Supreme Court No. 102177-1

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,
Appellant,
vs.
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
Respondent.

AMICUS CURIAE MEMORANDUM OF WESTERN WASHINGTON AGRICULTURAL ASSOCIATION

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I. INTRODUCTION

The Division I decision in *King County v. Friends of Sammamish Valley*, __ Wn. App. 2d __, 530 P.3d 1023, 1047 (Wash. Ct. App. 2023) ("*FOSV*") runs afoul of both the Growth Management Act ("GMA") and State Environmental Policy Act ("SEPA") and the, as well as prior decisions from the Court of Appeals. The decision revived King County Ordinance 19030 ("the Ordinance"), which the Growth Management Hearings Board ("GMHB" or "the Board") twice invalidated as "clearly erroneous." First, if let stand, the Ordinance will have direct, serious consequences on agricultural areas in King County. Second, the decision sets a damaging precedent for counties and municipalities across the state that may seek to evade GMA mandates and the procedural requirements of SEPA in favor of short-sighted business interests—and at the expense of Washington farmland and open spaces.

II. THE INTEREST OF *AMICUS*

Western Washington Agricultural Association ("WWAA") is a Washington cooperative association that works on behalf of those who farm the fertile soils of north Puget Sound and Washington's greater agricultural community.

III. STATEMENT OF THE CASE

WWAA adopts and incorporates by reference the statements of the case in the Petitions for Review. As *amicus*, WWAA provides the following additional context.

The Ordinance affects farmland in the agricultural and rural zones that is particularly unique and important to the food security of the state, and crucial to the state's overall economic and social success.

The legislature enacted the GMA in 1990 and 1991 largely "'in response to public concerns about rapid population growth and increasing development pressures in the state, especially in the Puget Sound region.'" *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 231-32, 110 P.3d 1132 (2005) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 546, 14 P.3d 133 (2000) ("*King County*")); *see* RCW 36.70A.010. One of the principal purposes of the GMA was to guard against the unchecked loss of food production and natural resources due to development pressure and urban land conversion.

State-wide, agricultural production, food processing, and associated trade represent a significant segment of the economy.[1]

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1. *See generally* Washington State Department of Agriculture, Agriculture: A Cornerstone of Washington's

Western Washington's agricultural lands should be of the highest priority. These areas are closest to our state's largest population centers, making them both uniquely important and uniquely vulnerable. They are also home to some of the world's most productive soil: Tokul soils are found only in King, Pierce, Skagit, and Snohomish Counties and are more productive than 98 percent of the world's soils.[2] Western Washington is a leader in producing specialty potatoes, berries, milk, and vegetables. The region produces spinach and brassica seed crops that generally cannot be grown anywhere else in the state. Washington is the top producer of blueberries in the nation, largely due to the crops grown in western Washington. Specialty potatoes such as reds, yellows, and purples can be grown commercially in western Washington because of the region's unique climate and soils.

This critical farmland is already under threat. In the Puget Sound region, farmers grow local food on a shrinking land base. For example, the Puyallup Valley was once a cornucopia of

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Economy, available at https://agr.wa.gov/washington-agriculture (last visited Sept. 8, 2023).

2. United States Department of Agriculture, Natural Resources Conservation Service, Tokul – Washington State Soil, available at https://www.nrcs.usda.gov/sites/default/files/2022-09/WA%20Soil%20Type.pdf (last visited Sept. 8, 2023). Tokul soils are made up of volcanic ash and loess over glacial till. *Id.*

farming and "one of the world's foremost hop-growing areas, producing spectacular yields."[3] Today, it is lost to overdevelopment. Pierce County lost nearly 23 percent of its farmland in just one ten-year span between 1997 and 2007. Snohomish County has one of the fastest growing populations in the United States, and development there is encroaching on farmland at an alarming rate. Skagit County is home to the last large, contiguous farmable valley west of the Cascades. There, too, many interests are applying pressure to convert land from farming.

As leading food producers nationally, Washington farmers will face these challenges in the next 25 years and beyond. An unimpeded loss of farmland in western Washington would lead to less local control of our food supply and system.

While restricted to its facts, this case appears to concern only King County, it is well understood that policy set in King County often serves as a model for other counties throughout the state. Once a field is converted to pavement, it does not return to farmable land. Once the topsoil is gone, we lose it forever.

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3. *See* HistoryLink, Puyallup – Thumbnail History (Jan. 22, 2008), available at https://www.historylink.org/file/8447#:~:text=Subsistence%20farming%20mutated%20into%20the,and%20flowers%20for%20cash%20crops (last visited Sept. 8, 2023).

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division I's decision conflicts with prior decisions by this Court and with published decisions of the Court of Appeals. RAP 13.4(b)(1), (2) Additionally, issues involved in this case present issues of substantial public interest that this Court must decide. RAP 13.4(b)(4).

A. THE COURT OF APPEALS FAILED TO ACCORD PROPER DEFERENCE TO THE GMHB'S INTERPRETATION OF THE GMA.

Under Supreme Court case law, the Board was entitled to deference in its determination that the County failed to comply with the GMA. Washington courts review the Board's legal conclusions "de novo, giving substantial weight to the Board's interpretation of the statute it administers." *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). The Board's fact findings are entitled to deference, as well, as courts review them only for "substantial evidence." *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008).

Here, the Board reviewed the lengthy administrative record and concluded that King County's adoption of the Ordinance was "clearly erroneous" in light of the goals and

requirements of the GMA. *See Friends of Sammamish Valley v. King County*, Central Puget Sound Growth Management Hearings Board, Case No. 20-3-0004, 2022 GMHB LEXIS 9 at *33-34 (Jan. 27, 2022) ("*FOSV GMHB*").

Interpreting the GMA's definition of "accessory uses," RCW 36.70A.177(3)(b)(i), the Board concluded that "[t]he 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." *FOSV GMHB*, 2022 GMHB LEXIS 9 at **39-40. The Board laid out a legal analysis to "determine whether the [wineries, breweries, and distilleries] (WBDs) allowed under the Ordinance are legitimately accessory to fruit production, or whether fruit production merely justifies/is accessory to beverage tasting and event venues." *Id.* at **39-40. Applying this test, the Board held "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)." *Id*. at *42. The Board further rejected the County's argument that "unpermitted, urban-style businesses" in the rural zone are "'existing business' that the legislature intended to enhance"—an interpretation the Board found "clearly erroneous." *Id*. at *48-50.

The Court of Appeals gave no weight to the Board's expertise, did not defer to, or engage with the Board's statutory analysis, and instead applied a wholly different analysis while substituting its view of the facts for the Board's. *FOSV*, 530 P.3d at 1039, 1041-42.

This Court should accept a review of the Court of Appeals decision to address its failure to accord the appropriate deference to the Board's expertise in interpreting the GMA.

B. THE COURT OF APPEALS' ANALYSIS CONTORTS GMA PROVISIONS THAT ARE MEANT TO PROTECT FARMLAND.

One of the GMA's central requirements is that covered counties and cities must designate urban growth areas (UGAs) "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." *Quadrant Corp*., 154 Wn.2d at 232 (quoting RCW 36.70A.110(1)). As this Court previously recognized, the GMA requires counties "*to conserve agricultural land in order to maintain and enhance the agricultural industry and to discourage incompatible uses*." *King County*, 142 Wn.2d at 557. Over 20 years ago, this Court recognized a vital need to interpret the GMA in a way that protects agricultural land—and the soils of the Sammamish Valley in particular—from conversion under local governments' creative zoning schemes:

> The soils of the Sammamish Valley . . . have the unique characteristics of prime farmland [and] 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 . . . .
>
> …
>
> **When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land. Further, RCW 36.70A.177 must be interpreted to harmonize with that mandate. . . .**

King County, 142 Wn.2d at 561-63 (emphasis added).

The Court of Appeals' decision departs from this precedent protecting agricultural lands and conflicts with this Court's *King County* decision regarding interpretation of RCW 36.70A.177. To take one example, the Ordinance treats WBDs as "agricultural accessory uses and activities." By contrast, the statute prohibits "nonagricultural accessory uses and activities" from being "located outside the general area already developed for buildings and residential use," RCW 36.70A.177(2)(b). As the Board pointed out, interpreting "agricultural activities" to include, for example, wine tasting, strains credulity. *See FOSV GMHB*, 2022 GMHB LEXIS 9 at **37-38 ("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.").

The Court of Appeals, rather than addressing head-on this inconsistency with the statute, instead stated that it would not matter because other provisions in the Ordinance would—the court conjectured—prevent agricultural lands from being repurposed for nonagricultural uses. *FOSV*, 530 P.3d at 1040. That analysis does not comport with this Court's requirement to interpret RCW 36.70A.177 "to harmonize with" the GMA's "mandate for the conservation of agricultural land." *King County*, 142 Wn.2d at 563. The Court should accept review to correct this inconsistency.

C. THE COURT OF APPEALS CONTRAVENED SUPREME COURT AND COURT OF APPEALS PRECEDENT BY APPROVING THE COUNTY'S BACKWARD-LOOKING SEPA ANALYSIS.

The SEPA environmental review process must be adequately completed *before* the government makes its decision. *See King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 666, 860 P.2d 1024 (1993) ("*Boundary Review Board*"). SEPA rules "ensure an agency fully discloses and carefully considers a proposal's environmental impacts before adopting it and 'at the earliest possible stage.'" *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555,

578, 309 P.3d 673 (2013) (internal citations omitted); *see* WAC 197-11-055(2)(c).

When the King County Council adopted the Ordinance in December 2019, it relied on a Determination of Non-Significance (DNS) based on the County's 2019 SEPA Checklist. There appears to be no dispute that the 2019 Checklist was deficient in a number of respects.

Under SEPA rules and precedent, the County—having performed an inadequate environmental review, then taking an action informed by that review—could not simply provide a belated, patched-up review while continuing with its misbegotten action. *See* WAC 197-11-055(2)(c). As this Court has recognized, "decisionmakers need to be apprised of the environmental consequences before the project picks up momentum, not after." *Boundary Review Board*, 122 Wn.2d at 664.

The Board appropriately found that the County violated SEPA by issuing a DNS that was based on an inadequate Checklist. *FOSV GMHB*, 2022 GMHB LEXIS 9 at *32-33, 65.

The Court of Appeals gave this issue short shrift. It described the analogous facts of *Spokane County* and that court's holding that Spokane County had failed to comply with SEPA by relying on a checklist that improperly deferred analysis of the impacts of "nonproject actions." *FOSV*, 530 P.3d at 1047 (citing

Spokane County, 176 Wn. App. at 580-81) . However, the court declined to address this same procedural deficiency in King County's SEPA process. *See id.* It instead made its own assessment of the "probable" impacts of the Ordinance, based on the County's *post hoc* 2020 Checklist, to wave away the County's procedural noncompliance. *See id.* This analysis is at odds with this Court's decision in *Boundary Review Board* and the Court of Appeals' decision in *Spokane County*.

Accordingly, the Court should accept review regarding the County's reliance on a *post hoc* SEPA checklist to continue with its planning amendments.[4]

D. THE COURT OF APPEALS' PRECEDENT WILL GUT PROTECTIONS FOR AGRICULTURAL LAND WHEN THOSE PROTECTIONS ARE MOST NEEDED.

The decision sets a precedent that allows localities to expand commercial services in designated agricultural and rural

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4. Amicus WWAA further supports Petitioners' arguments that review should be accepted to address the appropriate baseline conditions for SEPA review, and reject the Court of Appeals decision approving the County's use of a baseline that included illegal uses that its action would subsequently legalize. *FOSV*, 530 P.3d at 1045. The decision below runs afoul of this Court's recent decision in *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, where the Court held that "the appropriate baseline to compare the proposal's environmental impacts is the *condition* of the existing environment"—not existing uses, both legal and illegal. 198 Wn.2d 846, 872, 502 P.3d 359 (2022).

areas with just the thinnest connection to local agriculture. This has implications far beyond the Sammamish Valley.

It is a vital matter of public interest that the state's policymakers be required to protect western Washington's remaining farmland as the legislature intended the GMA. This region's Tokul soil is among the most productive in the world, making our farmland uniquely suited for producing many crops. Protecting farmland is also a matter of social justice, as King County farmland is often rented and farmed by people from socially disadvantaged communities in nearby urban areas.[5]

At the same time, western Washington's agricultural lands face threats from numerous directions. As the drafters of the GMA realized, regulation and planning are necessary to protect agricultural land from the effects of suburban sprawl.

The Petitions present several quintessential matters of public interest for this Court to decide. Going forward, will Washington policymakers be required to evaluate environmental impacts while these can still inform their decisions, or can they rely on *post hoc* justifications? Will Washington courts continue to interpret the GMA's provision for "innovative zoning

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5. *See* Kunkler, Aaron, "Finding farmland in King County is a perpetual struggle," ISSAQUAH REPORTER (March 23, 2021), available at https://www.issaquahreporter.com/news/finding-farmland-in-king-county-is-a-perpetual-struggle (last visited Sept. 8, 2023).

techniques" on agricultural lands "to harmonize with" its "mandate for the conservation of agricultural land"? And will Washington courts continue to accord proper deference to the GMHB regarding such interpretations?

V. CONCLUSION

Amicus WWAA respectfully requests that the Supreme Court accept review.

This document contains 2,453 words, excluding the parts of the document exempted from the word count pursuant to RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of September, 2023.

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CERTIFICATE OF SERVICE

On the date indicated below, I hereby certify that I caused the foregoing document to be filed via the Washington State Appellate Courts' Electronic Filing Portal, and sent copies via Electronic Mail to the following parties:

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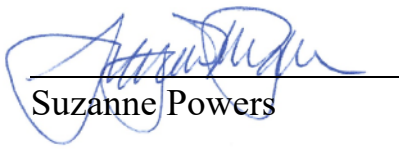
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of September, 2023, at Seattle, Washington.



Suzanne Powers

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