CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

DAVIDSON SERLES, et al.,	)	**Case No. 09-3-0007c**
Petitioner,	)	***(Davidson Serles)***
v.	)	
CITY OF KIRKLAND,	)	**FINAL DECISION AND ORDER**
Respondent, and	)	
TOUCHSTONE CORPORATION,	)	
Intervenor.	)	

SYNOPSIS

*The City of Kirkland enacted Ordinance Nos. 4170 and 4171 as part of a package of legislation amending the City's comprehensive plan and zoning to allow three downtown projects. Two property owners adjacent to the largest of these projects challenged the City's compliance with the Growth Management Act (**GMA**) and the State Environmental Policy Act (**SEPA**).*

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

The City processed the three private proposals as a non-project legislative action. Relying on the Court's holding in Citizens' Alliance to Protect our Wetlands v. City of Auburn,[1] the Board determined that the City's environmental review was required to consider alternatives in addition to the proposal and the no-action alternative. In dismissing the remainder of Petitioners' SEPA issues, the Board ruled:

[1] 126 Wn.2d 356, 894 P2d 1300 (1995).

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

The Board denied Petitioners' request for a determination of invalidity and remanded the Ordinances to the City for compliance. [Keywords: Countywide Planning Policies, Transportation Element- Financing Plan, SEPA.]

I. PROCEDURAL HISTORY[2]

On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza Corporation. The petitions were consolidated as Consolidated Case No. 09-3-0007c. [3]

Davidson Serles and Continental Plaza (collectively, **Petitioners**) challenge the City of Kirkland's (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the City's Comprehensive Plan and development regulations with respect to three downtown properties, the largest of which is an 11.5 acre parcel of land owned by Touchstone Corporation [**Touchstone** or **Intervenor]** which intervened in this matter.

Motions

The Board requested special briefing on questions of SEPA jurisdiction, SEPA standing, and the availability of invalidity as a remedy for SEPA noncompliance. A hearing on motions was held by teleconference. On June 10, 2009, the Board issued its Order on Motions, finding that the Board has jurisdiction over the SEPA issues raised and granting Petitioners' motion to supplement the record.

Hearing on the Merits

Each of the parties timely filed briefing on the merits as follows:

- Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners' PHB**]
- City's Prehearing Brief [**City Response**]
- Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]

[2] The complete chronology of procedures in this matter is attached as Appendix A.

[3] In a proceeding in King County Superior Court under Cause No. 09-2-02204-6 SEA, petitioners challenged Ordinances 4170 and 4171 and related ordinances on other grounds.

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The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill, City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works David Godfrey, and transportation engineer Thang Nguyen.

At the hearing each of the parties, without objection, provided the Board with illustrative exhibits which were admitted as "HOM exhibits" and are listed in full in Appendix B below. The hearing on the merits afforded the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The Board ordered a transcript of the hearing, which was received on August 18, 2009, and is referenced herein as **HOM.** At the hearing, Board member Earling requested that the City provide the Board with a listing of staff memoranda and power points provided to the City Council after July 1, 2008. The City subsequently filed a set of documents received by the Board on August 27, 2009.[4]

II. STANDARD AND SCOPE OF REVIEW

GMA Standard of Review

The Growth Management Boards are tasked by the legislature with determining compliance with the GMA:

> The Board is empowered to determine whether [city] decisions comply with GMA requirements, to remand noncompliant ordinances to [the city], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

The GMA creates a high threshold for challengers. A jurisdiction's GMA enactment is presumed valid upon adoption. RCW 36.70A.320(1). "The burden is on the petitioner to demonstrate that [the challenged action] is not in compliance with the requirements of [the GMA]." RCW 36.70A.320(2).

In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court summarized the Board's standard of review:

[4] Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

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> The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been committed." "Comprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with the goals and requirements of the GMA.

161 Wn.2d at 423-24 (internal case citations omitted).

As to the degree of deference to be granted under the clearly erroneous standard, the *Swinomish* Court stated:

> The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

Id. at 435, fn. 8 (internal citations omitted).

SEPA Standard of Review

Whether an environmental impact statement is adequate is subject to *de novo* review and is a question of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of an EIS is tested under the 'rule of reason,' which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. *Id*. The reviewing body does not rule on the wisdom of the proposed development but rather on "whether the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance v. City of Auburn (**Citizens' Alliance**)*, 126 Wn. 2d 356, 362, 894 P.2d 1300 (1995).

> In any action involving an attack on the adequacy of [an EIS] the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090. See, *City of Burien v. City of SeaTac, et al.*, CPSGMHB Case No. 98-3-0010, Final Decision and Order (Aug. 10, 1998), at 9.

Scope of Review

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA or SEPA only with respect to those issues presented in a timely petition for review. RCW 36.70A.290(1).

III. BOARD JURISDICTION AND PREFATORY NOTE

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BOARD JURISDICTION

The Board finds that the Petitions for Review were timely filed, pursuant to RCW 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject matter of the petitions pursuant to RCW 36.70A.280(1).[5]

PREFATORY NOTE

On December 16, 2008, the Kirkland City Council took action to enable applications for three private developments to proceed in downtown Kirkland. Rather than conduct three site-specific plan amendments and rezones, the City opted to review the proposed amendments together as a legislative process. The City undertook a package of six ordinances.[6] The two challenged here are Ordinance 4170, amending the City's Comprehensive Plan to implement changes to the downtown subarea plan, land use map, and transportation element, and Ordinance 4171, amending the City's Zoning Code to implement a new "Central Business District 5A Zone" for the Touchstone property.[7]

The challenged Ordinances allow Touchstone to re-develop Parkplace, a mixed-use project on an 11.5 acre tract in the Kirkland downtown area abutting the properties of the two petitioners. The Touchstone parcel today consists of 7 buildings separated by surface parking; one building is at 6 stories and the rest are 1-2 stories. DEIS at 3.1-1. The current development contains 95,300 square feet of office space and 143,150 square feet of retail. Previous zoning for the property allowed build-out to approximately 800,000 square feet of commercial space at building heights of three to five stories.

The challenged Ordinances increase building heights to eight stories, reduce building setbacks along street frontages, increase allowable lot coverage, and provide for reductions in parking requirements below the requirement of the parking code. The Ordinances allow as much as 1.2 million square feet of office and 592,700 square feet of retail and other commercial space (i.e., hotel, movie theater, athletic club, restaurants, supermarket) in the Parkplace development.

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[5] See Order on Motions, June 10, 2009.

[6] The complete package of ordinances:

- Ordinance 4170 Amending the Comprehensive Plan to implement changes to the downtown section of the Moss Bay Neighborhood Plan and the transportation element
- Ordinance 4171 Amending the City's zoning code to implement new CBD5A Zone [Touchstone property]
- Ordinance 4172 Adopting development master plan and design guidelines for Parkplace [Touchstone proposal]
- Ordinance 4173 Amending the Comprehensive Plan to implement changes to Planned Area 5 of Moss Bay Neighborhood [Orni and Altom properties]
- Ordinance 4174 Amending the zoning code, design guidelines and use zone [Orni and Altom properties]
- Ordinance 4175 Planned Action Ordinance under SEPA for development of Touchstone and Orni proposals

[7] The challenged ordinances also involve two other proposals referred to as the Orni and Altom proposals. Petitioners do not challenge the Orni and Altom portions of the Ordinances. HOM at 31-32.

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Ordinance 4175, the Planned Action Ordinance, provides the required SEPA mitigations to be implemented in the Parkplace redevelopment. Ordinance 4175 is not challenged by these Petitioners, but its provisions are relevant to the ensuing analysis.

With this Final Decision and Order, the Board first considers the Petitioners' various challenges arising from the internal and external consistency requirements of the GMA. Then the Board takes up the SEPA issues raised by Petitioners, and finally, the Petitioners' request for a determination of invalidity.

IV. LEGAL ISSUES AND DISCUSSION

LEGAL ISSUES 1 and 2

Consistency with Transportation Plan and Capital Facilities Plan

The Prehearing Order states Legal Issues 1 and 2 as follows:

1. *Do Ordinance Nos. 4170 and 4171 fail to guided by goals 1 and 12 (RCW 36.70A.020(1) and (12)), and fail to comply with the requirements of RCW 36.70A.070(preamble), and .070(6) by amending the City of Kirkland (**City**) Comprehensive Plan and Zoning Code to create new planning and zoning districts that would allow an intensity of development that would not be adequately served by transportation and other public facilities?*

2. *Do Ordinance Nos. 4170 and 4171 fail to guided by goal 12 (RCW 36.70A.020(12)), and fail to comply with the requirements of RCW 36.70A.070(preamble), .070(3) and .070(6) by amending the City's Comprehensive Plan and Zoning Code to create new planning and zoning districts that require transportation and other capital improvements for which financing plans meeting the requirements of RCW 36.70A.070(3) and .070(6) do not exist?*

Applicable Law

The GMA requires consistency among plan elements. The preamble to RCW 36.70A.070 states:

> The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

In setting forth the requirements for the capital facilities plan element, the same section of the GMA, at RCW 36.70A.070(3), requires

> A capital facilities plan element consisting of:
> (a) an inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities;
> (b) a forecast of the future needs for such capital facilities;
> (c) the proposed locations and capacities of expanded or new capital facilities;

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> (d) at least a six-year plan that will finance such capital facilities within projects funding capacities and clearly identifies sources of public money for such purposes; and
> (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element capital facilities plan element and financing plan within the capital facilities plan element are coordinated and consistent….

The transportation plan element is laid out in RCW 36.70A.070(6). Again, the transportation element "implements and is consistent with the land use element." *Id.* Specific sub-elements of the transportation plan include (iii) facilities and services needs and (iv) finance.

> (iii) Facilities and services needs, including:
> …
> (E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing and capacity needs of future growth;
> (F) Identification of … local system needs to meet current and future demands…
>
> (iv) Financing, including:
> …
> (B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year [TIP] required by RCW 35.77.010 for cities ….

Discussion and Analysis

Petitioners contend that the new design district and zoning created by Ordinance Nos. 4170 and 4171 will allow a 7.5 fold increase in office and retail area which will generate more vehicle traffic than can be accommodated by the existing road network at the adopted level of service standards. Petitioners' PHB, at 13. Petitioners point to 18 intersection capacity improvements identified in the FEIS at 3-16 and 3-17, estimated to cost more than $13 million, and adopted as necessary mitigations for the Touchstone proposal. *Id*. at 15. The Planned Action Ordinance – Ordinance No. 4175 – sets out these improvements in Appendix B. Only one of the required improvements – restriping at the intersection of 85th St. NE and 114th Ave. NE, at a cost of $166,400 – is included as funded in Kirkland's current 6-year Capital Facilities Plan (**CFP**). FEIS at 3-21. Petitioners argue that the Ordinances are noncompliant with the GMA requirements for consistent land use, capital facilities, and transportation plans, because the 18 transportation improvements necessary for the Touchstone proposal are not fully listed and funded in the City's capital and transportation plans.

In response, the City and Touchstone assert:

- The Petitioners have conflated the City's concurrency analysis (the basis for GMA consistency) and its traffic impact analysis (the basis for developer impact fee assessment under RCW 82.02).

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- The TIP (Transportation Improvement Plan) and CFP are only required to provide funding plans for a six-year period (here, 2008-2014). The 17 improvements other than the 85th/114th restriping are not projected to be needed until after 2014.
- Touchstone will be paying in excess of $9 million in transportation impact fees which will cover more than half the cost of the indicated improvements. Touchstone Response, at 16, citing City staff memos, Ex. 585 and 672.

In reply, Petitioners assert that eight of the 18 necessary projects are not even listed in the City's Capital Facilities Plan and so would not be eligible to be funded through developer impact fees. Petitioners' Reply, at 2. Further, Petitioners point out that the assertions as to the developer paying, as mitigation, for all or a major portion of the costs is unsupported by the record. *Id.* at 4-5.

The Board asks whether Kirkland's amendments to its comprehensive plan and zoning, adopted in the challenged Ordinances and requiring $13 million of transportation improvements over ten years in order to mitigate specific identified traffic impacts, are consistent with Kirkland's capital facilities plan and the transportation element of its plan, which do not contain or fund all of these improvements.

Under the Growth Management Act, both the capital facilities element and the transportation element require a forecast of needs and identification of needed future facilities. The capital facilities element calls for a 6-year funding plan, while the transportation element requires a multi-year financing plan that is based on a 10-year traffic forecast and facility needs identification. The Board recognizes the tension in the law between the required 10-year transportation facilities plan and the specific 6-year funding plans for the CFP and TIP.

Looking first at the statutory requirements for the capital facilities element, the Board agrees with Petitioners that consistency requires the City to amend its CFP to include all the "future needs for capital facilities" called out in the comprehensive plan and zoning amendments just enacted – i.e., all 18 identified improvements. RCW 36.70A.070(3)(b and c). All 18 identified improvements must be included in the City's capital facilities plan. However, the Board finds no requirement in the capital facilities element for the City to identify funding for capital projects beyond the six-year window. RCW 36.70A.070(3)(d).

Looking next at the statutory language concerning the transportation element, the Board reads, first, a requirement that the transportation element of a plan shall include "forecasts of traffic for at least ten years based on the adopted land use plan" and "identification of local needs" to meet future growth. RCW 36.70A.070(6)(a)(iii). In preparing the FEIS for Ordinances 4170 and 4171, and in identifying the specific improvements needed to meet transportation concurrency and mitigate traffic impacts, Kirkland has met this requirement.

Then the Board reads that the transportation element shall include "a multiyear financing plan *based on the needs identified in the comprehensive plan*." RCW 36.70A.070(6)(a)(iv). This is the first time the Board has had squarely before it the question of how the requirement for a ten-year transportation plan identifying facilities and services needs must interface with the requirement (in the same section of the statute) for a "multi-year financing plan." It seems apparent that the multi-year financing plan required by .070(6)(a)(iv) is not the same as the 6-year TIP. The multi-year financing plan encompasses the 10-year needs analysis set forth in the Facilities and Services Needs sub-element (.070(6)(a)(iii)), and "the appropriate parts … serve as the basis for the 6-year [TIP]."

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Here, the Planned Action Ordinance requires that all 18 traffic improvements be constructed to meet transportation concurrency and/or traffic impacts analysis.[8] Ord. 4175, Ex. B. The Planned Action Ordinance is effective for ten years, until December 31, 2018. Ord. 4175, ¶ 7. The City and Touchstone assert that the developer will be assessed impact fees for a substantial portion of the improvement costs, but there is no document in the record requiring a particular level of payment. In short, there is nothing in the transportation amendments adopted by Ordinance Nos. 4170 and 4171 that amounts to "a multiyear financing plan based on the needs identified in the comprehensive plan" which arise from "forecasts of traffic for at least ten years" and "identification of local system needs." RCW 36.70A.070(6).[9] The Board is left with a firm and definite conviction that a mistake has been made.

In sum, the Board finds and concludes that Ordinances 4170 and 4171 **fail to meet the consistency requirement** of RCW 36.70A.070 (preamble), .070(3), and .070(6) because of failure to amend the capital facilities plan to include all necessary capital improvements and because of the lack of a "multi-year financing plan based on the [10-year transportation] needs identified in the comprehensive plan."

The Petitioners pose two additional objections that are readily disposed of. First, Legal Issues 1 and 2 allege noncompliance with GMA Goal 12, Public Facilities and Services. The GMA concurrency requirements are linked to GMA Planning Goal 12. Petitioners did not argue this point in their briefing or at the hearing, and the Board finds no basis for a finding of non-compliance with Goal 12 or the GMA concurrency requirements.

Second, the Petitioners argue that the City's plans lack a provision for re-assessing land use if funding for needed improvements falls short. The Board finds that there is a provision for land use reassessment in Kirkland's 2004 Comprehensive Plan, Capital Facilities Element, at XIII-10, Policy CF-5.2, which satisfies this GMA requirement.

Conclusion

The Board concludes that the City's adoption of Ordinance 4170 and 4171 was **clearly erroneous** and **failed to comply** with RCW 36.70A.070 (preamble), .070(3), and RCW 36.70A.070(6). However, the Board concludes that Petitioners **have not carried their burden** of demonstrating failure to provide for reassessment of the land use element if funding falls short. The Board **remands** the Ordinances to the City to take legislative action to comply with the GMA as set forth in this order.

LEGAL ISSUE 3
Consistency with County-wide Planning Policies

The Prehearing Order states Legal Issue 3 as follows:

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[8] The Board understands the difference between Kirkland's transportation concurrency regulations (Title 25) and traffic impact fees (Title 27), but is not persuaded that the distinction is relevant to the RCW 36.70A.070(6)(a)(iii) and (iv) analysis.

[9] A multi-year financing plan is not necessarily a single document. As the City and Touchstone suggest, it might consist of the 6-year TIP and one or more developer agreements covering the transportation improvements identified in connection with these amendments.

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Does Ordinance No. 4170 fail to comply with the consistency requirements of RCW 36.70A.100 and .210 by amending the Kirkland Comprehensive Plan to create a new planning district that would allow intensity of development inconsistent with the County-wide Planning Policies, specifically CPPs FW 12(a) and LU 25a-25d, for King County?

Applicable Law

RCW 36.70A.100 requires that city planning "shall be coordinated with and consistent with" the comprehensive plans of the county and adjacent cities.

RCW 36.70A.210(3)(a) requires that county-wide planning policies must include policies to implement the urban growth allocated pursuant to RCW 36.70A.110.

RCW 36.70A.110(2), in turn, establishes the application of population projections within each GMA county:

> Based upon the growth management population projections made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period.

It is well-settled that a local comprehensive plan must be consistent with GMA-compliant county-wide planning policies. *Children's Defense Fund v. City of Bellevue I*, CPSGMHB Case No. 95-3-0011, Order Partially Granting Bellevue's Dispositive Motion (May 17, 1995), at 12; *Strahm v. City of Everett*, CPSGMHB 05-3-0042, Final Decision and Order (Sep. 15, 2006), at 30.

Discussion and Analysis

In Legal Issue 3, Petitioners contend that Kirkland's expansion of zoned capacity for commercial development is inconsistent with the allocation of employment in the King County County-wide Planning Policies (**CPPs**) and with the CPP goal of jobs/housing balance.

The relevant facts are not disputed by the parties:

- The Countywide Planning Policies allocate Kirkland an employment growth target of 8,800 jobs by 2022.
- Kirkland's zoned development capacity for employment growth under the 2004 comprehensive plan was 12,606, exceeding the CPP 2022 target by 3,806.
- Ordinance 4170 allows for employment growth of 16,291, exceeding the CPP 2022 target by 7,491.

Petitioners argue that the intensity of development allowed by Ordinance 4170 is inconsistent with the Countywide Planning Policies in violation of the GMA. The Board is not persuaded.

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First, the GMA requirements for population and employment allocations in cities and urban growth areas are specifically directed to ensuring *sufficient capacity* to accommodate growth.

- RCW 36.70A.110(2) provides that urban growth areas "shall include areas and densities *sufficient to permit the urban growth* that is projected to occur."
- The review and evaluation process of RCW 36.70A.215[10] requires a comparison of targets with actual growth patterns for the purpose of determining "whether a county and its cities are *achieving urban densities* within urban growth areas."
- Periodic review must be undertaken to ensure that adoption and amendments to county and city plans and development regulations "*provide sufficient capacity* of land suitable for development within their jurisdictions to accommodate their allocated … employment growth." RCW 36.70A.115.

The Board reads these provisions together as indicating that the population and employment targets allocated to cities by countywide planning policies are intended to require each city to zone areas and densities sufficient to accommodate that growth; in other words, the targets create a *floor* for zoned capacity, not a ceiling.

Petitioners have cited no GMA language suggesting that population and employment growth allocations in urban areas create a cap on local planning. Nor have they cited any case law to support their contention.

Second, Petitioners have pointed to no language in King County's CPPs that indicates the County's population or employment targets are intended to impose caps or limits on zoned development capacities for cities.

CPP LU-25a provides:

> Each jurisdiction shall plan for and accommodate the household and employment targets established pursuant to LU-25c and LU-25d. This obligation includes:
>
> a. Ensuring adequate zoned capacity; and
> b. Planning for and delivering water, sewer, transportation and other infrastructure … and
> c. Accommodating increases in household and employment targets as annexations occur.
>
> The targets will be used to plan for and accommodate growth within each jurisdiction. The targets do not obligate a jurisdiction to guarantee that a given number of housing units will be built or jobs added during the planning period.

Again, the CPP emphasis is on ensuring zoned capacity and infrastructure to accommodate projected growth. There is no suggestion that King County's CPP targets are intended to limit growth or establish a maximum capacity level.

Third, the objective of "jobs/housing balance" in the King County CPPs must be read in context. The CPPs allocate growth to broad subareas. Kirkland and the Eastside cities[11] are

[10] The review of .215 is not required for all counties, but is applicable to King County and its cities.

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in the East subarea. Jobs/housing balance is one of seven listed criteria for allocating growth targets within subareas.

CPP FW-12 provides:

> All jurisdictions within King County share the responsibility to accommodate the 20-year population projection and job forecast. The population projection shall be assigned to the four subareas of King County (Sea-Shore, East, South and the Rural Cities) proportionate with the share of projected employment growth. Anticipated growth shall be allocated pursuant to the following objectives:
>
> a. To ensure efficient use of land within the UGA by directing growth to the Urban Centers and Activity Centers;
> b. To limit development in Rural Areas;
> c. To protect designated resource lands;
> d. To ensure efficient use of infrastructure;
> e. To improve the jobs/housing balance on a subarea basis;
> f. To promote a land use pattern that can be served by public transportation and other alternatives to the single occupancy vehicle; and
> g. To provide sufficient opportunities for growth within the jurisdiction.

The Board notes that the additional employment growth made possible by Ordinance 4170 meets a number of the FW 12 objectives: it directs growth to an Activity Center,[12] makes efficient use of infrastructure, is well-served by public transportation and promotes other alternatives to the single occupant vehicle.

As to jobs/housing balance, FW12 calls for improving jobs/housing balance "on a subarea basis." Petitioners have provided the number of additional jobs and housing units for the City of Kirkland, but have not demonstrated that Kirkland's comprehensive plan amendment creates or contributes to an imbalance in the East subarea. Their argument that more jobs in Kirkland will exacerbate pressure for housing development in rural and resource lands, thus thwarting GMA Goals 1 and 2, is not supported by any facts in the record. The Board finds and concludes that Petitioners **have not carried their burden** on this issue.

Conclusion

The Board finds and concludes that Petitioners have **failed to carry their burden** of demonstrating that Ordinance 4170 is inconsistent with King County Countywide Planning Policies FW 12(a) and LU-25 or fails to comply with the consistency requirements of RCW 36.70A.100 and .210.

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[11] Bellevue, Redmond, Issaquah, Mercer Island, Sammamish, Kirkland, Kenmore, Bothell, Woodinville, Newcastle, Hunts Point, Medina, Yarrow Point, Clyde Hill.

[12] The CPPs identify the central business district of Kirkland as an activity center. See Section III Land Use Pattern, Part E Activity Centers. Kirkland's Comprehensive Plan designates its downtown area as a regional Activity Area. LU 5-3.

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LEGAL ISSUE 4 – SEPA Compliance

Legal Issue 4 challenges Ordinances 4170 and 4171 as non-compliant with SEPA because of the following deficiencies in the EIS:[13]

A. Failure to identify the objectives of the proposal
B. Failure to consider alternatives
C. Failure to consider the proposal's short-term impacts
D. Failure to consider indirect impacts
E. Failure to adequately consider traffic and parking impacts

A. Failure to identify the objectives of the proposal

The SEPA rules distinguish between "project actions" and "nonproject actions." Project actions include permit decisions on a site specific project. WAC 197-11-704(2)(a). Nonproject actions are "decisions on policies, plans or programs [such as] the adoption or amendment of comprehensive land use plans or zoning ordinances." WAC 197-11-704(2)(b). The City here acknowledges that Ordinances 4170 and 4171 were adopted as "nonproject actions." See, e.g., HOM, at 46.[14]

Petitioners contend that the City's EIS was deficient because it failed to state the public objectives of the proposed comprehensive plan amendment. Petitioners' PHB, at 24-26. Instead, the EIS recites the project-specific objectives of proponents Touchstone, Orni, and Altom. DEIS at 2.5.[15] In addition, Petitioners state that the City's objectives are only indicated in connection with the Planned Action Ordinance, which by definition aims to provide certainty in the permitting process. *Id.*[16]

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[13]The Prehearing Order states Legal Issue 4 as follows: *Were Ordinance Nos. 4170 and 4171 adopted through non-compliance with SEPA where the EIS prepared in support of those actions fails to fully meet the requirements of Chapter 43.21C RCW including the failure to identify, consider and evaluate: the overriding planning objectives to be served by the planned actions; a full range of alternatives to the proposed action; the impacts of full build-out under the proposed amendments; the total direct and indirect effects of more than doubling the area of office and commercial space within Planned Action Area A; impacts upon surrounding uses caused by the construction of the proposed office and commercial space; parking congestion and spillover impacts caused by a reduction of parking based upon a methodology that underestimates parking demand; and traffic impacts based upon the application of inconsistent and improper methodologies and mode splits?*

[14] The plan changes here were not confined to the properties involved in the three private amendment requests. For example, the City also rezoned a parcel adjacent to Altom's (FEIS at 2-4, 2-9), and realigned a view corridor.

[15] Touchstone's project-specific objectives:

> **Area A, Touchstone Corporation (Parkplace)**. The applicant's objective for this amendment request is to redevelop Parkplace to create an employment, shopping and entertainment center that is pedestrian-friendly, is oriented toward Peter Kirk Park, ties the Downtown and eastern cores of the City, and allows for modification of parking and other requirements to create a new urban mixed-use center at this location. The office portions of the center will include large floor plate dimensions that meet high technology needs.

DEIS, at 2.5.

[16] The objective of the Planned Action Ordinance is project certainty:

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Upon review of the record, the Board discerns a number of public objectives referenced in the City's review. These include, for example:

- Provide destination retail and community-serving retail in the downtown
- Catalyze downtown redevelopment
- Provide safe and fun places for teens
- More "third place" opportunities for gathering and entertainment
- Economic boost for downtown business
- Generation of retail sales tax
- Green building design and open space
- Creating a north-south street across the super-block

See, e.g., Ex. 569, Planning Commission Recommendation to City Council, Nov. 20, 2008.

The Board can readily surmise that an EIS process that began with a clear statement of the chosen public objectives for review of the private proposals might have generated alternative ways of meeting the City's goals with less negative environmental impact. See, WAC 197-11-440(5)(b).

However, Petitioners have cited no authority on this issue other than the SEPA guidelines. As the Board reads the relevant SEPA provisions, they are *permissive*, not mandatory. WAC 197-11-060(3) provides:

> (ii) A proposal by a lead agency or applicant **may** be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action.
> (iii) Proposals **should** be described in ways that encourage considering and comparing alternatives. Agencies **are encouraged to** describe public and nonproject proposals in terms of objectives rather than preferred solutions.

In the SEPA definitions, "'may' is optional and permissive and does not impose a requirement." WAC 197-11-700(3)(b). Petitioners' argument is appealing, but they have not identified a legal requirement that the City's EIS be based on a statement of public objectives.

The Board therefore finds and concludes that Petitioners have **not carried their burden** of proving Legal Issue 4A.

B. *<u>Failure to consider alternatives</u>*

Petitioners argue that the EIS is deficient in that only the "no action" alternative and the applicants' proposals were evaluated. Petitioners cite numerous cases indicating the

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> The City's objective for the Planned Action designation … is to provide for a streamlined SEPA review process for future area-specific development proposals and to provide greater certainty to potential developers, City decision-makers, and the public regarding the future development pattern and likely impacts of the Planned Action area.

Ex. 442, FEIS at 5-11.

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centrality of alternatives analysis in SEPA review. Petitioners' PHB at 26-31. They assert that for non-project actions, alternatives may not be limited to just the proposed action or only the properties owned by the applicants. *Id*.[17]

Here the City of Kirkland analyzed only the "no-action" alternative, which projected build-out on the three parcels under the existing zoning, and the "proposed action," i.e., the proponents' proposals for each of the three sites. The Planning Commission ultimately developed a third alternative for the Touchstone site (the FEIS Review Alternative), but this did not change the height, square footage, parking discounts, or other key elements of the proposal.[18]

As Petitioners have pointed out, in the FEIS at issue here, no offsite alternatives were reviewed, and no intermediate schemes were assessed.

Having reviewed the cases relied on by the parties, the Board finds *Citizens' Alliance to Protect our Wetlands v. City of Auburn, et al* ***(Citizens' Alliance)***, 126 Wn.2d 356, 894 P2d 1300 (1995) to be most on point. The Citizens' Alliance challenged the EIS developed by the City of Auburn for a thoroughbred horseracing track development. Auburn undertook the environmental review to support amendments to the zoning code to allow commercial recreation, including animal racetracks, in the M-2 zone as a conditional use. The city identified three potential sites within Auburn and included one of them as an alternative throughout the EIS.

The Supreme Court held that the racetrack project itself "qualifies for the private project exemption" from review of offsite alternatives. However, "because there is also a nonproject action [code amendment] involved in this case, Auburn is obliged to review offsite alternatives." 126 Wn.2d at 365.

While underscoring the difference between rezones and text amendments, the Court explained:

> Normally, under the private project exception, private projects which do not require rezones will not compel lead agencies to examine offsite alternatives….[N]onproject actions pose separate obligations under SEPA which a lead agency must satisfy. The environmental significance of the nonproject action creates the obligation to examine alternatives to the nonproject action….In practice, Auburn had to look at reasonable, feasible offsite alternatives to the building of a racetrack on lands zoned heavy industrial.

Id. at 366.

This Board's recent ruling in *North Everett Neighbors Alliance v. City of Everett* ***(NENA)***, CPSGMHB Case No. 08-3-0005, Final Decision and Order (May 18, 2009), at 32-25, is distinguishable. There the Board rejected petitioners' request for greater review of offsite

[17] Citing *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 42, 873 P.2d 498 (1994), *Barrie v. Kitsap County*, 93 Wn.2d 843, 857, 613 P.2d 1148 (1980).

[18] The FEIS Review Alternative requires a minimum of 300,000 square feet of retail uses and steps back the heights of buildings on certain parts of the property.

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alternatives in the EIS for the expansion of Providence Hospital. The Board found that alternative sites had previously been evaluated in a 2005 SEPA analysis. The Board determined that reliance on this previous consideration of offsite alternatives is specifically authorized by WAC 197-11-620 and WAC 197-11-235(6)(ii). In the present case, however, the City has pointed to no previous consideration of off-site alternatives for the kind of high-intensity mixed-use development at issue here.

In the present case, therefore, in accord with the *Citizens' Alliance* holding, Kirkland cannot limit its review to onsite alternatives. By looking beyond Touchstone's proposal for its own property, could the City realize the same objectives[19] at lower environmental cost? See, WAC 197-11-440(5)(b).

Petitioners suggest that there may be other commercially zoned areas of Kirkland that could be studied. Petitioners' PHB, at 31, Ex. 114. They also ask for a range of alternatives of less height and intensity on the same site. Petitioners' Reply, at 11-12. It seems reasonable to the Board that an alternative that included the *whole* of the superblock between 3rd and 6th might achieve both Touchstone's goals and the public's objectives with less negative impact on the environment and better synergies for the vibrant mixed-use destination the City envisions.[20] However, the Board does not dictate the specific alternatives to be reviewed.

The Board finds that Kirkland's FEIS for Ordinance 4170 and 4171 is insufficient for failure to assess reasonable alternatives to the Touchstone proposal,[21] including offsite alternatives to the nonproject action. The Board **remands** Ordinances 4170 and 4171 to the City of Kirkland to take the action necessary to fully comply with SEPA.

C. Failure to consider the proposal's short term impacts

WAC 197-11-060(4) requires the consideration of both short and long-term impacts of a proposal.

The Petitioners assert that the DEIS for the Touchstone proposal failed to properly address the short-term impacts of construction of the project. Petitioners' PHB, citing Comment Letter 23 at 10, in FEIS. The Final EIS at 4-19, 4-20 and 4-28 acknowledges that construction will disrupt traffic and lists generic measures that may be included in the building permits, but it does not thoroughly analyze the likely impacts, according to the Petitioners. Petitioners contend that, in light of adoption of a Planned Action Ordinance, no further environmental review is available, so long as the development falls within the adopted threshold (1,792,700 square feet for the Touchstone project). Petitioners' PHB at

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[19] On remand, the City "may" and "is encouraged to" articulate its public objectives. WAC 197-11-060(3)(ii) and (iii).

[20] Touchstone's ParkPlace property takes up the northeast corner and midsection of a superblock that includes Peter Kirk Park on the west. The Petitioners and others own properties in the south and east portions of the superblock. Environmental review limited to Touchstone's onsite proposal has the effect of isolating the other properties and perhaps intensifying environmental negative impacts. An alternative which considered all of CBD Area 5 might address the city's objectives differently, for example, assessing pedestrian linkages differently, finding additional "third place" or "green infrastructure" opportunities, proposing coordinated parking mitigation strategies, ensuring coordinated traffic ingress and egress management, and enhancing future redevelopment potential for the southeast properties.

[21] As indicated above, the Orni and Altom proposals are not before us.

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32. They conclude that impacts of "noise, vibration, dust, debris and disruption of adjacent uses" are simply ignored. *Id.*

The City asserts that construction noise impacts were addressed in the Scoping checklist, citing Ex. 442, FEIS at 5-14. The City states that visual impacts of construction are referenced under "aesthetics," with the comment that viewers "may not be accustomed to seeing construction activities and equipment" and may be moderately sensitive. Ex. 92, DEIS at 3.3-17. Construction impacts on vehicular and pedestrian traffic are acknowledged as being "particularly disruptive." Ex. 442, FEIS as 4-19.[22] The City references the conditions it may impose as part of the project permit process to address construction traffic management. City Response, at 13.

The Board first notes that build-out to the prior zoning allowance (the no-action alternative) would involve a protracted and disruptive period of construction on the Touchstone site. It is not readily apparent that construction of the additional square-footage or building heights under the new proposal would have significant additive negative impacts.

Second, the Board finds that, as part of the permit process, the City will apply its existing ordinances to mitigate construction impacts, as SEPA allows. See RCW 43.21C.240. These ordinances govern noise, heavy equipment, sedimentation, and the like.[23] Further, the FEIS specifically provides that consideration of construction mitigation at time of permit application may include such measures as designated parking for construction workers, limitations on truck movements and materials delivery, traffic flaggers, temporary sidewalks, and adjustment of traffic signal phasing. FEIS at 4-28.

The Board is not persuaded that the impacts of construction need further analysis in the SEPA process in order to ensure appropriate application of the City's existing ordinances. The Board concludes that, with respect to short-term impacts, "the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance*, 126 Wn.2d at 362. Petitioners **have not carried their burden** with respect to Legal Issue 4C.

D. <u>Failure to consider the proposal's long-term impacts</u>

Under WAC 197-11-060(4)(d) environmental review must consider both direct and indirect effects of a proposal. Indirect impacts "include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions." *Id.*

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[22] In addition, the Board notes that the DEIS addresses greenhouse gas emissions from construction activities (DEIS Appendix D) and police and fire response times based on construction activities (DEIS 3.15-13, 3.15-14).

[23] Kirkland construction impacts ordinances:

- Chapter 115.25 KZC. Development Activities, Movement of Heavy Equipment
- Chapter 115.35 KZC Erosion and Sedimentation
- Chapter 115.75 KZC Land Surface Modification
- Chapter 115.95 Noise
- 115.140 KZC Temporary Construction Trailers
- Title 21 Kirkland Municipal Code, Building and Construction

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The Petitioners assert that the EIS glosses over the land use impacts of the proposal. First, the City's analysis considers only commercial development already constructed or in the permitting pipeline, rather than full build-out of the whole downtown area under existing zoning. Thus, Petitioners allege, consistency between planned land uses and the capital facilities necessary to serve them is never fully assessed. Petitioners' PHB at 34. Further, the impacts of housing the additional 3,600 employees are ignored, according to Petitioners.

The City and Touchstone respond that the indirect impacts suggested by Petitioners are "merely speculative." Touchstone Response, at 23-24; City Response, at 13-14. The City points to the DEIS discussion of the land use compatibility of the Proposed Action and the No Action alternative in the study area.

The Board concurs that determining how an increase in zoned density in one location might affect development patterns in adjacent areas may involve some "speculation." Generally, however, the GMA refers to this exercise as "comprehensive planning," and requires that it be thoughtfully undertaken based on the best data, experience, and professional planning expertise available. The urban planning profession and planners in the greater Puget Sound metropolitan area in particular have developed ample data on the residential demand associated with commercial development and on the zoned capacity needed to accommodate various levels of residential demand, as well as on commute trip variables.

Here the Board notes that the DEIS assesses the land use compatibility of the Proposed Action and the No Action alternative on a study area which extends for just a few small blocks around the subject properties. Ex. 92, DEIS at 3.1-1. The DEIS lists as "significant unavoidable adverse impacts" the greater intensity of land use, concentration of employment, and potential for land use incompatibility. DEIS at 3.1-22. The DEIS projects an "overall redevelopment in the study area [that] will continue to increase office, retail and multifamily portions of the mix of uses found in Downtown and its perimeter area." DEIS at 3.1-18. "Single family residential uses are expected to decrease in the land use pattern study area as single-family structures located in multifamily and commercial zones redevelop." *Id.*

In brief, the DEIS projects the indirect land use effects of the proposal to include

- Commercial redevelopment of the adjacent blocks at greater intensity (within existing zoned capacity), and
- Redevelopment of single-family property in the study area to commercial or multifamily.

The DEIS looks at a narrow "study area" and provides no quantification of the likely housing pressures caused by an added 3,600 job concentration. However, under the "rule of reason," the City is not required to provide a detailed analysis of the full cascade of land-use impacts from its action. The Petitioners have put no housing-demand formula into the record. They propose, without any supporting data, that intense job growth in downtown Kirkland will result in residential sprawl in rural areas. The Board therefore concludes that Petitioners **have not carried their burden** of demonstrating a failure to consider the indirect impacts of the Ordinances.

E. <u>Failure to adequately consider traffic and parking impacts</u>

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Petitioners challenge the traffic and parking analysis relied on in the FEIS to support the greatly-reduced parking requirements for the Touchstone project. According to Petitioners, the EIS is faulty because it "includes just one data set – the ITE model." Petitioners' PHB, at 17. The Institute for Transportation Engineers (ITE) trip generation model at issue here is derived from empirical data from mixed-use projects elsewhere in the country; Petitioners' expert asserts that these counts already reflect mode splits and that reducing them again with additional mode split projections for the Touchstone project is unjustified. FEIS, pdf at 254, Bernstein letter, May 16, 2008. Further, Petitioners present actual mode split and parking demand data from office buildings within the City of Kirkland; these numbers differ significantly from the assumptions in the EIS. Petitioners' PHB at 18, FEIS, pdf at p. 251.

The City responds that the EIS traffic and parking analysis took into consideration the mode split (primarily carpooling) already embedded in the ITE trip rates; the analysis then projected an increased mode split based on adjacency of the Kirkland Transit Center and implementation of Transportation Demand Management. FEIS at 5-10 (Comment 1). The City asserts it used current local commute trip reduction (CTR) data to help determine SOV rates. The City notes that employers within the Touchstone development will be required to adopt CTR programs and meet CTR goals. City Response, at 15-16. Finally, the City states that it reasonably anticipates the required parking demand management program (controlled access, paid parking, and ongoing monitoring and mitigation of off-site parking impacts) will further reduce trip generation. *Id*. citing FEIS at 5-15 (Comment 18).

The Washington Courts have determined that resolving competing expert opinions is a task for lead agency, not the reviewing body:

> When an agency is presented with conflicting expert opinion on an issue, it is the agency's job and not the job of the reviewing appellate body, to resolve those differences.

City of Des Moines v. Puget Sound Regional Council, 108 Wn.App. 836, 852, 988 P.2d 27 (1999).

The Board finds that the City had before it both the ITE trip rates, as modified by the City's expert IFC Jones & Stokes, and the Bernstein critique submitted by Petitioners in comment on the DEIS. The City was within its authority to choose to rely on IFC Jones & Stokes and to incorporate this analysis into the FEIS. The Board concludes that, with respect to parking and traffic impacts, "the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance*, 126 Wn.2d at 362. The Board concludes that the Petitioners **have not carried their burden** with respect to Legal Issue 4E.

VI. INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order (Oct. 13, 2003), at 18. Here, Petitioners' Legal Issue No. 5 requests a determination of invalidity.

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Shall Ordinance No. 4170 and 4171 be invalidated where their continued effectiveness would substantially interfere with the fulfillment of the goals of the Growth Management Act, including, RCW 36.70A.020(1) and (12)?

Applicable Law

RCW 36.70A.302, the GMA's invalidity provision**,** provides in part:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter ….

Discussion and Analysis

A determination of invalidity is based on a finding that continued validity of a City's action "would substantially interfere with the fulfillment" of a GMA Goal. Petitioners here cite to GMA Goals 1 (Urban growth) and 12 (Public facilities and services). The Board has previously concluded that Petitioners have not carried their burden in demonstrating that the challenged Ordinance will frustrate GMA goals to accommodate urban growth and prevent sprawl. See Legal Issue 3. The Board has also concluded that the Ordinances do not violate the concurrency required by Goal 12. See Legal Issues 1 and 2.

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

Conclusion

The request for a determination of invalidity is **denied.**

V. <u>ORDER</u>

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:

1. Petitioners have **failed to carry their burden** of demonstrating that the City's adoption of Ordinances 4170 and 4171 (a) did not comply with RCW 36.70A.100 and .210 or was inconsistent with County-wide Planning Policies; (b) was not guided by GMA Planning Goals 1 or 12; or (c) that environmental review was inadequate as alleged in Legal Issues 4A, 4C, 4D and 4E.

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2. Petitioners' request for a determination of invalidity is **denied.**

3. The City of Kirkland's adoption of Ordinance Nos. 4170 and 4171 was **clearly erroneous** in two respects:

    - The City did not comply with RCW 36.70A.070(preamble), .070(3)(b, c) and .070(6)(a)(iv) as set forth under Legal Issues 1 and 2.
    - The City's SEPA review is deficient as set forth in Legal Issue 4B.

4. Therefore the Board **remands** Ordinance Nos. 4170 and 4171 to the City of Kirkland with direction to the City to take legislative action to comply with the requirements of the GMA and SEPA as set forth in this Order.

5. The Board sets the following schedule for the City's compliance**:**

- The Board establishes **April 5, 2010,** as the deadline for the City of Kirkland to take appropriate legislative action.

- By no later than **April 19, 2010**, the City of Kirkland shall file with the Board an original and three 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**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners and Intervenor. 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 **April 30, 2010**,[24] the Petitioners may file with the Board an original and three copies of Response to the City's SATC, simultaneously serving copies of the Response on the City and Intervenor.

- By no later than **May 7, 2010**, the City may file and serve a Reply to the Petitioners' Response.

- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. May 13, 2010,** at a location to be announced. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Kirkland takes the required legislative action prior to the April 5, 2009, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

[24] April 30, 2010, 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.

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So ORDERED this 5th day of October, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
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.[25]

[25] 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)

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APPENDIX A

Chronology of Procedures in CPSGMHB Consolidated Case No. 09-3-0007c

On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza Corporation (collectively, **Petitioners**). The two matters were consolidated and assigned Consolidated Case No. 09-3-0007c, referred to as *Davidson Serles v. City of Kirkland*.[26]

Davidson Serles and Continental Plaza challenge the City of Kirkland's (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the City's Comprehensive Plan and development regulations with respect to an 11.5 acre parcel of land owned by Touchstone Corporation, which has intervened [**Touchstone** or **Intervenor]**.[27] Petitioners are owners of two adjoining pieces of commercial property.

On February 24, 2009, the Board issued a "Notice of Hearing and Consolidation" in the above-captioned cases. The Order set a date for a prehearing conference and established a tentative schedule for the consolidated case.

On March 2, 2009, the Board received "Touchstone Motion to Intervene" (**Touchstone Motion**).

In their Petitions for Review, the two Petitioners assert that only the superior court, and not the Board, has authority to vacate a SEPA determination and to invalidate agency action retrospectively for violation of SEPA.[28] The City and Touchstone maintain that the Board has primary jurisdiction over SEPA challenges to the comprehensive plan and zoning code, but that Petitioners lack standing to bring a SEPA challenge. On March 17, 2009 the Presiding Officer sent a memo to the parties posing questions to be discussed at the PHC regarding jurisdiction and standing.

Prehearing Conference

On March 26, 2009, the Board conducted the prehearing conference at the Board's Offices in Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, conducted the conference. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were also present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental. Richard Hill appeared for potential Intervenor Touchstone Corporation. Robin Jenkinson represented Respondent City of Kirkland. A.P. Hurd (Touchstone) also attended.

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[26] Edward G. McGuire served as the initial presiding officer in this matter. Upon Board member McGuire's retirement from state service on April 30, 2009, Board member Margaret A. Pageler became Presiding Officer.

[27] The challenged ordinances also involve two other proposals referred to as the Orni and Altom proposals. Petitioners do not challenge the Orni and Altom portions of the Ordinances. HOM, at 31-32.

[28] These two ordinances and related enactments were challenged by these Petitioners on other grounds in King County Superior Court under Cause No. 09-2-02204-6 SEA.

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The City of Kirkland presented the Board and the parties with copies of Kirkland's "Index of the Record," listing 690 items.

The first matter of business was consideration of the Touchstone Motion to Intervene. None of the parties objected to intervention and the Presiding Officer orally granted the motion.

The Board laid out a briefing schedule and date for a telephonic hearing to consider on motions the threshold legal issues of jurisdiction and standing. The Board then reviewed its procedures for the hearing, including the exhibits and supplemental exhibits; dispositive motions; the Legal Issues to be decided; and a final schedule of deadlines.

The Board further discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The parties indicated that they were willing to pursue settlement negotiations and requested a 45-day settlement extension. At the close of the prehearing conference, the parties presented the Board with such a request signed by the parties.

The Board issued its Order on Intervention, Order Granting Settlement Extension, and Prehearing Order on March 30, 2009.

On May 14, 2009, the City of Kirkland filed an Amended Index to the Record and submitted its Core documents as follows:

- Kirkland Comprehensive Plan
- Final Environmental Impact Statement
- Capital Improvement Program 2009-2014

Motions

The following cross-motions, responses, and rebuttals were timely filed:

- Memorandum by Davidson Serles and Continental Plaza on SEPA Jurisdiction and SEPA Standing [**Petitioners' Opening**]
- City's Motion to Dismiss SEPA Claims [**City Motion – Dismiss**]
- Touchstone Motion to Dismiss SEPA Claims [**Touchstone Motion – Dismiss**]
- City's Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA Standing [**City Response**]
- Touchstone Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA Standing [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza in Opposition to Motions to Dismiss SEPA Claims [**Petitioners' Reply**]
- City's Reply to Petitioners' Response on SEPA Standing [**City Reply**]
- Touchstone Reply to Petitioners' Response on SEPA Standing [**Touchstone Reply**]
- Motion to Supplement the Record by Davidson Serles and Continental Plaza [**Petitioners' Motion – Supplement**]
- City's Opposition to Petitioners' Motion to Supplement Record [**City Opposition – Supplement**]

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- Reply by Davidson Serles and Continental Plaza in Support of Motion to Supplement the Record [**Petitioners' Reply – Supplement**]

The Board conducted a hearing on motions by teleconference on June 1, 2009, from 10:00-11:00 a.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. A.P. Hurd of Touchstone also attended. The hearing provided the Board the opportunity to explore legal questions in the case.

On June 10, 2009, the Board issued its Order on Motions, finding that the Board has jurisdiction over the SEPA issues raised and granting Petitioners' motion to supplement the record.

Briefing and Hearing on the Merits

Each of the parties timely filed briefing on the merits as follows:

- Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners' PHB**]
- City's Prehearing Brief [**City Response**]
- Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]

The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill, City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works David Godfrey, and transportation engineer Thang Nguyen.

Each of the parties, without objection, provided the Board with illustrative handouts at the hearing. The handouts were admitted as HOM Exhibits and are listed in Appendix B.

Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The Board ordered a transcript of the hearing, which was received on August 18, 2009, and is referenced herein as **HOM.** The hearing provided the Board the opportunity to explore legal questions in the case.

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At the hearing, Board member Earling requested that the City provide the Board with a listing of staff memoranda and power points provided to the City Council after July 1st. The City subsequently filed a set of documents received by the Board on August 27, 2009.[29]

[29] Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

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APPENDIX B

Handouts at the Hearing on the Merits

Handouts provided by Petitioner Davidson Serles – **Admitted as HOM Exhibit 1**

A. Comprehensive Plan, p. IX-22 "Transportation Facility Plan"

B. Planned Action Ordinance Mitigation Measures, Ordinance 4175, Ex. B (annotated by Petitioners to show projects listed in the Capital Facilities Plan)

C. Excerpts from FEIS at 3-21 to 3-23; Excerpts from Ex. 672, at 2

D. Excerpts from Ordinance 4175, section 3d(4)(e) and City impact fee ordinance, KZC 27.04.030

E. RCW 82.02(2), (3), (4); citation to *Bothell v. Snohomish County*, CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sep. 17, 2007), at 21.

F. Citation to *Strahm v. City of Everett*, CPSGMHB Case No. 05-3-0042, Final Decision and Order (Sep. 15, 2006), at 30; Excerpt from King County Comprehensive Plan Policies; Petitioners' table of jobs and housing surplus capacity in the Kirkland Plan

G. RCW 36.70A.215

Handouts provided by Petitioner Continental Plaza – **Admitted as HOM Ex. 2**

A. WAC 197-11-060

B. Excerpts WAC 197-11-440(5)

C. Excerpts RCW 43.21C.240

Handouts provided by Intervenor Touchstone – **Admitted as HOM Exhibit 3**

A. RCW 36.70A.070(3) and (6) excerpts

B. DEIS tables: 2014 Concurrency Assessment, 2022 Concurrency Assessment, and 2014 Traffic Impact Analysis

C. DEIS Figure 3.4-2 and 3.4-2 (annotated by Intervenor)

D. Kirkland 2004 Comprehensive Plan Capital Facilities Plan excerpts

E. FEIS, Attachment 2 to Comment Letter 23

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