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6 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**
7 **CENTRAL PUGET SOUND REGION**
8 **STATE OF WASHINGTON**

9 **FRIENDS OF SAMMAMISH VALLEY**
10 **(FOSV) ET AL.,**

11 **Petitioners,**

12 **v.**

13 **KING COUNTY,**

14 **Respondent.**

Case No. 20-3-0004c

**PETITIONERS' DISPOSITIVE SEPA
MOTION**

15
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23 **and fail to comply with SEPA, RCW Ch. 43.21C, and its regulations, WAC Ch.**
24 **197-11, including but not limited to: WAC 197-11-055(2); 197-11-060; 197-11-**
25 **080; 197-11-100; 197-11-310, 197-11-315; 197-11-330; 197-11-335, 197-11-**
26 **340; and 197-11-960: 11**



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2 possible time and instead issuing a DNS that continued King County’s
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K.C.C. 21A.38.1305

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1 **I. INTRODUCTION/REQUEST FOR RELIEF**

2 The Friends of Sammamish Valley, A Farm in the Sammamish Valley LLC, Marshall Leroy
3 d/b/a Alki Market Garden, Eunomia Farms LLC, Olympic Nursery Inc., C-T Corp., Roots of Our
4 Times Cooperative, Regeneration Farm LLC, Hollywood Hill Association, Terry and David R.
5 Orkiolla, Judith Allen (FOSV Petitioners), and Futurewise (collectively FOSV) submit this State
6 Environmental Policy Act (SEPA) dispositive motion requesting that the Board remand King
7 County Ordinance 19030 for preparation of an EIS and that the Board make a finding of
8 invalidity.¹

10 **II. STANDARD OF REVIEW FOR DISPOSITIVE MOTIONS**

11 Dispositive motions based on SEPA grounds are akin to superior court summary judgment
12 motions pursuant to CR 56. They are appropriate when they do not involve material disputed
13 facts and largely depend on legal questions.² "A procedural challenge to State Environmental
14 Policy Act (SEPA) compliance; particularly one involving a DNS would lend itself to resolution
15 by dispositive motion."³

17 Here, the undisputed facts are that the County issued a SEPA Determination of
18 NonSignificance (DNS) on April 26, 2019 based on a SEPA Environmental Checklist signed
19
20
21

22 ¹ See FOSV et al PFR at section VI. 2., 3.,and Futurewise PFR at sections 6.1, 6.2, 6.3.

23 ² *Olympians for Smart Development at al v Olympia*, WWGMHB No. 19-2-0002c, Order Denying Motion to
24 Dismiss, Allowing Supplementation of the Record, Granting Summary Judgment, And Deferring Consideration of
25 Invalidation (March 29, 2019), at 2-3 (and cases in footnotes therein) [hereafter cited as "*Olympians*"]; see *Dry Creek
Coalition v. Clallam County*, WWGMHB No. 08-2-003, Order on Motions to Dismiss and to Modify Prehearing
26 Order (Mar. 9, 2009) at 2; *IHIF Commercial, LLC v. City of Issaquah*, CPSGMHB Case No. 18-3-0007, Order on
Motions (Sept. 17, 2019).

³ *Olympians* at 7 quoting *Reading, et al. v. Thurston County*, WWGMHB No. 94-2-0019 (Order on Dispositive
Motions, December 22, 1994) at 3.

1 April 24, 2019.⁴ By the time the Checklist was signed, the County had already established a
2 schedule that assumed no EIS would be prepared, setting a June 12, 2019 public hearing at
3 which, the Checklist advised, “The Council may make a final decision on the proposed ordinance
4 on that day.”⁵

5 This is the SEPA DNS introduction to the proposal for which no EIS was required:
6

7 **Name of Proposal:** Proposed Ordinance 2018-0241.2 - Regulations for Wineries,
8 Breweries and Distilleries.

9 **Description of Proposal:** Amending King County’s land use and zoning standards concerning
10 wineries, breweries, distilleries and similar adult beverage uses.
11 Proposed regulations affect definitions, zoning designations where
12 uses are allowed, identifying different scales and types of uses,
13 establishing permitting thresholds. Regulations affecting access,
14 setbacks, lot sizes, parking and requirements for production facilities
15 and tasting rooms. Proposed regulations establishing demonstration
16 projects locations and criteria.

17 Establishing business licensing regulations. Modifying citation
18 penalties for wineries, breweries, distilleries and remote tasting
19 rooms.

20 Additional information about the proposal can be found here:
21 <https://www.kingcounty.gov/council/issues/winery-code.aspx>

22 This itself reflects a broad, deep, and wide proposal.

23 The response to Checklist Question A.11, which asked for a “brief”⁶, complete description of
24 the proposal, including the proposed uses and the size of the project and site” still extends over
25 two pages, single spaced. It calls out various aspects of the proposal with obvious significant
26 implications, although the shorthand descriptions attempt to make them seem more or less
innocuous. Even for proposal aspects that would apply to particular areas, no further
information/disclosure of impacts is provided.

⁴ DNS is Exhibit B and the Checklist Exhibit C to the FOSV Petition for Review.

⁵ *Id.* at 2 of 20.

⁶ Emphasis added.

1 Elements of the proposal ultimately adopted in Ordinance 19030 without preparation of an
2 EIS include:

- 3 • Establishment of “Demonstration Project Overlay A,” a de facto rezone, legalizing retail
4 “remote tasting room” sales outlets in the Sammamish Valley Rural Area. Most of the
5 Ordinance’s Demonstration Overlay A area is per the King County Code an Agricultural
6 Production Buffer special district overlay (SO-120). The agricultural production special
7 district overlay is an ecological buffer protecting Valley farmland⁷, with the requirement
8 that 75% of sites be maintained as open space.⁸
- 9 • The “Demonstration Project” was gerrymandered into existence with no environmental
10 review, specifically to legalize current businesses operating in violation of the current
11 code.⁹ The Ordinance grants these businesses permanent legal nonconforming use status
12 effectively allowing them to continue indefinitely.¹⁰
- 13 • Mislabeling as “tasting rooms” facilities with far greater impacts authorized to serve
14 alcohol by the glass and bottle, for consumption on-site, or to take away. They are retail
15 sales outlets that the Ordinance legalizes in a farmland buffer.
- 16 • Establishment of event centers on certain size parcels, which allow the largest wineries,
17 breweries and distilleries (referred to as “WBD IIIs”) to conduct activities not allowed
18 under current Code.
- 19 • Repeal of the current Code provision that limits Winery/Brewery/Distillery (WBD)
20 production facilities in RA and A zones to tastings and sales of product produced on-site
21 only. This limitation is replaced with provisions that authorize tastings and sales of
22 alcoholic beverages that are produced at other locations (e.g. Eastern Washington). The
23 upshot is that sham “Wineries”, “Breweries” and “Distilleries”, will in fact operate as
24 illustrated by current illegal operations, as intensive entertainment and event centers, bars
25 and taverns – uses that until now have been restricted as illegal.
- 26 • Opens up siting of WBDs in the Rural Areas by reducing the minimum site size from 4.5
to 2.5 acres.

⁷ King County Code (K.C.C.) 21A.38.130 in Tab 21A.38.130.

⁸ K.C.C. 21A.06.819 (open space definition) in Tab 21A.06.819

⁹ A proposed Demonstration Area B was ultimately not adopted. December 2, 2019 comments to the King County Council by Susan Wilkins, President of King County Water Tenders, succinctly describes the background of the this and other elements of the proposal. Tab IR GMHB-00004775.

¹⁰ Ordinance 19030 New Section: Section 29 in Tab Ord. 19030 of the Futurewise Petition For Review; see *Id.* at subsection F3.

1 Without environmental review, the Ordinance converts the County’s failure to enforce
2 current regulations that preclude impact-intensive retail outlets and event centers from operating
3 in rural and agricultural areas, into broadly applicable law that allows these retail uses and
4 impacts in rural and agricultural areas.

5
6 The response to Checklist Question A.9 stated:

7 Adopting the proposed legislation/regulations is nonproject action. Many
8 properties within King County have pending permit applications for a variety of
9 things that could be impacted by the proposed legislation. [Emphasis added.]

10 Again, none of the “many properties” are identified categorically or specifically, nor are the
11 “pending permit applications”.

12 The most common statement in the Checklist, repeated in some form at least 80 times, is that
13 the proposal “is nonproject action,” essentially relying on that label for saying no more. ¹¹

14 This pattern of no specific information is continued throughout the Checklist including into
15 the “Supplemental sheet for nonproject actions.” There, the supplement’s admonition to “be
16 aware of the extent of the proposal, or of the types of activities likely to result from the proposal”
17 resulted in no more information than in the preceding pages.

18
19 It is the foregoing pattern, explained further in the rest of this motion, that makes this DNS
20 particularly suited for dispositive motion review.

21 III. ARGUMENT

22 A. SEPA Impacts

23
24
25 ¹¹ This is true even with regard to Demonstration Project A for which specifics are called out in Ordinance
26 19030.

1 The FOSV parties have standing based on their participation in the County’s process.¹² But
2 in any event, the FOSV parties also meet the injury in fact and zone of interests standing
3 requirements if they are applicable to this case. As is documented below, FOSV parties have
4 been injured because the development authorized by Ordinance 19030, including the existing
5 illegal uses that will be allowed, have adversely impacted surface and ground water quality due
6 to pollution from onsite septic systems, adversely impacted water quality, quantity, and salmonid
7 impacts due to increased ground water demands in basins with low flows, adversely impacted
8 farmland due to pollution and excess storm water being discharged onto fields, adversely
9 impacted plants, animals, and fish due to buildings and impervious surfaces, adversely impacted
10 traffic due to increases in trips, and adversely impacted residents through excessive noise.¹³ The
11 impacts are within the zone of interests protected by SEPA.¹⁴
12
13

14 Both the FOSV et al and Futurewise PFRs provide descriptions of the petitioners’ standing
15 based on the impacts on them. The FOSV PFR in particular reflects in detail how Ordinance
16 19030 is exceptional in that its impacts are not just future phenomena; they are current and by
17 virtue of the Ordinance will continue – now with the legal framework to intensify.¹⁵
18

19 ¹² See *Gerend v. City of Sammamish*, CPSRGMHB Case No. 19-3-0015, Final Decision and Order (April 20,
20 2020), at 9-10.

21 ¹³ IR GMHB-00018696 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *9; IR GMHB-0018674-75 in
22 Tab IR GMHB-0018672, Memo of Roberta Lewandowski pp. 3 – 5; IR GHMB-00088434, GHMB-00088527 cited
23 pages in Tab IR GHMB-00088417, 2016 State of Our Watersheds p. 18, p. 111; KC-CTRL-009491 Page 200 in Tab
24 KC-CTRL-009491, Ann Haldeman email to Councilmember Lambert.

25 ¹⁴ WAC 197-11-444(1), (2) in Tab 197-11-444.

26 ¹⁵ See, e.g., FOSV PFR at: IV.3 (“significant impacts associated with and increased by” Ordinance 19030; at
IV. 4 (“ Existing commercial activities already illegally violate these restrictions and Ordinance 19030 will
exacerbate the attendant harm.... All co-petitioner farms are on the Sammamish Valley floor, which is downslope
from the commercial activities They are all across the street from or in close proximity to commercial activities
generated by either the Ordinance 19030 “Demonstration Area” or “event centers” or “wineries, breweries,
distilleries” venues.”); IV.9 (harm “from illegally operating urban commercial-type uses that would be allowed to
continue under Ordinance 19030...”); IV.11(Co-Petitioner uses specifically and directly harmed by Ordinance

1 This distinctive aspect of the Ordinance is reflected in the Record statements from Co-
2 Petitioners, including current farming participants, about current impacts and the effects of the
3 Ordinance on them. These described the problems with the Ordinance in terms of the
4 intensification and facilitation of the impacts already being felt in the Sammamish Valley from
5 incompatible uses.

6
7 For example, a comment letter by Co-Petitioner Alki Market Garden explains:

8 *Rampant land price speculation and environmental degradation from upslope*
9 *toxic runoff are existential threats to the Valley's APD farm businesses. Public*
10 *health and safety issues are increasing because urban use businesses are*
11 *operating where commercial infrastructure - such as sewer hookup, left turn*
12 *lanes, sidewalks and lighting - does not exist. Rewarding code violators and*
13 *opening the Valley to even more urban use will only increase the negative*
14 *impacts. ...*

15 *Why is the Council supporting the narrow interests of a handful of code violators*
16 *and land speculators over the will of the people? Why is the Council skirting the*
17 *Growth Management Act which protects our designated APD farmland,*
18 *watershed and Rural Area? Please do the right thing and keep urban use*
19 *businesses out of the Sammamish Valley Rural Area neighborhoods and farmland*
20 *buffer areas.*¹⁶

21
22 Barbara Lau, a registered shareholder of Co-Petitioner Roots of Our Times Cooperative¹⁷, a
23 Sammamish Valley farm/agricultural co-op, submitted detailed comments in response to the
24 County's notice of its proposed DNS explaining the proposal's substantial aggravation of direct
25 impacts.¹⁸

26

19030 which makes Agricultural land and Rural Areas available for other, "higher" uses, and thereby exacerbates pressure for conversion of less expensive Agricultural and Rural Areas).

¹⁶ Tab IR GMHB-00008678 (October 4, 2019 email from Alki Market Garden to County (via forward by FOSV).

¹⁷ Ms. Lau is also an FOSV consultant.

¹⁸ Tab IR GMHB-00018688; see IR GMHB-00018796 in Tab IR GMHB-00018688 (Lau memo challenging County explanation of DNS and asking for its withdrawal); Transcription of County 3/11/2019 Meeting Excerpts (Lau) in Tab Transcription of County 3/11/2019 Meeting Excerpts (Video in IR GMHB-00000001); Transcription

1 Andrew Ely of Eunomia Farms, also a Co-Petitioner here, commented repeatedly to the
2 County concerning the impacts of the proposed ordinance in perpetuating and unleashing illegal
3 operations and attendant impacts that were previously, at least theoretically, subject to
4 abatement.¹⁹

5 The “theoretical” abatement aspect, demonstrating the impacts for which the Ordinance now
6 provides previously absent legal cover, is illustrated in the record by the Matthews “Winery.” A
7 sham “winery” that does not produce its wine “product” on site as the Code required, it has
8 operated at the County’s sufferance entirely as a retail outlet bar and event center and as an outlet
9 for product produced entirely in Eastern Washington. Under Ordinance 19030, the Code
10 restrictions become elastic, and legalize/facilitate the impacts of Matthews operations.²⁰

11 Ely and other farmers also participated in preparation of a video succinctly explaining the
12 impacts they already experience that would be exacerbated by the proposed ordinance.²¹ The
13
14
15
16
17

18 of County 6/12/2019 Hearing excerpts (Lau: repeating need for EIS) in Tab Transcription of County 6/12/2019
19 Hearing Excerpts (Video in IR GMHB-00000001).

20 ¹⁹ See, e.g. Tab IR GMHB-0086576_129 (March 6, 2019 Andrew Ely email to County Executive); Tab IR
21 GMHB-00088395 (March 11, 2019 email from Ely to CM Dembowski); Tab IR GMHB-00007782 (Ely to King
22 County: “Changing current codes to bring a handful of code violating businesses into compliance is not a solution to
23 land use issues.”); Transcription of County 3/11/2019 Meeting Excerpts (Ely) in Tab Transcription of County
24 3/11/2019 Meeting Excerpts (Video in IR GMHB-00000001); Transcription of County 6/12/2019 Hearing excerpts
25 (Ely repeating again need for EIS) in Tab Transcription of County 6/12/2019 Hearing Excerpts (Video in IR
26 GMHB-00000001).

²⁰ Tab IR GMHB-00044504; Tab IR GMHB-00044597. As the Record items explain, the Matthews bar and
event center is on the immediate east side of Woodinville-Redmond Rd. bordering Co-Petitioners Orkiolla and
Allen. Immediately across the road to the west are the organic farms operated by Co-Petitioners A Farm in the
Sammamish Valley, Alki Market Garden, Eunomia Farms, as well as the Olympic Nursery. See also FOSV PFR at
sections 4, 8,9,10.

²¹ Transcript of Farm Video in Tab Transcription of Farm Video. The video itself is very short, 5 minutes or
less, and can be viewed at this Dropbox that does not require a password:

<https://www.dropbox.com/sh/5cswhlkzkuo8bhy/AAC36uQpOwzE7KO3le6pexRCa?dl=0>

1 FOSV Co-Petitioners and their supporters described its impacts and requested EIS review early,
2 often, and throughout the many months leading to adoption of Ordinance 19030.²²

3
4 **B. Issue 9. Did King County fail to be guided by RCW 36.70A.020(8) and (10) and fail
5 to comply with SEPA, RCW Ch. 43.21C, and its regulations, WAC Ch. 197-11,
6 including but not limited to: WAC 197-11-055(2); 197-11-060; 197-11-080; 197-11-
7 100; 197-11-310, 197-11-315; 197-11-330; 197-11-335, 197-11-340; and 197-11-960:**

8 **Issue 9 a. By failing to conduct actual SEPA review at the earliest possible time
9 and instead issuing a DNS that continued King County’s multi-year
10 deferral of SEPA review?**

11 **Issue 9 d. By concluding that an EIS was not required on the basis that adoption
12 of Ordinance 19030 was a “non-project action?”**

13 The SEPA regulations call for commencement of the SEPA process “at the earliest possible
14 time” and, again, for preparation of the threshold determination “at the earliest possible point in
15 the planning and decision-making process when the principal features of a proposal and its
16 environmental impacts can be reasonably identified”.²³ The likelihood of future agency
17 approvals or environmental review does not preclude current evaluation of environmental
18 impacts.²⁴ The governing principle is to avoid commitment to an approach before environmental
19 information is complete.²⁵

20
21 ²² See, e.g., Transcription of 3/11/2019 County Meeting excerpts (Quigley: President of Co-Petitioner Olympic
22 Nursery) in Tab Transcription of County 3/11/2019 Meeting Excerpts (Video in IR GMHB-00000001);
23 Transcription of 6/12/2019 Council Hearing excerpts with statements by Co-Petitioners (Ely: Euphonia Farm;
24 Glover: FOSV Board; Quigley: Olympic Nursery; Claire Thomas: Roots Co-Op and CT Corp Serena Glover:
25 FOSV Executive Director; Leroy: Alki Market Garden; Tanksley: HHA; Pakia Raj: FOSV) in Tab Transcription of
26 County 6/12/2019 Hearing Excerpts (Video in IR GMHB-00000001); Tab IR GMHB-00018768; Tab IR GMHB-
00018788 (SEPA Comments, requesting EIS and questioning DNS, by Susan Boundy-Sanders, Woodinville City
Councilmember).

²³ WAC 197-11-055(1),(2) in Tab 197-11-055.

²⁴ WAC 197-11-055(2)(a)(i) in Tab 197-11-055.

²⁵ WAC 197-11-055(c) in Tab 197-11-055.

1 Ecology's SEPA guidance for non-project actions confirms that environmental review starts
2 as early in the process as possible when sufficient information is available to analyze probable
3 environmental impacts. "... If the non-project action deals with a land-use decision or a proposal
4 to govern future development, the likely environmental impacts need to be considered."²⁶ Here,
5 the County's SEPA threshold determination should have come "as close as possible to the time
6 the County had developed a proposal (WAC [197-11-784](#))".²⁷ Instead, it came, contrary to
7 SEPA, not early, or even midway -- but at the eleventh hour, as a pro forma exercise rather than
8 an actual inquiry.

10 Petitioners diligently raised this issue with the County many months before the Ordinance
11 was adopted, giving the County ample notice of the concern and plenty of time to get started on
12 an EIS. For example, FOSV's Serena Glover emailed King County Council Committee Chair
13 Joe McDermott, noting the absence of SEPA review and explaining why it was needed, on
14 December 3, 2018, a year before the Council's December 2019 adoption of Ordinance 19030
15 on a 5 to 4 vote:

17 From: Serena Glover <serena@allenglover.com>
18 Subject: Please consider FoSV concerns before Beverage Ordinance vote
19 Date: December 3, 2018 at 1:36:09 PM PST
20 To: joe.mcdermott@kingcounty.gov

21 Chair McDermott,

22 On the eve of the PRE Committee vote on the Beverage Ordinance, I am writing
23 to you on behalf of Friends of Sammamish Valley, to ask you to take into
24 consideration some critical factors that became more apparent after the PRE
25 Committee meeting last Wednesday November 28.

26 ²⁶ <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Non-project-proposals>.

²⁷ WAC 197-11-310(2) in Tab 197-11-310.

1 (1) We have looked, but have seen no evidence that a **SEPA analysis** has been
2 conducted and have heard no reference to SEPA analysis in any of the committee
3 discussions. A SEPA analysis is intended to provide information on
4 environmental impacts of a proposal for decision makers to guide their decision
5 making. Is the PRE Committee planning to vote on allowing urban use businesses
6 in the Sammamish Valley and elsewhere in rural King County without taking into
7 consideration the information that SEPA provides? Several trained hydrology
8 engineers and scientists have already looked at our current situation in the
9 Sammamish Valley. Among others you've heard from from Dr. David Bain of
10 SnoKing Watershed Council and the Orca Conservancy, Barbara Lau from Al
11 Gore's Climate Reality Project, and Susan Wilkins from Water Tenders. Each of
12 them have emphasized the importance of the SO-120 Ag buffer to protecting the
13 Valley farmland and the Sammamish River watershed. Even non-scientist
14 residents can see that the compacted land caused by the seas of parked cars in the
15 current violator locations is sending additional runoff and pollutants onto our
16 farmland and into the river. Already one farmer, who gets 10 tons per acre of
17 organic produce off her land, has lost acreage to this problem.

18 Furthermore, lack of sewer hookup for these urban use locations is already
19 causing issues. One violator location, in a former older residential home, has no
20 working restroom. Porta-potties are permanently located on the property. Another
21 property has such extensive use of facilities that they have to pump their septic
22 tanks once a week in the warmer months. Typically a rural area septic system gets
23 pumped once every three to five years. The 7 violator locations, located in the
24 rural area on septic systems, all of which were designed for residential use, cannot
25 handle the water usage from dishwashers and sinks, nor the septic needs of an
26 urban use business with large numbers of on-site consumers. What doesn't get
27 handled properly in these businesses located in the rural area buffer ends up in the
28 ditch and overflowing into the farmland and river.

29 These 7 violator businesses and the proposed additional retail zone is directly
30 across a narrow 2-lane road, uphill from the farmland. **Are you certain you
31 understand the environmental impacts to the farmland and watershed from
32 these urban use activities being allowed in the Rural Area, not only today but
33 into the future as these businesses expand per the proposed Ordinance?**
34 [Emphasis in original]²⁸

35 There is no evidence in the Checklist that the information and questions in FOSV's message
36 and others like them were considered and addressed. Instead, when the County, almost half a

²⁸ Tab IR GMHB-00088770.

1 year later, got around to a SEPA threshold determination, it produced a Checklist stating over
2 80 times that the proposal was “non-project action” as if that excused failing to
3 acknowledge/disclose probable significant impacts and to prepare an EIS.

4 However, the “non-project” label is not a justification for evading preparation of an EIS.
5 “One of SEPA’s purposes is to provide consideration of environmental factors at the earliest
6 possible stage to allow decisions to be based on complete disclosure of environmental
7 consequences.”²⁹ Thus, SEPA’s policy is to ensure “full disclosure of environmental
8 information so that environmental matters can be given proper consideration during decision
9 making”³⁰ This policy “is thwarted whenever an incorrect ‘threshold determination’ is
10 made.” *Id.*

11
12 Further, WAC 197-11-060(4) mandates consideration of both short and long term impacts, as
13 well as direct and indirect impacts:
14

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

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

25 The Court of Appeals has explained with regard to how SEPA applies to non-project actions:
26

²⁹ *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993)(emphasis added).

³⁰ *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 700, 601 P.2d 501, 512 (1979)(emphasis added).

1 [T]he proposed land use related action approved in the FLRP [Fort Lawton
2 Master Plan] does not evade SEPA review simply because the approval of the
3 FLRP does not result in immediate land use changes. Indeed, as Magnolia argues,
4 this is precisely the type of government decision that would have the
5 “snowballing effect” described in *Black Diamond* [King County v. Boundary
6 Review Board, 122 Wn.2d 648, 860 P.2d 1024 (1993)] if pushed through the
7 LRA application process without SEPA review. Additionally, as Magnolia points
8 out, the FLRP is actually more precise and definite than the plan at issue in *Black*
9 *Diamond*. In *Black Diamond*, there was no pending development proposal other
10 than a preferred use as “[s]ingle family residential” or “Residential/Golf
11 Course Community.’” But here, the proposal in the FLRP was very detailed and
12 included the number of residential units approved, the layout of the uses, and
13 information indicating potential environmental impacts. Additionally, the City’s
14 approval of the FLRP has a greater binding effect than the annexation decision in
15 *Black Diamond*; as the parties acknowledged at oral argument, once adopted by
16 the federal government as a condition of transfer of the ARC property, it will bind
17 the City as to its use of that property.³¹

18 In the “*Black Diamond*” decision relied upon by the *Magnolia* court, King County (the
19 respondent here before the Board) obtained invalidation of a SEPA DNS issued by the City of
20 *Black Diamond* for a simple “non-project” annexation. King County persuaded the Washington
21 Supreme Court to hold that “a proposed land use related action is not insulated from full
22 environmental review simply because there are no existing specific proposals to develop the land
23 in question or because there are no immediate land use changes which will flow from the
24 proposed action.”³² The Ordinance here does not fall into the same nonconsequential category
25 as *Black Diamond*’s simple, non-project annexation. But, even if it did, King County established
26 three decades ago, in a Washington Supreme Court precedent confirmed and implemented in

³¹ *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 317, 230 P.3d 190 (2010) (internal footnotes omitted); see also *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 579, 309 P.3d 673 (2013), review denied 179 Wn.2d 1015, 318 P.3d 279 (2014) (for nonproject actions, agency must address “the probable impacts of any future project action the proposal would allow”).

³² *King County v. Wash. State Boundary Review Board*, 122 Wn.2d 648, 664 (1993).

1 subsequent appellate decisions, that the purported absence of a specific project does not justify
2 the absence of an EIS.

3 As emphasized in a recent Western Board Order granting summary judgment³³:

4 . . . While WAC 197-11-442(2) allows more flexibility when considering non-
5 project actions, that does not allow avoidance of environmental review merely
6 because there are no specific proposals under consideration.

7 Non-project actions are not exempt from adequate SEPA review. In fact,
8 jurisdictions may not evade SEPA review by deferring analysis until later stages
9 of actual development. This Board has often considered SEPA requirements in
10 regards to non-project actions.

11 Thus, when a city amends its Comprehensive Plan or changes zoning, a detailed
12 and comprehensive SEPA environmental review is required. SEPA is to function
13 "as an environmental full disclosure law," and the City must demonstrate
14 environmental impacts were considered in a manner sufficient to show
15 "compliance with the procedural requirements of SEPA." [citing *Association of
16 Citizens v Olympia*, GMHB No. 13-2-0014 (Final Decision and Order August 7,
17 2013) at 15.]

18 The City correctly points out that its determination is entitled to deference under
19 RCW 43.21C.090. However, it is also incumbent upon the City to establish a
20 showing that "environmental factors were considered in a manner sufficient to
21 amount to prima facie compliance with the procedural requirements of SEPA.
22 [citing, in footnote 21, *Chuckanut Conservancy V. Washington State Dept. of
23 Natural Resources*, 156 En.App. 274, 286-87(2010); *Juanita Bay Valley Cmty.
24 Ass'n. v City of Kirkland*, 9 Wn.App.59, 73 (1973).]

25 Andrew Ely, of Co-Petitioner Eunomia Farms, is a farmer not a lawyer. Yet, he offered the
26 County as cogent an explanation as any attorney's for why the DNS should be withdrawn
because it did not square with SEPA:

My name's Andrew Ely. Thank you, council, for having me here to give a little
bit of public insight. I just want to start with one. The Department of Ecology
[SEPA] websites reads "purpose and intent". SEPA's intent to ensure the written
environmental values are considered during decision making by state and local
agencies. When SEPA was adopted, the state lawmakers identified four primary

³³ *Olympians* at 6-7.

1 purposes. One, declare the state of a policy to encourage productive and enjoyable
2 harmony between people and their environment. Two, to promote efforts which
3 prevent or eliminate damage to the environmental biosphere. Three, to stimulate
4 public health and welfare and to enrich the understanding of the ecological
5 systems and the natural resources important to Washington and the nation. The
6 SEPA checklist that was performed for this Ordinance was filled out not
7 applicable for every single line item and it is utterly discouraging to have the
8 county not action [sic] on that. This was authored by county employees itself and
9 it just doesn't make sense [for] such a large area of agricultural and agricultural
10 areas. It should be taken into consideration what the environmental impacts are
11 going to be before an Ordinance is even proposed.³⁴

8 **Issue 9 b. By issuing a DNS based on an inadequate and inaccurate SEPA**
9 **Checklist that failed to recognize significant adverse impacts and,**
10 **inter alia, assuming they were balanced out by purported benefits of**
11 **the proposal?**

11 The court of appeals has identified the laws and regulations affecting SEPA review for
12 nonproject actions such as the adoption of Ordinance 19030.

13 Under SEPA, a county must include an environmental impact statement with any
14 proposal the lead agency's responsible official decides would "significantly
15 affect[] the quality of the environment." RCW 43.21C.030(2)(c); WAC 197-11-
16 330(1). An agency must make this threshold determination where, as here, the
17 proposal is an "action"³ and is not "categorically exempt."⁴ Former WAC 197-
18 11-310(1) (2003). The agency must use an environmental checklist to assist its
19 analysis and must document its conclusion in a determination of significance or
20 nonsignificance. Former WAC 197-11-315(1) (1995); WAC 197-11-340(1), -
21 360(1).

20 The agency must base its threshold determination on "information reasonably
21 sufficient to evaluate the environmental impact of a proposal." WAC 197-11-
22 335. In GMA planning, the agency should tailor the "scope and level of detail of
23 environmental review" to fit the proposal's specifics. WAC 197-11-228(2)(a).
24 Thus, for a nonproject action, such as a comprehensive plan amendment or
25 rezone, the agency must address the probable impacts of any future project action
26 the proposal would allow. Wash. State Dep't of Ecology, [State Environmental
Policy Act Handbook] § 4.1, at 66 [(1998 & Supp. 2003)]; see WAC 197-11-

³⁴ 10/7/19 King County Council Committee of the Whole Transcription excerpts in Tab Transcription of
10/7/2019 King County Council Committee of the Whole Meeting Excerpts (Video in IR GMHB-00000001).

1 060(4)(c)–(d). The purpose of these rules is to ensure an agency fully discloses
2 and carefully considers a proposal’s environmental impacts before adopting it

3 ³ See WAC 197–11–704(2)(b)(ii). Specifically, amendment 07–CPA–05 is a
4 nonproject action because it involves “[t]he adoption or amendment of
comprehensive land use plans or zoning ordinances.” *Id.*

5 ⁴ See RCW 43.21C.229, .450; WAC 197–11–305, –800; Additionally, while a
6 county may forego SEPA analysis if its comprehensive plan and development
7 regulations “provide adequate analysis of and mitigation for the specific adverse
8 environmental impacts of the project action,” this exception does not apply to
amendment 07–CPA–05 because it is a nonproject action. RCW 43.21C.240(1);
see also RCW 43.21C.240(2); WAC 197–11–158.³⁵

9 Applying these rules to the SEPA checklist that Spokane County prepared, the court of appeals
10 concluded:

11 The checklist did not tailor its scope or level of detail to address the probable
12 impacts on, for example, water quality, resulting from amendment 07–CPA–05
13 specifically. While the property is near potable water wells in a Critical Aquifer
14 Recharge Area with high susceptibility, the proposal could “allow an on-site
15 [wastewater disposal] system that will fail thus resulting in the degradation of the
16 local environment.” AR at 562. Despite these concerns, the checklist repeated
17 formulaic language postponing environmental analysis to the project review stage
and assuming compliance with applicable standards. Thus, the checklist lacked
information reasonably sufficient to evaluate the proposal’s environmental
impacts.³⁶

18 In addition, “the appropriate governing body must be able to demonstrate that environmental
19 factors were considered in a manner sufficient to amount to prima facie compliance with the
20 procedural requirements of SEPA.”³⁷ Only after the County “can affirmatively demonstrate
21 prima facie compliance with the procedural requirements of SEPA, then the burden will fall
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23

24 ³⁵ *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 578–79, 309 P.3d 673, 684–
85 (2013).

25 ³⁶ *Spokane Cty.*, 176 Wn. App. at 580–81, 309 P.3d at 685.

26 ³⁷ *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973).

1 upon FOSV... to prove” the County’s decision was invalid.”³⁸ The County must consider
2 environmental factors when deciding whether to issue determination of significance or
3 nonsignificance.³⁹

4 Further, WAC 197-11-330(5) precludes offsetting impacts by purported benefits
5 admonishing that “[a] threshold determination shall not balance whether the beneficial aspects
6 of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any
7 probable significant adverse environmental impacts under the rules stated in this section.”

8
9 Like the comprehensive plan and zoning amendments adopted by Spokane County, the
10 SEPA checklist for Ordinance 19030 also lacked information reasonably sufficient to evaluate
11 the proposal’s environmental impacts. Ordinance 19030 authorizes “Remote Tasting Rooms” as
12 permitted uses in the Rural Area (RA), Community Business (CB), the Regional Business (RB),
13 zones, subject to certain conditions in the areas described as the demonstration areas.⁴⁰ Winery/
14 Brewery/Distillery/Facility (WBD) uses are permitted in the Rural Area (RA) zones subject to
15 certain conditions.⁴¹ WBD IIs are permitted uses in the Agricultural (A), Neighborhood Business
16 (NB), the CB, the RB, and the Industrial (I) zones and permitted and conditional uses in the RA
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22 ³⁸ *Id.* at 9 Wn. App. at 74, 510 P.2d at 1149–50.

23 ³⁹ *Id.* at 9 Wn. App. at 73–74, 510 P.2d at 1149–50.

24 ⁴⁰ Ordinance 19030 p. 23, pp. 114-122 in Tab Ord. 19030 of the Futurewise Petition For Review.

25 ⁴¹ *Id.* p. 32. The Rural Area or RA zones include the RA-2.5 zone with a 2.5-acre minimum lot size, the RA-5
26 zone with a five-acre minimum lot size, the RA-10 zone with a ten-acre minimum lot size, and the RA-20 zone with
a 20-acre minimum lot size. King County Code Section (K.C.C.) 21A.04.010 in Tab 21A.04010-060. The RA zones
have the same allowed uses. Ordinance 19030 pp. 32-35, pp. 54-56 in Tab Ord. 19030 of the Futurewise Petition For
Review.

1 zones subject to special conditions.⁴² WBD IIIs are conditional uses in the A, RA, NB, CB, RB,
2 and I zones.⁴³

3 These zones cover aquifer recharge areas including the ones most susceptible to
4 contamination.⁴⁴ Wells are located throughout the aquifer recharge areas.⁴⁵ However, the
5 conditions do not include special measures to protect groundwater.⁴⁶ Further, wineries,
6 breweries, and distilleries, currently located in these areas,⁴⁷ already use onsite septic systems to
7 treat their waste water.⁴⁸ “These systems can leach and/or overflow excess effluent into the
8 groundwater, swamping the [Sammamish] Valley farm soils.”⁴⁹

9
10 Barbara Lau, who has prepared SEPA checklists as an Environmental Scientist with a major
11 engineering firm, in commenting on the environmental checklist, explained the mechanism
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14

15 ⁴² *Id.* pp. 32-33. The Agricultural or A zones include the A-10 zone with a ten-acre minimum lot size and the A-
16 35 zone with a 35-acre minimum lot size. K.C.C. 21A.04.010 in Tab 21A.04010-060. The A zones all have the same
17 allowed uses. Ordinance 19030 pp. 32-35, pp. 54-56 in Tab Ord. 19030 of the Futurewise Petition For Review.
18 Agricultural lands of long-term commercial significance are designated as Agricultural Production Districts (APDs)
19 in the comprehensive plan. *2016 King County Comprehensive Plan* Chapter 3 Rural Areas and Natural Resource
20 Lands pp. 3-39-3-40, p. *3-79 (Updated Oct. 29, 2018) (Core Document). The lands within the APDs designated by
21 the comprehensive plan and other farmlands deemed appropriate for long-term protection are zoned Agricultural.
22 K.C.C. 21A.04.030B in Tab 21A.04010-060.

23 ⁴³ Ordinance 19030 p. 33 in Tab Ord. 19030 of the Futurewise Petition For Review.

24 ⁴⁴ IR GMHB-00079803 in Tab IR GMHB-00079803, King County Critical Aquifer Recharge Areas; K.C.C.
25 21A.24.313 in Tab K.C.C. 21A.24.313; IR GMHB-00029652 in Tab IR GMHB-00029652, Sammamish Valley
26 Zoning Info; King County GIS Center, *Zoning 2012* in Tab Zoning Map. WAC 242-03-630(4) authorizes the board
or presiding officer to officially notice adopted regulations including the map in Tab Zoning Map and FOSV
requests the Board to officially notice the zoning map.

⁴⁵ IR GMHB-00018690 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *3. The wells are shown as
filled boxes, the colors in the legend indicates the class of water system they serve.

⁴⁶ *Id.* pp. 35-54.

⁴⁷ IR GMHB-00055812-13 in Tab IR GMHB-00055799, *King County Sammamish Valley Wine and Beverage
Study* pp. 10-11 (Sept. 2016).

⁴⁸ IR GMHB-00055824-30 in Tab IR GMHB-00055799, *Id.* p. 22-28; IR GMHB-00018698 in Tab IR GMHB-
00018688, Memo of Barbara Lau p. *9.

⁴⁹ IR GMHB-00018696 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *9.

1 behind likely significant adverse environmental impacts as WBDs now allowed under Ordinance
2 19030 continue septic system use.⁵⁰

3 Septic systems on these old lots were designed, sized and constructed for
4 domestic use. Commercial uses located on lots with deficient septic systems tend
5 to pump excess effluent into the drain fields, which become waterlogged and
6 further increase subsurface water flow down gradient to the creeks and farmlands.
7 Failed septic systems leach excess or inadequately treated wastewater into the
8 groundwater, causing contamination of the Valley groundwater, which can spread
9 into the Sammamish River.⁵¹

10 Roberta Lewandowski, a former Redmond Planning Director for 16 years and an experienced
11 SEPA official, agreed that houses converted into WBDs will “have insufficient septic capacity to
12 handle large crowds ...”⁵² Lewandowski’s duties at Redmond included “coordination with King
13 County and the surrounding cities on regional planning issues and land use and environmental
14 issues involving the Sammamish Valley [Agricultural Production District] APD, including the
15 Sammamish River and tributary rivers and streams flowing from the surrounding Rural Areas.”⁵³

16 Most of these facts and all of the adverse impacts were not disclosed in the SEPA checklist
17 for Ordinance 19030. Instead when asked to “[d]escribe waste material that will be discharged
18 into the ground from septic tanks or other sources ...” the County wrote “[n]ot applicable for this
19 nonproject action. No regulations governing waste disposal will be amended by the proposal.”⁵⁴
20 On page 12, the SEPA Checklist does disclose that “most” WBDs will use septic tanks, but does
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23 ⁵⁰ IR GMHB-00018688 in Tab IR GMHB-00018688, *Id.* p. *1.

24 ⁵¹ IR GMHB-00018696 in Tab IR GMHB-00018688, *Id.* p. *9.

25 ⁵² IR GMHB-0018672, 0018677 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. 1 & p. 6.

26 ⁵³ IR GMHB-0018672 in Tab IR GMHB-0018672, *Id.* p. 1.

⁵⁴ IR GMHB-0019591-92 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
distilleries pp. 7-8 (April 24, 2019).

1 not disclose their potential impacts or that they will be allowed in aquifer recharge areas.⁵⁵ The
2 checklist did not disclose that septic systems for Remote Tasting Rooms and WBDs are failing
3 and discharging to surface and ground water.⁵⁶ Nowhere did the checklist disclose the impacts
4 on wells in the area.⁵⁷ Like the checklist in the *Spokane County* decision, this checklist did not
5 address the probable impacts on water quality from Ordinance 19030. Like *Spokane County*,
6 King County was legally required to prepare an EIS and failed to do so.
7

8 In the *Olympians* decision, the Board concluded that a SEPA checklist that included answers
9 such as “[d]oes not apply as this is a non-project” and failed to disclose information on the
10 environmental impacts of a proposed development regulation amendment violated SEPA.⁵⁸
11 Like Olympia’s checklist in *Olympians*, most (in excess of 80) of the answers to the SEPA
12 Checklist questions for Ordinance 19030 were some variation on “[n]ot applicable for this
13 nonproject action.”⁵⁹ That was the answer for the questions on: slope; soils, agricultural lands of
14 long-term commercial significance; filling and grading; erosion; impervious surfaces; measures
15 to reduce or control impacts to the earth; air emissions; offsite emissions or odor; measures to
16 reduce or control emissions; surface water bodies; fills in water and wetlands; surface water
17 withdrawals or diversions; the 100 year flood plain; discharges of waste materials to surface
18 waters; waste material discharges from septic tanks; whether waste materials will enter ground or
19 surface waters; alterations to drainage patterns; plants; vegetation removal; measures to preserve
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22 ⁵⁵ IR GMHB-0019601 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
distilleries p. 17 of 20 (April 24, 2019).

23 ⁵⁶ IR GMHB-00018696-97 in Tab IR GMHB-00018688, Memo of Barbara Lau pp. *9-10.

24 ⁵⁷ IR GMHB-0019585-604 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries,
and distilleries pp. 1-20 of 20 (April 24, 2019).

25 ⁵⁸ *Olympians* at 5-11 of 18.

26 ⁵⁹ IR GMHB-0019589-601 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries,
and distilleries pp. 5-17 of 20 (April 24, 2019).

1 or enhance vegetation; listing any threatened and endangered species; migration routes; measures
2 to preserve or enhance wildlife; energy; environmental health; special emergency services;
3 measures to reduce or control environmental health hazards; noise; whether the proposal will
4 affect or be affected by working farm or forest land, the application of pesticides, tilling, and
5 harvesting; critical areas; how many people will work on the site; how many housing units will
6 be eliminated; the height of structures; views; light and glare; the displacement of existing
7 residential uses; proposed measures to avoid, minimize, or compensate for loss, changes to, and
8 disturbance of historic and cultural resources; whether the proposal requires any new or
9 improved roads, streets, pedestrian, bicycle or state transportation facilities; how many vehicular
10 trips per day would be generated; proposed measures to reduce or control transportation impacts;
11 the need for public services; measures to reduce or control direct impacts on public services; and
12 the utilities that will be provided.⁶⁰ The expert comments on the SEPA checklist show that
13 Ordinance 19030 would have the probable adverse environmental impacts that these questions
14 were designed to elicit and provided information the County could have used to revise the
15 Checklist.⁶¹

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18 The answers to the questions on the supplemental sheet for nonproject actions also do not
19 comply with SEPA. The checklist claims the proposal is not expected to increase discharges to
20 water, but septic tanks for existing remote tasting rooms and WBDs are already failing and
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25 ⁶⁰ IR GMHB-0019589-601 in Tab IR GMHB-0019585, *Id.*

26 ⁶¹ IR GMHB-0018688-98 in Tab IR GMHB-00018688, Memo of Barbara Lau pp. *1-11; IR GMHB-0018672-77 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski pp. *1-6.

1 discharging to ground and surface waters, as confirmed in information provided to the County.⁶²

2 No measures to avoid or reduce these impacts are proposed.⁶³ The checklist claims that that
3 noise impacts are expected to be sufficiently regulated under the County’s existing noise code.⁶⁴

4 No changes to the code are proposed.⁶⁵ County residents have already been impacted by noise
5 from these uses.⁶⁶

6
7 The checklist simply states that [t]he proposal is not likely to affect plants, animals, fish, or
8 marine life.”⁶⁷ No new measures are proposed to address any impacts.⁶⁸ The expert comments on
9 the SEPA determination document that there will be increases in buildings and impervious
10 surfaces, adversely affecting plants, animals, and fish.⁶⁹

11 The checklist contends there will not be adverse impacts on prime farmlands pointing to the
12 new requirement that 60 percent of the product processed onsite must be grown onsite.⁷⁰ But the
13 checklist does not disclose the adverse impacts of nearby development on farmland such as
14 storm water runoff from the sidewalls of the Sammamish Valley that make parts of the
15 Agricultural Production District “too wet for farming” and polluted runoff from failing septic
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19 ⁶² IR GMHB-0019602 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
20 distilleries p. 18 of 20 (April 24, 2019); IR GMHB-00018696 in Tab IR GMHB-00018688, Memo of Barbara Lau p.
*9.

21 ⁶³ IR GMHB-0019602 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
distilleries p. 18 of 20 (April 24, 2019).

22 ⁶⁴ IR GMHB-0019602 in Tab IR GMHB-0019585, *Id.* p. 18 of 20.

23 ⁶⁵ *Id.*

24 ⁶⁶ KC-CTRL-009491 p. 200 in Tab KC-CTRL-009491, Ann Haldeman email to Councilmember Lambert .

25 ⁶⁷ IR GMHB-0019602 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
distilleries p. 18 of 20 (April 24, 2019).

26 ⁶⁸ *Id.*

⁶⁹ IR GMHB-0018674-75 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski pp. 3 – 4.

⁷⁰ IR GMHB-0019603 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and
distilleries p. 19 of 20 (April 24, 2019).

1 systems flowing onto farmland.⁷¹ These impacts from existing illegal remote tasting rooms and
2 “sham” WDBs provide a demonstration of the future impacts of the Ordinance which will
3 legalize those uses.

4 Like the answers to the transportation questions in part B14 of the checklist, the answer to
5 the nonproject transportation question does not include any estimates of the traffic that will result
6 from the tasting rooms and WDBs allowed by Ordinance 19030.⁷² One of the experts
7 commenting on the checklist pointed out the existing tasting rooms and WDBs “clearly generate
8 significant traffic.”⁷³ The Olympia checklist had some trip estimates, but the Board concluded
9 that “[w]hile additional vehicular trips generated by the Ordinance are discussed, the Checklist
10 fails to adequately address possible impacts on transportation infrastructure.”⁷⁴ Here, the
11 checklist did not even disclose or discuss the additional trips let alone the impacts on the
12 transportation infrastructure.⁷⁵ In fact the checklist claims, without evidence, that Ordinance
13 19030 is not expected to increase demands on transportation.⁷⁶ These answers do not comply
14 with SEPA.
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17 Groundwater withdrawals from wells can cumulatively affect stream flows negatively
18 impacting “all stages of the salmonid life cycle. Water quality (e.g., temperature, flows) is
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22 ⁷¹ IR GMHB-0018674 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. 3; IR GMHB-00018696
in Tab IR GMHB-00018688, Memo of Barbara Lau p. *9.

23 ⁷² IR GMHB-0019599-600, GMHB-0019603 in Tab IR GMHB-0019585, SEPA Checklist Regulations for
wineries, breweries, and distilleries pp. 15-16, p. 19 of 20 (April 24, 2019).

24 ⁷³ IR GMHB-0018676 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. 5.

25 ⁷⁴ *Olympians*, at 8 of 18.

26 ⁷⁵ IR GMHB-0019599-600, GMHB-0019603 in Tab IR GMHB-0019585, SEPA Checklist Regulations for
wineries, breweries, and distilleries pp. 15-16, p. 19 of 20 (April 24, 2019).

⁷⁶ IR GMHB-0019602 in Tab IR GMHB-0019585, *Id.* p. 19 of 20.

1 affected by decreased inputs from groundwater.”⁷⁷ “From 2010-2014, 369 new wells (4.5%
2 increase) were added to the already existing 8,227 wells in the Lake Washington and Green-
3 Duwamish basins A total of 482 miles of streams in the Lake Washington and Green-Duwamish
4 basins are identified as having low streamflow problems”⁷⁸ The Lake Washington basin
5 includes the Sammamish Valley and the slopes along the valley.⁷⁹ The Green-Duwamish basins
6 include zones that permit WBDs.⁸⁰ As the checklist states, larger WBDs have to “connect to a
7 Group A water system or an existing Group B system if a Group A water system is not available
8 rather than creating a new permit exempt well”⁸¹ But the larger WBDs will still increase the
9 demand for ground water in basins that already have low stream flows harming salmon and
10 water quality. Smaller WBDs in these water short basins will also increase demands on ground
11 water, lowering flows even further. None of these impacts were disclosed in the SEPA
12 checklist.⁸² In short, like the SEPA checklist prepared by Olympia, the SEPA checklist for
13 Ordinance 19030 violates SEPA.
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15

16 The *Olympians* decision was concerned about “the probable future lack of overall analysis
17 due to the fact that resulting density increases will be incremental and would be unlikely to
18 trigger such analysis.”⁸³ That is also the case here. The “Remote Tasting Rooms” and many
19 WBD Is and IIs are permitted uses under Ordinance 19030, including, for the WBD Is and IIs,
20
21

22 ⁷⁷ IR GHMB-00088434 cited pages in Tab IR GHMB-00088417, *2016 State of Our Watersheds* p. 18.

23 ⁷⁸ IR GHMB-00088527 cited pages in Tab IR GHMB-00088417, *Id.* p. 111.

24 ⁷⁹ *Id.*

25 ⁸⁰ *Id.*; King County GIS Center, *Zoning 2012*.

26 ⁸¹ IR GMHB-0019604 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries, and distilleries p. 20 of 20 (April 24, 2019).

⁸² *Id.*

⁸³ *Olympians* at 10 of 18.

1 permitted uses in the Agricultural zones.⁸⁴ WBD Is are limited to 1,500 square feet.⁸⁵ WBD IIs
2 are limited to 3,500 square feet unless they are in an historic building.⁸⁶ Therefore both WBD Is
3 and IIs are exempt from SEPA if their parking lots are designed for 40 or fewer automobiles.⁸⁷
4 Like the uses at issue in the *Olympians* decision, many of the WBD Is and IIs will never undergo
5 SEPA review. This checklist was the only SEPA review those uses will receive.
6

7 The failure to disclose, analyze, and mitigate these impacts also violates RCW 36.70A.020(8)
8 and (10). RCW 36.70A.020(8) directs King County to maintain and enhance natural resource-
9 based industries, including productive ... agricultural ... and fisheries industries.” The County is
10 also to “[e]ncourage the conservation of productive ... agricultural lands ... and discourage
11 incompatible uses.” The adverse impacts on farmland and salmon habitat identified above violate
12 this goal. RCW 36.70A.020(10) directs King County to “[p]rotect the environment and enhance
13 the state’s high quality of life, including air and water quality, and the availability of water.”
14 Again, the adverse impacts on salmon habitat, water quality, and water quantity documented
15 above violate this goal. The EIS required by RCW 43.21C.031 can help to implement these
16 goals. This Board should find that the checklist violates SEPA, direct the preparation of the EIS,
17 and make a determination of invalidity for the violation of RCW 36.70A.020(8) and (10).
18

19 **Issue 9c. By issuing a DNS despite the fact that there are significant**
20 **unmitigated adverse impacts associated with the Ordinance?**
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24 ⁸⁴ Ordinance 19030 p. 23, pp. 32-33 in Tab Ord. 19030 of the Futurewise Petition For Review

25 ⁸⁵ *Id.* p. 53.

26 ⁸⁶ *Id.* p. 36.

⁸⁷ K.C.C. 20.44.040A.1 in Tab 20.44.040.

1 In determining whether an EIS must be prepared, the “responsible official may also consider
2 mitigation measures which an agency or the applicant will implement as part of the proposal.”⁸⁸

3 As is documented in Issue 9b, the development authorized by Ordinance 19030 has significant
4 probable adverse impacts on surface and ground water quality due to pollution from onsite septic
5 systems,⁸⁹ on water quality, quantity, and salmonid impacts due to increased ground water
6 demands in basins with low flows,⁹⁰ adverse impacts on farmland due to pollution and excess
7 storm water being discharged onto fields,⁹¹ impacts to plants, animals, and fish due to buildings
8 and impervious surfaces,⁹² traffic impacts,⁹³ and noise impacts.⁹⁴

10 The SEPA Determination of Nonsignificance (DNS) does not include any mitigating
11 measures or conditions.⁹⁵ For these impacts neither does the SEPA checklist.⁹⁶

13 The Washington State Supreme Court has held that “an EIS should be prepared where the
14 responsible agency determines that significant adverse environmental impacts are probable
15 following the government action.”⁹⁷ The unmitigated adverse environmental impacts of the
16 developments that will probably occur with the adoption of Ordinance 19030 require an EIS in
17 this case.

19 ⁸⁸ *Moss v. City of Bellingham*, 109 Wn. App. 6, 14–15, 31 P.3d 703, 708 (2001); WAC 197-11-330(1)(c).

20 ⁸⁹ IR GMHB-00018696 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *9.

21 ⁹⁰ IR GHMB-00088434, GHMB-00088527 cited pages in Tab IR GHMB-00088417, 2016 State of Our
Watersheds p. 18, p. 111.

22 ⁹¹ IR GMHB-00018696 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *9; IR GMHB-0018674 in Tab
IR GMHB-0018672, Memo of Roberta Lewandowski p. 3.

23 ⁹² IR GMHB-0018674-75 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski pp. 3 – 4.

24 ⁹³ IR GMHB-0018676 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. 5.

25 ⁹⁴ KC-CTRL-009491 p. Page 200 in Tab KC-CTRL-009491, Ann Haldeman email to Councilmember Lambert.

26 ⁹⁵ IR GMHB-00019541-42 in Tab IR GMHB-00019541, SEPA Non-Project Action DNS Proposed Ordinance
2018-0241.2 - Regulations for Wineries, Breweries and Distilleries pp. *1-2 (April 26, 2019).

⁹⁶ IR GMHB-0019585-604 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries,
and distilleries pp. 1-20 of 20 (April 24, 2019).

⁹⁷ *King Cty. v. Washington State Boundary Review Bd. for King Cty.*, supra, at 664.

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2 **Issue 9e. By failing to recognize how the proposal would be likely to affect**
3 **environmentally sensitive areas?**

4 WAC 197-11-330(3) provides that in determining an impact’s significance, “the responsible
5 official shall take into account the following, that: ... (e) A proposal may to a significant degree:
6 (i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of
7 historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic
8 rivers, or wilderness ...” King County designates rivers and streams as sensitive areas.⁹⁸ As was
9 documented above, rivers and streams will be adversely impacted by failing septic systems and
10 reduced flows from wells.⁹⁹ As Roberta Lewandowski documented, Ordinance 19030 will
11 adversely impact the prime farmland soils in the Sammamish Valley by directing storm water
12 onto these soils and in other ways.¹⁰⁰ The SEPA checklist and the DNS were silent on these
13 impacts, violating the holdings in *Spokane County* and *Olympians* and SEPA.¹⁰¹
14

15 **Issue 9g. By failing to recognize how the proposal would be likely to increase**
16 **demands on transportation or public services and utilities?**

17 As was documented under Issue 9b, the SEPA checklist fails to disclose any information on
18 transportation demand.¹⁰² The checklist also fails to disclose additional demands on public
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21 ⁹⁸ IR GMHB-00018690 in Tab IR GMHB-00018688, Memo of Barbara Lau p. *3.

22 ⁹⁹ IR GMHB-00018696-97 in Tab IR GMHB-00018688, Memo of Barbara Lau pp. *9-10; IR GHMB-
23 00088434, GHMB-00088527 cited pages in Tab IR GHMB-00088417, *2016 State of Our Watersheds* p. 18, p. 111.
24 ¹⁰⁰ IR GMHB-0018674, 76 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. *3, p. *5; Transcription
of County 3/11/2019 Meeting Excerpts (Ely) in Tab Transcription of County 3/11/2019 Meeting Excerpts (Video in
IR GMHB-00000001); Transcription of County 6/12/2019 Hearing excerpts (Ely) in Tab Transcription of County
6/12/2019 Hearing Excerpts (Video in IR GMHB-00000001).

¹⁰¹ *Spokane Cty.*, 176 Wn. App. at 580–81, 309 P.3d at 685; *Olympians* at 5-11 of 18.

25 ¹⁰² IR GMHB-0019599-600, GMHB-0019603 in Tab IR GMHB-0019585, SEPA Checklist Regulations for
26 wineries, breweries, and distilleries pp. 15-16, p. 19 of 20 (April 24, 2019).

1 services and utilities.¹⁰³ This failure violates the holdings in *Spokane County* and *Olympians* as
2 well as SEPA.¹⁰⁴

3 **Issue 9h. By failing to identify how the proposal would conflict with laws or**
4 **requirements for the protection of the environment?**

5 WAC 197-11-330(3) provides that in determining an impact’s significance, “the responsible
6 official shall take into account the following, that: ... (e) A proposal may to a significant degree:
7 ... (iii) Conflict with local, state, or federal laws or requirements for the protection of the
8 environment ...” Section 29 of Ordinance 19030 creates a remote tasting room demonstration
9 project authorizing these use in various areas.¹⁰⁵ Section 29G only allows applications for the
10 demonstration project for three years from the effective date of Ordinance 19030.¹⁰⁶ However
11 even if the demonstration project ends, Section 29.F.3 allows the remote tasting rooms approved
12 under the pilot project to “continue as long as an underlying business license or renewal is
13 maintained, and subject to the nonconformance provisions of K.C.C. chapter 21A.32.”¹⁰⁷ Section
14 29 makes uses authorized by a temporary program permanent no matter the subsequent
15 regulations or the problems created by the demonstration project and creates a de facto rezone
16 with Section 29.F.3 overriding permanently any provisions in the King County Code that protect
17 the RA zones and otherwise protect against outdoor expansion of uses, retail sales in rural areas,
18 excessive parking, and other adverse impacts. This temporary program is inconsistent with the
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23 ¹⁰³ IR GMHB-0019600, GMHB-0019603 in Tab IR GMHB-0019585, *Id.* p. 16, p. 19 of 20.

24 ¹⁰⁴ *Spokane Cty.*, 176 Wn. App. at 580–81, 309 P.3d at 685); *Olympians*, at 5-11 of 18.

25 ¹⁰⁵ Ordinance 19030 pp. 101-107 in Tab Ord. 19030 of the Futurewise Petition For Review.

26 ¹⁰⁶ *Id.* p. 105

¹⁰⁷ *Id.* pp. 104-05.

1 purpose of the RA zones.¹⁰⁸ These inconsistencies require an EIS to analyze the environmental
2 impacts.

3 IV. REQUEST FOR THE DETERMINATION OF INVALIDITY

4 The Board should find that the requirements of RCW 36.70A.302(1) are met. This Board has
5 concluded that a determination of invalidity is based on a finding that continued validity of a
6 local government’s “action ‘would substantially interfere with the fulfillment’ of a GMA
7 Goal.”¹⁰⁹ In *Blair*, the Board explained that “SEPA is an environmental full disclosure law that
8 requires [local governments] to identify and analyze the environmental effects of proposed
9 actions in order to achieve good land use decision making by involving and informing both the
10 public and decision-makers about the environmental consequences of the proposed actions.”¹¹⁰

11 While “[n]on-compliance with SEPA does not automatically equate to frustration of” RCW
12 36.70A.020(10), in *Blair* the rezoned property was “largely within critical areas and/or
13 shorelines, and development of this property without an environmental review that properly
14 informs the decision makers of the impact and mitigations of the intensity of development
15 allowed by the proposed zoning would render moot and thwart protection of the
16 environment.”¹¹¹

17 The same fact pattern applies here, except in *Blair* the rezone site was 43 acres and now tens
18 of thousands of acres are at risk.¹¹² The APDs, where WBD Is and IIs are permitted uses, total
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23 ¹⁰⁸ K.C.C. 21A.04.060 in Tab 21A.04010-060.

24 ¹⁰⁹ *Blair v. City of Monroe*, CPSRGMHB Case No. 14-3-0006c, Final Decision and Order (Aug. 26, 2014), at
25 30 of 34.

¹¹⁰ *Id.* at 31 of 34.

¹¹¹ *Id.*

¹¹² *Id.* at 1 of 34.

1 more than 41,000 acres.¹¹³ The RA and A zones include shorelines, rivers and streams,
2 geologically hazardous areas, critical aquifer recharge areas, wetlands, and other critical areas.¹¹⁴
3 Wineries, breweries, and distilleries are currently located in RA and A zones and in critical
4 areas.¹¹⁵ Like in *Blair*, development of these properties “without an environmental review that
5 properly informs the decision makers of the impact and mitigations of the intensity of
6 development allowed by the proposed zoning would render moot and thwart protection of the
7 environment” substantially interfering with RCW 36.70A.020(10)’s goal of protecting the
8 environment.¹¹⁶ Like the Board in *Blair*, this Board should also make a determination of
9 invalidity.
10

11 This Board has also recognized that the potential that developments may vest to can support
12 a finding of invalidity.¹¹⁷ In *Orton Farms*, the Central Board conclude that development
13 proposals could vest on illegally de-designated agricultural lands of long-term commercial
14 significance substantially interfering with the fulfillment of RCW 36.70A.020(8).¹¹⁸ Near the
15 Sammamish Valley are “[a]pproximately seven business currently operate in violation of zoning
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19 ¹¹³ Ordinance 19030 p. 23, pp. 32-33 in Tab Ord. 19030 of the Futurewise Petition For Review; *2016 King*
20 *County Comprehensive Plan* Chapter 3 Rural Areas and Natural Resource Lands p. 3-52 (Updated Oct. 29, 2018)
(Core Document).

21 ¹¹⁴ IR GMHB-0019591-92 in Tab IR GMHB-0019585, SEPA Checklist Regulations for wineries, breweries,
22 and distilleries p. 12, p. 18 of 20 (April 24, 2019); IR GMHB-00079803 in Tab IR GMHB-00079803, King County
23 Critical Aquifer Recharge Areas; IR GMHB-00029652 in Tab IR GMHB-00029652, Sammamish Valley Zoning
24 Info; King County GIS Center, Zoning 2012 in Tab Zoning Map; IR GMHB-00018690 in Tab IR GMHB-
25 00018688, Memo of Barbara Lau p. *3;

26 ¹¹⁵ IR GMHB-00055812-13 in Tab IR GMHB-00055799, *King County Sammamish Valley Wine and Beverage*
Study pp. 10-11 (Sept. 2016).

¹¹⁶ *Blair*, CPSRGMHB Case No. 14-3-0006c, Final Decision and Order (Aug. 26, 2014), at 31 of 34.

¹¹⁷ *Orton Farms, LLC v. Pierce County (Orton Farms)*, CPSRGMHB Case No. 04-3-0007c Final Decision and
Order (Aug. 2, 2004), at 43 of 50.

¹¹⁸ *Id.*

1 in this area, most have converted former residential structures to business use.”¹¹⁹ The illegal
2 businesses have a strong incentive to vest to Ordinance 19030 because the if the required
3 environmental review is conducted, greater protections for farmland and the environment could
4 be adopted. The illegal businesses and the businesses authorized by Ordinance 19030 have and
5 will increase storm water runoff result is waterlogged soils and increased soil toxicity on the
6 farms in the Sammamish Valley.¹²⁰ The illegal businesses are also polluting surface and ground
7 water including the Sammamish River and harming salmon habitat.¹²¹ If these businesses vest to
8 Ordinance 19030 they can continue these activities damaging farmland and the environment and
9 substantially interfering with the fulfillment of RCW 36.70A.020(8) and (10). This justifies a
10 finding of invalidity.
11

12 DATED this 20th day of April 2020, and respectfully submitted,
13

14 FUTUREWISE

15 /s/ Tim Trohimovich

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23
24 ¹¹⁹ IR GMHB-0018677 in Tab IR GMHB-0018672, Memo of Roberta Lewandowski p. 6.

25 ¹²⁰ IR GMHB-00018694-95 in Tab IR GMHB-00018688, Memo of Barbara Lau pp. *7-8.

26 ¹²¹ IR GMHB-00018693-96 in Tab IR GMHB-00018688, *Id.* pp. *6-9.

TABLE OF ATTACHMENTS

Index of Record Number (IR)	Tab Attached to this Motion	Document
	20.44.040	King County Code Sections (K.C.C.) 20.44.040
	21A.04.010-060	King County Code Sections (K.C.C.) 21A.04.010-21A.04.070
	21A.06.819	King County Code Sections (K.C.C.) 21A.06.819
	21A.24.313	King County Code Sections (K.C.C.) 21A.24.313
	21A.38.130	King County Code Sections (K.C.C.) 21A.38.130
	197-11-055	Washington Administrative Code (WAC) 197-11-055
	197-11-310	Washington Administrative Code (WAC) 197-11-310
	197-11-444	Washington Administrative Code (WAC) 197-11-777
GMHB-00004775	IR GMHB-00004775	December 2, 2019 comments to the King County Council by Susan Wilkins
GMHB-00007782	IR GMHB-00007782	October 7, 2019 Email from Andrew Ely to King County
GMHB-00008678	IR GMHB-00008678	October 4, 2019 Email from Alki Market Garden to County
GMHB-00018688	IR GMHB-00018688	Memo of Barbara Lau to Serena Glover, Executive Director, Friends of Sammamish Valley
GMHB-0018672	IR GMHB-0018672	Memo of Roberta Lewandowski
GMHB-00018768	IR GMHB-00018768	May 17, 2019 by Woodinville City Councilmember Susan Boundy-Sanders Memo to Ty Peterson
GMHB-00018788	IR GMHB-00018768	Woodinville City Councilmember Susan Boundy-Sanders' SEPA Comments

	Index of Record Number (IR)	Tab Attached to this Motion	Document
1			
2			
3	GMHB-00018796	IR GMHB-00018796	Memo of Barbara Lau to County
4			
5	GMHB-00019541	IR GMHB-00019541	SEPA Non-Project Action DNS Proposed Ordinance 2018-0241.2 - Regulations for Wineries, Breweries and Distilleries (April 26, 2019) attached to FOSV Petition for Review as Exhibit B
6			
7	GMHB-0019585	IR GMHB-0019585	SEPA Checklist Regulations for wineries, breweries, and distilleries (April 24, 2019) attached to FOSV Petition for Review as Exhibit C
8			
9			
10	GMHB-00029652	IR GMHB-00029652	Sammamish Valley Zoning Info map
11			
12	GMHB-00044504	IR GMHB-00044504	Michael Tanksley Email of August 28, 2017
13			
14	GMHB-00044597	GMHB-00044597	Michael Tanksley Email of August 29, 2017
15			
16	GMHB-00055799	IR GMHB-00055799	King County Sammamish Valley Wine and Beverage Study (Sept. 2016)
17			
18	GMHB-00079803	IR GMHB-00079803	King County Critical Aquifer Recharge Areas map
19			
20	GMHB-0086576_129	IR GMHB-0086576_129	March 6, 2019 Andrew Ely Email to County Executive
21			
22	GMHB-00088394	IR GMHB-00088394	March 11, 2019 Andrew Ely Email to Councilmember Dembowski
23			
24	GHMB-00088417	IR GMHB-00088417	<i>2016 State of Our Watersheds</i> cited excerpts
25			
26	GMHB-00088754	IR GMHB-00088754	November 11, 2017 Terry Orkiolla Email to King County
	GMHB-00088755	IR GMHB-00088755	May 2, 2018 Terry Orkiolla Email to King County

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Index of Record Number (IR)	Tab Attached to this Motion	Document
GMHB-00088770	IR GMHB-00088770	December 3, 2019 Serena Glover Email to Chair Joe McDermott
	KC-CTRL-009491	KC-CTRL-009491 p. 200, Ann Haldeman email to Councilmember Lambert
	Transcription of 10/7/2019 King County Council Committee of the Whole Meeting Excerpts	Transcription of 10/7/2019 King County Council Committee of the Whole Meeting Excerpts
	Transcription of County 3/11/2019 Meeting Excerpts	Transcription of County 3/11/2019 Meeting Excerpts
	Transcription of County 6/12/2019 Hearing Excerpts	Transcription of County 6/12/2019 Hearing Excerpts
	Transcription of Farm Video	Transcription of Farm Video re KC Beverage Ordinance
	Zoning Map	King County GIS Center, <i>Zoning 2012</i> map



CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of April 2020, the undersigned caused the following documents to be served on the persons listed below in the manner shown: **Petitioners' Dispositive SEPA Motion and attachments** in CPRGMHB Case No. 20-3-0004c.

Growth Management Hearings Board
PO Box 40953
Olympia, WA 98504-0953
Tel: 360-664-9170
Original and three copies

Ms. Cristy Craig
Civil Division
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
Tel. (206) 477-1163
Attorney for King County

<input type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Facsimile
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: central@luho.wa.gov

<input type="checkbox"/>	By United States Mail, postage prepaid and properly addressed
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Facsimile
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By Email: Cristy.Craig@kingcounty.gov ; Monica.Erickson@kingcounty.gov

Signed and certified on April 20, 2020,

Leona M. Phelan
Paralegal
Eglick & Whited, PLLC