

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

SAVE OUR SEPARATORS (SOS);)	
THOMAS AND MARY WILLIAMS;)	
PATRICIA HORN; BRUCE BURNS; and)	Case No. 04-3-0019
RON NOVAK,)	
)	(SOS)
Petitioners,)	
)	FINAL DECISION AND ORDER
v.)	
)	
CITY OF KENT,)	
)	
Respondent,)	
)	
and)	
)	
KENT 160 LLC,)	
)	
Intervenor.)	

SYNOPSIS

On April 20, 2004 the Kent City Council adopted Ordinance No. 3685 (the Ordinance), relating to and implementing comprehensive plan and zoning designations for approximately 156 acres of land which had been annexed by the City in 1987 (Annexation Area). Save Our Separators and several individuals challenged the action by filing a timely Petition for Review on June 23, 2004. Petitioners argued that the City's action did not comply with the Growth Management Act (GMA) for the following reasons: it was not coordinated with and not consistent with the plans of King County and the City of Auburn; it was not consistent with Countywide Planning Policies; it was not consistent with the City's own comprehensive plan policies; the City did not provide for early and continuous public participation; and the City failed to protect property rights. The Board disagreed, finding that the City did comply with the public participation requirements of GMA and the City was guided by the GMA goal of protecting property rights. The Board found that the Petitioners did not meet the burden of proof in demonstrating that the City's action was not consistent with the plans of adjacent jurisdictions, with Countywide Planning Policies and with the City's comprehensive plan policies.

Petitioners also argued that City's use of an addendum to an existing Environmental Impact Statement (EIS) rather than a Supplemental Environmental Impact Statement did not comply with the requirements of the State Environmental Policy Act (SEPA). A majority of the Board found that Petitioners did not have standing to challenge the City's SEPA action. A dissenting opinion on this issue is included in this Order.

The circumstances in this case are unique because the action involves property not contiguous to the balance of the City which was acquired for public utility purposes, declared surplus and sold for private development. Petitioners are not residents of the City and therefore lack the ability to express their dissatisfaction with the City's legislative action through the ballot box.

I. BACKGROUND¹

On April 20, 2004 the Kent City Council adopted Ordinance No. 3685 (the **Ordinance**), relating to and implementing comprehensive plan and zoning designations for approximately 156 acres of land which had been annexed by the City in 1987 (**Annexation Area**).

On June 23, 2004 Save Our Separators, *et al.*, (**Petitioners** or **SOS**) filed a Petition for Review (**PFR**) challenging the City of Kent's (the **City** or **Respondent**) action.

During July and August of 2004, the Board issued the Notice of Hearing, conducted a Prehearing Conference and issued its Prehearing Order and Order on Intervention (**PHO**). The PHO set a schedule, established legal issues to be decided by the Board and granted Kent 160 LLC (**Intervenor**) status to intervene on behalf of the City.

The Board's Order on Motions of September 16, 2004 admitted seventeen Core Documents (**Core Doc's**),² admitted four Supplemental Exhibits, dismissed ten of the twenty-two issues³ listed in the PHO and directed the Petitioners to address the basis for their SEPA standing in their Prehearing Brief .

On October 19, 2004 the Board received Petitioners' Motion to Exclude Respondent's and Intervener's Prehearing Briefs from the Record for Failure to Comply with the Board's Prehearing Order (**Petitioners' Motion to Exclude Briefs**) and Petitioners' Request to Reschedule Designated Dates for Petitioners' Reply Brief and Hearing on Merits of Petition (**Petitioners' Motion to Reschedule**).

On October 19, 2004 the Board issued its Order Amending Deadline for Petitioners' Reply Brief, Denying Petitioners' Motion to Exclude Briefs, Denying Petitioners' Motion to Reschedule the Hearing on the Merits and Extending the Deadline for Petitioners' Reply Brief.

¹ For more complete details see Appendix – A, Chronological Procedural History, *infra*.

² See Appendix – B, List of Core Documents.

³ Issues No. 3, 6, 10, 11, 12, 13, 14, 16, 17 and 22, as set forth in the PHO were dismissed.

The prehearing briefing received by the Board is referenced in this Final Decision and Order (FDO) as: Petitioners SOS, *et al.* Prehearing Brief (**Petitioners' PHB**), City of Kent's Prehearing Brief (**City's Response**), Kent 160 LLC's Prehearing Brief (**Intervenor's Response**), and Petitioners' Reply Brief (**Petitioners' Reply**).

On October 28, 2004 the Board conducted a Hearing on the Merits (**HOM**) in Conference Room #370, Seattle City Hall, 600 Fourth Avenue, Seattle, Washington. Board Members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Ron Novak represented the Petitioners, *pro se*. Michael C. Walter and Tom Brubaker, City Attorney, represented the City of Kent. Richard Wilson represented Intervenor Kent 160 LLC. The Court Reporter was Barbara Hayden, Byers & Anderson, Inc. The hearing was opened at 10:00 a.m. and adjourned at 12:20 p.m. The Board did not order a transcript of the HOM.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioners challenge Kent's adoption of Ordinance No. 3685. Pursuant to RCW 36.70A.320(1), Kent's Ordinance No. 3685 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by the City of Kent are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [the City] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.320(1), the Board will grant deference to the City in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court has stated, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified: "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.320(1), the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.'" *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

Although we review questions of law de novo, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*,

136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

Thurston County v. Western Washington Growth Management Hearings Board, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002).

III. BOARD JURISDICTION AND PRELIMINARY MATTERS.

A. BOARD JURISDICTION

The Board finds that the Petitioners’ PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which applies Comprehensive Plan and Zoning designations to the Annexation Area, pursuant to RCW 36.70A.280(1)(a).

SEPA STANDING⁴

In the Order on Motions for this case, the Board questioned the Petitioners’ SEPA standing and directed the Petitioners to address the basis for such standing in their PHB.⁵ All that is required to establish standing under the GMA is for a petitioner to participate, orally or in writing, before the county or city regarding the matter on which review is being requested. RCW 36.70A.280(2)(b). Though the Board has jurisdiction to hear claims based on SEPA, as it pertains to the GMA, the petitioner must prove more than just participation in the governmental process in order for the Board to hear the claim - they must present sufficient evidentiary facts to show specific and perceptible harm.⁶ For the Board to confer SEPA standing, a petitioner must show not only that their supposedly endangered interest is within the zone of interests protected by SEPA but that their injury is immediate, concrete, and specific, as opposed to conjectural or hypothetical.⁷ In addition, petitioners are required to sufficiently describe their standing in the PFR.⁸

In their PHB, Petitioners asserted that they have SEPA standing because they had participated in the City’s processes leading up to the passage of the ordinance under dispute and have shown that harm will occur to the Olson Creek watershed if development is allowed to occur. Petitioners state that during the City’s land use decision process, they raised concerns, both orally and in writing, as to the environmental

⁴ See Legal Issues 18, 19, 20 and 21, Appendix - B List of Issues Retained for Prehearing Briefing, *infra*.

⁵ *Save our Separators v City of Kent*, Order on Motions, 04-3-0019, Sept. 16, 2004, at 19.

⁶ *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016 (4316), Order Dismissing SEPA Claims (Dec. 30, 1994) at 6-7.

⁷ *Id.*

⁸ *Pilchuck Audubon Society v Snohomish County*, 95-3-0047c, Order on Motions (Aug. 17, 1995) at 3

impacts caused by ongoing development in the area as well as specific environmental impacts that they believed would result if the Annexation Area was allowed to be developed.⁹ To support these claims, petitioners provided minutes from the land use planning board and city council's public hearings where petitioners, a fisheries biologist, and a salmon restoration project manager testified; correspondence on the issue of environmental impacts; and a 1994 report which spoke to the impacts of development in the region.¹⁰ Petitioners assert the environmental impacts which the petitioners claim are occurring now, and will occur with further development of the Annexation Area, translate into actual, immediate harm to not only the petitioners and property owners within the watershed, but also to the fishery habitat of the basin and therefore they should be entitled to have their SEPA issues addressed.

Though the Board recognizes that development of the Annexation Area may have environmental impacts, at this point in the City's process it must be concluded that the threatened injuries suggested by the petitioners are conjectural and hypothetical.¹¹ In addition, the amendment to the City's comprehensive plan itself does not give rise to the alleged environmental harms rather it is the hypothetical proposed development that will lead to environmental impacts. The crux of Petitioners alleged harms seemingly are based on the increase in impervious surface and related impacts that may result due to development.¹² The Board has previously stated that a potential increase to impervious surface is a threatened future injury and does not rise to the level of immediate, concrete, and specific injury that SEPA standing requires.¹³ Such speculative injuries can be later addressed by the City or mitigated as actual developments are proposed; and the City, in their EIS Addendum, has stated that many of the Petitioners' concerns will be addressed when a site-specific proposal is considered.¹⁴ It is at the time that the City considers site-specific proposals that the petitioners should seek to become actively involved to ensure that the environmental impacts that they have asserted are adequately addressed by the City and that the City complies with their own environmental regulations when approving development of the Annexation Area.

The Board concludes that the Petitioners have failed to adequately satisfy the SEPA standing requirement of immediate, concrete, and specific injury and therefore the Board is unable to determine the SEPA issues they have raised. Legal Issues 18, 19, 20, and 21 are **dismissed**.

⁹ Petitioners PHB at 3

¹⁰ *Id.* at 3-6

¹¹ Board member Margaret Pageler dissents on this point. See *infra*, at 26-31.

¹² *Id.* at 5

¹³ *Citizens for Responsible Growth of Greater Lake Stevens v. Snohomish County*, CPSGMHB Case No. 03-3-0013, Order on Motions (Aug. 15, 2003) at 11.

¹⁴ In the EIS Addendum, Exhibit B to City's Motion to Dismiss, the City has noted that further environmental impacts will be addressed when a site-specific proposal is presented in the following areas: water, hydrology, stormwater, and animals.

B. PRELIMINARY MATTERS

During the Hearing on the Merits, the City's motion to strike¹⁵ from Petitioners' PHB the language appearing at p. 37, II. 3-10, and to preclude any argument or presentation related to the claims and allegations set forth in that section of the PHB was **denied**. The City's objection¹⁶ to any reference to reliance on Supplemental Exhibit No. 1 was **noted**.

IV. LEGAL ISSUES AND DISCUSSION¹⁷

A. LEGAL ISSUES NO'S. 1, 2, 4 AND 5.¹⁸

The Board's PHO sets forth these Legal Issues as follows:

Legal Issue No. 1

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the City of Kent failed to coordinate its actions with the City of Auburn and King County?

Legal Issue No. 2

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the countywide planning policies?

Legal Issue No. 4

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?

Legal Issue No. 5

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the zoning

¹⁵ City's Response at 17,18.

¹⁶ *Id.* Fn. 13 at 24.

¹⁷ See Appendix C - List of Issues Retained for Prehearing Briefing, *infra*.

¹⁸ These issues are based on RCW 36.70A.100.

is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?

Positions of the Parties

Petitioners argue that RCW 36.70A.100 requires that the City's comprehensive plan must be coordinated with, and consistent with, the comprehensive plans of adjacent jurisdictions. Petitioners' PHB at 8. Petitioners allege that the record does not reflect coordination with King County or the City of Auburn, both of whom have common borders with the Annexation Area. *Id.* at 10. In addition, Petitioners maintain that 36.70A.100 requires that the City should have coordinated their plan with other jurisdictions that have related regional issues such as transportation, surface water management, and water quality. *Id.* at 10-11. Furthermore, Petitioners claim that the City did not comply with Countywide Planning Policy (CPP) LU-27. *Id.* at 12. Petitioners argue that unilateral designation of the southerly 91 acres of the Annexation Area as Urban Separator should have been made in consultation with King County because 36.70A.100 requires that not only are Urban Separators a regional as well as local concern, but that the statute requires regulations governing Urban Separators should be made only with King County's review and concurrence. *Id.* at 14. Petitioners also claim that the designation of the southerly part of the Annexation Area as Urban Separator was arbitrary because the placement did not provide for a contiguous Urban Separator corridor between the Green River and other rural areas, rather the placement was solely to achieve the highest number of residential lots. *Id.* at 16. Petitioners assert the configuration of the Urban Separator designated by the City creates an island of Urban development surrounded by Urban Separator. *Id.* at 13. Petitioners claim the City's PUD regulations and bonus density provisions undermine the function and value of the designated Urban Separator. *Id.* at 13, 15, 17.

In order to properly address Urban Separator placement and regional issues, Petitioners argue that 36.70A.100 requires the City to consult with surrounding jurisdictions to assign appropriate weightings to the various planning goals and policies addressing the issues. *Id.* at 11. By consulting with other jurisdictions, the City will ensure that not just their preferences will be considered but those of the other interested jurisdictions. *Id.* Because the City did not coordinate with surrounding jurisdictions, the Petitioners assert that the City's actions – plan amendment and zoning - were unilateral and arbitrary. *Id.* at 10, 12.

In response, the City argues that Petitioners have failed to show that the City has violated 36.70A.100 because Petitioners did not provide a plan-to-plan comparison demonstrating the inconsistency and un-coordination that they claim. City's Response, at 35. The City claims that all the Petitioners have done is make generalized comments without specifically identifying the challenged provisions of the plan and explaining how it is uncoordinated or inconsistent. *Id.* at 36. Furthermore, the record demonstrates that the City sought, and in many case received, comments from King County, the City of Auburn, along with at least five other local jurisdictions and government agencies such as the Department of Ecology, US Army Corps of Engineers, NOAA. *Id.* None of the

agencies that received notice of the City's planning and zoning proposals objected to the City's proposals and therefore it can be concluded that if these agencies and entities had concerns over the City's coordination and consistency between comprehensive plans, they surely would have challenged the City's adoption of the ordinance. *Id.* at 36-37, 40. Lastly, the City claims that there is substantial evidence in the record that the City's ordinance complies with almost every King County CPP, some 219 policies, from which the Petitioners singled out just one policy and still failed to demonstrate how it is inconsistent. *Id.* at 39.

In response to the Petitioner's arguments involving the placement of the Urban Separator on the southern 91 acres of the Annexation Area, the City asserts that there is no requirement in either King County's CPPs or the City's own land use planning policies that require an Urban Separator be placed in a particular area. *Id.* at 37-38. In addition, the City argues that the Petitioners failed to demonstrate how the designation of the Urban Separator in the southern part of the Annexation Area fails to comply with LU-27 because all LU-27 does is provide for the definition and the purpose of an Urban Separator, not the location. *Id.* at 38.

The Intervenor's arguments are similar to those of the City. Intervenor's argue that RCW 36.70A.100 requires coordination and the record demonstrates, in fact is replete, with evidence that neighboring jurisdictions were contacted with no jurisdiction objecting. Intervenor's Response at 6. Intervenor's therefore concluded that when there is no objection, it is difficult to conceive that there can be a violation of the coordination requirement of RCW 36.70A.100. *Id.*

The Intervenor's also argue that LU-27 does not prevent the creation of new Urban Separators within a jurisdiction; rather LU-27 is designed to maintain and protect Urban Separators once they have been created. *Id.* at 7. Intervenor's state that there is no requirement for Urban Separators to be contiguous and the City's designation provided for all the environmental, visual, recreational, and wildlife benefits that LU-27 requires. *Id.* at 9-10. Essentially, Intervenor's argue that the City's Urban Separator on the Annexation Area did exactly what LU-27 mandates - provide for low-density development (Kent proscribed a maximum density of one dwelling unit per acre), separate urban land from other urban land, and protect environmentally sensitive areas (much of the Urban Separator area is a wetland). *Id.*

Applicable Law

RCW 36.70A.100 provides:

The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

Board Discussion

The foundation of Petitioner's arguments presented in their Prehearing Brief is that the City failed to coordinate both the amendment of their comprehensive plan and the establishment of zoning with adjoining jurisdictions, thereby violating RCW 36.70A.100 which requires consistency between the City's comprehensive plan and those of the other jurisdictions. The failure of coordination and consistency is at the base of Legal Issues 1, 2, 4, and 5.¹⁹ And it is an argument raised throughout Petitioners' brief on other issues as well. Petitioners use the term "coordination" at times as a synonym for "consultation." The City's requirement under GMA for outreach to other jurisdictions is contained in RCW 36.70A.140 and is addressed under Legal Issue No. 9, *infra*. Here the Board addresses coordination and consistency under the provisions of RCW 36.70A.100.

Regarding Legal Issues No. 1 and No. 4.

Petitioners assert that the amendment to Kent's comprehensive plan under Ordinance No. 3685 is not coordinated²⁰ with, and not consistent²¹ with, the comprehensive plans of King County and the City of Auburn. The City notified King County, the City of Auburn and other local, state, federal and tribal entities of the proposed plan amendment and initial zoning by mailing to each of them the following materials: Notice and Agenda for the LUPB public hearing of January 26, 2004, City Staff Report of January 15, 2004 to the LUPB Regarding Impoundment Reservoir Comprehensive Plan Land Use and Initial Zoning,²² City Staff Report "Adoption of Environmental Documents" dated January 16, 2004,²³ and City of Kent Addendum to the Kent Comprehensive Plan Environmental Impact Statement (#ENV-93-51) Kent Impound Reservoir Site (#ENV-2003-26).²⁴ Exhibit No. 136 at 1-10. The City notified these agencies of its proposed action and provided opportunities for them to respond.

In order to support their claim the Petitioners must identify the provisions of the King County and City of Auburn comprehensive plans with which Kent's plan amendment is uncoordinated and inconsistent. *Corrine R. Hensley v. City of Woodinville* CPSGMHB Case No. 96-3-0031, FDO (Feb. 25, 1997), at 13. Petitioners have not done this. Therefore, Petitioners have **failed to carry the burden of proof** in demonstrating that Kent's plan amendment is not coordinated with and not consistent with King County and Auburn comprehensive plans. Legal Issues No. 1 and No. 4 are **dismissed**.

¹⁹ Legal Issues 1, 2, and 4 question whether the adoption of the amendment to the City's comprehensive plan was coordinated, and therefore consistent, with adjacent jurisdictions.

²⁰ Legal Issue No. 1

²¹ Legal Issue No. 4

²² Exhibit No. 133.

²³ Core Doc. No. 10.

²⁴ Core Doc. No. 5.

Regarding Legal Issues No. 2.

Petitioners assert Kent's comprehensive plan amendment is inconsistent with Countywide Planning Policies, specifically CPP LU 27. SOS PHB, at 12-13. CPP LU-27 provides as follows:

Urban Separators are low-density areas or areas of little development within the Urban Growth Area. Urban Separators shall be defined as permanent low-density lands which protect adjacent resource lands, Rural Areas, and environmentally sensitive areas and create open space corridors within and between Urban Areas which provide environmental, visual, recreational and wildlife benefits. Designated Urban Separators shall not be redesignated in the future (in the 20-year planning cycle) to other urban uses or higher densities. The maintenance of these Urban Separators is a regional as well as local concern. Therefore, no modifications should be made to the development regulations governing these areas without King County review and concurrence.

Core Doc. No. 3, at 27.

Ordinance No. 3685 adopted comprehensive plan designations of Urban Separator (US) for the south 91 acres and Single Family Residential, three units per acre (SF-3), for the north 65 acres of the Annexation Area.²⁵ The City defines Urban Separators as follows:

Urban Separators are low-density lands that define community or municipal identities and boundaries, protect adjacent resource lands, rural areas, and environmentally sensitive areas, and create open space corridors within and between urban areas which provide environmental, visual, recreational and wildlife benefits.

Core Doc No. 4, at 15-23 and 15-24.

The City's definition of Urban Separators is consistent with CPP LU-27.

The location of Urban Separators in the vicinity of the Annexation Area are shown on the map Urban Separators – South Overview, Appendix 2, Countywide Planning Policies (Core Doc. No. 3); and on the map Urban Separator – Proposed Revisions, attached to both Exhibit No. 128 and Exhibit No 133. The Annexation Area was not designated Urban Separator prior to the amendments in Ordinance No. 3685. Therefore the provisions of CPP LU-27 related to redesignation of Urban Separators and modification of development regulations governing Urban Separators are not applicable to Ordinance 3685.

Kent planning staff contacted King County planning staff, which also staffs the Growth Management Planning Council (**GMPC**), regarding the proposition of the City

²⁵ Core Doc No.1, at 3.

designating the Annexation Area as Urban Separator. King County staff replied as follows:

In my opinion, individual jurisdictions may choose to designate Urban Separators in their own comprehensive plans which are consistent with the Countywide Planning Policies definition of what an Urban Separator is. Countywide Planning Policy LU-27 defines Urban Separators and gives a sense of the kind of land that qualifies as an Urban Separator. Recently, a new Urban Separator that was made up of a large wetland and its buffer was designated near Renton. It is not necessary for the GMPC to act first. GMPC could be asked to modify the Urban Separator map in the CPP's after city action – when the proposed amendment to the CPP's is ratified, this new Separator would be regionally designated as part of the CPP's.

Petitioners assert the designation of the southerly portion of the Annexation Area as Urban Separator, rather than the northerly portion, was arbitrary and does not comply with CPP LU-27 because the designated area is not contiguous with an existing Urban Separator corridor in the vicinity of the property and because the configuration creates an island of urban development surrounded by Urban Separator. A review of the Urban Separator maps in Core Doc. No. 3, and in Exhibits No. 128 and No. 133, together with the maps attached to the Ordinance indicates that a portion of the northwest boundary of the area designated by the City as Urban Separator adjoins the existing Urban Separator corridor. The King County Comprehensive Plan Land Use Map generally designates the area east, south and the southern half of the west boundary of the Annexation Area as Urban Residential, Medium, 4-12 units per acre. Exhibit No. 133, at 9. The Ordinance does not create an island of urban development surrounded by Urban Separator.

Petitioners assert that the City should have designated the north area of the site Urban Separator instead of the south area. Properties abutting the north and northwest boundaries of the Annexation Area are designated Urban Separator. Petitioners' arguments indicate the reasons why petitioners believe the City should have designated the north portion of the property US, rather than the south portion, but they did not persuade the City. This decision is within the City's discretion. Petitioners do not persuade the Board that the City's action was clearly erroneous or conflicts with the provisions of CPP LU-27.

Petitioners provide no facts to support their assertion that the City's PUD regulations and bonus density provisions undermine the function and value of the Urban Separator portions of the site.

Petitioners have not shown that Ordinance No. 3685 is non-compliant with CPP LU-27. Petitioners have **failed to carry the burden of proof** in demonstrating that Kent's comprehensive plan amendment is inconsistent with countywide planning policies. Issue No. 2 is **dismissed**.

Regarding Legal Issues No. 5.

Petitioners assert that the zoning accomplished under Ordinance No. 3685 does not comply with RCW 36.70A.100 because the *zoning* is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues. RCW 36.70A.100 does not apply directly to development regulations. This section of the GMA requires consistency between *comprehensive plans* of jurisdictions.²⁶ *Children's Alliance and Low Income Housing Institute v. City of Bellevue*, CPSGMHB Case No. 95-3-0011 (5311), Order Partially Granting Bellevue's Dispositive Motion (May 17, 1995) at 6; *City of Snoqualmie and City of Issaquah v. King County*, CPSGMHB Case No. 92-3-0004c (2304c), Final Decision and Order (Mar. 3, 1993), at 16. Legal Issue No. 5 is **dismissed**.

Conclusions

The Board concludes Petitioners have **failed to carry the burden of proof** in demonstrating that Kent's plan amendment is not coordinated with and not consistent with King County and Auburn comprehensive plans. Legal Issues No. 1 and No. 4 are **dismissed**.

The Board concludes Petitioners have not shown that Ordinance No. 3685 is non-compliant with CPP LU-27. Petitioners have **failed to carry the burden of proof** in demonstrating that Kent's comprehensive plan amendment under Ordinance No. 3685 is inconsistent with countywide planning policies. Legal Issue No. 2 is **dismissed**.

The Board concludes RCW 36.70A.100 requires consistency between comprehensive plans of jurisdictions not consistency between the zoning of a jurisdiction with the comprehensive plans of other jurisdictions. Legal Issue No. 5 is **dismissed**.

Petitioners have **failed to carry the burden of proof** in demonstrating that Kent's adoption of Ordinance No.3685 is non-compliant with RCW 36.70A.100.

B. LEGAL ISSUES NO'S. 7 AND 8.²⁷

The Board's PHO sets forth these Legal Issues as follows:

Legal Issue No. 7

Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the action was inconsistent with its Comprehensive Plan?

²⁶ However, the GMA requires development regulations to implement and be consistent with the individual jurisdiction's comprehensive plan. See RCW 36.70A.040 and .130, and Legal Issues No. 7 and 8, *infra*.

²⁷ These issues are based on RCW 36.70A.130.

Legal Issue No. 8

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the zoning was inconsistent with its Comprehensive Plan and associated development, and development review, regulations?

Positions of the Parties

Petitioners argue that both the City's decision to amend the comprehensive plan and the decision to assign the zoning are actions that must be consistent with the City's existing comprehensive plan. Petitioners' PHB, at 20, 26. Petitioners argue that the City failed to comply with several elements of their comprehensive plan namely LU-22 (environmental policies comply with state and federal protections; protect natural resources and environmentally sensitive areas) and LU-23 (protection and enhancement of water resources). *Id.* at 20-22. Petitioners assert that both of these land use planning goals were violated when the City's action did not seek review and concurrence from other government entities that had an interest in, and a shared obligation to, the function and value of the wetlands of the Annexation Area. *Id.* at 20-21. In addition, Petitioners assert that the City's casual disregard of numerous critical areas on the Annexation Area demonstrate that the City did not appropriately consider the protection of an environmentally sensitive area. *Id.* at 28. According to Petitioners, this insensitivity is demonstrated by the City's placement of the split-zoning dividing line through the largest wetland and the arbitrary assignment of SR-1 and SR-3 zoning which was based primarily on the City's own financial interests. *Id.*

In response to Petitioners allegations that the City's action was inconsistent with its own comprehensive plan, in violation of RCW 36.70A.130, the City argues that Petitioners' brief raises several issues which are completely off base and incorrect, creating a brief which is hard to follow or understand. City's Response, at 42-43. The City states that their environmental polices and regulations do comply with state and federal regulations and that Petitioners have failed to demonstrative how Ordinance 3685 violates LU-22. *Id.* at 43. Furthermore, the City claims that LU-22 is not at all relevant to the comprehensive plan amendment and initial zoning of the Annexation Area. *Id.* at 44. Though Petitioners claim that the City failed to consider the City's own land use goals and policies, the record provides substantial support to the contrary. According to the City, the City's staff contemplated the City's environmental land use goals and policies and, after thoughtful and balanced consideration, decided that a split zoning designation would address environmental concerns. *Id.* at 46.

The Intervenor argues in response that what RCW 36.70A.130 requires is for plan amendments to conform with the GMA's requirements and for amendments to be consistent with and implement a city's comprehensive plan. Intervenor's Response, at 10-11. This, according to the Intervenor, is exactly what Ordinance 3685 does. *Id.* at 11. In addition, Intervenor argue that the amendment does not violate LU-22 of the City's comprehensive plan because the Ordinance itself does not authorize any filling of wetlands. *Id.* Intervenor assert that Petitioners' claims of wetland fill from future

development are hypothetical and not properly before the Board in this appeal. *Id.* Likewise, LU-22.8 of the City’s comprehensive plan has not been violated because by designating the property as Urban Separator and providing for low-density SR-1 zoning, the City protected natural resources and environmentally-sensitive areas as required under the policy. *Id.* at 12. Intervenors further claim that Ordinance 3685 is consistent with all of the other land use policies that Petitioners allege have been violated and that both King County and the City of Auburn coordinated in this process. *Id.*

Petitioners reply that the City carries the burden of showing that it coordinated with, and that its action was consistent, with other jurisdictions. Petitioners assert that the City’s belief that an agency’s silence should equate to acceptance does not satisfy the Act’s requirements. Petitioners’ Reply, at 3. Petitioners assert that a high level of coordination between the City and other jurisdictions was required “due to the unique and unusual circumstances of the property as a municipal island.” *Id.* at 4. Petitioners argue that the City’s action will result in infrastructure impacts to both the City of Auburn and the Auburn School District and since these other jurisdictions will bear the infrastructure costs and impacts, Petitioners claim that the City was under a greater burden to ensure that the Act’s requirements of coordination and consistency were met. *Id.* Petitioners argue that the record provides for no evidence of coordination with other jurisdictions nor with salmon habitat restoration partners that the City had worked with for more than five years. *Id.* at 4.

Applicable Law

RCW 36.70A.130(1)(b) provides:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

Board Discussion

Regarding Issue No. 7.

Petitioners assert the comprehensive plan amendment under the Ordinance does not comply with Comprehensive Plan Land Use Goal LU-22 and a related water quality goal. However Petitioners provide no supporting arguments based on the comprehensive plan amendment. All of Petitioners arguments are based on “...the City of Kent’s Zoning Action...” which is the subject of Issue No. 8. Petitioners’ PHB, at 17-23. Petitioners have not adequately briefed Issue No. 7, and it is considered abandoned. *Finis Gerald Tupper v. City of Edmonds*, CPSGMHB Case No. 03-3-0018, FDO Mar. 19, 2004, at 5-7. Issue No. 7 is **dismissed**.

Regarding Issue No. 8.

The zoning action in the Ordinance is the application of initial zoning to the property under the provisions of KCC 15.09.055. Core Doc No. 4, at 15-149. Upon its annexation in 1987, the property was assigned an interim zoning designation of SR-2 under the provisions of KCC 15.03.020(E). *Id.*, at 15-29. The interim zoning expired six months after the annexation. *Id.* From the expiration of the interim zoning to the adoption of the Ordinance, the Annexation Area did not have a zoning designation. Under the provisions of RCW 39.70A.040(3) the City was required to adopt comprehensive plan and zoning designations for the Annexation Area by July 1, 1994. The Ordinance is the City's response to the requirements of RCW 36.70A.040(3) for the Annexation Area. The zoning action under the Ordinance is an amendment of a development regulation in that it is an addition to the City's zoning map. Therefore the zoning action is required to be consistent with and implement the City's comprehensive plan as provided in RCW 36.70A.130(1)(b).

Petitioners assert that the zoning accomplished by the Ordinance is not consistent with the following comprehensive plan goals and policies: Goal LU-22 and a related water quality goal, Goal LU-23, and Policies LU 22.8, LU23.1, LU 23.2, LU 23.3 related to environmental protection, and protection and enhancement of water resources.²⁸ In support of this claim, Petitioners argue that the Ordinance includes the planned filling of wetlands without adequate delineation and analysis of the wetlands, without review and concurrence by other interested government entities and without coordination with adjacent jurisdictions. Petitioners assert that the cited goals and policies were not adequately considered in the City's analysis of the zoning alternatives.

The Ordinance does not authorize the filling of wetlands. Development of the Annexation Area is subject to review and approval of project-specific land use proposals

²⁸ **Goal LU-22:** Ensure that the City's environmental policies and regulations comply with state and federal environmental protection regulations regarding air and water quality, hazardous materials, noise and wildlife and fisheries resources and habitat protection. Demonstrate support for environmental quality in land use plans, capital improvement programs, code enforcement, implementation programs, development regulations, and site plan review to ensure that local land use management is consistent with the City's overall natural resource goals. Core Doc. No. 2, at 4-24. In 1985, the City of Kent, in conjunction with the establishment of the City stormwater drainage utility, adopted the following water quality goal: "Reduce the environmentally detrimental effects of present and future runoff in order to maintain or improve stream habitat, wetlands, particularly water quality, and protected water-related uses." *Id.*, at 4-22.

Policy LU-22.8: As additional land is annexed to the City, assign zoning designations, which will protect natural resources and environmentally sensitive areas. *Id.*, at 4-25.

Goal LU-23: Protect and enhance natural resources for multiple benefits, including recreation, fish and wildlife resources and habitat, flood protection, water supply, and open space. *Id.*

Policy LU-23.1: Maintain the quantity and quality of wetlands via current land use regulation and review, and increase the quality and quantity of the City's wetlands resource base via incentives and advance planning. *Id.*

Policy LU-23.2: Protect wetlands not as isolated units, but as ecosystems, and essential elements of watersheds. Base protection measures on wetland functions and values, and the effects of on-site and off-site activities. *Id.*

Policy LU-23.3: When jurisdictional boundaries are involved coordinate wetland protection and enhancement plans and actions with adjacent jurisdictions and the Muckleshoot Indian Tribe. *Id.*

and related environmental review by the City. Exhibit No. 133, at 3; Core Doc. No. 5, at 2-3, 9.²⁹ The City notified adjacent jurisdictions (King County and the City of Auburn) and other local, state, federal and tribal entities (including the Muckleshoot Tribe) of the proposed plan amendment and initial zoning by mailing to each of them the following materials: Notice and Agenda for the LUPB public hearing of January 26, 2004, City Staff Report of January 15, 2004 to the LUPB Regarding Impoundment Reservoir Comprehensive Plan Land Use and Initial Zoning,³⁰ City Staff Report “Adoption of Environmental Documents” dated January 16, 2004,³¹ and City of Kent Addendum to the Kent Comprehensive Plan Environmental Impact Statement (#ENV-93-51) Kent Impound Reservoir Site (#ENV-2003-26).³² Exhibit No. 136 at 1-10. The City notified these agencies of its proposed action and provided opportunities for them to respond. The City is not required to obtain concurrence from these agencies for the proposed action.

The purpose of the procedure which the City followed in the preparation and adoption of the Ordinance is “...to ensure that the initial zoning of annexed territories is in conformance with city goals, policies and plans.” KCC 15.09.055(A). Core Doc. No. 4, at 15-149. The City Planning Services Division’s January 15, 2004 report to the Land Use Planning Board regarding “Impoundment Reservoir Comprehensive Plan Land Use and Initial Zoning,” presents the Division’s discussion and analysis of the comprehensive plan goals and policies relevant to six land use and zoning alternatives for the property. Exhibit No. 133, at 2. The report includes consideration of the goals and policies from the following elements of the City comprehensive plan: Land Use, Community Design, Housing, Capital Facilities, Transportation, Parks, Utilities and Economic Development. *Id.*, at 7-20. The Report includes the following statement: “The Land Use Element of the Comprehensive Plan contains goals and policies relating to increasing the flexibility in residential building site design, protection of the natural environment, provision of infrastructure, and inter-jurisdictional coordination.” The report then cites the following goals and policies: Goals LU-2, LU-9, LU-10, LU-18, LU-20, LU-23 and LU-25; Policies LU-8.3, LU-9.4, LU-10.1, LU-10.2, LU-10.3 and LU-23.2.³³ Exhibit No. 133, at 7-8.

²⁹ See Board discussion of SEPA Standing, *supra*, at 4.

³⁰ Exhibit No. 133.

³¹ Core Doc. No. 10.

³² Core Doc. No. 5.

³³ **Overall (LU) Goal:** Encourage a future growth and development pattern which implements the Community’s vision, protects environmentally sensitive areas, and enhances the quality of life of all Kent residents.

Goal LU-2: Establish a land use pattern throughout the urban growth area that will facilitate a multi-modal transportation system and provide efficient public facilities. Ensure that overall densities in the Potential Annexation Area are adequate to support a range of urban services.

Policy LU-8.3: Locate housing opportunities within close proximity to employment to employment, shopping, transit, and human and community services.

Goal LU-9: Provide opportunities for a variety of housing types, options, and densities throughout the city and the Potential Annexation Area.

The staff report states that development of the Annexation Area would require additional permits such as subdivision or planned unit development land use permits, and therefore, additional public hearings. An updated wetland delineation report and map would be required with an application for development. Exhibit No 133, at 3. The report comments that the presence of sensitive areas will impact site development. “Goals LU-18, LU-20, LU-23, and LU-25 and Policy LU-23.2 consider protection and enhancement of environmentally sensitive areas and ecosystem functions through programs and development regulations – including clustering and planned unit development site design. Urban Separator designation would only permit development of units in clusters of eight (8) on 50% of the developable area. Clustering reduces the amount of impervious surface in site development, and limits the proximity and number of potential sources of pollution to sensitive areas.” *Id.*, at 9. The report also states “The development of housing with flexibility and innovation in site design to reduce impacts on environmentally-sensitive areas, particularly using planned unit development and unit clustering regulations (as with Urban Separators) is consistent with the Overall Land Use Element Goal. More specifically, Goals LU-9, LU-10, LU-18, LU-20, LU-25 and Policies LU-10.2 and LU-10.3 support such approaches to minimize the environmental impacts of residential land use. Increasing the availability of a variety of housing types at urban densities in close proximity to public services and transit is supported by Goals LU-2, LU-9, LU-10 and Policies LU-8.3, LU-9.4, LU-10.2, LU-10-3. Several of the alternatives and options considered would encourage development at densities appropriate to the context of surrounding land use”. Exhibit No 133, at 10, 11.

Policy LU-9.4: Allow single-family housing on a variety of lot sizes. Locate smaller lot sizes within close proximity to the Urban Center or Activity Centers.

Goal LU-10: Revise development regulations to encourage more single-family development and more flexibility and innovation in terms of building and site design.

Policy LU-10.1: Calculate the allowable density for single-family developments based on the size of the overall development site, as opposed to individual lot sizes.

Policy LU-10.2: Allow clustering of housing units in subdivisions in order to maximize potential build-out of single family homes while preserving open space and environmentally sensitive areas.

Policy LU-10.3: Allow more flexibility in residential setbacks and parking, particularly on small lots, to encourage infill development and innovative site design.

Goal LU-18: Foster recognition of the significant role played by natural features and systems in determining the overall environmental quality and livability of the community.

Goal LU-20: Protect and enhance environmentally sensitive areas via the adoption of City regulations and programs which encourage well-designed land use patterns such as clustering and planned unit development. Use such land use patterns to concentrate higher urban land use densities and intensity of uses in specified areas in order to preserve natural features such as large wetlands, streams, steep slopes, and forests.

Goal LU-23: Protect and enhance natural resources for multiple benefits, including recreation, fish and wildlife resources and habitat, flood protection, water supply, and open space.

Policy LU-23.2: Protect wetlands not as isolated units, but as ecosystems, and essential elements of watersheds. Base protection measures on wetland functions and values, and the effects of on-site and off-site activities.

Goal LU-25: Regulate development in environmentally critical areas such as steep slopes and landslide-prone areas to prevent harm, to protect public health and safety, to save the remaining sensitive areas in the City.

The application of comprehensive plan goals and policies to the circumstances pertaining to the Annexation Area and its surroundings were the basis for the staff recommending the split zoning to which the Petitioners object. Petitioners disagree with the judgment of the staff in recommending a split zoning configuration and the judgment of the Council in adopting the specific split zoning configuration in the Ordinance.³⁴ But Petitioners have not shown that the zoning adopted by the Ordinance is inconsistent with the City's comprehensive plan. Petitioners have **failed to carry the burden of proof** in showing that the Ordinance fails to comply with RCW 36.70A.130. Legal Issue No. 8 is **dismissed**.

Conclusions

Petitioners have not adequately briefed Legal Issue No. 7, and it is considered abandoned. Legal Issue No. 7 is **dismissed**.

Petitioners have **failed to carry the burden of proof** in showing that the Ordinance fails to comply with RCW 36.70A.130. Legal Issue No. 8 is **dismissed**.

C. LEGAL ISSUES NO. 9

The Board's PHO sets forth Legal Issue No. 9 as follows:

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.140 because it did not provide for early and continuous public participation?

Position of the Parties

Petitioners assert that the City's use of a 'hybrid process' - one with elements that were both quasi-judicial and legislative - limited the public's ability to fully participate in the City's decision-making process in regards to the determining the future use of the Annexation Area. Petitioners PHB, at 29. The Petitioners alleged that the City's use of an emergency clause "fast tracked" the Ordinance and resulted in an inconsistent and incomplete record, effectively denying not only the public of adequate information but the City Council of the information necessary to make a reasoned and informed decision. *Id.* at 30-31. In addition, the Petitioners alleged that other tactics that the City utilized during the amendment and zoning process, such as lack of access to important documents, last minute insertion of unnamed documents into the record, overly strict rules regarding testimony at public hearings, and use of an Addendum to the City's EIS, created an atmosphere which stifled public participation. *Id.*

³⁴ This was a close question. While the planning staff recommended a split zoning designation, the LUPB voted 4 to 1 in favor of the zoning preferred by the Petitioners, and the Council divided 4 to 3 in adopting the split zoning configuration.

The City responds that public participation in the decision-making process was “early and continuous” as required by RCW 36.70A.140. The City argues that it held several workshops and hearings to allow for public input on the matter and notice of all of these workshops or hearings was published timely in the local area newspaper. City’s Response at 48. The City further argues that Petitioners had, and took, the opportunity to participate in the City’s decision-making process and that this is demonstrated by not only their oral testimony at hearings and workshops but the numerous written comments that they submitted to the City. *Id.* at 49. In addition, not only did the Petitioners participate but various private and governmental entities submitted written comments. *Id.* at 49. In regards to Petitioners’ claim that use of an addendum to the City’s EIS thwarted the GMA’s goal of public participation, the City responds that its decision to utilize an addendum was not only consistent with the City’s practices but well within the law. *Id.* at 50.

In support of the City, the Intervenor argues that the City’s decision encompassed several workshops and hearings and lasted for approximately ten months. Intervenor’s Response, at 13. The Intervenor asserts that Petitioners were afforded every opportunity for meaningful participation and that they, and others, participated at various times. *Id.* In fact, according to the Intervenor, the record demonstrates that the Petitioners participated on an on-going basis throughout the ten months the matter was under consideration. According to the Intervenor, the City’s process more than satisfied RCW 36.70A.140’s public participation requirements and that the Petitioners allegations of inadequate access to information, for themselves as well as the City Council, is unsupported by the facts. *Id.* at 15.

Petitioners reply that the City’s desire to achieve the maximum sales price effectively stifled public participation. Petitioners allege that the City’s process provided for no planning sessions in which area residents had the opportunity for a “back-and-forth discussion and open debate about the future use of that property.” Petitioners Reply, at 4. In addition, Petitioners assert that the City was unresponsive to outside concerns and comments, most of which “disappeared into a black hole” and, by limiting discussion with City personnel, suppressed the concerns and views of the public. *Id.* Petitioner, therefore, claim that the City’s action prevented the “open discussion” required under the Act.

Applicable Law

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public

meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

Board Discussion

Petitioners allege that the City violated RCW 36.70A.140 because it did not provide for early and continuous public participation. The public participation requirement of RCW 36.70A.140 is clear - a jurisdiction must provide the opportunity for public participation prior to amending a comprehensive plan. *McVittie v. Snohomish County*, CPSGMHB Case No. 00-3-0017, Final Decision and Order (Apr. 12, 2001) at 25, 28. The Act envisions that participation must occur during periods of open discussion and within a variety of forums. *Robison v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025 (4325c), Final Decision and Order (May 3, 1995) at 30. In addition, at the core of public participation is notice. *Weyerhaeuser Real Estate Company v City of DuPont*, CPSGMHB Case No. 98-3-0035 (8335), Final Decision and Order (May 19, 1999) at 6.

The City provided evidence that demonstrated their compliance with 36.70A.140 by producing seven (7) Affidavits of Publication from the King County Journal which provided notice to Petitioners, and the public at large, of several workshops and public hearings pertaining to the amendments to the comprehensive plan and initial zoning designation. See City's Response, Exhibits 7-13. In this regard, the Petitioners did have sufficient notice. In addition, for the purposes of satisfying the requirements of RCW 36.70A.140, written comments carry just as much weight as oral comments. *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016 (4316), Final Decision and Order (Apr. 4, 1995), at 75-76. The record demonstrates that Petitioners not only testified orally on several occasions (see LUPB Hearing 1/26/04 - Exhibit 137, LUPB Hearing 2/23/04 - Exhibit 138, Kent City Council Meeting 3/2/04 - Exhibit 103) but that Petitioners provided several written commentaries to the City as well. (See correspondence from Petitioner Novak - Exhibits 34, 35, 36, 37, 38, 39, 44, 50 and 51). In addition, several entities provided written correspondence (for example see correspondence: from CTED - Exhibit 46, from 1000 Friends of Washington - Exhibit 47, from US Army Corps of Engineers - Exhibit 48, from King County Road Services - Exhibit 52, from Sierra Club - Exhibit 54). Along with receiving oral and written comments in regards to the Annexation Area, the City provided information and documentation to private property owners, adjacent municipalities, tribes, and several state and county entities. Exhibit No.136, at 1-16.

The evidentiary record presented by all of the parties - Petitioners, City, and Intervenor - demonstrates the fulfillment of the City's obligations under RCW 36.70A.140. Several workshops and public hearings were conducted in which the Petitioners not only had the opportunity to speak, but took that opportunity. Notice of the City's actions was provided to a broad range of interested parties - private and governmental - all of whom had the opportunity to comment. The Petitioners actively participated, both orally and in writing, at various levels during the ten months of the decision-making process. The results of the information received during the City's public participation process produced heated debate amongst the City Council members themselves, with the final vote approving the amendment and zoning being 4 to 3. (Exhibit 104 at 139-140).

An integral part of the decision-making process is the opportunity for public comment, but this does not mean that the City is required to agree with public comments. The fact that the Petitioners are disappointed with the City's choice does not equate to a violation of the public participation requirement of the Act. *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068 (5368c), Final Decision and Order (Mar. 12, 1996) at 36.

Conclusions

The Board concludes that the record demonstrates the City fully **complied** with the Act's requirement of public participation under RCW 36.70A.140 in their decision-making process and therefore Legal Issue 9 is **dismissed**.

D. LEGAL ISSUES NO. 15

The Board's PHO sets forth Legal Issue No. 15

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.020 because the action was arbitrary and discriminatory and failed to protect the property rights of landowners?

Position of the Parties

Petitioners argue that the City's actions were arbitrary and discriminatory and, therefore, failed to protect the property rights of landowners. Petitioners state that the City purchased the Annexation Area through 12 separate eminent domain actions and that the City failed to protect property rights when, after determining that the property was not to be used for municipal purposes, the City did not offer the former landowners the opportunity to reacquire the property. Petitioners' PHB at 35. Petitioners also argue that the re-zoning of the property was not required, claiming that not only had a SR-2 zoning been 'grandfathered' in but the split zoning designation did not protect sensitive wetland areas as intended. *Id.* at 36. Petitioners allege that the zoning and location of the urban separator were based primarily on the City's own financial interests. *Id.* Petitioners further allege that this is not only demonstrated by the 'economic feasibility' clause

found within the purchase and sale agreement's contingency clause but by both the buyer's active participation in the City's decision-making process and the time extensions granted. *Id.* at 36-37. Petitioners allege that the City's rezoning actions constituted arbitrary spot zoning and were based primarily on achieving financial benefit for both the City and the subsequent purchaser of the property. *Id.* at 39.

Petitioners further argue that the City arbitrarily assigned weightings to various planning goals and policies and failed to include those pertaining to protection of the environment, even though approximately fifty percent of the Annexation Area consists of wetlands and steep slopes. *Id.* at 38. Petitioners assert that the City's determination of buildable acres was not based on a current assessment of the Annexation Area's wetlands (value and function) but was based on an arbitrary assumption tied to the City's desire to maximize the sales price of the property. *Id.* at 40. In addition, Petitioners argue that one of the property rights that is entitled to protection under RCW 36.70A.020(6) is the "right to have the [Olson Creek] watershed protected from the high adverse impact which will result from the high density of development allowed" thereby maintaining the wetland's value and function. *Id.* at 35.

The City argues that the historical background of the purchase and sale of the property is irrelevant to the issue as to whether the City properly considered the GMA's planning goals. City's Response, at 50. The City alleges that the rezone and Urban Separator designation do, in fact, demonstrate both sensitivity to environmental concerns and a thoughtful and balanced approach to planning and zoning for the property. *Id.* at 51. The City asserts that its rationale for split zoning was not arbitrary but was intended to offer additional protection for environmentally-sensitive areas consistent with King County CPP LU-27 while allowing for residential density consistent with the area. *Id.*

The City alleges that its "Goals Achievement Matrix" reflects the fact that the City appropriately 'weighted' the property's development potential against the City's comprehensive plan goals and policies, while addressing environmental concerns. *Id.* at 52. In addition, the record demonstrates that the City specifically considered GMA policies and planning goals, giving "careful and ongoing consideration to the rights of property owners - including the public which owns the property itself, as well as owners of property surrounding the site." *Id.*

The Intervenor asserts that there is no merit in the argument that the City's actions were arbitrary and discriminatory or failed to protect the rights of landowners. Intervenor's Response, at 16. Intervenor argues that the fact that the City did not offer the previous property owners the opportunity to repurchase the Annexation Area did not result in a violation of the GMA's goal and that the Petitioners' claim to a right to a protected watershed is unsupported, speculative, and not a proven violation of the GMA. *Id.*

The Intervenor further alleges that Petitioners' arguments in regards to a 'tainted' process that resulted in an arbitrary action is barred under the Doctrine of Collateral Estoppel due to the King County Superior Court's previous holding that the City's action was legislative in nature. *Id.* at 17. The Intervenor claims that the City's action was

exhaustive, resulting in seven land use alternatives, and that the Petitioners failed to adequately prove that the City's actions were both arbitrary and discriminatory. *Id.*

In reply, Petitioners reiterate their argument that placement of the separation line resulted in bisecting the largest wetland on the Annexation Area and placing a significant portion outside of the Urban Separator designation, resulting in a loss of protection. Petitioners' Reply at 7. In addition, Petitioners' now argue that the complete parcel - all 150+ acres - should be designated as Urban Separator since a considerable number of wetlands lie north of the separation line established by Ordinance 3685. *Id.* at 8. Petitioners once again argue that the City's true intent behind the split zoning was to achieve the higher density required to effectuate the sale of the property. *Id.*

Applicable Law

RCW 36.70A.020(6) provides:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following 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:

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Board Discussion

The GMA provides 13 goals which are meant to guide the development and adoption of a City's comprehensive plan and development regulations. RCW 36.70A.020. The property rights goal, while an important cornerstone of the GMA, is not supreme among the 13 goals; rather the Act requires local governments to balance all 13 goals. *Vashon-Maury, et al., v. King County CPSGMHB* Case No. 95-3-0008c (Oct. 23, 1995), FDO at 79.

RCW 36.70A.020(6) requires that the property rights of landowners shall be protected from arbitrary and discriminatory actions and, if those rights are infringed upon, that just compensation shall be made. Property rights are generally spoken of as a "bundle of sticks" and primarily encompass the right to possess, the right to exclude, and the right of alienation. In order for Petitioners to overcome the presumption of validity that actions of cities are granted by the Act, they must prove that the action taken by the City is both arbitrary and discriminatory. *Shulman v. City of Bellevue CPSGMHB* Case No. 95-3-0076, (May 13, 1996), FDO at 12.

In this case, Petitioners are property owners either adjacent to or within close proximity to the Annexation Area. Though this property was acquired by the City through 12 separate purchases, the Board can find nothing in the record that shows that any of the Annexation Area's acreage was acquired from the Petitioners themselves. Though non-contiguous to the City, the property was legally annexed in 1987 pursuant to RCW 35.13.180.³⁵ Petitioners now allege that Goal 6 of the Act imposes a requirement on the City that the prior property owners be given an opportunity to repurchase the property. The Board does not see how Goal 6 would require a City, who legally acquired title to property some 20 years ago, to offer this property, as 12 individual parcels, to the original owners. Prior property owners have no current property rights in the property and therefore, they could experience no infringement of rights.

In addition, the Board does not read the Act, and in particular Goal 6, as creating any new property rights but rather the Act, and the Goal solely reiterates the historical rights that have attached to private property owners. Petitioners assert development of the Annexation Area would infringe on their property right to a functional watershed. Petitioners' PHB at 35. Petitioners states that they have a "right to have the [Olson Creek] watershed protected from the high adverse impact which will result from the high density of development allowed" thereby maintaining the wetland's value and function. *Id.* at 35. Though the right to a healthful environment is provided for in SEPA, the Board does not see the same right attached to Goal 6's property rights, and it is not encompassed within the traditional fundamental rights of private property ownership - exclude, possess, alienate.

Petitioners' appeal to GMA Goal 6 reflects a flaw in the legislative scheme for annexations. Cities may annex non-contiguous territory only if the land is needed for municipal purposes. RCW 35.15.180. But what if the municipal purpose is abandoned? Should that "nullify" the prior annexation, as Petitioners propose?³⁶ There is no statutory provision addressing such a situation.

The de-annexation statute – RCW Ch.35A.16 – is unworkable under the circumstances. It requires a petition drive in the city or a majority vote of the City Council followed by a 60% vote of the electorate and approval by the Boundary Review Board. City's Response at 28. In the case of non-contiguous territory, where the impacted neighbors are not City voters, they have no remedy.

The procedures for surplussing municipal property, while less cumbersome, don't redress the fundamental unfairness perceived by Petitioners here. Again, the persons most impacted by change in the use of the property have no vote in the city where the change is being decided.

The GMA does not fill the gap in the legislative scheme for island annexations. Under GMA, all lands annexed by a city are presumed to be urban, so that if the municipal use

³⁵ RCW 35.13.180 allows for annexation of non-contiguous property for municipal purposes

³⁶ Petitioners' PHB at 10. See also Petitioners' claim cited in City's Response at 27, fn. 14.

is abandoned and the property surplussed, urban densities are the assumed result no matter how distant the property might be from the City.

The Petitioners' frustration is understandable. There "ought to be a law."³⁷ The Board's jurisdiction, however, is limited to interpreting and applying the GMA, and Petitioners have failed to prove a case under the Act.

Conclusions

The Board concludes that the record demonstrates the City **complied** with Goal 6, RCW 36.70A.020(6) and therefore Legal Issue No. 15 is **dismissed**.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioners have failed to carry the burden of proof in demonstrating non-compliance with the GMA as challenged in Legal Issues 1, 2, 4, 5, 7, 8, 15, 18, 19, 20 and 21. Therefore these issues are **dismissed with prejudice**.
- The City's adoption of Ordinance No.3685, adopting comprehensive plan and zoning designations for the Annexation Area, **complies with** the requirements of RCW 36.70A.140 [Legal Issue 9], and **was guided by** Goal (6) RCW 36.70A.020(6) [Legal Issue 15].

So ORDERED this 16th day of December, 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

³⁷ "Petitioners believe the (RCW 35.13.180) annexation statute was not meant to create a loophole by which a municipal government could annex extraterritorial property, hold the property indefinitely, and then profit from the property in a manner inconsistent with use of the property for municipal purposes." Petitioners' PHB at 10.

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member (See separate dissenting opinion).

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

Board Member Pageler's Dissent as to SEPA

I concur in the decision of the Board except with respect to SEPA. I would find that Petitioners satisfy the threshold requirements for SEPA standing and that their argument for a SEPA Supplemental EIS, as opposed to a mere Addendum, has merit.

Petitioners Have SEPA Standing

While the Petitioners' pleadings and briefings on this point are inartful, the Board's application of the *Trepanier* test is hypertechnical, denying Petitioners a remedy for the very harm that SEPA application in a GMA context should prevent. The Board's precedents applying the *Trepanier* test virtually eliminate SEPA appeal of non-project actions through the GMA process. It seems unlikely that was the intent of the legislature when it incorporated SEPA appeals into the Growth Hearings Board's jurisdiction.

Sometimes a non-project action [comprehensive planning or zoning] irreversibly opens a gate to significant ecological change. In such cases, SEPA analysis should be required at the opening of the gate; it is futile to merely analyze the incremental impact of each bulldozer as it rolls through the gate.

The Board recognized as much in *Master Builders Association of Pierce County v. Pierce County (MBA/Brink)* CPSGMHB Case No. 02-3-0010 (Order on Motion to Dismiss SEPA Claims, October 21, 2002).³⁸

[T]he Board notes that a petitioner that challenges a nonproject action that shifted land from one of the GMA's three fundamental and significant land use categories – Resources, Rural, or Urban – to a more intensive land use category, could arguably satisfy a strict application of the *Trepanier* SEPA standing test.

.... Shifts from limited and *less* intensive uses to diverse and *more* intensive uses, logically raise the potential for increases in significant adverse environmental impacts. It is a reasonable conclusion to draw that when such shifts occur, the *threatened injuries* to protected environmental interests fall within the zone of interests protected by SEPA. Further, assuming the shift involved a concurrent, complete and consistent plan, regulatory and mapping [designation] change, the impact could arguably be: *immediate* [upon the effective date], *concrete* [the intensity and diversity of permitted uses is significantly altered and environmental threats arguably increased], and *specific* [depending upon the relationship of the petitioner to the affected area]. In these limited situations the Board would not be applying the *Trepanier* test “loosely” or “assuming”

³⁸ *MBA/Brink* involved claims by builders and property owners that county land use restrictions would chill development and create blight their land and business. The Board properly found such harms speculative.

standing, but merely appropriately applying the test for significant nonproject actions.

Id. at 4, fn. 6 [emphasis in original].

In my view, the present case is one of the “limited situations” contemplated in *MBA/Brink*.

The Board majority sets forth the two-part *Trepanier* test and acknowledges that Petitioners meet the first prong: their endangered interest is clearly within the zone of interests protected by SEPA. *Supra* at 4. But the Board concurs with the Respondents that the threatened injury is “conjectural and hypothetical,” and that “[s]uch speculative injuries can be later addressed by the City or mitigated as actual developments are proposed.” *Id.*³⁹

I disagree. The threatened environmental injury in this case is certain and significant,⁴⁰ so much so that the U.S. Army Corps of Engineers is considering withdrawing federal financial support for downstream restoration of Olson Creek. Index 48, Letter from Lester E. Soule, Chief, Civil Projects Branch, US Army Corps of Engineers, February 27, 2004.

What is at issue here? The 156-acre reservoir property is incorporated as part of the City of Kent and is surrounded by King County Urban Growth Area. City’s Response at 5-6. The surrounding area is developing at urban densities with schools, utilities, and other urban services. *Id.* at 7-8. On its face, urban development might be expected at this site.

However, it’s clear from the record that the reservoir property is unique. First, because the land was acquired and held by the City of Kent for municipal purposes, the property is undeveloped and has been un-zoned since 1988.⁴¹ City’s Response at 25. In this respect the reservoir property is like land being redesignated from undevelopable resource land to a more intense use, within the scope of the *MBA/Brink* “limited situation” cited above.

Further, the reservoir property contains the Olson Creek headwaters marsh. Core Doc. – at 4, “Hydrology.” The environmental importance of the property was not fully understood until after the adoption of the City’s Final EIS on its Comprehensive Plan in

³⁹ The Board’s reliance on *Citizens for Responsible Growth of Greater Lake Stevens v. Snohomish County (Citizens)*, CPSGHB Case No. 03-3-0013 (Order on Motions, August 15, 2003), *supra* at fn. 11, is misplaced. Petitioners in *Citizens* sought SEPA standing regarding a City comprehensive plan amendment that changed the implementation schedule for urban build-out in an area already planned and mapped for urban development. Under those circumstances, the City’s action created no previously-unanticipated impacts.

⁴⁰ I focus here on injury to aquatic habitat, where Petitioners’ case is most coherent and compelling. Petitioners also cite loss of wildlife, risk of flooding and other adverse environmental impacts.

⁴¹ City’s Response at 3, fn. 3: “Ordinance 3685, for the first time, established zoning for the property, since it had originally been purchased and intended for an impoundment reservoir as part of the City’s public water system.”

January, 1995. Core Doc. --. Since January of 1995, intensive study and restoration of the Green River Watershed (WRIA 9) has been undertaken in response to the Federal listing of Puget Sound Chinook salmon as a threatened species in 1999. Index 34 at 1, Attachment 1 at 2-6. All the jurisdictions in the Green River basin have joined with NOAA Fisheries,⁴² the U.S. Army Corps of Engineers (the **Corps**), Washington Department of Fish and Wildlife and citizen representatives to develop strategies for recovering Chinook runs in the Green River system. Index 34, Attachment 1 at 3; Index 35 at 2.

New understanding of the ecological function of the reservoir property has emerged from this work. Briefly, the reservoir property contains wetlands that are the source of cool groundwater for Olson Creek. In an October 16, 2003 report to the WRIA 9 Steering Committee, professionals who are assessing the health of the Green/Duwamish River Ecosystem reported on the importance of preserving that source of cool water. Index 69, Attachment 4. Overheated water in the main stem of the Green River, a result of overdevelopment of streams and riverbanks in the basin, is a significant limiting factor for salmon survival in WRIA 9. Colder groundwater flowing from the Olson Creek sub-watershed helps moderate Green River water temperatures. *Id.* Additionally, Olson Creek is one of the incubators for salmon fry. It provides shelter for juvenile salmon who must find refuge from the rapid main stem flows of the Green River in late winter and early spring in order to survive. Index 50 at 2.

Testifying at the February 23, 2004, Land Use and Planning Board (**LUPB**) hearing, Mr. Noel Gilbrough, of the Corps, identified himself as the project manager for the Green-Duwamish Ecosystem Restoration Project. “He stated that this project consists of the restoration of six streams over the course of the next ten years at an approximate cost of \$135 to \$150 million dollars. He stated that one of those streams is Olson Creek that has an existing Coho run and the probability of Chum moving up into that stream with the mouth of the stream likely used by Chinook for their habitat. He stated that paving of any portion of the upper basin would be destructive to that site, with the potential to increase flood flows.” Index 93 at 6.

Mr. Fred Goetz, a fish biologist with the Corps, testified that the level of proposed development on the reservoir property jeopardized proposed restoration efforts for Olson Creek. Index 103 at 2. “[I]t would become questionable whether we can restore one half mile of this stream. We’re investing a large amount of federal dollars into this project and throughout the Green River Watershed.... One of the things we’re finding is that we can’t repair streams that have the hydrology altered beyond a certain point.” *Id.*

Federal, state and local agencies are spending tens of millions of dollars on land acquisition and restoration projects in the Green River basin. Index 35 at 4-5. However,

⁴² “NOAA Fisheries does not have authority to be involved in local planning issues.” Letter from D. Robert Lohn, Regional Administrator, NOAA Fisheries, August 8, 2003, to Mr. Ron Novak, characterizing Mr. Novak’s concerns for Olson Creek as “compelling and supportable” based on the 2000 WRIA 9 Habitat Limiting Factors and Reconnaissance Report. Index 35 at 2.

the Corps may abandon its planned restoration project at the confluence of Olson Creek and the Green River because residential development on the reservoir property will render downstream Olson Creek enhancement efforts futile. Index 48.⁴³ Loss of habitat-restoration funding is an *immediate, concrete and specific* injury. As Petitioner Novak states: “The Olson Creek Watershed Ecosystem is in jeopardy of losing the financial assistance needed to help regain its former health as a viable salmon stream and will get no second chance.” Index 38 at 2.

The City argues that any impacts of residential development will be assessed and mitigated through appropriate conditioning during project-level review. City’s Response at 63. At the City’s public hearings, city planners assured citizens and Council members that the City’s critical areas ordinances would be updated in parallel with King County to incorporate best available science and thus adequately protect the Olson Creek headwaters marsh.⁴⁴ Index 94 at 4; Index 108 at 5. However, at the time of the Board’s hearing on this matter, Kent had not yet adopted new critical areas regulations and the developer purchasing the reservoir property had already submitted its application for plat approval.⁴⁵

In my view, Petitioners have made the threshold case that the City’s action creates a threatened injury that is “immediate, concrete, and specific.” The zoning and comprehensive plan amendment allowing residential development of the reservoir property creates the certainty of irreversible impacts. There’s no dispute that residential development will create a major footprint on the watershed, only a debate as to whether it is likely to permanently destroy the marsh and stream hydrology or whether the damage can be mitigated by project conditioning.⁴⁶

A Supplemental EIS Is Warranted Here

⁴³ “The Corps does not see the benefit in expending limited funds in areas where large scale development has the potential to offset the benefit of the enhancement projects.... If the proposed [reservoir property] development is realized, the Corps...may reevaluate the feasibility of attempting to restore this portion of Olson Creek. Seattle District Staff of the Corps could recommend that federal funds not be expended on this site.” *Id.*

⁴⁴ At the January 26, 2004 LUPB hearing, Mr. Wolinski, environmental engineering manager in the City of Kent Public Works Department, responded to citizen concerns about the need to update the critical areas ordinance. “He stated that staff has been working with the City’s consultants for over a year in evaluating Best Available Science in the areas of storm water, wetland and groundwater protection. Mr. Wolinski stated that staff is actively involved in analyzing existing ordinances with respect to what improvements might be needed for staff to create regulations based on Best Available Science.” Index 94 at 4.

⁴⁵ Per Mr. Richard Wilson, for Intervenor, in response to Board member questions at the Hearing on the Merits, October 28, 2004.

⁴⁶ As to the City’s additional contention that Petitioners did not demonstrate specific personal injury to themselves (City’s Response at 19), the record is replete with correspondence, e-mails, and testimony from SOS participants who state that they live adjacent to or in the vicinity of the reservoir property and value the property as their view-shed, use it for passive recreation, wildlife viewing and bird watching, and count on it to ameliorate flooding on local roads. Petitioners’ PHB at 3, 4; Index 69, Attachment 7, Bird/Wildlife Inventory by Dianne Brooks; and see generally, Index 93, 94, 89, 90, 103, and 104.

The City reviewed the reservoir plan amendment and rezoning through an abbreviated SEPA addendum process. An addendum, rather than a more detailed supplemental EIS, is appropriate where existing environmental documents are sufficient for the necessary analysis because there are no *substantial changes* and no *new information* that would indicate adverse impacts.

The SEPA regulations provide in relevant part:

Existing documents may be used for a proposal by employing one or more of the following methods:

....

(c) An addendum, that adds analysis or information about a proposal but does not substantially change the analysis of significant environmental impacts and alternatives in the existing environmental document.

(d) Preparation of an SEIS [Supplemental Environmental Impact Statement] if there are:

(i) *Substantial changes* so that the proposal is likely to have significant adverse environmental impacts; or

(ii) *New information* indicating a proposal's probable significant adverse environmental impacts.

WAC 197-11-600(4). See, e.g., *City of Edgewood, et al., v. City of Sumner*, CPSGMHB Case No. 01-3-0018 (Final Decision and Order, January 18, 2002).

The reservoir property “was not part of the original [1995] EIS” when the City adopted its Comprehensive Plan. City’s Response at 55. Here, except for a current traffic analysis, the City has relied on environmental documents produced during or prior to 1995. Index 108 at 3.⁴⁷ The primary river basin analysis referenced and relied on by the City in its Addendum process was the *Eastern Tributaries of the Lower Green River Enhanced Reconnaissance Report of 1994 (Reconnaissance Report)*. Core Doc. 11. But throughout its briefing here, the City discredits the Reconnaissance Report as “inaccurate and misleading” because of substantial changes since 1994. City’s Response at 15. “The data and the characteristics described in this report are at least 12 years old, ... do not represent current land conditions... [and] should be given little or no weight.” *Id.* The Reconnaissance Report “is over 10 years old, relies on surveys or analyses which are at least 12 years old ... is completely out of date and directly belied by the existing physical environment ...” and “its findings are not relevant to the City’s now designated use for the property.” *Id.* at 57-58. Thus the City finds the Reconnaissance Report outdated and

⁴⁷ The documents relied on were the 1995 Wetland Delineation for the Reservoir Property, Core Doc. 5; the 1983 Geotechnical Report on the site when it was acquired and annexed by Kent, Core Doc. 7; the 2004 Traffic Impact Analysis, Core Doc. 17; the 1994 Reconnaissance Report, Core Doc. 11; the 1991 Soos Creek Community Plan EIS, Draft and Final, Core Docs. 12-14; and the 1995 City of Kent Comprehensive Plan EIS, Draft and Final, Core Doc. 10. *Id.*

irrelevant because of the extent to which *conditions have changed* in the basin since 1994. *Id.*⁴⁸

At least three *substantial changes* call for new SEPA analysis here:

- The City’s decision that the reservoir property was no longer needed for municipal purposes,
- The level of physical development in the surrounding area, as the City emphasizes in its critique of the Reconnaissance Report, and
- The federal listing of Puget Sound Chinook and bull trout as threatened species.

Substantial changes coupled with *new information* are the basis for an SEIS rather than an addendum. WAC 197-11-600(4). *New information* concerning aquatic habitat and salmon survival in the Green River basin has been developed in connection with regional salmon recovery efforts. *See above*. Petitioners point out that the US Congress funded a substantial new study of the Green/Duwamish ecosystem in 1995. Index 34 at 2. In 2000 King County published the WRIA 9 Habitat Limiting Factors and Reconnaissance Report which identifies Olson Creek issues. Index 35 at 2. These studies are full of *new information* about aquatic habitat in the Green River basin, identifying, *inter alia*, the importance of the Olson Creek headwaters marsh on the reservoir property.

I would find that Petitioners **have SEPA standing** and **have made a prima facie case for requiring a supplemental EIS**. I concur in the decision of the Board on all other issues.

Margaret A. Pageler
Board Member

⁴⁸ After all that, the City states that it “properly relied on prior documents [including the Reconnaissance Report] and environmental review to address environmental issues related to the zoning for the property.” *Id.* at 59.

APPENDIX - A

Chronological Procedural History on CPSGMHB Case No. 04-3-0019

On June 23, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Save Our Separators, *et al.*, (**Petitioners or SOS**), with two (2) Attachments. The matter was assigned Case No. 04-3-0019. Petitioners challenge the City of Kent's (**Respondent** or the **City**) adoption of Ordinance No. 3685 (the **Ordinance**), "An Ordinance... relating to and implementing comprehensive plan and zoning designations for the Impoundment reservoir property located at the northwest corner of the intersection of 124th Avenue Southeast and South 304th Street." The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or the **Act**), and the State Environmental Policy Act (**SEPA**). Petitioners requests the Board find the Ordinance non-compliant with the GMA, remand the Ordinance to the City, require the preparation of a Supplemental Environmental Impact Statement (**SEIS**), and require that the City to reconsider its action either through an "area wide" planning process or through a quasi-judicial zoning process.

On July 6, 2004 the Board received a Notice of Appearance from counsel for The City of Kent.

On July 6, 2004 the Board issued a Notice of Hearing (**NOH**) setting a Prehearing Conference on this matter for 10:00 a.m. August 2, 2004 and, among other things, establishing July 23, 2004 as the deadline for Petitioners to submit a restatement of the legal issues presented in the PFR.

On July 22, 2004 the Board received correspondence from Petitioners requesting an extension of the deadline for Petitioners' Re-Statement of Legal Issues to July 28, 2004 (**Request for Extension**).

On July 23, 2004 the Board issued an Order Extending Time for Restatement of Issues extending the deadline for the restatement to July 28, 2004.

On July 23, 2004 the Board received Respondent's Index of Documents (**Index**).

On July 27, 2004 the Board received Petitioners' Re-Statement of Legal Issues (**Restatement of Issues**).

On July 28, 2004 the Board received Amended Petitioners' Re-Statement of Legal Issues (**Amended Restatement of Issues**).

On July 29, 2004 the Board received Stipulation and Order for Intervention of Right by Kent 160 LLC (**Stipulation for Intervention**).

On August 2, 2004, the Board conducted the prehearing conference in this matter in the State Attorney General's Training Center, 24th Floor, Union Bank of California Building, 900 4th Avenue, Seattle. Present for the Board were Margaret Pageler and Bruce C.

Laing, presiding officer. Ron Novak represented the Petitioners, *pro se*. Michael C. Walter and Kim Adams Pratt represented the City.

Also present was Richard R. Wilson representing Kent 160 LLC, proposed Intervenor in the Stipulation for Intervention. The parties stated their stipulation for the proposed Intervention. The Board made an oral ruling granting the intervention and indicating a written ruling would be included in the Prehearing Order (**PHO**).

The Board reviewed its procedures for the Hearing, including the composition and filing of the Index to the Record Below; Exhibit Lists and Supplemental Exhibits; Dispositive Motions; the Legal Issues to be decided; and a Final Schedule of deadlines.

On August 9, 2004 the Board issued a Pre-hearing Order And Order on Intervention (**PHO**) setting forth the final schedule for this case and the Legal Issues to be addressed.

On August 13, 2004 the Board received Respondent's Amended Index (**Amended Index**).

On August 16, 2004 the Board received Petitioners' Motion to Supplement the Record (**Petitioners' Motion to Supplement**) with four attachments.

On August 16, 2004 the Board received Respondent City of Kent's Motion to Supplement the Record to Include Superior Court LUPA Order (**City's Motion to Supplement**), together with Declaration of Michael C. Walter in Support of Respondent City of Kent's Motion to Supplement the Record (**Walter Declaration**) with two attachments.

On August 16, 2004 the Board received Respondent City of Kent's Motion to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**City's Motion to Dismiss**) with six attachments.

On August 16, 2004 the Board received Kent 160 LLC's Motions for partial Summary Judgment (**Intervenor's Motion to Dismiss**) And to Supplement the Record (**Intervenor's Motion to Supplement**) with two attachments, together with Declaration of Richards R. Wilson in Support of Kent LLC's Motions for Summary Judgment And to Supplement the Record (**Wilson Declaration**).

On August 27, 2004 the Board received Respondent's Submittal of Core Documents consisting of the following 17 documents: City of Kent Ordinance No. 3685 (**Core Doc. No. 1**); City of Kent Comprehensive Plan, adopted April 18, 1995 (**Core Doc. No. 2**); King County Countywide Planning Policies, December 2003 (**Core Doc. No. 3**); Kent City Code – Title 15 (**Core Doc. No. 4**); And the following documents listed in the Amended Index: No. 1 – No. 6; No. 55; No. 123 – No. 127; No. 135.

On August 30, 2004 the Board received SOS Response to Respondent City of Kent's Motion to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**Petitioners' Response to City's Motion to Dismiss**).

On August 30, 2004 the Board received SOS Response to Kent 160 LLC's Motion for Partial Summary Judgment (**Petitioners' Response to Intervenor's Motion to Dismiss**).

On August 30, 2004 the Board received Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**City's Response to Petitioners' Motion to Supplement**) together with the Declaration of Fred Satterstrom in Support of the City of Kent's Opposition to Petitioners'; Motion to Supplement the Record (**Satterstrom Declaration**) and together with the declaration of Brenda Jacober in Opposition to Petitioners' Motion to Supplement (**Jacober Declaration**).

On August 30, 2004 the Board received Kent 160 LLC's Joinder in Respondent City of Kent's Response to Petitioners' Motion to Supplement the Record (**Intervenor's Joinder in City's Response to Petitioners' Motion to Supplement**).

On August 30, 2004 the Board received Kent 160 LLC's Renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Intervenor's Motion to Substitute Executed LUPA Order**), together with Declaration of Richard R. Wilson In Support of Kent 160 LLC's renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Second Wilson Declaration**).

On August 31, 2004 the Board received Respondent City of Kent's Renewed Request to Substitute Executed LUPA Order of Dismissal (**City's Motion to Substitute Executed LUPA Order**) together with Supplemental Declaration of Michael C. Walter in support of City of Kent's Renewed Request to Substitute Executed LUPA Order (**Second Walter Declaration**).

On September 7, 2004 the Board received Petitioner SOS's Rebuttal to Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**Petitioner's Reply to City's Response to Petitioners' Motion to Supplement**).

On September 7, 2004 the Board received City of Kent's Reply to Petitioners' Response to City's Motion to Dismiss Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (City's Reply to Petitioners' to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18 , and 20 – 22 (**City's Reply to Petitioners' Response to City's Motion to Dismiss**)).

On September 16, 2004 the Board issued its Order on Motions for this case. The Order on Motions admitted seventeen Core Documents(**Core Doc's**),⁴⁹ admitted four Supplemental Exhibits, dismissed ten of the twenty-two issues⁵⁰ listed in the PHO and directed the Petitioners to address the basis for their SEPA standing in their Prehearing Brief .

⁴⁹ See Appendix – B, List of Core Documents.

⁵⁰ Issues No. 3, 6, 10, 11, 12, 13, 14, 16, 17 and 22, as set forth in the PHO were dismissed.

On September 29, 2004 the Board received Petitioner SOS Prehearing Brief (**Petitioners' Prehearing Brief**) with 18 attached exhibits.

On October 14, 2004 the Board received City of Kent's Prehearing Brief (**City's Response**) with 68 attached exhibits.

On October 14, 2004 the Board received Kent 160 LLC's Prehearing Brief (**Intervenor's Response**) with 19 attached exhibits.

On October 15, 2004 the Board received City of Kent's Index of Exhibits Attached to Prehearing Brief.

On October 15, 2004 the Board received Kent 160 LLC's Index of Attached Exhibits for Prehearing Brief.

On October 19, 2004 the Board received Petitioners' Motion to Exclude Respondent's and Intervener's Prehearing Briefs from the Record for Failure to Comply with the Board's Prehearing Order (**Petitioners' Motion to Exclude Briefs**), together with an attached Declaration of Ron Novak.

On October 19, 2004 the Board received Petitioners' Request to Reschedule Designated Dates for Petitioners' Reply Brief and Hearing on Merits of Petition (**Petitioners' Motion to Reschedule**)

On October 19, 2004 the Board issued its Order Amending Deadline for Petitioners' Reply Brief containing the Board's decisions on Petitioners' Motion to Exclude Briefs and Petitioner's Motion to Reschedule. The Board Administrative Officer advised the parties of record by telephone of the Boards decisions on these motions.

On October 21, 2004 the Board received correspondence from the Intervenor drawing the Boards attention to the following error in the second paragraph of the Conclusions section of the Order Amending Deadline for Petitioners' Reply Brief: "In fact (and as correctly stated in the order under Heading II, 'Discussion'), it was the *Intervener's* Prehearing Brief that was delivered, with exhibits, within six minutes of the deadline, and the *City's* Brief that was delivered, without exhibits, within one hour and seven minutes of the deadline, not vice versa."

On October 21, 2004 the Board issued its Corrected Order Amending Deadline for Petitioners' Reply Brief.

On October 25, 2004 the Board received Petitioners' Reply Brief (**Petitioners' Reply**).

On October 27, 2004, The Board Administrative Officer notified the parties of record by telephone that the location of the Hearing on the Merits in this case was changed from the

Board's offices to Conference Room 370, Seattle City Hall, Fifth Avenue and James Street, Seattle, Washington.

On October 28, 2004 The Board conducted a Hearing on the Merits in Conference Room #370, Seattle City Hall, 600 Fourth Avenue, Seattle, Washington. Board members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Ron Novak, *pro se*, represented the Petitioners. Michael C. Walter and Tom Brubaker, City Attorney, represented the City of Kent. Richard Wilson represented Intervenor Kent 160 LLC. The Court Reporter was Barbara Hayden, Byers & Anderson, Inc. The hearing was opened at 10:00 a.m. and adjourned at 12:20 p.m.

APPENDIX – B

Core Documents Admitted by the Board’s Order on Motions, Sept. 16, 2004.

<u>Core Document Number</u> ⁵¹	<u>Title / Description</u>
1.	City of Kent Ordinance No. 3685.
2.	City of Kent Comprehensive Plan, adopted April 18, 1995.
3.	King County Countywide Planning Policies.
4.	Kent City Code – Title 15.
5.	Addendum to Kent Comprehensive Plan Environmental Impact Statement #ENV-93-51/ENV-2003-26, dated January 16, 2004. <i>Index No. 1</i>
6.	“2004 King County Comprehensive Plan Update Area Zoning Study Study Area: Auburn Lea Hill Urban Separator-Report. <i>Index No. 2</i>
7.	“Report Preliminary Geotechnical Studies Impoundment Reservoir for the City of Kent” (Geo Engineers). <i>Index No. 3</i>
8.	“Summary of Findings and Recommendations” (The Transpo Group) - January 2004. <i>Index No. 4</i>
9.	“Wetlands Evaluation and Delineation Report, 124 th Avenue S.E. Project Site, City of Kent, WA.” (Watershed Dynamics, Inc.) dated September 13, 1995. <i>Index No. 5</i>
10.	Adoption of Existing Environmental Documents dated January 16, 2004. <i>Index No. 6</i>
11.	Eastern Tributaries of the Lower Green River Enhanced Reconnaissance Report of 1994. <i>Index No. 55</i>
12.	Soos Creek Community Plan EIS, Draft. 1991. <i>Index No. 123</i>
13.	Soos Creek Community Plan EIS, Final. 1991. <i>Index No. 124</i>
14.	Soos Creek Community Plan EIS, Update. 1991. <i>Index No. 125</i>
15.	Soos Creek Plateau Communities Area Zoning. August 1978. <i>Index No. 126</i>
16.	Soos Creek Plateau Communities Plan DRAFT EIS. August 1978. <i>Index No. 127</i>
17.	City of Kent Impoundment Reservoir Site Transportation Impact Analysis – January 2004. <i>Index No. 135</i>

⁵¹ Core Documents No. 5 through No. 17 are listed in the City’s Index. The Index Number is included here at the end of the Title/Description of the document.

APPENDIX – C

Legal Issues Retained for Prehearing Briefing in CPSGMHB Case No. 04-3-0019

Legal Issue No. 1

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the City of Kent failed to coordinate its actions with the City of Auburn and King County?

Legal Issue No. 2

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the countywide planning policies?

Legal Issue No. 4

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?

Legal Issue No. 5

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.100 because the zoning is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?

Legal Issue No. 7

Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the action was inconsistent with its Comprehensive Plan?

Legal Issue No. 8

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the zoning was inconsistent with its Comprehensive Plan and associated development, and development review, regulations?

Legal Issue No. 9

Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.140 because it did not provide for early and continuous public participation?

Legal Issue No. 15

Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.020 because the action was arbitrary and discriminatory and failed to protect the property rights of landowners?

Legal Issue No. 18

Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.030 because the City of Kent failed to follow state guidelines in addressing environmental issues pertaining to its planning for the land affected by Ordinance 3685?

Legal Issue No. 19

Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.031 because the City of Kent failed to appropriately evaluate the environmental impacts of its land use action?

Legal Issue No. 20

Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through ordinance 3685 fail to comply with RCW 43.21C.034 because the City of Kent inappropriately relied on prior documents to address environmental issues related to the land use designation affected by Ordinance 3685?

Legal Issue No. 21

Should the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 be conditioned or denied as provided for by RCW 43.21C.060 because the city's action will cause environmental impacts which certain state agencies are empowered to prevent or avoid?