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NO. 64072-1
(CONSOLIDATED WITH NO. 65171-9)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, a Washington general
partnership,

Appellant,

v.

CITY OF KIRKLAND, a municipal corporation and TOUCHSTONE, a
Washington corporation, et al.,

Respondents,

and

TR CONTINENTAL PLAZA CORP., a Delaware corporation,

Intervenor Appellant

BRIEF OF RESPONDENTS

Robin Jenkinson, WSBA 10853
City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
(206) 587-3030

G. Richard Hill, WSBA 8806
McCullough Hill P.S.
701 Fifth Avenue, #7220
Seattle, WA 98104
(206) 812-3388

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A. INTRODUCTION

Appellant Davidson Serles & Associates (“Davidson”) and Appellant Intervenor TR Continental Plaza Corp. (“TR Continental”) (collectively, “Appellants”) own two office buildings in downtown Kirkland. They vigorously oppose an office and retail development proposed by Respondent Touchstone which would be located on the same “superblock” as their two office buildings. They are particularly concerned about the view impacts from their buildings if the Touchstone project is built as currently proposed.

Touchstone and two other property owners in the same downtown sub-area of Kirkland have proposed private comprehensive plan and zoning amendments to the City of Kirkland (“City”). The City processed those amendments legislatively. At the same time, the City prepared an environmental impact statement (“EIS”) pursuant to RCW 43.21C, the State Environmental Policy Act (“SEPA”), and a SEPA Planned Action Ordinance. The Planned Action Ordinance is authorized by RCW 43.21C.031, and is procedural, not substantive – it does not result in the permitting of any development. It merely accomplishes early environmental review for defined “planned actions” that may be proposed and subsequently permitted.

After its review, the City completed the EIS and adopted six

ordinances. The six ordinances (a) approved the three private comprehensive plan amendment requests; (b) approved the zoning amendments; (c) approved design guideline development regulations; and (d) adopted the SEPA Planned Action Ordinance.

Davidson and TR Continental appealed the comprehensive plan and zoning amendments to the appropriate forum – the Growth Management Hearings Board (“GMHB”), which has exclusive jurisdiction to consider such appeals, including as to SEPA compliance. RCW 36.70A.280(1). The GMHB has addressed their appeal, and has remanded the amendments for compliance with RCW 36.70A, the Growth Management Act (“GMA”) and for additional SEPA review. All parties have appealed the GMHB decision to Superior Court. In the meantime, the City is complying with the GMHB remand order.

However, Davidson and TR Continental sought to bypass the GMHB review process by also filing complaints appealing those amendments to an inappropriate forum – to King County Superior Court, along with an appeal of the design guideline development regulations. The trial court in this case properly dismissed those complaints because appeals of GMA comprehensive plan amendments and development regulations must be initially considered by the GMHB, as it has exclusive jurisdiction. RCW 36.70A.280(1); *Coffey v. City of Walla Walla*, 145

Wn.App. 435, 187 P.3d 272 (2008).

Davidson and TR Continental also asked that the trial court, pursuant to its constitutional writ authority, hold that the amendments constituted spot zoning. Davidson and TR Continental briefed this argument three times before the trial court, and were also allowed to make oral argument on this issue. The trial court properly dismissed that argument as well, since (a) Davidson and TR Continental already had an available avenue to appeal by joining its spot zoning claim with any appeal of the GMHB decision under RCW 34.05, the Administrative Procedures Act (“APA”); and (b) by law, a zoning amendment consistent with the comprehensive plan is not spot zoning.

Finally, Davidson and TR Continental also asked the trial court to review the validity of the SEPA Planned Action Ordinance based on the argument that the EIS was inadequate. The trial court properly dismissed this claim as well, because it constitutes an “orphan” SEPA appeal that fails to meet the linkage requirements for SEPA review. *Boss v. Dept. of Transp.* 113 Wn.App. 543, 54 P.3d 207 (2002).

Davidson and TR Continental have asked the Court of Appeals to reverse the decision of the trial court. Their appeal, however, has no merit. The trial court decision is consistent with applicable law. Davidson and TR Continental should be required to pursue their appeals in the

appropriate forums, as they are indeed doing. This duplicative forum, however, is not available to them.

B. COUNTER-STATEMENT OF ISSUES

1. Did the trial court properly dismiss appellants' spot zoning challenges to the City's comprehensive plan and zoning amendments?

2. Did the trial court properly dismiss appellants' challenge to the City's Planned Action Ordinance as constituting an unauthorized "orphan" SEPA challenge?

3. Did the trial court properly dismiss appellants' challenges to the City's comprehensive plan and zoning amendments, on the basis that exclusive jurisdiction for such challenges lies with the Growth Management Hearings Board?

4. Did the trial court properly dismiss appellants' challenges to the City's adoption of design review development regulations, on the basis that exclusive jurisdiction for such challenges lies with the Growth Management Hearings Board?

C. COUNTER-STATEMENT OF THE CASE

1. December 16, 2008.

On December 16, 2008, the City of Kirkland City Council adopted six ordinances. Four of the six were challenged in this lawsuit. CP 162-164.

Ordinances 4170, 4171, 4172, 4173 and 4174 are required to be

consistent with RCW 36.70A, the Growth Management Act (“GMA”), because they involve the adoption of amendments to the City’s Comprehensive Plan and development regulations. CP 162-164.

Ordinance 4170 amended the City’s Comprehensive Plan’s transportation element, as well as the text and accompanying diagrams of the Moss Bay Neighborhood (Downtown) portion of the Plan. CP 162-164, 190-217.

Ordinance 4171 amended the City’s Zoning Code to implement a new “Central Business District 5A Zone.” This ordinance resulted in the adoption of land use development regulations. CP 162-164, 218-232.

Ordinance 4172 amended the City’s Design Review Board regulations to include “Kirkland Parkplace Mixed Use Development Master Plan and Design Guidelines.” The Plan and Guidelines adopted by this Ordinance were incorporated by reference into the City’s Comprehensive Plan and Zoning Code, and set forth fully in the City’s Design Review Board Chapter of the Municipal Code. The Plan and Guidelines constitute development regulations. CP 162-164, 233-266.

Ordinance 4173 amended the City’s Comprehensive Plan to implement changes to the Planned Area 5 Section of the Moss Bay Neighborhood Plan and the Moss Bay Neighborhood Land Use Map. CP 162-164, 268-274. Ordinance 4173 is not challenged in this lawsuit.

Ordinance 4174 amended the City's Zoning Code sections relating to design regulations, the Use Zone Chart, and the Kirkland Zoning Map. CP 162-164, 275-308. It is also not challenged in this lawsuit.

Ordinance 4175 established a SEPA "planned action" for two areas in the City's Downtown Moss Bay Neighborhood. It was adopted pursuant to authority granted by SEPA at RCW 43.21C.031. Its recitals indicate that SEPA provides for the integration of environmental review with land use planning and project review through designation of "Planned Actions." Its recitals further indicate that designation of a Planned Action "*expedites the permitting process for subsequent, implementing projects whose impacts have been previously addressed in a Planned Action Environmental Impact Statement...*" (emphasis added). Ordinance 4175 does not authorize the development of any project. Rather, it merely sets forth procedures and criteria for evaluating future implementing projects for compliance with SEPA. If those future implementing projects fall within the scope of those criteria, no additional SEPA threshold determination will be required. If they do not, a new threshold determination will be required. CP 162-164, 309-320.

Prior to the adoption of each of these six ordinances, the City prepared a draft and final environmental impact statement pursuant to the requirements of SEPA. The City Council considered these environmental

documents before taking action on the six ordinances. CP 162-164.

2. Trial Court Complaints.

Each of the Appellants filed a complaint in Superior Court. The two complaints made virtually identical allegations and sought the same relief. CP 1-125, 152-161.

Davidson is a Washington general partnership and a landowner in the vicinity of the property regulated by the challenged ordinances. CP 2-3. TR Continental is a Delaware Corporation and also owns property in the vicinity of the property regulated by the challenged ordinances. CP 153-155.

The complaints alleged (1) that the challenged ordinances may only be lawfully adopted if they are preceded by adequate environmental review under SEPA; (2) that the challenged ordinances were not preceded by adequate environmental review under SEPA; and (3) therefore the challenged ordinances are null and void. The complaints also alleged that the zoning amendments constituted spot zoning. CP 1-8.

The complaints allege that “the developments, projects, activities and other actions” within the area regulated by the challenged ordinances “would adversely affect the interests of [plaintiffs] by increasing motor vehicle traffic and congestion, by creating pressures for spillover parking, by isolating property owned by [plaintiffs] from other portions of the

CBD, by blocking access to the [plaintiffs'] property through a major pedestrian corridor, by disrupting use of its property during construction, and by blocking light, air and views to and from its property, thereby interfering with the use and enjoyment of its property and rendering it a less desirable place to work.” CP 3.

The complaints asked the Court to declare the environmental review conducted in connection with the challenged ordinances inadequate; to declare the challenged ordinances null and void; and to enjoin the City from implementing the challenged ordinances. CP 9.

3. Appellants' GMHB Petitions.

Appellants challenged the validity of two of the four challenged ordinances (4170 and 4171) in petitions filed with the Central Puget Sound Growth Management Hearings Board (“GMHB”). CP 311-368. Those challenges also asked the GMHB to determine that the environmental review conducted in connection with the adoption of Ordinances 4170 and 4171 was legally inadequate.

4. Superior Court Dismissal of Complaints.

On June 4, 2009 the Superior Court entered Findings, Conclusions and Order Granting Summary Judgment of Dismissal (“Order”). CP 577-584. The Order sets forth the Superior Court’s reasons for granting the defendant’s motion for summary judgment. Appellants filed a motion for reconsideration, which was denied on July 27, 2009. CP 649-651.

5. Appeal to Court of Appeals.

Following entry of the Order denying motion for reconsideration, Appellants filed this appeal with the Court of Appeals. CP 652-678.

6. GMHB Adjudication of Appellants' Petitions.

On October 5, 2009 the GMHB issued its Final Decision and Order ruling on Appellants' petitions. *Davidson-Serles v. City of Kirkland*, CPSGMHB No. 09-3-0007c. The GMHB summarized its holdings at pp. 1-2:

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

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

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

The Board denied Petitioners' request for a determination of invalidity and remanded the Ordinances to the City for compliance.

7. Superior Court Appeals.

Appellants appealed the GMHB Decision to King County Superior Court pursuant to a petition for review of agency action. King County Superior Court Cause No. 09-2-43060-8 SEA. Trial in that matter is scheduled for July 6, 2010. The City and Touchstone also appealed the GMHB holding that the City's EIS was inadequate because it studied only two alternatives in addition to the proposed action. King County Superior Court Cause No. 09-2-43855-2 SEA. Trial in that matter is scheduled for July 12, 2010.

8. Motion for Discretionary Review.

Appellants have asked the Court of Appeals to grant discretionary review of the GMHB Decision as to the issues it has raised that are pending in the King County Superior Court Cause No. 09-2-43060-8 SEA. Court of Appeals Cause No. 64751-2-I. Appellants have not asked the Court of Appeals to grant discretionary review of the GMHB Decision as to the issues raised by the City and Touchstone that are pending in the King County Superior Court Cause No. 09-2-43855-2 SEA. The Court of Appeals has not to date ruled on that motion.

9. Proceedings Before City of Kirkland and Continuing Jurisdiction of GMHB.

The GMHB Order has remanded Ordinances 4170 and 4171 to render them in compliance with GMA and SEPA on or before April 5,

2010. The City is taking steps to comply with the GMHB Order. The GMHB has retained jurisdiction during the period of remand.

D. ARGUMENT

1. Summary Judgment Was Appropriately Granted.

Summary judgment is appropriate “if the pleadings... together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56; *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 348, 96 P.3d 979 (2004). “All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.” *Liberty Mutual Ins. Co. v. Tripp*, 144 Wn.2d 1, 10-11, 25 P.3d 997 (2001).

Because there was no genuine issue of material fact before the trial court, and because Respondents were entitled to judgment as a matter of law, the Court properly granted summary judgment.

2. The Superior Court Properly Dismissed Appellants’ Spot Zoning Claims.

Appellants argue that Respondent Touchstone never moved to dismiss their spot zoning claims. Appellants Brief at 2. This is incorrect. Respondent Touchstone’s motion in this case asked for dismissal of all of Appellants’ claims. CP 166-167, 179.

Appellants contend that the trial court “abused its discretion by

summarily dismissing Appellants' spot zoning claims without ever affording them the opportunity to brief or argue the basis for their claims." Appellants' Brief at 13.

This is factually incorrect. Appellants were clearly on notice that their spot zoning claim was at issue, since they briefed and argued the question at every turn. Appellants were provided and took advantage of four separate opportunities to do so. They argued their spot zoning claim (1) in their memorandum in response to motion for summary judgment, CP 397-398; (2) in oral argument; (3) in their motion for reconsideration, CP 593-596; and (4) in their memorandum in reply to response to motion for reconsideration, CP 636-637. Indeed, it is difficult to contemplate what greater opportunity to brief and argue their claims the trial judge could have afforded to Appellants.

Since this is the basis of their appeal on this issue (see Appellants Brief at 4, Issue A), it clearly has no merit. Their appeal should be denied. Since Appellants had ample opportunity to argue and brief the spot zoning issue (and fully availed themselves of that opportunity), and were clearly on notice that their spot zoning claim was at issue, neither *White v. Kent Medical Center, Inc.* 61 Wn.App. 163, 810 P.2d 4 (1991) nor *State v. Kirwin*, 137 Wn.App. 387, 153 P.3d 883 (2007) is applicable.

Appellants also argue that even if they have an available

alternative remedy, this is irrelevant to their right to review under Article IV, section 6 of the Constitution. Appellants Brief at 17. This is incorrect. It is clear that “a court may grant a constitutional writ [only] if no other avenue of appeal is available...” *Saldin Securities v Snohomish County*, 134 Wn.2d 288, 294, 949 P.2d 370 (1998). Here, another avenue of appeal is clearly available.

While the GMHB does not have jurisdiction over constitutional issues such as spot zoning, *Hood Canal Envtl. Council v. Kitsap County*, CPSGMHB No. 06-3-0012c FDO (August 28, 2006), such constitutional issues may be raised in the APA appeal of the GMHB decision affirming the validity of the comprehensive plan and zoning regulations. RCW 34.05.570(3) (“The court shall grant relief from an agency order... if it determines that: (a) The order... is in violation of constitutional provisions...”).

As Touchstone’s legal counsel made clear in response to the Court’s question at oral argument in this matter (CP 629-630), it was not necessary to address explicitly Appellants’ “spot zoning” claim, because the success of that claim is dependent on their challenge to the comprehensive plan amendment. In the event their challenge to the comprehensive plan amendment fails, by operation of law their “spot zoning” challenge fails as well. Since the GMHB has ruled on that claim,

and has not declared the comprehensive plan to be invalid, Appellants have failed to state a claim.

This is because a zoning decision that is in compliance with the comprehensive plan is by operation of law *not* a spot zone. See *Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969) (“Spot zoning has come to mean arbitrary and unreasonable zoning action... *not in accordance with the comprehensive plan*” (emphasis added)); *Henderson v. Kittitas County*, 124 Wn. App. 747, 757-758, 100 P.3d 842 (2004) (“spot zoning is an action by which an area is... specially zoned for a use totally different from and inconsistent with, the surrounding land *and not in conformance with the comprehensive plan*” (emphasis added)).

Appellants do not contend, nor may they, that the City’s zoning amendment is inconsistent with the City’s comprehensive plan amendment. They were, clearly, adopted at the same time for the same purpose. Since Appellants failed to convince the GMHB that the City’s comprehensive plan amendment is invalid, their “spot zoning” argument fails, as a matter of law.

Appellants have chosen not to raise the spot zoning issue in the appropriate forum (APA appeal from the GMHB decision). Their failure to raise this issue there does not justify them raising it here. The trial court properly dismissed this claim.

3. The Court Has No Jurisdiction Over “Orphan” SEPA Claims.

Appellants challenged the City’s Planned Action Ordinance, Ordinance 4175, on the grounds that the City failed to prepare an adequate EIS. The Superior Court properly dismissed that claim on the grounds that the courts have no jurisdiction over “orphan” SEPA claims.

Ordinance 4175 authorizes no development. Rather, it is an ordinance setting forth environmental considerations relevant to possible future implementing actions. No specific or final governmental action takes place until a specific “planned action project” is reviewed pursuant to Ordinance 4175, determined either to require a SEPA threshold determination or not based on the facts of the specific “planned action project,” and ultimately substantively approved by the City of Kirkland. CP 162-164, 309-320.

The Appellants’ challenge to Ordinance 4175 at this time, because it is not “linked to a specific [substantive] governmental action,” is an “orphan” SEPA claim prohibited by RCW 43.21C.075, which provides that “[t]he State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.” Accordingly, it was appropriately dismissed.

The Court of Appeals explained the SEPA “linkage requirement” in *Boss v. Dep’t of Transp.*, 113 Wn.App. 543, 54 P.3d 207 (2002):

The legislature requires that appeals under SEPA be linked to a specific governmental action:

(1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, *any appeal brought under this chapter shall be linked to a specific governmental action.* [SEPA] provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. [SEPA] is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) *Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations...*

(6)...

(c) *Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations....*

(8) For purposes of this section..., the words “action,” “decision,” and “determination” mean *substantive agency action including any accompanying procedural determinations under this chapter... The word “action” in this section... does not mean a procedural determination by itself made under this chapter.*

RCW 43.21C.075 (emphasis added).

“The general rule in both administrative and judicial SEPA appeals is that they must combine review of SEPA issues with the related government action.” *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993). The purposes of this linkage requirement are to “preclude judicial review of SEPA compliance before an agency has taken final action on a proposal, foreclose multiple lawsuits challenging a single agency action and deny the existence of ‘orphan’ SEPA claims unrelated to any government action.” *Grays Harbor*

County, 122 wn.2d at 251 (citing RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT Section 20, at 244-45 (1993)).

113 Wn.App. at 548-549. *Accord, Saldin Securities Inc. v. Snohomish County*, 134 Wn.2d 288, 949 P.2d 370 (1998).

Because Appellants' challenge to Ordinance 4175 is an "orphan" SEPA challenge unrelated to "final action on a proposal," judicial review is precluded.

Appellants' seek to make an exception to the linkage requirement by making four arguments. Appellants Brief at 20-26.

First, they contend that Ordinance 4175 "establishes substantive rights and substantive duties." Appellants' Brief at 21. This is factually incorrect. Ordinance 4175 is an ordinance authorized by SEPA, at RCW 43.21C.031. This statutory provision, adopted in 1995, authorizes a new category of project action in SEPA called a "planned action project." Designating specific types of projects as planned action projects shifts environmental review of a project from the time a permit application is made to an earlier phase in the planning process. See Washington State Department of Ecology SEPA Handbook, CP 180-186. However, while the planned action project procedure shifts environmental review to an earlier phase in the planning process, it does not amend the linkage requirement. The linkage requirement still precludes "orphan" judicial

review of SEPA compliance, and requires a SEPA challenge to be “linked” to an approved permit. RCW 43.21C.075(1).

Contrary to the argument of Appellants, Ordinance 4175 is not a substantive “final governmental action.” Rather, it is a purely procedural SEPA ordinance. It authorizes no final “planned action project.” It merely conducts environmental review at an earlier stage in the process for potential future “implementing planned action projects.” At such time as a permit for a final “planned action project” is approved – not before – a plaintiff can challenge the project for failure to comply with the requirements of SEPA. Until that time, there is nothing – other than preliminary procedural steps taken under SEPA (Planned Action Ordinance 4175 is itself a creature of SEPA) – for a plaintiff to challenge.

Appellants’ second argument is that they are entitled to an “orphan” appeal because the title of the EIS specifically refers to the Planned Action Ordinance. Appellants Brief at 22. However, an EIS title by itself is not a basis for Appellants to assert a cause of action. SEPA requires the City to prepare an EIS before adopting a planned action ordinance – that is, after all the very *raison d’etre* of the planned action process. RCW 43.21C.031. Accordingly, it stands to reason that the EIS in this case should refer to the Planned Action Ordinance. Still, there is nothing substantive that has been adopted for a plaintiff to challenge.

Appellants' challenge therefore remains "unlinked."

Appellants' third argument is circular. They state that they are entitled to bring this "orphan" challenge because SEPA requires them to appeal SEPA issues along with the "underlying governmental action." Appellants Brief at 23. However, the PAO is itself a "SEPA issue." It was adopted pursuant to SEPA and constitutes a form of SEPA compliance. Until a specific "planned action" is permitted, there is no "underlying governmental action" to appeal.

Finally, Appellants argue that failing to provide them with an opportunity to file an "orphan" SEPA appeal would not foster orderly review under SEPA, because the SEPA appeal would not take place until the government permitted a specific "planned action." It is more efficient, Appellants argue, to allow the SEPA issues to be litigated *before* the specific "planned action" is approved. Appellants Brief at 23-24. However, this argument proves too much. It would also arguably be efficient to allow any SEPA determination to be appealed immediately after it is completed, rather than await a decision on the underlying governmental action. However, the legislature has determined that such "orphan" appeals should await that underlying governmental action. RCW 43.21C.075. See also *Boss v. Dep't of Transp.*, 113 Wn.App. 543, 54 P.3d 207 (2002). The same statute and principle govern here.

Accordingly, the trial court properly dismissed Appellants' challenge to the PAO.

4. The Trial Court Properly Ruled that the GMHB Has Exclusive Jurisdiction Over Appellants' Challenges to the City's Amendments to the Comprehensive Plan and Zoning Code.

Appellants do not currently contest the trial court's ruling that the GMHB has exclusive jurisdiction over their GMA and SEPA challenges to the City's amendments to the comprehensive plan and zoning code.

Coffey v. City of Walla Walla, 145 Wn.App. 435, 437, 187 P.3d 272 (2008). Indeed, Appellants fully participated in a hearing before the GMHB, made their GMA and SEPA arguments, and received a decision from the GMHB on the very issues they had hoped to raise before the trial court. *Davidson-Serles v. City of Kirkland*, CPSGMHB No. 09-3-0007c (October 5, 2009).

The Appellants' sole remaining argument on this issue is that the trial court should have retained jurisdiction pending the GMHB adjudication of their appeal, because, they contend, the GMHB does not have authority to invalidate the City's actions for noncompliance with SEPA.

However, the GMHB ruled explicitly that it does have authority to invalidate the City's actions for noncompliance with SEPA. The GMHB ruled, however, that invalidation was not merited under the facts of this

case.

A determination of invalidity is based on a finding that continued validity of a city's action "would substantially interfere with the fulfillment of a GMA Goal." [RCW 36.70A.302]. Petitioners here cite to GMA Goal 1 (Urban growth) and 12 (Public facilities and services). The Board has previously concluded that Petitioners have not carried their burden in demonstrating that the challenged Ordinance will frustrate GMA goals to accommodate urban growth and prevent sprawl... The Board has also concluded that the Ordinances do not violate the concurrency required by Goal 12...

The Board also looks to Goal 10 which requires environmental protection. In this decision, the Board has found Kirkland's SEPA review inadequate in one respect and has therefore remanded the Ordinance to the City for further review. While the deficiency is serious, the Board is not persuaded that the GMA goal will be thwarted absent a ruling of invalidity. The Board remands the Ordinances to the City, establishes a compliance schedule, and declines to enter an order of invalidity.

Davidson-Serles, supra, at 20.

This determination is well within the discretion of the GMHB, and of the courts. Contrary to the argument made by Appellants, an injunction to prohibit enforcement of a governmental action taken without compliance with all of SEPA's procedural requirements is not automatically granted or always warranted. "Indeed, the balance of harms may point the other way." *Kucera v. Department of Transportation*, 140 Wn.2d 200, 221-222, 995 P.2d 63 (2000). This is especially so in the case of GMA, in which the legislature has adopted specific limitations on the remedies available to persons challenging GMA comprehensive plans and development regulations. See RCW 36.70A.302.

Appellants have appealed the GMHB determination on invalidity to the King County Superior Court (Cause No. 09-2-43060-8 SEA), and have filed a motion for discretionary review of the same GMHB determination with this Court (Cause No. 64751-2-I).

Since Appellants' only concern here – their hope to obtain relief which invalidates the City's ordinances – is being fully litigated elsewhere, it is perplexing why Appellants are seeking to pursue the same claim in this forum – particularly in light of the “judicial economy” interests they advocate elsewhere in their Brief. There is neither reason nor justification for this Court to provide an additional forum to make arguments that are being vigorously prosecuted elsewhere.

Appellants assert that they have the right to a hearing on their claim that the City's ordinances should be invalidated. With the exception of the Planned Action Ordinance appeal which as stated above is not justiciable (because it is an “orphan”) until a specific “planned action project” is permitted, Respondents agree. However, that hearing has taken place before the GMHB, and is currently being litigated on appeal of the GMHB decision. This current Court of Appeals forum, however, which sidesteps the mandated initial GMHB adjudicative process, is not, and has never been, the proper forum for their claim.

Appellants acknowledge that there are other avenues available to

adjudicate their claim, but assert that even if there are, they are independently entitled to judicial review under Article IV, section 6 of the Constitution. However, that entitlement is present only if there are no other avenues available for relief. *Saldin Securities v. Snohomish County*, 134 Wn.2d 288, 294, 949 P.2d 370 (1998). Since there are such other avenues available (and those avenues are “exclusive,” *Coffey v. City of Walla Walla, supra*), the trial court properly dismissed Appellants’ claims.

5. The Trial Court Properly Dismissed Appellants’ Appeal of the City’s Design Guideline Development Regulations.

Appellants contend that their appeal of Ordinance 4172 (CP 52-86), which adopted design guideline development regulations, was improperly dismissed by the trial court. Appellants Brief at 33-35. The trial court dismissed the appeal because, as with the appeal of the comprehensive plan and zoning amendments, exclusive jurisdiction rests with the GMHB, pursuant to *Coffey v. City of Walla Walla, supra*. CP 587-584.

Appellants concede that if the design guideline ordinance constitutes a “development regulation” under GMA, then the GMHB has exclusive jurisdiction to determine its lawfulness. Appellants Brief at 33-34.

Ordinance 4172 was in fact adopted pursuant to the City’s GMA authority, and amends the City’s Design Review Board regulations to

include “Kirkland Parkplace Mixed Use Development Master Plan and Design Guidelines.” The Plan and Guidelines adopted by this Ordinance were incorporated by reference into the City’s Comprehensive Plan and Zoning Code, and set forth fully in the City’s Design Review Board Chapter of the Municipal Code. CP 162-164.

The Plan and Guidelines therefore constitute development regulations as defined by the GMA: “the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances...” RCW 36.70A.030(7), and are therefore subject to the exclusive jurisdiction of the GMHB pursuant to RCW 36.70A.280 and *Coffey v. City of Walla Walla, supra*.

Appellants contend, however, that they are entitled to bypass the exclusive jurisdiction of the GMHB because they are not challenging the design guidelines under GMA, but only under SEPA. Therefore, they argue, the GMHB has no jurisdiction to consider the claim. Appellants Brief at 33-35.

Appellants’ contention is inconsistent, however, with the explicit language of GMA, which provides that the GMHB has jurisdiction to consider SEPA claims as well as GMA claims, as they pertain to GMA development regulations:

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

(a) That a ... city planning under this chapter is not in compliance with the requirement of this chapter... **or chapter 43.21C [SEPA] as it relates to... development regulations, or amendments, adopted under RCW 36.70A.040...**

RCW 36.70A.280 (emphasis added). There is no requirement that a petitioner make *both* a GMA claim *and* a SEPA claim. Either or both suffice to afford exclusive jurisdiction to the GMHB of the petition. Since the design guidelines are development regulations adopted under RCW 36.70A.040, the GMHB has exclusive jurisdiction to review them for compliance with SEPA as well as with GMA. *Coffey v. City of Walla Walla, supra*.

Accordingly, the trial court properly dismissed Appellants claims that the design guidelines ordinance was non-compliant with SEPA.

E. CONCLUSION

This appeal should be dismissed.

The spot zoning claim of Davidson and TR Continental was appropriately dismissed by the trial court, because the zoning amendment at issue is in compliance with a valid comprehensive plan. Moreover, Davidson and TR Continental are not entitled to a constitutional writ of review because they enjoyed an alternative avenue to pursue this claim.

The trial court properly dismissed Appellants' challenge to the City's SEPA Planned Action Ordinance because it constituted an "orphan"

SEPA claim unrelated to a substantive underlying governmental action. The legislature has determined that the appropriate time to obtain review of SEPA procedural compliance is when that review is linked to a specific project approval.

The trial court properly dismissed Appellants' challenges to the City's adoption of comprehensive plan, development regulation, and design guideline amendments because GMA provides exclusive jurisdiction to the GMHB over such challenges.

There are appropriate forums for Appellants to use to pursue their claims. Appellants are utilizing those appropriate forums. This duplicative Court of Appeals forum is not available to them.

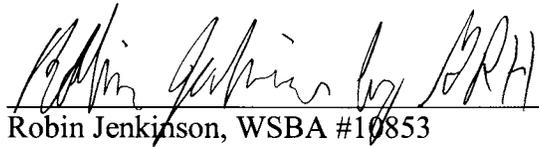
Respectfully submitted this 21st day of January, 2010.

McCULLOUGH HILL PS



G. Richard Hill, WSBA #8806
Attorneys for Respondent Touchstone

CITY OF KIRKLAND



Robin Jenkinson, WSBA #10853
Attorney for Respondent City of Kirkland

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COURT OF APPEALS
DIVISION ONE
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NO. 60472-1
(CONSOLIDATED WITH NO. 65171-9)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, a Washington general
partnership,

Appellant,

v.

CITY OF KIRKLAND, a municipal corporation and TOUCHSTONE, a
Washington corporation, et al.,

Respondents,

and

TR CONTINENTAL PLAZA CORP., a Delaware corporation,

Intervenor Appellant

PROOF OF SERVICE

Robin Jenkinson, WSBA 10853
City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
(206) 587-3030

G. Richard Hill, WSBA 8806
McCullough Hill P.S.
701 Fifth Avenue, #7220
Seattle, WA 98104
(206) 812-3388

I, LAURA D. COUNLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am employed with McCullough Hill, PS, attorneys for Respondent and Cross-Appellant Palermo at Lakeland LLC. On the date indicated below, I caused an executed copy of BRIEF OF RESPONDENTS and this PROOF OF SERVICE to be served via U.S.

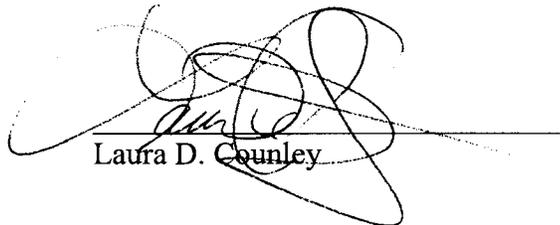
First Class mail on the following parties:

JEFFREY M. EUSTIS
ARAMBURU & EUSTIS
720 3RD AVE STE 2112
SEATTLE, WA 98104-1860

DAVID MANN
GENDLER & MANN
1424 4TH AVENUE, STE. 1015
SEATTLE, WA 98101

ROBIN JENKINSON
CITY ATTORNEY
CITY OF KIRKLAND
123 FIFTH AVENUE
KIRKLAND, WA 98033

DATED this 21ST day of January 2010, at Seattle, Washington.



Laura D. Counley