

**SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING**

WASHINGTON STATE DEPARTMENT OF ECOLOGY and	)	CPSGMHB Case No. 05-3-0034
WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT,	)	( <i>DOE/CTED</i> )
	)	
Petitioners,	)	
and	)	
	)	[King County Superior Court Case No. 06-2-16675-2 KNT – Honorable Brian Gain -and- King County Superior Court Case No. 06-2-16933-6 KNT – Honorable Jay D. White]
LIVABLE COMMUNITIES COALITION,	)	
	)	
Intervenor,	)	
	)	
v.	)	
	)	
CITY OF KENT,	)	
	)	
Respondent,	)	<b>CERTIFICATE OF APPEALABILITY</b>
and	)	
	)	
MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,	)	
	)	
	)	
Intervenors,	)	
and	)	
	)	
WASHINGTON ASSOCIATION OF REALTORS, and CITIZENS ALLIANCE FOR PROPERTY RIGHTS,	)	
	)	
	)	
<i>Amici Curiae.</i>	)	
	)	

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**I. APPLICATIONS FOR CERTIFICATES OF APPEALABILITY**

On April 19, 2006, the Central Puget Sound Growth Management Hearings Board (**Board**) issued its Final Decision and Order (**FDO**) in CPSGMHB Case No 05-3-0034. The Respondent City of Kent (**City** or **Kent**) and Intervenors Master Builders Association of King and Snohomish Counties and Building Industry Association of Washington (**MBA/BIAW**) appealed the decision to King County Superior Court.

The case arose as follows. Chapter 36.70A RCW – the Growth Management Act (**GMA**) – requires cities and counties to identify critical areas and adopt development regulations protecting their functions and values: the regulations are to be updated at five-year intervals, based on best available science (**BAS**). Pursuant to the requirement of RCW 36.70A.130, on April 19, 2005, the City of Kent (**City** or **Kent**) adopted Ordinance No. 3746 (the **Ordinance** or **CAO**), updating its critical areas regulations. With respect to wetlands, the City made no change to the classification or buffer requirements in place within the City since 1993 but reenacted the former provisions. The City’s record contained **BAS** assembled and analyzed by the City’s own qualified expert, Adolfson Associates, Inc.,<sup>1</sup> including the science summarized by the Department of Ecology in *Wetlands I* (2004).<sup>2</sup>

The Washington State Department of Ecology (**DOE**) and the Washington State Department of Community, Trade, and Economic Development (**CTED**) filed a timely challenge to various portions of the wetlands regulations in the City of Kent’s CAO. MBA/BIAW intervened on behalf of the City.

On April 19, 2006, the Board issued its Final Decision and Order (**FDO**). The Board found that Kent’s wetlands rating system was based on a 1979 schema<sup>3</sup> that does not account for the *functions* of wetlands: water quality, hydrology, and wildlife habitat. The Board further found that the regulatory *protections* for wetlands in the Kent CAO were not supported by BAS in the City’s record. The Board determined that these aspects of Kent’s Ordinance were clearly erroneous and non-compliant with the requirements of RCW 36.70A.040(3)(b), .060(2), .170, and .172(1) and were not guided by GMA goals RCW 36.70A.020(9) and (10). Despite this determination, the Board did not invalidate Kent’s Ordinance but remanded it, directing Kent to take legislative action to comply with the GMA as set out in the Board’s Decision.

On June 16, 2006, the Board received the “City of Kent’s Application for Direct Review by Court of Appeals and Request to the Central Puget Sound Growth Management Hearings Board for Issuance of a Certificate of Appealability” and accompanying “Declaration of Michael C. Walter” in King County Superior Court Case No. 06-2-16933-6 KNT.

On June 28, 2006, the Board received “Order of Certification for Direct Review by the Court of Appeals,” entered by the Honorable Brian Gain June 22, 2006, in King County Superior Court Case No. 06-2-16675-2 KNT. On June 29, 2006, the Board received from MBA/BIAW “Petitioners’ (1) Application for Certification by the King County Superior

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<sup>1</sup> Adolfson, *Best Available Science Issue Paper: Wetlands* (April 2003, updated April, 2004), and supplemental memoranda. See, FDO, at 8.

<sup>2</sup> The Department of Ecology in 2004 issued a three volume analysis and recommendations concerning wetlands: *Washington State Wetland Rating System for Western Washington; Freshwater Wetlands in Washington State, Volume I: A Synthesis of the Science (Wetlands I)*; *Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands (Wetlands II)*.

<sup>3</sup> Cowardin, et al., *Classification of Wetlands and Deepwater Habitats of the United States (1979)*. See, Ordinance Section 11.06.580.

Court for Direct Review by Court of Appeals and (2) Request to the Central Puget Sound Growth Management Hearings Board for Issuance of a Certificate of Appealability,” and accompanying “Declaration of Robert D. Johns.”

On June 30, 2006, the Board received from MBA/BIAW “Notice for Discretionary Review to the Washington State Court of Appeals, Division I” in Consolidated Case No. 06-2-16675-2 KNT.

## **II. AUTHORITY AND ANALYSIS**

RCW 34.05.518(3) identifies growth management boards as “environmental boards,” and establishes the following criteria for certification of appealability:

(b) An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

(i) Fundamental and urgent statewide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

RCW 34.05.518(4) requires a board to state in its certificate of appealability “which criteria it applied [and] explain how that criteria was met.”

This Board reviews the present requests for certification in light of each of these criteria. Although it is a close question, the Board makes the determination that delay is detrimental to the public interest. The next two criteria – fundamental and urgent statewide or regional issues and significant precedential value – are questionable. The Board finds that although the proceeding is unlikely to have significant precedential value, there are fundamental regional issues raised.

### *Would delay in determining the issues be detrimental?*

1. Delay *is not* detrimental to builders and developers.

By Ordinance 3746, the City of Kent readopted its pre-existing wetlands regulations. The Board’s FDO found these regulations non-compliant with the BAS in the City’s record; however, the Board *did not invalidate* the Ordinance. The assertions by the City of Kent and MBA/BIAW that development is in limbo during the pendency of this appeal are therefore mistaken. Developers may continue to vest to Kent’s wetlands regulations, as they have been doing for over twelve years, until such time as Kent brings its regulations into compliance with the GMA.<sup>4</sup>

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<sup>4</sup> Kent in all likelihood will seek a stay of the Board’s order during the pendency of any appeal. Developers can be expected to welcome the delay, as it stretches out the time during which they can vest projects based on outdated wetlands protections.

2. Delay *is not* detrimental to other Central Puget Sound cities and counties.

RCW 36.70A.130 required Central Puget Sound counties and cities to update their development regulations, including critical area protections, by no later than December 1, 2004, a date which was Legislatively revised last year to December 1, 2005. With the exception of Snohomish, every other Central Puget Sound county has completed that task.<sup>5</sup> Central Puget Sound cities have also already enacted or should have enacted their updated regulations.<sup>6</sup> The City of Kent asserts that other cities are awaiting the determination of this case. If that is true, the Board must conclude that these cities do so in violation of statutory deadlines. Any city or county that has complied with the legislative deadline will not be detrimentally affected by delay in determining the City of Kent's issues, as that city's or county's development regulations have already been enacted.

Similarly, any jurisdiction that may have adopted wetlands regulations similar to those held non-compliant in the Board's present ruling, but whose CAO update was not challenged within 60 days of publication, is no longer subject to challenge. Under the GMA, the unchallenged regulations of cities and counties are presumed valid; thus other cities and counties face no uncertainty and no detriment from a delay in review of the present case.

3. Delay *may be* detrimental to the public interest.

The public has two interests that may be detrimentally impacted by delay. The first is the public's interest in preserving wetlands and the environmental "functions and values" they provide.<sup>7</sup> Because the Board did not invalidate Kent's Ordinance and because the Board anticipates that the City of Kent will seek a stay of the Board's order, valuable wetlands within the City of Kent, such as the upper Soos Creek watershed and the Green River Valley, will be at continued risk of degradation during the pendency of the appeal.

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<sup>5</sup> The Board has heard and decided challenges to the CAO updates of King and Pierce Counties. *See, Keesling IV v. King County*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005); *Tahoma Audubon Society, et al., v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005). Challenges to Kitsap County's CAO update are currently pending in *Hood Canal, et al., v. Kitsap County*, CPSGMHB Case No. 06-2-0012c.

<sup>6</sup> Cities whose CAO updates have been challenged before this Board in 2005-2006 include Mukilteo, Tacoma, Bainbridge Island, Shoreline, and Seattle.

<sup>7</sup> *See generally, Ventures Northwest v. State*, 81 Wn. App. 363 (Div. II 1996) (Finding that it does not appear to be in the public interest to degrade wetland habitat and water quality with no mitigation to compensate for lost wetland values and functions); *Executive Order 90-04* (1990) (Stating that wetlands provide ecological as well as economic benefits to the State and it is in the public interest to protect the functions and values of wetlands); *Executive Order 89-10* (1989) (Stating that wetlands conservation is a matter of state concern); *RCW 90.58*, wetlands are defined as "shorelands" and protected by the Act as a valuable and fragile nature resource for which unrestricted development is not in the best public interest.

The second interest that may be detrimentally affected is the public's interest in certainty in land use matters.<sup>8</sup> As stated more fully below, the City of Kent and MBA/BIAW are challenging the Board's case-by-case approach to CAO decisions and the Board's reliance on and application of appellate and Supreme Court CAO decisions. Additionally, the appropriate role of state agencies – here, DOE and CTED – in providing advice or expertise to local governments is at issue. Delay in determining these issues may prolong uncertainty.

**The Board concludes that delay in determining the issues will be detrimental to the public interest.**

*Would the proceeding have significant precedential value?*

The Board adjudicates CAO challenges on a case-by-case basis; therefore the **Board concludes that the proceeding is unlikely to have significant precedential value.** Following the three-part test approved in *Ferry County*,<sup>9</sup> the Board reviews the particular science in the record of the challenged jurisdiction. For example, the BAS for marine shoreline “fish and wildlife habit” in one jurisdiction was a near-shore survey commissioned by the jurisdiction itself to identify salmon habitat along its entire coast line (*Tahoma Audubon v. Pierce County*, cited *supra*, fn. 5); another jurisdiction might rely on general federal agency designations for marine shoreline habitat identification (*Hood Canal v. Kitsap County*, cited *supra*, fn. 5). Since the Board uses a case-by-case analysis, the Board does not impose a single scientific formulation on every jurisdiction.<sup>10</sup>

In the Kent record, wetlands BAS was contained in the reports of the City's expert, Adolfson Associates, and in the DOE's *Wetlands I and II*. However, the Board's ruling concerning the particular science in the City of Kent's records is *not a precedent* that requires every city to use the same documents. While Central Puget Sound cities can hardly ignore such widely disseminated information as DOE's *Wetlands I and II*, they are permitted to generate their own studies, as King County did in adopting its CAO (see, *Keesling IV v. King County*, cited *supra*, fn. 5), or to rely on other sources that meet the criteria for BAS laid out in WAC 365-195-905.

Similarly, the Board's ruling regarding Kent's decision to rely on other regulations and programs besides buffers to protect wetlands was based on the specific facts of the case; viz, the absence of BAS in Kent's record ensuring that wetland functions and values would be protected by these other regulations and programs. A similar question arose in *Keesling IV*, the King County CAO challenge, where the record was very different. Keesling objected to King County's action that incorporated updated protections for critical areas in revised provisions of its Surface Water Management Ordinance and its

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<sup>8</sup> See generally, *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997); *W. Main Associates v. Bellevue*, 106 Wn.2d 47 (1986); *Hull v. Hunt*, 53 Wn. 2d 125 (1958) all recognizing the need for certainty and fairness in land use development.

<sup>9</sup> *Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.,2d 824, at 834, 123 P.3d 102 (2005).

<sup>10</sup> Each jurisdiction is required to consider best available science, under the *Ferry County* three-part test. 05334 DOE/CTED v. City of Kent (July 11, 2006)

Clearing and Grading Ordinance, as well as in its Critical Areas Ordinance. The Board upheld King County's use of multiple regulations, where the County could point to (a) thorough scientific analysis that identified the specific wetlands protections that could be provided through means other than buffers and (b) corresponding revisions to its clearing and grading regulations and its stormwater regulations, as well as to its critical areas ordinance. *Keesling IV*, at 20-21, 26, 31-32.

The Board's ruling in the present case *does not create a precedent* that requires a particular wetland rating system, wetland buffer width, or use of state agency science documents as BAS. So long as there is competent science in the city's or county's record, the Board does not impose any particular wetland ranking system or buffer width as a "bright line." The Board construes state agency guidelines and input to local jurisdictions as instructive, but not a mandate. Despite the fact that DOE's *Wetlands I and II* are guidelines, not mandates, the volumes may provide the best available science on wetlands in the record of a particular local jurisdiction (see, e.g., *Pilchuck V v. City of Mukilteo*, CPSGMHB Case No. 05-3-0029, Final Decision and Order (Oct. 10, 2005). In addition, WDFW, USGS, and other state and federal agencies may provide science to inform and guide CAO decision-making. In *Ferry County*, *supra*, the Court concluded that the county should not have disregarded the input of WDFW for critical habitat identification. In the present case, the City of Kent, like many larger Puget Sound jurisdictions, had the work of its own qualified BAS consultant in conjunction with the information provided by DOE and other agencies.<sup>11</sup> Thus, because the Board's review of CAO challenges is based on a case-by-case analysis that does not prescribe any particular study or regulatory regime as BAS for all jurisdictions, there is *little if any precedential value* in review of the Board's Kent FDO.

*Fundamental regional issues are raised.*<sup>12</sup>

The Board bases its Certificate of Appealability on the Board's belief that the present case raises the following fundamental regional issues:

1. Should the Board continue to adjudicate CAO challenges on a case-by-case basis?
2. Should the Board utilize the three-part *Ferry County* test for inclusion of BAS, and was the test properly applied?
3. Did the Board correctly apply the *Quadrant*<sup>13</sup> distinction between goals and requirements of the GMA?

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<sup>11</sup> Kent's consultant did not advocate a wetland ranking system that incorporated all three wetland functions and values, as recommended by DOE. However, Kent's consultant agreed with DOE that, particularly in light of Kent's truncated wetland ranking system, the buffer widths adopted by Kent were not within the range of BAS.

<sup>12</sup> The issues are *regional*, and not *statewide*, because the Growth Management Hearings Boards are set up on a regional basis and are expected to construe and apply the GMA in recognition of regional differences.

<sup>13</sup> *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

4. Was the Board correct in modifying the *Ferry County* test by adding a fourth component – justification for departure – based on *WEAN*?<sup>14</sup> Did the Board correctly apply the *WEAN* standard in determining that the City’s record did not support its deviation from BAS?

5. May individual cities in the Central Puget Sound region choose to “opt out” of protection for wetlands and justify the opt-out by an appeal to the high price of housing in the region?

6. Should the Board retain its own scientists, as allowed in RCW 36.70A.172(2), to review the science relied on by local jurisdictions in CAO cases?

### **III. CONCLUSION**

Applying the above criteria, the Board issues this Certificate of Appealability of its Final Decision and Order in CPSGMHB Case No. 05-3-0034, a copy of which is attached.

Dated this 11th day of July, 2006

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

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<sup>14</sup> *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 93 P.3d 885 (2004).