not even have to consider passing an ordinance that complied with the scientific recommendations. The *HEAL* court made it clear that the City was wrong on the issue:

Best available science must be “included” in the record, but contrary to the City’s position on appeal... mere inclusion is not all that is required... The Legislature passed RCW 36.70A.172(1) five years after the GMA was adopted. It knew the other factors, but neither made best available science the sole factor, the factor above all others nor made it purely procedural. ***Instead, the Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise.***

Id. at 531, (emphasis added).

That BAS not only be “included” in the record but also “considered” when drafting regulations was echoed by the *WEAN* court. “*HEAL* requires that evidence of BAS must be included in the record ***and must be considered substantively*** in the development of critical areas policies and regulations.” *WEAN*, 122 Wn. App. at 172 (emphasis added). “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.” *Id.* at 173.

As with requirement #1 above (assembly and inclusion of best available science), the Washington Administrative Code also offers guidance on requirement #2 (substantive consideration of the science when drafting regulations). To show that BAS has been considered, WAC 365-195-915 suggests that Cities address three specific items on the record: (1) policies and regulations intended to protect critical areas, (2) relevant scientific information actually used in the decision-making process, and (3) any non-scientific information used to balance against the science. WAC 365-195-915(1)(a-c).

Requirement #3: Under requirements 1 and 2 above, the City must (1) assemble the best available science on the issue, and include that science in the record (requirement #1), and (2) substantively consider the adoption of regulations that are consistent with the recommendations of that science (requirement #2). The third requirement addresses what must be done if a City adopts an ordinance that does not comply with (adopt) the “best” scientific recommendations.²⁴ Again, WAC 365-195-915 addresses this issue:

A county or city departing from science-based recommendations should:

²⁴ Obviously, this third requirement – justification for departure from BAS recommendations – is not necessary if the City’s regulations actually comply with BAS. Therefore, if the Court agrees with the City that the 3-tiered ranking system and wetland buffers *do comply* with BAS, this third step is unnecessary. However, even if this Court finds that the City’s regulations are not consistent with BAS, the City maintains that any alleged departure is more than amply justified by the record.

- (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 mere fact that a process exists for departure from the strict recommendations of science makes clear that a City is not required to *adopt* regulations that strictly comply with the recommendations of the scientific literature. Thus, the question here is not whether Kent has departed from strict scientific recommendations but, rather, whether the City has justified its decision to do so by including the information required in WAC 195-365-915(c).

Conclusion: RCW 36.70A.172(1) requires that cities include BAS in the process of drafting and adopting development regulations. Through the court cases and WAC sections that have interpreted and applied RCW 36.70A.172(1), three distinct requirements have emerged: (1) the city must assemble the BAS on the subject, and include that science in the record; (2) the city must actually review that science, and actually consider proposed regulations that comply with the scientific recommendations; and (3) if the city exercises its discretion not to adopt and implement the strict scientific recommendations, it must justify the departure.

Applying these three requirements to this case, it becomes clear that (1) the State Agencies and the Board misinterpreted, mischaracterized, or misapplied the law when reviewing the City's CAO, and (2) the City of Kent has more than complied with all the legal requirements for the adoption of its CAO.

B. The City Properly Included Best Available Science in Adopting the 3-Tier Wetland Ranking System

Requirement #1: There is simply no argument that the City did not assemble the BAS on wetland rating systems, or that the City did not include that information in the record. The State Agencies actually complimented the City in this regard: "We do not contend that the City failed to include best available science in the record. Indeed, we compliment the City on its use of well-qualified consultants and note the scientific information provided to the City by the consultant." CP 53, pp. 4-5. Even the Board said: "[t]here seems to be no dispute that Kent's record contains ample reputable science concerning the functions of wetlands and protection of those functions... It is not disputed that Kent's record included all relevant BAS." CP 59, p. 42-43.

Requirement #2: The next question is whether the City substantively considered adopting a rating system consistent with the strict recommendations of the BAS. For the purposes of this BAS requirement, the City assumes *arguendo* that DOE's 4-tier system is the *only* system

consistent with best available science.²⁵ Even if that is the case, there still can be no question that the City complied with requirement #2 by substantively considering the 4-tier rating system:

- April, 2003: Wetland expert Adolfson Associates provides City with a full review of DOE's 4-tier system. CP 34, Ex. 106.
- April, 2004: Adolfson updates its BAS on wetland ranking systems, and provides another review of DOE's 4-tier system. *Id.*
- May 24, 2004: Planning staff slide presentation to LUPB specifically states "DOE 4-tiered Classification system option is under consideration." CP 34, Ex. 157 at 3.
- May 24, 2004: City staff submits memo to the LUPB: "Discussions at the staff level regarding the potential buffer widths and recommendations with regards to BAS are on-going. Within this discussion, staff is evaluating the Department of Ecology's 4-tiered wetland rating system which would create four wetland categories rather than three (which currently exist in the code)." *Id.* at p. 1.
- September 13, 2004: Planning staff submits response to DOE's comments on the draft CAO. "Based on the city's analysis, the three-tiered system is consistent with best available science. Staff recommends retaining the 3-tiered system to retain some consistency with the currently adopted regulations." CP 41, Ex. 108, p. 3.
- September 13, 2004: Citizen urges City to adopt DOE's 4-tier system at public hearing. *Id.* at Ex. 141.
- November 2, 2004: Presentation to City Council includes side-by-side comparison of buffers with 3-tier vs. 4-tier rating systems. *Id.* at Ex. 163.

²⁵ The City believes the record clearly supports a finding that the 3-tier ranking system is consistent with BAS. If Kent's 3-tier ranking system is consistent with BAS, then requirement #2 is moot since the City obviously *considered* the system it adopted. So, only DOE's 4-tier system need be addressed with respect to requirement #2.

- November 22, 2004: Adolfson Associates submits a memo which accurately predicts that DOE will argue that the 3-tiered system is a departure from BAS. CP 41 at Ex. 112, p. 4.
- November 29, 2004: Adolfson details the City's consideration of DOE's 4-tier system. Ex. 116. "Although arriving late in the GMA update process, *Adolfson and City planning staff reviewed the new Ecology wetland rating system. However, Adolfson and City staff decided, due to the higher level of complexity in the rating form and increased ability for subjectivity between evaluators using the form, to continue use of the City's 3-tiered rating system.*" *Id.* at 2 (emphasis added).
- January 19, 2005: Presentation to PEDC includes side-by-side comparison of buffers with 3-tier vs. 4-tier rating system. *Id.* at Ex. 161.

Based on clear and overwhelming evidence in the record, the City obviously considered and carefully evaluated DOE's 3-tier wetland rating system. Consequently, the City clearly complied with requirement #2 of RCW 36.70A.172(1).

Requirement #3: Assuming, *arguendo*, that the City's 3-tier wetland rating system is a departure from the strict recommendations of BAS,²⁶ the next question is whether the record sufficiently justifies that decision.²⁷ Given the in-depth treatment this subject received, as shown in the statement of facts above, it is hard to argue that the City did not clearly articulate its reasons for declining DOE's 4-tier system.

²⁶ The City denies this, and the record clearly supports a finding that the 3-tier rating system is consistent with BAS, contrary to the Board's FDO. CP 36, Ex. 116, 119.

²⁷ Again, even though the WAC 365-190-080(a) expressly authorizes the City *not to adopt* DOE's new 4-tiered system, the City assumes, for the purposes of this brief, that DOE's 4-tier system is the only conceivable system that complies with BAS (which it clearly is not).

Again, the question is not whether the City *complied* with DOE's conservative, single-issue environmental concerns and recommendations and its "one-size fits all" approach, but whether the City adequately included the science, considered the options, and justified its decision. Unfortunately, however, the Board completely ignored the clear law that allows the City to deviate from BAS in adopting environmental protection regulations, and summarily discounted the overwhelming evidence in the record supporting the departure. Instead, the Board merely held that "the City of Kent's wetlands rating system is outdated, does not adequately assess wetland functions such as water quality and hydrologic functions, *and is not supported by BAS in the record.*" CP 59 at 35:1-3. By explicitly holding that the rating system is not "supported by BAS in the record," the Board has simply ignored the fact that the law explicitly allows the City to adopt regulations "not supported by BAS" as long as that deviation from BAS is justified on the record. WAC 195-365-915(c).

The City has clearly complied with the requirement to justify any alleged deviation from BAS in adopting the 3-tier system. This justification is spelled out clearly in Adolfson's November 29, 2004 memo.

In 2003 and 2004, Adolfson assisted the City with development of a full package of regulations and standards for wetlands that works interactively with the 3-tiered wetland rating system currently in use.

In August 2004, Ecology revised and published final guidance on the new 4-tiered wetland rating system. This

new rating system results in the same number of wetland categories (Category I through IV) as the old 1999 state rating system, but uses a new and *entirely different* scientific approach based upon the hydro-geomorphic (water and landscape elements) functions of the wetland. *This new system is considerably more complicated in nature since it seeks to evaluate multiple functions and values of wetlands.*

Although arriving late in GMA update process, Adolfson and City planning staff reviewed the new Ecology wetland rating system. However, Adolfson and City staff decided, *due to the higher level of complexity in the rating form and increased ability for subjectivity between evaluators using the form*, to continue use of the City's 3-tiered system. While it is recognized that the State's new 2004 wetland rating system may be appropriate for ranking wetlands at a state or county level where there is a wide diversity of wetland types, *urban areas such as Kent find that a more simplistic system makes better practical and scientific sense given the lesser diversity of wetland types.*

CP 34, Ex. 116, p. 2 (emphasis added). Adolfson concluded:

Adolfson and City staff believe that wetland functions and values will be protected, as mandated under the GMA, with the City rating system. The non-scientific information used to support this decision is outlined above, and includes *City staff's need for an easily and consistently applied rating system that minimizes staff and developer misinterpretation. Adolfson and staff do not identify any potential risks to the functions and values of wetlands by using the revised three-tiered rating system for wetlands.*

Id. at Ex. 119, p. 3 (emphasis added).

In addition to that, and the sundry other justifications in the record supporting the 3-tier system, the City has even provided extensive justification *in the ordinance itself*. Findings N, O, P, and Q are all

dedicated to an in-depth explanation for the City's choice to use the 3-tier system rather than DOE's 4-tier system. *CP 2, Ex. A.* This decision required the City to consider and balance the full range of factors, both scientific and non-scientific, as well as the 13 GMA planning goals.

Based on the overwhelming evidence in the record, there is simply no question that the City complied with what is actually required of it. The City assembled the best available science, spent months considering and debating whether to adopt the 3-tier or 4-tier rating system, then exhaustively analyzed and justified its eventual decision to retain the existing, tested and commonly used 3-tier system. The Board's summary adoption of the baseless arguments made by the State Agencies on this issue is clearly erroneous, not based on substantial evidence, and should be reversed by this Court.

C. **The City Properly Included Best Available Science In Adopting its Wetland Buffers**

The State Agencies alleged – and the Board simply concurred – that the City did not include BAS in adopting the wetland buffers included in the City's CAO. *See CP 59, p. 35-40.* However, based on the BAS requirements as outlined above, there is simply no merit to that contention. The City exhaustively collected and analyzed the science involved, debated *ad nauseum* the merits of buffers in strict adherence to the recommendations of the science, then thoughtfully balanced the various needs and goals of the City to arrive at the buffer widths ultimately chosen by the City Council to be included in the CAO.

Requirement #1: The first question is whether Kent adequately gathered the scientific evidence regarding wetland buffers and included that science in the record. *HEAL, supra; WEAN, supra*. Both the Board and the State Agencies acknowledge that the City complied with the requirement to compile thetas, and include that science in the record. CP 59, p. 42-43, CP 53, p. 4-5.²⁸

Requirement #2: Requirement #2 of RCW 36.70A.172(1), as interpreted by this Board and the courts, asks whether Kent substantively *considered* adopting a regulation (wetland buffers, in this case) that complied with the scientific recommendations of the BAS. This is perhaps the question that is most obviously answered by the extensive public record in this case. However, despite the exhaustive debate over the buffer widths, the Board nevertheless came to the stunning conclusion that the City's "later rejection of the overwhelming scientific advice that protection of wetlands required wider buffers, makes it *impossible* to assert that Kent *substantively* considered BAS." CP 59, 43:8-11 (emphasis added). This statement by the Board makes it clear that it either misunderstood BAS requirements, or simply disregarded them. Under the Board's theory, the fact that the City did not *adopt* the State's recommendations means that the City *did not even consider* those recommendations. Apparently, the Board finds it "impossible" to believe

²⁸ In its Reply Brief to the Board, the State Agencies wrote: "... we complement [*sic*] the City on its use of well-qualified consultants and note the scientific information provided to the City by the consultant. ... We also complement [*sic*] the City on its extensive public participation process, through which additional science was provided to the City." CP 53, p. 4-5.

that a City could *consider* the State Agencies' recommendations, but fail to actually *adopt* those recommendations wholesale.

However, to come to this conclusion, the Board again simply ignored the mountain of evidence in this case. First, as the statement of facts (*supra*) clearly shows, there can be no question but that wetland buffers were the single most researched, analyzed, and hotly debated issue in the entire CAO update process. Considering the extensive and detailed public record in the LUPB meetings, PEDC meetings, ad hoc committee meetings, wetland focus group meetings, and full City Council meetings, along with the hundreds of public comments received, it is actually "impossible" to conceive of an issue that has undergone a more substantive scientific consideration than Kent's wetland buffers. The issues of wetland buffers was very nearly the sole issue addressed during the entire public process. The record is replete with debates on wetland buffers, comments on wetland buffers, meeting on wetland buffers, analysis of wetland buffers, votes on wetland buffers, etc. Considering the nearly three-year process Ordinance No. 3746 underwent before being passed, it is difficult to understand how the State Agencies could claim, or the Board find and conclude, that the wetland buffers "were not adequately considered."

Second, the Board seems to have ignored the fact that the initial draft of Kent's CAO update *actually included expanded buffers*. In fact, it was not until shortly before the actual adoption of the Ordinance No. 3746 that City staff even submitted a draft update that *did not* include expanded

wetland buffers. Even at the very end of the process, when the PEDC finally voted to forward the CAO to the full Council, two of the four options the presented by the Planning Board included *expanded* buffers. *See Statement of Facts, supra.* Consequently, not only did the City obviously *consider* expanded buffers, those buffers were actually written into nearly every draft CAO presented to the public and various decision-making bodies. Any argument that the City did not substantively consider the expanded buffers demanded by the State Agencies (principally DOE) is simply without merit. For the Board to find that “*failure to adopt*” is equal to “*failure to consider*” is not supportable under the law in general, or the facts of this case in particular. The Board’s decision that the City failed to even consider expanded buffers is clearly erroneous, not based on any evidence – let alone *substantial* evidence – is arbitrary and capricious, and should be reversed by this Court.

Requirement #3: The third and final requirement of RCW 36.70A.172(1) is that if the City has departed from best available science, proper justification must be made for that departure. WAC 365-195-915. The first thing the City must do is “Identify the information in the record that supports its decision to depart from science-based recommendations.” WAC 365-195-915(c)(i). Regarding this requirement, the extensive public record on Kent’s CAO is filled with references to the factors supporting the City Council’s decision to adopt buffers slightly below the strict recommendations of some scientists. The following are some examples:

- Citizen comments reminding the City to be diligent to avoid relying on extreme extrapolations from data involving non-urbanized land uses and data outside of Washington. CP 41, Ex. 61.
- Analysis of GMA housing, capital facilities, and transportation element. (Planning goals #4, #12, and #3 of RCW 36.70A.020). Ex. 61. Also analyzes buildable lands capacity, infrastructure capacity, and market availability of land. *Id.*
- Citizen correspondence arguing that wider buffers are a taking of private property (GMA planning goal #6) and in conflict with other GMA requirements *Id.* at Ex. 70.
- Citizen correspondence giving analysis of the impact of buffers on housing affordability (GMA planning goal #4). Also offers in-depth research on the actual effects of buffers on several specific pieces of private property in the City (GMA planning goal #6) as well as the results of scientific post-construction buffer monitoring projects *Id.* at Ex. 72.
- Public hearing with eight individuals offering live comments on the various factors that must be balanced against the scientific information. *Id.* at Ex. 141.
- On-the-record comments by Councilmember Clark expressing his concern about whether staff had adequately balanced the BAS recommendations against the full range of GMA Planning Goals. *Id.* at Ex. 142.
- On-the-record comments by Councilmember White as to the effect of the proposed CAO definitions would have on various properties. *Id.*
- On-the-record comments by Councilmember White voicing concern over the negative effect of expanded wetland buffers on the City's ability to meet GMA density requirements and prevent urban sprawl (GMA Planning Goals #1 and #2).
- On-the-record comments by Councilmember White about various levels of mitigation employed for different types of developments. *Id.*

- On-the record comments from Environmental Consultant Richard Weinman regarding the balancing between BAS and the full range of GMA planning goals. *Id.* at Ex. 144.
- On-the-record comments from City Principal Planner and Environmental Engineering Manger addressing separate approaches for critical areas protection between the East Hill and Valley Floor. *Id.*
- On-the-record comments from Councilmember White addressing the balancing of GMA goals against the strict requirements of BAS. *Id.*
- Multiple on-the-record citizen comment addressing the effect of larger (expanded) wetland buffers on private property (GMA Planning Goal #6). *Id.* at Ex. 145.
- Multiple on-the-record citizen comment about the effects of larger, expanded wetland buffers on economic development opportunities (GMA Planning Goal #5). *Id.*
- On-the-record citizen comments about effect of larger, expanded wetland buffers on employment opportunities within the City (GMA Planning Goal #5). *Id.*
- On-the-record citizen comments regarding need to balance BAS with the full range of GMA Planning Goals. *Id.*
- On-the-record discussion among City staff, environmental experts, attorneys, and council members about Court decisions outlining the requirements for departure from BAS. *Id.*

These are just a few examples of the dozens of ways the City fully and publicly performed on-the-record balancing of BAS against the full range of planning goals, as it was required to do. *See* CP 41, Exs. 146-152 for additional examples. This evidence is in Ordinance No. 3746.

The second thing the City must do is to “[e]xplain its rational for departing from the science-based recommendations.” WAC 365-195-915(c)(ii). Again, the numerous public meetings and on-the-record

comments and decisions from the LUPB and PEDC, for example, leave no doubt as to the City's many rationale for departure from the State's strict prescriptive recommendations.

Finally, the City must 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. WAC 365-195-915(c)(iii). Regarding this requirement, there can be little doubt that the City Council had full and accurate information on how the existing wetland buffers would affect the functions and values of critical areas within the City of Kent. For example:

- A memorandum describing departures from "best available science" and outlining the risks to the functions and values of wetlands resulting from the proposed Wetland Regulations, Option 3. CP 34, Ex. 119.
- Although effective in removal of coarse sediments and marginally effective in nutrient removal such as nitrogen and phosphorous, buffers less than 50 feet were not effective for removal of fine sediments or protection of wetland wildlife habitat. *Id.* at p. 3.
- Ecology's publication *Wetland Buffers: Use and Effectiveness* (pub. #920010) concludes that buffers less than 50 feet in width are generally ineffective for protection of most wetland functions. *Id.*
- Retaining a 50-foot buffer on Category 2 wetlands in Kent provides less than adequate protection for many wildlife species according to the scientific literature. *Id.*

Even the State Agencies admitted in its briefing to the Board that the City adequately identified the potential risks to critical areas posed by the smaller buffer widths:

The record makes clear that many wetland functions and values are put at a high risk of degradation under the CAO. The City's own consultants stated that the potential risks include the following

CP 33, 22:17-22:7.

Since the record indicates, and DOE admits, that the City fully identified the potential risks to wetlands posed by reduced buffers, the only question left is whether the City identified any additional measures chosen to limit such risks. That question, too, can only be answered in the positive. For example, the record includes the expert findings that "Development and implementation of a citywide habitat protection plan, as proposed by Ecology, would integrate some of the above listed protection measures and serve to offset impacts to habitat losses, which may occur as a result of Option 3." CP 34, Ex. 119, p. 5.

In addition to the unprecedented habitat protection plan incorporated into Ordinance No. 3746, the City included in the COA a large number of programs and regulatory processes that supplement protection of the functions and values of critical areas in the City. The most significant of these additional programs and regulatory processes include the following:

- Development and regulation of a comprehensive storm and surface water utility pursuant to Chapter 7.05 of the Kent City Code. City regulations provide authority to ensure that surface flows to the downstream watershed do not increase or cause a degradation to the quality of the water. The City has developed a requirement to maintain water quality through the Resource Stream Protection menu established in the 2002 Kent Surface Water Design Manual. The Resource Stream Protection menu treatment

goal is to reduce metals found in urban runoff that are potentially detrimental to the aquatic health of wetlands, streams, and sensitive areas.

- Water quality monitoring. The City monitors water quantity and quality throughout the City.
- Modeling. The City uses modeling to identify needs for future capital improvement project solutions to impacts on critical areas. Problems identified may be related to water quality, flooding, or biological issues.
- Development. Continued review of proposed developments within the city and within the city's wellhead protection areas outside City limits to ensure continued protection of the biological and hydrologic integrity of the City's water resources, to guarantee stormwater regulations are enforced, and to ensure protection of the City's municipal water supply.
- Solid Waste/Recycling/Conservation. The City has a program in place to educate the public and to assist with the conservation of the City's water supply, as well as solid waste management, recycling awareness, and other conservation measures.
- Wellhead Protection. Protection of the City's groundwater resources, both inside and outside the city limits, are completed through monitoring groundwater conditions, commenting on development review within the wellhead protection areas that are outside our jurisdiction, coordinating with other agencies, and conducting special projects intended to address potential contaminant sources to the city's groundwater resources. Any project located within this designated area must enhance or maintain the water quantity and quality for infiltration to the maximum extent possible.
- FEMA Floodplain Restrictions. Areas mapped within the Federal Emergency Management Act (FEMA) floodplain face additional development constraints. Developments within the designated floodplain are required to include compensatory flood storage volumes that are calculated

from pre- and post-development to be 50% of the 100-year flood storage volume lost.

- Education. Educational opportunities provided by the City include: an annual Water Festival; community workshops; “2000 Trees” program (in which the City, through the efforts of community volunteers, annually plants the same number of trees as the number of each calendar year); the City’s website provides and updates critical areas and environmental information; other volunteer projects; publications; and special requests for City staff to make community presentations.
- NPDES Phase II. The City must comply with all conditions and requirements described in The National Pollutant Discharge Elimination System Phase II (NPDES). 40 CFR 122.34. This Phase II permit program requires that the City implement controls to reduce stormwater pollutants, which have been shown to harm drinking water, human health, and wildlife habitat. The Phase II rule extends coverage of the NPDES program to the City of Kent because it owns and operates a storm drain system, discharges to surface waters, is located in an urbanized area, and is more than 1,000 in population. As a result, the City must apply for a NPDES Phase II Stormwater Permit. As a permittee, the City must comply with the Minimum Control Measure Requirements as described in 40 CFR 122.34(b). These minimum measures include public education and outreach on stormwater impacts, public involvement/participation, illicit discharge detection and elimination, construction site stormwater runoff control, post construction stormwater management, and pollution prevention/good housekeeping for municipal operations. Complying with these new requirements will benefit water quality and protect critical areas and habitat within the City.
- Regional Meetings and Organizations. City representatives regularly attend and participate in the following meetings: APWA Stormwater Managers; Cedar River Council; WRIA 8 (Cedar River) and WRIA 9 (Green/Duwamish) Forums and committees; South King County Regional Water Association; South King County

Groundwater Management Committee; Green Duwamish Ecosystem Restoration Program; and the Green River Flood Control District. These various organizations create substantive regional regulations that further protect various aspects of the natural environment in Kent.

- Wetland Maintenance Program. The City owns and maintains a large number of wetland resources within the City. Maintenance includes removal of non-native and invasive plants, planting native plants, maintaining fences, providing educational materials, and monitoring wetlands for code violations.
- Volunteer Native Plant Restoration—The City conducts an ongoing native plant restoration program, often through volunteer planting events, which also provide a unique opportunity for public education.
- Eagle Scout Program. The City helps sponsor an Eagle Scout Program that allows candidates for eagle scout awards to complete a project in our parks to earn their eagle scout award. Often these projects are environmentally beneficial.²⁹

See, CP 2, Ex. A, pp. 1-11.

Concurrent with these additional regulatory processes and programs, the City has also committed significant taxpayer dollars to a variety of environmental restoration/enhancement and flood remediation/protection projects that protect wetlands and benefit the local environment. Some of these, established in the record, include:

- Green River Natural Resource Area—A 300-acre preserve located in the heart of the City's manufacturing and industrial sector and adjacent to the Green River was

²⁹ Most of these programs and processes are monitored by the City's Environmental Engineering section within the Public Works Department. This group's purpose and task is to facilitate the restoration, enhancement and protection of environmental resources in Kent. The Parks Department, Planning Department and Public Works Operations division also help implement these programs.

constructed, at a cost of approximately \$11 million, into a multi-faceted facility for flood protection, water quality enhancement, wildlife habitat, preservation of open space, and passive recreational activities. The site has also served as an educational facility to illustrate the importance of protecting watersheds. It also provides opportunities for volunteer groups to plant trees and shrubs from the on-site native plant nursery. The City also has plans to construct a regional watershed interpretive center that will assist with educating the public on watershed issues.

- In the early 1980's, the City began replacing large sections of the Kent Springs Transmission main in order to reduce water losses from leakage on the aging water transmission main. The project was completed in 1996, having replaced nearly 15 miles of large diameter ductile iron piping. The total project cost was \$10.5 million. Also, beginning in 1997, the City began a comprehensive water system program to test for and find water system leaks. This leak detection program identified and corrected leakage throughout Kent's water distribution system. The water losses for the Kent water system in the 1970's was approximately 15% of the total water produced, and that has been reduced to 3.38% losses as of 2003, significantly below the industry standard of 15 to 20%.
- Kent, as a collection agency that sends sewerage to King County Metro, has participated in, and continues to participate in the County's Infiltration and Inflow (I/I) program. I/I metering was done throughout the Kent collection system. The total project costs (SSES, design, construction, post project flow monitoring, etc.) was \$1,446,900. One unique aspect of the Kent pilot project was that it was totally for private side sewers—no work or rehabilitation was performed on the public sewer system. The project rehabilitated 139 service laterals and 172 side sewers. Post project flow monitoring revealed a 78% I/I reduction was achieved.

- 98th Avenue Regional Treatment and Detention Pond (1995)—This project decreased peak flows and improved water quality. Cost was \$2,250,000 including design, permitting, construction, maintenance, and monitoring.
- Mill Creek Box Culverts -- improvements to Central Avenue, Novak Lane, S. 228th Street, Fisher Industrial Park (1995)—This project improved fish passage and implemented flood remediation, which is intended to reduce excessive stream flows. Cost: \$1,170,000 including design, permitting, construction, maintenance, and monitoring.
- Mill Creek Box Culvert at Bowen Scarff Ford (1997)—This project improved fish passage and implemented flood remediation. Cost: \$622,500 including design, permitting, construction, maintenance and monitoring.
- Mill Creek Fish Habitat Improvements (1998)—This project benefited fish habitat and improved water quality. Cost: \$277,500 including design, permitting, construction, maintenance, and monitoring.
- Fish Habitat Enhancement near S. 277th Street Corridor (1999)—This project benefits fish and wildlife habitat and improved water quality. Cost: \$328,440 including design, permitting, construction, maintenance, and monitoring.
- Wetland Mitigation Site Improvements along S. 277th Street Corridor (2000)—This project benefits fish and wildlife habitat, implements flood control, and improves water quality. Cost: \$528,090 including design, permitting, construction, maintenance, and monitoring.
- Wiesner Drainage Improvements (2001)—This project implemented flood remediation and water quality improvements. Cost: \$176,250 including design, permitting, construction, maintenance and monitoring.
- West Fork Soosette Creek Box Culvert and Stream Restoration (2003)—This project improved fish habitat,

water quality, and flood remediation. Cost: \$1,291,695 including design, permitting, construction, maintenance, and monitoring.

- Boeing Creek Restoration Improvements (2003)—This project improved fish and wildlife habitat and concomitantly implemented water quality improvements. Cost: \$147,300 including design, permitting, construction, maintenance, and monitoring.
- Mill Creek Restoration Improvements (2003)—This project benefits fish habitat, flood remediation, and water quality. Cost: \$290,250 including design, permitting, construction, maintenance, and monitoring.
- Upper Meridian Valley Creek Box Culvert and Stream Restoration (2003)—This project benefits flood remediation, fish habitat, and water quality. Cost: \$897,935 including design, permitting, construction, maintenance, and monitoring.
- Springbrook Creek Restoration Improvements (2004)—This project benefits fish habitat, implements stream restoration, improves water quality. Cost: \$756,600 including design, permitting, construction, maintenance, and monitoring.
- S. 192nd Street/Springbrook Creek Culvert Replacement (2004)—This project implemented flood remediation. Cost: \$197,850 including design, permitting, construction, maintenance, and monitoring.

Additionally, the City determined through its various capital improvement plans to implement the following projects in the future, which will help protect the functions and values of wetlands:

- The Meridian Valley Creek Restoration/256th Flume removal (completed in 2005)—This project will remove the stream from a concrete flume adjacent to SE 256th Street and relocate it into a new stream channel, through a wetland

connected to Soos Creek. This will improve fish habitat for one of the most productive Coho streams in the City.

- Lake Meridian Outlet Relocation (2005-2006)—This project will relocate the outlet of Lake Meridian into a new stream channel through a forested area and wetlands, rather than adjacent to 152nd Avenue SE.
- Soosette Creek Restoration (2007)—This project would restore Soosette Creek channel south of SE 256th Street, add structure to the stream, and restore the buffer with native vegetation.
- Upper Meridian Valley Creek Improvements (2007)—This project would replace culverts at SE 234th Street and SE 236th Street, thereby improve fish passage and flood remediation.
- North Fork West Branch Soosette Creek Improvements (planned, not scheduled)—This project will add native trees and shrubs to a buffer area north of Kent-Kangley Road.
- Meridian Meadows Detention Pond Fish Passage Improvements (2007)—A low flow fish passage needs will be constructed within the detention pond vault.
- 132nd Avenue Stormwater north of 282nd Street (completed)—This project will enhance the conveyance capabilities of an existing stormwater system and benefit flood remediation.
- West Fork West Branch Soosette Creek culvert replacement (2007)—With the widening of 116th Avenue SE, several driveway culverts will be replaced with larger culverts, enhancing fish passage and flood remediation. In addition, the stream buffer will be moved away from the road and planted with native vegetation to enhance water quality.
- Boeing Creek Restoration (planned)—This project would include relocating Boeing Creek away from S. 212th Street and West Valley Highway, adding meanders and structures,

including large woody debris, and would include replanting the buffers with native vegetation.

- Johnson Creek Watershed Restoration and Flood Protection (on-going)—This watershed is currently experiencing development pressure which will generate additional stormwater runoff. For those properties within the City of Kent, the provisions of the Green River Flood Management Agreement must be met; however, not all sites in the watershed are within the City and stormwater impacts may be an issue. In addition, the watershed contains some large wetlands in need of restoration. The goal of the project is to complete a watershed based plan to address stormwater, habitat and restoration. Benefits include: flood remediation, water quality, fish and wildlife habitat, open space, stream and wetland restoration.
- Culvert replacement projects within the Mill Creek drainage (2007 and on-going)—There are 4 remaining culverts that need to be replaced in the Mill Creek watershed. Upon completion, their replacement will benefit flood remediation, fish passage, and wildlife habitat.
- Rosso Property acquisition (2005)—The City of Kent applied for and received a Salmon Recovery Funding (SRF) Board grant to acquire a portion of this property along the Green River. If able to complete this purchase, the city plans to construct back channel habitat, plant native vegetation, remove non-native vegetation, and construct a native plant nursery on-site, which has nearly a mile of Green River frontage.
- Lower Mill Creek Auburn Confluence Property Acquisitions and Restorations (in-progress)—The City has been working with property owners on the potential acquisition along this portion of Mill Creek and has acquired a King County Conservation Futures grant for this purpose. If the property is secured, the City would construct a backchannel and would plant the site with native vegetation.

- Clark Lake outlet gravel augmentation (planned but not scheduled)—The City plans to augment stream bed gravel in the Clark Lake outlet for spawning Coho salmon.
- Green River Riverview Park back-channel (2006-2007)—This project is part of the Green/Duwamish Ecosystem Restoration Plan in which the City is partnering with the United States Army Corps of Engineers and other jurisdictions to restore salmonid habitat in the watershed. This project would construct a backchannel for rearing and refuge on the Riverview Park site including log structures and planting of native vegetation.
- Garrison Creek restoration (2005 and on-going)—This project will restore a portion of Garrison Creek which is currently causing flooding problems on the northbound SR 167/S. 212th Street off-ramp. In addition the project will also restore an up-stream portion of Garrison Creek. Benefits of this project will include flood remediation, fish and wildlife habitat, and water quality improvements.

See e.g., CP 2, Ex. A, recitals and *infra*. All of these programs and projects will serve to protect the functions and values of critical areas in Kent and will, either specifically or generally, preserve or enhance habitat for all life stages of anadromous fish. The Kent City Council has been, and continues to be, committed to improving, enhancing, and protecting critical areas and the environment in this City.

In addition to its adopted critical areas regulations, the City of Kent has an extensive and multi-faceted array of existing regulations that both individually and collectively help protect wetlands and their buffers. Some of these regulations (cited by Kent City Code chapter) include:

- KCC Ch. 1.04 – Code Enforcement
- KCC Ch. 7.03 – Solid Waste, Recyclable Materials and Yard Waste
- KCC Ch. 7.05 – Storm and Surface Water Utility

- KCC Ch. 7.07 – Surface Water and Drainage Code
- KCC Ch. 7.13 – Water Shortage Emergency Regulations
- KCC Ch. 8.04 – Litter Control
- KCC Ch. 11.03 – Environmental Policy
- KCC Ch. 11.04 – Shoreline Master Program
- KCC Ch. Title 12 – Zoning
- KCC Ch. 14.09 – Flood Hazard Regulation

These existing regulations – both directly and indirectly – provide substantial benefit to critical areas and to the functions and values of wetlands and associated buffers. They provide additional justification for the City’s decision to retain its existing wetland buffers and to deviate not adopt the State’s version of BAS demanding larger wetland buffers.

Within the context of the aforementioned programs, projects, and complimentary development regulations, and taking into consideration the broader scientific evidentiary disputes as to the appropriate interpretation and application required to include BAS, the City Council, staff, and the City’s environmental consultants reviewed and considered the BAS in the record and evaluated and analyzed its relevance to the types and functions and values of the streams, wetlands, and other critical areas found in Kent. The City has documented and included BAS in the record through specific BAS documents prepared for each critical area. These documents help provide a framework for adoption of Ordinance No. 3746.

Additionally, the City has not only identified such measures in the record of this Ordinance, which is all that is required by law, but the City went on to devote six single-spaced pages to a listing of various city

projects that offset any potential loss of wetland functions and values. *See* CP 2, Ex. A, (Recitals H, I, J, K, and L of Ordinance No. 3746).

Based on the numerous public discussions of these issues, the on-the-record balancing performed, the public comments received, the extensive public record, the City's wide-ranging and progressive environmental protection scheme, and the City's comprehensive findings in the Ordinance itself, the City has unarguably gone far beyond what was necessary to justify its decision to depart from the State's myopic version of BAS on the narrow issue of prescriptive minimum buffer widths. Consequently, even if this Court finds that the City's wetland buffers are lower than those recommended by the State's BAS, any claim that the City did not comply with the requirement to justify that departure, as authorized by WAC 365-195-915(c), is simply unsupportable and contrary to the mountain of evidence in the record. The Board's decision that the City's wetland buffers have not been adequately justified is clearly erroneous, not supported by substantial evidence and is arbitrary and capricious. The decision should be reversed by the Court.

VI. CONCLUSION

The City of Kent is an environmentally friendly city, actively engaged in study and protection of the environment far beyond the involvement of most other jurisdictions. Through its Planning Department and activities, its Parks Department and activities, and its broad, detailed and innovative environmental regulations, Kent is a leader in environmental protection. These policies, regulations and activities –

summarized in this brief – supplement the critical areas regulations in Ordinance No. 3746, and further identify, preserve and enhance the City’s natural resources, especially wetlands.

The City Council properly and thoughtfully exercised the broad discretion granted to it by the GMA to adopt its new critical areas regulations. In light of nearly two and one-half years of public comment and participation, extensive environmental review, a lengthy and comprehensive planning process (including an inordinate number of public hearings, public meetings, public workshops, and numerous focus groups), regular coordination and communication between the City and other government agencies, extensive environmental regulations, and the existing environment in the City, it cannot be said that the City Council, in adopting Ordinance No. 3746, “clearly” and “definitely” made a mistake in adopting its 3-tiered wetlands rating system, or in establishing wetland buffers in its CAO. The Board clearly usurped the broad legislative discretion afforded to the City, substituted its own judgment, and utterly ignored the law in this area. The law recognizes the importance that local environmental protection and legislation is performed by the *local* government, for the *local* citizens and taxpayers, based on *local* conditions, *local* regulations, and other *local* factors. The position established by the Board and the State Agencies in this case – a top-down, state-controlled, centralized control of local land use issues – has no basis in the law, and is actually contrary to the mandates of the GMA and sound planning practices.

This Court should reverse the Board's usurpation of the City's broad discretion under the law, and uphold Ordinance No. 3746.

RESPECTFULLY SUBMITTED this 1st day of December, 2006.

KEATING, BUCKLIN &
McCORMACK, INC., P.S.

CITY OF KENT



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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/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;
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RIGHTS,

Respondents.

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I certify that I e-mailed and mailed, via U.S. mail, postage pre-paid, copies of the below listed documents no later than December 1, 2006, as follows:

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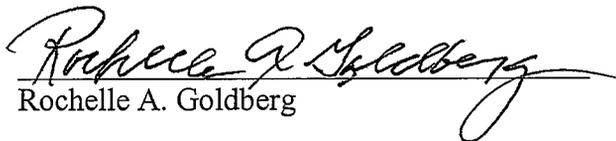
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