CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

KENT C.A.R.E.S., and DON B. SHAFFER	)	
	)	**CPSGMHB Case No. 04-3-0023**
Petitioner,	)	
	)	***(Shaffer II)***
v.	)	
	)	
CITY OF KENT	)	**FINAL DECISION AND ORDER**
	)	
Respondent.	)	
	)	

SYNOPSIS

Kent CARES and Don Shaffer challenged the City of Kent's adoption of Ordinance No. 3698, updating its GMA Comprehensive Plan – Plan Update. Petitioner posed 20 legal issues for the Board to resolve in the petition for review; however, after briefing and argument on motions to dismiss for lack of standing, the Board dismissed nineteen of the issues. While Petitioner had participated in the initial Plan process, amendment cycles and subarea planning, his participation in the Plan Update process was limited to one issue. That issue related to the City's decision to remove a grade separation from its transportation improvement plan (and incorporated into the Plan Update) which, Petitioner argued, created an internal inconsistency within the Plan Update.

In upholding the City's action as compliant with the GMA, the Board noted that the particular grade separation in question was referred to as a "possibility" in the original Plan, a subarea Plan for the Downtown area, and that the Plan Update did not mandate or direct the construction of this particular grade separation. Therefore the Board found no internal inconsistency within the Plan Update.

I. BACKGROUND[1]

On July 20, 2004, the Council of the City of Kent (the **City** or **Kent**) adopted Ordinance No. 3698 – the City of Kent's Comprehensive Plan Update (**Plan Update**).[2] Publication of the Plan Update occurred on July 24, 2004. On September 22, 2004, the Board received two petitions for review (**PFR**s) challenging the City's action. Although the two

[1] The full Procedural History and Chronology of party submittals and Board Orders is provided in Appendix A.
[2] The Board received a certified copy of the Plan Update on November 4, 2004. The Plan Update is a Core Document and may be referred to hereafter as **Core Document** or **Plan Update**.

PFRs were initially consolidated, they were bifurcated when the City and the parties to one of the PFRs entered settlement negotiations and received a settlement extension.

The PFR in the present matter was filed by Mr. Don Shaffer, individually, and as principal for Northwest Alliance Inc. and Kent CARES (hereafter **Petitioner** or **Shaffer**).

During October the Board held the prehearing conference and issued the Prehearing Order (**PHO**) establishing the schedule for the case and framing twenty issues presented by Petitioner to be resolved by the Board.

There were no motions to supplement the record during the scheduled motions practice; however, the City of Kent filed a dispositive motion to dismiss all the issues noted in the PHO,[3] asserting that neither Northwest Alliance, Kent CARES nor Mr. Shaffer had established GMA participation standing to challenge the Plan Update.

After review of the motions, briefing and limited record, the Board concluded that although all Petitioners had participated during the process for the City of Kent's adoption of its 1995 GMA Plan, the adoption of the City's 1998 Downtown Strategic Action Plan, and the adoption of a 2002 Planned Action Ordinance for the Kent Station, only Mr. Shaffer and Kent CARES participated in the process of adopting the Plan Update in 2004. The Board concluded further that participation by Mr. Shaffer and Kent CARES participation was limited to one issue -- the City's elimination of a proposed grade separation at James Street. Consequently, the Board granted the City's motion to dismiss for 19 of the 20 Legal Issues framed in the PHO. Therefore, the sole issue remaining before the Board in the present proceeding is resolution of Legal Issue 13, *infra*. *See* 12/9/04 Order on Motions.

During January and February 2005, the Board received timely briefing from the parties. Hereafter, Petitioner's prehearing brief, the City of Kent's response brief, and Petitioner's reply brief are referred to as **Shaffer PHB**, **Kent Response** and **Shaffer Reply,** respectively.

On February 7, 2005, the Board held a hearing on the merits (**HOM**) at the Washington State Housing Commission's Elliot Bay Room [27th Floor], 1000 2nd Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioner Shaffer appeared *pro se*. Respondent City of Kent was represented by Kim Adams Pratt. Also present for the City of Kent were Gloria Gould-Wesson, Steve Mullen and Reneé Cameron. Court reporting services were provided by Catherine A. Decker from Van Pelt, Corbett Bellows. The hearing convened at 10:10 a.m. and adjourned at approximately 12:15 p.m.

[3] The PHO parroted the legal issues posed in the PFR.

During the HOM the Board admitted several exhibits and directed each party to provide follow-up materials to the Board by noon on February 11, 2005. The post hearing submittals of the parties were timely filed. *See* Preliminary Matters, *infra*.

Hereafter, the parties' references to Index numbers used to identify exhibits will be cited as ***Ex***.

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

Petitioner challenges the City of Kent's adoption of its Plan Update, as adopted by Ordinance No. 36698. Pursuant to RCW 36.70A.320(1), Kent's Ordinance No. 3698 is presumed valid upon adoption.

The burden is on Petitioner, Kent CARES/Shaffer, to demonstrate that the actions taken by 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 [Kent] 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 of Kent'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 the Board will grant deference to Kent in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As 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 Hearing 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.3201, 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, 444, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court recently 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 Hearing Board, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002).

III. BOARD JURISDICTION AND PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that Mr. Shaffer's PFR was timely filed, pursuant to RCW 36.70A.290(2); Mr. Shaffer has GMA standing to appear before the Board on Legal Issue 13, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which updates the City of Kent's Comprehensive Plan, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

At the beginning of the Hearing on the Merits, the Board addressed and ruled upon outstanding motions and requests of the parties, as follows:

1. Pursuant to WAC 242-02-660(4), the Board took **official notice** of the City of Kent's Exhibit A[4] – Ordinance No. 3608 – the Planned Action Ordinance (**PAO**) for the Kent Station.
2. The Board also **admitted** Petitioner Shaffer's attachment "H[5]" to his reply brief and identified it as Hearing on the Merits Exhibit – **HOM Ex. 1**.
3. The Board **denied** Petitioner's motion to supplement the record with the environmental documents associated with the PAO Ordinance.

During the HOM, the Board **admitted** Petitioner Shaffer's demonstrative chart as **HOM Ex. 2**. Mr. Shaffer was directed to provide page citations to the documents referenced in the chart by 12:00 noon on February 11, 2005.

Towards the close of the HOM, the Board directed the City of Kent to provide copies of the relevant pages[6] from the City's 1999, 2000, 2001, 2002, and 2003 six-year Transportation Improvement Programs (**TIP**). The City was also given until 12:00 noon on February 11, 2005 to provide the requested material.

On February 10, 2005, the Board received the requested citations from Mr. Shaffer and the requested TIPs from the City.

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[4] Attached to the City Reply.

[5] May 27, 2004 letter from Kurt Triplett [King County] to Don Shaffer, regarding a public disclosure request for "Programmatic EIS documents for individual Urban Centers.'

[6] Those pages dealing with grade separations at rail crossings, in particular, and reference to James or Willis Streets and the Union Pacific Railroad.

IV. LEGAL ISSUE AND DISCUSSION

LEGAL ISSUE NO. 13

The Board's PHO set forth Legal Issue No. 13

> 13. *Did the City of Kent in its approval and adoption of its Ordinance 3698 intended to update and amend its Comprehensive Plan, fail to comply with adverse-impact analysis requirements by failure to analyze impacts of eliminating James Street Grade Separation project from the Transportation Element in Update? [RCW 36.70A.070, .020, .070(6), .140 and .210 and RCW 43.21C]*

The Challenged Action

In its 2004 Plan Update (Ordinance No. 3698) the City made several revisions to the Plan's Transportation Element (**TE**) – Chapter 9. The TE includes identification of transportation improvement needs and a financing and implementation plan. The TE sets forth a generalized improvement program for 2010 and 2020, but notes "the critical component [of the TE] is the Six Year Capital Improvement Program (**CIP**). It is critical because the GMA mandates that plans be financially sound and able to be implemented with respect to concurrency." Plan Update, at 48. The CIP for 2004-2009 is shown in Table 9.7. *Id*. at 55 and 51.[7] Also referenced and included in the TE is the City's Transportation Improvement Plan/Program (**TIP**) – "a list of the City's transportation system improvement projects (Six Year Transportation Improvement Plan) anticipated through 2009." *Id*. at 3.

Additionally the TE states:

> Every year, the City adopts a Transportation Improvement Program aimed at showing improvements and expenditures over a six year period. The most recent program, adopted for the 2004-2009 period, provides adequate levels-of-service and corrects existing deficiencies, as defined by the City's service standard. Elements of this action plan include road widening and development of new corridors; road and traffic signal maintenance; and pedestrian and bicycle path development; and continued support for neighborhood traffic calming.

Id. at 49.

[7] The Board notes that some Puget Sound jurisdictions rely upon their TIP as the funding mechanism for projects identified their transportation element; the City of Kent, however, has chosen to create a separate CIP mechanism that apparently draws from the TIP in identifying projects to be funded over the ensuing six-year period.

Petitioner takes issue with the City's deletion of a proposed "Grade Separation Crossing" at James Street and the Burlington Northern/Santa Fe/Union Pacific Railroad tracks, from the City's TIP. However, Petitioner did not appeal the City's revision to the TIP. Instead, Petitioner challenges the Plan Update, which includes and references the TIP, and alleges inconsistencies with the City's Plan and other GMA violations. In essence, Petitioner contends that the City's Plan requires and directs a grade separation at James Street, and the City erred by deleting it from its transportation improvement plan and program.

It is undisputed that the TIPs for 2004-2009[8] and 2005-2010 do not include a grade separation project for James Street at the Burlington Northern/Santa Fe or Union Pacific Railroad.[9] [*See* Ex. 253, Resolution No. 1654, adopted September 16, 2003; and Ex. 254, Resolution 1684, adopted September 9, 2004]. However both TIPs provide for a "Willis Street (SR 516) Grade Separation Project" with the Union Pacific and Burlington Northern/Santa Fe tracks. *See* Ex. 253, at ii, and 19 and 20; and Ex. 254, at v, and 20 and 23.

Applicable Law

Petitioner alleges the City's action was internally inconsistent with the Plan [RCW 36.70A.070 (preamble)], was not guided by the goals of the Act [RCW 36.70A.020], did not adhere to the requirements for a Transportation Element [RCW 36.70A.070(6)], was inconsistent with King County Countywide Planning Policies [RCW 36.70A.210] and allegedly did not adhere to the environmental review requirements of the State Environmental Policy Act [Chapter 43.21C RCW]. Petitioner's briefing, with varying degrees of success, relates these concerns to the elimination of the James Street grade separation.

The Board's discussion begins with the question of internal consistency, and then moves to the public participation process. Finally, the other allegations are addressed.

Board Discussion

RCW 36.70A.070 (preamble) – Internal Consistency:

The City of Kent first adopted its GMA Comprehensive Plan in 1995. The Plan adopted an urban center concept. *See* Findings of Fact (**FoF**) 1 and 2, in Appendix B. In 1998, the City adopted a Downtown Strategic Action Plan (**DSAP**) which is incorporated into the City's Comprehensive Plan. The DSAP area generally corresponds to the urban center area identified in the Comprehensive Plan. *See* FoF 3-5. The Plan Update continues the urban center focus and continues to recognize the DSAP as an urban center in the City of

[8] The 2004-2009 TIP was in effect when the City adopted its Plan Update.
[9] The Board notes that it appears that reference to the possibility of a James Street grade separation was first deleted by the City in favor of a grade separation at Willis Street in the 2003-2008 TIP.

Kent. *Id*. Environmental review, pursuant to, and consistent with, the provisions of Chapter 43.21C RCW accompanied each of these actions. *See* FoF 1, 2, 3, 7, 8 and 9.

The City of Kent is not unlike other jurisdictions in the Puget Sound region in that is facing serious traffic congestion problems. The City's 1995 Comprehensive Plan, the 1998 DSAP and the Plan Update all acknowledge traffic congestion as a problem. However, what is perhaps particular to the City is that the Union Pacific and Burlington Northern/Santa Fe Railroads have tracks that bisect the City north to south. This poses east-west traffic blockage problems in the downtown area due to rail traffic. Congestion is apparent in the City's downtown, DSAP or urban center area.

As the City notes, the 1995 Plan contained the following passage:

> Rail Crossings – One of the most significant problems with downtown circulation is the problem created by the at grade railroad crossings on the east-west arterials. Currently, *James, Smith, Titus and SR 516 (Willis)* cross the tracks at grade. Other east-west arterials, such as *212th and 277th Streets* are also affected. Traffic backs up these arterials, and intersections may or may not remain clear for north-south traffic to pass. Traffic signal cycles are not tied to the crossings and can compound delays and congestion by making east-west traffic queue through several cycles after the train has cleared. Burlington Northern estimates about 40-50 trains per day use the tracks, including a variable number of trains in the 4-6 PM peak period. Union Pacific estimates their track utilization at 10-20 trains per day. This could increase by 20 trains per day and 10 per peak period as a result of the proposed commuter rail operation. Problems associated with railroad grade separation crossings could be exacerbated with the implementation of commuter rail.

Kent Response, at 3; quoting 1995 Comprehensive Plan; and Plan Update, at 32-33 (emphasis supplied).

This language did not mandate the construction of a grade separation at James Street. It clearly acknowledges that the lack of grade separations is a problem and identifies James Street as one of several east-west streets that face this problem.

The City notes that the 1995 Comprehensive Plan, specifically the CIP, allocated $100,000 for "Road and Railroad Separation Studies." Kent Response, at 4; *quoting* the 1995 Comprehensive Plan; and Plan Update, at 54. The City also emphasizes that the CIP in the 1995 Comprehensive Plan "did not specify that a grade separation project would be constructed at James Street." *Id*. The City's 1995 CIP was an appropriate response to the problem posed by the lack of grade separations. It provided funding to study the problem and identify recommendations for addressing it. Again, the Board agrees with the City, the 1995 Comprehensive Plan, including the CIP, illustrates a

commitment to address a clear problem – at grade railroad crossings, but does not direct the construction of a grade separation at James Street.

Petitioner does not address or refer to the City's CIP; however, Petitioner does note that in the Plan Update, the City deleted the "Rail Crossing" language quoted by the City *supra*. Shaffer PHB, at 4.

The City does not dispute that the language was deleted. However, it notes that it revised and refined some of the prior Plan language and that grade separations are addressed elsewhere in the Plan Update.

> Truck and rail freight movement often come into conflict points in the City of Kent. Since both systems are of vital importance to international commerce, the City has identified facilitating both rail and truck movement as of the highest priority for current and future transportation improvements. Recent improvements include grade separation projects at South 196th Street and 277th Street over both the Burlington Northern Santa Fe Railroad (BNSF) tracks and the Union Pacific (UP) tracks. These grade-separation projects improve safety for rail, truck, and vehicles traffic; allow train speeds to increase; remove key choke points for cross valley traffic; and integrate Intelligent Transportation Systems (ITS) to coordinate with the regional ITS Architecture. The City has identified future grade-separation projects for South 228th Street and South Will [*sic* Willis] (SR 516) in its current Six Year Transportation Improvement Program [TIP]. South 212th Street is also being considered for future grade separation in the City's long range transportation plans.

Kent Response, at 4; *quoting* Plan Update, at 40.

The Board finds that this language clearly addresses the grade separation issue, reports on progress, identifies priorities and particular projects that the City actively is considering. A grade separation at James Street is not among the priorities or projects that the City's Plan Update is presently considering. The 2004-2009 TIP and 2005-2010 TIP confirm the priorities. *See* Exs. 253 and 254; and FoF 12 and 13. These choices are within the City's discretion and do not indicate an inconsistency between the 1995 Comprehensive Plan, Plan Update and the TIP.

However, Petitioner asserts that the 1998 DSAP, which was, and remains, incorporated into the City's Plan Update, provides specific direction to construct the James Street grade crossing; therefore providing the basis for the inconsistency. Shaffer PHB, at 5-6.

To support his argument, Petitioner offers quotations from, and references to, the DSAP. First Mr. Shaffer quotes a sentence from the DSAP "Vision" Chapter [II] portraying "A Visit to the Future." The DSAP Vision section states, "James Street will be the downtown's busiest east-west traffic corridor, and the grade-separated railroad crossing

will eliminate what would have otherwise been a serious blockage at the Burlington Northern/Santa Fe railroad crossing." Shaffer PHB, at 5; *quoting* DSAP, at II-1. The Board notes that this statement is from the Vision Statement of the DSAP; standing alone, it does not commit or mandate the construction of a James Street grade separation at any specified time. It merely portrays a possible future setting.

Next, Petitioner refers to attached schematic sketches and maps in the DSAP to support the assertion that the DSAP directs construction of the James Street grade separation.

- Figure IV-1: Actions recommended by the Kent Downtown Strategic Action Plan are summarized above – [schematic map] indicating "*Possible* Rail Grade Separation" at James Street. DSAP, at IV-4 (emphasis supplied);
- Figure IV-4: Recommended Transportation Improvements – [schematic map] indicating "*Possible* Underpass" in key, and reference to "B-4 – Plan for Underpass" on map at James Street. DSAP, at IV-10 (emphasis supplied);
- Figure V-2: Proposed elements of the North Frame District – [schematic map] indicating "Plan for *Possible* Rail Grade Separation" at James Street (emphasis supplied);
- Figure V-6: Central Avenue Corridor and West Frame Districts are illustrated above – [schematic map] indicating "*Possible* Rail Grade Separation" at James Street (emphasis supplied);
- Figure V-11 Central Avenue Corridor 20 Year Vision[10] – [schematic map] indicating "Grade-separated railroad crossing" at James Street;
- Figure V-12 Proposed Elements of the East Frame District – [schematic map] symbolically indicating a grade separation at James Street, but no notation is provided.

Shaffer PHB, at 5, Attachment C [DSAP]; and Shaffer Reply, at 9, Attachment G [DSAP and *Draft* DSAP].

The City argues that these Figures recognize the *possibility* of a grade separation at James Street, but they do not mandate such an outcome. Kent Response, at 7. The Board agrees. These Figures symbolically indicate or suggest the *possibility* of such a project in the future. Without more, these Figures do not persuade the Board that the City has directed the construction of a grade-separation at James Street at any specified time.

Finally, Petitioner refers to a two recommendations noted as "B-4" in the Draft DSAP. The first B-4 reference indicates a recommendation to "Plan for underpass at James and BN&SF tracks," noting a 2-10 year generalized timeframe and stating "determined by Regional Fast Corridor project." Shaffer PHB, at 5; Attachment D. The second

[10] Figure V-11 includes the following note: "This visualization is a conceptual interpretation of growth management policies and Downtown Strategic Action Plan recommendations. It does not represent a specific recommendation for any one parcel. Its purpose is to provide an example of possible building infill, including height, location, use, density and site amenities." *Id*.

reference to Action B-4 states "Work with appropriate agencies to build a James Street RR Underpass." *Id*. Attachment E [*Draft* DSAP]

The City counters that the "B-4" references cited by Petitioner are misleading since they are from the *Draft* DSAP, not the DSAP that was adopted in 1998 and incorporated into the City's Comprehensive Plan. Kent Response, at 6. Instead of the language quoted by Petitioner from the *Draft* DSAP, the actual adopted DSAP indicates "B-3 Plan for underpass at James *and* Willis Streets/BN&SF tracks," noting a 5-10 year general timeframe and reference to the Regional Fast Corridor project. *See* Figure IV-3, DSAP, at IV-9.

Petitioner's reliance on language in the Draft DSAP is irrelevant to the question before the Board since the referenced language was never adopted by the City. The actual language adopted by the City in the 1998 DSAP suggests *planning* for underpasses at James *and* Willis.

The Board cannot read this language in isolation, but considers it in the context of all the references in the Figures also discussed *supra*, which discuss the *possibility* of such underpasses.[11] Further this language dilutes the importance Petitioner attaches to James Street, since this language injects a possible Willis Street underpass into the mix, indicating that even in 1998, the City was keeping its options open and considering various possible grade separation alternatives. This sole reference to a James Street underpass, in the context of the DSAP, does not rise to the level of a mandate or commitment to construct such a project at any specified time.

Additionally, the DSAP's Figure IV-3 "Preliminary Capital Cost Estimates" indicates that a "RR Underpass of Willis and James Street" is estimated to cost $13,000,000 for each underpass [*i.e.* $26,000,000 for both]. DSAP, at IV-9. The City argues that the DSAP recognized that the recommendations spanned twenty years and that "The plans, costs, and infrastructure needs may change and adjust. Each project [in Figure IV-3] should be reevaluated in its own time based on specific plans." Kent Response, at 7; *citing* DSAP at IV-8. This language also supports the City's contention that the DSAP does not mandate Petitioner's preferred project at James Street.

The Board's review of the various TIPs indicates that the estimated cost of grade separation projects has increased as reflected in each of the City's TIPs. *See* FoF 10-13. The TIPs bear out the City's contention that adjustments and reevaluation of potential grade separation projects are within its discretion; and the City's refinement and narrowing of such projects is anticipated in, and consistent with, the City's Plan Update, including the DSAP.[12]

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[11] In light of the Figures, one could interpret this language to mean that a grade separation at James Street was *only a possibility*, but an underpass at Willis was a higher priority and not so qualified.

[12] The Board notes that the only *funded* grade separation project appearing in the Plan Update's Transportation Element *CIP* is a grade separation at 228th/BNSF.

Conclusion – Internal Consistency:

The Board concludes that the City's inclusion and reference to the 2004-2009 TIP, which does not include reference to the James Street grade separation, is not inconsistent with the City's Plan Update, including the 1998 Downtown Strategic Action Plan. The City of Kent's adoption of the Plan Update **complies** with the GMA as challenged by Petitioner.

RCW 36.70A.140 – Public Participation:

Petitioner also argues that "City officials simply and covertly removed all mention of the James Underpass from the TIP documents and the Comp Plan Update. This is a flagrant and undeniable violation of RCW 36.70A.140." Shaffer PHB, at 6. Petitioner contends that the DSAP evolved out of considerable community discussion in 1997 and 1998, and in Petitioner's view, reflected community support for the James Street underpass, yet in the Plan Update the City presented "the amendment proposal [elimination of James Street grade separation] to the community virtually as if the Underpass had never been under consideration." Shaffer PHB, at 7.

The Board has already addressed the nature of the "James Street Underpass" references in the DSAP, *supra*. The DSAP acknowledged grade separation issues and it discussed possible grade separation projects; however, the DSAP did not mandate, direct or commit the City to construct an underpass or grade separation at James Street. The DSAP does not provide the explicit direction regarding James Street that Petitioner attributes to it.

As the Board clarified in its December 9, 2004 Order on Motions, at 8, "[T]he TIP is not before the Board." However, the City's public process for the Plan Update as it relates to Petitioner's issue is within the scope of the challenge. The Board notes that the Ordinance adopting the Plan Update recites the dates when the City held workshops and public hearings on various elements and the entire Comprehensive Plan. *See* Ordinance No. 3698, Recital B, at 2.

The Board further notes that the City held a workshop on the Transportation Element on November 11, 2003 and a public hearing on the Transportation Element on December 8, 2003. There was a workshop on the entire Plan Update and a public hearing on it on February 9, 2004 and March 8, 2004, respectively. Petitioner does not dispute that these workshops or public hearings occurred or were properly noticed. *See* Shaffer PHB, at 1-8; and Shaffer Reply, at 1-14.

Petitioner concedes that he attended the December 8, 2003 public hearing before the Land Use and Planning Board (**LU&PB**) and that he testified, on behalf of Kent CARES, regarding the James Street underpass. Petitioner asserts, "There is no indication the City Staff would have broken their silence on the subject [James Street underpass] had the matter not been specifically raised by Kent CARES." Shaffer Reply, at 6.

Petitioner acknowledges that the City heard his comments when he cites to the minutes of that meeting, "Mr. Shaffer stated that there is some reference to grade separation but that the essence of his concern is that the community be involved with the prioritization process for the locating of the grade separations." *Id*. at 7, *citing* Ex. 152, (underlined emphasis in Petitioner's briefing). This lack of involvement in the prioritization process and the reliance upon City staff is what Mr. Shaffer asserts is noncompliant with the public participation requirements of the GMA. *Id*.

The City responds that when the question of the elimination of the James Street underpass was posed to the LU&PB by Mr. Shaffer, City staffed explained the rationale for its elimination from the TIP and the Plan Update. The City states that the City Engineer and the City's Transportation Engineering Manager explained to the LU&PB "that there are four reasons why James Street was eliminated as a grade separation candidate: the need to maximize connectivity, prioritize large expenses, benefit industrial traffic and maintain connections with adjacent land uses."[13] Kent Response, at 5.

It is important to note that staff was explaining to the LU&PB, an advisory body, why the James Street underpass was eliminated from the 2004-2009 TIP – the TIP which was adopted by the City Council. Since this TIP is referenced in the Plan Update it was appropriate for staff to provide the requested explanation and rationale to the members of the LU&PB so they could consider it in making their recommendation on the Plan Update to the City Council. Had the LU&PB been persuaded by Mr. Shaffer's concerns, the LU&PB could have recommended that the James Street underpass be amended back into and specifically referenced in the Plan Update. There is no evidence that the LU&PB chose to do so.

Likewise, the testimony of Kent CARES and the exchange before the LU&PB was reflected in the LU&PB minutes and was made part of the record for the City Council to consider. Consequently, the City Council itself could have taken up Petitioner's concern and amended the Plan Update accordingly. Again, there is no evidence that the City Council chose to do so. Contrary to Mr. Shaffer's wishes and desires, the City chose not to include a James Street underpass in the TIP or the Plan Update. This decision does not run afoul of the GMA's public participation requirements.

While citizens should be involved in influencing the land use decisions to be made, it is not up to Petitioner or other citizen organizations to prioritize and decide land use issues;

[13] The City amplifies on these four points by indicating that: 1) Willis Street provides access to Interstate 5 and extends across the valley floor to the east hill of Kent; James Street does not have the same connectivity to I-5; 2) The estimated cost of grade separation projects runs as much as $40,000,000 and therefore they have to be carefully prioritized; 3) "Willis Street benefits freight and large truck traffic more than the same project at James Street"; and 4) "Maintaining the connections to the adjacent land uses along James Street would be very challenging, whereas along Willis Street/SR 516 there are not any adjacent land uses immediately adjacent to where the grade separation would be constructed." Kent Response, at 5; *See also* FoF 10-13.

this is the job of the local elected officials. Over a decade ago this Board first articulated what the GMA's public participation provisions require:

> The "public participation" that is one of the hallmarks of the GMA, does not equate to "citizens decide." The ultimate decision-makers in land use matters under the GMA are the elected officials of cities and counties, not neighborhood activists or neighborhood organizations.

City of Poulsbo, City of Port Orchard and City of Bremerton v. Kitsap County, CPSGMPB Case No. 92-3-0009c, Final Decision and Order, (Apr. 6, 1993), at 36.

Additionally, the next year, this Board stated:

> "Take into account public input" means "consider public input." "Consider public input" does means "to think seriously about" or "to bear in mind" public input; "consider public input" does not mean "agree with" or "obey" public input.

Twin Falls Inc., Weyerhaeuser Real Estate Co., Snohomish County Property Rights Alliance and Darrell R. Hartung v. Snohomish County, CPSGMPB Case No. 93-3-0003c, Final Decision and Order, (Sep. 7, 1993), at 77. The Board has consistently upheld and applied these concepts. *See* CPSGMHB Digest of Decisions 1992- 2004, Keyword - Public Participation, at 321 through 335.

Conclusion – Public Participation:

The Board concludes that the public participation process used by the City of Kent in adopting the Plan Update reference to the City's TIP and elimination of the James Street underpass **complies** with the public participation requirements of the GMA as challenged by Petitioner.

Other Petitioner Arguments:

Legal Issue 13 references RCW 36.70A.020 – the goals of the GMA. Yet Petitioner offers no argument identifying a GMA goal and suggesting how that goal is thwarted in relation to the James Street underpass. Shaffer PHB, at 1-8. Petitioner has **abandoned** any goal challenge implied in Legal Issue 13.

Petitioner's brief includes argument about whether the City of Kent's Urban Center concept is consistent with King County County-wide Planning Policy (**CPPs**) LU-48. Shaffer PHB, at 1-4. These arguments are not persuasive and are, at best tenuously linked to the James Street grade separation issue framed in Legal Issue 13. Shaffer PHB, at 3-4, Shaffer Reply, at 10-14. Additionally, the City's urban center concept and CPPs were the focus of Petitioner' Legal Issues 8, 12, 14 and 15. These Legal Issues were

dismissed by the Board in the December 9, 2004 Order on Motions. Petitioner cannot resurrect them here.

Petitioner offers passing conclusory remarks about whether the Plan Update related to the James Street underpass complies with the GMA's Transportation Element Requirements. "Petitioners assert that the removal of the James Street Underpass project from the Comp Plan is not logically consistent with the land use element. . ." Shaffer PHB, at 7. This conclusory statement is not an adequate showing of proof. Petitioner has **abandoned** any .070(6) challenge implied in Legal Issue 13.

Finally, Petitioner's brief contains general assertions of noncompliance with environmental review requirements of SEPA [Chapter 43.21C. RCW]. Shaffer PHB, at 3, 4, 5, 7 and 8. The Board first notes that Appendix B, FoFs 1, 2, 3, 5, 7, 8 and 9, chronicles the City's environmental review process for its Plan and Plan Update. Petitioner fails to spell out how these documents fall short in relation to Legal Issue 13. Additionally, failure to comply with the provisions of SEPA was the focus of Petitioner's Legal Issues 14, 15, 17, 18, 19 and 20. These Legal Issues were **dismissed** by the Board in the December 9, 2004 Order on Motions. Petitioner cannot resurrect them here.

Conclusions – Legal Issue 13

The Board finds and concludes that the City of Kent's Plan Update, including the 1998 DSAP, and the inclusion of the 2004-2009 TIP, which excluded the James Street grade separation, are internally consistent [RCW 36.70A.070(preamble)]; and that the City's public participation process for the Plan Update adhered to the requirements of the GMA [RCW 36.70A.140]. The Board therefore determines that the City of Kent's adoption of Ordinance No. 3698, adopting the City's Plan Update, including its reference to the City's 2004-2009 TIP which eliminated the possible James Street grade separation project, **complies** with the requirements of the GMA as challenged in Legal Issue 13.

V. ORDER

Based upon review of the Petition for Review, the Board's 12/9/04 Order on Motions, the GMA, prior Orders of this Board and the other Growth Boards, the briefs and exhibits submitted by the parties, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

- The City of Kent's adoption of Ordinance No. 3698 adopting the City's Plan Update, including its reference to the City's 2004-2009 TIP which eliminated the possible James Street grade separation project, **complies** with the requirements of the GMA as challenged in Legal Issue 13 and as set forth and interpreted in this Final Decision and Order.

So ORDERED this 3rd day of March 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

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.

APPENDIX A

PROCEDURAL HISTORY

General

On September 22, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from 1000 Friends of Washington (**1000 Friends**). The matter was assigned Case No. 04-3-0022. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. 1000 Friends challenged the City of Kent's (**Kent** or **City**) adoption of Ordinance No. 3698 updating and amending the City's Comprehensive Plan. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

Also on September 22, 2004, the Board received a PFR from Kent CARES, Northwest Alliance, Inc., and Don B. Shaffer (**Shaffer**). The matter was assigned Case No. 04-3-0023. Board member Edward G. McGuire is also the PO for this matter. Shaffer also challenges the City's adoption of Ordinance No. 3698 updating and amending the City's Comprehensive Plan. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On September 23, 2004, the Board issued an "Order of Consolidation and Notice of Hearing" in the above-captioned consolidated case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On October 25, 2004, the Board conducted the PHC. Board members Edward G. McGuire, presiding officer, and Bruce C. Laing were present for the Board. John Zilavy represented Petitioner 1000 Friends. Don Shaffer appeared *pro se*, representing himself, Kent CARES and Northwest Alliance Inc. Kim Adams Pratt represented Respondent City of Kent.

At the PHC, the Board received "Joint Motion to Bifurcate and Extend Case Schedule" from Petitioner 1000 Friends of Washington and the City of Kent. These parties ask the Board to bifurcate the consolidated cases in order to allow these parties to pursue settlement negotiations. Petitioner Shaffer was given until October 27, 2004 to provide comment, if any, on the Joint Motion.

The Board received a comment letter from Petitioner Shaffer on the Joint Motion by October 27, 2004. Mr. Shaffer objected to the City's lack of desire to pursue settlement negotiations with him. The same day the Board received a letter from 1000 Friends noting that Mr. Shaffer's objection should not be a basis for denying the motion to bifurcate and allow for settlement negotiations.

On October 27, 2004, the Board issued the following Orders: 1) "Order Bifurcating the Consolidated Cases;" 2) "Order Granting Settlement Extension and Prehearing Order" in CPSGMHB Case No. 04-3-0022, *1000 Friends of Washington v. City of Kent* [*1000*

Friends V]; and 3) "Prehearing Order" (**PHO**) in *Shaffer v. City of Kent* [***Shaffer II***], CPSGMHB Case No. 04-3-0023. The *Shaffer II* PHO set the schedule and Legal Issues for the *Shaffer II* case. The PHO identified 20 Legal Issues.

Motions to Supplement the Record or Amendments to the Index

On October 25, 2004, 2004, the Board received the City of Kent's "Respondent's Index of Documents" (**Index**).

On November 4, 2004, the Board received a certified copy of Ordinance No. 3698 with attachments.

On November 8, 2004, the Board received the City of Kent's "Respondent's Amended Index of Documents" (**Amended Index**).

There were no motions to supplement the record.

At the HOM, the Board took official notice of City of Kent Ordinance No. 3608 (Planned Action Ordinance for Kent Station); and admitted two exhibits. One exhibit was attached to Petitioner's briefing, but no motion to supplement the record accompanied it; the second was a demonstrative exhibit prepared by Petitioner. The Board asked for, and received (February 11, 2005) record citations for this exhibit. The Board also asked for, and received (February 11, 2005) excerpts from the City of Kent's six-year TIPs from 1999 through 2003.

Dispositive Motions

On November 8, 2004, the Board received "Respondent's Motion to Dismiss for Lack of Standing" (**Kent Motion**), with nine attached exhibits. The City of Kent's Motion was timely filed.

On November 10, 2004, the Board issued an "Order Rescheduling Briefing Schedule for Motions." This Order adjusted the deadlines for Petitioner's Response and Respondent's Reply. Petitioner was given until November 19, 2004 to respond to the Kent Motion.

On November 19, 2004, via telefacsimile, the Board received "Petitioner's Reply to City's Motion to Dismiss." The Shaffer Response was timely filed; however, while the motion referred to exhibits, there were no exhibits attached to the motion.[14] The City of Kent did not receive the attached exhibits either. The Board also received "Petitioner's Motion to Revise Case Name."

The Board received the "attached exhibits" on November 23, 2004. Later the same day, the Board received a letter from the City of Kent requesting that the deadline for replying to Shaffer's Response be extended until November 30, 2004. The letter indicated that

[14] The exhibits were mailed to the Board, postmarked the day the Board received the fax.

Mr. Shaffer concurred with the extension request. The Presiding Officer telephonically contacted the parties and orally granted the extension request, and indicated that the Board's Order on Motions would likely be delayed a week beyond the December 2, 2004 target date set forth in the PHO. No written order of the Board was issued regarding the extension.

On November 30, 2004, the Board received "Respondent's Response to Petitioner's Reply to Motions to Dismiss." The City's reply was timely filed.

The Board did not hold a hearing on the dispositive motions.

On December 9, 2004, the Board issued its "Order on Motions." The Order **denied** Petitioner's motion to revise the case name; **dismissed** Northwest Alliance Inc. as a named Petitioner, and **granted** the City's motion to dismiss 19 of the 20 Legal Issues posed in the PHO. Lack of GMA participation standing was the basis for the Board's dismissal of Northwest Alliance Inc. and the 19 Legal Issues. The only remaining Legal Issue in this matter is Legal Issue 13.

BRIEFING AND HEARING ON THE MERITS

On January 6, 2005, the Board received "Petitioner's Prehearing Brief," with 7 attached exhibits, labeled A through G. (**Shaffer PHB**)

On January 27, 2005, the Board received "Respondent's Prehearing Brief," with ten (10) attached exhibits, labeled by Index number. (**Kent Response**).

On January 27, 2005, the Board issued an "Order Changing Location for the Hearing on the Merits."

On February 3, 2005, the Board received "Petitioner's Reply Brief," with 8 attached exhibits, labeled A through H. (**Shaffer Reply**).

On February 7, 2005, the Board held a hearing on the merits at the Washington State Housing Commission's Elliot Bay Room [27th Floor] 1000 2nd Avenue, Seattle Washington. Board members Edward G. McGuire, Presiding Officer, and Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioner Shaffer appeared *pro se*. Respondent City of Kent was represented by Kim Adams Pratt. Also present for the City of Kent were Gloria Gould-Wesson, Steve Mullen and Renee Cameron. Court reporting services were provided by Catherine A. Decker from Van Pelt, Corbett Bellows. The hearing convened at 10:10 a.m. and adjourned at approximately 12:15 p.m.

APPENDIX B

Findings of Fact

The Board finds that:

1. The City adopted its first GMA Comprehensive Plan in 1995, via Ordinance No. 3222; and a draft and final Environmental Impact Statement was completed for the 1995 Plan. *See* Ordinance No. 3698, Section 1, at 4; and Ex. 13.
2. The City's 1995 Plan EIS analyzed the environmental impacts and mitigation measures for the selected Urban Center alternative,[15] as well as, a Mixed Use Center and Existing Plans alternative. *See* Ex. 13, generally, and Impact Summary Table, at vi-viii.
3. The City adopted a Downtown Strategic Action Plan and Integrated Environmental Impact Statement in 1998[16] (hereafter, **DSAP**), via Ordinance No. 3398. The DSAP's recommendations are based upon the "Preferred Alternative, Alternative 2." *See* Ex. 10, generally, and Alternative 2,[17] at VI-4.
4. The DSAP is incorporated by reference into the City's Plan, including the Plan Update. *See* Plan Update, at 21; Plan Update Goal CD-12, at 19; and Ordinance No. 3398, *Id*.
5. The City's Plan, including the Plan Update, identifies and incorporates an Urban Center area, roughly corresponding to the DSAP area. *See* Draft and Final EISs, Ex. 13; Plan Update, at 4, 5, 21 and Future Land Use Map (FLUM), Figure 4.8; and DSAP, at II-4.
6. The City adopted a Planned Action Ordinance[18] (hereafter, **PAO**) in 2002, via Ordinance No. 3608,[19] for the Downtown Kent Station Planned Action Site. *See* Ex. A to Kent Reply [the Board took official notice of this exhibit at the HOM.]

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[15] The Board notes that the DSEIS, at 3-29, indicates that the "Urban Center alternative is anticipated to result in the least amount of citywide automobile traffic and traffic congestion."

[16] The Board notes that the DSAP includes Additional Environmental Information, at Chapter VI, at VI-1 through VI-22, but the Supplemental EIS for the DSAP was not included in the Index and is not included as part of the record in this matter.

[17] The DSAP identifies Alternative 2 as follows:

> Alternative 2 focused on attracting regional trade based on further development of the compact historic commercial/civic core of downtown. It emphasized encouraging investors to assemble land, identifying redevelopable sites, and increasing park and street improvements. This alternative described a master plan process to develop the existing developable property between Smith and James Streets east of S. Fourth Avenue. It also described commercial redevelopment of the north side of James Street. It proposed locating the proposed commuter rail station between Gowe and Meeker Streets and closing Gowe to vehicle traffic at the railroad grade. *This alternative included railroad underpasses at James and Willis Streets*.

(Emphasis supplied).

[18] PAO's are authorized pursuant to RCW 43.21C.031, and allow for Planned Action designations. A specific development proposal within a designated Planned Action area is governed by the procedures of

7. The PAO includes mitigation measures for the Kent Station Planned Action. The mitigation measures included with the PAO are intended to mitigate impacts identified in the Draft and Final Supplemental EIS prepared in July of 2002.[20] *Id.*
8. On March 1, 2004, the Responsible Official for the City issued the "City of Kent Addendum to the Kent Comprehensive Plan Environmental Impact Statement (#ENV-93-51) – 2002/2004 Comprehensive Plan Update." *See* Ex. 22.
9. On March 1, 2004, the Responsible Official for the City issued "Adoption of Existing Environmental Documents [the 7/94 draft and the 1/95 final EIS] for the 1995 Comprehensive Plan." *See* Ex. 23.
10. The City's TIPs for 1999-2004, 2000-2005, 2001-2006, and 2002-2007 include reference to a "*Burlington Northern/Santa Fe Railroad/Union Pacific Railroad Grade Separation Project*" and list the following projects: "South 212th Street, *James Street* ***and /or*** *Willis Street/State Route 516.*" These TIPs recognize the possibility of grade separation projects along the Burlington Northern/Santa Fe and Union Pacific tracks at both, or either, James and Willis Streets, as well as South 212th Street. The estimated cost of these projects, is given as $46,000,000, $46,000,000, $84,000,000 and $84,000,000, respectively by subsequent TIPs. *See* 1999-2004 TIP, at 15; 2000-2005 TIP, at 20; 2001-2006 TIP, at 18; and 2003-2007 TIP, at 17.
11. The City's 2003-2008 TIP only references a "Willis Street (SR 516) Railroad Grade Separation Project" with "Grade Separation Crossings at Union Pacific Railroad & Burlington Northern/Santa Fe Railroad." This TIP, for the first time, selects Willis over James for a possible grade separation project. A grade separation project for James Street is not included. The estimated cost of just the Willis Street project is $33,000,000. *See* 2003-2008 TIP, at iii and 30.
12. Just as the prior TIP did not mention a James Street grade separation project, the City's TIP for 2004-2009 is likewise silent. Instead it includes grade separations for Willis Street (SR 516) at the Burlington Northern/Santa Fe and Union Pacific Railroad tracks. The combined estimated cost of the Willis Street project is $37,000,000. *See* Ex. 253, 2004-2009 TIP, at ii, and 19 and 20.
13. The City's 2005-2010 TIP also excludes reference to a James Street grade separation at the railroad tracks. Instead the TIP includes grade separation projects for Willis Street (SR 516) at the Burlington Northern/Santa Fe and Union Pacific crossings. The combined estimated cost of the Willis Street project is $37,000,000. *See* Ex. 254, 2005-2010 TIP, at vi, and 20 and 23.

RCW 43.21C.031 and WAC 197-11-172 and is not subject to an additional SEPA threshold determination, EIS or additional environmental review.

[19] Ordinance No. 3608 is entitled:

> AN ORDINANCE of the City Council of the City of Kent, Washington, establishing a Planned Action for a site approximately 25.0 acres in size, bounded by James Street and Harrison Streets, 4th Avenue and 1st Avenue, as described in the adopted Kent Station Supplemental Environmental Impact Statement.

[20] Neither the Draft nor Final Supplemental EIS are part of the record in this matter.