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NO. 58433-2-I

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

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

Petitioners/Appellants,

v.

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

Defendants/Respondents.

CITY OF KENT,

Petitioner/Appellant

v.

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

Respondents.

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I. INTRODUCTION

The Growth Management Act (GMA) requires that all cities and counties in Washington designate and protect critical areas, including wetlands. RCW 36.70A.170, .060(2), .030(5). All cities and counties must include the best available science when developing and adopting regulations to protect critical areas, and those regulations must protect the functions and values of critical areas. RCW 36.70A.172(1). Critical areas regulations must be updated at specified intervals and each update must include the best available science. RCW 36.70A.130(1).

The State Agencies (Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development) challenged the wetland protection provisions adopted in City of Kent Ordinance 3746. The Growth Management Hearings Board (Board) found Kent had (1) relied on outdated science, (2) disregarded the scientific evidence and recommendations of its own expert consultant and staff, (3) rejected the scientific evidence and recommendations of the state agency with expertise in wetlands protection, (4) relied on other City programs and plans to provide wetlands protection without any evidence in the record that those programs and plans included the best available science or protected wetlands functions and values, and (5) determined it was necessary to depart from the best available science to provide

affordable housing even though the evidence in the record showed there was no conflict between the GMA requirement to protect wetlands and the GMA goal of providing affordable housing. The Board determined that each of these actions failed to comply with the GMA's requirements.

This is not a case in which the Board impermissibly failed to defer to a local planning decision that complied with the GMA. Nor is it a case in which state agencies are attempting to wrest planning decisions away from local elected officials. It is not a case in which the Board adopted some new or unprecedented interpretation of the GMA. Rather, this is a case in which the Board's decision relied explicitly and transparently on the plain language of the GMA and on the pertinent reported decisions of this Court and the Washington Supreme Court. The Board simply applied the law as interpreted by the appellate courts of Washington.

In August 2006, in response to the Board's carefully crafted decision, Kent adopted a new ordinance (Ordinance 3805), which the Board found complied with the GMA in a December 2006 order.¹ This consolidated appeal therefore is moot and should be dismissed. The wetlands provisions at issue in this appeal are no longer in effect in Kent, and there is no current outstanding issue of noncompliance.

¹ "Order Finding Compliance [Re: Ordinance No. 3805 – Critical Areas Ordinance Revision]," Dec. 13, 2006, available at <http://www.gmhb.wa.gov/central/decisions/>. For the Court's convenience, a copy of this order is attached as **Appendix A**.

If this Court were to reach the merits, even though the appeal is moot, the Court should uphold the Board's decision. The Board applied the proper standard of review, afforded the City the deference it was due under the GMA, and issued a careful and well-reasoned decision that correctly stated and applied the law and is supported by substantial evidence in the record.

II. STATEMENT OF THE CASE

A. Relevant Facts

In its Final Decision and Order (FDO), April 19, 2006, the Board found the wetlands protection provisions of Ordinance 3746 (now superseded) did not comply with the GMA.² The Board made several significant findings of fact that are unchallenged and thus verities on appeal. *Manke Lumber Co. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 113 Wn. App. 615, 628, 53 P.3d 1011 (2002), *review denied*, 148 Wn.2d 1017 (2003).

The City of Kent contains over 300 wetlands of various sizes that are important for flood management, water quality protection, and waterfowl and salmonid habitat. FDO at 17-18 (Findings 7-9). To

² The FDO is in the Administrative Record at Tab 59 (denoted herein as "AR Tab 59"). Ordinance 3746 is at AR Tab 2 (attached to the State Agencies' Petition for Review to the Board). Because this matter is before this Court on direct review, the Administrative Record was transmitted directly to this Court. There are no substantive Clerk's Papers (CP) in the record.

protect these wetlands, Ordinance 3746 continued the use of a three-tier wetlands classification system developed by King County in the early 1980s and assigned buffers based on that classification. *Id.* at 17, 19, 21 (Findings 3, 24, 46). The system classified wetlands based primarily on wetland size and number of vegetation classes; it did not rate wetlands for hydrological characteristics or water quality functions. *Id.* at 19 (Findings 23, 24). Modern four-tier wetland rating systems, in contrast, including the one developed by the state Department of Ecology (Ecology) beginning in 2002 take into account wetland hydrology and water quality functions. *Id.* at 20 (Findings 25-27, 29). Early in its development of Ordinance 3746, however, the City decided to retain its old three-tier system because it was familiar and easy to use. *Id.* at 21 (Finding 35).

Ordinance 3746 assigned wetland buffers for each wetland category. *Id.* at 21 (Finding 37). The City's wetlands consultant, Adolfson Associates, advised the City that these buffers were too small to adequately protect most wetlands functions, recommended (as did City planners) that the buffers be increased by 25 feet, and reported that even larger buffers would be required "based solely on science". *Id.* (Findings 38-40). Adolfson considered the wetlands rating system and buffers in Ordinance 3746 (which did not include the recommended 25-foot increase) to be a departure from best available science (BAS).

Id. (Finding 45). Ecology formally urged the City to either adopt Ecology's four-tier rating system or increase the protections to various classes of wetlands under the three-tier system. *Id.* (Findings 42, 43). Nevertheless, Ordinance 3746, as adopted, retained both the old three-tier rating system and the old buffer widths. *Id.* (Finding 46).

Ordinance 3746 included "Recitals," in which the City identified actions it found would offset the low level of wetlands protection in the rating system and buffers. FDO at 22 (Finding 47). The Board found these Recitals did not demonstrate unique local circumstances justifying a departure from science-based recommendations, but reflected the City's implementation of obligations imposed generally on cities in the region. *Id.* at 22-23 (Findings 48, 49, 55-59).

Responding to arguments that larger buffers would reduce housing availability, the Board found, based on the City's own analysis, that the buffer width increases recommended by Adolfson would not adversely impact the City's capacity to absorb projected population growth. FDO at 22 (Findings 50-52). Even with wetlands buffers increased by 25 feet, the City still would have capacity for 6,275 households, more than its 20-year planning target (4,284 households). *Id.*

The Board found the State Agencies had carried their burden as to all issues and concluded Ordinance 3746 did not comply with the GMA.

B. Procedural History

Two notices of appeal were filed, one by the City of Kent, and the other by the Master Builders Association of King and Snohomish Counties and the Building Industry Association of Washington (“MBA/BIAW”). Both Kent and MBA/BIAW sought and were granted direct review in this Court under RCW 34.05.518. Their appeals were consolidated for review.

III. MOTION TO DISMISS AS MOOT

The Court of Appeals may dismiss an appeal that is moot on the motion of a party.³ RAP 18.9(c)(2). This consolidated appeal is moot because Ordinance 3746, which the Board found to be noncompliant with the GMA, has been amended by the City of Kent, and the amendments were submitted to the Board for review and found to be in compliance with the GMA. Accordingly, the noncompliant portions of Ordinance 3746 no longer are effective in Kent, and the noncompliant ordinance has been superseded by a new, compliant ordinance. The State Agencies therefore move to dismiss this appeal as moot.

A. Facts in Support of Motion

The Board remanded Ordinance 3746 to the City with directions to take legislative action to comply with the GMA by October 19, 2006, as

³ A motion to dismiss for mootness is directed at the Court’s jurisdiction and may be raised at any time. *Citizens for Financially Responsible Gov’t v. City of Spokane*, 99 Wn.2d 339, 350; 662 P.2d 845 (1983). See also RAP 10.4(d) (allowing motion in brief).

provided in RCW 36.70A.300(3)(b). FDO at 55. Neither the City nor MBA/BIAW sought a stay of the Board's Order. Instead, the City took action to comply with the FDO by enacting Ordinance 3805 in August 2006 (after this Court granted direct review) to correct the noncompliance with the GMA.⁴ By its terms, Ordinance 3805 took effect 30 days later, replacing the ordinance whose noncompliance is at issue in this appeal.

Thereafter, the City submitted Ordinance 3805 to the Board for review, contending the new ordinance corrected the noncompliance found in the FDO and brought the City into full compliance with the GMA. Order Finding Compliance at 5. The State Agencies agreed the new ordinance complied with the GMA, and MBA/BIAW did not object. *Id.* On December 13, 2006, the Board issued its Order concluding the new ordinance brought the City into compliance and closed the case. *Id.* at 6.

B. This Appeal Is Moot Because No Outstanding Issue of GMA Noncompliance Remains in this Case

Courts normally do not decide moot cases. *Klickitat Cy. Citizens Against Imported Waste v. Klickitat Cy.*, 122 Wn.2d 619, 631, 860 P.2d 390 (1993) (moot case “should be dismissed”). A case is moot if there is no longer any case or controversy between the parties. *Alderwood Assocs. v. Wash. Env'tl. Coun.*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981). When an

⁴ See Order Finding Compliance at 3 (attached to this brief as Appendix A).

ordinance or statute on appeal is amended during the pendency of the appeal, that amendment may render the appeal moot. *See, e.g., Dioxin/Organochlorine Ctr. v. Pollution Control Hrgs. Bd.*, 131 Wn.2d 345, 350, 932 P.2d 158 (1997); *State ex. rel. Evans v. Amusement Ass'n of Wash., Inc.*, 7 Wn. App. 305, 306-08, 499 P.2d 906 (1972). Similarly, if an ordinance or regulation expires during the pendency of an appeal, the appeal may thereby become moot. *See, e.g., Hartman v. State Game Comm'n*, 85 Wn.2d 176, 177-78, 532 P.2d 614 (1975).

This appeal is moot. The noncompliant provisions in Ordinance 3746 are no longer in effect in Kent, and the new ordinance (Ordinance 3805) that replaced them fully complies with the GMA. The Board's Order finding noncompliance has been superseded by its Order Finding Compliance. The City is in compliance with the GMA. Thus, there is no live case or controversy between these parties. The Court should simply dismiss this appeal as moot.

C. The Exception for Issues of Continuing and Substantial Public Interest Does Not Apply in This Case

In its discretion, the Court may rule on a moot case if it involves an issue of "continuing and substantial public interest." *See, e.g., Wells v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 100 Wn. App. 657, 667 n.10, 997 P.2d 405 (2000). Under this exception, the Court may rule on a moot case

when the real merits of the controversy are unsettled and a continuing question of great public importance exists. *Snohomish Cy. v. Shoreline Hrgs. Bd.*, 108 Wn. App. 781, 787, 32 P.3d 1034 (2001). The court considers three factors: (1) whether the issue is public rather than private in nature; (2) whether an authoritative decision on the issue is desirable to provide guidance to public officials; and (3) whether the issue is likely to recur. *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988).

The State Agencies admit the first factor is present in this consolidated appeal, because GMA compliance is a public issue. The second factor is not present, however, because the specific issues brought to the Board were primarily factual rather than legal, as the Board clearly recognized. The Board followed the legal framework governing critical areas ordinances laid out in the three controlling appellate cases from this Court and the state Supreme Court.⁵ The central issues in this case are all factual: whether the wetlands protection provisions in Kent's ordinance included the best available science and whether its justification for departing from the best available science is supported by evidence in the

⁵ *Ferry Cy. v. Concerned Friends of Ferry Cy.*, 155 Wn.2d 824, 123 P.3d 102 (2005); *Whidbey Envtl. Action Network v. Island Cy. (WEAN)*, 122 Wn. App. 156, 174-75, 93 P.3d 885 (2004), *review denied*, 153 Wn.2d 1025 (2005); *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999).

record. *See* Kent Br. at 38-45. The Board, in deciding this case, simply followed and applied the controlling precedents to the record before it. The Board broke no new legal ground. *See* FDO at 1-3.

Kent or MBA/BIAW may argue there is continuing public controversy over the issue of wetland buffers. Even if true, the mere existence of a continuing public controversy is not itself sufficient to invoke the exception. For the case to fall within the mootness exception, there must be undecided legal issues the court needs to resolve to “provide future guidance to public officers.” *See Snohomish Cy. v. State*, 69 Wn. App. 655, 660, 850 P.2d 546 (1993) (factual issues do not meet the criteria for the mootness exception). The legal issues in this case already have been resolved in prior decisions of this Court and the Supreme Court.

For similar reasons, the third factor considered under the mootness exception is not present, because the issues in this case are unlikely to recur. The Board concluded Kent did not follow settled law in developing its wetlands protection provisions. FDO at 9-11 (summarizing controlling law). To find that the issues raised here are likely to recur, the Court would have to presume other jurisdictions will adopt the same wetlands protection measures using the same justifications as Kent, notwithstanding reported appellate decisions to the contrary. The Court should not presume future noncompliance, since the burden always rests with a

challenger to demonstrate noncompliance with the GMA. RCW 36.70A.320(2).

Kent or MBA/BIAW may argue that the State Agencies, by not objecting to direct review, conceded that this case presents issues of continuing and substantial public importance. While the State Agencies agree that GMA compliance is of substantial public importance, they have not conceded that this appeal presents unresolved legal issues that warrant review notwithstanding mootness. Even the Board recognizes that its decision was not precedential because critical areas cases are fact-specific:

Following the three-part test approved in *Ferry County* [155 Wn.2d at 834], the Board reviews the particular science in the record of the challenged jurisdiction.... Since the Board uses a case-by-case analysis, the Board does not impose a single scientific formulation on every jurisdiction.

In the Kent record, wetlands BAS was contained in the reports of the City's expert, Adolfson Associates, and in the DOE's *Wetlands I and II*. However, the Board's ruling concerning the particular science in the City of Kent's records is *not a precedent* that requires every city to use the same documents. While Central Puget Sound cities can hardly ignore such widely disseminated information as DOE's *Wetlands I and II*, they are permitted to generate their own studies, as King County did in adopting its CAO [citation omitted], or to rely on other sources that meet the criteria for BAS laid out in WAC 365-195-905.

Certificate of Appealability at 5 (footnotes omitted).⁶

⁶ The Board issued the Certificate of Appealability on July 11, 2006, in response to Kent's request, but it does not appear in Kent's Index to Clerk's Papers filed Sept. 11,

D. Conclusion

For the reasons stated above, the State Agencies respectfully submit that this case is now moot, the exception to the mootness doctrine does not apply, and this consolidated appeal should be dismissed.

This brief proceeds to the merits in the event the Court does not dismiss the appeal as moot.

IV. SUMMARY OF THE ARGUMENT ON THE MERITS

The GMA imposes specific requirements on cities and counties to designate critical areas and adopt development regulations to protect their structure, functions, and values. The Board interpreted and applied these statutory requirements in strict reliance on the decisions of this Court and the state Supreme Court. Its determination that Kent's wetlands protection provisions did not comply with the GMA was heavily fact-specific, but in every respect its legal analysis closely followed these controlling precedents. Each of the Board's factual findings is supported by substantial evidence in the record.

2006, in King County Superior Court. A copy of the Certificate is available at <http://www.gmhb.wa.gov/central/decisions/>. For the Court's convenience, a copy of the Certificate is attached as **Appendix B**.

V. ARGUMENT ON THE MERITS

A. Standard of Review and Relief Available Under RCW 34.05

Judicial review of a Growth Management Hearings Board decision is conducted under the Administrative Procedure Act (APA), RCW 34.05, under which the Court reviews the record made before the Board. *Lewis Cy. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 157 Wn.2d 488, 497 ¶ 7, 139 P.3d 1096 (2006). Kent and MBA/BIAW bear the burden of demonstrating the Board's decision is invalid. RCW 34.05.570(1)(a); *Lewis Cy.*, 157 Wn.2d at 498 ¶ 9.

The APA sets forth nine bases for granting relief from the Board's decision, RCW 34.05.570(3), of which Kent alleges three: subsections (d), (e), and (i). *See Kent Br.* at 32-33.⁷

RCW 34.05.570(3)(d) authorizes relief if Kent or MBA/BIAW demonstrate the Board erroneously interpreted or applied the law. Under this subsection, the Court reviews the Board's legal conclusions de novo. While the Board must defer to the City's planning decisions that are consistent with the GMA, "the Board itself is entitled to deference in determining what the GMA requires. This court gives 'substantial weight' to the Board's interpretation of the GMA." *Lewis Cy.*, 157 Wn.2d at 498

⁷ MBA/BIAW did not cite RCW 34.05 in its opening brief. For purposes of this brief, therefore, the State Agencies will treat MBA/BIAW's arguments as implicating only the subsections in RCW 34.05.570(3) cited by Kent.

¶ 8 (citing *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000)).⁸

RCW 34.05.570(3)(e) authorizes relief if Kent or MBA/BIAW demonstrate the Board's order is not supported by evidence that is substantial when viewed in light of the whole record before the Court. The record before this Court is the record that was before the Board. *Thurston Cy. v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Id.* (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997)). The Court does not weigh the evidence or substitute its view of the facts for that of the Board. *Callecod*, 84 Wn. App. at 676 n.9. On mixed questions of law and fact, the Court

⁸ The decision in *Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005), sometimes is cited for the proposition that the Board must defer to policy decisions made by local governments in the implementation of the GMA. See, e.g., MBA/BIAW Br. at 2. That was not the holding in *Quadrant*. Rather, the Court held the GMA requires the Board to give deference only to local planning decisions that comply with the GMA. *Quadrant*, 154 Wn.2d at 238. After the recent decision in *Lewis Cy.*, there should be no further confusion about the holding in *Quadrant*. The Court in *Lewis Cy.* explained that the Board has a statutory duty to determine whether a challenged plan or development regulation adopted under the GMA complies with the GMA's requirements. *Lewis Cy.*, 157 Wn.2d at 498 ¶ 8 n.7 (citing RCW 36.70A.300(3) and .320(3)). So long as the Board applies the correct standard of review – the clearly erroneous standard – its determination of compliance or noncompliance is entitled to deference by a reviewing court. *Lewis Cy.*, 157 Wn.2d at 498 ¶ 8; see *Quadrant*, 154 Wn.2d at 238 ¶ 23 (deference to the local government ends when it is shown that the local government's action is a clearly erroneous application of the GMA). To find an action "clearly erroneous," the Board must have a "firm and definite conviction that a mistake has been committed." *Lewis Cy.*, 157 Wn.2d at 497 ¶ 7 (quoting *Dep't of Ecology v. PUD No. 1 of Jefferson Cy.*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

determines the law independently, then applies it to the facts as found by the Board. *Thurston Cy.*, 148 Wn.2d at 8.

RCW 34.05.570(3)(i) authorizes relief if Kent or MBA/BIAW demonstrate the Board's order is arbitrary or capricious. "Arbitrary and capricious" means willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action; where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though the reviewing Court may believe it to be erroneous. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). This test is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

RCW 34.05.574 limits the relief available to Kent or MBA/BIAW. The Court may affirm the Board's order, order the Board to take action or exercise discretion required by law, enjoin or stay the Board's decision, remand for further proceedings, or enter a declaratory judgment. RCW 34.05.574(1). "In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency." *Id.*

Accordingly, a reviewing court may set aside the Board's decision, but it lacks authority to determine whether Kent's ordinance complies with the GMA. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 809-810, 959 P.2d 1173 (1998).⁹

B. The Board Correctly Articulated the GMA's Requirements Regarding Critical Areas and Best Available Science

The State Agencies raised six legal issues in their petition to the Board (*see* FDO at 6): first, that the wetlands rating system and wetlands buffers in Ordinance 3746 did not protect all the functions of Kent's wetlands, as required by the GMA (Board's Legal Issues 1, 2); second, that the City adopted an impermissible exception to the statutory definition of "wetland" (Issue 3)¹⁰; third, that the City did not substantively include best available science in developing the ordinance (Issue 4); and fourth, that the recitals in the ordinance purporting to justify the departure from BAS were not based on evidence in the record and were, in any event, legally insufficient to justify inadequate wetlands protection (Issues 5, 6).

These issues required the Board to review the evidence in the record and make fact-specific determinations to determine whether the

⁹ In *Quadrant*, 154 Wn.2d at 247-48 ¶ 40, without citation to RCW 34.05.574, the Court concluded remand was unnecessary because there were no material issues left for the Board to decide following the Court's decision. Since the Court did not reference RCW 34.05.574, the remedy in *Quadrant* should be considered fact-specific, rather than some new judicial exception to the statutory limitation in RCW 34.05.574.

¹⁰ The City has conceded the definition was erroneous, and this issue is not before the Court. *See* Kent Br. at 2-9.

wetlands protection sections of Ordinance 3746 complied with the GMA. Ultimately the Board found the State Agencies carried their burden as to all issues and concluded the wetlands protection sections of Ordinance 3746 did not comply with the GMA. FDO at 55. This section of the brief summarizes the applicable GMA requirements and explains how the Board interpreted and applied these requirements in explicit reliance on the decision of this Court and the Washington Supreme Court.

1. Critical Areas Must Be Designated and Protected Before Planning for Urban Development

Citing to RCW 36.70A.170(1)(d), .040(3), .060(2), and .030(5)(a), the Board began its summary of the applicable law by explaining that all counties and cities in Washington must designate and protect critical areas, including wetlands. FDO at 9-10. The Board noted also that the designation and protection of critical areas precedes the development of comprehensive plans and the designation of urban growth areas under the GMA. *Id.* at 10-11. Only after critical areas protections were in place were counties and cities to proceed to the next implementation steps under the GMA, including the planning for urban growth.¹¹

¹¹ The temporal priority of critical areas protection is evident in a comparison of the statutory deadlines applicable to Kent: critical areas were to be designated and protected by Sept. 1, 1991 (RCW 36.70A.060(2), .170(1)); interim urban growth areas were to be designated by Oct. 1, 1993 (RCW 36.70A.110(5)); final urban growth areas were to be designated in the comprehensive plan and implementing development regulations by July 1, 1994 (RCW 36.70A.040(3)).

As the Board correctly noted, the designation and protection of critical areas were the first formal steps required in implementing the GMA for two reasons: (1) to preclude urban growth in areas unsuited for urban development, either because of environmental significance or because of danger to human life and property; and (2) to prevent irreversible environmental harm while comprehensive plans and implementing regulations were prepared. FDO at 11.¹²

2. Local Governments Must Include the Best Available Science When Developing Critical Areas Regulations

In 1995, the Legislature added a new section to the GMA that requires cities and counties to “include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1).¹³ This Court has held BAS must be included in the record and must be considered substantively in the development of critical areas policies and regulations. *HEAL*, 96 Wn. App. at 532; *WEAN*, 122 Wn. App. at 171.

The Board turned to the *HEAL* decision to explain the purpose of this substantive BAS requirement: to ensure that critical areas regulations

¹² See Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 907-08 (1993).

¹³ The legislative history of RCW 36.70A.172 is summarized in Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Mgmt. Act*, 23 Seattle U.L. Rev. 97, 102 n.15 (1999).

are not based on speculation and surmise, but on meaningful, reliable, relevant evidence. FDO at 14 (citing *HEAL*, 96 Wn. App. at 531).

[Critical areas] are deemed critical because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.

Id. (quoting *HEAL*, 96 Wn. App. at 533). Still relying on *HEAL*, the Board explained that substantive use of BAS not only ensures that local governments develop critical areas regulations that pass constitutional muster, but that such regulations are effective and fair:

The fundamental premise underlying the best available science requirement, according to the Court in *HEAL*, is that regulations based on science will be better protective of critical areas than ones that are not based on science; thus BAS is essential to an accurate decision about what policies and regulations are necessary to mitigate environmental effects of development.

Id. (citing *HEAL*, 96 Wn. App. at 533).

The Board next turned to the decisions in *Ferry Cy.* and *WEAN* for the analysis to be used in determining whether Kent complied with the BAS requirement. The Board found the following factors in *Ferry Cy.* for determining whether BAS was included in local critical areas regulations:

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

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

FDO at 14-15, 42 (quoting *Ferry Cy.*, 155 Wn.2d at 834). The Board followed the Supreme Court's admonition that these factors should be applied on a case-by-case basis and there should be no bright-line definition of BAS. *Id.* at 14-15 (citing *Ferry Cy.*, 155 Wn.2d at 834).

The Board carefully reviewed the *WEAN* decision because it specifically addressed buffer widths for critical areas. Based on *WEAN*, 122 Wn. App. at 172, and consistent with WAC 395-195-915(c), the Board added a fourth factor to the *Ferry Cy.* test: whether the record contains facts that justify any departure from science-based recommendations. FDO at 16, 42.¹⁴

Despite the Board's careful reliance on *Ferry Cy.* and *WEAN*, Kent insists the GMA leaves the ultimate decision to cities and counties to determine what it means to include BAS in designating and protecting critical areas, Kent Br. at 38-39, and Kent continues to advocate an interpretation of the BAS requirement that effectively abandons its duty to substantively consider the BAS in the record, *id.* at 43-44.

¹⁴ The precise test applied in *WEAN*, 122 Wn. App. at 172, was whether the record contained sufficient evidence of "unique local conditions to justify a departure downward from the buffer width requirements outlined in the scientific literature." This Court's decision in *WEAN* is the only published appellate decision specifically allowing any departure from science-based recommendations. The *Ferry Cy.* decision did not acknowledge a possibility of departing from science-based recommendations.

Kent is not the ultimate decision maker. As explained *supra* at footnote 8, the Board has a statutory duty to determine whether the city complied with the GMA's requirements, and the Board is not to defer to a local decision that is a clearly erroneous interpretation of the GMA. Not only is Kent's interpretation of RCW 36.70A.172(1) subject to review by the Board, but the Board's interpretation is subject to review by the courts. RCW 36.70A.300(5); *see also Thurston Cy.*, 148 Wn.2d at 11-15 (affirming Board's interpretation of the GMA and rejecting County's contrary interpretation).

Kent continues to argue that the requirement to include BAS consists of three steps: (a) include BAS in the record; (b) consider BAS when the ordinance is developed; (c) depart from BAS if departure can be justified. This argument effectively subverts the requirement that BAS be substantively considered. *HEAL*, 96 Wn. App. at 532; *WEAN*, 122 Wn. App. at 171. For BAS to be substantively considered, there must be more than procedural compliance; there must be two truly possible outcomes: (1) protective regulations informed by and consistent with science-based recommendations; or (2) protective measures that depart from science-based recommendations but that still protect the functions and values of the critical areas, with sufficient evidence in the record to justify the effectiveness of the alternative protection measures. *WEAN*, 122 Wn.

App. at 173. Kent's three-step argument ignores the GMA's requirement that the functions and values of critical areas actually be protected and, as the Board correctly stated, it omits the third element of the *Ferry Cy.* framework established by the Supreme Court. FDO at 43; *see* page 19, *supra*. More fundamentally, because Kent's approach effectively predetermines the result (i.e., departure from BAS), it cannot be said to be a "reasoned process," as required by the second element of the *Ferry Cy.* test. Kent's argument should be rejected, and the Board's reliance on *Ferry Cy.* and *WEAN* should be affirmed.

3. Local Governments Must Adopt Regulations that Protect the Functions and Values of Critical Areas

Counties and cities are required to protect not only the structure of critical areas, but also their functions and values. RCW 36.70A.172(1); WAC 365-195-825(2)(b). The Board relied on the *WEAN* decision to understand this requirement. In *WEAN*, the county adopted a buffer width based only on water quality functions, rather than looking at "the entirety of functions attributed to stream buffers," and argued its buffers were "within the range" of BAS. FDO at 15 (quoting *WEAN*, 122 Wn. App. at 174). This Court disagreed:

While 25-foot buffers did fall within the range of some of the evidence given, they did so only with specific and narrow functions in mind, rather than the entirety of functions attendant to type 5 streams.... But the GMA

requires that the regulations for critical areas must protect the “functions and values” of those designated areas. This means all functions and values.

Id. (quoting *WEAN*, 122 Wn. App. at 174-75). The Board’s reliance on *WEAN* should be affirmed.

4. Local Governments Must Update Their Critical Areas Regulations Using Current Best Available Science

Ordinance 3746 was adopted pursuant to RCW 36.70A.130(1)(c), FDO at 17 (Finding 6), which requires that critical areas ordinances be updated regularly. The Board described the update requirement as a statutory recognition that “science is a dynamic enterprise and that scientific understandings will grow over time,” relying on the admonition in *Ferry Cy.*, 155 Wn.2d at 837-838, that a city or county “cannot choose its own science over all other science and *cannot use outdated science* to support its choice.” FDO at 14 (Board’s emphasis). In other words, a city or county may not use outdated science when updating critical areas ordinances. The Board’s reliance on *Ferry Cy.* should be affirmed.

C. The Board Correctly Concluded Kent Did Not Comply with the GMA’s Best Available Science Requirement

As the preceding section demonstrates, the Board did not craft a new interpretation of the GMA’s requirements, nor did it stray from the controlling judicial construction of the critical areas and BAS requirements in the GMA. The Board broke no new legal ground. The

Board simply applied those controlling provisions and judicial construction to the record before it and found the City had not complied with the requirement to include BAS when developing regulations to protect the functions and values of wetlands.

1. The Board Properly Placed the Burden of Proof on the Petitioners Challenging the Critical Areas Regulations

MBA/BIAW initially argue the Board improperly placed the burden on Kent to defend its ordinance, rather than on the State Agencies to prove that the challenged ordinance did not adequately protect wetlands. MBA/BIAW Br. at 8. They are wrong. The Board correctly placed the burden on the State Agencies to demonstrate noncompliance with the GMA's requirements. FDO at 16.

In *WEAN*, 122 Wn. App. at 184, this Court held it was not impermissible burden-shifting for the Board, in response to a petition for review, to examine whether a county or city has complied with the GMA.

The Board explained how this case parallels *WEAN*:

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

undertaken in the *Ferry County* case.... It is Petitioners' burden to prove by clear and convincing evidence that the City's ordinance does not comply with the GMA because it does not include BAS for wetlands protection.

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

FDO at 17.

The State Agencies demonstrated that the City's wetlands rating system relied on outdated science and did not include BAS, that the City's wetlands buffers were outside the range of recommendations based on BAS, and that the record contained no evidence justifying a departure from those recommendations. It was not part of the State Agencies' burden here to show that use of a modern science-based wetlands rating system and buffers that comply with BAS will improve wetlands protection over an outdated system and buffers smaller than the range supported by science. The GMA's BAS requirement rests on the premise that ordinances that include BAS will better protect critical areas than

ordinances that depart from BAS.¹⁵ The GMA does not require proof of the statutory premise in each case.¹⁶

The Board properly required the State Agencies to demonstrate noncompliance with the GMA, as required in RCW 36.70A.320.

2. The Wetlands Rating System in Ordinance 3746 Relied on Outdated Science and Did Not Classify Wetlands According to Their Functions

As explained above, the GMA requires that cities and counties adopt development regulations to protect critical area functions and values. The Board correctly noted that wetlands can be protected under the GMA without using a wetland classification system, but if one is used it must include BAS to ensure the adopted protection measures in fact protect wetland functions. FDO at 31, 33-34.

¹⁵ That premise is articulated in *HEAL*, at 96 Wn. App. at 533: “[T]he best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.” Indeed, the premise that BAS is necessary for an informed decision is so strong that a city or county that “fails to incorporate, or otherwise ignores the best available science” is in real danger of adopting a critical areas ordinance that “may well serve as the basis for conditions and denials that are constitutionally prohibited.” *Id.* The premise also is reflected in the rule that a city or county may not rely on outdated science. *Ferry Cy.*, 155 Wn.2d at 837-838.

¹⁶ Were that the rule, as MBA/BIAW advocates, no challenge could succeed. Except in the most extreme and obvious of cases, evidence of adequate or inadequate protection becomes apparent only with the passage of time, and the 60-day window in RCW 36.70A.290 for challenging a critical areas ordinance or amendment plainly is insufficient for any such evidence to accumulate. Moreover, if that were the rule, the Board could not find noncompliance until damage to critical areas had occurred in sufficient quantum to constitute proof of the ordinance’s ineffectiveness or shortcomings, which would eviscerate the GMA’s requirement to prospectively protect the functions and values of critical areas. RCW 36.70A.060(2), .172(1).

Ordinance 3746 included a wetlands rating system, but the Board found it was based on an outdated three-tier classification scheme that did not take into account wetlands functions. FDO at 19-20 (Findings 24, 25). The Board concluded this classification scheme, in combination with the City's inadequate buffers (discussed in the next section of this brief), did not comply with the GMA's requirement to protect wetlands functions and values. *Id.* at 39-40. The Board properly concluded that Kent's wetlands rating system was not based on BAS:

In reenacting its three-tier wetlands ranking system, Kent failed to account for the full range of wetland functions and therefore failed in its GMA obligation to protect critical area functions and values.... Retaining this outdated system ignores the advances of science and understanding of wetland functions and values that have occurred over the last decade.

Id. at 34. The Board's findings are supported by substantial evidence, its conclusions are consistent with law, and both should be affirmed.

The purpose of a wetland rating system is to classify wetlands according to the functions they perform, including hydrologic functions (flood control, erosion control, aquifer recharge, etc.), water quality functions (sediment retention, nutrient uptake, toxin removal, etc.), and habitat (for fish, wildlife, and plants, including migration corridors). FDO

at 31 (citing Ex. 81-B).¹⁷ Not all wetlands perform all functions, nor do all wetlands perform all functions equally well. *Id.* (citing WAC 365-190-080(1) and Ex. 106).¹⁸ Consequently, a rating system is used to classify wetlands according to the functions they perform, so that proper protections for those functions may be assigned – and, correspondingly, so unnecessary protections may be avoided. *Id.* at 31-32.

The central problem with Kent's outdated system was that it failed to account for wetland functions and did not differentiate among classes of wetlands based on function. It was based on a system developed by King County in the early 1980s, which in turn was based loosely on the Cowardin system published in 1979, which had been developed to map wetlands from aerial photographs, not to identify or protect wetland functions.. FDO at 17, 19 (Findings 3, 24); *id.* at 32. Accordingly, Kent's three-tier system classified wetlands based on gross characteristics such as size, number of vegetation classes, and presence of bog species. AR Tab 2 (Ordinance 3746, § 11.06.580).

¹⁷ The Exhibits before the Board were attached to the parties' briefs and may be found under AR Tabs 34, 41 and 53. *See* WAC 242-02-52001 (evidence to be considered by the Board is to be cited in a brief and attached thereto). Exhibit 81-B (AR Tab 34) is *Freshwater Wetlands in Washington State – Volume 1: A Synthesis of the Science*, part of the draft wetlands guidance released by Ecology in August 2003 and provided to the City of Kent during the development of Ordinance 3746.

¹⁸ Exhibit 106 (AR Tab 34) is *Best Available Science Issue Paper: Wetlands*, prepared by the City's consultant, Adolfsen Associates.

Scientific research over the last 20 years has shown that the factors used in Kent's ordinance are not adequate to assess the performance of wetland functions. Exs. 67, 79, 86, 95 (AR Tab 34).¹⁹ For example, an assumption underlying Kent's three-tier system was that larger wetlands provide better habitat than smaller ones, but subsequent research has shown that some small wetlands provide important habitat not provided by larger wetlands.²⁰ Size no longer is used as a factor to assess wetland functions.

Because the classifications in Ordinance 3746 are not predictive of wetland functions and values, the ordinance placed wetlands with similar functions and values into different categories with different protective standards; conversely, it grouped wetlands into categories without regard to their disparate functions and values and the measures necessary to protect them.²¹

¹⁹ These exhibits are official comment letters from an Ecology wetlands specialist to Kent planning staff, submitted during the drafting of Ordinance 3746.

²⁰ See Tom Hruby et al., *Methods for Assessing Wetland Functions, Vol. 1: Riverine and Depressional Wetlands in the Lowlands of Western Washington, Part 1: Assessment Methods* (1999), cited in Ex. 81-B (AR Tab 34) (Ecology guidance) and Ex. 106 (AR Tab 34) (Adolfson BAS report to the City of Kent).

²¹ In particular, under the City's ordinance, Category 2 contains wetlands that exhibit a wide range of type and level of function, but it provides a one-size-fits-all buffer. As a result, some wetlands in Category 2 receive adequate protection, but many do not. See Ex. 86 (AR Tab 34) (comment letter from Ecology wetlands specialist to Kent planning staff); Ex. 119 (AR Tab 34) (letter from Adolfson to City of Kent).

Starting in the 1990s, wetlands scientists developed a new four-tier classification system based on wetlands' hydrogeomorphic characteristics.²² This system takes into account all three categories of wetland functions – hydrologic, water quality, and habitat – using factors directly related to the functions the wetland performs. For example, the position of the wetland in the landscape – as adjacent to a river, lake or situated in a depression – indicates whether the wetland provides habitat for anadromous species and whether it provides flood control. Ex. 81-B, Table 2-5. Kent's system, by contrast, did not use any factors related to water quality or hydrologic functions. *See* Ex. 116 (AR Tab 53)²³.

Kent claims the Board erred by rejecting its reasons for retaining its three-tier system – i.e., that its three-tier system is easier to use and more familiar to the City than the four-tier system.²⁴ Kent Br. at 47-50.

²² *See* Ex. 81-B, § 2.3.1 (AR Tab 34). A wetland's hydrogeomorphic characteristics are determined by its position in the landscape, the source of water that supports it, and the flow of water within the wetland. These factors are the primary drivers of wetland functions, particularly hydrologic and water quality functions. *Id.* *See generally* Ex. 81-A (*Washington State Wetland Rating System for Western Washington, Revised*, Ecology Publication 04-06-025 (August 2004) (AR Tab 34)

²³ Exhibit 116 is a letter from Adolfsen to the City of Kent. The State Agencies' Reply Brief to the Board contains an extended footnote summarizing some of the differences between the factors used in Ordinance 3746 and those used in a modern four-tier system. *See* AR 53 at 13-14 fn.9.

²⁴ Kent also argued a modern ratings system was not needed because the City has a "lesser diversity of wetland types" than other jurisdictions. Kent Br. at 47-50. This contention is not supported by the record. The Board found, based in part on the work of the City's consultant, that Kent contains a great variety of high functioning wetlands. FDO at 17-18 (Finding 7, citing Ex. 106 (AR 34) (Adolfsen BAS report to Kent)).

The Board properly rejected this arguments for three reasons: (1) mere complexity is not a sufficient reason to reject a new classification system;²⁵ (2) many other jurisdictions (including numerous cities and King and Pierce Counties) have adopted the new system, so it likely is familiar to wetlands consultants who will be working in Kent; and (3) Kent could have made changes to its existing system or developed its own system, so long as its system included BAS – the City was not required to use this new system to the exclusion of any other. FDO at 34.

On appeal, Kent does not address the reasons given by the Board, but argues simply that the Board should have deferred to the City’s reasoning (regardless of what those reasons were). This argument is wrong as a matter of law. As explained in footnote 8, *supra*, the Board has a statutory duty to determine whether a challenged plan or development regulation adopted under the GMA complies with the GMA’s requirements. *Lewis Cy.*, 157 Wn.2d at 498 ¶ 8 n.7 (citing RCW 36.70A.300(3) and .320(3)).

²⁵ Indeed, the alleged complexity of the new system simply reflects the complexity of wetland functions, which may be a reason to use the new system. The Board made an unchallenged finding that the four-tier system “was developed with the challenges of subjectivity and complexity in mind” and had been field-tested to ensure “replicability of application.” FDO at 20 (Finding 28); *see* Ex.81-A at 5 (AR Tab 34).

Relying on two sentences taken out of context from Ecology's two-volume guidance on wetlands protection in Washington,²⁶ MBA/BIAW argue there is no difference between rating systems in how they address protection of wetland functions and values. MBA/BIAW Br. at 8-9. There may not have been much difference between various older wetlands rating systems, since (like Ordinance 3746) they used factors that were not predictive of wetland function. However, the "assumption" in the cited passage (that better protection for wetlands is provided with improved understanding of wetlands functions and values) is not just an idle guess; it is an educated prediction supported by citation to two scholarly works, one a comprehensive treatise prepared by the National Research Council (an arm of the National Academy of Sciences).²⁷ Moreover, the science reviewed in Ecology's wetlands guidance is unequivocal about the importance of understanding wetland functions in order to determine the appropriate levels of protection, as modern wetland rating systems do. Ex. 81-A, chs. 2, 5 (AR Tab 34). *See also* Ex.81-C,

²⁶ Excerpts from the two volumes are found at Exhibits 81-A and 81-B (AR Tab 34). The two volumes together comprise over 900 pages of text and tables. Copies of the final versions are available at www.ecy.wa.gov/biblio/0506006.html (volume 1) and www.ecy.wa.gov/biblio/0506008.html (volume 2).

²⁷ The two cited works are National Research Council, *Wetlands: Characteristics and Boundaries* (1995); and E.M. Roth et al., *Oregon Freshwater Wetland Assessment Methodology* (1993).

App. 8-A at 1 (the protections a wetland requires are directly related to its functions) (AR Tab 34).

MBA/BIAW also claim there is no difference “on the ground” between rating systems. MBA/BIAW Br. at 9-10. This claim is not true if one is comparing an outdated rating system like the Cowardin system with a modern rating system like the one developed by Ecology. Both Adolfson and Ecology explained to the City how the use of the outdated three-tier system, in combination with its inadequate buffers, would fail to protect specific wetland types and functions. *See* Exs. 79, 86, 119, 178.²⁸

Based on the evidence in the record and relying on *WEAN*, 122 Wn. App. at 175, the Board correctly concluded Kent was required to protect *the entirety* of the functions and values of its critical areas under RCW 36.70A.172(1), and it laid out in detail why Kent’s retention of the

²⁸ Exhibits 79 and 86 (AR Tab 34) are comment letters from Ecology to the City. Exhibit 119 (AR Tab 34) is a memo from Adolfson to the City. Exhibit 178 (AR Tab 34) is a memo from the City’s Principal Planner to the Planning and Economic Development Committee of the City Council. The State Agencies gave generalized examples of on-the-ground differences in the two rating systems. One example follows:

Under the City’s 3-tier system, all wetlands greater than one acre with two wetland classes (emergent, shrub, forested, open water) or wetlands between one and ten acres with three or four wetland classes, would fall under Category 2 and would be assigned a 50-foot buffer. Under Ecology’s 4-tier system, these same wetlands could fall into Categories I, II or III, depending on their total score for all three function groups (water quantity, water quality and habitat) and whether they had other features such as mature forest, or were bogs or natural heritage wetlands. Depending on the habitat score and the intensity of adjacent land use, and applying the best available science, buffers likely would range from 75 to 300 feet.

AR Tab 53 at 11 (State Agencies’ Reply Brief to the Board).

outdated three-tier rating system did not include BAS and did not protect all wetland functions and values. FDO at 19-20 (Findings 22-29); *id.* at 31-35. The Court should affirm the Board's conclusion that the wetlands rating system in Ordinance 3746 did not comply with the GMA.

3. The Buffers Adopted in Ordinance 3746 Were Not Sufficient to Protect Wetland Functions

In adopting Ordinance 3746, Kent retained the same wetland buffers it had in its previous critical areas ordinance. FDO at 21 (Finding 46). The Board found these buffers were below the width supported by science in the record. *Id.* Substantial evidence in the record supports the Board's finding and it should be affirmed.

The City's consultant, Adolfson Associates, reported to the City that retaining the existing buffers was not consistent with BAS. Exs. 115 at 2, 119 at 3 (AR Tab 34). Adolfson recommended that Kent increase its buffers by 25 feet for all wetlands categories and identified the risks to wetlands functions if the City retained its existing buffers.²⁹ Exs. 115 at 3, 119 at 4. The City's staff concurred with Adolfson's recommendation.

²⁹ Adolfson identified the following risks: (1) degradation of habitat for wetland-related species, especially in Category 1 and 2 wetlands; (2) degradation of riparian wetlands that protect salmonids and their habitat; (3) continued water quality degradation in wetlands caused by increased inputs of fine sediments from urban development; (4) continued pollutant loading in wetlands, particularly in Category 2 and 3 wetlands; (5) reduced stormwater and floodwater storage capacity over time in wetlands receiving sediment loading; and (6) continued water quality degradation in streams within the City, which already are documented on the State 303d list of impaired waters under the federal Clean Water Act. Ex. 119 at 4 (AR Tab 34).

Ex. 178 at 2 (AR Tab 34). Ecology submitted comment letters warning that even the consultant's recommended buffer width increases were inadequate to protect some wetland functions. Exs. 79, 86 (AR Tab 34).

According to the guidance Ecology provided to the City (which was developed using BAS), buffer widths necessary to protect all wetland functions for Category 1 and 2 wetlands range from 100 to 300 feet for high intensity land uses (as in urban areas) depending on the sensitivity of the wetland and the specific habitat functions performed. Buffer widths for Category 3 wetlands range from 80 feet to 150 feet, and category 4 wetlands require approximately 50-foot buffers. *See* Ex. 81-C, App. C, Table 2 (AR Tab 34). There is no contrary scientific evidence in the record. Kent's adopted buffers of 25 to 100 feet were substantially below these ranges, particularly for Category 1 and 2 wetlands.³⁰

MBA/BIAW argue the Board should have deferred to the City's "policy" choice regarding buffers, contending the science is inadequate to determine adequate buffer width. MBA/BIAW Br. at 21-35. They support their argument by posing a series of questions and selectively citing statements from Ecology's guidance. There is no evidence in the

³⁰ Kent admits it adopted buffers that were "slightly below the strict recommendations of some scientists." Kent Br. at 53. In fact, the City's buffers were substantially below the recommendations of all the science in the record. There simply is no science in the record that supports the buffers Kent adopted.

record that Kent actually asked or considered any of these questions. Had Kent done so, it would have found information in Ecology's guidance – derived from BAS – that would have helped the City determine how much buffer is needed to protect these functions.³¹ While science may not give a definitive, bright-line answer to every possible question, science in the record does establish a clear range of buffer widths needed to protect wetlands, and the City's chosen buffers fell below that range.³²

³¹ For example, MBA/BIAW raise questions regarding alleged difficulties in determining appropriate buffers for sediment removal and wildlife habitat. MBA/BIAW Br. at 22-25. The science is in the record to develop answers to their questions. *See* Ex. 81-B, § 5.5.3.1 (AR Tab 34) (relationship of buffer width to sediment removal); Ex. 81-B, ¶ 5.5.4.1 and Table 5-5 (buffer widths needed for wildlife species).

³² *See* Ex. 81-C, App. C, Table 1 (AR Tab 34) (buffer widths needed to protect wetlands based on category alone); Table 2 (buffer widths needed to protect wetlands if land use impacts are considered); Tables 4-7 (buffer widths needed if both land use and specific wetland functions are considered). *See also* Supplemental Exs. 1 and 2 (AR 28) (showing buffer widths needed for birds and amphibians).

MBA/BIAW claim Ecology's wetlands guidance "admits there is no scientific information or agreement on a host of critical questions that must be resolved in order to establish an identifiable range of acceptable wetland buffer widths and other protection measures." MBA/BIAW Br. at 36. This simply is not true. The guidance provide ranges for buffer effectiveness, based on the four primary factors that BAS documents as relevant to determining widths: (1) the type of wetland and its functions and values; (2) the type of adjacent land use and its expected impacts; (3) the character (soils, slope, vegetation) of the buffer; and (4) the buffer functions necessary to protect the wetland from the adjacent land use. Ex. 81-B, § 5.5 (AR Tab 34). The City's consultant evaluated the same body of science as Ecology and came to similar conclusions regarding the effectiveness of the buffers adopted in Ordinance 3746. Ex. 119 at 3-4 (AR Tab 34).

MBA/BIAW also assert the City made a policy choice to adopt 'better' rather than bigger buffers by encouraging revegetation of existing buffers. MBA/BIAW Br. at 32. According to the science in the record, however, the buffers Kent adopted, even if revegetated, would still be inadequate. *See* Ex. 81-C, Appendix 8-C at 2 (AR Tab 34) (recommended buffers assumed to be vegetated). Thus, based on the BAS in the record, merely encouraging revegetation of existing buffers would not protect wetland functions in Kent.

The buffer widths adopted in Ordinance 3746 were below the range established by the BAS in the record, and the Board correctly found they did not comply with the GMA. This Court should affirm the Board.

D. The Board Correctly Concluded the Record Did Not Support Kent’s Stated Justification for Departing from Best Available Science

As explained beginning at page 16, *supra*, the GMA requires that cities and counties protect the functions and values of critical areas and develop their protective regulations with the substantive inclusion of BAS. Although the language of those statutory provisions does not contemplate any “departure” from the BAS in the record or from the requirement to protect critical areas and their functions and values, this Court’s decision in *WEAN*, 122 Wn. App. at 172, held there could be a departure from the “buffer width requirements outlined in the scientific literature,” but only if the city or county can point to the part of the record showing how “unique local conditions” justify the departure.³³

³³ A departure from science-based recommendations (i.e., a departure from recommended buffer widths based on the BAS in the record, not a departure from the BAS itself) also is contemplated by WAC 365-195-915(1)(c) (emphasis added):

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

- (i) Identify the information in the record that supports its decision to depart from science-based recommendations;
- (ii) Explain its rationale for departing from science-based recommendations; and

WEAN emphasized, however, that even if such justification is in the record, “the GMA requires that the regulations for critical areas must protect the ‘functions and values’ of those designated areas. This means all functions and values.” *WEAN*, 122 Wn. App. at 174-75 (footnote omitted)). Accordingly, a city or county must justify its departure and explain how the functions and values will be protected using alternative means. *See* WAC 365-195-915(1)(c)(iii).

1. The Board Correctly Found No Evidence in the Record of Unique Circumstances in Kent That Would Justify Reduced Wetlands Protection

Applying *WEAN*, the Board found no unique local conditions in the City’s record that justified departure:

All Central Puget Sound jurisdictions are reviewing substantially the same recent scientific findings as they update their CAOs. Many Central Puget Sound cities are built in river valleys and flood plains; many jurisdictions struggle with the need to protect the natural hydrology and at the same time allow property development. All Central Puget Sound cities have stormwater regulations; most have salmon protection programs and wetland or stream enhancement projects. If anything, Kent’s location in the Green River Valley, its floodplain valley floor areas, its critical wetlands in the upper reaches of Soos Creek and other significant salmon streams suggest unique local need for extraordinary protection of remaining wetlands.

(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.

The Supreme Court has encouraged the Board – and presumably, therefore, also cities and counties and reviewing courts – to “benefit” from the “greater guidance” provided in WAC 365-195-905 through -925. *Ferry Cy.*, 155 Wn.2d 824, 838-39, ¶31.

FDO at 45 (citations omitted). The record contains no evidence of unique local conditions that would justify the use of an outdated wetlands rating system and buffer widths below the science-based recommendations in the record. The record contains no evaluation or analysis of wetland types or environmental conditions or other special circumstances that would justify these protection measures. The Board's finding is supported by the lack of evidence in the record.

2. The Board Correctly Concluded the City's Reliance on Other Ordinances and Programs to Protect Critical Areas Was Not Supported by the Record

As noted above beginning at page 34, the City's wetlands consultant repeatedly documented several risks to wetland functions if the City retained its old buffers, including degradation of both habitat and water quality, increased pollutant loading and sedimentation, reduction in stormwater and floodwater storage capacity, and water quality degradation in streams. *See* Ex. 115 at 3; Ex. 119 at 4 (AR Tab 34). The consultants recommended a number of specific "additional measures" the City should use to offset these risks.³⁴ City planning staff concurred in the recommendation. Ex. 186 at 5 (AR Tab 34)

³⁴ Among Adolfson's recommendations to the City were the following:

- Use more stringent water quality protection measures during stormwater design to specifically protect wetland resources;

Instead, the Recitals portion of Ordinance 3746 simply included a list of other programs, policies, and regulations the City found provided protection for wetlands even if the wetlands provisions of the ordinance did not. These Recitals were not supported by any analysis or citation to the science in the record. Ordinance 3746, Recitals H-L (AR Tab 2). Applying the test from *WEAN*, 122 Wn App. at 173-75, the Board concluded the City had not demonstrated in the record how these other programs protected the specific functions and values provided by Kent's wetlands. FDO at 49. The Board's decision is supported by substantial evidence and consistent with law, and it should be affirmed.³⁵

-
- Reduce thresholds for when stormwater management is required on sites that contain wetlands;
 - Maintain building setback areas in grass or lawn to provide biofiltration outside of the wetland buffer in new developments;
 - Enhance all existing wetland buffers on sites pending development action;
 - Require stewardship plans designed to protect wetland resources in agricultural areas adjacent to or in wetlands;
 - Use low-impact development strategies that reduce the impact of urban development on wetland resources;
 - Purchase highly sensitive or high quality wetland areas and their buffers by the City as open space;
 - Use voluntary conservation easements or other mechanisms to set aside natural areas containing significant wetlands.

Ex. 115 at 4; Ex. 119 at 4-5 (AR Tab 34). Adofson advised that “[d]evelopment and implementation of a citywide wildlife 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 [the option that was adopted in Ordinance 3746].” Ex. 119 at 5.

³⁵ The Board is not required to defer to the City Council's findings. The GMA mandates that the Board enter its own findings based on the entire record before it, and

The State Agencies consistently have supported the City's use of nonregulatory and other complementary measures to protect wetlands. *See, e.g.*, AR Tab 34 at 35-36; AR Tab 53 at 25-28. Indeed, Ecology's wetlands guidance anticipates such measures and contains a detailed discussion of the elements such measures would need to include to protect wetlands in lieu of adequate regulatory measures. *See* Ex. 81-C, chs 4, 5, 9, 11 (AR Tab 34).³⁶ These elements include a landscape assessment and analysis; identification of site specific restoration and enhancement opportunities; prioritization of restoration options; development of a plan for implementing such options, including funding; and a monitoring program. *Id.*, ch. 4. The State Agencies even offered to fund and assist Kent in the development of such a program. *See* Ex. 95 at 2 (AR Tab 34); Ex. 186, Att. A (AR Tab 34). Such a program was not included in Ordinance 3746.

the Board's decision is based on that record, not the Council's findings. RCW 36.70A.270(6), .290(4), .302(1)(b).

Here again, MBA/BIAW argue that the Board "shifted the burden of proof" by requiring the City to demonstrate that the existing programs and policies included BAS. MBA/BIAW Br. at 37. As explained beginning at page 24, *supra*, the Board does not impermissibly "shift the burden" by requiring the City to fulfill its statutory obligation and include in its record the justification for its departure.

³⁶ The four cited chapters in Exhibit 81-C present a framework for protecting and managing wetlands (ch. 4), a process for analyzing the landscape and its wetlands (ch. 5), guidance for developing and implementing nonregulatory programs to protect wetlands (chs. 9, 11), all of which Ecology developed based on the best available science addressing wetlands protection that is currently available.

Instead, the ordinance provided a lengthy list of regulations, programs, and projects the City had taken or proposed to take that would benefit wetlands in the City. In *WEAN*, 122 Wn. App. at 180, this Court explained that if a city or county wanted to rely on preexisting regulations to satisfy its obligation under RCW 36.70A.172(1),

those preexisting regulations must be subject to the applicable critical areas analysis to ensure compliance with GMA requirements. Otherwise, a county could use myriad preexisting regulations in an attempt to satisfy GMA critical areas requirements without actually having to include BAS analysis. This would contravene RCW 36.70A.172.

Relying on *WEAN*, the Board examined the record provided by the City and found no BAS analysis associated with any listed regulation, program, or project that addressed the protection of wetland functions and values. FDO at 47-49. Instead, to cite one example, the Board found recommendations in the record from the City's consultant and staff that the City would need to adopt a series of new, more stringent stormwater and other requirements in order to mitigate risks to wetlands if the wetland provisions in Ordinance 3746 were adopted.³⁷ *Id.* Those recommendations were not implemented in Ordinance 3746.³⁸

³⁷ See footnote 34 above.

³⁸ When providing technical assistance under the GMA, Ecology assumes urban jurisdictions in the Puget Sound basin will have adequate stormwater regulations and that these are a necessary component of protecting critical areas. Applying BAS, Ecology has

The City listed a number of programs (including solid waste recycling and conservation, wellhead protection, educational activities, and an Eagle Scout program) that may increase public awareness and maintain or improve general environmental conditions in the City, but there is no information in the record to demonstrate any wetland-related benefits. The City also listed its compliance with FEMA floodplain restrictions and permit requirements under the federal Clean Water Act; such compliance may provide marginal benefits to wetlands, but there is no information in the record to show they protect wetland functions and values.

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

While these regulations, programs, and projects may provide important environmental gains, there is no information in the record to

concluded the existence of such regulations does not eliminate the need to use other effective measures such as buffers to protect wetland functions and values. *See* Ex. 81-B, chs. 3-5 (AR Tab 34). Stormwater regulations reduce some impacts on aquatic resources from development, but they do not by themselves stop the degradation of wetlands functions from increases in runoff and loss of infiltration resulting from development; and, because they do little to protect and maintain wetland habitat functions, they do not reduce the need for buffers to perform those functions. *Id.*

demonstrate how or whether any of these efforts will protect the functions and values of Kent's wetlands.³⁹ This Court should uphold the Board's conclusion that no evidence in the record supports the City's finding that its list of regulations, programs, and projects will protect wetlands.

3. The Board Correctly Found the Record Did Not Support the City's Findings that Reduced Wetlands Protection Was Needed to Balance the GMA Goals

Kent and MBA/BIAW argue that the City was permitted to retain wetland buffers outside the range of BAS in the record in the exercise of its discretion to balance the GMA's goals in RCW 36.70A.020.⁴⁰ Kent Br. at 34-37; MBA/BIAW Br. at 33. The Board ultimately resolved this argument factually, finding no evidence in the record of any actual conflict between wetlands protection and any goal of the GMA:

[G]iving deference to the City of Kent's concern for GMA goals concerning housing, economic development, and property rights, the Board fails to find specific facts in the City's record that would support a finding that disregard of BAS for wetlands is necessary or will materially contribute to achieving those goals.

³⁹ It is conceptually possible to adopt effective wetlands protection without using traditional rating systems and buffers through a combination of regulations, programs, and projects that interact to protect wetland functions and values. To comply with RCW 36.70A.060(2) and .172(1), however, the City must provide a reasoned analysis in the record that includes BAS in explaining how the interaction protects wetland functions and values. It is not enough to simply list the regulations, programs, and projects without the required analysis, or to provide an analysis without support in the record. And it is not enough to rely on plans and good intentions, since effective wetlands protection requires provisions and programs that are currently enforceable.

⁴⁰ As Kent acknowledges (Kent Br. at 35), the GMA's goals are "not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

FDO at 54-55. Absent any evidence of actual conflict in the record, the Board concluded there was no need to perform any balancing of the GMA's goals against its requirements. Absent such evidence, the Court need not address the argument that GMA requirements must be balanced against GMA goals.

If the Court chooses to address this argument, the Board correctly concluded a city or county may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements. FDO at 13. The Board reached this conclusion in reliance on three published appellate decisions. It cited first to *King Cy.*, 142 Wn.2d at 555-63, in which the Court contrasted the GMA's goal of providing recreational opportunities with its requirements for designating and conserving agricultural lands, and concluded the GMA's agricultural lands requirements prevailed over the recreational goal on designated agricultural lands. FDO at 11-12.

The Board then turned to *Quadrant*, 154 Wn.2d at 246, in which the Court specifically rejected the argument that GMA goals create independent substantive requirements:

In *King County*, this Court considered both the goals and the requirements of the GMA in determining whether allowing active recreation on designated agricultural lands violated the GMA. However, *King County* did not rely on

the applicable goal in isolation nor did it hold the goals to independently create substantive requirements.

(Emphasis added). Rather, as the Board correctly explained,

The *Quadrant* Court stated that GMA requirements provide substance to GMA goals.... The Supreme Court explained that a city or county's discretion to balance GMA goals is not a license to ignore the GMA's explicit requirements. Thus "balancing" and "deference" come into play when GMA mandates have been satisfied. *Quadrant*, 154 Wn.2d at 246-247.

FDO at 12-13 (emphasis added). The GMA goals do not impose any additional requirements other than those provided for in the body of the GMA. *Quadrant*, 154 Wn.2d at 246, ¶¶35-37.

Finally, the Board cited this Court's decision in *City of Bellevue v. E. Bellevue Cmty. Mun. Corp.*, 119 Wn. App. 405, 81 P.3d 148 (2003), in which Bellevue had attempted to exempt a redevelopment project from the GMA's concurrency requirement by arguing that the project fulfilled other GMA goals. This Court rejected the argument, because "concurrency is not a goal, it is a requirement." *Bellevue*, 119 Wn. App. at 414.

The Board correctly concluded the City's obligation to balance competing GMA goals is not a license to ignore the GMA's explicit requirements. Just as Kent "cannot ignore the best available science in favor of the science it prefers simply because the latter supports the

decision it wants to make,” *HEAL*, 96 Wn. App. at 534,⁴¹ the City cannot ignore the GMA’s requirement that it protect the functions and values of critical areas in favor of the GMA goals it prefers simply because the latter supports the decision it wants to make.

More fundamentally, both Appellants fail to acknowledge that the balancing of GMA goals occurs not at the level of the critical areas ordinance, but rather at the level of the comprehensive plan.⁴² The fact that the GMA goals are in tension and must be balanced cannot be used to avoid the specific statutory mandate that critical areas and their functions

⁴¹ *Accord Ferry Cy.*, 155 Wn.2d at 837-38 ¶28.

⁴² For example, a local government may achieve a balance between critical areas protection and economic development by allowing development to occur in areas that do not impact critical areas. Both goals may be served, and balance at the scale of the entire plan may be achieved, but not on every parcel of land. Residential development is balanced against commercial development by providing separate areas for each activity, not by allowing both on each and every parcel in the City. If, after fully protecting critical areas, there were insufficient lands remaining on which to provide adequate housing or allow commercial development, the City should work with the county to expand its UGA or its zoning provisions in order to meet those goals, consistent with RCW 36.70A.110 and .215. There is no evidence in the record that Kent pursued any option other than to adopt inadequate wetland protection.

The State Agencies do not concede that the GMA permits the reduction of critical areas protection to allow a balancing of the GMA goals. *Arguendo*, if a reduction were permissible, the record would have to contain evidence the City used a “reasoned process” (see *Ferry Cy.*, 155 Wn.2d at 835, ¶21) to conclude there was a need to balance wetlands protection against a GMA goal. The State Agencies submit the City would have to first quantify the risks to its wetlands from retaining buffers below the range of BAS by estimating the extent of habitat lost, species lost, water quality impaired, flood storage lost, etc. It would then have to quantify the impacts on housing, economic development, and private property if buffers within the range of BAS were adopted, by estimating the costs to property owners from those buffers, the amount of business opportunities lost, tax revenue lost, etc. The City then would have to compare those two quantified data sets to determine which outweighs the other. Without such a rigorous methodology, the City’s claim to have “balanced” one goal against another is without sound foundation. There is no evidence of any such “reasoned process” in this record.

and values be protected, any more than they could be used to avoid the requirement of designating urban growth areas (RCW 36.70A.040, .110), or developing a capital facilities element in its comprehensive plan (RCW 36.70A.070(3)). The sole purpose of a critical areas ordinance is to protect critical areas, and the requirements in RCW 36.70A.060 and .172(1) are specific to that end. Consistent with the decisions in *King Cy.*, *Quadrant*, and *Bellevue*, there is nothing in the GMA that allows a local government to reduce or avoid the GMA's critical areas requirement – or any specific statutory requirement in the GMA – to achieve a balance among competing GMA goals.

E. The Board's Order Does Not Violate Substantive Due Process

MBA/BIAW alleges the Board violated substantive due process when it “ordered Kent to adopt a different wetland rating system and more stringent wetland buffers.” MBA/BIAW Br. at 43. Since their brief does not allege that any particular statute facially violates substantive due process, the State Agencies will presume theirs is an as-applied challenge.

To determine whether a regulation violates substantive due process, the Court asks (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive

on the landowner. *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990).

MBA/BIAW does not appear to be asserting that wetlands protection *per se* is an illegitimate public purpose. Rather, their sole argument appears to be that the Board must require a challenger to prove an existing wetlands protection ordinance is not working before that ordinance can be updated or improved. Because this argument alleges inclusion of BAS is not reasonably necessary when updating critical areas regulations, it is properly addressed to the second prong of the substantive due process test. This prong does not require that a regulation be “precisely tailored” to solve an existing problem in every case, only that the regulation “tend to solve” the problem being addressed. *Girton v. City of Seattle*, 97 Wn. App. 360, 365, 983 P.2d 1135 (1999), *review denied*, 140 Wn.2d 1007 (2000). As shown repeatedly above, the GMA’s requirement that critical areas regulations be updated regularly using current best available science is reasonably related to the protection of wetland functions and values, and perhaps even of constitutional significance. *See HEAL*, 96 Wn. App. at 533 (“If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited.”) The Board did not err by requiring

compliance with RCW 36.70A.172(1) rather than the test proposed by MBA/BIAW.

Finally, it is instructive to review MBA/BIAW's argument regarding the third prong of the substantive due process test, that the challenged action is "unduly oppressive on the landowner." Because no specific land or landowner is at issue, MBA/BIAW resorts to a simplistic argument: the Board is requiring more restrictive wetlands protection than contained in Ordinance 3746, so the Board's interpretation is unduly oppressive. This is not the test under the third prong. Undue oppression on a landowner is assessed by balancing three factors: the nature of the harm sought to be avoided, the availability and effectiveness of less drastic protective measures, and the economic loss suffered by the property owner. *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 664-65, 946 P.2d 768 (1997). If there were any particular property or landowner at issue, the burden on that landowner would have to be assessed by examining the impacts of the wetland protection provisions actually adopted by the City in response to the Board's interpretation of the GMA, since the GMA does not directly regulate property. Here there is no such ordinance before the Court, no landowner, and no evidence in the record of any identified or measurable economic loss. None of the factors listed in *Christianson* can be assessed, except through mere speculation.

MBA/BIAW has not demonstrated any violation of substantive due process and its claim should be dismissed.

VI. CONCLUSION

For the reasons stated above, the Court should dismiss this consolidated appeal as moot. If the Court reaches the merits, it should affirm the Board's Final Decision and Order in its entirety and dismiss MBA/BIAW's substantive due process claim.

RESPECTFULLY SUBMITTED this 31st day of January, 2007.

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✓ CMS

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT) Case No. 05-3-0034
OF ECOLOGY and)
WASHINGTON STATE DEPARTMENT)
OF COMMUNITY, TRADE AND)
ECONOMIC DEVELOPMENT,) (DOE/CTED)

Petitioners,
and

LIVABLE COMMUNITIES COALITION,

Intervenor,

v.

CITY OF KENT,

Respondent,

and

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

Intervenors,

and

WASHINGTON ASSOCIATION OF)
REALTORS, and CITIZENS ALLIANCE)
FOR PROPERTY RIGHTS,)

Amici Curiae.

ORDER FINDING
COMPLIANCE
[Re: Ordinance No. 3805 –
Critical Areas Ordinance
Revision]

RECEIVED

DEC 14 2006

ATTORNEY GENERAL'S OFFICE
AGRICULTURE & HEALTH DIVISION

I. BACKGROUND

On April 19, 2006, the Board entered its Final Decision and Order (FDO) in this case.
The FDO provided, in relevant part:

- 1 1. The City of Kent's adoption of Ordinance No. 3746, Sections 11.06.020.B.1,
2 .040.A.12, 11.06.580, and 11.06.660, was **clearly erroneous** and **does not**
3 **comply** with the requirements of RCW 36.70A. 040(3)(b), .060(2), .170, and
4 .172(1) and **is not guided** by GMA goals RCW 36.70A.020(9) and (10).
5 2. Therefore the Board **remands** Ordinance No. 3746 to the City of Kent with
6 direction to the City to take legislative action to comply with the requirements of
7 the GMA as set forth in this Order.
8 3. The Board sets the following schedule for the City's compliance:
9
10 • The Board establishes **October 19, 2006**, as the deadline for the City of
11 Kent to take appropriate legislative action.
12 • By no later than **November 2, 2006**, the City of Kent shall file with the
13 Board an original and four copies of the legislative enactment described above,
14 along with a statement of how the enactment complies with this Order (**Statement**
15 **of Actions Taken to Comply - SATC**). By this same date, the City shall also
16 file a "**Compliance Index**," listing the procedures (meetings, hearings etc.)
17 occurring during the compliance period and materials (documents, reports,
18 analysis, testimony, etc.) considered during the compliance period in taking the
19 compliance action.
20 • By no later than **November 16, 2006**,¹ the Petitioners may file with the
21 Board an original and four copies of Response to the City's SATC.
22 • By no later than **November 27, 2006**, the City may file with the Board a
23 Reply to Petitioners' Response.
24 • Each of the pleadings listed above shall be simultaneously served on each
25 of the other parties to this proceeding, including intervenors, and upon *amici*, at
26 their request.
27 • Pursuant to RCW 36.70A.330(1), the Board hereby schedules the
28 Compliance Hearing in this matter for **December 11, 10:00 a.m. , 2006**, at the
29 Board's offices. If the parties so stipulate, the Board will consider conducting the
30 Compliance Hearing telephonically. If the City of Kent takes the required
31 legislative action prior to the October 19, 2006, deadline set forth in this Order,
32 the City may file a motion with the Board requesting an adjustment to this
33 compliance schedule.
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37 FDO, at 55.

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39 Subsequently the Board's decision was appealed. However, there was no stay of the
40 Board's Order pending appeal.
41

42 On November 27, 2006, the Board issued its Order Changing Location of Compliance
43 Hearing, notifying the parties on the Board's change of offices.
44
45
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47

48 ¹ November 16, 2006, is also the deadline for a person to file a request to participate as a "participant" in
49 the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining
50 whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

1 On November 28, 2006, the Board received City of Kent's Statement of Actions Taken to
2 Comply (SATC) and Compliance Index.² The SATC attached a copy of Ordinance No.
3 3805, adopted by the City of Kent on August 15, 2006. The SATC indicated that the City
4 enacted Ordinance No. 3805, to comply with the FDO. The Ordinance amended the
5 City's Critical Areas Ordinance provisions concerning wetlands by adopting a wetland
6 rating system based on wetland functions [Sec. 11.06.533, .580], increasing the wetland
7 buffers [Sec. 11.06.600A, B, and C], and amending an exemption for unintentionally-
8 created wetlands [Sec. 11.06.530]. The City in its SATC represented that all parties to this
9 proceeding had been informed during the development and enactment of Ordinance No.
10 3805 and that the Petitioners were in agreement. The City requested that the Compliance
11 Hearing be cancelled.
12

13
14 The Board did not receive any responsive pleadings or written materials from any other
15 party.
16

17 For the convenience of the Parties, the Compliance Hearing was convened by telephone
18 conference call at 10:00 a.m. December 11, 2006. Board member Margaret Pageler
19 convened the hearing, with Board member David O. Earling in attendance. The City of
20 Kent was represented by Michael Walter. Alan Copey represented Petitioner
21 Washington State Department of Community, Trade and Economic Development, Tom
22 Young represented Petitioner Washington State Department of Ecology, and Bob Johns
23 represented Intervenor Master Builders Association of King and Snohomish Counties.³
24

25 26 II. DISCUSSION

27 28 The Action Taken:

29
30 City of Kent Ordinance No. 3805 amends the City's Critical Areas Regulations, as
31 indicated in its title, "to provide for wetland categorization and wetland buffer widths as
32 required pursuant to a decision by the Central Puget Sound Growth Management
33 Hearings Board." Ordinance, Title.
34

35
36 The Board's synopsis of its Final Decision and Order summarizes the issues on remand:

37
38 *On April 19, 2005, the City of Kent adopted Ordinance No. 3746, its updated*
39 *Critical Areas Ordinance. The Ordinance readopted Kent's previous wetland*
40 *rating system and buffers. ...*

41
42 *The Board finds that Kent's exemption for accidentally/unintentionally-created*
43 *wetlands impermissibly expands the statutory exemption and therefore does not*
44 *comply with the GMA mandate to protect critical areas. [Relying on City of*
45

46
47
48 ² There was no objection by any parties to the late filing of the SATC.

49 ³ Intervenor Livable Communities Coalition, by Keith Scully, and Amicus Washington Association of
50 Realtors, by Jay Derr, had previously indicated by email that they would not participate in the hearing.

1 *Bellevue v. East Bellevue Community Municipal Corporation (Bellevue)*, 119
2 Wn.App. 405, 81 P.3d 148 (2003)].

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

14
15
16 *Kent retained its existing buffer widths as well as its rating system. Both the*
17 *City's wetlands consultant and City staff informed the City that the buffers were*
18 *below the range indicated by best available science and recommended an*
19 *increase of at least 25 feet for each wetland category, which the City rejected. The*
20 *Board finds that Kent's wetland buffer regulations do not comply with the GMA*
21 *mandate to protect the functions and values of critical areas. [Relying on WEAN].*

22
23
24 *To determine compliance with the GMA requirement to include best available*
25 *science, the Board applies the three criteria set forth in the Supreme Court's*
26 *recent Ferry County ruling: (1) The scientific evidence contained in the record;*
27 *(2) Whether the analysis by the local decision-maker involved a reasoned*
28 *process; and (3) Whether the decision made by the local government was within*
29 *the parameters of the best available science as directed by RCW 36.70A.172(1).*
30 *The Board finds that Kent's wetland regulations do not fall within the parameters*
31 *of the best available science in the City's record. [Relying on Ferry County v.*
32 *Concerned Friends of Ferry County, et al. (Ferry County), 155 Wn.2d 824, 123*
33 *P.3d 102 (2005).]*

34
35
36
37 *The Board enters an Order of Noncompliance with respect to the challenged*
38 *provisions of Kent Ordinance 3746, remands the Ordinance, and schedules a*
39 *Compliance Hearing.*

40
41 FDO, at 1-2.

42
43 The Board's Order ruled:

- 44
45
46 • The City of Kent's adoption of Ordinance No. 3746 [specific sections] was
47 **clearly erroneous** and **does not comply** with the requirements of RCW
48 36.70A.040(3)(b), .060(2), .170, and .172(1) and **is not guided** by GMA goals
49 RCW 36.70A.020(9) and (10).

1 FDO, at 55.
2

3 By Ordinance No. 3805, the City of Kent revised its wetlands rating system to a
4 classification based on the functions of wetlands identified in the best available science.
5 Ordinance, Sec. 11.06.580; Sec. 11.06.533. The City expanded its standard wetland
6 buffer widths for each category of wetland; the City provided for reduced buffer widths
7 with "all applicable mitigation measures" and increased buffer widths in connection with
8 priority habitat areas. Ordinance, Sec. 11.06.600.A, B, and C. The City of Kent amended
9 its exemption for unintentionally-created wetlands to be consistent with the GMA
10 definition of wetlands. Ordinance, Sec. 11.06.530.
11

12
13 Positions of the Parties
14

15 The City of Kent asserts that adoption of Ordinance No. 3805 brings the City into
16 compliance with the GMA requirements that were the basis for the challenge in this
17 matter. None of the parties filed written briefs in connection with the Compliance
18 Hearing; however, Petitioners indicated at the hearing that they concur with the City's
19 action.
20

21 The Board notes that the City of Kent consulted with DOE and CTED in developing the
22 amendments to its wetlands regulations. Ordinance, Recital I; SATC, at 2.
23 Representatives of Petitioners DOE and CTED attended the City Council meeting where
24 the amendments were adopted and testified in favor of the Ordinance. SATC, Exhibit 3,
25 Kent City Council Meeting minutes (Aug. 15, 2006), at 2. The minutes reflect that DOE
26 representative Richard Robahm supported the revised rating system as "function-based,"
27 and CTED representative Leonard Bauer described the Ordinance as providing "science-
28 based protections of the City's wetlands and the functions they provide." *Id.*
29
30

31 Board Discussion:
32

33 The Board's FDO concluded that the City of Kent's critical areas regulations failed to
34 include best available science in establishing a wetland rating system and associated
35 buffer widths and that its exemption for unintentionally-created wetlands was
36 inconsistent with the GMA.
37

38 The Board acknowledges that there are several ways that the ample science in the record
39 might have been applied by the City of Kent to comply with the requirements of RCW
40 36.70A.172(1). Here, the City reviewed various compliance options. SATC, Exhibit 1,
41 *Wetlands Regulation Options*, staff memo (June 29, 2006). The City consulted with DOE
42 and CTED, conducted a public process, gave notice to CTED as required by RCW
43 36.70A.106, and completed environmental review. SATC, at 2-3. Based on the prior
44 well-developed record, the City of Kent has now enacted measures to protect the
45 functions and values of wetlands as critical areas. The Board is persuaded that Ordinance
46 No. 3805 complies with the statute.
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III. FINDINGS AND CONCLUSIONS

The Board finds and concludes:

1. The City of Kent's adoption of Ordinance No. 3805 used best available science to protect the functions of wetlands.
2. In enacting Ordinance No. 3805, the City of Kent relied on competent science already in the City's record.
3. On remand from the Board's FDO, the City of Kent consulted with State agencies and prepared a staff analysis of various options for amending the City's regulations to ensure science-based protections for wetlands functions.
4. By Ordinance No. 3805, the City of Kent adopted a wetland classification system based on the scientifically-recognized functions of wetlands.
5. By Ordinance No. 3805, the City of Kent expanded required buffer widths for each category of wetlands to achieve buffers supported by best available science for protection of wetland functions.
6. By Ordinance No. 3805, the City of Kent adopted a definition of unintentionally-created wetlands consistent with RCW 36.70A.030(21).
7. The City of Kent's adoption of Ordinance No. 3805 concerning wetlands complies with RCW 36.70A.172(1) and the related provisions of the GMA: RCW 36.70A.040(3)(b), .060(2), .170, and GMA goals RCW 36.70A.020(9) and (10).

IV. FINDING OF COMPLIANCE

Based upon review of the April 19, 2006, Final Decision and Order, the City of Kent SATC, the Board's review of Ordinance No. 3805 and other documents in the record, and the comments offered at the Compliance Hearing, the Board finds:

- By adopting Ordinance No. 3805 [Critical Areas Ordinance Revision] the City of Kent has **complied** with the goals and requirements of the GMA as set forth in the Board's FDO and the GMA. The Board therefore enters a Finding of Compliance for the City of Kent Re: Ordinance No. 3805 [Critical Areas Ordinance Revision].

V. ORDER

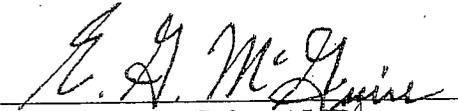
Based upon review of the April 19, 2006, Final Decision and Order, the City of Kent SATC, the Board's review of Ordinance No. 3805 and other documents in the record, and the comments offered by the parties at the Compliance Hearing, and having deliberated on the matter, the Board ORDERS:

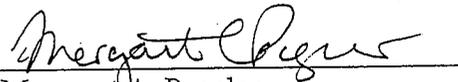
- CPSGMHB Case No. 05-3-0034, *DOE/CTED v. City of Kent*, is **closed**. The City of Kent's adoption of Ordinance No. 3805 corrects the deficiencies found in Ordinance No. 3746 and **complies** with the goals and requirements of the GMA as set forth in the Board's April 19, 2006 FDO. The Board therefore enters a **Finding of Compliance** for the City of Kent Re: Ordinance 3805 [Critical Areas Ordinance Revision].

1
2 So ORDERED this 13th day of December, 2006.

3
4 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

5
6
7 
8 David O. Earling
9 Board Member

10
11 
12 Edward G. McGuire, AICP⁴
13 Board Member

14
15 
16 Margaret A. Pageler
17 Board Member

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21
22
23 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
24 files a motion for reconsideration pursuant to WAC 242-02-832.⁵
25
26
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28
29
30

31
32 ⁴ Although Board member McGuire did not attend the compliance hearing, he has reviewed the submitted materials and
33 discussed the case with the Board and concurs in finding compliance.

34 ⁵ Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

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

CPSGMHB Case No. 05-3-0034
 DOE/CTED v. City of Kent
 DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Order Finding Compliance [Re: Ordinance No. 3805 – Critical Areas Ordinance Revision]** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **December 13, 2006.**

Signed Linda Kersfords

<p><i>Pr 360/586-4608 phone 360/586-6760 fax tomy@atg.wa.gov</i> Thomas J. Young, AAG, WA. State Department of Ecology 2425 Bristol Court SE P.O. Box 40109 Olympia, WA 98504-0109</p>	<p><i>Rt 253/856-5770 phone 253/856-6770 fax TBrubaker@ci.kent.wa.us</i> Tom Brubaker, Kent City Attorney 220 4th Avenue South Kent, WA 98032</p>
<p><i>Pr 360/664-4987 phone 360/586-3564 fax alanc@atg.wa.gov</i> Alan D. Copsey, AAG, WA State, Agri. & Health Division, Dept. of CTED P. O. Box 40109 Olympia, WA 98504-0109</p>	<p><i>Courtesy MBA 425/467-9966 phone 425/451-2818 fax duana@JMMLAW.com johns@JMMLAW.com</i> Robert D. Johns & Duana Kolouskova Johns Monroe Mitsunaga 1601 114th Avenue S.E., Suite 110 Bellevue, WA 98004</p>
<p><i>Courtesy BIAW 800/228-4228 phone 360/352-7801 fax Timothyh@BIAW.com</i> Timothy Harris, General Counsel BIAW 111 W. 21st Avenue, P.O. Box 1909 Olympia, WA 98507</p>	<p><i>Courtesy WA Ass'n of Realtors 206/382-9540 phone 206/626-0675 fax jderr@buckgordon.com</i> Jay P. Derr & Annette M. Messitt Buck & Gordon LLP 2025 First Avenue, Suite 500 Seattle, WA 98121</p>
<p><i>Courtesy CAPR Amicus 425/576-0484 phone 425/576-9565 fax acc@pacificlegal.org</i> Russell C. Brooks & Andrew C. Cook Pacific Legal Foundation 10940 NE 33rd Place, Suite 210 Bellevue, WA 98004</p>	<p><i>Courtesy LCC Ir 206/343-0681 phone 206/709-8218 fax johnz@futurewise.org</i> John T. Zilavy Futurewise 1617 Boylston Avenue Seattle, WA 98122</p>
<p><i>Courtesy City of Kent Rt 206/ 623-8864 phone 206/223-9423 mwalter@kbmlawyers.com jculumber@kbmlawyers.com</i> Michael C. Walter & Jeremy W. Culumber Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104-3175</p>	<p>Barbara Miner, Clerk King County Superior Court 516 Third Avenue, Room E-609 Seattle, WA 98104</p>

1
2 SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

3
4 WASHINGTON STATE DEPARTMENT) CPSGMHB Case No. 05-3-0034
5 OF ECOLOGY and)
6 WASHINGTON STATE DEPARTMENT) (DOE/CTED)
7 OF COMMUNITY, TRADE AND)
8 ECONOMIC DEVELOPMENT,)
9)

10) Petitioners,)

11 and)

12)
13) [King County Superior Court
14 LIVABLE COMMUNITIES COALITION,) Case No. 06-2-16675-2 KNT –
15) Honorable Brian Gain -and-
16) King County Superior Court
17) Case No. 06-2-16933-6 KNT –
18) Honorable Jay D. White]

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v.)

CITY OF KENT,)

Respondent,)

and)

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

Intervenors,)

and)

WASHINGTON ASSOCIATION OF)
REALTORS, and CITIZENS ALLIANCE)
FOR PROPERTY RIGHTS,)

Amici Curiae.)

CERTIFICATE OF APPEALABILITY

RECEIVED
JUL 1 2 2006

Attorney General's Office
Agriculture & Health Division

41
42
43 I. APPLICATIONS FOR CERTIFICATES OF APPEALABILITY

44
45
46 On April 19, 2006, the Central Puget Sound Growth Management Hearings Board
47 (**Board**) issued its Final Decision and Order (**FDO**) in CPSGMHB Case No 05-3-0034.
48 The Respondent City of Kent (**City or Kent**) and Intervenors Master Builders
49 Association of King and Snohomish Counties and Building Industry Association of
50 Washington (**MBA/BIAW**) appealed the decision to King County Superior Court.

LM
JP

1
2 The case arose as follows. Chapter 36.70A RCW – the Growth Management Act (GMA)
3 – requires cities and counties to identify critical areas and adopt development regulations
4 protecting their functions and values: the regulations are to be updated at five-year
5 intervals, based on best available science (BAS). Pursuant to the requirement of RCW
6 36.70A.130, on April 19, 2005, the City of Kent (City or Kent) adopted Ordinance No.
7 3746 (the Ordinance or CAO), updating its critical areas regulations. With respect to
8 wetlands, the City made no change to the classification or buffer requirements in place
9 within the City since 1993 but reenacted the former provisions. The City’s record
10 contained BAS assembled and analyzed by the City’s own qualified expert, Adolfson
11 Associates, Inc.,¹ including the science summarized by the Department of Ecology in
12 *Wetlands I* (2004).²
13
14

15 The Washington State Department of Ecology (DOE) and the Washington State
16 Department of Community, Trade, and Economic Development (CTED) filed a timely
17 challenge to various portions of the wetlands regulations in the City of Kent’s CAO.
18 MBA/BIAW intervened on behalf of the City.
19

20 On April 19, 2006, the Board issued its Final Decision and Order (FDO). The Board
21 found that Kent’s wetlands rating system was based on a 1979 schema³ that does not
22 account for the *functions* of wetlands: water quality, hydrology, and wildlife habitat. The
23 Board further found that the regulatory *protections* for wetlands in the Kent CAO were
24 not supported by BAS in the City’s record. The Board determined that these aspects of
25 Kent’s Ordinance were clearly erroneous and non-compliant with the requirements of
26 RCW 36.70A.040(3)(b), .060(2), .170, and .172(1) and were not guided by GMA goals
27 RCW 36.70A.020(9) and (10). Despite this determination, the Board did not invalidate
28 Kent’s Ordinance but remanded it, directing Kent to take legislative action to comply
29 with the GMA as set out in the Board’s Decision.
30
31

32 On June 16, 2006, the Board received the “City of Kent’s Application for Direct Review
33 by Court of Appeals and Request to the Central Puget Sound Growth Management
34 Hearings Board for Issuance of a Certificate of Appealability” and accompanying
35 “Declaration of Michael C. Walter” in King County Superior Court Case No. 06-2-
36 16933-6 KNT.
37
38

39 On June 28, 2006, the Board received “Order of Certification for Direct Review by the
40 Court of Appeals,” entered by the Honorable Brian Gain June 22, 2006, in King County
41 Superior Court Case No. 06-2-16675-2 KNT. On June 29, 2006, the Board received from
42 MBA/BIAW “Petitioners’ (1) Application for Certification by the King County Superior
43
44

45 ¹ Adolfson, *Best Available Science Issue Paper: Wetlands* (April 2003, updated April, 2004), and
46 supplemental memoranda. See, FDO, at 8.

47 ² The Department of Ecology in 2004 issued a three volume analysis and recommendations concerning
48 wetlands: *Washington State Wetland Rating System for Western Washington; Freshwater Wetlands in*
49 *Washington State, Volume I: A Synthesis of the Science (Wetlands I); Wetlands in Washington State,*
50 *Volume 2: Guidance for Protecting and Managing Wetlands (Wetlands II).*

³ Cowardin, et al., *Classification of Wetlands and Deepwater Habitats of the United States* (1979). See,
Ordinance Section 11.06.580.

1 Court for Direct Review by Court of Appeals and (2) Request to the Central Puget Sound
2 Growth Management Hearings Board for Issuance of a Certificate of Appealability,” and
3 accompanying “Declaration of Robert D. Johns.”
4

5 On June 30, 2006, the Board received from MBA/BIAW “Notice for Discretionary
6 Review to the Washington State Court of Appeals, Division I” in Consolidated Case No.
7 06-2-16675-2 KNT.
8

9 10 11 **II. AUTHORITY AND ANALYSIS**

12
13 RCW 34.05.518(3) identifies growth management boards as “environmental boards,” and
14 establishes the following criteria for certification of appealability:
15

16 (b) An environmental board may issue a certificate of appealability if it
17 finds that delay in obtaining a final and prompt determination of the issues
18 would be detrimental to any party or the public interest and either:
19

20 (i) Fundamental and urgent statewide or regional issues are raised; or
21

22 (ii) The proceeding is likely to have significant precedential value.
23

24
25 RCW 34.05.518(4) requires a board to state in its certificate of appealability “which
26 criteria it applied [and] explain how that criteria was met.”
27

28 This Board reviews the present requests for certification in light of each of these criteria.
29 Although it is a close question, the Board makes the determination that delay is
30 detrimental to the public interest. The next two criteria – fundamental and urgent
31 statewide or regional issues and significant precedential value – are questionable. The
32 Board finds that although the proceeding is unlikely to have significant precedential
33 value, there are fundamental regional issues raised.
34

35 36 Would delay in determining the issues be detrimental?

37
38 1. Delay *is not* detrimental to builders and developers.
39

40 By Ordinance 3746, the City of Kent readopted its pre-existing wetlands regulations. The
41 Board’s FDO found these regulations non-compliant with the BAS in the City’s record;
42 however, the Board *did not invalidate* the Ordinance. The assertions by the City of Kent
43 and MBA/BIAW that development is in limbo during the pendency of this appeal are
44 therefore mistaken. Developers may continue to vest to Kent’s wetlands regulations, as
45 they have been doing for over twelve years, until such time as Kent brings its regulations
46 into compliance with the GMA.⁴
47

48
49 ⁴ Kent in all likelihood will seek a stay of the Board’s order during the pendency of any appeal. Developers
50 can be expected to welcome the delay, as it stretches out the time during which they can vest projects based
on outdated wetlands protections.

1
2 2. Delay *is not* detrimental to other Central Puget Sound cities and counties.
3

4 RCW 36.70A.130 required Central Puget Sound counties and cities to update their
5 development regulations, including critical area protections, by no later than December 1,
6 2004, a date which was Legislatively revised last year to December 1, 2005. With the
7 exception of Snohomish, every other Central Puget Sound county has completed that
8 task.⁵ Central Puget Sound cities have also already enacted or should have enacted their
9 updated regulations.⁶ The City of Kent asserts that other cities are awaiting the
10 determination of this case. If that is true, the Board must conclude that these cities do so
11 in violation of statutory deadlines. Any city or county that has complied with the
12 legislative deadline will not be detrimentally affected by delay in determining the City of
13 Kent's issues, as that city's or county's development regulations have already been
14 enacted.
15

16
17 Similarly, any jurisdiction that may have adopted wetlands regulations similar to those
18 held non-compliant in the Board's present ruling, but whose CAO update was not
19 challenged within 60 days of publication, is no longer subject to challenge. Under the
20 GMA, the unchallenged regulations of cities and counties are presumed valid; thus other
21 cities and counties face no uncertainty and no detriment from a delay in review of the
22 present case.
23

24
25 3. Delay *may be* detrimental to the public interest.
26

27 The public has two interests that may be detrimentally impacted by delay. The first is the
28 public's interest in preserving wetlands and the environmental "functions and values"
29 they provide.⁷ Because the Board did not invalidate Kent's Ordinance and because the
30 Board anticipates that the City of Kent will seek a stay of the Board's order, valuable
31 wetlands within the City of Kent, such as the upper Soos Creek watershed and the Green
32 River Valley, will be at continued risk of degradation during the pendency of the appeal.
33
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38

39
40 ⁵ The Board has heard and decided challenges to the CAO updates of King and Pierce Counties. *See,*
41 *Keesling IV v. King County*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005);
42 *Tahoma Audubon Society, et al., v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and
43 Order (July 12, 2005). Challenges to Kitsap County's CAO update are currently pending in *Hood Canal, et*
44 *al., v. Kitsap County*, CPSGMHB Case No. 06-2-0012c.

45 ⁶ Cities whose CAO updates have been challenged before this Board in 2005-2006 include Mukilteo,
46 Tacoma, Bainbridge Island, Shoreline, and Seattle.

47 ⁷ *See generally, Ventures Northwest v. State*, 81 Wn. App. 363 (Div. II 1996) (Finding that it does not
48 appear to be in the public interest to degrade wetland habitat and water quality with no mitigation to
49 compensate for lost wetland values and functions); *Executive Order 90-04* (1990) (Stating that wetlands
50 provide ecological as well as economic benefits to the State and it is in the public interest to protect the
functions and values of wetlands); *Executive Order 89-10* (1989) (Stating that wetlands conservation is a
matter of state concern); *RCW 90.58*, wetlands are defined as "shorelands" and protected by the Act as a
valuable and fragile nature resource for which unrestricted development is not in the best public interest.

1 The second interest that may be detrimentally affected is the public's interest in certainty
2 in land use matters.⁸ As stated more fully below, the City of Kent and MBA/BIAW are
3 challenging the Board's case-by-case approach to CAO decisions and the Board's
4 reliance on and application of appellate and Supreme Court CAO decisions. Additionally,
5 the appropriate role of state agencies – here, DOE and CTED – in providing advice or
6 expertise to local governments is at issue. Delay in determining these issues may prolong
7 uncertainty.
8

9
10 **The Board concludes that delay in determining the issues will be detrimental to the**
11 **public interest.**

12
13 Would the proceeding have significant precedential value?
14

15 The Board adjudicates CAO challenges on a case-by-case basis; therefore the Board
16 concludes that the proceeding is unlikely to have significant precedential value.
17 Following the three-part test approved in *Ferry County*,⁹ the Board reviews the particular
18 science in the record of the challenged jurisdiction. For example, the BAS for marine
19 shoreline “fish and wildlife habit” in one jurisdiction was a near-shore survey
20 commissioned by the jurisdiction itself to identify salmon habitat along its entire coast
21 line (*Tahoma Audubon v. Pierce County, cited supra, fn. 5*); another jurisdiction might
22 rely on general federal agency designations for marine shoreline habitat identification
23 (*Hood Canal v. Kitsap County, cited supra, fn. 5*). Since the Board uses a case-by-case
24 analysis, the Board does not impose a single scientific formulation on every jurisdiction.¹⁰
25
26

27 In the Kent record, wetlands BAS was contained in the reports of the City's expert,
28 Adolfson Associates, and in the DOE's *Wetlands I and II*. However, the Board's ruling
29 concerning the particular science in the City of Kent's records is *not a precedent* that
30 requires every city to use the same documents. While Central Puget Sound cities can
31 hardly ignore such widely disseminated information as DOE's *Wetlands I and II*, they are
32 permitted to generate their own studies, as King County did in adopting its CAO (see,
33 *Keesling IV v. King County, cited supra, fn. 5*), or to rely on other sources that meet the
34 criteria for BAS laid out in WAC 365-195-905.
35

36
37 Similarly, the Board's ruling regarding Kent's decision to rely on other regulations and
38 programs besides buffers to protect wetlands was based on the specific facts of the case;
39 viz, the absence of BAS in Kent's record ensuring that wetland functions and values
40 would be protected by these other regulations and programs. A similar question arose in
41 *Keesling IV*, the King County CAO challenge, where the record was very different.
42 Keesling objected to King County's action that incorporated updated protections for
43 critical areas in revised provisions of its Surface Water Management Ordinance and its
44

45
46
47 ⁸ See generally, *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997); *W. Main Associates v. Bellevue*,
48 106 Wn.2d 47 (1986); *Hull v. Hunt*, 53 Wn. 2d 125 (1958) all recognizing the need for certainty and
49 fairness in land use development.

50 ⁹ *Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.,2d 824, at 834, 123
P.3d 102 (2005).

¹⁰ Each jurisdiction is required to consider best available science, under the *Ferry County* three-part test.

1 Clearing and Grading Ordinance, as well as in its Critical Areas Ordinance. The Board
2 upheld King County's use of multiple regulations, where the County could point to (a)
3 thorough scientific analysis that identified the specific wetlands protections that could be
4 provided through means other than buffers and (b) corresponding revisions to its clearing
5 and grading regulations and its stormwater regulations, as well as to its critical areas
6 ordinance. *Keesling IV, at 20-21, 26, 31-32.*

7
8
9 The Board's ruling in the present case *does not create a precedent* that requires a
10 particular wetland rating system, wetland buffer width, or use of state agency science
11 documents as BAS. So long as there is competent science in the city's or county's record,
12 the Board does not impose any particular wetland ranking system or buffer width as a
13 "bright line." The Board construes state agency guidelines and input to local jurisdictions
14 as instructive, but not a mandate. Despite the fact that DOE's *Wetlands I and II* are
15 guidelines, not mandates, the volumes may provide the best available science on wetlands
16 in the record of a particular local jurisdiction (see, e.g., *Pilchuck V v. City of Mukilteo*,
17 CPSGMHB Case No. 05-3-0029, Final Decision and Order (Oct. 10, 2005). In addition,
18 WDFW, USGS, and other state and federal agencies may provide science to inform and
19 guide CAO decision-making. In *Ferry County, supra*, the Court concluded that the
20 county should not have disregarded the input of WDFW for critical habitat identification.
21 In the present case, the City of Kent, like many larger Puget Sound jurisdictions, had the
22 work of its own qualified BAS consultant in conjunction with the information provided
23 by DOE and other agencies.¹¹ Thus, because the Board's review of CAO challenges is
24 based on a case-by-case analysis that does not prescribe any particular study or regulatory
25 regime as BAS for all jurisdictions, there is *little if any precedential value* in review of
26 the Board's Kent FDO.
27

28
29 *Fundamental regional issues are raised.*¹²
30

31 The Board bases its Certificate of Appealability on the Board's belief that the present
32 case raises the following fundamental regional issues:
33

34
35 1. Should the Board continue to adjudicate CAO challenges on a case-by-case
36 basis?
37

38 2. Should the Board utilize the three-part *Ferry County* test for inclusion of BAS,
39 and was the test properly applied?
40

41 3. Did the Board correctly apply the *Quadrant*¹³ distinction between goals and
42 requirements of the GMA?
43

44
45 ¹¹ Kent's consultant did not advocate a wetland ranking system that incorporated all three wetland functions
46 and values, as recommended by DOE. However, Kent's consultant agreed with DOE that, particularly in
47 light of Kent's truncated wetland ranking system, the buffer widths adopted by Kent were not within the
48 range of BAS.

49 ¹² The issues are *regional*, and not *statewide*, because the Growth Management Hearings Boards are set up
50 on a regional basis and are expected to construe and apply the GMA in recognition of regional differences.

¹³ *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d
224, 110 P.3d 1132 (2005).

1
2 4. Was the Board correct in modifying the *Ferry County* test by adding a fourth
3 component – justification for departure – based on *WEAN*?¹⁴ Did the Board correctly
4 apply the *WEAN* standard in determining that the City's record did not support its
5 deviation from BAS?
6

7
8 5. May individual cities in the Central Puget Sound region choose to "opt out" of
9 protection for wetlands and justify the opt-out by an appeal to the high price of housing in
10 the region?
11

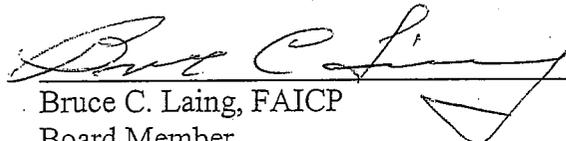
12 6. Should the Board retain its own scientists, as allowed in RCW 36.70A.172(2),
13 to review the science relied on by local jurisdictions in CAO cases?
14
15

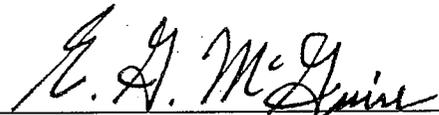
16 **III. CONCLUSION**
17

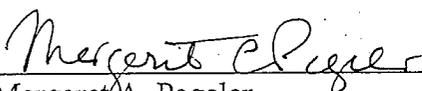
18 Applying the above criteria, the Board issues this Certificate of Appealability of its Final
19 Decision and Order in CPSGMHB Case No. 05-3-0034, a copy of which is attached.
20

21 Dated this 11th day of July, 2006
22

23
24 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
25
26

27
28
29 
30 _____
31 Bruce C. Laing, FAICP
32 Board Member
33

34
35 
36 _____
37 Edward G. McGuire, AICP
38 Board Member
39

40
41 
42 _____
43 Margaret A. Pageler
44 Board Member
45
46
47
48
49

50 ¹⁴ *Whidbey Environmental Action Network v. Island County* (WEAN), 122 Wn. App. 156, 93 P.3d 885 (2004).

CPSGMHB Case No. 05-3-0034
DOE/CTED v. City of Kent
DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Certificate of Appealability** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **July 11, 2006**.

Signed *Linakene Torres*

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<p><i>Pr 360/664-4987 phone 360/586-3564 fax alanc@atg.wa.gov</i> Alan D. Copsey, AAG, WA State, Agri. & Health Division, Dept. of CTED P. O. Box 40109 Olympia, WA 98504-0109</p>	<p><i>Courtesy MBA</i> <i>425/467-9966 phone 425/451-2818 fax duana@JMMLAW.com</i> <i>johns@JMMLAW.com</i> Robert D. Johns & Duana Kolouskova Johns Monroe Mitsunaga 1601 114th Avenue S.E., Suite 110 Bellevue, WA 98004</p>
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<p><i>Courtesy City of Kent</i> <i>Rt 206/ 623-8864 phone 206/223-9423</i> <i>mwalter@kbmlawyers.com</i> <i>jculumber@kbmlawyers.com</i> Michael C. Walter & Jeremy W. Culumber Keating, Bucklin & McCormack, Inc., P.S. 800 Fifth Avenue, Suite 4141 Seattle, WA 98104-3175</p>	<p>Barbara Miner, Clerk King County Superior Court 516 Third Avenue, Room E-609 Seattle, WA 98104</p>