

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

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|---------------------------------|---|----------------------------------|
| WASHINGTON STATE DEPARTMENT |) | Case No. 05-3-0034 |
| OF ECOLOGY and |) | |
| WASHINGTON STATE DEPARTMENT |) | |
| OF COMMUNITY, TRADE AND |) | |
| ECONOMIC DEVELOPMENT, |) | (<i>DOE/CTED</i>) |
| |) | |
| Petitioners, |) | |
| and |) | |
| |) | |
| LIVABLE COMMUNITIES COALITION, |) | |
| |) | |
| Intervenor, |) | ORDER FINDING |
| |) | COMPLIANCE |
| v. |) | [Re: Ordinance No. 3805 – |
| |) | Critical Areas Ordinance |
| CITY OF KENT, |) | Revision] |
| |) | |
| Respondent, |) | |
| and |) | |
| |) | |
| MASTER BUILDERS ASSOCIATION OF |) | |
| KING AND SNOHOMISH COUNTIES and |) | |
| BUILDING INDUSTRY ASSOCIATION |) | |
| OF WASHINGTON, |) | |
| |) | |
| Intervenors, |) | |
| and |) | |
| |) | |
| WASHINGTON ASSOCIATION OF |) | |
| REALTORS, and CITIZENS ALLIANCE |) | |
| FOR PROPERTY RIGHTS, |) | |
| |) | |
| <i>Amici Curiae.</i> |) | |
| |) | |

I. BACKGROUND

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

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

FDO, at 55.

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

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

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

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

The Board did not receive any responsive pleadings or written materials from any other party.

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

II. DISCUSSION

The Action Taken:

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

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

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

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

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

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

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

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

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

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

...

The Board enters an Order of Noncompliance with respect to the challenged provisions of Kent Ordinance 3746, remands the Ordinance, and schedules a Compliance Hearing.

FDO, at 1-2.

The Board's Order ruled:

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

FDO, at 55.

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

Positions of the Parties

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

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

Board Discussion:

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

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

III. FINDINGS AND CONCLUSIONS

The Board finds and concludes:

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

IV. FINDING OF COMPLIANCE

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

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

V. ORDER

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

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

So ORDERED this 13th day of December, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP⁴
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 242-02-832.⁵

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

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

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

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

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