

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 CENTRAL PUGET SOUND REGION  
3 STATE OF WASHINGTON  
4

5 FOSV, et al.

6  
7 Petitioners,

**CASE No. 20-3-0004c**

8 v.

**ORDER ON DISPOSITIVE MOTIONS**

9  
10 KING COUNTY,

11 Respondent.  
12  
13

14 **I. INTRODUCTION**

15 This matter comes before the Board pursuant to numerous motions and other  
16 pleadings filed by the parties. The Board has before it the following submittals from the  
17 parties:  
18

- 19 • Petitioners' Joint Dispositive SEPA Motion and Request for Invalidity.<sup>1</sup>  
20 (Petitioners' SEPA MTD)
- 21 • King County's Motion for Partial Summary Judgment.<sup>2</sup> (County's PMSJ)
- 22 • King County's Response to Petitioners' Dispositive Motion.<sup>3</sup> (County's Response  
23 to SEPA MTD)
- 24 • Futurewise's Response to King County's Motion for Partial Summary Judgment.  
25 (FW Response to PMSJ)<sup>4</sup>
- 26 • FOSV's Response to County's Motion for Summary Judgment and Cross-Motion  
27 for Partial Summary Judgment.<sup>5</sup> (FOSV Response to PMSJ and Cross-Motion)
- 28 • King County's Consolidated Reply to Responses to County's Motion for Partial  
29 Summary Judgment (County's Reply)<sup>6</sup>

30 \_\_\_\_\_  
31 <sup>1</sup> Filed April 20, 2020. Errata providing corrected footnote citations were filed April 21, 2020.

<sup>2</sup> Filed April 20, 2020.

<sup>3</sup> Filed April 29, 2020.

<sup>4</sup> Filed April 29, 2020.

<sup>5</sup> Filed April 29, 2020 and incorporating by reference FW Response to PMSJ.

<sup>6</sup> Filed May 6, 2020.

- Petitioners' Joint Reply In Support of Dispositive SEPA Motion. (Petitioners' Reply)<sup>7</sup>

## II. BACKGROUND

The challenged action is Ordinance 19030 amending the County's development regulations concerning wineries, breweries, distilleries (WBD) and similar adult beverage uses, establishing demonstration project locations and criteria, establishing business licensing regulations, and modifying citation penalties for wineries, breweries, distilleries and remote tasting rooms.<sup>8</sup>

In 2018, the County was aware of 54 wineries, breweries, and distilleries in unincorporated King County, of which apparently only 4 were legally permitted.<sup>9</sup> To address the problem, the Council funded the Sammamish Valley Wine and Beverage Industry Study<sup>10</sup> in 2016 to consider the industry's "interface with local communities."<sup>11</sup>

Per the language of the Ordinance itself, there was "a need to bring adult beverage industry development regulations up to date with state licensing allowances. In particular, a state winery allowance for off-site tasting created confusion for business owners regarding the interplay between state licensing requirements and county land use regulations."<sup>12</sup> The action was taken "after a multiyear study of the adult beverage industry" necessary to evaluate existing zoning regulations for the adult beverage industry in light of changes in industry practices, ... and the growing popularity of adult beverage industry across King County ..."<sup>13</sup> One goal was to "minimize the ambiguities in existing development regulations ... to improve clarity, administrative efficiencies and enforceability while avoiding confusion for the industry users that may have been caused by lack of consistency with state

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<sup>7</sup> Filed May 6, 2020.

<sup>8</sup> KC-CTRL-0001: Staff report to King County Council (December 4, 2018).

<sup>9</sup> While the study was ongoing, "the County's permitting department ... signed status quo agreements with some of the adult beverage businesses in which the businesses acknowledged that aspects of their uses were not fully code compliant and agreed not to increase areas of non-compliance." County Response to SEPA Motion at 6.

<sup>10</sup> (Bates GMHB-00055799): King County Sammamish Valley Wine and Beverage Study (September 2016).

<sup>11</sup> County Response to SEPA at 5.

<sup>12</sup> Finding C, Ordinance 19030 at 2-3.

<sup>13</sup> Finding D, Ordinance 19030 at 3.

1 regulatory systems.”<sup>14</sup> The Ordinance establishes one demonstration project to evaluate  
2 “the presence of remote tasting rooms in Rural Area zoned land in the Sammamish valley  
3 ... an area where businesses are supported by nearby small-scale agriculture” and “relies  
4 on a pastoral setting and a rural sense of community for economic viability.”<sup>15</sup> Thus the  
5 State Route 202 corridor was deemed “an ideal place to test the demonstration project’s  
6 ability to support businesses that are primarily nonurban in nature...”<sup>16</sup>  
7

### 8 III. DISPOSITIVE MOTIONS

9  
10 The Growth Management Act provides for dismissal of frivolous petitions or where a  
11 person filing the petition lacks standing.<sup>17</sup> Under the Board’s Rules of Practice and  
12 Procedure, dispositive motions on a limited record to determine the board’s jurisdiction, the  
13 standing of a petitioner, or the timeliness of the petition are permitted. The Petitioners have  
14 moved for summary judgment, a dispositive motion under WAC 242-03-555. Although the  
15 Board does not often entertain such motions, they are appropriate when, based on a limited  
16 record, they do not involve disputed facts and turn primarily on questions of law.<sup>18</sup> Here, the  
17 challenge involves the issuance of a Declaration of Nonsignificance (DNS) and, as this  
18 Board stated in *Reading*: “A procedural challenge to State Environmental Policy Act (SEPA)  
19 compliance; particularly one involving a DNS would lend itself to resolution by dispositive  
20 motion.”<sup>19</sup>  
21

22 Under Washington Superior Court Civil Rule 56 a motion for summary judgment may  
23 be granted when the moving party shows that there is no genuine dispute as to any material  
24 fact and that, construing the facts and inferences in the light most favorable to the  
25 nonmoving party, the movant is entitled to judgment as a matter of law.  
26  
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29 \_\_\_\_\_  
30 <sup>14</sup> Finding E, Ordinance 19030 at 3.

31 <sup>15</sup> Finding X, Ordinance 19030 at 11.

32 <sup>16</sup> Finding X, Ordinance 19030 at 12.

<sup>17</sup> RCW 36.70A.290(3).

<sup>18</sup> See *Twin Falls, Inc. v. Snohomish County*, CPSGMHB No. 93-3-0003 (Order on Dispositive Motion, June 11, 1993) at 17-18. *Reading, et al. v. Thurston County*, WWGMHB No. 94-2-0019c (Order on Dispositive Motions, December 22, 1994).

<sup>19</sup> *Reading* at 3.

1 **Standard of Review**

2 The County correctly asserts that actions it takes under the Growth Management Act  
3 (GMA) are to be presumed valid on adoption and entitled to deference.<sup>20</sup> The County’s  
4 discretion is not boundless, however.<sup>21</sup>

5 To prevail in a challenge before the Growth Board, the Petitioners have the burden to  
6 show that the challenged action was *clearly erroneous in view of the entire record before*  
7 *the Board and in light of the goals and requirements of the Act.* Thus, the County’s  
8 assertion that the standard is “clear and convincing evidence” is incorrect.<sup>22</sup> For the Board  
9 to find the action clearly erroneous, the Board must be left with the firm and definite  
10 conviction that a mistake has been made.”

11  
12 Additionally, SEPA requires all government agencies to consider the environmental  
13 effects of a proposed action, together with alternatives to the proposed action.<sup>23</sup> The  
14 Supreme Court has referred to SEPA as an environmental full disclosure law.<sup>24</sup> SEPA  
15 requires agencies to identify, analyze, disclose, and consider mitigation of impacts on both  
16 the natural and built environments resulting from a proposed action.<sup>25</sup> Thus, where an action  
17 rests on a threshold determination of nonsignificance (DNS), the action’s compliance with  
18 SEPA in turn rests on whether the DNS complied with the requirements of SEPA. While the  
19 County’s decision to issue a DNS is entitled to deference under RCW 43.21C.090, it is  
20 incumbent upon the County to establish a showing that “environmental factors were  
21 considered in a manner sufficient to amount to prima facie compliance with the procedural  
22 requirements of SEPA.”<sup>26</sup> Thus, in issuing a DNS, a jurisdiction *must establish prima facie*  
23 *SEPA compliance.*  
24  
25  
26  
27

28 \_\_\_\_\_  
29 <sup>20</sup> RCW 36.70A.320.

30 <sup>21</sup> *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561 (2000).

31 <sup>22</sup> County’s Response to SEPA MTD at 1.

32 <sup>23</sup> *Spokane County v. Eastern Wash. Growth Mgmt. Hearings Bd.*, 160 Wn. App. 274, 283 (2011).

<sup>24</sup> *Moss v. Bellingham*, 109 Wn. App. 6 (2001).

<sup>25</sup> RCW 43.21C.030; RCW 36.70A.035(2); *Norway Hill Pres. & Prot. Assn. v. King County Council*, 87 Wn.2d 267 (1976).

<sup>26</sup> *Chuckanut Conservancy v. Dep’t of Natural Res.*, 156 Wn. App. 274, 286 – 87 (2010); *Juanita Bay Valley Cmty. Ass’n v. Kirkland*, 9 Wn. App. 59, 73 (1973).

1 **Petitioners’ SEPA Motion and request for Invalidity**

2 Petitioners move for summary judgment on their Issue 9, arguing the County’s  
3 adoption of Ordinance 19030 failed to comply with RCW 43.21C.<sup>27</sup> In that regard, they  
4 assert that there is no genuine dispute of material fact. Although the County “specifically  
5 contests all mischaracterizations and editorializations regarding Checklist content presented  
6 as facts throughout Petitioners’ brief,”<sup>28</sup> it actually does not “specifically” contest any facts.  
7 The County repeatedly objects to “unproven code violations”, allegations, and factual  
8 representations,<sup>29</sup> but it does not identify facts in dispute. The parties do not disagree as to  
9 the timeline of events or as to the content of the Checklist, its incorporated studies and  
10 reports, or the threshold determination. **The Board concludes** that there are no disputed  
11 facts and the question is one of law.  
12

13 The essence of the Petitioners’ challenge under RCW 43.21C.030 is three-fold: (1)  
14 the threshold determination was not made as early as possible during development of the  
15 regulatory proposal as required by WAC 197-11-055; (2) the environmental checklist was  
16 insufficient to support a DNS as required by WAC 197-11-335, such that the County failed to  
17 establish a prima facie compliance with RCW 43.21C.030; and (3) the County failed to  
18 comply with SEPA because its SEPA review did not adequately disclose likely  
19 environmental impacts.  
20  
21

22 **Earliest Possible SEPA Review**

23 Petitioners allege that the County failed to timely conduct SEPA review of the  
24 challenged ordinance. Issue 9 a.  
25

26 It is evident from the record that the County realized many years ago that  
27 development pressures and actual development were increasing within the unincorporated  
28 areas outside of the City of Woodinville’s urban growth area and within the Sammamish  
29 River valley.<sup>30</sup> Considerable development in that area was in violation of the County’s  
30

31  
32 <sup>27</sup> Issue 9 appears in full in Appendix B.

<sup>28</sup> County’s Response to SEPA MTD at 11.

<sup>29</sup> *Id.* at 3, 11, 12, 14, 16.

<sup>30</sup> See KC-CTRL-0001, Metropolitan King County Staff Report (December 4, 2018) at 2.

1 development regulations.<sup>31</sup> In fact, the County's 2012 Work Plan directed the County  
2 Executive to "develop recommendations to improve the interface of the burgeoning wine  
3 industry with the surrounding communities".<sup>32</sup> The Executive's retained consultant,  
4 Community Attributes Inc. (CAI), conducted interviews and public meetings.  
5 CAI then issued the Sammamish Valley Wine and Beverage Study in September 2016  
6 which included "a series of policy recommendations" and also addressed possible  
7 infrastructure improvements.<sup>33</sup>

8  
9 The Executive then began crafting "a series of proposed policy changes".<sup>34</sup> A draft of  
10 the Executive's proposed regulations was issued in June 2017<sup>35</sup> and, following public  
11 comment, a final report (the King County Action Report) and a proposed ordinance was sent  
12 to the County Council in April 2018.<sup>36</sup> While that proposed ordinance was amended in some  
13 respects by the County Council, both the Executive's proposal and the Ordinance as  
14 adopted incorporate the same or nearly identical development regulations applicable to  
15 wineries, breweries and distilleries.<sup>37</sup>

16  
17 Issue 9a presents a question regarding the timing of the County's SEPA Checklist on  
18 April 9, 2019. WAC 197-11-055(2) states, in part:

19 (2) **Timing of review of proposals.** *The lead agency shall prepare its*  
20 *threshold determination* and environmental impact statement (EIS), if required,  
21

22 <sup>31</sup> County's Response to SEPA MTD at 6. Also Staff Report at 3:

23 ...[N]eighbors of wineries within the Sammamish Valley filed a number of code enforcement  
24 complaints for operating in violation of the zoning code and construction without required  
25 permits. The Department of Permitting and Environmental Review (DPER), knowing that the  
26 Executive would be beginning a study to look at policy recommendations, signed settlement  
27 agreements with 20 of the wineries.

28 <sup>32</sup> Staff Report at 3:

29 The funding will be used to secure consultant assistance to support the outreach, research  
30 and recommendation process. The study will focus on economic development, transportation,  
31 land use and agriculture in the Sammamish Valley area, and may also make  
32 recommendations for other parts of unincorporated King County as appropriate.

<sup>33</sup> KC-CTRL-0001, Metropolitan King County Staff Report (December 4, 2018) at 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3-4.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> The amended development regulations address, among other things, licensing, new definitions, the permitted use table applicable to wineries, breweries and distilleries and impose conditions regarding lot size, parking, hours of operation, setbacks, and allowance for special events. The Ordinance also includes provisions for a demonstration project to allow "remote tasting rooms".

1 *at the earliest possible point in the planning and decision-making process,*  
2 when the principal features of a proposal and its environmental impacts can be  
3 reasonably identified.

4 (a) A proposal exists when an agency is presented with an application or has  
5 a goal and is actively preparing to make a decision on one or more alternative  
6 means of accomplishing that goal *and* the environmental effects can be  
7 meaningfully evaluated.

8 (i) The fact that proposals may require future agency approvals or  
9 environmental review shall not preclude current consideration, as long as  
10 proposed future activities are specific enough to allow some evaluation of their  
11 probable environmental impacts.

12 WAC 197-11-784 defines the rules' use of the word "proposal":

13 **"Proposal" means a proposed action.** A proposal includes both actions and  
14 regulatory decisions of agencies as well as any actions proposed by  
15 applicants. **A proposal exists at that stage in the development of an action**  
16 **when an agency is presented with an application, or has a goal and is**  
17 **actively preparing to make a decision on one or more alternative means**  
18 **of accomplishing that goal, and the environmental effects can be**  
19 **meaningfully evaluated.** (See WAC 197-11-055 and 197-11-060(3).) A  
20 proposal may therefore be a particular or preferred course of action or several  
21 alternatives. For this reason, these rules use the phrase "alternatives including  
22 the proposed action." The term "proposal" may therefore include "other  
23 reasonable courses of action," if there is no preferred alternative and if it is  
24 appropriate to do so in the particular context. (Emphasis added.)

25 The purpose of these rules is to ensure an agency fully discloses and carefully  
26 considers a proposal's environmental impacts before adopting it and "at the earliest possible  
27 stage."<sup>38</sup> An agency may not postpone environmental analysis to a later implementation  
28 stage if the proposal would affect the environment without subsequent implementing  
29 action.<sup>39</sup>

30 Here, following the 2016 study, the Executive considered possible policy changes  
31 and, following a public review draft of regulatory changes, issued draft proposals in June  
32 2017.<sup>40</sup> Public comments were considered before the Executive sent a Final Action Report

<sup>38</sup> *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663-64, 666, 860 P.2d 1024 (1993);  
See WAC 197-11-060(4)(c)-(d).

<sup>39</sup> Richard L. Settle, *The Washington State Environmental Policy Act* § 13.01[1], at 13-16 (1987 & Supp.  
2010); See WAC 197-11-060(5)(d)(i)-(ii).

<sup>40</sup> County's Response to SEPA MTD at 7.

1 and a proposed ordinance to the Council on April 30, 2018.<sup>41</sup> The Council considered the  
2 proposal for another year before the SEPA Checklist was prepared on April 9, 2019,<sup>42</sup> and it  
3 was signed on April 24, 2019.<sup>43</sup> The SEPA Responsible Official issued a DNS on May 17,  
4 2019.<sup>44</sup> The Checklist advised that the County had set a June 12, 2019, public hearing and  
5 “The Council may make a final decision on the proposed ordinance on that day.”<sup>45</sup>

6  
7 The County and then the Council considered the “proposal” that became Ordinance  
8 19030 for nearly two and a half years before the threshold determination was made,<sup>46</sup> but  
9 the Checklist was prepared over a 15-day period and unambiguously anticipated that an  
10 EIS would not be prepared. Further, as addressed elsewhere in this order, it is evident that  
11 the proposed regulatory changes would be likely to result in potentially significant  
12 environmental impacts. The environmental effects of the proposal could and should have  
13 been meaningfully evaluated.

14  
15 **The Board finds** that the County failed to conduct an environmental review of the  
16 proposal at the earliest possible time in violation of the requirements of RCW 43.21C.030  
17 and WAC 197-11-055(2).<sup>47</sup>

### 18 19 **Sufficiency of Checklist**

20 The Petitioners argue that the Checklist provided inadequate and inaccurate  
21 information regarding the impacts of the Ordinance<sup>48</sup> and that, based on many of the  
22 responses on the Checklist, the County appears to have assumed that as a “non-project  
23 action” impacts would be properly addressed at a later date.<sup>49</sup> As a result, Petitioners  
24

25  
26 <sup>41</sup> *Id.*

<sup>42</sup> KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 2.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> The Checklist incorporated by reference the Study and the Report. County’s Response to SEPA MTD at  
27 14, 15

<sup>45</sup> IR GMHB-0019585: SEPA Checklist (April 24, 2019) at 2. Ultimately Ordinance 19030 was amended and  
28 passed on December 4, 2010. It became effective without the Executive’s Signature December 19, 2019.

<sup>46</sup> KC-CTRL-0001: Action Report at 3 states “This report is King County’s response to the policy  
29 recommendations outlined in the [CAI Wine/Beveridge Study].”

<sup>47</sup> Pursuant to RCW 43.21C.110, the Department of Ecology has promulgated rules to establish uniform  
30 requirements for compliance with SEPA, WAC 197-11-020, which are to be given substantial deference. WAC  
31 197-11-010.

<sup>48</sup> Issue 9b.

<sup>49</sup> Issue 9d.



1 contend that the County failed to disclose likely impacts on environmentally sensitive  
2 areas<sup>50</sup> and increased demands on public infrastructure such as transportation and  
3 utilities.<sup>51</sup>

4 SEPA requires that proposals for legislation such as amending zoning regulations  
5 may be defined as “nonproject actions” and, in many cases, the available information  
6 describing the impacts of a nonproject action may be less specific than information available  
7 for development of a specific project on a specific site. However, SEPA still requires that  
8 the impacts of activities authorized by legislation be evaluated so that decision-makers and  
9 the public can take the information into account when commenting on and formulating  
10 decisions regarding the proposal.  
11

12 Nonproject actions are not exempt from adequate SEPA review<sup>52</sup> and jurisdictions  
13 may not evade adequate SEPA review by deferring analysis until later stages of actual  
14 development when the principal features of a proposal and its environmental impacts can  
15 be reasonably identified.<sup>53</sup> This Board has often considered SEPA requirements in regards  
16 to nonproject actions.  
17

18 Thus, when a city amends its Comprehensive Plan or changes zoning, a  
19 detailed and comprehensive SEPA environmental review is required. SEPA is  
20 to function “as an environmental full disclosure law,” and the City must  
21 demonstrate environmental impacts were considered in a manner sufficient to  
22 show “compliance with the procedural requirements of SEPA.”<sup>54</sup>

23 The Board has long held that the impacts that must be considered for a nonproject  
24 action are the impacts that are allowed by virtue of the change in designation itself. While  
25 project level impacts may properly be deferred to the permitting stage, the jurisdiction must  
26  
27

28 <sup>50</sup> Issue 9e.

29 <sup>51</sup> Issue 9g.

30 <sup>52</sup> WAC 197-11-055(2)(a)(i): The fact that proposals may require future agency approvals or environmental  
31 review shall not preclude current consideration, as long as proposed future activities are specific enough to  
32 allow some evaluation of their probable environmental impacts.

<sup>53</sup> WAC 197-11-055. *Alpine Lakes v. Natural Resources*, 102 Wn. App. 1, 16 (1999).

<sup>54</sup> *Olympians for Smart Development & Livable Neighborhoods, et al. v. City of Olympia*, GMHB 19-2-0002c  
(Order Granting Summary Judgment, March 29, 2019) at 6 (citing *Association of Citizens Concerned About  
Chambers Lake Basin, et al. v. City of Olympia*, GMHB No. 13-2-0014 (Final Decision and Order, August 7,  
2013) at 15.

1 evaluate the impacts allowed under the changed designation at the time of that nonproject  
2 action.<sup>55</sup> If the impacts are not merely hypothetical but can be known or are reasonably  
3 foreseeable, it is incumbent upon the jurisdiction to develop and consider such  
4 information.<sup>56</sup>

5 The County maintains that the likelihood of environmental impacts is low by  
6 characterizing the effect of Ordinance 19030 as tightening “regulations on a pre-existing use  
7 category in pre-existing zone designations and does not authorize any site-specific or  
8 project level actions.”<sup>57</sup> The problem with the County’s argument is that it is describing  
9 regulations that are, in some instances, more restrictive than the development that has  
10 actually occurred in contravention of current code while it ignores the likely additional  
11 development authorized by the Ordinance, including approval of existing code violations.

12 Further, the Ordinance itself identifies the objectives of supporting the adult beverage  
13 industry and fostering related tourism.<sup>58</sup> It simply does not follow that removal of regulatory  
14 bans on previously illegal activities will not result in an expansion of these newly-allowable  
15 uses, yet the County’s Checklist responds “Not applicable for this nonproject action” for  
16 every question on the Checklist related to impacts to Earth (including steep slopes and  
17 erosion), Air (including emissions), Water (including wetlands, storm runoff, and flood plain  
18 questions despite the impacted area being both a drainage basin known to support  
19 anadromous fisheries and an agricultural valley), Plants, Animals, Energy and Resources,  
20 Environmental Health, Noise, Land and Shore Use, Housing, Aesthetics (including alteration  
21 of views and compatibility with rural character), Light and Glare (despite allowing tasting  
22 rooms and event centers), Recreation, Historic and cultural preservation, Transportation  
23 (including estimated vehicular trips and parking for patrons and services at “event centers”),  
24  
25  
26  
27

28  
29 <sup>55</sup> *WEAN v. Island County*, GMHB No. 03-2-0008 (Final Decision and Order, August 25, 2003) at 39, “The  
30 impacts that must be considered for this non-project action are the impacts that are allowed by virtue of the  
31 change in designation itself. While project level impacts may properly be deferred to the permitting stage, the  
32 County must evaluate the impacts allowed under the changed designation at the time of that non-project  
action.”

<sup>56</sup> A SEPA determination is a “detailed statement” of impacts, effects, alternatives, and resources created by  
an action the SEPA determination is evaluating”. RCW 43.21C.030(2)(c).

<sup>57</sup> County’s Response to SEPA MTD at 39.

<sup>58</sup> Finding D, Ordinance 19030 at 3.

1 Public Services (including police, fire, and public transit impacts that might be created by  
2 serving alcohol at events) and Utilities (including sanitary sewer and water). Further, despite  
3 stating “not applicable”, the Checklist itself notes that: (1) there are noise-intensive aspects  
4 of the WBD uses;<sup>59</sup> (2) WBD uses would be allowed in Agricultural and Rural Areas and a  
5 demonstration project in the Sammamish Valley Rural Area;<sup>60</sup> (3) “The proposal will go  
6 through environmental review and a public hearing process” before Council action (but the  
7 Checklist was the environmental review);<sup>61</sup> (4) most WBD business in rural unincorporated  
8 King County do not have access to sanitary sewer and utilize septic systems;<sup>62</sup> and (5) The  
9 proposal may result in additional limits on water access.<sup>63</sup>

11 As previously stated, the County’s key responsibility was to evaluate the impacts of  
12 the proposal in light of the change in *allowable uses*,<sup>64</sup> but the Checklist declines to even  
13 acknowledge areas of potential impact and utterly fails to identify necessary areas of  
14 environmental review.

16 **The Board finds** that the County’s Checklist failed to provide a detailed statement of  
17 reasonably foreseeable and cumulative environmental impacts that may result from  
18 Ordinance 19030 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

20 **Adequate Disclosure of Likely Environmental impacts.**

21 In *Spokane County v. E. Wash. Growth Mgmt. Hearings Board*,<sup>65</sup> the Court stated:

22 Under SEPA, a county must include an environmental impact statement with  
23 any proposal the lead agency's responsible official decides would “significantly  
24 affect[ ] the quality of the environment.” RCW 43.21C.030(2)(c); WAC 197-11-  
25 330(1). An agency must make this threshold determination where, as here, the  
26 proposal is an “action” and is not “categorically exempt.” Former WAC 197-11-  
27 310(1) (2003). The agency must use an environmental checklist to assist its  
28 analysis and must document its conclusion in a determination of significance

29 <sup>59</sup> KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) Question 7b(3).

30 <sup>60</sup> *Id.* Question 8e.

31 <sup>61</sup> *Id.* Question 9l.

32 <sup>62</sup> *Id.* Question 16a.

<sup>63</sup> *Id.*

<sup>64</sup> *Olympians for Smart Development & Livable Neighborhoods et al. v. City of Olympia*, GMHB 19-2-0002c (Order Granting Summary Judgment, March 29, 2019) at 7.

<sup>65</sup> *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 578-79 (2013).

1 or nonsignificance. Former WAC 197-11-315(1) (1997); WAC 197-11-340(1), -  
2 360(1).

3 The agency must base its threshold determination on "information reasonably  
4 sufficient to evaluate the environmental impact of a proposal." WAC 197-11-  
5 335. In GMA planning, the agency should tailor the "scope and level of detail  
6 of environmental review" to fit the proposal's specifics. WAC 197-11-228(2)(a).  
7 **Thus, for a nonproject action, such as a comprehensive plan amendment  
8 or rezone, the agency must address the probable impacts of any future  
9 project action the proposal would allow.** Wash. State Dep't of Ecology,  
10 *supra*, § 4.1, at 66; see WAC 197-11-060(4)(c)-(d). (Emphasis added.)

11 WAC 197-11-060(4) sets forth the impacts that should be evaluated:

12 **Impacts:**

13 (a) SEPA's procedural provisions require the consideration of "environmental"  
14 impacts (see definition of "environment" in WAC 197-11-740 and of "impacts"  
15 in WAC 197-11-752), with attention to impacts that are likely, not merely  
16 speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-  
17 080 on incomplete or unavailable information.)

18 (b) In assessing the significance of an impact, a lead agency shall not limit its  
19 consideration of a proposal's impacts only to those aspects within its  
20 jurisdiction, including local or state boundaries (see WAC 197-11-330(3) also).

21 (c) Agencies shall carefully consider the range of probable impacts, including  
22 short-term and long-term effects. Impacts shall include those that are likely to  
23 arise or exist over the lifetime of a proposal or, depending on the particular  
24 proposal, longer.

25 (d) A proposal's effects include direct and indirect impacts caused by a  
26 proposal. Impacts include those effects resulting from growth caused by a  
27 proposal, as well as the likelihood that the present proposal will serve as a  
28 precedent for future actions. For example, adoption of a zoning ordinance will  
29 encourage or tend to cause particular types of projects or extension of sewer  
30 lines would tend to encourage development in previously unsewered areas.

31 (e) The range of impacts to be analyzed in an EIS (direct, indirect, and  
32 cumulative impacts, WAC 197-11-792) may be wider than the impacts for  
which mitigation measures are required of applicants (WAC 197-11-660). This  
will depend upon the specific impacts, the extent to which the adverse impacts  
are attributable to the applicant's proposal, and the capability of applicants or  
agencies to control the impacts in each situation.

The County characterizes the Petitioners' concerns as speculative, noting that the  
SEPA Responsible Official concluded, "[N]one of the comments have identified unmitigated  
environmental impacts of the limited code changes that would result in a more than likely

1 probable significant impact.”<sup>66</sup> The County defends both the DNS and Checklist as being  
2 sufficient, incorporating the Study and Action report, and argues that the commenters failed  
3 in some essential way to provide, as an example, sufficient facts “to establish a nexus  
4 between the proposal and soil or water conditions in the Sammamish Valley area.”<sup>67</sup> The  
5 assumption is that the commenters had to prove the impact in order for the County to have  
6 a duty to consider it.  
7

8 The dissonance in this reading is stark: this determination was based on a review of  
9 the EIS for previous comprehensive plan updates<sup>68</sup> and on a Checklist that consistently  
10 takes a pass on identifying any of the impacts that may result from this change to the  
11 previously evaluated regulations. The Checklist, time and time again, relies on an allegation  
12 that the question posed is “not applicable for this nonproject action.” The Checklist answer  
13 to the query about discharges from septic tanks is illustrative of this dismissive approach to  
14 a serious question concerning ground water.  
15

16 2) Describe waste material that will be discharged into the ground from septic tanks  
17 or other sources, if any. ...

18 Not applicable for this nonproject action. No regulations governing waste disposal will  
19 be amended by this proposal.<sup>69</sup>  
20

21 The Checklist includes a supplemental sheet for nonproject actions which  
22 summarizes the County’s belief that prior studies and existing regulations are sufficient to  
23 protect the environment from any impacts of this ordinance.<sup>70</sup> However, WAC 197-11-335  
24 requires that the threshold determination be based on information “reasonably sufficient to  
25 evaluate the environmental impacts” of *this* proposal.<sup>71</sup> In contrast, Petitioners submitted  
26 multiple examples of likely adverse environmental impacts due to uses which will become  
27

28  
29 \_\_\_\_\_  
30 <sup>66</sup> King County’s Response to SEPA MTD at 1 (quoting KC-Ctrl-0001 the SEPA DNS Memorandum).

31 <sup>67</sup> *Id.* at 13.

32 <sup>68</sup> KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 2.

<sup>69</sup> KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 7-8 (April 24, 2019).

<sup>70</sup> *Id.* at 18-20.

<sup>71</sup> WAC 197-335 reads, in pertinent part: The lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal (WAC 197-11-055(2) and 197-11-060(3)).

1 allowable in the rural area under Ordinance 19030, none of which were addressed or were  
2 addressed at best in summary fashion. For example:

3  
4 *Demonstration Project*

5 The Ordinance establishes “Demonstration Project Overlay A”. Petitioners argue that  
6 the overlay is “a de facto rezone” in which “remote tasting room” sales outlets will be  
7 permitted in the Sammamish Valley Rural Area.<sup>72</sup> The Board notes that Demonstration  
8 Overlay A lies within an Agricultural Production Buffer (APD) special district overlay (SO-  
9 120) designated as an ecological buffer between agricultural land and upslope residential  
10 uses.<sup>73</sup> The Demonstration Project Overlay effectively overrides the code requirement that  
11 75% of sites be maintained as open space,<sup>74</sup> which limits impervious and compacted  
12 surfaces and helps protect the hydrology and water quality in the Sammamish Valley Rural  
13 area.<sup>75</sup> It is a notorious fact that the Sammamish River is an important migratory corridor for  
14 anadromous fish, including Chinook Salmon and Steelhead Trout listed as threatened under  
15 the Endangered Species Act, which travel to spawning habitat in its tributaries, as well as  
16 the Issaquah Hatchery.<sup>76</sup>

17  
18  
19 **The Board finds** the Checklist fails to disclose likely environmental impacts of the  
20 Demonstration Project Overlay in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

21  
22 <sup>72</sup> Petitioners’ SEPA MTD at 6-7. Petitioners allege that the Demonstration Overlay boundaries were selected  
23 to legalize current businesses operating in violation of the current code and that the Ordinance grants them  
24 permanent legal nonconforming use status effectively allowing them to continue indefinitely.

25 <sup>73</sup> KCC 21A.38.130 reads:

26 21A.38.130 Special district overlay - agricultural production buffer.

27 A. The purpose of the agricultural production buffer special district overlay is to provide a buffer  
28 between agricultural and upslope residential land uses. An agricultural production buffer special district  
29 overlay shall only be established in areas adjacent to an agricultural production district and zoned RA.

30 B. The following development standard shall apply to residential subdivisions locating in an agricultural  
31 production buffer special district overlay: Lots shall be clustered in accordance with K.C.C. 21A.14.040 and at  
32 least seventy-five percent of a site shall remain as open space, unless greater lot area is required by the  
Seattle-King County department of public health.

<sup>74</sup> *Id.*

<sup>75</sup> (Bates GMHB-0018672): Memo of Roberta Lewandowski (May 16, 2019) at 6-9; See *also*, IR GMHB-  
00055799: *2016 State of Our Watersheds*.

<sup>76</sup> The 2017 Salmon Recovery Plan Update includes four salmon enhancement projects along the stretch of  
the Sammamish River reasonably likely to be impacted by impervious surfaces in APD SO-120 buffer. IR  
GMHB-00018688: Memo of Barbara Lau to Serena Glover, Executive Director, Friends of Sammamish Valley  
(May 16, 2019) at 8.

1 *Establishing Adult Beverage Tourism District in the Rural Area*

2  
3 Ordinance 19030 allows “tasting rooms” authorized to serve alcohol by the glass and  
4 bottle, for consumption on-site, or to take away,<sup>77</sup> making them retail sales outlets intended  
5 to attract adult beverage “tourism” in the APD SO-120 buffer.<sup>78</sup>

6 Ordinance 19030 allows event centers at the largest wineries, breweries and  
7 distilleries (referred to as “WBD IIIs”) to conduct activities not allowed under current Code.  
8 For example, WBD III event centers may host groups of up to 250 people for weddings, etc.,  
9 where food and alcoholic beverages are typically served.<sup>79</sup>

10  
11 Ordinance 19030 establishes a tourist destination food and adult beverage district in  
12 a Rural Area currently designated in the Code as SO-120 to provide an environmental  
13 buffer for the Agricultural Production District.<sup>80</sup> Before allowing such uses in the Rural Area  
14 and APD, the County must comply with SEPA requirements to fully disclose likely  
15 environmental impacts.

16 **The Board finds** the Checklist fails to disclose likely environmental impacts of  
17 establishing a destination food and adult beverage tourism district in the APD buffer SO-120  
18 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

19  
20  
21 *Elimination of on-site production requirement*

22 Ordinance 19030 repeals the current Code provision that limits WBD production  
23 facilities in RA and A zones to tastings and sales of product produced on-site only and  
24 authorizes tastings and sales of alcoholic beverages that are produced at other locations  
25 (e.g. Eastern Washington). Petitioners argue that elimination of the onsite production  
26 requirement will lead to sham “Wineries”, “Breweries” and “Distilleries” that will be permitted  
27 to operate as intensive entertainment centers serving food and alcoholic beverages.<sup>81</sup> The  
28 Board agrees that elimination of the on-site production requirement disconnects the activity  
29  
30

31 <sup>77</sup> Ordinance 19030 Findings P and Q at 9.

32 <sup>78</sup> Ordinance 19030 amending KCC Sections 13-24 at 20-93.

<sup>79</sup> Ordinance 19030 amending KCC 26.B.5 at 96.

<sup>80</sup> Ordinance 19030 Sections 28-29 at 101-102.

<sup>81</sup> Petitioners’ SEPA MTD at 6-7.

1 from its agricultural nexus and may greatly facilitate the proliferation of such businesses.

2 The County was required to consider the likely environmental of such proliferation.

3 **The Board finds** the Checklist fails to disclose likely environmental impacts of  
4 elimination of the on-site production requirement in violation of RCW 43.21.030(c) and WAC  
5 197-11-060(4).  
6

7 *Reduction in minimum lot size for Wineries, Breweries, and Distilleries*

8 Ordinance 19030 allows siting of WBDs in the Rural Areas by reducing the minimum  
9 lot size from 4.5 to 2.5 acres in Rural Area 6.<sup>82</sup> Common sense dictates that this increases  
10 the number of parcels eligible for siting of WBD, but the County has not considered  
11 environmental impacts such as the increased percentage of impervious surface, etc.  
12

13 **The Board finds** the Checklist fails to disclose likely environmental impacts of the  
14 minimum lot size reduction in Rural Area 6 in violation of RCW 43.21.030(c) and WAC 197-  
15 11-060(4).  
16

17 *Using Temporary Use Permits (TUPs) to exempt WBD Event Centers from zoning*  
18 *restrictions*

19 Petitioners complain that expansion of WBD “special events” through a program of  
20 “temporary use permits” (TUP) overrides zoning limitations on: building occupancy, use of  
21 portable toilets, parking, performance stages, tents or canopies, traffic controls, and  
22 operation hours.<sup>83</sup> For the largest category of WBD in the RA zone, expansion of the prior  
23 limit of 2 winery events per month to 24 in any 365-day period (e.g., all could occur in the  
24 summer) with authority to permit up to 250 guests per event.<sup>84</sup>  
25

26 Parcels 8 acres or larger would be allowed up to 96 events per year with no monthly  
27 maximum other than overall annual average of 8 events per month; amplified sound  
28 allowed; structures used for events can be within 150 feet of rural residences.<sup>85</sup> Citing KCC  
29  
30

31  
32 <sup>82</sup> Ordinance 19030, Section 18 at 36.

<sup>83</sup> Ordinance 19030, Section 24 at 93.

<sup>84</sup> Ordinance 19030, Section 26 at 95.

<sup>85</sup> Ordinance 19030, Section 25 at 94-95.



1 21A.32.100-140, Petitioners argue that eliminating the requirement for a TUP renders the  
2 conduct of special events a permanent right to operate without regard to previously  
3 applicable Code TUP criteria including compatibility with surrounding uses, and without  
4 being subject to the requirements for annual review and for mandatory nonrenewal after five  
5 years.<sup>86</sup>

6  
7 **The Board finds** the Checklist fails to disclose likely environmental impacts  
8 exempting event centers from zoning restrictions through the use of temporary use permits  
9 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

10  
11 The Washington Supreme Court recognized the unique and threatened nature of the  
12 Sammamish Valley in *King County v. Central Puget Sound Growth Management Hearings*  
13 *Board*<sup>87</sup> and invalidated King County comprehensive plan and zoning amendments that  
14 would have allowed use of agricultural land for sports fields. The Court concluded:

15 **The soils of the Sammamish Valley APD have the unique characteristics**  
16 **of prime farmland.** The APD includes some of the most productive  
17 agricultural land in the state, but it is also among the areas most impacted by  
18 rapid population growth and development. **Even though the properties in**  
19 **this case lie in the APD, there is pressure to convert the land to**  
20 **nonagricultural uses. ...**

21 **When read together, RCW 36.70A.020(8),.060(1), and .170 evidence a**  
22 **legislative mandate for the conservation of agricultural land. ...**

23 The County's amendments, which allow active recreational uses on  
24 designated agricultural lands, do not comply with the GMA, .... Although the  
25 GMA encourages recreational uses of land, there is no conservation mandate  
26 for recreational use as with agricultural use. **In this case, the GMA mandates**  
27 **conservation of the APD's limited, irreplaceable agricultural resource**  
28 **lands.** (Emphasis added)

29  
30  
31  
32

---

<sup>86</sup> Petitioners' Reply at 3.

<sup>87</sup> *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561-63; 14 P.3d 133 (2000).

1 While the Board appreciates the County's desire to promote the economy and  
2 tourism, SEPA and its implementing regulations require it to consider the impacts of its  
3 WBD tourism proposal on the environment.

4 As the Board recently held in *Olympians*, it is imperative that jurisdictions considering  
5 nonproject actions address the probable impacts of future authorized project actions when  
6 considering significant zoning changes.<sup>88</sup> "An agency may not postpone environmental  
7 analysis to a later implementation stage if the proposal would affect the environment without  
8 subsequent implementing action."<sup>89</sup> Here, it is apparent that the County's decision was  
9 made without full consideration of the possible environmental consequences. It is apparent  
10 that information was available and/or could have been developed that would have provided  
11 much greater specificity regarding the impacts of Ordinance 19030, but the Checklist fails to  
12 provide that information and the decision makers were thus prevented from receiving the  
13 required "environmental full disclosure."<sup>90</sup> The Board is left with the firm and definite  
14 conviction that a mistake has been made as a result of the County's issuance of a DNS  
15 based on a Checklist which failed to adequately address the probable impacts of the  
16 proposed action on the natural and built environment.

17  
18  
19 **The Board finds and concludes** that the County failed to establish prima facie  
20 SEPA compliance.

21 **The Board concludes** that the County's action violated RCW 43.21C.030 and WAC  
22 197-11-060(4) by basing its issuance of a DNS on an inadequate Checklist

23  
24 **The Board finds and concludes** that Ordinance 19030 was clearly erroneous in  
25 view of the entire record before the Board and in light of the goals and requirements of the  
26 GMA and SEPA.

27  
28  
29 <sup>88</sup> *Olympians* at 10 (citing *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 579, (2013)).

30 <sup>89</sup> *Id.* citing RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT § 13.01[1], at 13-15 to -16 (1987 & Supp. 2010); see WAC 197-11-060(5)(d)(i)-(ii).

31 <sup>90</sup> The function of SEPA determinations is to have "environmental considerations become part of normal  
32 decision making." *Loveless v. Yantis*, 82 Wn.2d 754, 765, (1973). [SEPA determinations are to] provide consideration of environmental factors . . . to allow decisions to be based on complete disclosure of environmental consequences. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663, (1993)

1 Invalidity

2 Accompanying Petitioners' motion is their plea that the Board issue an order  
3 invalidating Ordinance 19030 for failure to comply with SEPA.

4 SEPA challenges address the legal adequacy of the environmental impact statement  
5 (EIS) or environmental checklist supporting a determination of nonsignificance (DNS) and  
6 the actions taken in reliance on such an environmental document, typically the enactment of  
7 an ordinance.<sup>91</sup>

8  
9 As the Court of Appeals stated in *Davidson Serles*, imposition of invalidity depends  
10 on the entire fact situation before the Board:

11 On the appropriate facts, the Board could find that failure to properly conduct  
12 the required environmental review for a city or county action interfered with  
13 fulfillment of the GMA's environmental goal and, upon such a finding, could  
14 invalidate the relevant ordinance.<sup>92</sup>

15 A local jurisdiction's authority to act is qualified by the requirements of SEPA. A  
16 determination of nonsignificance is a legal prerequisite to the City's action.<sup>93</sup> In issuing a  
17 DNS, it is incumbent upon a jurisdiction to establish *prima facie* SEPA compliance.

18 Moreover, we hold that RCW 43.21C.030(c) necessarily requires the  
19 *consideration* of environmental factors by the appropriate governing body in  
20 the course of all state and local government actions before it may be  
21 determined whether or not an Environmental Impact Statement must be  
22 prepared.

23 Thus, SEPA requires that a decision *not* to prepare an Environmental Impact  
24 Statement must be based upon a determination that the proposed project is  
25 *not* a major action significantly affecting the quality of the environment.

26 A decision by a branch of state government on whether or not to prepare an  
27 Environmental Impact Statement is subject to judicial review, but before a  
28 court may uphold such a decision, the appropriate governing body must be  
29 able to demonstrate that environmental factors were considered in a manner  
30

31 <sup>91</sup> RCW 43.21C.075(6)(c) reads, "Judicial review under this chapter shall without exception be of the  
32 governmental action together with its accompanying environmental determinations."

<sup>92</sup> *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 158  
(2010).

<sup>93</sup> *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 256 (1993).

1 sufficient to amount to prima facie compliance with the procedural  
2 requirements of SEPA.<sup>94</sup>

3 The finding of invalidity is a matter for the Board's judgment based on the record  
4 before it. Invalidity requires three separate and distinct actions by the Board:<sup>95</sup>

- 5 a) A finding of noncompliance with the Act, with an order of remand.
- 6 b) A determination that continued validity will interfere with the Act's goals.
- 7 c) Identification of the specific part of the regulation, and reason for invalidity.

8  
9  
10 *Noncompliance*

11 The Board has entered the following findings and conclusions:

- 12 **1. The Board finds** that the County failed to conduct an environmental review of the  
13 proposal at the earliest possible time in violation of the requirements of RCW  
14 43.21C.030 and WAC 197-11-055(2).
- 15 **2. The Board finds** that the County's Checklist failed to provide a detailed  
16 statement of reasonably foreseeable and cumulative environmental impacts that  
17 may result from Ordinance 19030 in violation of RCW 43.21.030(c) and WAC  
18 197-11-060(4).
- 19 **3. The Board finds** the Checklist fails to disclose likely environmental impacts of the  
20 Demonstration Project Overlay in violation of RCW 43.21.030(c) and WAC 197-  
21 11-060(4).
- 22 **4. The Board finds** the Checklist fails to disclose likely environmental impacts of  
23 establishing a destination food and adult beverage tourism district in the APD  
24 buffer SO-120 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

25  
26  
27  
28  
29 <sup>94</sup> *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73 (1973).

30 <sup>95</sup> RCW 36.70A.302(1) provides:

31 The board may determine that part or all of a comprehensive plan or development regulations  
32 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, and (c)  
Specifies in the final order the particular part or parts of the plan or regulation that are  
determined to be invalid, and the reasons for their invalidity.

- 1           **5. The Board finds** the Checklist fails to disclose likely environmental impacts of  
2           elimination of the on-site production requirement in violation of RCW 43.21.030(c)  
3           and WAC 197-11-060(4).  
4           **6. The Board finds** the Checklist fails to disclose likely environmental impacts of  
5           reducing the minimum lot size in Rural Area 6 in violation of RCW 43.21.030(c)  
6           and WAC 197-11-060(4).  
7           **7. The Board finds** the Checklist fails to disclose likely environmental impacts  
8           exempting event centers from zoning restrictions through the use of temporary  
9           use permits in violation of RCW 43.21.030(c) and WAC 197-11-060(4).  
10           **8. The Board finds and concludes** that the County failed to establish prima facie  
11           SEPA compliance.  
12           **9. The Board concludes** that the County's action violated RCW 43.21C.030(c) and  
13           WAC 197-11-335 by basing its issuance of a DNS on an inadequate Checklist.  
14           **10. The Board finds and concludes** that Ordinance 19030 was clearly erroneous in  
15           view of the entire record before the Board and in light of the goals and  
16           requirements of the GMA and SEPA.  
17  
18  
19

20           Thus, the Board has determined that King County failed to comply with SEPA RCW  
21 43.21C.030(c) and has remanded this matter to the County to achieve compliance pursuant  
22 to RCW 36.70A.300.  
23

#### 24 *Interference with GMA Goals*

25           The Board has determined that the record indicates that there was no timely  
26 consideration of the environmental impacts of the County's adoption of development  
27 regulations in violation of RCW 43.21C.030. Petitioners allege that the continued validity of  
28 the Ordinance would substantially interfere with Goals 8 and 10.<sup>96</sup>  
29

30           RCW 36.70A.020 includes the following goal language:  
31  
32

---

<sup>96</sup> Petitioners' SEPA MTD at 33. In Petitioners' Reply at 10, Petitioners reference goals 10 and 12. The Petitioner may not offer new argument in a reply brief, so references to goal 12 were disregarded.

1 (8) Natural resource industries. Maintain and enhance natural resource-based  
2 industries, including ... agricultural, and fisheries industries. Encourage the  
3 conservation of ... productive... agricultural lands, and discourage  
4 incompatible uses.

5 (10) Environment. Protect the environment and enhance the state's high  
6 quality of life, including air and water quality, and the availability of water.

7 The Petitioners point to two prior hearings board cases as offering analogy to this  
8 situation, in which environmental damage may occur if the Ordinance is allowed to become  
9 effective without environmental review. They argue that applying the principles of these  
10 cases to the instant case illustrates why the Ordinance should be found invalid.

11 In *Blair v. City of Monroe*, the Board invalidated an ordinance rezoning property  
12 without appropriate SEPA compliance where the property was “largely within critical areas  
13 and/or shorelines, and development of this property without an environmental review that  
14 properly informs the decision makers of the impacts and mitigations of the intensity of  
15 development allowed by the proposed zoning would render and moot and thwart protection  
16 of the environment.”<sup>97</sup> The Petitioners argue that environmental values at risk here in the  
17 affected RA and A zones and adjacent critical areas are similar, and permitting potential  
18 development action “without environmental review that properly informs the decision makers  
19 ... would render moot and thwart protection of the environment” substantially interfering with  
20 RCW 36.70A.020(10)’s goal of protecting the environment.<sup>98</sup> In *Orton Farms, LLC v. Pierce*  
21 *County*, the Board took note that the possibility of development proposals vesting on de-  
22 designated agricultural lands supported a finding that the ordinance substantially interfered  
23 with RCW 36.70A.020(8). As Petitioners note, a number of businesses currently operate in  
24 violation of zoning in the area and have a strong incentive to vest to the Ordinance’s  
25 provisions.<sup>99</sup> The County’s Checklist acknowledges the possibility that permit applications  
26 may be pending.<sup>100</sup>

31 \_\_\_\_\_  
32 <sup>97</sup> *Blair v. City of Monroe*, GMHB No. 14-3-0006c (FDO, August 26, 2014) at 30.

<sup>98</sup> *Id.* at 31.

<sup>99</sup> (Bates GMHB-0018672): Memo of Roberta Lewandowski at 6.

<sup>100</sup> KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 3.

1 The Board agrees. As this Board concluded above, acting without information  
2 regarding environmental effects fails to comply with both SEPA and GMA. Petitioners'  
3 argument that the County's "blinded approach here rests on a barren SEPA Checklist and  
4 an aggressively suppressive approach to recognition of impacts and Comprehensive Plan  
5 policies that bear"<sup>101</sup> is well-taken.  
6

7 *Reason for Invalidity*

8 The Ordinance's description in the SEPA DNS reflects its breadth:  
9

10 Amending King County's land use and zoning standards concerning wineries,  
11 breweries, distilleries and similar adult beverage uses. Proposed regulations  
12 affect definitions, zoning designations where uses are allowed, identifying  
13 different scales and types of uses, establishing permitting thresholds.

14 Regulations affecting access, setbacks, lot sizes, parking and requirements for  
15 production facilities and tasting rooms. Proposed regulations establishing  
16 demonstration projects locations and criteria.

17 Establishing business licensing regulations. Modifying citation penalties for  
18 wineries, breweries, distilleries and remote tasting rooms.<sup>102</sup>

19 Ordinance 19030 is an omnibus ordinance, bringing into one package a variety of  
20 actions affecting a variety of County regulatory regimes, all in an attempt to address the  
21 issues affecting the over-arching issue, the development of a coherent approach to the  
22 siting and regulation of wineries, breweries, distilleries and similar adult beverage uses.  
23 However, Sections 1-11 and 30 of Ordinance 19030 include the Council's Findings and  
24 provisions pertaining to business licensing standards, appeals before the hearing examiner,  
25 code enforcement, and civil penalties and are not amendments to the County's  
26 comprehensive plan or development regulations subject to review before the Board  
27 pursuant to RCW 36.70A.280(1)(a). The Board makes additional findings as follows:  
28  
29  
30

31 \_\_\_\_\_  
32 <sup>101</sup> Petitioners' Reply at 10.

<sup>102</sup> IR GMHB-0019585: SEPA Checklist (April 24, 2019) and IR GMHB-00019541: SEPA Determination of Nonsignificance (April 26, 2019) include at least two dozen separate regulatory actions to be taken in the proposed ordinance.

1 **11. The Board finds** that development of rural land without an environmental review  
2 that properly informs the decision makers of the impacts and mitigations as  
3 allowed by the Sections 12-29, 31, and Map Amendments #1 and #2 of  
4 Ordinance 19030 fails to maintain and enhance agricultural and fisheries  
5 industries by rendering moot and thwarting the conservation of productive  
6 agricultural land and discouragement of incompatible uses.

7  
8 **12. The Board finds and concludes** development of rural land without an  
9 environmental review that properly informs the decision makers of the impacts of  
10 the development as allowed by the Sections 12-31 and Map Amendments #1 and  
11 #2 of Ordinance 19030 fails to protect the environment, by rendering moot and  
12 thwarting protection of air and water quality and the availability of water.

13 **13. The Board finds and concludes** that the continued validity of Sections 12-31  
14 and Map Amendments #1 and #2 of Ordinance 19030 would substantially interfere  
15 with the fulfillment of the GMA Planning Goals 8 and 10.  
16

17  
18 In sum, the Board: a) determined that King County failed to comply with SEPA RCW  
19 43.21C.030(c) and remanded this matter to the County to achieve compliance pursuant to  
20 RCW 36.70A.300; b) determined that continued validity of the action will interfere with the  
21 GMA Goals 8 and 10; c) identified the noncompliant sections; and d) entered Findings of  
22 Fact and Conclusions of Law supporting invalidity as set forth above.

23 **Ordinance 19030 is declared invalid.**  
24

25 **County's and Petitioners' Motion for Partial Summary Judgment as to Issue 8 and**  
26 **Finding AA**  
27

28 *Issue 8: Does Ordinance 19030, by allowing uses characterized by the County as unlawful*  
29 *to continue to operate unlawfully "for a minimum of twelve months after the effective date of*  
30 *this Ordinance", as stated in Ordinance 19030 Finding AA, fail to implement and is it*  
31 *inconsistent with KCCP Policy I-504, and KCC 21A.32.040, and does it violate GMA*  
32 *consistency and implementation requirements including, e.g., RCW 36.7A.070, and RCW*  
*36.70A.130(1)(d)?*



1 Finding AA reads:

2 AA. The county is committed to providing fair, accurate and consistent  
3 enforcement of the regulations adopted by this ordinance. The executive  
4 expects to engage on-call consultants to conduct outreach and provide  
5 technical assistance to businesses required to comply with the new  
6 regulations. It is anticipated that some businesses may take several months to  
7 come into compliance. For businesses progressing toward compliance with  
8 the ordinance, the county does not intend to begin enforcement proceedings  
9 for a minimum of twelve months after the effective date of this ordinance.

9 The County moves the Board to “summarily dismiss” Petitioners’ appeal of Finding  
10 AA, which it states “describes the King County Executive’s prospective intent to defer active  
11 enforcement of Ordinance 19030 against adult beverage businesses making substantial  
12 progress toward code compliance for twelve months following adoption,”<sup>103</sup> on the grounds  
13 that the Board lacks jurisdiction over enforcement actions.

14 During the time that the study and ordinance were being considered, the  
15 county’s Permitting Division determined that many, if not most of the state-  
16 licensed adult beverage businesses in unincorporated King County were at  
17 least partially out of compliance with applicable regulations.<sup>104</sup>

18 The County alleges that Finding AA describes the King County Executive’s  
19 prospective intent, when prioritizing enforcement, to defer active enforcement of Ordinance  
20 19030 against adult beverage businesses making substantial progress toward code  
21 compliance for twelve months following adoption.  
22

23 Petitioners respond that the County mischaracterizes the language in Finding AA,  
24 arguing that Ordinance 19030 is a GMA development regulation over which the Board has  
25 jurisdiction and not merely “an instrument of prosecutorial discretion” adopted by the County  
26 Executive who, in fact, declined to sign the Ordinance 19030. Petitioners concede that there  
27 are no “material” facts in dispute, while disagreeing heartily with the County’s application of  
28 the facts, and asks that the Board grant their cross-motion for summary judgment to  
29 Petitioners as to Issue 8.  
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<sup>103</sup> County’s PMSJ at 1.

<sup>104</sup> *Id.* at 4, citing Combined Permitting/King County Public Health Violation Table, KC-CTRL-001436-001437:  
GMHB 70524, GMHB 70500.

1 Indeed, the County concedes, “The purpose of Finding AA of Ordinance 19030 is to  
2 amend King County’s development regulations to add clarity and enforceability to its adult  
3 beverage business regulations.”<sup>105</sup>

4 **The Board finds** that it has jurisdiction over Ordinance 19030 pursuant to RCW  
5 36.70A.280.

6 That said, having granted summary judgment in favor of Petitioners and entered an  
7 order of invalidity as to Ordinance 19030 for substantial interference with the goals and  
8 requirements of the GMA; and having remanded the Ordinance to the County to take  
9 actions to come into compliance, the Board decides that it is not in the interest of judicial  
10 efficiency to reach the merits of this issue at this time.

11 The County’s partial motion for summary judgment is **denied**.

12 Petitioners’ cross-motion for partial summary judgment is **denied**.

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15 *Conclusion*

16 Insuring decision makers are fully apprised of likely environmental consequences is a  
17 fundamental SEPA requirement and a *prerequisite* to adoption of any GMA-related  
18 legislation by local government. Given that Ordinance 91030 is totally dependent on and  
19 intertwined with the environmental goals and requirements of SEPA and GMA, Petitioners’  
20 substantive issues are not “ripe” for decision and the Board declines to address the merits of  
21 those issues at this time. Moreover, the GMA does not allow the Board to issue advisory  
22 opinions on issues not requiring resolution.<sup>106</sup> The Board remands this matter to the County  
23 to address the requirements or RCW 43.21C and 36.70A. The Board is not addressing any  
24 other substantive issues that are not yet ripe for review.<sup>107</sup>  
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29 <sup>105</sup> County's PMSJ at 9.

30 <sup>106</sup> RCW 36.70A.290(1).

31 <sup>107</sup> The Western Board in *Achen v. Clark County* stated: “Whether or not the County has complied with the  
32 GMA as to the substantive aspect of the code's adoption is not decided here because of the flaws in the  
public participation process. The manner of which Clark County adopted this code does not comply with the  
Act.” Here too, the failure of the public participation process was inextricably linked to the entirety of the  
Resolution and the matter should be remanded. *See also, Neighborhood Alliance et al. v. Spokane County  
County*, GMHB No. 13-1-0006c (Order Granting Dispositive Motion, November 26, 2013).

1 **IV. ORDER**

2 After full consideration, the Board determined to enter the following order with  
3 opinions to follow. In view of the previous briefing schedule, the Board desires to timely  
4 apprise the parties of a change in case schedule. Now, therefore, it is hereby ORDERED:  
5

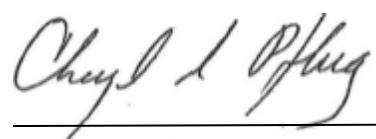
- 6 • The County’s partial motion for summary judgment is **denied**.
- 7 • Petitioners’ cross-motion for partial summary judgment is **denied**.
- 8 • Petitioners’ dispositive SEPA motion is **granted**.
- 9 • Ordinance 91030 is **remanded** to the County for actions to come into compliance  
10 with RCW 43.21C.030 and chapter 197-11 WAC.
- 11 • Sections 12-31 and Map Amendments #1 and #2 of Ordinance19030 are  
12 declared **invalid**.
- 13 • **The Board extends its waiver of the requirements of WAC 242-03-230 and**  
14 **WAC 242-03-240 to file paper copies until July 1, 2020**, although the parties  
15 are encouraged to do so if able.
- 16 • The following compliance calendar shall be in effect:  
17

Item	Date Due
Compliance Due	November 6, 2020
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	November 20, 2020
Objections to a Finding of Compliance	December 4, 2020
Response to Objections	December 14, 2020
<b>Telephonic Compliance Hearing</b> 1 (800) 704-9804 and use pin code 4472777#	<b>January 6, 2021</b> <b>10:00 a.m.</b>

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29 Length of Briefs – A brief of 15 pages or longer shall have a table of exhibits. WAC  
30 242-03-590(3) states: “Clarity and brevity are expected to assist a board in meeting its  
31 statutorily imposed time limits. A presiding officer may limit the length of a brief and impose  
32 format restrictions.” **Compliance Report/Statement of Actions Taken to Comply shall be**

1 limited to 15 pages, 25 pages for Objections to Finding of Compliance, and 10 pages  
2 for the Response to Objections.

3  
4 DATED this 26<sup>th</sup> day of May 2020.

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8 Cheryl Pflug, Board Member

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12 Deb Eddy, Board Member

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16 William Roehl, Board Member

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## Appendix A

*Issue 9. Did King County fail to be guided by RCW 36.70A.020(8) and (10) and fail to comply with SEPA, RCW Ch. 43.21C, and its regulations, WAC Ch. 197-11, including but not limited to: WAC 197-11-055(2); 197-11-060; 197-11-080; 197-11-100; 197-11 -310, 197-11-315; 197-11-330; 197-11 -335, 197-11-340; and 197-11-960:*

- a. *By failing to conduct actual SEPA review at the earliest possible time and instead issuing a DNS that continued King County's multi-year deferral of SEPA review?*
- b. *By issuing a DNS based on an inadequate and inaccurate SEPA Checklist that failed to recognize significant adverse impacts and, inter alia, assuming they were balanced out by purported benefits of the proposal?*
- c. *By issuing a DNS despite the fact that there are significant unmitigated adverse impacts associated with the Ordinance?*
- d. *By concluding that an EIS was not required on the basis that adoption of Ordinance 19030 was a "non-project action?"*
- e. *By failing to recognize how the proposal would be likely to affect environmentally sensitive areas?*
- f. *By failing to recognize how the proposal would be likely to increase demands on transportation or public services and utilities?*
- g. *By failing to identify how the proposal would conflict with laws or requirements for the protection of the environment?*