

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

	)	
KENT C.A.R.E.S. and DON B.	)	<b>Case No. 03-3-0012</b>
SHAFFER, individually,	)	
	)	<i>(Kent C.A.R.E.S. III)</i>
Petitioner,	)	
	)	<b>FINAL DECISION AND ORDER</b>
v.	)	
	)	
CITY OF KENT,	)	
	)	
Respondent.	)	
	)	

**I. CASE SYNOPSIS**

Petitioner Kent C.A.R.E.S. and Donald B. Shaffer challenged the City of Kent’s adoption of Ordinance No. 3639, which amended the City’s development regulations governing the administrative modifications of planned unit development/planned action ordinance actions. Among their allegations, Petitioner contended that the amendments constituted violations of the Growth Management Act’s goals and requirements relative to public participation, protecting property rights from arbitrary and discriminatory actions, and ensuring predictability in the development permit process.

The Board agreed with the City that the challenged ordinance does not violate the public participation goals and requirements of the GMA and affirmed that cities have the authority to delegate to administrators the flexibility and discretion to modify development permit conditions, subject to certain provisos. However, the Board agreed with Petitioner that the City’s ordinance was not sufficiently clear in establishing the process and criteria to be used by the administrator when differentiating minor modifications from major modifications.

The Board has remanded the ordinance to the City and directed that legislative action be taken to bring it into compliance with the goals and requirements of the Growth Management Act. Due to the narrow scope of the noncompliance, and the ease with which it may be cured, the Board did not invalidate the Ordinance and instead gave Kent until March 31, 2004 to correct the flaw.

**II. PROCEDURAL HISTORY**

On June 4, 2003, the Central Puget Sound Growth Management Hearings Board (**CPSGMHB** or the **Board**) received a Petition for Review (**PFR**) from Kent C.A.R.E.S., Northwest Alliance, Inc, and Don B. Shaffer (**Petitioner, Kent C.A.R.E.S. or Shaffer**). The matter was assigned Case No. 03-3-0012,

and is hereafter referred to as *Kent C.A.R.E.S. III v. City of Kent*. Board member Lois H. North was assigned as the Presiding Officer for this matter. Petitioner challenge the adoption by the City of Kent (**Respondent, City or Kent**) of Ordinance No. 3639. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA or the Act**).

On July 3, 2003, the Board received the Respondent's Index to the Record.

On July 7, 2003 the Board conducted the Prehearing Conference at the Board's Office, 900 4<sup>th</sup> Ave., Suite 2470, Seattle. Board member Lois H. North, presiding officer in this matter, conducted the conference. Petitioner Don B. Schaffer appeared *pro se*. Representing the City was Kim Adams Pratt. Also in attendance were the Board's Legal Externs Simi Jain and Lynette Meachum. After a review of the legal issues, the schedule and other procedural matters, the presiding officer indicated that the prehearing order would be issued by July 10, 2003.

On July 7, 2003 the Board issued the Prehearing Order setting forth the Final Schedule and the statement of eleven Legal Issues.

On July 14, 2003 the Board received "Respondent's Motion to Dismiss For Lack of Service of Process, Standing and Jurisdiction." Four exhibits accompanied the motion.

On July 21, 2003 the Board received "Petitioner's Response to Respondent's Motion to Dismiss" with two exhibits.

On July 28, 2003, the Board received "Respondent's Petitioner's Reply to Petitioner's Response."

On July 31, 2003, the Board issued "Order on Motions" (the **Order on Motions**). The Order on

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Motions **dismissed** Legal Issues 5, 10 and a portion of 11 for Lack of Jurisdiction.

On August 28, 2003, the Board received "Petitioner's Prehearing Brief" (the **PHB**).

On September 22, 2003, the Board received "Respondent's Prehearing Brief" (the **City's Response**).

On September 29, 2003, the Board received "Petitioner's Petitioner's Reply to Respondent's Prehearing Brief" (the **Petitioner's Reply**).

The Board conducted the Hearing on the Merits in this matter on October 6, 2003 in the conference room on the 24<sup>th</sup> floor of the Bank of California Building, 900 Fourth Avenue in downtown Seattle.

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Present for the Board were Edward G. McGuire and Joseph W. Tovar, presiding officer.

Representing Petitioner was Donald B. Shafer, appearing *pro se*. Representing the City of Kent was Kim Adams Pratt. Also present for the City was Charlene Anderson. Court reporting services were provided by Brenda J. Steinman of Mills and Lessard, Seattle. No witnesses testified.

### **III. FINDINGS OF FACT**

1. The Kent City Council adopted Ordinance No. 3639 on April 1, 2003. PFR, Exhibit A.
2. The caption of Ordinance No. 3639 reads: “AN ORDINANCE of the city council of the city of Kent, Washington, amending section 15.08.400(I) of the Kent City Code, regarding planned unit developments, to provide a process for the modification of master plans located in commercial, office, and manufacturing zones consistent with planned action ordinances and development agreements.” *Id.*
3. Section 1 of Ordinance No. 3689 reads as follows, with deletions shown in strikethrough and additions shown in underlining:

*I. Modification of plans.* Requests for modifications of final approved plans shall be made in writing and shall be submitted to the planning ~~services office~~ department in the manner and form prescribed by the planning manager. In commercial, office, and manufacturing zones, determination of minor and major modifications in master plans consistent with a planned action ordinance and development agreement shall be made at the sole discretion of the planning manager. Criteria for determining minor and major modifications in all other cases shall be as stated in subsection I(1) and I(2) below. The criteria for approval of a request for a major modification shall be those criteria covering original approval of the permit which is the subject of the proposed modification.

1. *Minor modifications.* Modifications are deemed minor if all the following criteria are satisfied.
  - a. No new land use is proposed.
  - b. No increase in density, number of dwelling units or lots is proposed.
  - c. No change in the general location or number of access points is proposed.
  - d. No reduction in the amount of open space is proposed.
  - e. No reduction in the amount of parking is proposed.
  - f. No increase in the total square footage of structures to be developed is proposed, and
  - g. No increase in general height of structures is proposed.

Examples of minor modifications include but are not limited to lot line adjustments, minor relocations of buildings or landscaped areas, minor changes in phase and timing, and minor changes in elevations of buildings.

2. *Major modifications.* Major adjustments are those which, as determined by the

planning manager, substantially change the basic design, density, open space or other similar requirements or provisions. Major adjustments to the development plans shall be reviewed by the hearing examiner. The hearing examiner may review such adjustments at a regular public hearing. If a public hearing is held, the process outlined in subsection (F) of this section shall apply. The hearing examiner shall issue a written decision to approve, deny or modify the request. Such a decision shall be final. Any appeals of this decision shall be in accordance with KCC 12.01.040.

*Id.*

#### **IV. STANDARD OF REVIEW/BURDEN OF PROOF/deference**

##### **A. Board Review of Local Government Decisions**

Petitioner Kent C.A.R.E.S. challenges The City's adoption of Ordinance No. 03-006 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance Nos. 03-006, is presumed valid upon adoption by the City. Kent C. A.R.E.S. bears the **burden of proof** of overcoming the City's **presumption of validity** by presenting evidence and argument that demonstrates clear error.

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

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the City in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn. App. Div. II, 2001). In 2002, the Supreme Court affirmed the Court of Appeals decision in *Cooper Point. Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

##### **B. Judicial Review of Board Decisions**

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be “qualified by experience or training in matters pertaining to land use planning.” The Board has been endowed by the legislature with quasi-judicial

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functions due to its expertise in land use planning. Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency’s interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

*Id.*

#### **v. board jurisdiction**

The Board finds that Petitioner’s PFR was timely filed, pursuant to RCW 36.70A.290(2); that Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the remaining legal issues, pursuant to RCW 36.70A.280(1)(a).

### **VI. LEGAL ISSUES**

#### **Prefatory Note**

Although the PHO listed eleven legal issues, two of these issues, and a portion of a third, were dismissed by the Order on Motions. The remaining nine legal issues are addressed below. In response to the briefing of the parties, the Board has grouped its discussion and analysis of these legal issues.

#### **A. LAND USE ASSUMPTIONS**

##### **Legal Issue No. 2**

***Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to include and consider transportation “land-use assumptions”? [RCW 36.70A.020 and .070]***

##### **1. Applicable Law**

The Petitioner did not specify in the PFR or briefing which of the thirteen planning goals listed in RCW

36.70A.020 are relevant to this issue. Nor did the Petitioner reference which portion of RCW 36.70A.070 (*i.e.*, the preamble, as opposed to subsections (1) through (9)) is at issue.

## **2. Discussion**

### **a. Positions of the Parties**

#### Kent C.A.R.E.S.

Petitioner states that, by its explicit wording, the amendments apply with regard to “commercial land uses, office land uses, and/or manufacturing land uses” but argues:

However, these land uses interrelate to other land uses in the city, such a transportation, public and utilities land uses, service land uses, resource land uses, cultural, entertainment, and recreational land uses, and residential land uses. Petitioner argue that it is difficult, if not impossible, to consider a proposed plan modification concerning commercial, office, or manufacturing land uses without their [sic] being some functional interconnection to other land uses, as defined by the City Zoning Code, but excluded from the amendment language.

PHB, at 6.

#### City of Kent

The City assumes that Petitioner is concerned with Goal 3 because “that is the only planning goal that refers to transportation” and that the reference to “land use assumptions” means that Petitioner are concerned about the transportation element (*i.e.*, RCW 36.70A.070(6)). City’s Response, at 5-6. The City points out that Ordinance No. 3639 does not amend the transportation element of the Kent comprehensive plan and argues that the ordinance “in no way changes any land use assumptions made by the City in its Comprehensive Plan.” City’s Response, at 6.

### **b. Analysis**

The Board agrees with the City that it is difficult to understand Petitioner’s arguments with regard to Legal Issue No. 2. City’s Response, at 6. It may be, as the City surmised, that Kent C.A.R.E.S. is specifically concerned about noncompliance with planning goal 3 and Subsection (6) of RCW 36.70A.070. It is impossible to tell from the issue as stated, and the City’s surmise, though logical, requires deductive reasoning.

The burden of proof in a GMA challenge is the petitioner’s to carry, and fundamental to doing so successfully is pointing to *which* statutory provision is the focus of an allegation of noncompliance. Because Petitioner do not meet this most basic of requirements with respect to Legal Issue No. 2, they fail to carry the burden of proof.

Moreover, even if the Board were to conclude that this legal issue implicates RCW 36.70A.020(3) and RCW 36.70A.070(6), this claim fails. The Board notes that RCW 36.70A.060(7) applies only to comprehensive plans and amendments thereto, not development regulations and their amendment. Ordinance No. 3639 amends the City’s development regulations with respect to certain planned unit development permits. Finding of Fact 2.

### **3. Conclusions re: Legal Issue No. 2**

The Board concludes that the Petitioner have **failed to carry the burden of proof** relative to Legal Issue No. 2.

## **B. PUBLIC PARTICIPATION**

### **Legal Issue No. 1**

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to “encourage the involvement of citizens in the planning process” and ensure community coordination to “reconcile conflicts”? [RCW 36.70A.020(11)]*

### **Legal Issue No. 3**

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to set up provisions for ensuring adequate enforcement of development regulations (including civil and criminal penalties)? [RCW 36.70A.140]*

### **Legal Issue No. 4**

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to provide for “early and continuous” public “open discussion” in “the development and amendment” of “proposals and alternatives” prior to adoption? [RCW 36.70A.140]*

### **Legal Issue No. 5**

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to provide for “consideration of and response to public comments”? [RCW 36.70A.140]*

### **Legal Issue No. 7**

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with the mandate to involve the public at the “earliest possible time” to begin with the “visioning process in which the public is*

*invited to participate in a broad definition of the kind of future to be sought for the community”?*  
[RCW 36.70A.140/WAC365-195-600]

## **1. Applicable Law**

RCW 36.70A.020(11) provides:

Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed

## **2. Discussion**

### **a. Positions of the Parties**

Kent C.A.R.E.S.

Petitioner groups arguments addressing Legal Issues Nos. 1, 3, 4, 5, and 7 under the heading of “Non-Compliance with the GMA Prior to Adoption.” Petitioner asserts:

A key principle of the GMA mandates that the City, when reviewing a proposed amendment to the City’s Comprehensive Plan or the adoption of a development regulation encourage [rather than discourage or restrict] citizen involvement in the process. In addition, such citizen involvement should provide early and continuous opportunity for the public to interact with the City. Under the GMA [RCW 36.70A.140] the City should have earnestly considered the comments from the public and the City should have generated

actual responses to the comments received prior to passing Ordinance No. 3639 . . . [and] work to reconcile conflicts within the community.

PHB, at 2-3.

Kent C.A.R.E.S. complains that the City's process, as modified by Ordinance No. 3639, provides no "mechanism for ongoing interaction with the public regarding decisions dictated by the planning manager." PHB, at 3. Petitioner contends that the amendatory language is vague, inviting alternative interpretations of the word "zones" for example (PHB, at 4-5) and that the phrase "determination of minor and major modifications in master plans" could be read to be either "disjunctive or conjunctive." PHB, at 5. Petitioner expresses concern that the City's administrator could interpret such language in a way that would "totally restrict all public comment regarding large-scale, multi-phase, master-planned PUDs" contrary to RCW 36.70A.140. *Id.*

Finally, Petitioner points to RCW 36.70A.020(5) to argue that the amendments do not "promote economic opportunities" for all citizens, but instead confer that benefit only "on the friends of City Hall." PHB, at 6. Kent C.A.R.E.S. further contends that the amendments violate RCW 36.70A.020 (6) because they would "compromise" the ability of property owners outside the area of a PUD master plan to protect their property rights. *Id.*

### City of Kent

In refuting the Petitioner's public participation claims, the City cites to the record of citizen input regarding Ordinance No. 3639, including a public hearing before the City Council on April 1, 2003 and the City's Land Use and Planning Board on September 23, 2002. City's Response, at 3. Grouping its response Petitioner's arguments regarding Legal Issues 1, 4, 5 and 7, the City argues:

Contrary to Petitioner's argument, the City is not compelled to "generate actual responses" to the public comments received. In the case of, the petitioners argued that the County had not complied with the GMA because the county did not specifically answer petitioners' individual questions or provide them with an explanation of how the County responded to petitioners' comments. The Board [in *Bremerton*] held that a "response may, but need not, take the form of an action, either a modification to the proposal under consideration, or an oral or written response to the comment or question."

City's Response, at 3-4, Citing *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (February 8, 1999), at 24. Emphasis omitted.

In responding to the arguments regarding Legal Issue No. 3, Kent cites a more recent Board case for the proposition that a petitioner's mere "dissatisfaction and disappointment with the decision made by the City does not mean that the City did not comply with RCW 36.70A.140." City's Response, at 4, citing *Montlake Community Club v. City of Seattle*, CPSGMHB Case No. 99-3-0002c, Final Decision and Order (July 30, 1999), at 9. In response to the Kent C.A.R.E.S. contention that Ordinance No. 3639 is

flawed because it allegedly lacks “adequate enforcement of development regulations” the City points out that no enforcement provision is listed in RCW 36.70A.140. Therefore, the City reasons, Petitioner can demonstrate no breach of a non-existent duty. *Id.*

The City contends that Petitioner misstates Legal Issue No. 3 in its Prehearing Brief., attempting to insert for the first time the argument that the Ordinance violates RCW 36.70A.140 because it does not require “ongoing interaction with the public” and “an opportunity to appeal.” City’s Response, at 5. Kent points out that no such requirement exists in the statute, nor appears in Legal Issue No. 3. Finally, the City disputes the relevance of the Petitioner’s complaint that the City declined the Petitioner’s offer to discuss the issues at settlement conference proposed by Kent C.A.R.E.S. *Id.*

### **b. Analysis**

The Board agrees with the City on every point raised under these five legal issues. The record shows that the City met its obligations under RCW 36.70A.140 to afford public participation opportunities to the public in general and to Petitioner in particular. The City correctly observes that the Board has previously held that a local government has no GMA duty to provide a specific response, either written or oral, to each comment or criticism offered by members of the public. Likewise, the GMA imposes no duty upon a local government to “meet with petitioners” for the purposes of discussing their comment, nor within the context of a potential settlement conference. While the Board commonly inquires whether the parties might wish to avail themselves of other Boards’ resources in order to pursue settlement, nothing in the Act, the Board’s rules or orders mandates that a local government engage in settlement conference proceedings. Likewise, a local government decision to decline to participate in such proceedings does not constitute a violation of RCW 36.70A.140.

The “ongoing interaction with the public” that Petitioner describes is, in fact a GMA objective, certainly with respect to the process of developing and considering adoption of comprehensive plans and development regulations. RCW 36.70A.140. However, Petitioner’s arguments seem to suggest that the GMA mandates that such “ongoing interaction” continue into the permit processing, issuance and enforcement phases, including the consideration of possible amendments. This is a mistaken impression. Once the highly discretionary and public participation-intensive legislative process culminates in the adoption of plans and regulations, the opportunity for “public participation” is greatly reduced, and rightly so. The “timeliness” and “predictability” that must be assured by the development permit process (RCW 36.70A.020(7)) would be thwarted if a city were obliged to engage in the kind of “ongoing interaction” during the permit phase that Petitioners’ describe.

### **3. Conclusions re: Legal Issues Nos. 1, 3, 4, 5 and 7**

The Board concludes that the Petitioner have **failed to carry the burden of proof** with regard to legal issues Nos. 1, 3, 4, 5 and 7.

## C. FAIR PERMIT PROCESSING AND NONDISCRIMINATORY ACTIONS

### Legal Issue No. 6

*Did the City of Kent in its adoption of subject Ordinance No. 3639 fail to comply with the mandate that the City's permit applications be processed in a "fair manner"? [RCW 36.70A.020(7)]*

### Legal Issue No. 8

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to be fair and non-discriminatory in the City's promotion of "economic opportunity"? [RCW 36.70A.020(5)]*

### Legal Issue No. 9

*Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with the mandate to protect private property owners from arbitrary and discriminatory actions? [RCW 36.70A.370/RCW 36.70A.020(6)]*

#### 1. Applicable Law

RCW 36.70A.020(5) provides:

Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

RCW 36.70A.020(6) provides:

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

RCW 36.70A.020(7) provides:

Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

#### 2. Discussion

### **a. Positions of the Parties**

#### Kent C.A.R.E.S.

Petitioner identify a common thread among these three legal issues as “mandating that development regulations under the GMA be written so as to be non-discriminatory, non-arbitrary, and fair.” PHB, at 7. Petitioner argue that the City’s planning manager could act in an unreasonable manner, approve modifications that financial benefit a master plan developer, but not other property owners, and that there are inadequate safeguards for review of adverse environmental impacts. PHB, at 6.

Petitioner argues that the amendments render the City’s PUD modification process vague and confusing, vest too much authority in an administrator, and improperly insulate modification decisions from the public’s review, comment and appeal. Petitioner summarizes this position as follows:

Petitioner assert that regulations concerning proposed modifications to a multi-acre, multiple land use, multiple-phased PUD project to be consistent with the GMA should work to provide additional public participation opportunities rather than work to exclude public participation . . . [the Ordinance] would give totalitarian power to a City employee to classify even the most significant modifications of a PUD Master Plan to be “minor modifications” which would then allow that employee to amend the formal conditions of approval without any opportunity for public objection or appeal.

Petitioner’s Reply, at 3.

#### City of Kent

Kent disputes Petitioner’s allegations and characterizations. The City asserts:

Contrary to Petitioner’s allegations, Ordinance No. 3639 does not give the planning manager unrestrained power. The amendment . . . did not change the requirement that the hearing examiner, after a public hearing, will still decide whether to approve, modify, or deny all major modification. When asked by the City Council after the public hearing whether this amendment would change the public process, the planning manager explained that it would not.

City’s Response, at 7.

With respect to minor modifications, the City contends:

Under the amendment, the planning manager only has this authority [to approve minor modification] when the planning manager is already working within the confines and the restrictions imposed by the PAO, the PAO’s EIS, and a development agreement. These

documents would have already gone through extensive public process. RCW 36.70B.200, RCW 43.21C.031.

City's Response, at 7-8.

### **b. Analysis**

Many of Petitioner's arguments about "fairness" revisit prior City actions, including actions not

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presently before the Board. It is outside the scope of the present matter for the Board to opine on the lawfulness or advisability of alleged actions or motives of the City or its employees. Here, the Board looks only to the specific language of Ordinance No. 3639 in order to determine whether, on its face, that legislation fails to comply with the cited statutes.

Before taking up the arguments of the parties, it is useful to note that the Board has previously examined questions related to the discretion delegated to administrators. In *Pilchuck Audubon Society, et al., v. Snohomish County [Pilchuck]*, CPSGMHB Case No. 95-3-0047, Final Decision and Order, (Dec. 6, 1995), the Board stated:

The successful delegation of such decisions to administrators will depend largely upon the diligence, competence and judgment of the individuals that local governments place in such roles, yet it is not the place of this Board to make personnel decisions, nor to evaluate their performance.

What is within our realm are the development regulations that provide administrators with clear and detailed criteria so that, in wielding professional judgment, the Director has regulatory "sideboards" and policy direction. Failure to provide such parameters does not just place an administrator in an uncomfortable position — it would undermine, perhaps fatally, the duty of the legislative body to articulate in its adopted development regulations its expectations and requirements with regard to critical areas protection.

*Pilchuck*, at 36.

More recently, the Board examined the discretion of a local government to authorize its administrator to consider extensions to the life of an approved development permit. In *Olson, et al., v. City of Kenmore (Olson)* CPSGMHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003), the Board stated;

The Board notes that the addition of the extension process "diminishes" the predictability originally set forth in KCC 21A.41.100 (A) and (B). Nonetheless, it is clearly within the City of Kenmore's discretion to determine whether it desires a permit extension process or not, and to establish the criteria for granting, denying or otherwise limiting the frequency or duration of such extensions.

*Olson*, at 7, footnotes omitted.

From the *Olson* and *Pilchuck* holdings, the Board gleans that the GMA does not preclude a local government from adopting development regulations that delegate to administrators a degree of flexibility in making modifications to approved permits. However, the Board's *Olson* reasoning makes clear that, in order for an administrator to wield such discretion, he or she must be guided by a specific process and criteria for doing so. To delegate such authority without providing the necessary "direction and sideboards" to guide an administrator's discretion would constitute a substantive noncompliance

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with both RCW 36.70A.020(6) and (7). To paraphrase and amplify the above-cited *Olson* holding, the Board holds:

**It is within a local government's discretion to determine whether or not it desires a development permit modification process and whether that process will be administrative as opposed to quasi-judicial; however, in doing so, it must establish the process and criteria for granting, denying or otherwise limiting the frequency, scope or duration of such modifications. Development regulations that fail to do so may be in substantive noncompliance with RCW 36.70A.020(6) (7).**

Here, the City of Kent has authorized its administrator, the planning manager, at his or her "sole discretion" to determine what proposed modifications to certain permits (*i.e.*, permits that have been issued pursuant to an adopted planned action ordinance and development agreement) shall be considered to be minor. In response to the allegation that there are no criteria to guide the planning manager in the exercise of his/her discretion, the City contends that the range of discretion is limited by the fact that such modification requests must be "consistent" with "a planned action ordinance and development agreement." City's Response, at 2.

While "consistency" is a laudable goal, in this context it does not provide clear and unambiguous direction about the scope and nature of discretion reserved to an administrator evaluating whether a modification request to permit conditions is "minor" as opposed to "major." There is a sharp contrast between vague direction to "be consistent" with an approved permit and clear delineation of the criteria

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to be used to guide administrative discretion.

Applying the above holding to Ordinance No. 3639, the Board agrees with Petitioner that the City's ordinance does not establish a GMA-compliant process and criteria to guide the administrator in differentiating minor from major modifications. Ordinance No. 3639, as written, authorizes the planning manager, in wielding his or her sole discretion, to approve or require modification of conditions of an approved PAO/development agreement permit – yet it does so without providing the City's administrator with clear direction about what process and criteria are to be employed to determine whether a proposed modification is a minor or major one. Absent spelling out such criteria in the development regulation itself, or, alternatively spelling out in the development regulation that each PAO/development agreement permit must include specific criteria to guide subsequent

administrative determinations regarding minor/major modifications, the City's modification provisions fail to comply with RCW 36.70A.020(6) and (7).

The Board finds and determines that Ordinance No. 3639 is **clearly erroneous** and is **in noncompliance** with RCW 36.70A.020(6) and (7) and will remand it to the City to take legislative action consistent with the requirements of the GMA as interpreted in this Order.

### 3. Conclusions re: Legal Issues Nos. 6, 8 and 9

The Board concludes that the Petitioner have failed to carry the burden of proof with regard to legal issue No. 8. The Board concludes that the Petitioner have carried the burden of proof with regard to Legal Issues Nos. 6 and 9 which allege noncompliance with RCW 36.70A.020(7) and (6), respectively. The Board finds the City's action **clearly erroneous** and issues to the City of Kent a **finding of noncompliance** for Ordinance No. 3639. The Board will remand the Ordinance to the City for legislative action to cure the defect.

## VIII. invalidity

### 1. Applicable Law

RCW 36.70A.302 provides in relevant part:

(1) A board may determine that part or all of a comprehensive plan or development regulations 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 . . .

### 2. Discussion

While Petitioner did allege noncompliance with a number of GMA goals (RCW 36.70A.020(5), (6), (7), and (11)), their prayer for relief points to no specific goal that will be thwarted by the continued validity of Ordinance No. 3639 during the period of remand. PFR, at 3; PHB, at 10; Petitioner's Reply, at 4-5. The City's Response brief does not speak directly to the question of invalidity, instead arguing that the Board should not even reach the question of noncompliance, which finding would be precedent to considering the question of invalidity.

With respect to the narrow and specific noncompliance alleged in Legal Issues 6 and 9, *supra*, the Petitioner has carried the burden of proof to show that Kent Ordinance No. 3639 failed to be guided and did not substantively comply with RCW 36.70A.020(6) and (7). The Board has remanded the

Ordinance for the City to amend it to bring it into compliance with the goals and requirements of the Act.

### 3. Conclusions re: Invalidity

The Board has found Kent's adoption of Ordinance No. 3639 **noncompliant** with RCW 36.70A.020(6) and (7). The Board believes that it has provided the City with a reasonable amount of time to make the relatively minor but necessary revisions to the ordinance to achieve GMA compliance. There is no evidence in the record to suggest that there is a danger of inappropriate vesting during the period of remand. Therefore, the Board **declines** to enter a determination of invalidity for Ordinance No. 3639.

### **Ix. ORDER**

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. The Board issues the City of Kent a **finding of noncompliance** with RCW 36.70A.020(6) and (7) with regards to Ordinance No. 3639, and remands it to the City with the following direction.
2. The Board establishes **4:00 p.m. on Wednesday, March 31, 2004** as the deadline for the City of Kent to take appropriate legislative action to achieve compliance with the goals and requirements of the GMA as interpreted and set forth in this Order.
3. By **Wednesday, April 7, 2004, at 4:00 p.m.**, or within one week of taking the legislative action described in paragraph 2 above, whichever comes first, the City shall submit to the Board, with a copy to the Petitioner, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.
4. By **Wednesday, April 21, 2004, at 4:00 p.m.**, or within two weeks of receiving the SATC, whichever comes first, the Petitioner shall submit to the Board, with a copy to all opposing counsel, an original and four copies of any Response to the SATC.
5. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m. on Monday, May 3, 2004**. The Compliance Hearing will be held at the Board's offices at 900 Fourth Avenue, Suite 2470, in Seattle, WA. In the event that the City takes legislative action earlier than the date established in paragraph 2 above, the Board will issue a subsequent Order setting the revised date for Compliance Hearing.

So ORDERED this 1st day of December 2003.

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

**APPENDIX A – RE-NUMBERED LEGAL ISSUES PURSUANT TO THE ORDER ON MOTIONS**

LEGAL ISSUE No. 1: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to “encourage the involvement of citizens in the planning process” and ensure community coordination to “reconcile conflicts”? [RCW 36.70A.020(11)]

LEGAL ISSUE No. 2: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to include and consider transportation “land-use assumptions”? [RCW 36.70A.020 and 070]

LEGAL ISSUE No. 3: Did the City of Kent in its adoption of Ordinance No. 3639 fail to set up provisions for ensuring adequate enforcement of development regulations (including civil and criminal penalties)? [RCW 36.70A.140]

LEGAL ISSUE No. 4: Did the City of Kent in its adoption of Ordinance No. 3639 fail to provide for “early and continuous” public “open discussion” in “the development and amendment” of “proposals and alternatives” prior to adoption? [RCW 36.70A.140]

~~LEGAL ISSUE No. 5: Did the City of Kent in its adoption of Ordinance 3639 fail to comply with requirements to “provide the public with timely information and meaningful opportunities for participation” including “site-specific public participation plans” with regard to toxic cleanup efforts within the areas impacted by Ordinance? [RCW 36.70A.020/WAC 173-340-600/RCW 70.105D/ KCC 11.02]~~

LEGAL ISSUE No. ~~6~~ 5: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to provide for “consideration of and response to public comments”? [RCW 36.70A.140]

LEGAL ISSUE No. ~~7~~ 6: Did the City of Kent in its adoption of subject Ordinance No. 3639 fail to comply with the mandate that the City’s permit applications be processed in a “fair manner”? [RCW

36.70A.020(7)]

LEGAL ISSUE No. 8 ~~7~~: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with the mandate to involve the public at the “earliest possible time” to begin with the “visioning process in which the public is invited to participate in a broad definition of the kind of future to be sought for the community”? [RCW 36.70A.140/WAC365-195-600]

LEGAL ISSUE No. 9 ~~8~~: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to be fair and non-discriminatory in the City’s promotion of “economic opportunity”? [RCW 36.70A.020(5)]

~~LEGAL ISSUE No. 10: Did the City of Kent in its adoption of Ordinance 3689 fail to comply with the mandate not to withhold from the general public documents pertinent to issues under consideration within said Ordinance? [RCW 36.70A.020 and RCW 42.17]~~

LEGAL ISSUE No. 11 ~~9~~: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with the mandate to protect private property owners from arbitrary and discriminatory actions ~~and/or unconstitutional, non-compensated takings?~~ [RCW 36.70A.370/RCW 36.70A.020(6)]

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[1]

Appendix A lists all eleven original legal issues. Strikethroughs show portions that were dismissed by the Order on Motions and the remaining issues are renumbered to nine.

[2]

On August 1, 2003, Joseph W. Tovar became the Presiding Officer for this case due to Ms. North’s retirement effective that date.

[3]

The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board’s website at [www.gmhb.wa.gov/central/index.html](http://www.gmhb.wa.gov/central/index.html).

[4]

For example, Petitioner complains that the City made “no effort to reconcile conflicts or respond to comments relating to . . . Kent C.A.R .E.S. II.” PHB, at 3.

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[5]

For example, if a development regulation were to grant to an administrator, explicitly or implicitly, the authority to *post-*

*hoc* impose or remove conditions or restrictions of an approved permit, *absent clear direction about process and criteria in that permit*, both Goal 6 and 7 would be undermined. Such a legislative enactment could well constitute an “arbitrary” as well as “discriminatory” action (*i.e.*, a violation of Goal 6), to say nothing of thwarting, rather than ensuring, “predictability” (*i.e.*, a violation of Goal 7.) For further Board discussion relative to the interplay of Goal 7 with local government development regulations, see *King County, et al., v. Snohomish County, et al. [King County]*, Final Decision and Order, (Oct. 13, 2003), at 15-16.

[6]

An example of the latter appears at the end of the amended paragraph describing the criteria used in “all other cases” (“ . . . The criteria for approval of a request for a major modification shall be those criteria covering original approval of the permit which is the subject of the proposed modification.”) Finding of Fact 3.