

On March 30, 2006, a “Proposed Final Order and Judgment Granting Relief Under Administrative Procedure Act” (**Final Order of Relief**), was signed by the Honorable Bruce W. Hilyer of King County Superior Court. In his Final Order of Relief, Judge Hilyer stated that based upon the Supreme Court’s holding in *Viking Properties v. Holm*, 155 Wn.2d 112 (2005), the Board does not have the authority to impose a “bright line” rule of a minimum four dwelling units per acre, and that the Board does not have the authority to require local jurisdictions to establish a uniform minimum residential density. Final Order of Relief at 2-3. Based on this finding, Judge Hilyer ruled that the Board’s FDO was outside of the statutory authority and jurisdiction of the Board and was an erroneous interpretation and application of the law. *Id.* at 3. Judge Hilyer reversed the Board’s FDO in *Kaleas* regarding non-compliance and the resulting invalidity for vacant and undeveloped properties, because the Board based its decision on the bright line rule. The Court remanded the matter to the Board for entry of an order consistent with his decision. *Id.* at 2-4.

On April 10, 2006, based on Judge Hilyer’s Order, the Board received “City of Normandy Park’s Request for Finding of Compliance.”

On April 24, 2006, the Board received “Futurewise’s Response to the City of Normandy Park’s Request for a Finding of Compliance,” with three attached exhibits.

On April 26, 2006, the Board received “City of Normandy Park’s Reply Regarding Request for Finding of Compliance, Alternatively, Request for Clarification of Proceedings,” with three attached exhibits.

On May 9, 2006, via e-mail from the Board’s AAG – Martha Lantz, the Board received a copy of a “Notice of Direct Appeal to Supreme Court” filed by Petitioners John R. Kaleas and Bruce W. Horst filed on April 26, 2006, seeking review of the Final Order of Relief, as issued by Judge Hilyer on March 30, 2006.

On May 11, 2006 the Board issued an “Acknowledgement of Notice of Direct Appeal to Supreme Court” indicating that the Board would not take any action on the matter until resolution of the matter before the Court.

On May 12, 2006, the Board received a letter from Jay Derr, representing the City of Normandy Park, requesting the Board to enter a finding of compliance and lift invalidity or schedule a pre-remand hearing conference to discuss and clarify the pending proceedings before the Board and courts. On the same day, the Board received, via e-mail from the Board’s AAG – Martha Lantz, a copy of Petitioner Kaleas’ “Statement of Grounds for Direct Review.”

On May 15, 2006 Board received, via e-mail from the Board’s AAG – Martha Lantz, a copy of “Normandy Park’s Answer to Statement of Grounds for Direct Review,” indicating direct review by the Supreme Court is appropriate. Later that day, the Board issued a “Notice of Pre-Remand Hearing Conference for Superior Court Remand of King

County Superior Court No. 05-2-27090-0 KNT.” The Notice set May 30, 2006 as the date for a Pre-Remand Hearing Conference (**PRHC**) to discuss the remand matter.

On May 30, 2006, the Board held the PHRC at the Board’s offices. Board Member, and Presiding Officer in the *Kaleas* matter, Edward G. McGuire convened the conference. Board members Bruce C. Laing and Margaret A. Pageler also attended the conference. Jay Derr and Duncan Green appeared for the City of Normandy Park. Tim Trohimavich appeared for Petitioner Futurewise. David Mann appeared for Petitioners Kaleas and Horst. Petitioner Jack Kaleas and interim Mayor George Hadley of Normandy Park also attended. Julie Taylor, Board Law Clerk, and Kris Hollingshead and Brian Payne, Board externs were also present.

At the PRHC, the Board and the parties discussed the record, the legal issue subject to the remand and a schedule for the case.

The City of Normandy Park renewed its request that the Board enter a finding of compliance and rescind the determination of invalidity, pursuant to the Superior Court’s Order. Neither Petitioners Kaleas nor Futurewise objected to the City’s request to rescind invalidity. The Board indicated it would address the question in this Pre-Remand Hearing Order.

II. PRE-REMAND HEARING ORDER

Based upon the PRHC discussions, the Board enters the following Order for the King County Superior Court Remand of the *Kaleas* matter – 05-2-27090-0 KNT. This Order addresses the following topics: 1) the Record; 2) the Legal Issue(s) to be decided by the Board on Remand; 3) the schedule; and 4) the Board’s Determination of Invalidity in the Kaleas FDO.

1. The Record:

The Board has been informed that a copy of the Record has been secured – the Board’s Master File has not been Archived. Therefore, it is unnecessary for the parties to pursue retrieval of the Record from the Court.

Attached to this Order, as Appendix A, is a copy of: 1) the *log* of the Board’s Master File for the *Kaleas* case, *i.e.* Record;¹ and 2) the second transmittal letter to the Superior Court. Please note that the *log* for the Record indicates that Normandy Park’s Index was filed on 1/13/05, contains 8 pages and is located at Tab #4. Items from this Index [Tab #4] are within the scope of this remand proceeding.

While the Board now has access to the Record in this matter as it was originally presented to the Board, the Board notes that only single copies of the documents are included in the Board’s Master File – *i.e.* Record. Therefore, the Board asks that the

¹ Note that any Exhibits attached to briefing are not separately identified, but included as part of the filed brief.

parties attach copies of any exhibits relied upon to their briefing on remand. [The parties should provide an original and four copies of all submitted materials, unless otherwise directed by the Board.]

The parties may attach “excerpts” from lengthy exhibits (*e.g.* the Plan) that exist in the Board’s Master File. If any party references or chooses to “excerpt” any portion of the *Transcript* from the Board’s Hearing on the Merits, that party must provide *two copies of the full HOM Transcript*, as the Board did not order a transcript of the HOM, and it is not part of the Board’s Master File.

Additionally, Normandy Park is asked to provide *one copy*² of the following Core Documents that were involved in the 2005 *Kaleas* proceeding: 1) the City of Normandy Park’s GMA Plan, including the future land use map (**FLUM**); and 2) the City of Normandy Park’s Zoning map.

In light of the Supreme Court’s holding in *Viking*, the Board requests that the City provide, to the extent feasible, information related to the location of land encumbered by existing covenants that restrict the development of land based upon density. The Board has also indicated it will allow the record to be supplemented with information regarding Normandy Park’s Plan or zoning as it existed in 1990 – pre-GMA – and any population or residential density information available for the same time period (1990). Pursuant to WAC 242-02-660 and -670, the Board may take official notice of such documents.

If there are questions regarding the Record or submittal requirement, the parties should not hesitate to contact the Board. The Board is trying to minimize the expense to all the parties.

2) **Legal Issue(s):**

It was not disputed at the PRHC that the primary Legal Issue for the Board on Remand is whether the City of Normandy Park’s Plan provides for appropriate urban densities; and how local discretion and Board’s deference affects this decision. At the PRHC, the parties were asked to formulate agreed upon Legal Issue(s) that the Board would answer in this remand proceeding. The parties were given until 5:00 p.m. June 1, 2006 to provide the Legal Issue(s).

On June 1, 2006, the Board received the an e-mail from the parties that set forth four issues for the Board to resolve on remand. The Legal Issue(s) for the Board to answer on remand are as follows:

1. ***Does the adoption of Ordinance 742, adopting an updated and revised plan, fail to comply with RCW 36.70A.130, .020(1) and .110, as to permitted urban densities?***

² At the PHC, the Board asked for *two copies* of these documents; however, with retrieval of the Board’s master file – the record – only one copy will be necessary.

2. *Does the adoption of the challenged provisions of Ordinance 742 substantially interfere with the goals of the Growth Management Act, thereby warranting invalidity?*
3. *Whether Petitioners are entitled to re-argue before the Board the same issues that were presented to and rejected by the Superior Court on appeal?*
4. *Whether, under Viking Properties and Judge Hilyer's Order, the City is given discretion under GMA to decide what constitutes appropriate urban densities under RCW 36.70A.110; and whether the Petitioners in this case have met their burden of proving that the City's decision in this case, based on the information in the record regarding existing conditions, was clearly erroneous?*

3) **Briefing and Hearing Schedule:**

The briefing and hearing Schedule for this Remand Proceeding is included as Appendix B.

4) **Invalidity:**

To the extent that the Board relied upon the “bright line” rule of 4 dwelling units per acre in determining appropriate urban densities as the basis for entering the determination of invalidity, the Board will **rescind** the determination of invalidity as set forth in the FDO. The Board notes that in the *Kaleas* FDO, the Board stated that “the determination of invalidity shall only apply to vacant lands, undeveloped lands, underdeveloped lands and proposals for redevelopment within the single-family [R-20 and R-15] or medium family [R-12.5] residential designations.” See FDO, at 25-26. Of the 1635 acres within the City of Normandy Park, the Board concluded that a determination of invalidity would apply to approximately 107 vacant acres. See FDO, at 21. Nonetheless, for the duration of this remand proceeding, the Board **rescinds** the determination of invalidity as set forth in the FDO. The Board notes that a request for invalidity is included among the issues posed for the Board to decide in this remand matter.

So ORDERED this 1st day of June, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Presiding Officer

Bruce C. Laing, FAICP
Board Member

Margaret A. Pageler,
Board Member

APPENDIX A

The Record – Board Master File Log and Transmittal Letter

1. Master File Log:

Kaleas et al., v. City of Normandy Park
Case No. 05-3-0007c
(04-3-0025 consolidated w/ 05-3-0007)

Tab #	Date	Filing Title:	Filed By:	Pages
1.	12/01/04	Petition for Review (04325)	Petitioner	10
2.	12/06/04	Notice of Hearing	CPSGMHB	9
3.	01/10/05	Prehearing Order	CPSGMHB	9
4.	01/13/05	City of Normandy Park Index of Relevant Documents	Respondent	8
5.	01/21/05	Petition for Review (0007)	Petitioner	5
6.	01/25/05	Order of Consolidation	CPSGMHB	10
7.	01/31/05	Declaration of Mailing	Respondent	2
8.	02/04/05	Prehearing Order	CPSGMHB	8
9.	02/11/05	Order Rescheduling Hearing on the Merits	CPSGMHB	2
10.	02/15/05	Notice of Withdrawal (Dearborn)	Petitioner	1
11.	02/17/05	Notice of Appearance (Gendler & Mann)	Petitioner	4
12.	02/23/05	Ltr. From Petitioners' Counsel re 3-day ext.	Pr (faxed)	1
13.	02/25/05	Ltr. From Ptr's Counsel re e-day extension	Pr (orig.)	1
14.	02/25/05	Order Rescheduling Briefing Schedule	CPSGMHB	2
15.	03/04/05	Prehearing Brief (Futurewise)	Petitioner	37
16.	03/04/05	Prehearing Brief (Kaleas & Horst)	Petitioners	195
17.	03/28/05	Hearing Brief of City of Normandy Park (Exhibits Notebooked "X" in Files Room.	Respondent	23
18.	03/28/05	NP's Amended Index of Relevant Documents	Respondent	4
19.	03/28/05	Declaration of Service	Respondent	2
20.	03/31/05	Email filing of FW Reply Brief	Petitioner	2
21.	04/01/05	FW Reply Brief – Original filed	Petitioner	24
22.	04/01/05	Reply Brief of Petitioners Kaleas & Horst (includes 2 sheets from email delivery, too)	Petitioners	13
23.	07/19/05	FINAL DECISION and ORDER Deadline – Motions for Reconsideration – 07/29/05 Appeal Deadline – COB August 18, 2005	CPSGMHB	32

Tab #	Date	Filing Title:	Filed By:	Pages
		APPEAL LOG – King County Superior Court No. 05-2-27090-0 KNT – Judge McBroom [blue jacket]		
24.	08/17/05	Petition for Review	Petitioner Norm. Park	47
25.	09/01/05	Notice of Appearance	AAG Lantz	3
26.	09/15/05	Application for Certification of Appealability (King County Sup. Ct.) – original service	Appellant	9
27.	09/26/05	Order Denying Certificate of Appealability	CPSGMHB	4
28.	11/21/05	Order Granting Motion for Partial Stay of Final Decision and Order	Appellant	3
29.	11/23/05	Order Acknowledging Stay	CPSGMHB	2
30.	02/23/06	Futurewise Response Brief –email fr. AAG	Resp. FW	33
31.	03/07/06	Brief of Respondents Kales & Horst (via AAG/email) fr. Gendler & Mann	Respondents	3 saved
32.	03/07/06	NP’s Reply Brief (via AAG/email) fr. Buck & Gordon	Petitioner	3 saved
33.	04/10/06	City of Normandy Park’s Request for Finding of Compliance – electronic	Petitioner	1 saved
34.	04/11/06	City of Normandy Park’s Request for Finding of Compliance w/ attached Final Order and Judgment Granting Relief Under Administrative Procedure Act & [Proposed] Order Finding Compliance and Rescinding Invalidity – formal filing	Respondent	14
35.	04/21/06	Futurewise’s Response to the City of Normandy Park’s Request for Finding of Compliance – electronic	Petitioner	1 saved
36.	04/24/06	Futurewise’s Response to the City of Normandy Park’s Request for Finding of Compliance w/ exhibits: 11, 24 & C – formal	Petitioner	49
37.	04/26/06	City of Normandy Park’s Reply Regarding Request for Finding of Compliance and, Alternatively, Request for Clarification of Proceedings – electronic	Respondent	2 saved
38.	04/26/06	Corrected Declaration of Service of City of Normandy Park’s Reply Regarding Request for Finding of Compliance ETC. – electronic	Respondent	1 saved
39.	04/26/06	City of Normandy Park’s Reply Regarding Request for Finding of Compliance and, Alternatively, Request for Clarification of Proceedings w/ Appendix A, B & C – formal	Respondent	88
40.	04/27/06	Corrected DofS of City of Normandy Park’s	Respondent	2

Tab #	Date	Filing Title:	Filed By:	Pages
		Reply Regarding Request for Finding of Compliance, Etc. – formal filing		
41.	05/09/06	Copy of Notice of Direct Appeal to Supreme Court, forwarded to CPSGMHB by AAG Lantz	Respondents Kaleas, Horst & FW	8
42.	05/11/06	Acknowledgement of Notice of Direct Appeal to Supreme Court	CPSGMHB	3
43.	05/12/06	Letter from Jay Derr to PO McGuire – electronic filing	Respondent	2
44.	05/15/06	Normandy Park’s Answer to Statement of Grounds for Direct Review (SCSW Case No. 78630-5) – electronic filing	Respondent	3
45.	05/15/06	Notice of Pre-Remand Hearing Conference for Superior Court Remand of King County Superior Court No. 05-2-27090-0 KNT	CPSGMHB	3
46.	05/16/06	Letter from Jay Derr to PO McGuire – formal filing	Respondent	2
47.	05/22/06	Statement of Grounds for Direct Review – Mann on behalf of Kales & Horst (to Sup.Ct.)	via AAG Lantz	18

2. Transmittal Letter:

February 7, 2006

Honorable Bruce Hilyer
King County Superior Court – Kent
Department 40, Kent Regional Justice Center
401 4th Avenue North
Kent, WA 98041

Attention: Bailiff Lee Walters, 4D

Re: **King County Superior Court Case No. 05-2-27090-0 KNT**
CPSGMHB No. 05-3-0007c

Dear Judge Hilyer:

Please find attached the Second Submittal of the Index and Certification of Record in the above-captioned case. As before, this consists of documents in the Board’s Master Log numbered 1 through 23 (the Final Decision and Order), contained in two 3-ring binders, clearly identified. Exhibits to the Hearing Brief of the City of Normandy Park (Tab 17), are contained in a separate 3-ring binder, clearly marked. Please also note that the sealed original transcript of the Hearing on the Merits 4/14/05, was separately sent to you on November 15, 2005. [Please accept my apology for misspelling your name on that transmittal letter, when I clearly know better!]

In view of the fact that our first Index and Certification of Record, delivered to King County Superior Court on October 18, 2005, cannot be located by the Court and additionally, an online search of the court records yesterday revealed NO case with this number (see Exhibit A), I am attaching a separate copy of this transmittal letter and asking you to date-stamp and sign it, returning it to the ABC delivery person for transferal to the Board with ABC's regular delivery acknowledgment. Thank you.

Sincerely,

Linda Kerr Stores, Administrative Officer
Central Puget Sound Growth
Management Hearings Board

xc: Jay P. Derr & Duncan Greene, Buck & Gordon
Susan Rae Sampson, City Attorney
for Normandy Park
John R. Kaleas
Bruce W. Horst
David S. Mann, Gendler & Mann
John Zilavy, Futurewise
Martha P. Lantz, AAG
(all with attachment)

APPENDIX B

Final Briefing and Hearing Schedule

FINAL SCHEDULE
King County Superior Court Remand
of
CPSGMHB Case No. 05-3-0007c
Kaleas v. City of Normandy Park
King County Docket No. 05-2-27090-0 KNT

All documents must be filed with the Board (one original plus four copies on three-hole punched paper and copied back-to-back) and a copy served upon the other party by 4:00 p.m. on the designated day, unless otherwise noted.

DATE	EVENT
May 30, 2006	Pre- Remand Hearing Conference held
May 31, 2006	Record in <i>Kaleas v. Normandy Park</i> , CPSGMHB Case No. 05-3-0007c retrieved – master file and log – one copy.
June 1, 2006	Board Pre-Remand Hearing Order issued
June 22, 2006	Deadline for Petitioner’s Pre-Remand Hearing Brief (with exhibits)
July 6, 2006	Deadline for Respondent’s Response Brief (with exhibits)
July 20, 2006	Deadline for Petitioner’s Reply Brief (optional)
July 27, 2006	Remand Hearing 10:00 a.m.-12:30 p.m., location - Board’s offices, Suite 2470
August 14, 2006	Board Order on Remand “target” due date