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Supreme Court Case No. 102177-1
(Court of Appeals Case No. 83905-5-I)

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

FRIENDS OF SAMMAMISH VALLEY, A Farm in the Sammamish Valley LLC, Marshall Leroy d/b/a Alki Market Garden, Eunomia Farms, LLC, Olympic Nursery Inc., C-T Corp., Roots of Our Times Cooperative, Regeneration Farm LLC., Hollywood Hills Association, Terry and David R. Orkiolla, Judith Allen, and FUTUREWISE,

Respondents.

FUTUREWISE'S PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

The Petitioner is Futurewise, a Washington State nonprofit corporation. Futurewise was a petitioner before the Growth Management Hearings Board (Board) and a respondent before the Court of Appeals.

II. CITATION TO THE COURT OF APPEALS DECISION

The Petitioner seeks review of the following published Court of Appeals decision: *King County v. Friends of Sammamish Valley and Futurewise*, Case No. 83905-5-I filed June 12, 2023, hereinafter Opinion. A copy of this opinion is enclosed as Appendix A.

The Opinion reversed *FOSV et al. v. King County*, Central Puget Sound Region Growth Management Hearings Board (CPSRGMHB) Case No. 20-3-0004c, Order Nunc Pro Tunc Correcting Scrivener's Errors in Final Decision and Order (Jan. 27, 2022), hereinafter FDO. A copy of the FDO is enclosed as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Opinion's baseline that considered only uses and the Opinion's failure to consider absolute impacts in conflict with SEPA and the *Wild Fish Conservancy* decision?

2. Does relying on a SEPA checklist prepared after adoption of an Ordinance comply with SEPA and is the checklist prepared for 19030 inconsistent with the *Spokane County* decision?

3. Did the Opinion correctly interpret the law when it labeled actual and likely impacts as "speculative"?

IV. STATEMENT OF THE CASE

A. Procedural History

The King County Council adopted Ord. 19030 (19030) in December 2019 on a 5-4 vote. 19030 became effective by operation of law after the County Executive did not sign it.[1] 19030 amended KingCo development regulations on siting and

[1] Certified Record (CR) 329. 19030 is at CR 217-338.

operating alcohol-related businesses, i.e., wineries, breweries, distilleries and remote tasting rooms (WBDs).[2] It was enacted based on a County staff State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) dated April 26, 2019, which dispensed with an environmental impact statement (EIS) and with the disclosure and examination of environmental impacts required by SEPA.[3] The DNS, relied upon by the County Council in adopting 19030, was based on the April 24, 2019, SEPA Checklist.[4]

The Friends of the Sammamish Valley and affiliated individuals and groups (FoSV) and Futurewise timely filed petitions for review of 19030 with the Board.[5] The Board issued a FDO finding that 19030 violated the GMA, including requirements to protect agricultural lands and rural areas, and

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[2] CR 217-338.
[3] CR 26-27.
[4] CR 27; CR 29-33, 45. The 2019 SEPA Checklist is at CR 29-48.
[5] CR 49407.

SEPA.[6] The Court of Appeals Opinion reversed the Board and held that 19030 complied with the GMA and SEPA.[7]

B. 19030

19030 legalized WBDs in 64 square miles of agricultural lands of long-term commercial significance zoned Agricultural (A) and 300 square miles of Rural Area (RA) zones.[8] There, land and costs are cheaper than in GMA-designated urban growth areas (UGAs) where the infrastructure suited to the WBDs intensive retail and production businesses is available.[9]

19030 authorizes "Remote Tasting Rooms" as permitted uses in the Rural Area (RA) zones in Demonstration Area A subject to certain conditions and in the Community Business

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[6] CR 49403. The Board FDO is in Appendix B and at CR 49403-49457.
[7] Opinion 2.
[8] CR 9085; CR 9172 (This zoning map shows the KingCo areas with RA designations, as light blue, light green and mid green. Their square miles can be determined arithmetically using the mileage legend at the bottom.).
[9] CR 9094, CR 10129-31.

(CB) and the Regional Business (RB) zones.[10] Winery/Brewery/Distillery uses (WBDs) Is became permitted uses in the Rural Area (RA) zones subject to certain conditions.[11] WBD IIs became permitted uses in the Agricultural (A), Neighborhood Business (NB), the CB, the RB, and the Industrial (I) zones and permitted and conditional uses in the RA zones subject to special conditions.[12] WBD IIIs are conditional uses in the A, RA, NB, CB, RB, and I zones.[13] Permitted uses are permitted outright.[14] A "conditional use" is an allowed "exception to zoning ordinances; it allows a property owner to use his or her property in a manner that the

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[10] CR 239, CR 241-42, CR 317-23, CR 331, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29. The location of these zones can be found on the zoning map at CR 9172.
[11] CR 248, 19030 Sec. 18A.
[12] CR 248-49, 19030 Sec. 18A.
[13] CR 249, *Id.*
[14] *Hansen v. Chelan Cnty.*, 81 Wn. App. 133, 139, 913 P.2d 409, 412 (1996).

zoning regulations expressly permit under conditions specified in the regulations."[15]

Before the adoption of 19030, the sale of alcoholic beverages in the A and RA zones was limited to sales of products produced on site and incidental items.[16] K.C.C. 21A.08.070B.13 formerly read as follows:

> Only as accessory to a winery or SIC Industry No. 2082-Malt Beverages, and limited to sales of products produced on site and incidental items where the majority of sales are generated from products produced on site.[17]

19030 repealed this requirement, substituting that at least two of the five stages of wine, beer, cider, or distilled spirits production identified by 19030 must occur on site.[18] One of those stages of production must be crushing, fermenting, or

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[15] *Weyerhaeuser v. Pierce Cnty.*, 95 Wn. App. 883, 886, 976 P.2d 1279, 1281 (1999).
[16] CR 000238-39, CR 000241-42, prior K.C.C. 21A.08.070A & B.13.
[17] CR 241-242.
[18] CR 248-49, CR 253, CR 257, 19030 Sec. 18A., B.3.f., & B.12.g.

distilling.[19] If these requirements are met, tasting and retail sales of beverages is allowed.[20] So now retail sales in the A zones, RA zones, and other zones can consist of beverages mostly made, three of five steps, offsite and brought onsite.

19030 3 reduced the minimum lot size for WBD IIs in the RA zones from 4.5 to 2.5 acres, increasing the sites where they can be located.[21]

C. "Settlement Agreements"

To protect rural areas and preclude intensive urban uses on rural and agricultural lands, the GMA generally prohibits urban services such as sewers in rural areas.[22] The lack of infrastructure has not deterred some intensive alcohol-related uses from locating in Rural Areas outside of the City of Woodinville to take advantage of lower land costs

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[19] CR 253, 19030 Sec. 18B.3.f.
[20] CR 253, CR 258, 19030 Sec. 18B.3.h. & B.12.i.
[21] CR 000248-49, CR 000266, 19030 Sec. 18 K.C.C. 21A.08.080A. & B.30.a.; CR 10225-26.
[22] RCW 36.70A.110(4); RCW 36.70A.030(35).

commensurate with rural zoning while escaping having to pay for urban infrastructure.[23] And, unfortunately, while occasionally citing them for violations, KingCo allowed this egregious code noncompliance.

Matthews Winery, a major illegal venue, continues in operation to this day. County Health Department and Code Enforcement records show that Matthews was cited in 2012 for illegally converting a recreational vehicle garage into a bar and event center and holding events and concerts in violation of zoning regulations. It was also cited, starting in 2006, for violating stormwater pollutant source control requirements, violations that remained unresolved until 2015. To comply with ground and surface water pollution regulations, the Matthews owners installed a 3,000-gallon holding tank from which every few days raw effluent generated by its intensive retail uses is pumped into a truck for off-site disposal. Matthews also has

[23] CR 9076; CR 9094.

relied on porta potties to accommodate crowds attending its events.[24] These steps highlight the daily incompatibility of these intensive retail uses which create burdens suitable for urban infrastructure, not for makeshift measures in protected Agricultural and Rural Areas.

Years of little or no KingCo enforcement action against illegal uses and resulting impacts on rural and agricultural lands with consequent public outcry, led to a KingCo "solution" that presaged 19030's Finding AA, which announced an enforcement deferral.[25] The "solution" was "settlement agreements" allowing noncompliant uses to continue to operate.[26] This created a group of unlawful *faits accomplish* "anticipating code amendments" that would legalize them.[27]

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[24] CR 8146-71; CR 8173-8206.
[25] CR 8124-26; CR 8223; CR 8248-50; CR 229.
[26] CR 8323-28. Some violators expanded their business regardless, without County enforcement. CR 7480, 7482-84, 7487, and CR 8081 et seq. The number of violators escalated. CR 7480, 7482-84, 7487, and CR 8081 et seq.
[27] CR 8323-85.

The agreements were unsuccessful in restraining the illegal uses.[28]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Issue 1: Is the Opinion's baseline that considered only uses and the Opinion's failure to consider absolute impacts in conflict with SEPA and the *Wild Fish Conservancy* decision?

The Opinion concluded that "[u]nder both *Chuckanut Conservancy* and *Quadrant Corp.*, the appropriate baseline from which to gauge Ordinance 19030's impact was the existing uses ongoing in the Sammamish Valley at the time Ordinance 19030 was enacted."[29] This conclusion conflicts with this Court's *Wild Fish Conservancy* decision where this Court concluded that: "Rather than establishing the baseline on the current *uses* of the land (as the WFC suggests), the

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[28] *See, e.g.*, CR 8119-20 (County notice of revocation/enforcement in light of egregious "settlement" violations); CR 8115-16 (County reverses revocation, owner announces it "can continue doing business under this settlement agreement as usual.") CR 7480, 7482-84, 7487, and CR 8081 et seq.

[29] Opinion 41.

appropriate baseline to compare the proposal's environmental impacts is the *condition* of the existing environment."[30] This Court held "WDFW's threshold determination was not clearly erroneous when it compared the impacts of steelhead farming to the current, existing condition of the environment of Puget Sound …."[31]

The 2019 Checklist utterly fails to consider the impacts of 19030 on the condition of the Sammamish Valley and the County's Agricultural and Rural Areas.[32] For example, it fails to disclose the remote tasting rooms operating in the Sammamish Valley and the condition of the valley.[33] The Responsible Official's memo justifying the County's DNS focused on uses, not the condition of the Sammamish Valley or

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[30] *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 872, 502 P.3d 359, 372 (2022) emphasis in the original.
[31] *Id.*
[32] CR 29-48.
[33] CR 29-48.

the condition of the County's Agricultural and Rural Areas.[34] The DNS also does not consider the condition of the environment in the County's Agricultural and Rural Areas.[35]

Similarly, the Opinion focused on uses and not the condition of the Sammamish Valley or the condition of the County's Agricultural and Rural Areas.[36] The Opinion conflicts with the Supreme Court's *Wild Fish Conservancy* decision.[37]

The Opinion conflicts with the *Wild Fish Conservancy* decision in a second way. In that decision this Court wrote that Ecology adopted WAC 197-11-330(3) "outlining the various factors that an agency must use in determining whether a proposal's impacts will be 'significant.'"[38] In *Wild Fish Conservancy* decision "the factor most relevant to this case states that '[t]he absolute quantitative effects of a proposal are

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[34] CR 8509-11.
[35] CR 26-27.
[36] Opinion 40-42.
[37] *Wild Fish Conservancy*, 198 Wn.2d at 872, 502 P.3d at 372.
[38] *Id.*, 198 Wn.2d at 870, 502 P.3d at 372.

also important [in determining a proposal's significance], and may result in a significant adverse impact *regardless of the nature of the existing environment*.' WAC 197-11-330(3)(b) (emphasis added [by this Court])."[39]

While Futurewise argued that KingCo's SEPA decision violated the requirement in WAC 197-11-330(3)(b), the Opinion never addressed this argument.[40] For example, none of the businesses operating as a remote tasting room in Demonstration Area A were permitted uses prior to adoption of 19030.[41] Remote tasting rooms were not authorized at all in the A or RA zones under the prior regulations.[42] Five remote tasting rooms are operating in Demonstration Area A and were

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[39] *Id.*, 198 Wn. 2d at 871, 502 P.3d at 372.
[40] Brief of Respondent Futurewise Case No. 83905-5-I pp. 38-39 (Filed July 25, 2022); Opinion 1-49.
[41] CR 010182, CR 010184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13; CR 239, CR 241-42, CR 317-23, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29, CR 331, Demonstration Project Overlay A: Sammamish Valley map.
[42] CR 010182, CR 010184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13.

intended to be legalized by 19030.[43] The Opinion erred in not considering the environmental impacts of these newly authorized uses on the condition of the Sammamish Valley including its Agricultural and Rural Areas.[44] This conflicts with this Court's *Wild Fish Conservancy* decision. This Court should take review under RAP 13.4(b)(1) because the Opinion conflicts with *Wild Fish Conservancy* decision.

The Opinion's focus on *Quadrant Corp.* is also misplaced.[45] *Quadrant Corp.* addressed the question of whether an area qualified for being included in an UGA and said nothing about SEPA or baselines.[46]

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[43] CR 47652, Row 6 (Castillo de Feliciana), Row 7 (Cave B Estate Winery), Row 11 (Cougar Crest Estate Winery), Row 20 (Patit Creek Cellars/Forgeron), Row 25 (Sky River Meadery); CR 317-18, Ord. 19030 Sec. 29.
[44] Opinion at 45.
[45] Opinion 41.
[46] *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 228, 110 P.3d 1132, 1134 (2005).

B. Issue 2: Does relying on a SEPA checklist prepared after the adoption of an Ordinance comply with SEPA and is the checklist prepared for 19030 inconsistent with the *Spokane County* decision?

WAC 197-11-340(2)(a), provides that "[a]n agency shall not act upon a proposal for fourteen days after the date of issuance of a DNS if the proposal involves: … (v) A GMA action." 19030 was a GMA action.[47] WAC 197-11-055(2)(c) provides: "Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070)." Therefore, KingCo was required to complete its environmental review before adopting 19030.

WAC 197-11-315(1) provides that counties "shall use the environmental checklist" to assist in deciding if a proposal requires an environmental impact statement. The SEPA Checklist for 19030 was submitted on April 24, 2019.[48] The DNS for 19030, dated April 26, 2019, was based on the SEPA

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[47] CR 218-20, Ord. 19030 pp. 2 – 4.
[48] CR 30.

Checklist submitted on April 24, 2019.[49] A SEPA Checklist must be prepared and reviewed by the County responsible official before issuing a DNS.[50] The 2019 Checklist did not have an Attachment A or a table comparing 19030 with the former Code and an impact summary in the table.[51] The County Council adopted 19030 on December 4, 2019.[52]

Attachment A to SEPA Checklist for the WBD Ordinance (November 2020) is an attachment to a November 2, 2020, SEPA Checklist.[53] This Checklist and Attachment A were not used in the SEPA review for Ordinance 19030 having been prepared almost one year after Ordinance 19030 was adopted.[54]

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[49] CR 26-27; CR 29-33, 45.
[50] WAC 197-11-330(1)(a). The responsible official is the government "officer or officers, committee, department, or section of the lead agency designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency" including issuing DNSs. WAC 197-11-788; WAC 197-11-330.
[51] CR 29-45.
[52] CR 329, 19030 p. 113.
[53] CR 8578-623. Attachment A to the November 2020 SEPA Checklist is at CR 8608-20.
[54] CR 8580; CR 329, Ord. 19030 p. 113.

The 2020 SEPA Checklist was prepared after the Board found the County's SEPA review for Ordinance 19030 violated SEPA.[55] King County did not conduct the SEPA review for the 2019 adoption of Ordinance 19030 based on the 2020 Checklist.[56] The King County Council did not have that November, 2020 Checklist before it when adopting 19030 in December, 2019. The 2019 Checklist did not have an impact summary or a table comparing Ordinance 19030 with the former code.[57] The table the Opinion cited was attached to a 2020 Checklist.[58]

Before the Court of Appeals, KingCo pointed to a table at CP 041839-44, but that table is different than Attachment A and does not include an "impact summary."[59] Attachment A to the 2020 Checklist claims that only five parcels countywide known

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[55] CR 8567; CR 008578.
[56] CR 8567; CR 26-27.
[57] CR 29-45.
[58] Opinion 14. The checklist is at CR 8578-623.
[59] CR 8608-20.

to be WBDs could hold events without a temporary use permit.[60] The table King County cited does not say that.[61] But the Opinion relies on this claim in upholding 19030.[62] The Opinion incorrectly concluded that Attachment A to the 2020 Checklist was based on and furthered an analysis of code changes already included in the Action Report which included the table KingCo cited.[63] The 2020 Checklist included new claims.[64] The Board never considered the 2020 Checklist and King County never argued the Board should.[65]

However, the Opinion relied on the 2020 Checklist and attachments.[66] As the Opinion concluded on SEPA compliance:

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[60] CR 8611.
[61] CP 041839-44.
[62] Opinion 14.
[63] Opinion 14 fn. 4.
[64] CR 8611.
[65] CR 49403-57; King County's Prehearing Brief pp. 8-10, pp. 50-58 and Appendix I in King County's Motion For Leave To File Over-Length Reply Brief, and To Supplement The Administrative Record, And For Additional Time For Oral Argument in Case No. 839055-I.
[66] Opinion 14-17, 45-46, 48.

"We agree with the County that when the appropriate baseline is used and the restrictive provisions of the Ordinance are taken into account, the 2020 Checklist is adequate to support the DNS."[67] Note that the Opinion does not say the 2019 Checklist is adequate.[68] The Opinion wrote: "The 2020 Checklist discusses the likelihood that Ordinance 19030 will lead to the development identified as posing a risk to the Sammamish Valley and is supplemented by an analysis of the code changes Ordinance 19030 makes as compared to prior code."[69] The Opinion also wrote: "The County did not postpone environmental analysis of the potential impacts of Ordinance 19030 to the extent they are probable and not speculative. The comparative analysis of code changes between Ordinance 19030 and prior code added to the 2020 Checklist bears out this conclusion."[70]

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[67] Opinion 46 underlining added.
[68] Opinion 1-49.
[69] Opinion 46.
[70] Opinion 48.

KingCo did not use the 2020 Checklist and Attachment A to SEPA Checklist for the WBD Ordinance (November 2020) in the SEPA review before adopting Ordinance 19030 in 2019.[71] Whether a government agency can use a SEPA checklist prepared a year after a decision subject to review under SEPA to comply with SEPA is an issue of substantial public interest that should be determined by the Supreme Court. The Supreme Court has held that "the initial determination by the 'responsible official,' See RCW 43.21C.030(2)(c), as to whether the action is a 'major actions significantly affecting the quality of the environment' is very important."[72] The checklist is an essential part of that process.[73] "A thorough review and written revisions to the checklist by the lead agency is critically important because the checklist (and other reports if available)

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[71] CR 329, 19030 p. 113.
[72] *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn. 2d 267, 273, 552 P.2d 674, 678 (1976)
[73] WAC 197-11-330(1)(a).

supports the legal validity of the threshold determination."[74] It is also "[i]mportant for receiving useful feedback from other agencies, tribes, and the public" and "necessary for providing other agencies with jurisdiction with environmental information prior to making decisions on the proposal …"[75]

Therefore, this case qualifies for review by the Supreme Court under RAP 13.4(b)(4).

The substantial public interests in this case are shown by the decisions of this Court on conserving agricultural lands and protecting the rural areas. This Court's *Soccer Fields* decision held that "[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land."[76] *Soccer Fields* also held that "[t]he County was required *to assure the conservation of agricultural lands*

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[74] WASH. STATE DEP'T OF ECOLOGY, STATE ENVIRONMENTAL POLICY ACT HANDBOOK p. 20 (2018).
[75] *Id.*
[76] *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products."[77]

This Court's *Soccer Fields* decision held that "to constitute an innovative zoning technique [authorized by RCW 36.70A.177] consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry."[78]

This Court's *Lewis County* and *Kittitas County* decisions again upheld the requirement that development regulations are required to conserve agricultural lands such as KingCo's Agricultural (A) zones.[79] KingCo failed to conserve agricultural

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[77] *Id.*, 142 Wn.2d at 556, 14 P.3d at 140 emphasis in original.
[78] *Soccer Fields*, 142 Wn.2d at 560, 14 P.3d at 142.
[79] *Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 509, 139 P.3d 1096, 1106 (2006); *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.,* 172 Wn.2d 144, 172, 256 P.3d 1193, 1206 (2011); CR 8996, K.C.C. 21A.04.030B.

lands as the GMA requires when making the SEPA determination for 19030.[80]

This Court has repeatedly held that the GMA requires county comprehensive plans and development regulations to protect rural areas.[81] Rural areas include lands that are not in UGAs or designated for agriculture, forest, or mineral resources.[82] The KingCo SEPA decision failed to protect rural lands.[83]

The Opinion also conflicts with the *Spokane County* decision. There the Court of Appeals concluded the Spokane County's "checklist did not tailor its scope or level of detail to address the probable impacts on, for example, water quality, resulting from" an amendment to the plan and development

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[80] CR 26-27; CR 29-48; CR 8509-11.
[81] *Kittitas Cnty.*, 172 Wn.2d at 162–65, 256 P.3d at 1201–03; *Thurston Cnty. v. Cooper Point Ass'n*, 148 Wn.2d 1, 12–13, 57 P.3d 1156, 1162 (2002); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 728, 222 P.3d 791, 793 (2009).
[82] *Thurston Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 357, 190 P.3d 38, 51 (2008).
[83] CR 26-27; CR 29-48; CR 8509-11.

regulations.[84] "While the property is near potable water wells in a Critical Aquifer Recharge Area with high susceptibility, the proposal could 'allow an on-site [wastewater disposal] system that will fail thus resulting in the degradation of the local environment.'"[85] "Despite these concerns, the checklist repeated 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."[86]

Like the amendments adopted by Spokane County, the 2019 SEPA checklist for 19030 lacked information reasonably sufficient to evaluate the proposal's environmental impacts. 19030 authorizes "Remote Tasting Rooms" as permitted uses in

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[84] *Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd*., 176 Wn. App. 555, 580, 309 P.3d 673, 685 (2013) *review denied* 179 Wn.2d 1015, 318 P.3d 279 (2014).
[85] *Id.*
[86] *Id.*, 176 Wn. App. at 580-81, 309 P.3d at 685.

the RA zones in Demonstration Area A and in the CB and RB zones.[87] WBDs Is are permitted uses in the RA zones.[88] WBD IIs are permitted uses in the A, NB, the CB, the RB, and the I zones and permitted and conditional uses in the RA zones.[89] WBD IIIs are conditional uses in the A, RA, NB, CB, RB, and I zones.[90] WBDs are no longer limited to only selling beverages produced onsite and remote tasting rooms were never allowed before in the RA zones.[91]

These zones cover critical aquifer recharge areas including the areas most susceptible to contamination.[92] Wells are located throughout the aquifer recharge areas.[93] However, the regulations do not include updated measures to protect

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[87] CR 239, CR 241-42, CR 317-23, CR 331, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29.
[88] CR 248, 19030 Sec. 18A.
[89] CR 248-49, 19030 Sec. 18A.
[90] CR 249, *Id.*
[91] CR 10182, CR 10184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13.
[92] CR 7631; CR 7516; CR 7575; CR 7695.
[93] CR 9027. The wells are shown as filled boxes; the legend colors indicate the water system class they serve.

groundwater even though state law does not allow "wastewater from alcohol production to be treated in onsite systems that are designed to treat wastewater from toilets, shower and kitchens."[94] Further, WBDs are currently located in these areas[95] and already use onsite septic systems to treat their waste water.[96] "These systems can leach and/or overflow excess effluent into the groundwater, swamping the [Sammamish] Valley farm soils."[97] Already, one of the remote tasting rooms in the RA zone had to abandon a septic tank and drain field and replace it with a holding tank and agree to connect to a sewer when available even though sewers are urban services, not rural services.[98]

Most of these facts and all of the adverse impacts were not disclosed in the 2019 SEPA checklist for 19030. Instead, when

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[94] CR 000251-70; CR 000036; Opinion p. 6 fn. 2.
[95] CR 009075-76.
[96] CR 009087, CR 009093; CR 009033.
[97] CR 009033.
[98] CR 009671-81; CR 009033; CR 009172; CR 009008; RCW 36.70A.030(30), (35).

asked to "[d]escribe waste material that will be discharged into the ground from septic tanks or other sources …" the County wrote "[n]ot applicable for this nonproject action. No regulations governing waste disposal will be amended by the proposal."[99] The SEPA Checklist does disclose that "most" WBDs will use septic tanks, but does not disclose their potential impacts, that tanks may have to be replaced with holding tanks and connect to sewers, or that they will be allowed in aquifer recharge areas.[100] The checklist did not disclose that septic systems for Remote Tasting Rooms and WBDs are failing and discharging to surface and ground water.[101] The checklist did not disclose the impacts on wells including contaminated ground water.[102] Like the checklist in the *Spokane County*, this checklist did not address the probable

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[99] CR 000035-36.
[100] CR 000045.
[101] CR 009033-34.
[102] CR 000029-48; CR 009033.

impacts on water quality from 19030. Like *Spokane County*, KingCo violated SEPA.

Like *Spokane County*, the 19030 checklist repeated formulaic language and "lacked information reasonably sufficient to evaluate the proposal's environmental impacts."[103] KingCo's checklist took the SEPA equivalent of the Fifth Amendment over 80 times. Most answers to the 19303 SEPA Checklist were some variation on "[n]ot applicable for this nonproject action."[104] That was the answer for the question on agricultural lands of long-term commercial significance.[105]

The checklist contends there will not be adverse impacts on prime farmlands pointing to the new requirement that 60 percent of the product processed onsite in the A zone must be grown onsite.[106] But the checklist does not disclose the adverse impacts of nearby development on farmland such as storm

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[103] *Spokane Cnty.*, 176 Wn. App. at 581, 309 P.3d at 685.
[104] CR 33-45.
[105] CR 41.
[106] CR 47.

water runoff that make parts of the Agricultural Production District "too wet for farming" and polluted runoff from failing septic systems flowing onto farmland.[107] These impacts from existing remote tasting rooms and WBDs demonstrate the future impacts of 19030.

Damage to the environment is "an interest plainly protected by SEPA."[108] The SEPA rules identify soils, surface and ground water, runoff, and agricultural crops as elements of the environment.[109] The SEPA determination failed to protect these important interests.[110]

While the Opinion correctly summarized *Spokane County*, the Opinion did not follow its holdings.[111] The Opinion conflicts with *Spokane County*, a published decision of the

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[107] CR 9020; CR 9033.
[108] *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63, 70 (2000).
[109] WAC 197-11-444(1)(a)(ii), (1)(c), (2)(b)(vii).
[110] CR 26-27; CR 29-48; CR 8509-11.
[111] Opinion 46-47.

Court of Appeals. This Court should review this Opinion as provided for in RAP 13.4(b)(2).

C. Issue 3: Did the Opinion correctly interpret the law when it labeled actual and likely impacts as "speculative"?

At the threshold determination stage "SEPA requires consideration of environmental impacts, 'with attention to impacts that are likely, not merely speculative.'"[112] An impact is not speculative if it is "likely or reasonably likely to occur . . ."[113]

The Opinion labeled the adverse impacts that had already occurred and were likely to occur as "speculative."[114] The record shows that WBDs located on rural and agricultural lands.[115] The already occurring adverse impacts include traffic congestion, speculation in farmland, increasing farmland costs beyond what farmers can afford, failing septic systems,

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[112] *Wild Fish Conservancy*, 198 Wn.2d at 873, 502 P.3d at 373.
[113] WAC 197-11-782.
[114] Opinion 44-45, 47-48, 49.
[115] CR 9075-76; CR 9172.

stormwater impacts on farmland, impacts to irrigation water, and impacts on instream flows needed by salmon.[116] 19030 did not include regulations addressing speculative farmland price increases, septic tanks, storm water, instream flows, or irrigation water.[117] The effectiveness of the provisions related to traffic are contested.[118] The SEPA checklist did not disclose any of these impacts.[119] The Opinion waved the impacts away by labeling them speculative.[120]

These impacts all adversely impact elements of the environment and SEPA protects the environment from damage.[121] The GMA also requires the conservation of agricultural lands.[122]

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[116] CR 8179-85, CR 009020, CR 009022, CR 009033, CR 009121, CR 9143, CR 009038, CR 10158.
[117] CR 35-48.
[118] CR 9020.
[119] CR 35-48.
[120] Opinion 44-49.
[121] *Kucera*, 140 Wn.2d at 212, 995 P.2d at 70; WAC 197-11-444(1)(a)(ii), (1)(c), (2)(b), (2)(c).
[122] *Soccer Fields*, 142 Wn.2d at 562, 14 P.3d at 143.

This Court wrote that "[w]e therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action."[123] As was documented above, the uses allowed by 19030 have created actual significant adverse impacts and more of these impacts are probable as future development occurs. The Opinion is inconsistent with the *Boundary Review Board* decision and review should be granted under RAP 13.4(b)(1). The speculative issue also involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

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[123] *King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993).

VI. CONCLUSION

Futurewise respectfully requests that the State Supreme Court accept review and make the following legal holdings:

1. The focus on uses in the baseline, rather the condition of the environment, and the failure to consider absolute impacts violated SEPA and WAC 197-11-330(3) and conflicts with the *Wild Fish Conservancy* decision.[124]
2. A SEPA checklist prepared after the completion of an action subject to SEPA review violates SEPA and the checklist prepared for 19030 is inconsistent with the *Spokane County* decision.
3. Actual and likely impacts are not "speculative" under SEPA.

This document contains 4,992 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: July 11, 2023, and respectfully submitted.

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[124] *Wild Fish Conservancy*, 198 Wn.2d at 870-72, 502 P.3d at 372.

s/ Tim Trohimovich

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of July 2023, he, she, or they caused the following document to be served on the persons listed below in the manner shown: Futurewise's Petition For Review in Court of Appeals Case No. 83905-5-I with Appendixes.

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Signed and certified on this 11th day of July 2023,

s/ Tim Trohimovich

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Appendix A

FILED
6/12/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KING COUNTY, a political subdivision of the state of Washington,

Petitioner,

v.

FRIENDS OF SAMMAMISH VALLEY, a Washington nonprofit corporation; and FUTUREWISE,

Respondents,

A FARM IN THE SAMMAMISH VALLEY LLC; MARSHALL LEROY d/b/a Alki Market Garden; EUNOMIA FARMS, LLC; OLYMPIC NURSERY INC.; C-T CORP.; ROOTS OF OUR TIMES COOPERATIVE; REGENERATION FARM LLC; HOLLYWOOD HILLS ASSOCIATION; TERRY and DAVID R. ORKIOLLA; and JUDITH ALLEN,

Defendants.

No. 83905-5-I

DIVISION ONE

PUBLISHED OPINION

BIRK, J. — King County (County) adopted Ordinance 19030 (Ordinance), amending its land use code governing winery, brewery, and distillery (WBD) facilities. Friends of Sammamish Valley (FoSV) and Futurewise, among others, challenged the Ordinance before the Growth Management Hearings Board for the Central Puget Sound region (Board). FoSV and Futurewise contend that proliferation of WBDs in the Sammamish Valley would have significant

environmental consequences that the County failed to recognize and evaluate. The Board agreed and invalidated most of the Ordinance. We conclude that when its limitations are properly interpreted, Ordinance 19030 is not likely to lead to the development FoSV and Futurewise predict, and the County was correct in issuing a determination of nonsignificance that the Ordinance will not have a probable significant adverse environmental impact. We reverse the Board's order of invalidity and remand for entry of a finding of compliance with the Growth Management Act (GMA), chapter 36.70A RCW, and the State Environmental Policy Act (SEPA), chapter 43.21C RCW.

I

A

Although Ordinance 19030 amends the King County Code applicable throughout the county, the parties focus on its impact in the Sammamish Valley. This area runs from Redmond, Washington, northward along State Route 202 toward Woodinville, Washington. To the west of the Sammamish Valley lie incorporated areas of the cities of Redmond, Kirkland, and Woodinville. The Sammamish Valley includes lands zoned agricultural in a designated agricultural production district. The "broad Sammamish River Valley trough" includes a migratory salmon river and prime farmland. To the east of the agricultural area lie upslope lands zoned rural area. Upland areas to the east drain through 11 mapped small creeks down the valley slopes and into the Sammamish River. Upland drainage potentially affects agricultural land in the valley if increased drainage

leads to the land being waterlogged. Drainage also potentially affects the suitability of the river as a wildlife habitat.

Woodinville has become a destination known for its wineries and tasting rooms. Eastern Washington is recognized as a grape growing region for wine. In some cases, grapes from Eastern Washington have been transported to the Woodinville area for fermenting and processing. Numerous wineries, breweries, and distilleries have located inside the Woodinville city limits. Within its limits, Woodinville provides urban services such as water, sewer, police, fire, traffic control, and surface water management. Historically, a few wineries were established outside the Woodinville city limits, in unincorporated King County. The appropriateness and legal status of these establishments was disputed in submissions to the County during its consideration of Ordinance 19030.

In September 2016, the County published the "Sammamish Valley Wine and Beverage Study" (Study). The Study's stated primary objective was to develop County policy and code recommendations for economic development, transportation, land use, and agriculture. The study area included Woodinville, Kirkland, Redmond, rural areas, and agricultural production districts. The Study found that wine production grew steadily from 1990 to 2013. Although King County was found to be the second largest producer of wine in Washington, it is not noted as a grape growing region and the wineries and tasting rooms in the County are largely representative of wineries using grapes from Eastern Washington. The Study found that Woodinville is one of two hubs in Washington for wine related

retail. The Study was identified as part of the background for Ordinance 19030. The Study was followed by a 2018 "Action Report" that was described as the "County's response to the policy recommendations outlined in [the Study]." The Action Report included discussion of both transportation and agriculture in the Sammamish Valley.

In 2017 and 2018, local residents documented in submissions to the County that it had entered into agreements with property owners in the Sammamish Valley concerning alleged nonconforming uses of their properties for adult beverage businesses. One letter identified eight businesses in unincorporated King County just outside Woodinville city limits that were asserted to be operating as "Tasting Rooms" in violation of the King County Code with alleged pending code violations in late 2019. Opponents of Ordinance 19030 asserted the prospect the County might relax code requirements and permit new adult beverage business in the unincorporated areas was resulting in land speculation, driving up prices into a range that would make agricultural or traditional rural uses not cost effective.

Among the asserted code violations predating Ordinance 19030 was an online review of Castillo de Feliciana Vineyard and Winery LLC complaining about the establishment's reliance on a "porta potty for [a] bathroom," to which the business replied it was "required by [the] County to have all patrons on Friday nights" use portable toilets. A newspaper referenced Sal Leone, owner of a wine tasting room asserted to be "running afoul of [the] County for operating in an area set aside for agriculture," who appealed and "says if he doesn't win, he'll get stinky

pigs and loud roosters for rural ambience." In a news story, the owners of Chateau Lill Events LLC reportedly stated, "[T]here simply hasn't been enough space" at their location "to produce wine," so "the tasting room and event facility has been separate" and it was " 'already a stretch to call it a winery.' "

In another case, the County served a notice and order on Icarus Holdings LLC and Vladen Milosavljevic. The County alleged proposed and existing construction and businesses violated the subject property's zoning as agricultural. At a contested hearing, the hearing examiner declined to reach whether plans for a winery and distillery use were consistent with code, because the plans had not yet come to fruition and "the zoning code is in flux, with extensive pending legislation on wineries and distilleries." The hearing examiner concluded a bakery on the site appeared to violate code, because it was not allowed in the agricultural zone and it appeared to exceed the scope of a previous owner's permit for "retail agricultural products." However, the hearing examiner allowed the bakery to continue while the owners transitioned to a legal use.

Several documents were submitted in regard to "Matthews Estate" (Matthews),[1] including its construction of a 3,000 gallon holding tank for on-site sewage disposal; stormwater pollutant violations dating back to 2006 associated

[1] Throughout the record, the establishments owned by Cliff and Diane Otis are referred to under several different names, including Matthews Estate Winery – Rubstello/Otis LLC, Matthews Estate, Tenor Wines LLC, and Rubstello/Otis LLC. For consistency, we refer to this group of establishments collectively as "Matthews."

with fermentation tanks and effluent from grape crushing;[2] a 2012 citation for conversion of a garage into business space for wine production, a tasting room, and an office without required permits and holding "Events/Concerts" without an approved temporary use permit; and an agreement by Matthews not to protest sewer extension if it becomes available. In an enforcement case, the owners of Matthews entered into a settlement agreement with the County in anticipation of pending adult beverage code changes.

Over a weekend in late August 2017, Matthews hosted what one resident described as "[t]he outrage of the 'White Party,' " photographs of which depicted bumper-to-bumper traffic blocking the road "for hours," open land filled with cars parking under a cloud of dust, portable toilets, food trucks, King County sheriff deputies directing guests across the road, and an assemblage of persons in all-

[2] Opponents relied on an August 3, 2009 letter ostensibly written by Douglas D. Navetski, supervising engineer with King County's Water Quality Compliance Unit. In the letter, Navetski directed Matthews to stop flushing the processing area of crushed grapes toward the road drainage system, and instead "collect and contain the process water from this grape crushing activity and dispose to your onsite septic system." In response to a motion by King County in this matter, FoSV points to a letter filed in the clerk's papers for King County v. Friends of Sammamish Valley, No. 84659-1-I (Wash. Ct. App. Feb. 12, 2021). The letter is dated February 12, 2021 and is from Katelynn Piazza, SEPA Coordinator with the state Department of Ecology, to Ty Peterson with the County's permitting division and the responsible official who issued the determination of nonsignificance for Ordinance 19030. Id. Piazza's 2021 letter indicates that "[s]tate law does not allow wastewater from alcohol production to be treated in onsite systems that are designed to treat wastewater from toilets, shower and kitchens." Id. Piazza concludes the SEPA checklist for Ordinance 19030 "should also identify potential impacts of wastewater disposal on drinking/groundwater from rural WBD businesses." Id. Piazza's letter outlines options WBD facilities could use to dispose of wastewater, though the letter states they are "expensive and entail significant effort." Id.

white attire, and which was reported as having "attracted about 1,500 millennials" and involved "parking 500 to 600 cars across the street on farmland." A resident told the County that "up until 2016 the 'wineries' were having music past midnight" and Matthews is not a winery but a "wine bar." The County became aware that Matthews was referred to as a "nightclub" in an online review.

On March 28, 2018, the County sent a letter to Matthews's owners notifying them that it had verified a complaint of an expansion of their business. The County viewed Matthews's use of a grass area for wine business related activities as an expansion contrary to the settlement agreement. The County noted the property continued to be used for events and activities, which required a temporary use permit the owners had not requested. The County concluded these violations breached the settlement agreement, advised Matthews's owners to cease using the grass area for winery activities, and advised Matthews's owners to submit a temporary use permit application for events occurring on the property. In response to a letter from the owners' attorney, the County paused enforcement action pending an updated adult beverage ordinance.

B

On April 24, 2019, the County published its SEPA environmental checklist (Checklist). The Checklist relied on both the Study and the Action Report. The Checklist stated Ordinance 19030 was a nonproject action that is not site specific and would apply throughout unincorporated King County. For section B of the Checklist, which constituted most of the Checklist, the majority of the responses

concerning the environmental elements of the proposal were "not applicable for this nonproject action." In response to a question asking about proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, the County wrote, "The proposed regulations appropriately regulate WBD land uses consistent with the Comprehensive Plan. The proposal will go through environmental review and a public hearing process, before being acted on by the King County Council." In the supplement to the Checklist, the County noted that the "proposal generally increases the regulations on winery, brewery, and distillery uses, and is not expected to increase discharges to water, emissions to air or production of toxic or hazardous substances." It also noted that existing regulation on various environmental considerations, such as discharge to water, emission to air, production of noise, and effects on plants and wildlife, are already covered by existing applicable regulation on these activities. The Checklist stated Ordinance 19030 was not expected to conflict with or change any requirements for protection of the environment.

On April 26, 2019, the SEPA responsible official, Ty Peterson, issued a determination of nonsignificance (DNS). Peterson reviewed the Checklist and other information on file, considered the extent to which the proposed ordinance will cause adverse environmental effects in excess of those created by existing regulations, and considered mitigation measures that the agency or proponent will implement as part of the proposal. Peterson found the available information was reasonably sufficient to evaluate the environmental impact of the proposed

ordinance and concluded that the proposed ordinance will not have a significant impact to current or continued use of the environment.

In May 2019, Peterson received several e-mails and letters from interested parties, including FoSV and Futurewise, on the proposed ordinance and its DNS. Futurewise argued that basing the DNS on a Checklist deferring analysis of impacts by labeling the action as nonproject was error and that some aspects of the proposed ordinance were more specific than nonproject actions. FoSV requested the DNS be withdrawn and an environmental impact statement (EIS) be prepared. Barbara Lau, an environmental scientist, opined the proposed ordinance would legalize existing illegal businesses and authorize new development that would cause significant environmental impacts. Roberta Lewandowski, a former planning director and SEPA responsible official for the city of Redmond, concluded the DNS was not appropriate. Lewandowski stated the proposed ordinance had an after-the-fact approach of looking backward to discover environmental impacts, which did not comply with the spirit or requirements of SEPA. Lau and Lewandowski documented impacts that new development in the Sammamish Valley could have on the environment and agriculture.

On June 10, 2019, Peterson sent a memorandum to Erin Auzins, the King County Council's supervising legislative analyst, explaining his decision to issue the DNS. Peterson stated he reviewed the Checklist, proposed ordinance, existing codes, regulations and policies, associated studies, and public comments that

were received after the DNS was issued and published. Peterson believed project level impacts could not be anticipated with responsible certainty and attempting to do so would result in "gross speculation." Peterson characterized the proposed ordinance as making "relatively minor" amendments that would not necessarily allow for the reasonable anticipation of probable environmental impacts. Peterson opined the majority of public comments failed to recognize that the proposed ordinance amended existing regulations and the majority of amendments placed restrictions that had not previously existed on WBD uses. Peterson considered the potential for a likely significant impact or probable adverse impact[3] when he reviewed existing conditions, the scope of this nonproject action, and whether existing regulations mitigate any potential impact. Peterson listed 11 areas of environmental regulatory protection or code that the proposed amendments did not change and that would apply to any new development. Peterson found that potential impacts of concern identified in public comment would be most appropriately analyzed at the project level. Peterson characterized the public comments as concerning character, policy, philosophical, growth management, and land use arguments, as opposed to identifying unmitigated environmental impacts likely to result from the code changes.

[3] Peterson's memorandum used the phrase "more than probable adverse environmental impact" in reference to an agency's threshold determination process. This appears to be a typographical error. Peterson also described the threshold determination as requiring consideration of any "likely" significant impact, and he cited WAC 197-11-330. There the code directs the agency to "[d]etermine if the proposal is likely to have a probable significant adverse environmental impact." WAC 197-11-330(1)(b). There is no information suggesting, and the parties do not argue, that Peterson did not apply the proper standard.

C

The County adopted Ordinance 19030 on December 4, 2019. Ordinance 19030 imposed a new license requirement on operating or maintaining an adult beverage business in unincorporated King County. Generally, Ordinance 19030 established a schedule for adult beverage businesses to become licensed, either through establishing a legal nonconforming use or through compliance with its new requirements.

Ordinance 19030 superseded preexisting code which had permitted "Winery/Brewery/Distillery" uses. The Ordinance replaced the former use with "Winery/Brewery/Distillery/Facility" uses I, II, and III. The Ordinance continued previous code that a WBD facility may be sited in agricultural areas only where the "primary" use is "Growing and Harvesting Crops" or "Raising Livestock and Small Animals." Under Ordinance 19030, there is a new requirement for WBD facilities in agricultural areas that 60 percent of the products processed must be grown on site. This is more restrictive than former code, which required WBD uses only to have 60 percent of the products processed grown in the Puget Sound counties, a regional designation that did not require such facilities to process anything grown on site.

Ordinance 19030 altered a former code restriction to tasting of products "produced on-site." Before, the code stated,

> Tasting of products produced onsite may be provided in accordance with state law.

Ordinance 19030 amended this to provide,

> Tasting and retail sales of products produced on-site may occur only as accessory to the primary winery, brewery, distillery production use and may be provided in accordance with state law.

This code provision addresses "[t]asting" and "retail sales" in both agricultural and rural areas. In addition to the primary use requirement applicable in agricultural areas of growing crops or raising livestock, for "[t]asting" and "retail sales" this provision adds a new primary production use requirement applicable in both agricultural areas and rural areas.

Ordinance 19030 imposed other new regulatory requirements. One is that "[a]t least two stages of production of wine, beer, cider or distilled spirits, such as crushing, fermenting, distilling, barrel or tank aging, or finishing . . . shall occur on-site." One of the on-site stages must be "crushing, fermenting or distilling." The Ordinance's other new requirements include regulating floor area, operating hours, parking, licensure, events, impervious surfaces, lot size, water connection, and setbacks.

Ordinance 19030 established new provisions governing temporary use permits for events. In considering a temporary use permit, the County must consider building occupancy and parking limitations, and condition the number of guests allowed based on those limitations. The Ordinance imposed limits of 150 guests at a WBD II and 250 guests at a WBD III. In the rural area, Ordinance 19030 changed the temporary use permit limitation from two events per month to 24 days in any 1 year period.

There is an exception for which a temporary use permit is not required at WBD II and III facilities, if six conditions are satisfied regarding the business's liquor licensure, parcel size, setbacks, location in the rural area zone, access to an arterial or state highway, and hours of use of amplified sound. If a facility is not licensed as a WBD II or III and therefore cannot rely on the exception, a temporary use permit is required if any of seven conditions exist, including exceeding building occupancy, use of portable toilets, parking overflow, use of temporary stages, use of tents or canopies requiring a permit, traffic control, or exceeding allowed operating hours.

Ordinance 19030 created "Demonstration Project Overlay A" in 13 parcels within the rural area zone adjacent to Woodinville. This aspect of Ordinance 19030 uniquely allows "remote tasting rooms." Remote tasting rooms were not defined or explicitly allowed before Ordinance 19030, but Ordinance 19030 provided a means by which these uses can be regulated and licensed. The County acknowledged Demonstration Project Overlay A may result in additional traffic and congestion should new tasting rooms be developed beyond those existing before the Ordinance was adopted. However, the County noted events at remote tasting rooms are limited to two per year per parcel, and Ordinance 19030 limited the number of permitted attendees, making it more restrictive than the former code.

D

On March 4, 2020, FoSV filed a petition with the Board challenging Ordinance 19030 under the GMA and SEPA. On May 26, 2020, the Board granted

summary judgment for FoSV that Ordinance 19030 violated SEPA and substantially interfered with the fulfillment of the GMA's planning goals. The Board found the Checklist inadequate. The Board "remanded this matter to the County to achieve compliance" pursuant to RCW 36.70A.300. There, the GMA provides that in case of noncompliance with SEPA, the Board "shall remand the matter to the affected . . . county" and "specify a reasonable time . . . within which the . . . county . . . shall comply with" the GMA. RCW 36.70A.300(3)(b). The Board established November 6, 2020 as the due date for compliance.

On November 5, 2020, the County issue a new SEPA checklist (2020 Checklist) "in response to the Growth Management Hearings Board Order on Dispositive Motions . . . which granted the petitioners' summary judgment motion and invalidated most of the substantive sections of Ordinance 19030." The 2020 Checklist included a supplemental sheet for nonproject actions (Part D) and four attachments.

Attached to the 2020 Checklist, the County included a table comparing Ordinance 19030 with the former code and an impact summary highlighting the changes between the two versions of the code.[4] Only five parcels countywide that potentially could host WBD II or III facilities could hold events without a temporary use permit, and these parcels were known to already be or potentially be WBD facilities at the time Ordinance 19030 was adopted. The County noted the

[4] The County's response to FoSV's and Futurewise's motion for reconsideration in this court establishes that the table was based on and furthered analysis of code changes already included in the Action Report, which had been considered as part of the original DNS.

exemption could lead to a greater number and more frequent occurrence of events on these properties than might otherwise occur under the former code, "which could mean greater periodic traffic congestion, noise, or other impacts than would otherwise occur under the former code."

On April 16, 2021, the superior court reversed the Board's May 26, 2020 order after finding that the Board exceeded its statutory authority and the order was based on an improper application of the summary judgment standard. The superior court remanded with direction that the Board conduct a hearing on the merits, which the Board did. The Board issued its final, corrected decision on January 23, 2022. Now reviewing the County's revised 2020 Checklist, the Board again found the County had not prepared an adequate checklist under SEPA and again remanded for compliance under RCW 36.70A.300. The Board invalidated sections 12-29, 31, and map amendments No. 1 and No. 2 of Ordinance 19030 and remanded to the County for action to comply with several statutes and administrative requirements. King County filed an appeal from the Board's January 23, 2022 order in superior court, and the action was transferred to this court pursuant to RCW 34.05.518(1)(b).[5]

[5] On January 19, 2023, the County filed a "renewed motion for accelerated review" of this matter or alternately a stay of the appeal filed under Friends of Sammamish Valley, No. 84659-1-I. The motion discloses that pursuant to RCW 36.70A.330(1) and (2), the Board conducted a compliance hearing on August 15, 2022. The Board issued an order finding the County in continued noncompliance. Friends of Sammamish Valley, No. 84659-1-I (Sept. 8, 2022). The County appealed that order, and King County Superior Court transferred the matter to this court. Id. We deny as moot the County's motion for accelerated review in this matter, and we deny without prejudice the County's motion to stay Friends of Sammamish Valley, No. 84659-1-I.

II

The County argues the Board exceeded its jurisdiction by basing its GMA and SEPA analysis on alleged code violations of several existing businesses in the Sammamish Valley. The County argues that the GMA assigns the Board no authority to review site specific land use decisions and, further, that unadjudicated code complaints are unreliable for a GMA and SEPA analysis because even an accurate complaint may not result in a determination that the use is unlawful. The County argues the Board confused a use that is allowed but may not comply with all aspects of governing code, with a use that is illegal and cannot exist in compliance with code.

This distinction is supported by Seven Hills, LLC v. Chelan County, in which the court held that a county's resolution declaring a moratorium on siting new cannabis production and processing activities did not amend or replace existing ordinances, and Seven Hills established a nonconforming use before adoption of the resolution. 198 Wn.2d 371, 376, 495 P.3d 778 (2021). After the county changed the agricultural zoning laws, cannabis growing and processing became nonconforming uses. Id. at 398. The county argued that absent compliance with every required permit and license, a cannabis business could not continue operations after its moratorium. Id. at 397. However, while Seven Hills's failure to obtain a final inspection put them out of compliance with a building permit, it did not necessarily make the use unlawful. Id.

Under RCW 36.70C.040(1), land use petitions fall within the exclusive jurisdiction of superior courts. A "land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination on "[t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property." RCW 36.70C.020(2)(c). Relevant here, the Board may review only petitions alleging "a state agency, county, or city planning . . . is not in compliance with the requirements of [the GMA], . . . as it relates to plans, development regulations, or amendments, adopted under [the GMA]." RCW 36.70A.280(1)(a). "Development regulations" are controls placed on development or land use activities by a county or city, including, among other things, zoning ordinances, official controls, and subdivision ordinances. RCW 36.70A.030(8).

We agree with FoSV that this case does not concern any final land use decisions, which are subject to review in superior court and not before the Board. A rezone involving a single site may fall within the Board's jurisdiction "if it implements a comprehensive plan amendment." Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd., 176 Wn. App. 555, 572, 309 P.3d 673 (2013). The development regulations at issue here fall within the Board's express statutory jurisdiction under RCW 36.70A.280(1)(a). This remains so when evaluating the effect of the development regulations for GMA and SEPA compliance involves considering whether new development at the affected site or sites may "disrupt[] the neighborhood's rural character" under the GMA or "could significantly affect

environmental quality" under SEPA. Id. at 577, 580. The Board did not exceed its jurisdiction by addressing the probable effects of Ordinance 19030 in regard to specific sites.

Additionally, FoSV argues that the Board did not exceed its jurisdiction in making statements about the legal effect of Ordinance 19030, asserting that the Ordinance legalizes, without appropriate consideration, existing operations that the County had cited as unlawful. Under SEPA, "for a nonproject action, such as a comprehensive plan amendment or rezone, the agency must address the probable impacts of any future project action the proposal would allow." Id. at 579. Substantial evidence does not support the conclusion that Ordinance 19030 legalizes previously illegal uses.

When applying for a license under Ordinance 19030, a person must certify the application under penalty of perjury and must include, "[f]or any adult beverage businesses attempting to demonstrate legal nonconforming use status[,] . . . documentation sufficient to establish that the requirements of [King County Code] Title 21A have been met," referring to the County's nonconforming use rules. If an adult beverage business was operating under an active Washington State Liquor and Cannabis Board license for its current location before Ordinance 19030 was effective and the County had not objected to that license, the operator can obtain an initial six month license and then, if the County determines the operator has taken "substantial steps" to document compliance with the County's nonconforming use rules, an additional six months. Thereafter, the County can

approve further licensure only if the applicant has established a legal nonconforming use, shows substantial steps toward doing so, or has conformed with the new requirements for a WBD I, II, or III or remote tasting room regulations. Ordinance 19030 requires operators to establish compliance with prior code or with Ordinance 19030's new requirements. The Board's order makes frequent reference to Ordinance 19030 allowing development "in contravention of current code," approving "*existing code violations*," or "removal of regulatory bans on previously illegal activities." With one exception, the Board nowhere points to an instance of a use it believes was illegal before Ordinance 19030 that would become legal under Ordinance 19030.

The exception is Demonstration Project Overlay A, which the Board asserts allows "uses that are not currently allowable." For Demonstration Project Overlay A, the Ordinance establishes new regulations governing floor area, operating hours, licensure, special events, and off-street parking. Although Ordinance 19030 contemplates that there will be ongoing evaluation and future permanent legislation, it does not mandate that future legislation occur. Remote tasting rooms in Demonstration Project Overlay A "may continue as long as an underlying business license or renewal is maintained." Ordinance 19030 "supersedes other variance, modification or waiver criteria" of the County zoning code. However, continuing a remote tasting room use remains "subject to the nonconformance provisions" of the County code. Within Demonstration Project Overlay A, as well, the Ordinance requires that businesses conform either to former code or to

Ordinance 19030's new requirements. In both agricultural and rural areas, and in Demonstration Project Overlay A, businesses must show compliance with either former or current code.

The Board's decision does not identify any site it believed was not in compliance, the justification for that conclusion, or a reason to believe the nature of the noncompliance would have supported abatement by the County. Under Seven Hills, it does not follow that because a business was ostensibly not in compliance with a code provision, the County could succeed in code enforcement resulting in cessation of the activity. Some of the violations and alleged violations shown in the record concerned only certain activities on properties in the Sammamish Valley, not the broad assertion that the uses on site were illegal and could be subject to action to terminate them, and the possibility of nonconforming use is not addressed for any site. The record does not contain substantial evidence that the County had the ability under the former code to terminate any of the preexisting uses asserted by FoSV and Futurewise to be noncompliant.

The Board did not exceed its jurisdiction under the GMA because it did not conclude, and its record does not permit the conclusion, that any specific site's land use was legal or illegal.

III

The GMA requires that counties with specified populations adopt comprehensive growth management plans. Futurewise v. Spokane County, 23 Wn. App. 2d 690, 694, 517 P.3d 519 (2022) (citing former RCW 36.70A.040

(2014)). A jurisdiction's comprehensive plan must contain data and detailed policies to guide the use and development of land, as prescribed by the GMA. Id. Because of legislative compromises at the time of the enactment of the GMA, Washington courts do not grant the GMA liberal construction. Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd., 164 Wn.2d 329, 342, 190 P.3d 38 (2008). The Growth Management Hearings Boards are "charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations." Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd., 157 Wn.2d 488, 497, 139 P.3d 1096 (2006); RCW 36.70A.280, .302.

When a party challenges a development regulation before the Board, the regulation is "presumed valid upon adoption," RCW 36.70A.320(1), and the Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the [B]oard and in light of the goals and requirements of [the GMA]," RCW 36.70A.320(3). To find an action clearly erroneous, the Board must have a firm and definite conviction that a mistake has been committed. Thurston County, 164 Wn.2d at 340-41. The Board's obligation to apply the "clearly erroneous" standard of review implements a legislative directive that the Board must "grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of [the GMA]." RCW 36.70A.3201. Before the Board, the party challenging an agency action has the burden of demonstrating failure to comply with the GMA. Thurston County, 164 Wn.2d at 341. Here, FoSV and Futurewise had the burden before the

Board to show that Ordinance 19030 was clearly erroneous in light of the record and the goals and requirements of the GMA.

The GMA provides that a party aggrieved by a final decision of the Board may appeal the decision in court pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 36.70A.300(5) (citing RCW 34.05.514); Thurston County, 164 Wn.2d at 341. Under RCW 34.05.518, in circumstances the parties do not dispute exist here, the superior court may transfer review of a final decision of an agency to the Court of Appeals. We review a Board's order for substantial evidence, meaning a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. Thurston County, 164 Wn.2d at 341. On mixed questions of law and fact, we determine the law independently and apply it to the facts as found by the agency. Id. at 341-42. We review issues of law de novo. Id. at 341. We give "[s]ubstantial weight" to the Board's interpretation of the GMA, but the court is not bound by the Board's interpretations. Id.

Because of the legislative directive that the Board grant deference to the agency, "deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general." Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). The Board's deference to an agency's action under the GMA ends when it is shown that the action is clearly erroneous. Id. However, if the Board's decision fails to apply the

deferential "clearly erroneous" standard to the agency action, then the Board's decision is not entitled to deference from the court. Id.

The party appealing a Board decision has the burden of demonstrating the invalidity of the Board's action. Thurston County, 164 Wn.2d at 341; Quadrant Corp., 154 Wn.2d at 233. One ground on which an agency action may be challenged is that the agency erroneously interpreted or applied the law. RCW 34.05.570(3)(d). We review a question of law de novo under the "error of law" standard. City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 136 Wn.2d 38, 49, 959 P.2d 1091 (1998). Under the "error of law" standard, the court may substitute its own view of the law for the Board's. Marcum v. Dep't of Soc. & Health Servs., 172 Wn. App. 546, 559, 290 P.3d 1045 (2012). "If the Board's order correctly found that the [agency's] planning action was clear error, this court defers to the Board's determination of the GMA's requirements. But if this court determines that the Board erred when it found clear error or did not give sufficient deference to the [agency], this court gives deference to the [agency's] planning action." Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 2 Wn. App. 2d 737, 749, 413 P.3d 590 (2018).

Interpretation of a statute is a question of law we review de novo. Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). "The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). Statutory interpretation begins with the

statute's plain language and ordinary meaning. Id. We apply the same principles of interpretation to a county ordinance. Ellensburg Cement Prods., Inc., 179 Wn.2d at 743. We conclude the County has met its burden of showing that the Board erred in interpreting Ordinance 19030 and, as a result, the Board erred in assessing Ordinance 19030's compliance with the GMA.

A

The Board and the parties first have focused on Ordinance 19030's allowing WBD II and WBD III uses in areas zoned for agricultural uses. The Board found that Ordinance 19030 failed to restrict agricultural accessory uses and activities to those that are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site in violation of RCW 36.70A.177(3)(b)(ii). Futurewise argues WBDs cannot qualify as agricultural or nonagricultural accessory uses, in part because under Ordinance 19030 only two of the five production steps are required to take place on site.

RCW 36.70A.177 permits counties to use "innovative zoning techniques" in areas designated as agricultural lands of long-term commercial significance. RCW 36.70A.177(1). One such technique is to allow "accessory uses." RCW 36.70A.177(2)(a). King County Code 21A.06.013 defines "accessory use" as "a use, structure or activity that is: (A) Customarily associated with a principal use; (B) Located on the same site as the principal use; and (C) Subordinate and incidental to the principal use." Section .177 permits agricultural and nonagricultural accessory uses. Agricultural accessory uses include without

limitation the storage, distribution, and marketing of regional agricultural products, agriculturally related experiences, or the production, marketing, and distribution of value-added agricultural products. RCW 36.70A.177(3)(b)(i). Section .177 permits nonagricultural accessory uses if they are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site. RCW 36.70A.177(3)(b)(ii). Nonagricultural accessory uses, "including new buildings, parking, or supportive uses, shall not be located outside the general area already developed for buildings and residential uses and shall not otherwise convert more than one acre of agricultural land to nonagricultural uses." Id.

In King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 547, 14 P.3d 133 (2000) (hereafter Soccer Fields), the County and a local youth soccer association began acquiring land to develop into new athletic facilities. The effort targeted properties in the same Sammamish Valley area that is the focus of this case, which contained prime agricultural soil, and at the time the first property was acquired, the County's comprehensive plan discouraged active recreational uses within agricultural production districts (APDs). Id. The County amended its comprehensive plan and zoning code to allow active recreation in APDs. Id. at 548. Soccer Fields held that RCW 36.70A.020(8), .060(1), and .170 evidenced a legislative mandate for the conservation of agricultural land, and that section .177 must be interpreted in a manner consistent with that mandate. Id. at 562. The court concluded the GMA

did not allow the county to permit recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture. Id.

1

The Board's finding that Ordinance 19030 authorizes uses in violation of section .177 is based on an erroneous reading of the Ordinance as allowing the repurposing of agricultural lands. The Board stated that Ordinance 19030 is an attempt by the County to "permit previously unallowable uses within the [Sammamish Valley] APD," relying on decisions finding GMA violations where there were "no restrictions" on accessory uses in agricultural areas. The Board never explains what uses it believed were allowable beforehand in the area zoned agricultural. Ordinance 19030 replaced a previous use of "Winery/Brewery/Distillery," which was allowed in the agricultural zone but was "only allowed on sites where the primary use is . . . Growing and Harvesting Crops or . . . Raising Livestock and Small Animals." This same limitation is retained for the new described uses WBD II and WBD III when established in the agricultural zone. Compared to the superseded previous allowed use, the new WBD II and WBD III uses have amended provisions for lot size, floor area, structures, and on-site tasting, and new regulations governing parking, on-site production, location of nonagricultural facility uses, retail sales, and impervious surfaces. Like the previous use category, a WBD II or WBD III use under Ordinance 19030 is permitted in the agricultural zone only on sites whose primary use is growing crops or raising livestock. The new WBD II and WBD III uses must additionally comply

with Ordinance 19030's new requirements. Ordinance 19030 does not allow a previously unallowed use, but redefines a previously allowed use with new, more extensive requirements.

FoSV and Futurewise argued before the Board that Ordinance 19030 violated section .177 because its new regulations "do not require that WBDs be located in already developed portions" of agricultural parcels. Ordinance 19030 states that for WBD IIs and WBD IIIs in the agricultural zone, structures for nonagricultural facility uses "shall be located on portions of agricultural lands that are unsuitable for agricultural purposes," which the Ordinance describes as "areas within the already developed portion of such agricultural lands that are not available for direct agricultural production, or areas without prime agricultural soils." Focusing on the reference to areas "without prime agricultural soils," the Board saw a danger that suitable, but not prime, agricultural soils would be repurposed to accessory uses. This interpretation errs by overlooking the requirement that facilities be located only on land "unsuitable for agricultural purposes." In applying Ordinance 19030, the County must follow section .177, it may permit WBDs in agricultural lands only when the primary use on site is growing crops or raising livestock, and it may permit WBD facilities to be sited only on portions of agricultural lands unsuitable for agricultural purposes.

The Board further concluded that Ordinance 19030 was inconsistent with state law in requiring that "sixty percent" of the products processed at a WBD in the agricultural zone be grown "on-site." This was inconsistent, the Board stated,

with the requirement of the GMA that agricultural land must be "land primarily devoted" to commercial agricultural production under RCW 36.70A.030(3). The requirement that WBDs in the agricultural zone process products grown on site is a new requirement Ordinance 19030 imposes that did not exist before. Prior code for a winery, brewery, or distillery required only that 60 percent of the products processed be grown "in the Puget Sound counties." In allowing accessory WBD facilities only if the majority of the products processed are grown on site, Ordinance 19030 is more protective of agricultural production on site than previous code.

The Board raises the specter of the 60-percent-grown-on-site requirement being meant to create the appearance of promoting agriculture while in reality encouraging "banquet venues and distillery tasting rooms."[6] The Board described this provision of Ordinance 19030 as meaning that "consuming a hamburger at a fast-food tasting room is an agriculturally-related experience if some portion of the meat, lettuce, tomato or other ingredient are produced onsite." The Board described its task as determining "whether the WBDs allowed under Ordinance 19030 are legitimately accessory to fruit production, or whether fruit production merely justifies/is accessory to beverage-tasting and event venues." Futurewise makes a similar argument, based on Ordinance 19030's requiring only two stages of production to occur on site (another requirement new from prior code), meaning that three could occur offsite. We take these arguments as envisioning a nominal

[6] The Board's reference to "tasting rooms" in this context is somewhat misleading, because Ordinance 19030 does not allow what it refers to as "remote tasting rooms" except in Demonstration Project Overlay A.

winery, for instance, processing grapes grown on site into wine, whose main purpose is to serve as a *wine bar* providing tasting of other wines besides that produced on site.[7]

We do not agree that Ordinance 19030 disguises such intent. Before this scenario could occur, the County, applying Ordinance 19030, would need to conclude, consistent with section .177, the primary use on site is growing crops or raising livestock; winery facilities could be located only on portions of the lands unsuitable for agricultural uses; and enough of the site would need to be devoted to agricultural production so that 60 percent of the products processed came from the site. Other limitations would come into play as well, such as restrictions on the floor area devoted to on-site tasting or retail sales compared to production. Unlike the proposal in Soccer Fields, Ordinance 19030 when properly interpreted does

[7] For the first time in this court in a motion for reconsideration, FoSV and Futurewise argue that lines 510-12 of Ordinance 19030 eliminated what they call the " 'sales rule,' " and that appreciating the consequence of this is "essential for a fully informed analysis under SEPA and the GMA." This court generally does not consider arguments raised for the first time in a motion for reconsideration. Hous. Auth. v. Ne. Lake Wash. Sewer & Water Dist., 56 Wn. App. 589, 595 n.5, 784 P.2d 1284, 789 P.2d 103 (1990). We note, however, that FoSV and Futurewise focus on an alteration of preexisting code without recognition of its being replaced by new and different requirements. In the agricultural zone, former code allowed a use of "Liquor Stores," but only as accessory to the previous category of "SIC Industry No. 2081 Malt Beverages," and limited to sales of products "produced on site" and "incidental items" where the "majority" of sales was required to be from products "produced on site." Ordinance 19030 eliminates the allowance of "Liquor Stores" in agricultural zones. In agricultural zones, such use is superseded by the new WBD II and III uses, subject to the primary use requirement of growing crops or raising livestock, the 60-percent-grown-on-site requirement, retail sales limited to accessory use, and the other new restrictions set forth in the ordinance. While it is true there is not a majority sales requirement as there was before, that requirement is replaced by new and different requirements protective of agricultural lands consistent with section .177.

not repurpose agricultural lands into nonagricultural uses. The Board erred when it interpreted Ordinance 19030 otherwise.

2

The Board alludes to the prospect of events occurring in the agricultural zone and conflicting with agricultural uses. Ordinance 19030 creates new requirements and conditions for issuance of temporary use permits at the WBD facilities it allows. FoSV and Futurewise complain of several preexisting use patterns in the Sammamish Valley, such as activities exceeding building occupancy; involving "portable toilets"; exceeding the number of allowed parking spaces; using "temporary stages," "tents," or "canopies"; requiring "traffic control"; or extending "beyond allowable hours of operations." Ostensibly in response to these patterns, Ordinance 19030 newly requires a temporary use permit with certain exceptions. In the agricultural zone, the temporary use shall not exceed two events per month. During permit review, the County must "consider" building occupancy and parking limitations "in addition to all other relevant facts," and "shall condition the number of guests allowed for a temporary use based on those limitations." The County may not authorize more than 150 guests at a WBD II, or more than 250 guests at a WBD III. The Board found, without further analysis, "events of that size in agricultural areas without regulations ensuring adequate setbacks to prevent conflicts between agricultural activities and events" violates section .177's requirement that accessory uses do not interfere with agricultural use of neighboring properties.

The Board's focus on events appears to stem from its concern that Ordinance 19030 will promote the establishment of "banquet venues" in the agricultural zone. This interpretation neglects Ordinance 19030's requirement that sites in agricultural areas must be devoted to a primary use of growing crops or raising livestock. It also overlooks that temporary use permits are subject to the County's discretion to impose limitations to avoid the conflicts the Board fears. As discussed above, Ordinance 19030 alters the restrictions on temporary use permits in areas zoned rural area so that annual averages are applied, allowing events to be clustered in the summer months. But the same is not true in the agricultural zone in which events remain limited to two per month as they were under prior code. Finally, the Board's reference to the capacity limitations for events at WBDs ignores that these are caps newly imposed by Ordinance 19030 where none had existed before. Ordinance 19030 cannot be viewed as an expansion of the permissions allowed for events held in agricultural areas, and the Board erred in construing it to do so.

B

The Board and Futurewise maintain that Ordinance 19030 violates the GMA because it does not conform to the County's comprehensive plan. A land use decision need only generally conform to the comprehensive plan. Spokane County, 176 Wn. App. at 574-75; Woods v. Kittitas County, 162 Wn.2d 597, 613, 174 P.3d 25 (2007). We conclude that the Board's erroneous interpretation of Ordinance 19030 led to an erroneous conclusion that Ordinance 19030 failed to

"generally conform" to the comprehensive plan. The Board found that Ordinance 19030 was inconsistent with County Policy R-201. As emphasized by the Board, R-201 calls for development standards to "protect and enhance" "[t]he natural environment," "[c]ommunity small-town atmosphere, safety, and locally owned small businesses," and "[t]raditional rural land uses." The County's policy follows the GMA's requirement for the rural element of a comprehensive plan, which must "protect the rural character of the area." RCW 36.70A.070(5)(c). The Board concluded Ordinance 19030 thwarted these requirements based on its omitting adequate environmental review or sufficient development regulations to ensure "new allowable uses" are compatible with the "natural environment," "traditional rural land uses" of appropriate size and scale, and rural uses that "do not include primarily urban-serving facilities." The Board rejected the County's reliance on its "discretion to enhance the job base in rural areas and create opportunities for business development."

1

The Board asserted the County improperly ignored "the illegal nature" of existing uses "which could be addressed by code enforcement." The Board speculated that these uses, which the Board did not specifically identify, were "*apparently* not protected as prior non-confirming uses." (Emphasis added.)

As discussed above, the Board had no justifiable basis for concluding that any existing use was "illegal" or "could be addressed by code enforcement." As was true for agricultural lands, likewise for areas zoned rural area, prior code had

allowed a previous use of "Winery/Brewery/Distillery." Prior code stated tasting of products produced on site "may be provided in accordance with state law." Under Ordinance 19030, the accessory use is broadened to tasting and retail sales, but is subject to a new requirement that it "may occur only as accessory to the primary winery, brewery, distillery production use." The Board adopted an erroneous interpretation of Ordinance 19030 when concluding it led to "new allowable uses," and improperly speculated when it assumed that Ordinance 19030 legalized previously illegal uses. When properly interpreted as imposing new regulations over what had been allowed under the previous "Winery/Brewery/Distillery" use, Ordinance 19030 does not fail to "generally conform" to R-201.

2

FoSV argues that Ordinance 19030's new provision for "[t]asting and retail sales" at WBD facilities creates a hidden expansion of retail sales, because, according to FoSV, "state law" permits a winery to sell wine "of its own production" at an off-site "additional location." RCW 66.24.170(3). FoSV theorizes that the new language would allow a WBD functioning merely as a "retail" "storefront" for an Eastern Washington winery. FoSV does not establish (and we do not decide) that state law would operate in this manner. In any event, Ordinance 19030 creates a new requirement that a WBD facility may occur "only" as "accessory" to a "primary" winery, brewery, or distillery "production" use. When read in the context of this new requirement, Ordinance 19030 does not create a hidden expansion of "retail" "storefront" operations without a primary production use on site.

FoSV also disputes the import of the new requirement that two stages of production occur on site, describing this as an "[i]llusory" production requirement. FoSV argues that Ordinance 19030 addresses production in a manner amounting to a "loophole," by allegedly allowing WBDs "with no realistic production capabilities" if there is "a single barrel out back labelled 'fermenting', 'aging', or 'finishing,' but only constituting a negligible fraction" of sales. FoSV points out that prior code required that in the rural area 60 percent of the materials processed be grown in Puget Sound counties. As noted above, Ordinance 19030 changes this to a 60-percent-grown-on-site requirement, but it also limits that requirement to agricultural areas. As a result, FoSV argues, in the rural area, Ordinance 19030 replaces the former requirement of 60 percent grown in Puget Sound counties with a new definition of production requiring only that two stages of production occur on site, a requirement FoSV argues can be exploited by a site primarily importing wine from Eastern Washington having a "single barrel out back."

These arguments also overlook that Ordinance 19030 imposes a new requirement in the rural area that the "primary" use at a WBD be winery, brewery, or distillery "production use." By requiring a primary production use in the rural area, Ordinance 19030 does not authorize a WBD lacking realistic production capabilities and attempting to justify a primary *retail* use through two stages of production of a negligible or sample production quantity. When properly

interpreted, Ordinance 19030 does not authorize uses inconsistent with traditional rural land uses under R-201.[8]

3

FoSV contends that Ordinance 19030 does not generally conform to the County's Policy SO-120. This policy explains that "[t]he purpose of the agricultural production buffer special district overlay" is to provide a buffer between agricultural land "and upslope residential land uses." KING COUNTY CODE 21A.38.130(A). To implement this policy, the code applies to "residential subdivisions locating in an agricultural production buffer special district overlay," and requires that "[l]ots shall be clustered . . . and at least seventy-five percent of a site shall remain as open space." KING COUNTY CODE 21A.38.130(B). FoSV does not demonstrate that Ordinance 19030's amendments to the uses allowed in the rural area zone implicate this policy applicable to "residential subdivisions." Ordinance 19030 does not authorize any "residential subdivisions" and does not authorize any use that would not still be subject to SO-120.

While this code provision governs residential subdivisions, Futurewise and FoSV nevertheless argue that the purpose of the code is to limit surface development to prevent damaging runoff flowing from upslope lands into the agricultural lands and the river. Ordinance 19030 imposes a protection against

[8] FoSV and Futurewise's new argument in seeking reconsideration that the elimination of the "sales rule" violates the GMA makes the same error in regard to the rural area as noted above in regard to the agricultural zone. In superseding the former use of "Liquor Stores," Ordinance 19030 makes WBD uses in the rural area subject to new and different requirements, including a primary production use and limiting retail sales to a use accessory to the primary production use.

surface development for WBD facilities in requiring that "[t]he impervious surface associated with the winery, brewery, distillery facility use shall not exceed twenty-five percent of the site, or the maximum impervious surface for the zone in the according with [King County Code] 21A.12.030[(A)] or 21A.12.040[(A)], whichever is less." This is both a new requirement for WBD facilities and one that generally conforms to SO-120's requirement that 75 percent of a residential subdivision in an agricultural buffer overlay remain as open space. This requirement is not imposed on a "remote tasting room" established within the 13 parcels within Demonstration Project Overlay A, which lie within the agricultural buffer overlay. But FoSV and Futurewise point to no evidence that Demonstration Project Overlay A will likely increase impervious surface on or runoff from these 13 parcels. Ordinance 19030 does not exempt these parcels from existing law imposing impervious surface regulations and surface water management regulations. There is no basis for concluding that there will be increased runoff from these parcels in a manner that does not generally conform to SO-120.

4

The Board found that Ordinance 19030 failed to "generally conform" to the County's general code provisions for the vesting of prior nonconforming uses under King County Code 21A.32.040. But this conclusion was based on the Board's assumption that Ordinance 19030's Demonstration Project Overlay A coincides with "sites on which illegal operations are currently known to be in existence." This assumption was unjustified, because nothing supported the

Board in concluding any individual use was "illegal," nor does Ordinance 19030 legalize any preexisting "illegal" use. When properly interpreted, Ordinance 19030 does not fail to "generally conform" to the County's existing vesting rules.

IV

In addition to reviewing GMA compliance, "hearings boards may review petitions alleging a county did not comply with SEPA in adopting or amending its comprehensive plan or development regulations." Spokane County, 176 Wn. App. at 569-70. The legislature enacted SEPA in 1971, expressing the aim of injecting environmental awareness into governmental decision-making. Wild Fish Conservancy v. Dep't of Fish & Wildlife, 198 Wn.2d 846, 855, 502 P.3d 359 (2022). SEPA is a procedural statute to ensure that environmental impacts and alternatives are properly considered. Save Our Rural Env't v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983).

SEPA and its implementing regulations require that the government conduct environmental review, through at least a threshold determination, for any proposal that meets the definition of an action. Int'l Longshore & Warehouse Union, Loc. 19 v. City of Seattle, 176 Wn. App. 512, 519, 309 P.3d 654 (2013). A project action involves "a decision on a specific project, such as a construction or management activity located in a defined geographic area." WAC 197-11-704(2)(a). "Nonproject" actions are "actions which are different or broader than a single site specific project, such as plans, policies, and programs." WAC 197-11-774. The purpose of SEPA rules is to ensure an agency fully discloses and

carefully considers a proposal's environmental impacts before adopting it and at the earliest possible stage. Spokane County, 176 Wn. App. at 579. An agency may not postpone environmental analysis to a later implementation stage if the proposal would affect the environment without subsequent implementing action. Id.

The agency must use an environmental checklist to assist its analysis and must document its conclusion in a threshold determination of significance, a determination of mitigated nonsignificance, or a DNS. Id. at 578-79; WAC 197-11-350. A determination of significance requires the preparation of an EIS. RCW 43.21C.030(2)(c); WAC 197-11-400(2). The agency must base its threshold determination on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. A threshold determination must not balance whether the beneficial aspects of a proposal outweigh its adverse impacts but, rather, must consider whether a proposal has any probable significant adverse environmental impacts. WAC 197-11-330(5). If the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the agency must issue a DNS.[9] WAC 197-11-340.

[9] There is no dispute the responsible official was charged with determining whether Ordinance 19030 would have probable significant environmental impacts when making the threshold determination. Futurewise takes out of context a statement from Heritage Baptist when it further argues that the responsible official could not consider other code requirements that would necessarily bear on any future projects in evaluating the likelihood that Ordinance 19030 would have probable significant environmental impacts. In Heritage Baptist, we stated, "[A] county, city, or town may not rely on its existing plans, laws, and regulations when evaluating the adverse environmental impacts of a nonproject action." 2 Wn. App. 2d at 752. This referred to the requirements for a supplemental EIS examining a

The agency has the burden of showing prima facie compliance with the procedural requirements of SEPA. Juanita Bay Valley Cmty. Ass'n v. City of Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973). A threshold determination that an EIS is not required is reviewed under the "clearly erroneous" standard. Chuckanut Conservancy v. Dep't of Nat. Res., 156 Wn. App. 274, 286, 232 P.3d 1154 (2010). The scope of review is broad, and the search for significant environmental impacts must be considered in light of the public policy of SEPA. Id. The public policy of SEPA is consideration of environmental values. Nor. Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement," the decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090.

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rezone, in which it is settled " 'the environmental consequences are discussed in terms of the maximum potential development of the property.' " Id. (quoting Ullock v. City of Bremerton, 17 Wn. App. 573, 581, 565 P.2d 1179 (1977)). Moreover, Heritage Baptist relied on a statement in a footnote in Spokane County noting that a statute directed issuance of a DNS in certain situations in which existing development regulations " 'provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action,' " but this "exception" does not apply to a nonproject action. 176 Wn. App. at 578 n.4 (quoting RCW 43.21C.240(1)). The responsible official in this case did not attempt, as the agency had in Heritage Baptist, to undertake an EIS let alone assume something less than maximum potential development following the rezone in doing so or, as the court alluded to in Spokane County, to rely on a statutory provision directing the outcome of the threshold determination.

A

The County challenges the Board's finding that the responsible official included "illegal uses" as a baseline condition for the SEPA threshold determination, because it was not supported by evidence in the record. Futurewise argues that the Board correctly concluded that Demonstration Project Overlay A legalized uses that are not currently allowable and that the impacts of legalizing these uses were never considered by Peterson or in the Checklist.

In Chuckanut Conservancy, the court addressed the "baseline" against which to evaluate the environmental impacts. 156 Wn. App. at 283. The term "baseline" is a term borrowed from National Environmental Policy Act of 1969, 42 U.S.C. § 4321, jurisprudence, and is a practical tool often employed to identify the environmental consequences of a proposed agency action. Chuckanut Conservancy, 156 Wn. App. at 284 n.8. In Chuckanut Conservancy, Blanchard Forest was proposed to be divided into four management zones: for conservation and recreation, for habitat conservation, for logging, and for revenue production. Id. at 281. It was undisputed the forest had been logged before the new management plan and would continue to be under the new plan. Id. at 280-82. Those challenging the management plan argued that the "decision to protect the core zone from logging demonstrates that all of the Blanchard Forest need not be logged" and that the environmental impacts "must be evaluated against a 'no logging' use." Id. at 289. We rejected this argument, holding the agency's task is

to "analyze the proposal's impacts against existing uses, not theoretical ones." Id. at 290.

In Quadrant Corp., the court held that agencies planning under the GMA should consider vested development rights when determining whether an area "already is characterized by urban growth" according to RCW 36.70A.110(1). 154 Wn.2d at 228. The vested rights doctrine establishes that land use applications vest on the date of submission and entitle the developer to divide and develop the land in accordance with the statutes and ordinances in effect on that date. Id. at 240. The Growth Management Hearing Board had determined that counties could consider only the "built environment." Id. The court found this unreasonably precluded local jurisdictions from considering vested rights to divide and develop land and erroneously forced counties to ignore the likelihood of future development. Id. at 241.

Under both Chuckanut Conservancy and Quadrant Corp., the appropriate baseline from which to gauge Ordinance 19030's impact was the existing uses ongoing in the Sammamish Valley at the time Ordinance 19030 was enacted. It would be speculative to attempt to evaluate the impact of Ordinance 19030 based on the possibility—which was never established—that the County could have forced the cessation of one or more businesses had Ordinance 19030 never been enacted. Those challenging Ordinance 19030 point to Matthews's case as one demonstrating the environmental threat to the Sammamish Valley from the prospect of new development. The County points to it as demonstrating the

challenge of enforcement against such establishments under preexisting code. Ordinance 19030 does not legalize any previously terminable uses but explicitly requires that uses comply with former code or its new requirements. To the extent code violations are documented, they establish that some businesses in the Sammamish Valley were required to address code violations over a period ranging at least from 2006 to 2017, but they do not establish that any of the businesses could not exist in their current form either because they could be abated under code or because they could not continue as nonconforming uses.[10]

B

The County challenges the Board's finding that the DNS impermissibly used potential benefits of Ordinance 19030 to balance the potential negative impacts of the proposal, in violation of WAC 197-11-330(5). FoSV responds by stating that the SEPA checklist is neither a bibliography nor a balancing act, but is a full disclosure document that must provide enough information to adequately inform the County Council as to the likely significant environmental impacts of their action. Relying on WAC 197-11-330(5), Futurewise argues that the Board was correct to

[10] Another new argument in FoSV and Futurewise's motion for reconsideration is their contention that five businesses were illegal before Ordinance 19030 because they had insufficient lot size. They cite a spreadsheet they say was prepared by the County showing winery establishments in the county and listing lot sizes, which FoSV and Futurewise compare to former code. The spreadsheet does not identify the businesses as illegal or subject to abatement, the Board did not find existing uses were illegal on this basis, and FoSV and Futurewise did not make this argument in their briefs. We decline to consider this new argument. Hous. Auth., 56 Wn. App. at 595 n.5.

conclude that the responsible official engaged in illegal balancing of positive and negative impacts of Ordinance 19030.

Under WAC 197-11-330(5), Peterson was not permitted to balance any beneficial aspects of Ordinance 19030 with its adverse impacts but rather had to consider whether the proposal had any probable significant adverse environmental impacts. The Board first seemed to believe that the County was engaged in improper balancing by touting the benefits of, as the Board put it, "[b]uilding out the rural area of the Sammamish Valley into a string of upscale spirit tasting and wedding venues." Nothing in the DNS suggests this was a motivation in evaluating the probable impacts of Ordinance 19030, or a likely effect of the Ordinance. By imposing requirements of primary agricultural and production uses across the areas in question, the Ordinance does not allow primary spirit tasting and event venue businesses.

The Board also implies that Peterson engaged in impermissible balancing when he stated that the vast majority of Ordinance 19030's amendments result in new limitations on WBD uses, as opposed to expanding or introducing new uses previously unpermitted. For instance, the Board stated that Ordinance 19030 eliminated the "on-site production requirement" of the former code and reduced the minimum lot size for some WBD uses in the rural area from 4.5 acres to 2.5 acres, which, the Board asserted, "Common sense dictates" will increase "the number of parcels eligible" for siting WBD uses. These statements take the provisions of Ordinance 19030 out of context. Simultaneously the Ordinance

newly limits WBD uses in the agricultural and rural area zones to sites whose primary use is growing crops, raising livestock, or winery, brewery, or distillery production, and requires at least two stages of production to occur on site. "Common sense" might dictate that removing an on-site production requirement or reducing the minimum lot size *alone* would logically open up more parcels to more allowed uses, but the same does not hold for an overlay of extensive new regulation with new and different terms.

Futurewise argues an analysis of rural area parcels FoSV presented to the County should have been considered in the Checklist and DNS. The analysis lists 43 rural area parcels greater than 2.5 acres and the theoretical permissible amount of commercial space for WBD II or III uses Ordinance 19030 would allow. However, 29 of these parcels are equal to or greater than 4.5 acres and already qualified for WBD uses under preexisting code without any of the new restrictions Ordinance 19030 imposes. It remains speculative that any parcels, including these 43, would be the site of new development, and no representation is offered that they lie in the Sammamish Valley or that their development would have any of the environmental consequences FoSV and Futurewise attributed to the Ordinance.

FoSV and Futurewise rely on evidence that existing uses for events and tasting rooms dependent on wine produced in Eastern Washington has in the past created traffic, commercialization, and encroachment concerns. Under Ordinance 19030, new WBD I, II, and III uses must, in the agricultural zone, be based on 60 percent of their product being grown on site, and in the rural area zone, be based

on a primary production use. FoSV and Futurewise identify no substantial evidence in the administrative record, and we have found none, that, on a nonspeculative basis, new WBDs are likely to occur in any numbers or cause any new or increased traffic, commercialization, or encroachment concerns. FoSV and Futurewise identify no substantial evidence that new remote tasting room uses are likely, considering that they can exist only on 13 parcels in Demonstration Project Overlay A, several of which are already occupied. In concluding that Ordinance 19030 does not exhibit a likelihood of generating new, nonspeculative adverse impacts, Peterson did not engage in improper balancing.

C

The County challenges the Board's finding that the Checklist, as supplemented by the 2020 Checklist, failed to evaluate all reasonably foreseeable impacts of the proposal by impermissibly delaying environmental review to the project phase, in violation of WAC 197-11-060. Futurewise contends that the Checklist's repetitive variation on the phrase "not applicable for this nonproject action" as a response to most of the Checklist's questions violates SEPA. The Study of wineries in the Sammamish Valley and the Action Report are referenced in the Checklist. The Study and Action Report are high-level documents, and neither contains detailed discussion of any environmental concerns for the Sammamish Valley or any potential impacts of potential legislation. We agree with FoSV and Futurewise that the Study and Action Report by themselves cannot satisfy the requirement of SEPA that the Checklist "provide information reasonably

sufficient to evaluate the environmental impact of the proposal." Anderson v. Pierce County, 86 Wn. App. 290, 301, 936 P.2d 432 (1997) (citing WAC 197-11-315 to -335).

However, the County prepared an amended checklist on remand from the Board's first order pursuant to RCW 36.70A.300. The 2020 Checklist discusses the likelihood that Ordinance 19030 will lead to the development identified as posing a risk to the Sammamish Valley and is supplemented by an analysis of the code changes Ordinance 19030 makes as compared to prior code. If the checklist does not contain sufficient information to make a threshold determination, the applicant may be required to submit additional information. Moss v. City of Bellingham, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (citing WAC 197-11-335(1)). We agree with the County that when the appropriate baseline is used and the restrictive provisions of the Ordinance are taken into account, the 2020 Checklist is adequate to support the DNS.

In Spokane County, the court held the hearings board did not err in finding SEPA noncompliance because the record showed that the county failed to fully disclose or carefully consider specific, probable environmental impacts before the amendment was adopted and at the earliest possible stage. 176 Wn. App. at 581. The county characterized the proposals as nonproject actions, leaving much of the required environmental analysis to be determined if site specific developments are proposed. Id. at 563. The checklist did not tailor its scope or level of detail to address the probable impact resulting from the amendment. Id. at 580. The

checklist repeated formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards. Id. at 580-81. The court found the checklist lacked information reasonably sufficient to evaluate the proposal's environmental impacts. Id. at 581.

In Chuckanut Conservancy, the court held the DNS did not clearly err in determining that a forest management plan did not require an EIS. 156 Wn. App. at 293. The management plan called for a recreational overlay applicable to all management zones in the forest and changed no existing regulations, policies, or plans; new projects would be subject to environmental review. Id. at 282-83. The DNS reasoned that the management plan was a nonproject action outlining management objectives to be implemented under existing rules and policies and therefore generated no environmental impacts by themselves. Id. at 283. The DNS considered the entire regulatory and policy system governing forestry on state lands. Id. at 290. The management plan had no bearing on the selection of future forest practices. Id. at 292. The challenger did not clarify what adverse impacts may result from the management plan, and its true argument was that the management plan did not eliminate all environmentally adverse impacts on the forest. Id. The agency did not improperly rely on the existing regulatory and policy framework in its threshold review, since the management plan made no changes to existing uses except to preserve some tracts from harvest. Id.

The Board's decision, Futurewise, and FoSV do not point to substantial evidence that Ordinance 19030's provisions will likely have a nonspeculative

adverse impact that the County failed to consider. Their concerns for the legalization of existing uses are almost entirely confined to 13 parcels where, much as the challengers alleged in Chuckanut Conservancy, they allege long-standing existing uses will not be curtailed by the new Ordinance. The County did not postpone environmental analysis of the potential impacts of Ordinance 19030 to the extent they are probable and not speculative. The comparative analysis of code changes between Ordinance 19030 and prior code added to the 2020 Checklist bears out this conclusion. This both relied on the appropriate baseline of the ongoing use patterns and appropriately incorporated Ordinance 19030's restrictive elements. This analysis considered, among other things, impacts to water use within the Woodinville water district, impacts of event and WBD II and III locations including traffic congestion and noise, impacts of decreasing on-site parking requirements for WBDs including a potential reduction in visitors, and impacts of reductions to impervious surface requirements. Analogously to Chuckanut Conservancy, Ordinance 19030 creates new and different requirements alongside an existing array of environmental and other development regulations. We agree with the County that it is speculative to say that the Ordinance is likely to result in the proliferation of WBD uses to a degree different than was already allowed under the former code.

When Ordinance 19030 is considered as a whole, in agricultural areas it restricts WBD uses to those that are accessory within the meaning of King County Code and section .177 to primary uses of growing crops or raising livestock, and

in rural areas it restricts them to uses accessory to primary production uses. These overarching restrictions, like many others appearing in the ordinance, are never mentioned in the Board's 55-page order. Because, correctly interpreted, Ordinance 19030 is more restrictive than the Board interpreted it to be, Peterson was correct to conclude that it would be speculative to forecast that it will result in redevelopment of the Sammamish Valley to any identifiable degree. The County was entitled for this nonproject action to rely on project-level requirements that individual developments comply with SEPA, existing legal requirements, and Ordinance 19030's requirements as described in this opinion.

V

A correct interpretation of Ordinance 19030 demonstrates that it does not violate section .177 and generally conforms to the County's comprehensive plan, Ordinance 19030 does not violate the GMA, the Board erroneously interpreted or applied the law in violation of RCW 34.05.570(3)(d), and the DNS supporting Ordinance 19030 did not violate SEPA. We reverse the Board's order of invalidity and remand to the Board with instructions to reinstate the DNS and enter a finding of GMA and SEPA compliance.

Birk, J.

WE CONCUR:

Mann, J.

Dwyer, J.

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

FOSV, et al., Petitioners, v. KING COUNTY, Respondent.	**CASE No. 20-3-0004c** **ORDER NUNC PRO TUNC CORRECTING SCRIVENER'S ERROS IN FINAL DECISION AND ORDER**

This order corrects multiple scrivener's errors in the Final decision and Order issued January 3, 2022.[1]

SYNOPSIS

FOSV, et al., (Petitioners) challenged Ordinance 19030 amending King County's development regulations concerning wineries, breweries, distilleries (WBDs) and remote tasting rooms outside the urban area and on designated agricultural land. The Growth Management Hearings Board (Board) concluded the County's action failed to comply with RCW 43.21C and GMA requirements to ensure protection of agricultural lands, rural character, sufficient public infrastructure, and consistency between the comprehensive plan and development regulations.

I. PROCEDURAL POSTURE

Petitioners challenged King County's (County) December 2019 adoption of Ordinance 19030 amending the County's development regulations concerning wineries,

[1] This matter comes before the Board on Petitioners' Motion for Reconsideration to correct scrivener's errors, filed on January 13, 2022, to which the County responded without objection on January 20, 2022.

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breweries, distilleries (WBDs) 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. The Board granted summary judgment to Petitioners as to the threshold issue of the timing and sufficiency of the SEPA checklist (Checklist).[2]

On appeal, the Superior Court held that the Board had improperly applied CR 56 in granting summary judgment prior to holding a Hearing on the Merits and remanded the matter to the Board for further proceedings.[3] The Superior Court did not overturn the Board's determinations regarding Project A and Finding AA.[4]

Amid confusion caused by transmittal of conflicting orders from the Superior Court, communication between the County, the Department of Commerce (DOE), and the Board's agency administrative director was copied directly to the Board discussing how the Board's finding of non-compliance and invalidity could interfere with the County's eligibility for grant funding. Emails and phone calls among the parties, staff and DOE illustrated broad confusion as to the law and regulation guiding eligibility and apparent ignorance as to the inappropriateness of involving the Board panel. In response to these communications, the Board issued a disclosure of *ex parte* communication to the Board[5] and, after resolving the issue of conflicting remand orders, issued an order partially vacating its Order on Dispositive Motions and resuming the case calendar.[6]

Subsequently, the Board granted the parties' joint request for a 45-day settlement extension. The Board held an additional Prehearing Conference in early October to clarify issues and the deadlines necessary to comply with the Board's statutory mandate that cases be decided within 180 days of filing and issued an Amended Prehearing Order.[7]

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[2] Order on Dispositive Motions (May 26, 2020).
[3] Case No. 20-2-10245-8 SEA (Order Granting King County's Appeal, April 26, 2021).
[4] Superior Court Order at 17-18.
[5] Letter to Parties with attachment (June 17, 2021).
[6] Order Partially Vacating Order on Dispositive Motions and Resuming Case Calendar (July 2, 2021).
[7] Issued October 8, 2021.

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Petitioners submitted their prehearing brief,[8] and the County filed its Objection to the Amended Prehearing Order the same day. The Board partially granted the County's motion, striking Issue 9a.[9] The County timely filed its prehearing brief,[10] to which Petitioners replied.[11]

In other actions, Petitioners filed a Motion to Take Official Notice of (1) the King County Tax Assessor's zoning designation of parcel # 3404700075 as RA2.5 SO; and (2) a real estate listing advertising two contiguous tax parcels totaling 4.17 acres outside the Woodinville UGA promoted as "an incredible opportunity in the thriving 'adult beverage' epicenter."[12] Petitioners assert that the two exhibits, taken together, demonstrate how the reduction in parcel size from 4.25 to 2.5 acres facilitates the conversion of rural area residential property to WBDs uses and the intent to include rural properties in the urban "thriving 'adult beverage" epicenter." The Board finds that documents were not part of the record before the Council and not necessary or of substantial assistance to the Board where a marketing piece may be dismissed as "puffery" and where the likely impact is intuitively obvious on its face. The Petitioners' motion for official notice is **denied**.

Subsequently, Petitioners filed a very late Motion to Take Official Notice of the entirety of KCC Title 21A, Chapter 24 (critical area regulations) KCC 21.A.06.1070 and 21A.06.1255. The County filed a very late Motion to for official notice of KCC 21A.30.085 and 21A.30.090 (addressing Home Occupation and Home Industry business in unincorporated King County).

The Board held a Hearing on the Merits which afford the parties the opportunity to highlight their briefed arguments and answer the Board's questions.

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[8] Petitioners' Prehearing Brief, filed October 14, 2021.
[9] Order Partially Granting County's Motion to Amend the Amended Prehearing Order (November 1, 2021).
[10] King County's Prehearing Brief, filed November 3, 2021.
[11] Petitioners' Reply Brief, filed November 10, 2021.
[12] Petitioners' Motion for Official Notice filed November 11, 2021.

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To the extent that the parties have briefed the Code sections for which official notice was sought, the Board takes official notice pursuant to WAC 242-03-630(4). The Board limits its consideration of these Code sections to arguments specifically set forth in a party's briefing.

II. BACKGROUND

Agricultural lands of long-term commercial significance are designated as Agricultural Production Districts (APDs) in the County's comprehensive plan.[13] The lands within the APDs designated by the comprehensive plan and other farmlands deemed appropriate for long-term protection are zoned Agricultural.[14]

In 2016, the Metropolitan King County Council (the Council) funded the Sammamish Valley Wine and Beverage Industry Study[15] to consider the industry's "interface with local communities."[16] The study period evaluated "existing zoning regulations for the adult beverage industry in light of changes in industry practices, state licensing allowances and the growing popularity of adult beverage industry across King County and the state of Washington."[17] During the course of the study, King County (the County) became aware that of 54 Wineries, Breweries and Distilleries (WBDs) in unincorporated King County, only 4 had legal permits to operate.[18]

On May 18, 2019, King County issued a determination of non-significance (DNS) for King County's Proposed Ordinance 2018-0241.2 – Regulations for Wineries, Breweries and

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[13] 2016 King County Comprehensive Plan, Chapter 3: Rural Areas and Natural Resource Lands, pp. 3-39-3-40, p. *3-79 (Updated Oct. 29, 2018).
[14] K.C.C. 21A.04.030B.
[15] (Bates GMHB-00055799): King County Sammamish Valley Wine and Beverage Study (September 2016).
[16] County Response to SEPA Motion at 5.
[17] Finding D, Ordinance 19030 at 3.
[18] 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 (April 29, 2020) at 6.

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Distilleries.[19] The Ordinance's designation was later changed to Ordinance 19030 (the Ordinance), and was adopted on December 4, 2019, by the Council. The Ordinance amended the County's development regulations concerning WBDs, and established demonstration project locations, criteria, business licensing regulations, and modified citation penalties for wineries, breweries, distilleries, and remote tasting rooms.[20]

The Friends of Sammamish Valley (FOSV), Futurewise, and the other named Petitioners (Petitioners), petitioned the Central Puget Sound Region Growth Management Hearings Board (the Board), challenging Ordinance 19030, on the grounds that it violated various portions of the State Environmental Policy Act (SEPA) as well as portions of the Growth Management Act (GMA).

Procedural matters relevant to the case are set out above in Section 1, Procedural Posture.

Legal issues established in the Prehearing Order and relevant to the case are detailed in Appendix A.

III. BOARD JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290 (2). The Board finds Petitioners have standing to appear before the Board pursuant to RCW 36.70A.280(2) (b). The Board also finds they jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

IV. STANDARD OF REVIEW

SEPA

SEPA requires all government agencies to consider the environmental effects of a proposed action, together with alternatives to the proposed action.[21] The Supreme Court

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[19] Superior Court Order at 2.
[20] KC-CTRL-0001: Staff report to King County Council (December 4, 2018).
[21] *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.,* 160 Wn. App. 274, 283 250 P.3d 1050 (2011).

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has referred to SEPA as an environmental full disclosure law.[22] SEPA requires agencies to identify, analyze, disclose, and consider mitigation of impacts on both the natural and built environments resulting from a proposed action.[23] Thus, where an action rests on a threshold determination of nonsignificance (DNS), the action's compliance with SEPA in turn rests on whether the DNS complied with the requirements of SEPA. While the County's decision to issue a DNS is to be given "substantial weight" under RCW 43.21C.090, it is incumbent upon the County to establish a showing that "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA."[24] Thus, in issuing a DNS, a jurisdiction must establish *prima facie* SEPA compliance.

GMA

Comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[25] This presumption creates a high threshold for challengers as the burden is on the Petitioners to demonstrate that any action taken by the County is not in compliance with the Growth Management Act (GMA).[26] The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[27]

The scope of the Board's review is limited to determining whether a County has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[28] The Board is directed to find compliance unless it determines that the challenged action is clearly erroneous in view of the entire record before the Board and in

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[22] *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001).
[23] RCW 43.21C.030; RCW 36.70A.035(2); *Norway Hill Pres. & Prot. Assn. v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976).
[24] *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 286 – 87, 232 P.3d 1154, 1156 (2010); *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973).
[25] RCW 36.70A.320(1).
[26] RCW 36.70A.320(2).
[27] RCW 36.70A.280, RCW 36.70A.302.
[28] RCW 36.70A.290(1).

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light of the goals and requirements of the GMA.[29] In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[30]

V. ANALYSIS AND DISCUSSION

Consolidated SEPA Issues

Adequacy of the SEPA Checklist and Disclosure of Likely Environmental impacts (Issues 9(b), 9(c), 9(f), 9(g), and 9(h))

Did the County's checklist fail to adequately disclose the likely and significant adverse environmental impacts of Ordinance 19030 in violation of SEPA, RCW Ch. 43.21C, and its regulations, WAC Ch. 197-11, including 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:

Applicable Law:

RCW 43.21C.030(c) requires that a jurisdiction base its issuance of a DNS on an adequate Checklist:

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
(i) the environmental impact of the proposed action;
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
(iii) alternatives to the proposed action;
(iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

WAC 197-11-060 Content of environmental review.

(1) Environmental review consists of the range of proposed activities, alternatives, and impacts to be analyzed in an environmental document, in accordance with SEPA's goals

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[29] RCW 36.70A.320(3).
[30] *Dep't of Ecology v. PUD 1,* 121 Wn.2d 179, 201, 849 P.2d 646, 657 (1993).

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and policies. This section specifies the content of environmental review common to all environmental documents required under SEPA.

...

(4) Impacts.

...

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

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

WAC 197-11-330 - Threshold determination process.

An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency decides whether an EIS is required in the threshold determination process, as described below.

...

(5) A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

WAC 197-11-335 Additional information.

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)). The lead agency may take one or more of the following actions if, after reviewing the checklist, the agency concludes that there is insufficient information to make its threshold determination:

(1) Require an applicant to submit more information on subjects in the checklist;

(2) Make its own further study, including physical investigations on a proposed site;

(3) Consult with other agencies, requesting information on the proposal's potential impacts which lie within the other agencies' jurisdiction or expertise (agencies shall respond in accordance with WAC 197-11-550); or

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(4) Decide that all or part of the action or its impacts are not sufficiently definite to allow environmental analysis and commit to timely, subsequent environmental analysis, consistent with WAC 197-11-055 through 197-11-070.

Board Discussion

In its recitation of issues involving violation of SEPA, the Petitioners protest that the Checklist provided inadequate and inaccurate information regarding the impacts of the Ordinance[31] and that, based on many of the responses on the Checklist, the County appears to have assumed that as a "non-project action" impacts would be properly addressed at a later date.[32] As a result, Petitioners contend that the County failed to disclose likely impacts on environmentally sensitive areas[33] and increased demands on public infrastructure such as transportation and utilities.[34]

SEPA review is to function "as an environmental full disclosure law," and the County must demonstrate that environmental impacts were considered in a manner sufficient to show "compliance with the procedural requirements of SEPA."[35] Under SEPA, proposals for legislation such as amending zoning regulations may be defined as "nonproject actions" and, in many cases, the available information describing the impacts of a nonproject action may be less specific than information available for development of a specific project on a specific site. However, SEPA still requires that the impacts of activities authorized by legislation be evaluated so that decision-makers and the public can take the information into account when commenting on and formulating decisions regarding the proposal. Thus, nonproject actions are not exempt from adequate SEPA review[36] and jurisdictions may not

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[31] Issue 9b.
[32] Issue 9d.
[33] Issue 9e.
[34] Issue 9g.
[35] *Olympians for Smart Development & Livable Neighborhoods, et al. v. City of Olympia*, GMHB No. 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).
[36] WAC 197-11-055(2)(a)(i): The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

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evade adequate SEPA review by deferring analysis until later stages of actual development where the principal features of a proposal and its environmental impacts can be reasonably identified.[37]

The Board has long held that the impacts that must be considered for a nonproject action are the impacts that are allowed by virtue of the change in designation itself. While project level impacts may properly be deferred to the permitting stage, the jurisdiction must evaluate the impacts allowed under the changed designation at the time of that nonproject action.[38] If the impacts are not merely hypothetical but can be known or are reasonably foreseeable, it is incumbent upon the jurisdiction to develop and consider such information.[39] Additionally, "the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to *prima facie* compliance with the procedural requirements of SEPA."[40]

The Division III Court of Appeals carefully reviewed relevant statutes and regulations to establish the requirements necessary when a jurisdiction makes a threshold SEPA determination for a nonproject action such as Ordinance 19030:[41]

> The agency must use an environmental checklist to assist its analysis and must document its conclusion in a determination of significance or nonsignificance. Former WAC 197-11-315(1) (1997); WAC 197-11-340(1), -360(1).

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[37] WAC 197-11-055. *Alpine Lakes v. Natural Resources*, 102 Wn. App. 1, 16 979 P.2d 929, 937 (1999).
[38] *WEAN v. Island County*, GMHB No. 03-2-0008 (Final Decision and Order, August 25, 2003) at 39: The impacts that must be considered for this non-project action are the impacts that are allowed by virtue of the change in designation itself. While project level impacts may properly be deferred to the permitting stage, the County must evaluate the impacts allowed under the changed designation at the time of that non-project action.
[39] 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).
[40] *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140. 1149 (1973).
[41] *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 574, 309 P.3d 673, 682, (2013), Wash. App. LEXIS 2127, *21, 2013 WL 5082077, review den'd 179 Wn.2d 1015, 318 P.3d 279 (2014) (Bold emphasis added.).

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> The agency must base its threshold determination on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. In GMA planning, the agency should tailor the "scope and level of detail of environmental review" to fit the proposal's specifics. WAC 197-11-228(2)(a). Thus, for a nonproject action, such as a comprehensive plan amendment or rezone, **the agency must address the probable impacts of any future project action the proposal would allow.** Wash. State Dep't of Ecology, *supra*, § 4.1, at 66; *see* WAC 197-11-060(4)(c)-(d). The purpose of these rules is to ensure an agency fully discloses and carefully considers a proposal's environmental impacts before adopting it and "at the earliest possible stage." *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). An agency may not postpone environmental analysis to a later implementation stage if the proposal would affect the environment without subsequent implementing action. 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).

In sum, when a county amends its Comprehensive Plan or changes zoning, a detailed and comprehensive SEPA environmental review is required to understand and evaluate the impact of the change in *allowable uses*.

The County presents an initial and persistent flaw in its arguments, both orally and in briefing, by (1) consistently characterizing the changes made in the Ordinance as a mere tightening of pre-existing zone designations that does not authorize any site-specific or project level actions;[42] and (2) stating that where a proposal "'changes neither the actual current uses to which the land was put nor the impact of continued use on the surrounding environment,' that action is not a major action significantly affecting the environment and an EIS is not required." The County concludes that, while it considered the changes made by the proposed action, its review was not required to evaluate the impacts "already allowed by its existing adopted development requirements."[43] The County's interpretation is flawed on both counts.

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[42] King County's Prehearing Brief at 51, 54, 57, 60.
[43] *Id.* at 54.

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First, *some* of the new regulations are more restrictive than the development that has actually occurred in contravention of current code, but existing unallowable uses is not the baseline from which the County must start its query. To the contrary, the SEPA requirement is that the County consider and disclose the likely impacts that will arise as a result in the change in allowable uses – including both the full amount of additional development authorized by the Ordinance *and the approval of existing code violations*. As discussed in Issues 7 and 8 below, the Demonstration Project A Overlay (Demo A) effectively grandfathers into legal existence uses that are not currently allowable. Additionally, some of the new regulations expand both the size, frequency, and character of the allowable uses and make parcels currently too small for WBDs eligible for such uses. Particularly in light of the Ordinance's stated objective of supporting the adult beverage industry and fostering related tourism,[44] it does not follow that removal of regulatory bans on previously illegal activities will not result in an expansion of these newly allowable uses and development of previously ineligible parcels. While the policy choice remains in the hands of the Council, SEPA requires that the Council act with full information as to the environmental impacts of that choice.

Secondly, the County's assertion that, although quantitative impacts should be considered, the basic requirement set forth in WAC 197-11-228 is that the impacts to be evaluated are "adverse environmental effects in excess of those created by existing uses in the area and the absolute quantitative adverse environmental effects of the action itself"[45] misstates the law conveniently. The County has erroneously inserted the "balancing act" language of the GMA[46] into SEPA. The balancing does not occur at the SEPA level. SEPA requires that **the beneficial aspects of a proposal shall not be used to balance adverse impacts in determining significance**.

WAC 197-11-330(5) states:

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[44] Ordinance at Section D.
[45] King County's Prehearing Brief at 54.
[46] RCW 36.70A.020.

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> A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

In sum, the SEPA checklist is neither a bibliography or a balancing act: it is a *full* disclosure document that must provide, within its four corners and without requiring decision-makers to pore over source studies,[47] enough information to adequately inform the County Council as to the likely, significant environment impacts of their action. The impacts to be disclosed are all those likely to result from the change in allowable uses.

As a matter of logic, the Checklist may not gloss over the impact of legalizing existing noncompliant uses nor fail to address *all* "future project action the proposal would allow"[48] – including currently illegal activities that the Ordinance makes permissible. *Only after* receiving adequate information, may the Council publicly make a decision that, in its view, balances GMA goals that may compete for priority. Building out the rural area of the Sammamish Valley into a string of upscale spirit tasting and wedding venues may indeed be the Council's preference. SEPA itself doesn't prohibit that decision. It says the Council may not take that action without first being adequately apprised of the likely environmental impact.

The Board finds that the Checklist impermissibly included existing unallowed uses as a baseline condition and so failed to address the full range of probable impacts of all future project action the proposal would allow as required by WAC 197-11-060(4)(c)-(d).

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[47] Washington State Dep't of Ecology, State Environmental Policy Act Handbook (2018 Update), § 2, at 25, states:
To incorporate documents by reference, the agency must identify and describe the documents in the current environmental checklist, threshold determination, or EIS." Although the Checklist lists two prior studies, it does not identify the contents of those documents nor discuss how the information was used to answer the Checklist questions.

[48] Washington State Dep't of Ecology, State Environmental Policy Act Handbook, § 7 at 75 (1998 & Supp. 2003).

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The Board finds that Ordinance 19030 impermissibly used potential benefits of the Ordinance 19030 to "balance" the potential negative impacts of the proposal, in violation of WAC 197-11-330(5).

The Petitioners further contend that the County's SEPA Checklist provided inadequate and inaccurate information regarding the impacts of the Ordinance. The County argues that the SEPA checklist was sufficient because it addressed a variety of environmental concerns, such as groundwater usage, storm water, traffic, noise, and Agricultural zones.[49] The County defends both the DNS and Checklist as being sufficient and argues that the commenters failed in some essential way to provide, as an example, sufficient facts "to establish a nexus between the proposal and soil or water conditions in the Sammamish Valley area."[50] The assumption is that the commenters had to prove the impact in order for the County to have a duty to consider it.

The Checklist, time and time again, relies on an allegation that the question posed is "not applicable for this nonproject action." The Checklist answer to the query about discharges from septic tanks is illustrative of this dismissive approach to a serious question concerning ground water.

> 2) Describe waste material that will be discharged into the ground from septic tanks or other sources, if any. …
>
> Not applicable for this nonproject action. No regulations governing waste disposal will be amended by this proposal.[51]

The Checklist includes a supplemental sheet for nonproject actions which summarizes the County's belief that prior studies and existing regulations are sufficient to protect the environment from any impacts of this ordinance.[52] However, WAC 197-11-335 requires that the threshold determination be based on information "reasonably sufficient to evaluate the environmental impacts" of *this* proposal. In contrast, Petitioners submitted

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[49] King County's Prehearing Brief at 51.
[50] King County's Response to SEPA MTD at 1 (quoting KC-Ctrl-0001 the SEPA DNS Memorandum).
[51] KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 7-8 (April 24, 2019).
[52] *Id.* at 18-20.

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multiple examples of likely adverse environmental impacts due to uses which will become allowable in the rural area under Ordinance 19030, none of which were addressed or were addressed at best in summary fashion. So the County's assertion that prior studies and existing regulations are sufficient to protect the environment seems particularly conclusory. Various provisions of the Ordinance provide examples.

Demonstration Project

The Ordinance establishes the "Demonstration Project Overlay A" (Demo A). Petitioners argue that the overlay is a "*de facto* rezone" in which "remote tasting room" sales outlets will be permitted in the Sammamish Valley Rural Area.[53] The Board notes that the Demo A lies within an Agricultural Production Buffer (APD) special district overlay (SO-120) designated as an ecological buffer between agricultural land and upslope residential uses.[54] The Demo A effectively overrides the code requirement that 75% of sites be maintained as open space,[55] which limits impervious and compacted surfaces and helps protect the hydrology and water quality in the Sammamish Valley Rural area.[56] It is a notorious fact that the Sammamish River is an important migratory corridor for anadromous fish, including Chinook Salmon and Steelhead Trout listed as threatened under the Endangered Species Act, which travel to spawning habitat in its tributaries, as well as the

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[53] Petitioners' SEPA MTD at 6-7. Petitioners allege that the Demonstration Overlay boundaries were selected to legalize current businesses operating in violation of the current code and that the Ordinance grants them permanent legal nonconforming use status effectively allowing them to continue indefinitely.

[54] A.38.130 Special district overlay - agricultural production buffer.
A. The purpose of the agricultural production buffer special district overlay is to provide a buffer between agricultural and upslope residential land uses. An agricultural production buffer special district overlay shall only be established in areas adjacent to an agricultural production district and zoned RA.
B. The following development standard shall apply to residential subdivisions locating in an agricultural production buffer special district overlay: Lots shall be clustered in accordance with K.C.C. 21A.14.040 and at 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.

[55] *Id.*

[56] (Bates GMHB-0018672): Memo of Roberta Lewandowski (May 16, 2019) at 6-9; *See also,* IR GMHB-00055799: *2016 State of Our Watersheds*.

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Issaquah Hatchery.[57] The creation of an overlay zone which overrides existing code and results in the sanction of previously disallowed uses requires something more in environmental review than the superficial treatment provided by the County's DNS.

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

Elimination of on-site production requirement

Ordinance 19030 repeals the current Code provision that limits WBDs production facilities in RA and A zones to tastings and sales of product produced on-site only and authorizes tastings and sales of alcoholic beverages that are produced at other locations (*e.g.* Eastern Washington). Petitioners argue that elimination of the onsite production requirement will lead to sham "Wineries", "Breweries" and "Distilleries" that will be permitted to operate as intensive entertainment centers serving food and alcoholic beverages. The Board agrees that elimination of the on-site production requirement disconnects the activity from its agricultural nexus and may greatly facilitate the proliferation of such businesses. The County was required to consider the likely environmental impacts of such proliferation.

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

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

Ordinance 19030 allows siting of WBDs in the Rural Areas by reducing the minimum lot size from 4.5 to 2.5 acres in the Rural Area.[58] Common sense dictates that this increases the number of parcels eligible for siting of WBDs, but the County has not considered environmental impacts such as the increased percentage of impervious surface, etc. Again,

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[57] 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.

[58] Ordinance 19030, Section 18 at 36.

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the question is unresolved as to the scope or degree of the impact. The violation here is in the failure to adequately address likely environmental impacts in the required SEPA review, by simply concluding in the Checklist that the impacts are not significant.

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

Using Temporary Use Permits (TUPs) to exempt WBDs Event Centers from zoning restrictions

Petitioners complain that expansion of WBDs "special events" through a program of "temporary use permits" (TUP) overrides zoning limitations on: building occupancy, use of portable toilets, parking, performance stages, tents or canopies, traffic controls, and operation hours.[59] For the largest category of WBDs in the RA zone, expansion of the prior limit of 2 winery events per month to 24 in any 365-day period (*e.g.,* all could occur in the summer) with authority to permit up to 250 guests per event.[60]

Parcels 8 acres or larger would be allowed up to 96 events per year with no monthly maximum other than overall annual average of 8 events per month; amplified sound allowed; structures used for events can be within 150 feet of rural residences.[61] Citing KCC 21A.32.100-140, Petitioners argue that eliminating the requirement for a TUP renders the conduct of special events a permanent right to operate without regard to previously applicable Code TUP criteria, including compatibility with surrounding uses, and without being subject to the requirements for annual review and for mandatory nonrenewal after five years. As Petitioners complain, the Checklist does not attempt to quantify the amount of development that will become allowable and does not thoroughly disclose possible impacts. For example, the allowable event frequency for WBDs in the Agricultural (A) and Rural Area

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[59] Ordinance 19030, Section 24 at 93.
[60] Ordinance 19030, Section 26 at 95.
[61] Ordinance 19030, Section 25 at 94-95.

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(RA) zones is changed from 2 days per month to 24 days per year. The Checklist notes the change makes it more likely that events will be concentrated in summer months but does not disclose what number of events currently occur with such concentration being prohibited. WBDs II and III may host up to 150 and 250 guests respectively – which the Checklist characterizes as more restrictive than the prior code that did not explicitly set maximums event sizes. There are 5 parcels that could hold these large events in the RA zone up to 96 days/year without a TUP unless they exceed building occupancy; use portable toilets, or need off-site parking, etc.[62] The Checklist states this "could mean greater periodic traffic congestion, noise, or *other impacts*." There is no attempt to quantify how much additional impact of whatever sort might occur based on the increase in the size and allowable frequency of these events.

Remote Tasting Rooms, which no longer are required to be accessory to onsite agricultural use and simply follow existing codes, similar to those for bars and restaurants, are a new permitted use in the Demo A overlay up to 60 days/year[63] on 13 properties outside the Woodinville UGA in the rural agricultural (RA) zone,[64] nearly all of which appear to be impacted by steep slope and landslide hazards.[65] The Checklist states:

> Although the WBD ordinance is a nonproject action with no identifiable "site,"… potential steep slope hazard areas are located on several of the 13 parcels in Demonstration project area. However, these steep slopes are not located on the developed portions of these parcels that would most likely be used for any remote tasting rooms … [and] would be subject to existing regulations and, for new development proposals, would be identified and addressed under existing regulations during permit review.

Repeatedly throughout the Checklist, the County repeats this reassuring implication that existing regulations and future permit review will insure no negative impacts. But as has

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[62] Attachment A to SEPA Checklist, p. 4. Note that the parking requirements are also reduced.
[63] Attachment A to SEPA Checklist, p. 13.
[64] SEPA Checklist, p. 28.
[65] Attachment C to SEPA Checklist.

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been noted, a "county … may not rely on its existing plans, laws, and regulations when evaluating the adverse environmental impacts of a nonproject action."[66]

In Spokane County *Spokane Cty. v. E. WA. Growth Mgmt. Hrngs Bd.*, the court noted:

> The checklist did not tailor its scope or level of detail to address the probable impacts on, for example, water quality, resulting from amendment 07-CPA-05 specifically. While the property is near potable water wells in a "Critical Aquifer Recharge Area" with high susceptibility, the proposal could "allow an on-site [wastewater disposal] system that will fail thus resulting in the degradation of the local environment." Despite these concerns, the checklist repeated 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. [67]

The County attempts to distinguish the instant controversy from *Spokane County,* but admits SEPA commenters were concerned that tasting rooms could utilize residential septic systems that could be deficient to handle large crowds and could fail, resulting in groundwater impacts"[68]. Further, as the Petitioners notes, the WBDs III are conditional uses in the A, RA, NB, CB, RB, and I zones, which are located over aquifer recharge areas containing wells.[69] The regulations do not include special measures to protect groundwater, and the WDBs currently located in these areas use onsite septic systems to treat their wastewater[70] which could leach and/or overflow excess effluent into the groundwater, potentially swamping the Sammamish Valley farm soils.

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[66] *Heritage Baptist Church v. Central Puget Sound Growth Mgmt. Hearings Bd.,* 2 Wn. App. 2d 737, 752, 413 P.3d 590, 598 (2018) citing *Spokane Cty. V. E Wash. Growth Mgmt. Hearings Bd.,* 176 Wn. App. 555, 578, n.4, 309 P.3d 673 (2013) (holding county may forgo SEPA analysis if its comprehensive plan and development regulations provide adequate analysis and mitigation for environmental impacts of the project action, exception does not apply to a nonproject action).

[67] *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 580-81, 309 P.3d 673, 685 (2013).

[68] King County's Prehearing Brief at 9.

[69] *Id.* at 3-4.

[70] *Id.* at 4.

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The County's argument that the commentators haven't proven that any septic systems are *currently* failing is unpersuasive and irrelevant to the need for full disclosure. As the WAC explains, "impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer."[71] The question is not whether the existing septic systems are sufficient to support current operations.

The Board finds that the Checklist failed to evaluate all reasonably foreseeable impacts of the proposal by impermissibly delaying environmental review to the project phase, in violation of WAC 197-11-060.

Cumulative Impacts

In addition to the sections of the Ordinance discussed above, Petitioners raise the contention that groundwater withdrawal from wells negatively impacting "all stages of the salmonid life cycle," and argue that "from 2010-2014, 369 new wells (4.5% increase) were added to the already existing 8,227 wells in the Lake Washington and Green-Duwamish basins, with a total of 482 miles of streams in the Lake Washington and Green-Duwamish basins are identified as having low streamflow problems.[72] They go on to identify multiple potential impacts resulting from the increased demands to ground water basins with low stream flows, such as harm to wildlife, and lower water quality.[73] The County in response claims that KCC permits for new or changed uses and new development require proof of water availability and approval for waste discharge from Seattle King County Public Health.[74] This is a specific example of a problem with the wholesale approach taken to the Checklist and subsequent DNS.

The County's Checklist recites "Not applicable for this nonproject action" for *every question* on the Checklist related to impacts to Earth (including steep slopes and erosion), Air (including emissions), Water (including wetlands, storm runoff, and flood plain questions

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[71] WAC 197-11-060.
[72] King County's Prehearing Brief at 9.
[73] Petitioners' Prehearing Brief at 4-5.
[74] KCC 20.20.040.

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despite the impacted area being both a drainage basin known to support anadromous fisheries and an agricultural valley), Plants, Animals, Energy and Resources, Environmental Health, Noise, Land and Shore Use, Housing, Aesthetics (including alteration of views and compatibility with rural character), Light and Glare (despite allowing tasting rooms and event centers), Recreation, Historic and cultural preservation, Transportation (including estimated vehicular trips and parking for patrons and services at "event centers"), Public Services (including police, fire, and public transit impacts that might be created by serving alcohol at events) and Utilities (including sanitary sewer and water).

Then, despite stating "not applicable", the Checklist itself notes that: (1) there are noise-intensive aspects of the WBDs uses;[75] (2) WBDs uses would be allowed in Agricultural and Rural Areas and a demonstration project in the Sammamish Valley Rural Area;[76] (3) "[t]he proposal will go through environmental review and a public hearing process" before Council action;[77] (4) most WBDs businesses in rural unincorporated King County do not have access to sanitary sewer and utilize septic systems;[78] and (5) the proposal may result in additional limits on water access.[79] It is not at all clear how any proposal would go through environmental review and a public hearing process, given the nature of the challenged Ordinance. For most purposes, the Checklist was the environmental review. Certainly, the County has not committed to "timely, subsequent environmental review, consistent with WAC 197-11-055 through 197-11-070 and Part Six" as required by WAC 197-11-330(2)(b).

As previously stated, the County's key responsibility was to evaluate the impacts of the proposal in light of the change in *allowable uses*,[80] but the Checklist declines to even acknowledge areas of potential impact and utterly fails to identify necessary areas of

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[75] K-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) Question 7b(3).
[76] *Id.* Question 8e.
[77] *Id.* Question 9l.
[78] *Id.* Question 16a.
[79] *Id.*
[80] *Olympians for Smart Development & Livable Neighborhoods et al. v. City of Olympia*, GMHB No 19-2-0002c (Order Granting Summary Judgment, March 29, 2019) at 7.

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environmental review. The Board has the firm and definite conviction that a mistake has been made.

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

The Washington Supreme Court recognized the unique and threatened nature of the Sammamish Valley in *King County v. Central Puget Sound Growth Management Hearings Board*[81] and invalidated King County comprehensive plan and zoning amendments that would have allowed use of agricultural land for sports fields. The Court concluded:

> The soils of the Sammamish Valley APD have the unique characteristics of prime farmland. The APD includes some of the most productive agricultural land in the state, but it is also among the areas most impacted by rapid population growth and development. Even though the properties in this case lie in the APD, there is pressure to convert the land to nonagricultural uses. …
>
> When read together, RCW 36.70A.020(8),.060(1), and .170 evidence a legislative mandate for the conservation of agricultural land. …
> The County's amendments, which allow active recreational uses on designated agricultural lands, do not comply with the GMA, …. Although the GMA encourages recreational uses of land, there is no conservation mandate for recreational use as with agricultural use. In this case, the GMA mandates conservation of the APD's limited, irreplaceable agricultural resource lands.

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

As the Board recently held in *Olympians*, it is imperative that jurisdictions considering nonproject actions address the probable impacts of future authorized project actions when considering significant zoning changes.[82] "An agency may not postpone environmental

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[81] *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561-63; 14 P.3d 133 (2000).

[82] *Olympians* at 10 (citing *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 579, (2013)).

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analysis to a later implementation stage if the proposal would affect the environment without subsequent implementing action."[83] Here, it is apparent that the County's decision was made without full consideration of the possible environmental consequences. It is apparent that information was available and/or could have been developed that would have provided much greater specificity regarding the impacts of Ordinance 19030, but the Checklist fails to provide that information and the decision makers were thus prevented from receiving the required "environmental full disclosure."[84] The Board is left with the firm and definite conviction that a mistake has been made as a result of the County's issuance of a DNS based on a Checklist which failed to adequately address the probable impacts of the proposed action on the natural and built environment.

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

The Board finds and concludes that the County's action violated RCW 43.21C.030(c) and WAC 197-11-335 by basing its issuance of a DNS on an inadequate Checklist.

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

Consolidated GMA Issues

Issue 1: By permitting nonagricultural accessory and other uses on agricultural lands of long-term significance in a manner and with facilities that would interfere with and not support the continuation of the overall agricultural use of the property and neighboring properties:

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[83] *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)).

[84] The function of SEPA determinations is to have "environmental considerations become part of normal decision making." *Loveless v. Yantis*, 82 Wn.2d 754, 765, 513 P.2d 1023, 1029 (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, 860 P.2d 1024, 1032 (1993)

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a. **Does Ordinance 19030 fail to be guided by RCW 36.70A.020(1), (2), (8), (10), and (12) (see WAC 365-196-815) and does it violate the GMA duty to protect and other duties, in, e.g., RCW 36.70A.060(1), RCW 36.70A.070(5)(c), RCW 36.70A.120, RCW 36.70A.210, or RCW 36.70A.290(2) and the standards in RCW 36.70A.177?**
b. **Does Ordinance 19030 fail to implement, and is it inconsistent with, KCCP Policies RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-333, R-336, R-402, R-403, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, E-99l, T-202, T-206, T-208, T-209, F-209, T-210, I-504, U-149, the associated narrative, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?**

Issue 5: Does Ordinance 19030, by allowing Rural Area destination tourist food and alcoholic beverage venues for the conduct of adult beverage business high attendance events, by allowing adult beverage businesses that are essentially regional retail facilities in the Rural Areas, and by encouraging retail businesses in the Rural Area by reducing the minimum lot size for many of these facilities to 2.5 acres and incorporating definitional provisions that permit sales of product produced elsewhere, fail to be guided by RCW 36.70A.020 (1), (2), (8), (9), and (10), violate RCW 36.70A.070(5), RCW 36.70A.110(1), RCW 36.70A.120, RCW 36.70A.210, or RCW 36.70A.290(2), and does it fail to implement and is it inconsistent with KCCP Policies for, inter alia, avoidance of sprawl, limitation of nonresidential uses and protection and enhancement of rural character and agricultural areas including RP-202, RP-203, RP-206, R-201, R-202, R-204, R- 205, R-301, R-303, R-324, R-332, R-333, R-336, R-402, R-403, R-513, R-514, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, T-202, T-206,T-208, T-209, T-210, F-209, F-233, I-504, U-149 and the associated narrative, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?

Issue 6: Does Ordinance 19030 violate RCW 36.70A.070(5)(c) and RCW 36.70A.110(1) by failing to contain rural development, assure visual compatibility, reduce inappropriate conversion, protect critical areas, and protect against conflicts with the use of agricultural lands?

Applicable Laws:

RCW 36.70A.020 Planning Goals
The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations … and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:
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(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forestlands and productive agricultural lands, and discourage incompatible uses.
***
(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.
***
(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.060 Natural resource lands and critical areas—Development regulations.

(1)(a) Each county … shall adopt development regulations … to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW **36.70A.170**. … Such regulations shall assure that the **use of lands adjacent to agricultura**l, forest, or mineral **resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products**, or timber, or for the extraction of minerals. …

RCW 36.70A.070(5)(c) Comprehensive plans—Mandatory elements.
(c) Measures governing rural development. **The rural element shall include measures that apply to rural development and protect the rural character of the area**, as established by the county, by:
(i) Containing or otherwise controlling rural development;
(ii) Assuring visual compatibility of rural development with the surrounding rural area;
(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
(iv) **Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources**; and
(v) **Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170**.

RCW 36.70A.177 Agricultural lands—Innovative zoning techniques—Accessory uses.
A county or a city may use a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW **36.70A.170**. The innovative zoning techniques should be designed to conserve agricultural lands and encourage the agricultural economy**. Except as provided in subsection (3) of this section, a county or city should encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes**.

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(2) **Innovative zoning techniques** a county or city may consider include, but are not limited to:
(a) Agricultural zoning, **which limits the density of development and restricts or prohibits nonfarm uses of agricultural land and may allow accessory uses, including nonagricultural accessory uses and activities, that support, promote, or sustain agricultural operations and production, as provided in subsection** (3) of this section;
…
(3) Accessory uses allowed under subsection (2)(a) of this section shall comply with the following:
(a) Accessory uses shall be located, designed, and operated **so as to not interfere with, and to support the continuation of, the overall agricultural use of the property and neighboring properties**, and shall comply with the requirements of this chapter;
(b) **Accessory uses may include:**
(i) Agricultural accessory uses and activities, **including but not limited to the storage, distribution, and marketing of regional agricultural products from one or more producers, agriculturally related experiences, or the production, marketing, and distribution of value-added agricultural products, including support services that facilitate these activities**; and
(ii) Nonagricultural accessory uses and activities **as long as they are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site.** Nonagricultural accessory uses and activities, **including new buildings, parking, or supportive uses, shall not be located outside the general area already developed for buildings and residential uses and shall not otherwise convert more than one acre of agricultural land to nonagricultural uses**; and

RCW 36.70A.130 Comprehensive plans—Review procedures and schedules—Amendments.
(1) (d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

21A.38.130 Special district overlay - agricultural production buffer.
A. The **purpose of the agricultural production buffer special district overlay is to provide a buffer between agricultural and upslope residential land uses**. An agricultural production **buffer special district overlay shall only be established in areas adjacent to an agricultural production district and zoned RA**.
B. The following development standard shall apply to residential subdivisions locating in an agricultural production buffer special district overlay**: Lots shall be clustered in accordance with K.C.C. 21A.14.040 and at 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.

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Compliance with Accessory Uses

Petitioners argue that Ordinance 19030 violates the GMA requirement to conserve agricultural land because it does not require that the location, design, and operation of WBDs prevent interference with, and actually support, overall agricultural use of the property,[85] citing *King County. v. Cent. Puget Sound Growth Mgmt. Hrngs Board*[86] and *Lewis County v. Western Washington Growth Management Hearings Board*[87] The Board notes that the *King County* case cited here also involved an attempt by King County to amend its code to permit previously unallowable uses within the APD of, *inter alia*, the Sammamish Valley by liberally construing the accessory use provisions of RCW 36.70A.177. In *King County*, the court held that "[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land, and that RCW 36.70A.177 must be interpreted to harmonize with that mandate." The court held that the County was required to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.[88]

Petitioners also cite the Board's decision in *Clark County*,[89] wherein the Clark County regulations violated GMA because there were no restrictions in the record to ensure that the location, design, and operation of accessory uses "not interfere with, and in fact support, the overall agricultural use of the property."[90] Additionally, the Board held that the types of uses must be related to the types of activities contemplated by the list in RCW 36.70A.177(b)(i) and must be limited to uses accessory in nature. As examples, Petitioners note that the

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[85] Petitioners' Prehearing Brief at 18-20.
[86] *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133, (2000), Wash. LEXIS 834.
[87] *Lewis County v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 509, 139 P.3d 1096, 1106 (2006).
[88] Petitioners' Prehearing Brief at 18-19 (citing *King Cty. v. Cent. Pgt Snd Growth Mgmt. Hrngs Bd.* (Soccer Fields), 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000); *accord, Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 509, 139 P.3d 1096, 1106 (2006)).
[89] *Clark County Natural Resources Council v. Clark Cty.*, WWGMHB Case No. 09-02-0002, (Amended Final Decision and Order, Aug. 10, 2009).
[90] *Id.*

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regulations do not require that WBDs be located in already developed portions of parcels as required by RCW 36.70A.177(3)(b)(ii) because they allow new buildings, parking, etc. development in areas "without prime agricultural soils"[91] and thus potentially "right next to a neighbor's field or animal pens" where conflict could arise between WBDs decks and parking allowed within the setbacks and potential noise, dust, pesticides, smells, and flies from adjust farms that could result in complaints and lawsuits that impede farm activities.[92]

Both of these cases were appealed, and the Supreme Court validated the Board's analysis and decisions.

The County responds that the definition of "agricultural land" includes land primarily devoted to horticultural, viticultural, and grain products under RCW 36.70A.030 and extrapolates that "the cultivation of or culture of grapes, especially for winemaking"[93] is "viticulture." Continuing this line of thinking, the County looks to the dictionary definition of "marketing" to find "selling and distributing a product or service" and next asserts that the marketing allowed by RCW 36.70A.177(3)(b)(i) must be read such that tasting room sales are an accessory use that falls squarely within those contemplated by the statute.[94] At the hearing on the merits, the County argued that winetasting was an agriculturally-related experience and so also fell under the definition of an agricultural use. Further, the County asserts that the requirement that 60% of source fruit be grown on-site requirement ensures that beverage tasting and associated events at WBDs are accessory to agricultural use.[95] The Board is not persuaded by this argument. Under this definition, consuming a hamburger at a fast-food tasting room is an agriculturally-related experience if some portion of the meat, lettuce, tomato or other ingredient are produced onsite.

RCW 36.70A.030(3) reads:

> (3) "Agricultural land" means **land primarily devoted** to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or

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[91] Ord. 19030 Sec. 18 K.C.C. 21A.08.080B.3.g. & B.12.h. p. 37 & pp. 41-42.
[92] Petitioners' Prehearing Brief at 20- 27.
[93] The County's definition is from the Merriam-Webster Dictionary.
[94] King County's Prehearing Brief at 12-13.
[95] King County's Prehearing Brief at 12-14.

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> animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by *RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and **that has long-term commercial significance for agricultural production.** (Emphasis added.)

The County does not explain how banquet venues and distillery tasting rooms fall under the uses contemplated by the statute. Instead, the County argues in the alternative that the language "a county or city should encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes"[96] can be read as an encouragement to *expand* non-agricultural uses because it is an innovative zoning technique allowing non-agricultural uses only on lands with poor soils (the County's actual code says "non-prime soils", which is likely broader) and includes new limitations on parking.[97] The County's reading is clearly erroneous as that language merely places a limitation on where nonagricultural uses may be located: *i.e.*, only on lands with poor soils or otherwise not suitable for agricultural use. The thrust of RCW 36.70A.177(3)(b)(i) is to allow agricultural accessory uses and activities that *support agricultural production* of long-term commercial significance. Finally, in addition to locational criteria, RCW 36.70A.177(3)(b(ii) restricts nonagricultural accessory uses and activities to those that are *consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site*.

The Board determined in *Clark County* that, although the list is not exclusive, allowed agricultural uses must be related to the types of activities contemplated by the list and must be *limited to uses accessory in nature*."[98] In the Board's view, the County's definition puts the cart before the horse by first identifying the desired use (here, alcoholic beverage tasting with associated event venues) and working backwards to justify it under the accessory use

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[96] King County's Prehearing Brief at 14 (citing RCW 36.70a. 177(1)).
[97] King County's Prehearing Brief at 14-15.
[98] Petitioners' Prehearing Brief at 20 (citing *Clark County Natural Resources Council v. Clark Cty.*, WWGMHB Case No. 09-02-0002, (Amended FDO, Aug. 10, 2009), at 12 of 32)). The Board also wrote that "RCW 36.70A.177(2)(a) [the provision allowing agricultural zoning] allows nonagricultural accessory uses that support, promote, or sustain agricultural operations and production."

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statute. Instead, *the threshold determination is to identify the agricultural use of long-term commercial significance to which the land is already primarily devoted*.[99] Once that is determined, the question then becomes (1) whether or not the use can coexist without interfering with the primary agricultural use, and (2) whether the use supports the continuation of the overall primary agricultural use of the property *and neighboring properties*.[100] Put differently, here the Board must determine whether the WBDs allowed under Ordinance 19030 are legitimately accessory to fruit production, or whether fruit production merely justifies/is accessory to beverage-tasting and event venues.

The County argues that, within a development condition setting forth detailed limits on tasting and retail sales, the phrase "…as allowed by state law…" must be read harmoniously with the County's grown on-site and produced on-site accessory tasting and sales limitations, and that the zoning ordinances must be construed as a whole to ascertain purpose and effect,[101] but cites no statute that allows the County to establish that a use is accessory by setting a bright-line threshold of onsite production or manufacturing.

Petitioners charge that reducing the minimum lot size for WBDs II in the RA zone from 4.5 to 2.5 acres will increase the number of lots on which WBDs II are allowed and so the Ordinance fails to protect rural character through controlling rural development and assuring its visual compatibility, protecting critical areas, and protecting against conflicts with the use of agricultural lands.[102] The County responds that it hasn't increased the number of parcels, but that is not the point. More parcels are made eligible for development. Because the Checklist did not attempt to quantify how many additional parcels can be developed, the impact of this development on sprawl and rural character is hard to determine.

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[99] RCW 36.70A.177(3).
[100] RCW 36.70A.177(3)(a).
[101] King County's Prehearing Brief at 20 (citing *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238–39, 110 P.3d 1132, 1139–40 (2005)).
[102] Petitioners' Prehearing Brief at 32.

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As far as WBDs II and WBDs III uses, the Board is firmly convinced that a mistake has been made.

The Board finds that Ordinance 19030 fails to maintain and enhance agricultural and fisheries industries by thwarting the conservation of productive agricultural land and discouragement of incompatible uses, in violation of RCW 36.70A.060(1)(a).

The Board finds that events of that size in agricultural areas without regulations ensuring adequate setbacks to prevent conflicts between agricultural activities and events fails to comply with RCW 36.70A.177(3)(a), RCW 36.70A.070(5)(c)(v), and RCW 36.70A.060(1)(a).

The Board finds that Ordinance 19030 fails to restrict agricultural accessory uses and activities to those that are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site in violation of RCW 36.70A.177(3)(b)(ii).

The Board finds that, by expanding the area that may be developed to areas that do not have "prime soils", Ordinance 19030 also fails to comply with the locational criteria in RCW 36.70A.177(3)(b(ii) requiring that new development "shall not be located outside the general area already developed for buildings and residential uses and shall not otherwise convert more than one acre of agricultural land to nonagricultural uses."

Consistency with Comprehensive Plan Farmland and Environmental Policies:

R-606: Farm lands, forest lands and mineral resources shall be conserved for productive use through the use of Designated Agricultural and Forest Production Districts … where the principal and preferred land uses will be commercial resource management activities, and by the designation of appropriate compatible uses on adjacent Rural Area and urban lands.

R607: Land uses, utilities, and transportation facilities within and adjacent to Designated Agricultural and Forest Production Districts …, shall be sited and designed to ensure compatibility with resource management.

E-445: Stormwater runoff shall be managed through a variety of methods, with the goal of protecting surface water quality, in stream flows, and aquatic habitat; promoting groundwater recharge while protecting groundwater quality; reducing the risk of flooding; protecting public safety and properties; and enhancing the viability of agricultural lands.

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R-642: King County shall continue to implement the objectives of the Farmland Preservation Program. Protection of property purchased under the Farmland Preservation Program shall be a high priority when balancing conflicting interests such as locating transportation, active recreation, utility facilities, or other uses that could have an adverse impact on farm operations. King County shall use the Transfer of Development Rights Program as another tool to preserve farmland.

Petitioners identify a host of County policies with which they assert the Ordinance is inconsistent, but fails to brief many of them. For those briefed, the Board's analysis is significantly more difficult given the inadequacy of the County's checklist in analyzing the impact on properties adjacent to WBDs, tasting rooms, and event venues.

RCW 36.70A.130(1)(d) requires development regulation amendments to be consistent with and implement the comprehensive plan.[103] The Board has long held that internal consistency requires that no feature of a plan or regulation thwarts attainment of any other plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.[104]

The requirement that jurisdictions have regulations that implement comprehensive plans is even more directive, requiring the scope to fully carry out the comprehensive plan goals, and polices. However, as the County notes, the Board has long held that no single regulation need have the scope to fully carry out *every* Comprehensive Plan policy. Thus, a development regulation need not strictly adhere but must "generally conform" to the comprehensive plan.[105]

Petitioners argue that the Ordinance is not consistent with King County's comprehensive plan, because WBD uses can increase storm water runoff that may pollute

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[103] RCW 36.70A.130(1)(d).
[104] WAC 365-196-210(8).
[105] RPHB at 23. *See, e.g., Feil v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 367, 377, 259 P.3d 227, 231 (2011), as corrected (Sept. 29, 2011), as corrected (Jan. 10, 2012); *Town of Woodway v. Snohomish Cty.*, 172 Wn. App. 643, 654, 291 P.3d 278, 283 (2013), aff'd, 180 Wn.2d 165, 322 P.3d 1219 (2014); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997) (quoting *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980)); *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 574–75, 309 P.3d 673, 682 (2013).

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streams, will reduce in-stream flows, and reduce the viability of agricultural lands. They also argue that the Ordinance does not ensure that siting of WBDs will ensure compatibility and protect agricultural uses on adjacent lands.

As discussed in the analysis of the County's SEPA review, the Petitioners raised many important concerns related to whether or not Ordinance 19030 is consistent with these policies. There the County was required to assure a lack of conflict with GMA mandates and the Board looked to see if the County had met its obligation.

Here the burden is on the Petitioners to show that the Ordinance *thwarts* attainment of cited comprehensive plan policies. The County's *inadequate SEPA review and failure to adopt regulations compliant with RCW 36.70A.060, .070, and .177* raised serious concerns about the consistency of the Ordinance with these policies, particularly R-606 and E-445. That said, the Board cannot determine whether the Ordinance inevitably *thwarts* the County's attainment of these policies at this time.

The Board finds that the matter is not ripe for review until the County has remedied the areas of SEPA and GMA noncompliance already identified.

Compliance with Comprehensive Plan APD Buffer Policies

Issue 2: By Permitting urban-type commercial uses and facilities within Rural Area SO-120 APD buffers, did the Ordinance fail to be guided by the GMA, to assure conservation of agricultural resource lands, and does it implement and is it consistent with KCCP Policies?

Issue 3: Does Ordinance 19030, by adopting development regulations that fail to implement, and that are inconsistent with King County Agricultural Production Buffer SO-120 and KCCP, and by, *e.g.,* permitting a destination tourist food and alcoholic beverage district on land that is designated to serve as buffer for the Sammamish Valley Agricultural Production District, fail to implement and is it inconsistent with KCCP Policies?

Issue 4: Does Ordinance 19030, by converting the designated Agricultural Production District and its Rural Area buffers into an experimental district "to determine the impacts and benefits of the adult beverage industry on Rural and Agricultural zoned areas," fail to be guided by the GMA, and KCCP Policies?

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Applicable Laws:

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

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

B. The following development standard shall apply to residential subdivisions locating in an agricultural production buffer special district overlay: Lots shall be clustered in accordance with K.C.C. 21A.14.040 and at 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. (Ord. 15032 § 50, 2004: Ord. 12823 § 8, 1997).

R-201: It is a fundamental objective of the King County Comprehensive Plan to maintain the character of its designated Rural Area. The Growth Management Act specifies the rural element of comprehensive plans include measures that apply to rural development and protect the rural character of the area (Revised Code of Washington 36.70A.070 (5)). The Growth Management Act defines rural character as it relates to land use and development patterns (Revised Code of Washington 36.70A.030 (15)). This definition can be found in the Glossary of this Plan. Rural development can consist of a variety of uses that are consistent with the preservation of rural character and the requirements of the rural element. In order to implement Growth Management Act, it is necessary to define the development patterns that are considered rural, historical or traditional and do not encourage urban growth or create pressure for urban facilities and service. Therefore**, King County's land use regulations and development standards shall protect and enhance the following attributes associated with rural character and the Rural Area: a. The natural environment, particularly as evidenced by the health of wildlife and fisheries (especially salmon and trout), aquifers used for potable water, surface water bodies including Puget Sound and natural drainage systems and their riparian corridors; b. Commercial and noncommercial farming**, forestry, fisheries, mining, home-occupations and home industries; c. Historic resources, historical character and continuity important to local communities, as well as archaeological and cultural sites important to tribes; d. **Community small-town atmosphere, safety, and locally owned small businesses**; e. Economically and fiscally healthy Rural Towns and Rural Neighborhood Commercial Centers with clearly defined identities compatible with adjacent rural, agricultural, forestry and mining uses; f. Regionally significant parks, trails and open space; g. A variety of low-density housing choices compatible with adjacent farming, forestry and mining and not needing urban facilities and services; h. **Traditional rural land uses of a size and scale that blend with historic rural developmen**t; and i. **Rural uses that do not include primarily urban-serving facilities**.

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R-205: Uses related to and appropriate for the Rural Area include those relating to agriculture, forestry, mineral extraction, and fisheries, such as the raising of livestock, **growing of crops**, **creating value-added products, and sale of agricultural products; small-scale cottage industries; and recreational and small-scale tourism uses that rely on a rural location.**

R-324: Nonresidential uses in the Rural Area shall be limited to those that: a. **Provide convenient local products and services for nearby residents; b. Require location in a Rural Area; c. Support natural resource-based industries**; d. Provide adaptive reuse of significant historic resources; or e. **Provide recreational and tourism opportunities that are compatible with the surrounding Rural Area. These uses shall be sited, sized and landscaped to complement rural character as defined in policy R-101 and R-201**, **prevent impacts to the environment and function with rural services including on-site wastewater disposal.**

R-336: King County shall continue to support the rural development standards that have been established to protect the natural environment by addressing seasonal and maximum clearing limits, **impervious surface limits and resource-based practices. Stormwater management practices should be implemented that emphasize preservation of natural drainage systems...**

As discussed at length *supra*, adoption of Ordinance 19030, without a SEPA review that adequately apprised decision-makers of the likely environmental consequences of the action, was incompatible with protecting the natural environment or ensuring compatibility with traditional character and scale of rural uses. Petitioners also point out that the Ordinance is intended to attract alcohol beverage *tourism* which, by definition, is about attracting and serving the residents of neighboring urban areas and thus **not** primarily a rural use. Petitioner persuasively asserts that the Ordinance amounts to "a *de facto* override of the Urban Growth area to allow business serving urban populations … to set up shop across the [Woodinvile] city line" allowing the rural area to acquire a share of the tasting room business that Woodinville has cultivated, but without ensuring adequate provision of urban-level infrastructure.[106]

[106] Petitioners' Prehearing Brief at 28-30.

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The County responds with a number of conclusory assertions to the effect that the Ordinance's careful amendments add robust protections for A zones and increase conditions requiring rural character consistency, including but not limited to eliminating impactful home occupation WBDs uses and requiring that new WBDs uses be sited on arterials.[107] Looking to legislative findings in RCW 36.70A.011, the County asserts that it has discretion to enhance the job base in rural areas and create opportunities for business development.[108] Once again the County ignores the illegal nature of some of the existing uses which could be addressed by code enforcement. The Board believes the County's interpretation that the unpermitted, urban-style businesses (which are apparently not protected as prior non-conforming uses by virtue of existence prior to the adoption of rural area regulations) are the "existing business" that the legislature intended to enhance is clearly erroneous. Neither does the intent language in RCW 36.70A.011 exempt the County from the *requirements* in the GMA and its own code that it protect the rural environment and character.

The Board is firmly convinced that adopting the Ordinance without adequate environmental review or sufficient development regulations to ensure new allowable uses are compatible with" (a) the natural environment … (h) traditional rural land uses of a size and scale that blend with historic rural development, and (i) Rural uses that do not include primarily urban-serving facilities" thwarts the County's implementation of policy R201.

The Board finds that the Ordinance is internally inconsistent with KCC Policy R201 in violation of RCW 36.70A.130(d).

Issue 7: **Is Ordinance 19030's establishment of an experimental overlay demonstration area inconsistent with KCC requirements for demonstration projects, including but not limited to KCC 21A.55.030.B, is it inconsistent with and does it fail to implement KCCP I-504 and KCC 21A.32.040, and does it violate the consistency and implementation requirement in 36.70A.130(1) because, although it purports to establish a temporary "demonstration project" pursuant to KCC Ch. 21A.55, in fact it**

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[107] King County's Prehearing Brief at 28.
[108] King County's Prehearing Brief at 28-30.

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assures the indefinite continuation of rogue illegal uses regardless of the outcome of the purported "demonstration"?

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

Applicable Laws:

KCC 23.01.020 Statement of goals.
It is the policy of King County to emphasize code compliance by education and prevention as a first step. **This policy is designed to ensure code compliance and timely action that is available to all persons and uniform in its implementation.** While warnings and voluntary compliance are desirable as a first step**, enforcement and civil penalties should be used for remedial purposes as needed to assure and effect code compliance**. Abatement or remediation should be pursued when appropriate and feasible. Uniform and efficient procedures, with consistent application tailored by regulation to each department's mission, should be used to accomplish these goals.

KCC 21A.32.040 Nonconformance - abatement of illegal use, structure or development.
Any use, structure or other site improvement **not established in compliance with use and development standards in effect at the time of establishment shall be deemed illegal and shall be discontinued** or terminated and subject to removal pursuant to the provisions of K.C.C. Title 23.

KCC 20.20.070 Vesting.

> A. Applications for Type 1, 2, and 3 land use decisions, except those which seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all of the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.
> B. Supplemental information required after vesting of a complete application shall not affect the validity of the vesting for such application.

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C. Vesting of an application does not vest any subsequently required permits, nor does it affect the requirements for vesting of subsequent permits or approvals.

Ord. 19030 Finding AA to Ordinance 19030:

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

KCC 21A.55.020 Demonstration project - authority, application and designation.

A. In establishing any demonstration project, the council shall specify the following:

1. The purpose of the demonstration project;
2. The location or locations of the demonstration project;
3. The scope of authority to modify standards and the lead agency, department or division with authority to administer the demonstration project;
4. The development standards established by this title or other titles of the King County Code that affect the development of property that are subject to administrative modifications or waivers;

Petitioners argue that the Ordinance establishes a "remote tasting room" project (Demo A) within the APD buffer and adjacent to the City of Woodinville's tourist and adult beverage districts where ample capacity and urban-level infrastructure exists and supports WBDs business and tasting rooms. It is a notorious fact that land outside urban areas is less expensive, precisely because it does not have urban services and does have use restrictions. Although KCC 21A.32.040 provides that "any use, structure or other site improvement not established in compliance with use and development standards in effect at the time of establishment shall be deemed illegal and shall be discontinued or terminated and subject to removal," the new "demonstration" overlay coincides with sites on which

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illegal operations are currently known to be in existence.[109] This cannot be viewed as an accident when read together with Finding AA to Ordinance 19030[110] and the Ordinance, which states that projects whose applications are eligible for approval for "demonstration" will be granted by the County as *nonappealable Type I land use decisions* in accordance with K.C.C. 20.20.020.[111]

The County begins by arguing that the Petitioners' GMA noncompliance argument is now moot because Ordinance 19030 became effective in December of 2019, thus the twelve-month period discussed in Finding AA lapsed in December of 2020.[112] If this is true, King County's July 1, 2021, stipulation to Superior Court that Ordinance 19209 (Moratorium Ordinance) placing a moratorium on Ordinance 19030[113] was disingenuous to say the least. The County's stipulation took place in the context of the Superior Court having stayed compliance proceedings on December 1, 2020, and prior to the court lifting its stay based, in part, on the County's stipulation that the Moratorium Ordinance would remain in effect. This Board does not have equitable powers and will confine its analysis to determining whether Ordinance 19030 complies with the GMA.

Although the County states that "demonstration projects "are designed to evaluate new uses and systems *not contained in permanent code",* it goes on to concede the Petitioners' point, noting that the demonstration projects in Demo A "… may continue … as

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[109] Forgeron, Sky River Mead, Cougar Crest, Cave B, and Castillo de Feliciana. GMHB 00086576 136, 293-6, 316-24, 327-32 at Tab IR GMHB 00086576.

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

[111] Petitioners' Prehearing brief at 44-45. GMHB 00086576 19 at Tab IR GMHB 00086576 (Sect 29 of Ordinance 19030, Section 29 NEW SECTION D.3 at pp101-103 reads:
An application for a remote tasting room under this shall be reviewed as a Type I land use decision in accordance with KKC 20.20.020.

[112] King County's Prehearing Brief at 47.

[113] Passed April 25, 2021.

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long as a business license or renewal is maintained…" "because this provision simply reflects KCC vesting rules.[114]

The County argues further that Finding AA does not conflict with the KCC's legal nonconforming use provisions, citing *Seven Hills v. Chelan County*, where a marijuana retailer, "absent compliance with every required permit and license," could not operate until expiration of the moratorium. The Supreme Court disagreed, reversed the hearing examiner and the Court of Appeals, and held that *Seven Hills* established a nonconforming use prior to adoption of the moratorium. The County's argument is inapposite in the instant case where the County has submitted no documentation showing the current uses are not non-conforming by virtue of having been established prior to the County's adoption of agricultural designations. Instead, the uses are apparently unlawful and could be subject to code enforcement actions.

The Board is firmly convinced that a mistake has been made. The provisions for remote tasting rooms in Demo A thwart attainment of policies and enforcement of KCC 21A.32.040.

The Board finds that the provisions of the Demonstration Project Overlay A are internally inconsistent with KCC 21A.32.040 in violation of RCW 36.70A.130(1)(d).

VI. INVALIDITY

The Department of Ecology's SEPA Handbook STATE ENVIRONMENTAL POLICY ACT HANDBOOK § 7, at 75 (1998 & Supp. 2003). states:

> It is not possible to meet the goals or requirements of GMA or to make informed planning decisions without giving appropriate consideration to environmental factors. The GMA nonproject actions such as the adoption of policies, plans, and regulations form the basis for subsequent "on the ground" project decisions that directly affect our environment.
>
> Environmental review at the planning stage allows the GMA city or county to analyze impacts and determine mitigation system-wide, rather than project by project. This allows cumulative impacts to be identified and addressed, and

[114] RPHB 45-46. Citing 19030 at sec. 29, 103:2074-2075.

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provides a more consistent framework for the review, conditioning, or denial of future projects.

Petitioners ask that the Board issue an order invalidating Ordinance 19030 for failure to comply with SEPA.

As the Court of Appeals stated in *Davidson Serles*,[115] imposition of invalidity depends on the entire fact situation before the Board:

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

A local jurisdiction's authority to act is qualified by the requirements of SEPA. A determination of nonsignificance is a legal prerequisite to the City's action.[116] In issuing a DNS, it is incumbent upon a jurisdiction to establish *prima facie* SEPA compliance.

> Moreover, we hold that RCW 43.21C.030(c) necessarily requires the *consideration* of environmental factors by the appropriate governing body in the course of all state and local government actions before it may be determined whether or not an Environmental Impact Statement must be prepared.
>
> Thus, SEPA requires that a decision *not* to prepare an Environmental Impact Statement must be based upon a determination that the proposed project is *not* a major action significantly affecting the quality of the environment. A decision by a branch of state government on whether or not to prepare an Environmental Impact Statement is subject to judicial review, but before a court may uphold such a decision, the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.[117]

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[115] *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 158 244 P.3d 1003, 1007 (2010).
[116] *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 256 857 P.2d 1039, 1046 (1993).
[117] *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73 510 P.2d 1140, 1149 (1973).

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The finding of invalidity is a matter for the Board's judgment based on the record before it. Invalidity requires three separate and distinct actions by the Board:[118]

a) A finding of noncompliance with the Act, with an order of remand.

b) A determination that continued validity will interfere with the Act's goals.

c) Identification of the specific part of the regulation, and reason for invalidity.

Noncompliance

The Board has entered the following findings and conclusions:

FINDINGS OF FACT

1. The County's Checklist failed to provide a detailed statement of reasonably foreseeable and cumulative environmental impacts that may result from Ordinance 19030 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
2. The Checklist failed to disclose likely environmental impacts of the Demonstration Project Overlay in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
3. The Checklist failed to disclose likely environmental impacts of establishing a destination food and adult beverage tourism district in the APD buffer SO-120 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
4. The Checklist failed to disclose likely environmental impacts of elimination of the on-site production requirement in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

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[118] RCW 36.70A.302(1) provides:
The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board: (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter, 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.

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5. The Checklist failed to disclose likely environmental impacts of reducing the minimum lot size in the Rural Area in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
6. The Checklist failed to disclose likely environmental impacts exempting event centers from zoning restrictions through the use of temporary use permits in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
7. Ordinance 19030 fails to maintain and enhance agricultural and fisheries industries by rendering moot and thwarting the conservation of productive agricultural land and discouragement of incompatible uses, in violation of RCW 36.70A.060(1)(a).
8. Ordinance 19030 authorizes events of a size and intensity within agricultural areas without regulations ensuring adequate setbacks to prevent conflicts between agricultural activities and events and thus fails to comply with RCW 36.70A.177(3)(a), RCW 36.70A.070(5)(c)(v), and RCW 36.70A.060(1)(a).
9. Ordinance 19030 fails to restrict agricultural accessory uses and activities to those that are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site in violation of RCW 36.70A.177(3)(b)(ii).
10. By expanding the area that may be developed to areas that do not have "prime soils", Ordinance 19030 also fails to comply with the locational criteria in RCW 36.70A.177(3)(b(ii) requiring that new development "shall not be located outside the general area already developed for buildings and residential uses and shall not otherwise convert more than one acre of agricultural land to nonagricultural uses."
11. Sections 12-29, 31, and Map Amendments #1 and #2 of Ordinance19030 are internally inconsistent with KCC Policy R201 in violation of RCW 36.70A.130(d).
12. Sections 12-29, 31, and Map Amendments #1 and #2 of Ordinance19030 (specifically the provisions of the Demonstration Project Overlay A) are internally inconsistent with KCC 21A.32.040 in violation of RCW 36.70A.130(1)(d).

CONCLUSIONS OF LAW

A. The County failed to establish *prima facie* SEPA compliance, as its DNS and Checklist violated WAC 197-11-060.

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B. The County's action in adopting Ordinance 19030 violated RCW 43.21C.030(c) and WAC 197-11-335 by basing its issuance of a DNS on an inadequate Checklist.

C. The adoption of Ordinance 19030 was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA and SEPA.

D. Ordinance 19030 substantially interferes with the fulfillment of the GMA Planning Goals 8, 10 and 12.

Thus, the Board determines that King County failed to comply with SEPA, RCW 43.21C.030(c), and remands this matter to the County to achieve compliance pursuant to RCW 36.70A.300.

Interference with GMA Goals

The Board has determined that the record indicates that there was no timely consideration of the environmental impacts of the County's adoption of development regulations in violation of RCW 43.21C.030. Petitioners allege that the continued validity of the Ordinance would substantially interfere with Goals 8, 10, and 12.

RCW 36.70A.020 includes the following goal language:

> (8) Natural resource industries. Maintain and enhance natural resource-based industries, including … agricultural, and fisheries industries. Encourage the conservation of … productive… agricultural lands, and discourage incompatible uses.
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.
> (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use … .

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

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In *Blair v. City of Monroe*,[119] the Board invalidated an ordinance rezoning property without appropriate SEPA compliance where the property was "largely within critical areas and/or shorelines, and development of this property without an environmental review that properly informs the decision makers of the impacts and mitigations of the intensity of development allowed by the proposed zoning would render and moot and thwart protection of the environment." The Petitioners argue that environmental values at risk here in the affected RA and A zones and adjacent critical areas are similar, and permitting potential development action "without environmental review that properly informs the decision makers … would render moot and thwart protection of the environment" substantially interfering with RCW 36.70A.020(10)'s goal of protecting the environment.[120] In *Orton Farms, LLC v. Pierce County*, the Board took note that the possibility of development proposals vesting on de-designated agricultural lands supported a finding that the ordinance substantially interfered with RCW 36.70A.020(8). As Petitioners note, a number of businesses currently operate in violation of zoning in the area and have a strong incentive to vest to the Ordinance's provisions.[121] The County's Checklist acknowledges the possibility that permit applications may be pending.[122]

The Board agrees that the Ordinance substantially interferes with goals (8), (10) and 12. As this Board concluded above, acting without information regarding environmental effects fails to comply with both SEPA and GMA. Petitioners' argument that the County's blindered approach here rests on a barren SEPA Checklist and an aggressively suppressive approach to recognition of impacts and applicable Comprehensive Plan policies is well-taken. Additionally, the County has failed to adopt development regulations sufficient to ensure that necessary infrastructure will be in place to serve new development in the rural area *at the time the development is available for occupancy and use.*

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[119] *Blair v. City of Monroe*, GMHB No. 14-3-0006c (FDO, August 26, 2014) at 30.
[120] *Id.* at 31.
[121] (Bates GMHB-0018672): Memo of Roberta Lewandowski at 6.
[122] KC-CTRL-0001 (Bates GMHB-0019585): SEPA Checklist (April 24, 2019) at 3.

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Reason for Invalidity

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

> Amending King County's land use and zoning standards concerning wineries, breweries, distilleries and similar adult beverage uses. Proposed regulations affect definitions, zoning designations where uses are allowed, identifying different scales and types of uses, establishing permitting thresholds. Regulations affecting access, setbacks, lot sizes, parking and requirements for production facilities and tasting rooms. Proposed regulations establishing demonstration projects locations and criteria.
> Establishing business licensing regulations. Modifying citation penalties for wineries, breweries, distilleries and remote tasting rooms.[123]

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

13. **The Board finds** that development of rural land without an environmental review that properly informs the decision makers of the impacts and mitigations as allowed by the Sections 12-29, 31, and Map Amendments #1 and #2 of Ordinance19030 fails to maintain and enhance agricultural and fisheries industries by rendering moot and thwarting the conservation of productive

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[123] 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.

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agricultural land and discouragement of incompatible uses in violation of RCW 36.70A.060(1)(a).

14. **The Board finds and concludes** development of rural land without an environmental review that properly informs the decision makers of the impacts of the development as allowed by the Sections 12-31 and Map Amendments #1 and #2 of Ordinance19030 fails to protect the environment, by rendering moot and thwarting protection of air and water quality and the availability of water.
15. **The Board finds and concludes** that the continued validity of Sections 12-31 and Map Amendments #1 and #2 of Ordinance19030 would substantially interfere with the fulfillment of the GMA Planning Goals 8, 10 and 12.

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

Ordinance 19030 is declared invalid.

VII. CONCLUSION

The Board entered the following findings and conclusions:

Findings of Fact

1. The County's Checklist failed to provide a detailed statement of reasonably foreseeable and cumulative environmental impacts that may result from Ordinance 19030 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
2. The Checklist failed to disclose likely environmental impacts of the Demonstration Project Overlay in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
3. The Checklist failed to disclose likely environmental impacts of establishing a destination food and adult beverage tourism district in the APD buffer SO-120 in violation of RCW 43.21.030(c) and WAC 197-11-060(4).

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4. The Checklist failed to disclose likely environmental impacts of elimination of the on-site production requirement in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
5. The Checklist failed to disclose likely environmental impacts of reducing the minimum lot size in the Rural Area in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
6. The Checklist failed to disclose likely environmental impacts exempting event centers from zoning restrictions through the use of temporary use permits in violation of RCW 43.21.030(c) and WAC 197-11-060(4).
7. Development of rural land without an environmental review that properly informs the decision makers of the impacts of the development as allowed by the Sections 12-31 and Map Amendments #1 and #2 of Ordinance19030 fails to protect the environment, by rendering moot and thwarting protection of air and water quality and the availability of water.
8. Ordinance 19030 fails to maintain and enhance agricultural and fisheries industries by thwarting the conservation of productive agricultural land and discouragement of incompatible uses, in violation of RCW 36.70A.060(1)(a).
9. Ordinance 19030 authorizes events of a size and intensity within agricultural areas without regulations ensuring adequate setbacks to prevent conflicts between agricultural activities and events and thus fails to comply with RCW 36.70A.177(3)(a), RCW 36.70A.070(5)(c)(v), and RCW 36.70A.060(1)(a).
10. Ordinance 19030 fails to restrict agricultural accessory uses and activities to those that are consistent with the size, scale, and intensity of the existing agricultural use of the property and the existing buildings on the site in violation of RCW 36.70A.177(3)(b)(ii).
11. By expanding the area that may be developed to areas that do not have "prime soils", Ordinance 19030 also fails to comply with the locational criteria in RCW 36.70A.177(3)(b(ii) requiring that new development "shall not be located outside

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the general area already developed for buildings and residential uses and shall not otherwise convert more than one acre of agricultural land to nonagricultural uses."

12. Ordinance 19030 is internally inconsistent with KCC Policy R201 in violation of RCW 36.70A.130(d).

13. The provisions of the Demonstration Project Overlay A are internally inconsistent with KCC 21A.32.040 in violation of RCW 36.70A.130(1)(d).

Conclusions of Law

A. The County failed to establish *prima facie* SEPA compliance, as its DNS and Checklist violated WAC 197-11-060.

B. The County's action in adopting Ordinance 19030 violated RCW 43.21C.030(c) and WAC 197-11-335 by basing its issuance of a DNS on an inadequate Checklist.

C. The adoption of Ordinance 19030 was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA and SEPA.

D. Ordinance 19030 substantially interferes with the fulfillment of the GMA Planning Goals 8, 10 and 12.

IX. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

- Sections 12-29, 31 and Map Amendments #1 and #2 of **Ordinance 19030 are declared invalid**.
- **Ordinance 19030 is remanded to the County to take action to come into compliance with RCW 43.21.030(c), WAC 197-11-060, WAC 197-11-330(5), WAC 197-11-335.**

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- **Ordinance 19030 is remanded to the County to take action to come into compliance with RCW 36.70A.060(1)(a), RCW 36.70A.070(5)(c(v), RCW 36.70A.130(1)(d), and RCW 36.70A. 177(3)(a) and (b)(ii).**

Item	Date Due
Compliance Due	July 1, 2022
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 15, 2022
Objections to a Finding of Compliance	July 29, 2022
Response to Objections	August 8, 2022
Compliance Hearing Zoom link will be provided at a later date	**August 15, 2022** **10:00 A.M**

Length of Briefs – A brief of 15 pages or longer shall have a table of exhibits and a table of authorities. WAC 242-03-590(3) states: "Clarity and brevity are expected to assist a board in meeting its statutorily imposed time limits. A presiding officer may limit the length of a brief and impose format restrictions." **Compliance Report/Statement of Actions Taken to Comply shall be limited to 35 pages, 45 pages for Objections to Finding of Compliance, and 10 pages for the Response to Objections.**

SO ORDERED this 27th day of January, 2022.

Cheryl Pflug, Presiding Officer

Deb Eddy, Board Member

James McNamara, Board Member

Growth Management Hearings Board
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Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[124]

[124] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. *See* RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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Appendix A: Legal Issues

Per the Prehearing Order, legal issues in this case were as follows: **Consolidated Growth Management Act Issues**

1. By permitting nonagricultural accessory and other uses on agricultural lands of long-term significance in a manner and with facilities that would interfere with and not support the continuation of the overall agricultural use of the property and neighboring properties:

   a. Does Ordinance 19030 fail to be guided by RCW 36.70A.020(1), (2), (8), (10), and (12) (see WAC 365-196-815) and does it violate the GMA duty to protect and other duties, in, e.g., RCW 36.70A.060(1), RCW 36.70A.070(5)(c), RCW 36.70A.120, RCW 36.70A.210, or RCW 36.70A.290(2) and the standards in RCW 36.70A.177?

   b. Does Ordinance 19030 fail to implement, and is it inconsistent with, KCCP Policies RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-333, R-336, R-402, R-403, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, E-99l, T-202, T-206, T-208, T-209, F-209, T-210, I-504, U-149, the associated narrative, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?

2. By permitting urban-type commercial uses and facilities within Rural Area SO-120 APD buffers:

   a. Does Ordinance 19030 fail to comply with the requirements of RCW 36.70A.060 and RCW 36.70A.177 to assure conservation of agricultural resource lands?

   b. Does Ordinance 19030 fail to implement and is it inconsistent with KCCP Policies RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-336, R-402, R-403, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, T-202, T-208, T-209, F-209, I-504, U-149, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?

3. Does Ordinance 19030, by adopting development regulations that fail to implement, and that are inconsistent with King County Agricultural Production Buffer SO-120 and King County Code Section 21A.38.130 and by, e.g., permitting a destination tourist food and alcoholic beverage district on land that

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is designated to serve as buffer for the Sammamish Valley Agricultural Production District, fail to implement and is it inconsistent with KCCP Policies RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-336, R-402, R-403, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, T-202, T-208, T-209, F-209, I-504, U-149, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?

4. Does Ordinance 19030, by converting the designated Agricultural Production District and its Rural Area buffers into an experimental district "to determine the impacts and benefits of the adult beverage industry on Rural and Agricultural zoned areas," fail to be guided by RCW 36.70A.020(1), (2), (8), and (10), does it fail to implement and is it inconsistent with KCCP Policies RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-336, R-402, R-403, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, T-202, T-208, T-209, F-209, I-504, U-149, and applicable KCCP definitions, does it violate the conformance and consistency requirements in, e.g., RCW 36.70A.130(1), and does it violate RCW 36.70A.060(1), RCW 36.70A.110(1), and RCW 36.70A.170?

5. Does Ordinance 19030, by allowing Rural Area destination tourist food and alcoholic beverage venues for the conduct of adult beverage business high attendance events, by allowing adult beverage businesses that are essentially regional retail facilities in the Rural Areas, and by encouraging retail businesses in the Rural Area by reducing the minimum lot size for many of these facilities to 2.5 acres and incorporating definitional provisions that permit sales of product produced elsewhere, fail to be guided by RCW 36.70A.020 (1), (2), (8), (9), and (10), violate RCW 36.70A.070(5), RCW 36.70A.110(1), RCW 36.70A.120, RCW 36.70A.210, or RCW 36.70A.290(2), and does it fail to implement and is it inconsistent with KCCP Policies for, inter alia, avoidance of sprawl, limitation of nonresidential uses and protection and enhancement of rural character and agricultural areas including RP-202, RP-203, RP-206, R-201, R-202, R-204, R-205, R-301, R-303, R-324, R-332, R-333, R-336, R-402, R-403, R-513, R-514, R-606, R-607, R-642, R-643, R-647, R-649, R-655, E-445, E-497, T-202, T-206, T-208, T-209, T-210, F-209, F-233, I-504, U-149 and the associated narrative, applicable KCCP definitions, and does it violate the consistency requirement in, e.g., RCW 36.70A.130(1)(d)?

6. Does Ordinance 19030 violate RCW 36.70A.070(5)(c) and RCW 36.70A.110(1) by failing to contain rural development, assure visual compatibility, reduce inappropriate conversion, protect critical areas, and protect against conflicts with the use of agricultural lands?

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7. Is Ordinance 19030's establishment of an experimental overlay demonstration area inconsistent with KCC requirements for demonstration projects, including but not limited to KCC 21A.55.030.B, is it inconsistent with and does it fail to implement KCCP I-504 and KCC 21A.32.040, and does it violate the consistency and implementation requirement in 36.70A.130(1) because, although it purports to establish a temporary "demonstration project" pursuant to KCC Ch. 21A.55, in fact it assures the indefinite continuation of rogue illegal uses regardless of the outcome of the purported "demonstration"?

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

Consolidated SEPA Issues

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:

   f. **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? (Since 9a was stricken, do we categorize this issue as a or b?)

   g. **C** By issuing a DNS despite the fact that there are significant unmitigated adverse impacts associated with the Ordinance?

   h. **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 adversely affect land use, including whether it would allow or encourage land uses incompatible with existing plans, policies and Code?

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

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

i. By failing to acknowledge the impacts of the proposal in allowing continuation of land uses with a history of generating significant adverse environmental impacts while operating illegally?

DATED this xx day of January 2022.

Chery Pflug, Presiding Officer

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION

Case No. 20-3-0004c

FOSV, et al. v. King County

ELECTRONIC DECLARATION OF SERVICE

I, LYNN ECCLES, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Legal Assistant to the Environmental and Land Use Hearings Office. On the date indicated below a copy of the ORDER NUNC PRO TUNC CORRECTING SCRIVENER'S ERRORS IN FINAL DECISION AND ORDER in the above-entitled case was sent to the following via email:

Lena Madden
Cristy Craig
Civil Division
W400 King County Courthouse
lena.madden@kingcounty.gov
Cristy.Craig@kingcounty.gov

Tim Trohimovich
Futurewise
tim@futurewise.org

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DATED this 27th day of January 2022.

Lynn Eccles

Lynn Eccles, Legal Assistant

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FUTUREWISE

July 11, 2023 - 10:42 AM

Transmittal Information

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Appellate Court Case Title:	King County, Appellant v. Friends of Sammamish Valley, Respondents

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Comments:

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