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Division I
State of Washington

No. 75375-4-I
(Snohomish County Superior Court No. 16-2-03250-6)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

HERITAGE BAPTIST CHURCH,

Appellant,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT
HEARINGS BOARD, BRANDI BLAIR, MATTHEW BLAIR, BRETT
BLAIR, JAMES BLAIR, LOWELL ANDERSON, DOUGLAS HAMAR,
AND CHAD MCCAMMON; and the CITY OF MONROE,

Respondents.

APPELLANT HERITAGE BAPTIST CHURCH'S OPENING
BRIEF

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TABLE OF CONTENTS

I. NATURE OF THE CASE 1

II. ASSIGNMENTS OF ERROR..... 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

IV. STATEMENT OF THE CASE..... 3

 A. Description of the Subject Property 3

 B. Discussion of the Original Process Reclassifying the Property to General Commercial and the Board’s 2014 Order..... 7

 C. Discussion of Monroe’s Remand Review, Development of the SEIS and Second Legislative Action Reclassifying the Property to General Commercial..... 10

 D. Discussion of Compliance Proceedings Before the Board and Summary of the 2016 Order on Appeal 14

V. ARGUMENT..... 18

 A. The Standards of Review Under the APA Must Be Applied Subject to the Growth Management Act’s Deference to Monroe’s Planning and Policy Choices 18

 B. The GMA Mandates Deference to Monroe as the Planning Authority Choosing to Reclassify the Property to General Commercial 21

 C. Under SEPA, the Determinations of Monroe and its SEPA Designated Official are Entitled to Great Weight 24

 i. *SEPA requires that great weight be given to Monroe’s SEIS and the environmental determinations made therein.....* 25

 ii. *The 2016 Order was erroneous because the Board improperly substituted its judgment for Monroe, failing to give great weight to Monroe’s determination of what was reasonable environmental analysis.....* 26

 D. The SEIS Was Not Required to Analyze Environmental Impacts that Are Addressed by Monroe’s Regulations, Such as Those Governing Critical Areas..... 29

| | | |
|-----|---|----|
| E. | Review of the SEIS is Governed by the ‘Rule of Reason’ | 33 |
| i. | <i>The Rule of Reason does not require analysis of remote and speculative consequences</i> | 34 |
| ii. | <i>The 2016 Order improperly required analysis of remote and speculative impacts</i> | 35 |
| F. | The SEIS Pertained to a Nonproject Action Which Gives Monroe More Flexibility to Perform Environmental Review On the Basis of Less Detailed Information and to Evaluate Environmental Impacts at a Broad Level | 38 |
| i. | <i>Environmental analysis for a nonproject action is normally less detailed and may leave certain environmental impacts and alternatives to the future for review under a development-specific project action</i> | 38 |
| ii. | <i>The Board erred by requiring Monroe to go beyond a nonproject level of analysis under this SEIS</i> | 41 |
| G. | The Board Improperly Expanded the Non-Compliance Review Into Areas the Board Previously Dismissed in the Original 2014 Order | 43 |
| H. | The Board Erred in Basing its Determination of Invalidity Solely on SEPA | 44 |
| I. | The Board Erred by Failing to Support its Determination of Invalidity with Findings, Conclusions and Clear Remand Instructions | 47 |
| VI. | CONCLUSION | 49 |

TABLE OF AUTHORITIES

CASE LAW

| | |
|--|------------|
| <i>Anderson v. Pierce County</i> , 86 Wn. App. 290, 302, 936 P.2d 432 (1997)..... | 35 |
| <i>Blair et al v. City of Monroe, CPSGMHB</i> Case No. 14-3-0006c..... | 9 |
| <i>Cascade Bicycle Club v. Puget Sound Regional Council</i> , 175 Wn. App. 494, 514, 306 P.3d 1031 (2013)..... | 24, 39 |
| <i>City of Redmond v. Central Puget Sound Growth Management Hearings Board</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998) | 20, 21 |
| <i>City of Shoreline, et al v. Snohomish County, CPSGMHB</i> Consolidated Case Nos. 09-3-0013c and 10-3-0011c..... | 21 |
| <i>Davidson Serles & Assocs. v. Central Puget Sound Growth Management Hearings Board</i> , 159 Wn. App. 148, 244 P.3d (2010)..... | 44, 45 |
| <i>Diehl v. Mason County</i> , 94 Wn. App. 645, 651-652, 661, 972 P.2d 543 (1999)..... | 22 |
| <i>Glasser v. City of Seattle</i> , 139 Wn. App. 728, 736, 162 P.3d 1134 (2007)..... | 33, 34 |
| <i>Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)</i> , 96 Wn. App. 522, 526, 979 P.2d 864 (1999) | 18, 20 |
| <i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003, 1033, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) | 16, 31 |
| <i>Moss v. City of Bellingham</i> , 109 Wn. App. 6, 14, 31 P.3d 703 (2001)..... | 29, 33, 40 |
| <i>Phoenix Development v. City of Woodinville</i> , 171 Wn.2d 820, 830, 256 P.3d 1150 (2011)..... | 21, 22 |

| | |
|---|---------------------------|
| <i>Quadrant Corp. v. State Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 238, 110 P.3d 1132 (2005)..... | 20, 22, 23, 24 |
| <i>Solid Waste Alternative Proponents v. Okanogan County</i> , 66 Wn. App. 439, 442, 832 P.2d 503, 505 (1992)..... | 24, 25, 26, 27, 34, 40 |
| <i>Town of Woodway v. Snohomish County</i> , 172 Wn. App. 643, 291 P.3d 278 (2013), affirmed 180 Wn.2d 165, 322 P.3d 1219 (2015)..... | 20, 44, 45 |
| <i>Ullock v. Bremerton</i> , 17 Wash. App. 573, 580, 565 P.2d 1179, <i>review denied</i> , 89 Wash.2d 1011 (1977) | 25 |

STATUTES

| | |
|----------------------|----------------|
| RCW 34.05.518..... | 18 |
| RCW 34.05.570..... | 20, 21 |
| RCW 36.70A.020..... | 14, 46 |
| RCW 36.70A.302..... | 3, 46, 47, 49 |
| RCW 36.70A.320..... | 21, 23 |
| RCW 36.70A.3201..... | 19, 21, 23, 25 |
| RCW 43.21C.090..... | 25 |
| RCW 43.21C.240..... | 29, 31, 37 |

OTHER AUTHORITIES

| | |
|---|--------|
| Laws of 1997, ch. 429, §§ 2, 20..... | 23 |
| WAC 22-16-031..... | 5 |
| WAC 197-11-158..... | 29 |
| WAC 197-11-442..... | 38, 39 |
| WAC 197-11-443..... | 39 |
| WAC 197-11-704..... | 38, 39 |
| <i>Washington's Growth Management Revolution Goes to Court,</i> 23 Seattle U.L.Rev. 5, 8 (1999)..... | 22, 23 |

I. NATURE OF THE CASE

The City of Monroe required hundreds of pages of environmental review as part of its record in order to evaluate whether to reclassify Heritage Baptist Church's (Heritage) property to General Commercial zoning. This review was supported by independent expert consultant analysis regarding every potential environmental consideration pertinent to the property. Monroe's State Environmental Policy Act (SEPA) designated official declared that this environmental review was the most extensive he had ever been involved with over more than two decades. Upon reclassifying the property, the Monroe City Council then issued 43 pages of findings and conclusions analyzing its priorities under the Growth Management Act (GMA) and its Comprehensive Plan, and addressing the environmental review process. There simply can be no serious debate that the City Council had complete environmental disclosure to rely on in considering whether to reclassify the property.

Nonetheless, the Central Puget Sound Growth Management Hearings Board (Board) invalidated Monroe's reclassification of the property solely because the Board wanted yet more environmental review. The Board overstepped its authority in numerous ways not supported by SEPA or the GMA. For example, the Board would have Monroe and Heritage speculate as to what specific development-based mitigation

would involve even though no development application has been submitted (or required at this stage). The Board would also require review of the property as if Monroe's critical area regulations do not apply.

Contrary to the Board's Order, the SEIS fully and extensively disclosed the broad range of environmental impacts and alternatives. The Monroe City Council was fully informed of the environmental considerations involved with reclassifying the Property.

II. ASSIGNMENTS OF ERROR¹

1. Did the Board err by failing to give deference to Monroe under the Growth Management Act?
2. Did the Board err in failing to give great weight to the determinations of Monroe's SEPA designated official?
3. Did the Board err in failing to allow the SEIS to rely on existing regulations that adequately address environmental considerations?
4. Did the Board err in requiring Monroe to consider remote and speculative consequences?
5. Did the Board err in requiring Monroe to address development specific, project considerations?
6. Did the Board err in expanding the scope of remand to include further transportation analysis after it dismissed such issues in its original order?
7. Did the Board err in invalidating Monroe's reclassification of the property on the basis of SEPA?

¹ Assignments of error are hereby made to the Board's Order Finding Continued Non-Compliance as the Court has taken this case up on direct review.

8. Did the Board err by failing to enter substantive and specific findings and conclusions to support invalidity?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the SEIS properly evaluate the nonproject action based on the applicable SEPA review standards? (Assignments of Error #2-5)
2. Was the City of Monroe entitled to deference with respect to its planning choices in rezoning and redesignating the property to General Commercial? (Error #1)
3. Were the SEPA responsible official entitled to great weight and did the Board err in failing to give this deference? (Error #2)
4. Did the SEIS appropriately rely on adopted regulations which govern particular environmental considerations? (Error #3)
5. Did the Board err in requiring the City of Monroe to engage in review of remote and speculative consequences? (Error #4)
6. Did the Board improperly require the non-project action to address development specific, project considerations? (Error #5)
7. Did the Board improperly exceed the scope of its original remand when it reviewed Monroe's actions taken to comply? (Error #6)
8. Did the Board violate RCW 36.70A.302 and caselaw by imposing invalidity on the basis of SEPA alone? (Error #7)
9. Did the Board's order imposing invalidity violate RCW 36.70A.302 because the Board failed to set forth any substantive findings and conclusions in support thereof? (Error #8)

IV. STATEMENT OF THE CASE

A. Description of the Subject Property.

Heritage owns 42.81 acres of vacant land located on the east end of Monroe's city limits (the "Property"). *Clerks Papers (CP)*, 002814.

Vicinity and site maps are found at CP 002829 and throughout the expert consultant reports in the record, cited to herein.

The Property is located in the long-established Urban Growth Area (“UGA”). *CP 002814*. The Property’s configuration, adjacency to a state highway and urban location make it ideal for urban development within the framework of highly protective environmental regulations. As a result, five years ago, Heritage applied for a rezone of the Property under the Monroe Municipal Code (MMC) and land use re-designation under the Monroe Comprehensive Plan from Limited Open Space (LOS) to General Commercial (GC). *CP 003794*. This action is collectively referred to herein collectively as the ‘reclassification’.

As the comprehensive record in this case reveals, Monroe staff, Hearing Examiner, Planning Commission and City Council have engaged in hundreds of hours of staff review and public hearings, and several binders-worth of environmental analysis, and twice evaluated and determined that rezone to GC was proper. Likewise, multiple independent, expert consultants have analyzed every environmental aspect of the Property and potential environmental impacts of potential development under both GC and other potential zoning alternatives.

The Property is bounded to the south by State Route 2 (SR 2), which is the Property’s sole vehicular access. *CP 002827; CP 002081*

(traffic impact study site vicinity map). This access is particularly convenient for commercial zoning, as any future development would not send vehicle traffic through, or adversely impact, local streets or neighborhoods. *CP 002100*. Future access location and design would need to be coordinated with the Washington State Department of Transportation, potentially bringing funding for improvements to SR2 at the Property's access location. *Id.*

The Property's topography is primarily flat or gently rolling, with steep wooded hillsides bordering the site to the north. *CP 002827*. The Property contains a complex of three wetlands and a stream (often referred to as an oxbow slough).² *CP 002933-4* (Critical Areas Report); *CP 002845* (Critical Areas Composite Map). A recorded Native Growth Protection Area ("NGPA") generally tracks the area covered by the oxbow slough and associated wetlands, requiring that development be placed away from those critical areas. *CP 002178-9*. The NGPA provides that all areas identified as such "shall remain undisturbed in perpetuity. No filling, grading or construction are permitted within these areas without prior written approval of the City of Monroe." *Id.*

²The oxbow slough was historically a channel of the Skykomish River which now receives water from a ditch that flows along the north side of SR 2. It is classified as a Shoreline of the State under WAC 22-16-031. *CP 002933; 002948-9*.

The natural features of the site are generally low functioning due to characteristics such as a lack of vegetation structure and diversity. *CP 002933-4*. Even so, the critical areas analysis relied on the most conservative assumptions to provide the most environmental protection reasonably possible: for example, the addressing the stream as though it were fish bearing, thereby giving it the biggest possible buffer, even though no fish were observed. *Id.* Such conservative analysis would ultimately lead to greater mitigation efforts at the time any specific land development might be proposed.

The Property lies within the nearby Skykomish River drainage basin. The Property is also identified as being within a future 100-year special flood hazard area on the Federal Emergency Management Agency's preliminary mapping, but Monroe has not adopted that mapping to date; as a result the developable portion of the property does not currently lie in a regulated 100-year flood hazard area. *CP 002071-5*. Nonetheless, to be conservative the environmental review discussed herein treated the property as if it does lie in the 100-year flood plain. That environmental analysis included extensive review of flood volumes and velocities to determine potential impacts on any future development in case updated mapping is adopted in the future, finding that flood volumes could be mitigated with compensatory flood storage at the time of land

development if required. *CP 002-825* (hydraulic and engineering analysis referenced therein and found at *CP 003036-002117*).

Monroe's longstanding, GMA-based critical area regulations strictly limit construction within established critical areas and buffers; as a result, physical development of the Property is limited to only that portion of the Property that is outside the steep slopes, streams, shorelines and wetlands and their associated buffers. *CP 001060-001105*. Heritage previously recorded the NGPA restriction, limiting any future development of the Property consistent with those critical area regulations. *CP 002178-9*. The NGPA and Monroe's critical area regulations collectively limit the developable area of the 43-acre Property to approximately 11.3 acres. *CP 002823*.

B. Discussion of the Original Process Reclassifying the Property to General Commercial and the Board's 2014 Order.

The Property is one of the last cohesive parcels of land left available for commercial development within Monroe and its UGA, and one of only two with ready, direct access onto SR 2. *CP 002852-3*. Alternative sites for commercial zoning that were analyzed during environmental review would require either rezoning or extensive environmental mitigation for development (for example, landfill remediation). *Id.* Commercial zoning of the Property as GC is

particularly appropriate due to its location and consistency with Monroe's vision for the immediate area as a gateway into the city. *CP 001417*.

The portion of the city within which the Property is located was generally classified as open space since 1994, but with an express eye to future reclassification. *CP 003794*. Monroe has since adopted critical area regulations that address open space protections that were not in existence in 1994, and now has been progressively reclassifying property in a manner more consistent with urban policies and priorities. In 2006, Monroe considered rezoning the Property as part of a larger sub-area process, but was forced to abandon that process due to lack of funding. *Id.* In 2010, Heritage submitted an application to reclassify the specific Property (instead of part of a larger area-wide rezone), under which it is required to pay for all processing and environmental review. *Id.* This allows the City Council to deliberate the merits of the reclassification without being burdened with the costs of environmental review.

In 2013, after extensive environmental analysis and a comprehensive Environmental Impact Statement, the Monroe City Council reclassified the Property to GC. *CP 000006-11; CP 001331-001420* (appendices). In its supportive findings, the Council explained how reclassifying the East Monroe area would accomplish Monroe's long range planning goals under the GMA:

The proposed amendments are consistent with the City's Comprehensive Plan and reflect the City's planning vision concerning the function of the East Monroe area vis a vis the City's larger planning vision for the entire jurisdiction. Allowing limited commercial development within the area promotes economic opportunity by enabling the establishment of new businesses at a commercially desirable location adjacent to and accessible from State Route 2, a heavily travelled thoroughfare. Development of this type will provide an urban gateway presence at the City's jurisdictional boundary. . .

CP 001417.

The reclassification was based on extensive environmental review under SEPA, culminating in a Final Environmental Impact Statement (EIS). The EIS analyzed the environmental impacts of reclassifying the Property to GC, as well as impacts under three alternative reclassification categories. Upon on appeal by longstanding opponents to the rezone, the Monroe Hearing Examiner upheld the adequacy of the EIS. *CP 001601-1632.*

Having been unsuccessful before the Hearing Examiner, those rezone opponents also challenged Monroe's reclassification of the Property to the Board. *CP 002430-2464: Blair et al v. City of Monroe*, CPSGMHB Case No. 14-3-0006c, Final Decision and Order, (August 26, 2014) (2014 Order).

In the 2014 Order, the Board dismissed the vast majority of issues that the rezone opponents had raised, rejecting their concerns related to

urban growth, sprawl, transportation and traffic, economic development, permits, natural resources, citizen participation, adequacy of existing development potential, and noise. However, the Board did remand the case to Monroe for further environmental study and invalidated the reclassification until that further environmental review was completed. The Board expressly identified and limited the remand issues, instructing Monroe to address the following: (i) formulate a "no action alternative" based on existing non-developed conditions and/or alternative locations within Monroe; (ii) analyze environmental impacts of future development on the 43 acres of the reclassified Property despite the critical area and NGPA regulatory restraints on development; (iii) further assess the impacts of development on ecological functions of the waterways and wetlands; and (iv) assess impacts of development alternatives on hydrology in the oxbow slough, including impacts on flow velocity and volume, and landslide potential of the steep slopes located on the northern portion of the Property. *CP 002893-2927* (also at *CP 002449-2459*).

C. Discussion of Monroe's Remand Review, Development of the SEIS and Second Legislative Action Reclassifying the Property to General Commercial.

Monroe and Heritage did not dispute the limited scope of this remand; the Board's instructions were relatively clear and the environmental review was feasible to complete, albeit at significant

expense and time. Monroe staff and the City Council went to great lengths to involve the public in the process and to obtain public comments, even discussing the compliance process in a public forum so that the entire remand process was fully open for public input. *CP 002706.*

During the compliance period, the Board granted Heritage the status of Compliance Participant by an Order, dated January 2, 2015, which provides Heritage the rights of a party in all the forthcoming proceedings (those subsequent to the 2014 Order). *CP 002597-2601.*

Monroe then took over a year to develop what ultimately was a Supplemental Environmental Impact Statement (SEIS), based on extensive, independent outside consultants' analysis of all environmental aspects identified by the Board for further review. *CP 002811-003403.* Both Monroe and Heritage invested a significant amount of time and resources in performing extensive environmental analysis to address these remand issues. Monroe's Community Development Director declared that the draft SEIS alone was one of the most detailed and complex environmental impact statements he had reviewed throughout his 25-year planning career. *CP 002620.* In addition to Heritage being the party required to pay for all the independent environmental analysis, Heritage invested significant time and resources to actively address the extensive public comments made during the SEIS process. *CP 00354-003661.*

In its Compliance Briefing to the Board, Monroe summarized its efforts conducted over a year to scope, obtain outside consultant analysis and ultimately issue the SEIS. *CP 002668-2673*. The SEIS accomplished the following objectives, consistent with the 2014 Board Order:

- Evaluated a "No Action-No Development/Single Family Residential" alternative to establish baseline conditions for the entire 43 acres.
- Assessed the maximum development of the entire site under the proposed zoning designation.
- Considered development impacts to landslide and erosion hazard areas and the impacts of fill placement within the floodplain areas.
- Identified the existing values and functions of environmental site features and assessed potential development impacts to the ecological function of the stream, wetlands, and listed wildlife species and their habitat.
- Addressed flood history and potential flooding impacts and mitigation related to potential development of the site, including upstream and downstream properties that may be impacted.
- Considered alternative locations for GC development within the City and their comparative environmental costs.

CP 002823.

The SEIS summarized each Board comment and explained how the environmental analysis addressed the topic. *CP 002823-2825*. The analysis then continued for 70 pages, along with multiple appendices of technical reporting and analysis. *CP 002826-3121*. This work was in addition to the original EIS and the multiple technical reports appended

thereto. *CP 001772-2192*. Independent environmental analysis was performed by outside, expert, independent consultants for every conceivable aspect related to the site, including traffic; wetlands, streams and fish/wildlife habitat; comprehensive plan and zoning policies; flood hazard mitigation (including flow velocity and volume); soils; stormwater; geologic hazard; and steep slope evaluation.

As Monroe proceeded through the public review process, including review by the Monroe Planning Commission, all outside consultants remained engaged and addressed questions or concerns by the public and Monroe staff/officials. *See e.g. CP 003805-3815* (supplemental explanation of analysis addressing Planning Commission concerns).

After extensive public comments and numerous public hearings, the Monroe City Council ultimately adopted Ordinances 015/2015 and 016/2015 (the “2015 Ordinances”), again reclassifying the Property to GC. *CP 002695-002743; CP 002745-2792*. In doing so, the Monroe City Council took extraordinary efforts, holding additional hearings beyond what was required by Monroe’s GMA public participation requirements. *CP 002663; 002671; CP 002701-2743* (Council findings which discuss public hearings and comment opportunities throughout findings). The Monroe City Council attached to both 2015 Ordinances a 43-page document setting forth its findings and conclusions documenting its

review process, evaluation to address the 2014 Order, consistency with Comprehensive Plan Policies, evaluation of rezone criteria, and discussion of its planning priorities in adopting the reclassification. *CP 002701-2743*. The Council's findings addressed the SEIS process and substance in great detail, including a discussion of the expert analysis as well as the lay public concerns, and how the SEIS and expert analysis addressed those. *CP 002711-002712*. The Monroe City Council also addressed the Planning Commission's questions and concerns and identified the evidence in the record which substantively resolved all those concerns. *CP 002710-2712*. The Monroe City Council discussed how the reclassification to GC complies with all GMA Goals set forth in RCW 36.70A.020, including discussion under Goal 10, Environment, regarding Monroe's extensive and comprehensive SEPA environmental review process. *CP 002726; see generally CP 002722-2727* (Findings regarding GMA Goals).

D. Discussion of Compliance Proceedings Before the Board and Summary of the 2016 Order on Appeal.

Monroe's Statement of Compliance Actions Taken, along with Monroe's and Heritage's further briefing to the Board, clearly explained the specific actions taken to correct those aspects of SEPA review the Board had found deficient, while imploring the Board to decline as

improper the Petitioners ongoing invitation to expand the scope of remand to revisit issues that the Board had already dismissed. *CP 002662-2693; CP 002639-2661; CP 003697-3748; CP 003749-3815*. Those briefs addressed in detail Monroe's compliance process, including public comment and numerous public hearings.

Nonetheless, on April 1, 2016, the Board issued an Order Finding Continuing Non-Compliance (2016 Order), invalidating the 2015 Ordinances. *CP 003826-3883*. Rather than recognizing that the determinations of the Monroe City Council and Monroe SEPA Official were entitled to great weight, the Board improperly engaged in its own analysis of what it believed was more or less credible evidence under the SEIS. *CP -3862-3875*. The Board found that the SEIS was inadequate, based on confusing and patently erroneous conclusions. For example, the Board believed it did not have evidence that the NGPA was recorded against the entire Property, even though the Board had a copy of the recorded document in its record and which was attached to the FEIS and SEIS. *Compare CP 003859 (Board Finding); CP 002178-9 (Recorded Short Plat reflecting NGPA); CP 002823 (SEIS Discussion of NGPA)*. Similarly, the Board found that the SEIS did not contain sufficient analysis of the oxbow slough and whether it is connected to the east with the Skykomish River, even though (a) that slough is comprehensively

regulated under the Monroe Municipal Code critical area regulations whether it is connected to the Skykomish River or not and (b) the independent critical area report analyzed the slough under the highest protective standard as a Type 1, salmonid bearing stream. *Compare CP 003862-003865* (Board discussion); *CP 001060-001105* (Critical area regulations); *CP 002936* (Critical area report).

The Board also found fault with the SEIS for failing to consider whether all 43 acres could be developed, even though all but 11 acres are restricted by Monroe Municipal Code as critical areas. Instead, the Board felt the SEIS should discuss development under a ‘reasonable use exception’ scenario. *CP 003854-003859*. However, a reasonable use exception is available only where strict application of a city’s regulations would otherwise deprive a property owner of all economically viable use of the land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1033, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). A reasonable use exception would be unavailable where, as here, a portion of the property can be developed. Since there was no disagreement that 11 acres of the Property can be developed, it would be nonsensical for the SEIS to explore development under a reasonable use exception.

The Board delved into such questions as to whether Monroe should adopt flood mitigation regulations that regulate development of the

Property in the future if a specific development application is submitted. *CP 003866-003871*. The Board discussed whether Monroe should regulate the Property as a 100-year floodplain and whether the SEIS properly considered how a floodplain designation would affect specific development plans. Yet that entire discussion is illusory until a specific development application is submitted with the details necessary to assess whether, how much, and what type of mitigation might be required. As even the Board had to recognize, flood mitigation regulations would not preclude development but instead at most would require analysis as to mitigation and flood storage systems at the time of a development-specific application. *CP 003868*. The question of specific mitigation and storage calculations will be entirely dependent on whatever regulations might be in effect at the time specific development is proposed.

The Board erroneously concluded that the SEIS purported to state that construction of five residences would displace habitat while the commercial development would improve habitat. *CP 003850*. An examination of even the subsections to which the Board cited reveals the SEIS does not make such statements. Instead, the SEIS clearly states that both residential and commercial development would have environmental impacts, differing in extent. *See e.g. CP 002881-2* (discussion of animals/habitat). However, the SEIS explains that commercial

development may justify such extensive mitigation requirements related to buffer enhancement and flood storage mitigation that habitat might be created or improved; for example, through extensive removal of invasive species and planting of native species along with performance bonding. *CP 002882*.

Based on its feeling that the SEIS was inadequate, the Board summarily held, with no analysis, that the 2015 Ordinances violate GMA Goal 10 and entered a determination of invalidity. *CP 003876*.

Heritage timely sought judicial review of the Board's Order. The Superior Court issued its Order of Certification for Direct Review by the Court of Appeals on June 3, 2016. This Court also accepted direct review based on the standards set forth in RCW 34.05.518.

V. ARGUMENT

A. **The Standards of Review Under the APA Must Be Applied Subject to the Growth Management Act's Deference to Monroe's Planning and Policy Choices.**

This Court reviews the appeal of a Board decision by applying the standards of the Administrative Procedure Act ("APA") directly to the record presented to the Board. *Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999).

However, the Court does not grant full deference to the Board, but instead defers to the clear authority of a city or county to make its planning decisions:

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201.

The Supreme Court explained that the GMA's deference to a city or county thus supersedes deference to the Board under the APA:

In the face of this clear legislative directive, we now hold that 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. While we are mindful that this deference ends when it is shown that a county's actions are in fact a "clearly erroneous" application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions. Thus a board's ruling that fails to apply this "more deferential standard of review" to a county's action is not entitled to deference from this court.

Quadrant Corp. v. State Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (citations omitted).

With this in mind, the APA provides the following standards for granting relief with respect to review of the Board's 2016 Order:

- a. The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- b. The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- c. The agency has erroneously interpreted or applied the law;
- d. The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter....

RCW 34.05.570(3) ("Agency" in the foregoing referring to the Board).

The question of whether the Board has erroneously interpreted or applied the law is reviewed de novo. *HEAL*, 96 Wn. App. at 526. The Court is not bound by the Board's interpretation of statutes. *Id.*, citing *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). It is important to note that the Supreme Court has determined that the very issues raised in this case, i.e. the interpretation of GMA and SEPA requirements, is entirely statutory. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 175, 322 P.3d 1219 (2014).

In reviewing the Board's findings under RCW 34.05.570(3)(e), substantial evidence is defined as "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Redmond*, 136 Wn.2d at 46.

B. The GMA Mandates Deference to Monroe as the Planning Authority Choosing to Reclassify the Property to General Commercial.

Because this case involves a compliance proceeding, Heritage and Monroe both recognized that Monroe had the burden to demonstrate that its legislation no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4). However, that burden is tempered by the discretion local government has in making its planning choices. RCW 36.70A.3201. The GMA does not dictate that a city follow a particular means or method to achieve compliance. Instead, the Board itself has "consistently held a county or city has discretion in determining how to comply." *See, e.g., City of Shoreline, et al v. Snohomish County*, CPSGMHB Consolidated Case Nos. 09-3-0013c and 10-3-0011c, Order Finding Continuing Noncompliance and Setting a New Compliance Schedule (May 16, 2012), at 3-4.

The GMA mandates that local jurisdictions be allowed to plan for their own growth. The GMA "does not prescribe a single approach to growth management." *Phoenix Development v. City of Woodinville*, 171

Wn.2d 820, 830, 256 P.3d 1150 (2011). Our Supreme Court recognizes that the “ultimate burden” for planning under the GMA rests with cities and counties, which have the right and responsibility to accommodate local needs. *Phoenix*, 171 Wn.2d at 830. Here, the Monroe City Council is the ultimate arbiter of what the local needs are and how best they should be accommodated when it comes to the Property.

The GMA “contains numerous provisions which tend to show that local jurisdictions have broad discretion in adapting the requirements of the GMA to local realities.” *Quadrant*, 154 Wn.2d at 236. Cities and counties “are accorded a great deal of latitude and discretion in creating their [development regulations] according to local needs, growth patterns, and resources.” *Diehl v. Mason County*, 94 Wn. App. 645, 650, 972 P.2d 543 (1999). Historically, the growth boards initially substituted their judgment as to the overall goals of the GMA instead of granting deference to local decisions. In response, the legislature amended the GMA to *specifically require* that the Board defer to local jurisdictions in planning:

Relevant here, the GMA, at its inception, was “riddled with politically necessary omissions, internal inconsistencies, and vague language.” Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle U.L.Rev. 5, 8 (1999). This troubled beginning “spawned statutory ambiguity about the locus of the line between state mandate and local policy discretion” in fashioning UGAs. *Id.* at 49. While the growth management hearings boards “generally have resolved the ambiguity in favor of state mandate, expansively interpreting the Act to effectuate these

central goals ... [t]he legislature has responded with GMA amendments affording greater discretion to counties and cities.” *Id.*; see Laws of 1997, ch. 429, §§ 2, 20. Notably, these 1997 amendments to the GMA placed the onus on local jurisdictions to “balance priorities and options for action in full consideration of local circumstances” and pointedly amended the threshold for a finding of noncompliance from the “preponderance of the evidence” standard to requiring the action be “clearly erroneous.” Laws of 1997, ch. 429, §§ 2, 20 (codified at RCW 36.70A.320(3) and .3201).

Quadrant, 154 Wn.2d at 232–33.

In many ways, as discussed herein and reflected in the decision and concurrences themselves, the Board substituted its judgment for Monroe’s with regard to reclassification of the Property to GC. For example, underlying its entire decision the Board admitted it simply did not agree with Monroe’s determination to rely on exhaustive expert analysis because the Board felt Monroe did not “respectfully consider the information and perspectives” of the project opponents. *CP 003880*. Yet, the Board failed to acknowledge the volumes of public comment that Monroe reviewed and addressed during both the FEIS and the SEIS process (233 pages of comments for the SEIS alone) and the detailed response to public comment included with the SEIS. *CP 003129-3365*; *CP 003366-3403*. Likewise, the Board failed to consider the various logical and rational findings that supported reclassifying the Property in light of Comprehensive Plan policies, Monroe’s long range planning efforts, the

utility of this Property and its unique opportunities due to immediate access onto SR 2. *CP 002701-2743*.

In its 2016 Order, the Board contravened the legislature's mandates under the GMA that it give deference to Monroe's planning decisions. Therefore, the Board's determination "is not entitled to deference from this court." *Quadrant*, 154 Wn.2d at 238.

C. Under SEPA, the Determinations of Monroe and its SEPA Designated Official are Entitled to Great Weight.

The 2016 Decision concerned itself solely with whether the SEIS was adequate under SEPA. The Board erred by not giving great weight to Monroe's SEPA determinations. Heritage respectfully requests that this Court review the SEIS with an eye toward giving great weight to the determinations made by Monroe and its SEPA designated official.

Adequacy of the SEIS is subject to de novo review by this Court. *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439, 441, 832 P.2d 503 (1992). In its review, the Court defers to the planning jurisdiction's determinations regarding the adequacy of the EIS, giving those determinations substantial weight. *Solid Waste*, 66 Wn. App. 442; *Cascade Bicycle Club v. Puget Sound Regional Council*, 175 Wn. App. 494, 503, 306 P.3d 1031 (2013). The purpose of this Court's review is "to determine whether the environmental effects of the proposed action

are disclosed, discussed, and substantiated by opinion and data.” *Solid Waste*, at 442, citing *Ullock v. Bremerton*, 17 Wash. App. 573, 580, 565 P.2d 1179, review denied, 89 Wash.2d 1011 (1977).

i. SEPA requires that great weight be given to Monroe’s SEIS and the environmental determinations made therein.

Under SEPA, “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 shall be accorded substantial weight.” RCW 43.21C.090 (emphasis added). As such, to find Monroe’s actions to be “clearly erroneous”, this Court “must be left with the firm and definite conviction that a mistake has been committed.” *Id.* (citations omitted). This SEPA deference is consistent with the deference given to Monroe’s planning decisions under the GMA. RCW 36.70A.3201.

The question upon review by this Court is whether the SEIS was sufficient “to permit a reasoned choice” by the Monroe City Council. *Solid Waste*, 66 Wn. App. at 444. As the *Solid Waste* Court explained: “At some point, a decision must be made between what is reasonable and what is not. The agency’s decision should be given great weight.” *Id.*, at 444-45. The *Solid Waste* Court explained that, even though reasonable people may differ on the local agency’s conclusion, so long as the local

government considered appropriate factors that support its decision, its judgment should not be disturbed. *Id.* at 446.

- ii. *The 2016 Order was erroneous because the Board improperly substituted its judgment for Monroe, failing to give great weight to Monroe's determination of what was reasonable environmental analysis.*

The SEIS discussed every environmental aspect of reclassifying the Property to GC. As Monroe's SEPA responsible official declared, the environmental review for this reclassification far eclipsed any environmental review he had been involved with throughout his career: "The Draft SEIS is unequivocally the most detailed and complex environmental impact statement for a nonproject action that I have personally reviewed." *CP 002620*. In fact, the Board was able to engage in 57-pages of discussion because the SEIS contained such extensive environmental disclosure of issues not already covered by Monroe's regulations. The Board failed to understand the role of SEPA to disclose and the Board's role to evaluate whether that disclosure was sufficient for Monroe to make a reasoned decision on the reclassification. Rather than recognizing the comprehensive nature of the SEIS and original EIS, the Board improperly focused on aspects that it disagreed with substantively based on its own subjective opinions and desire for development-specific details.

The Board failed to give Monroe's environmental determinations great weight. Contrary to the mandates of case law, the Board improperly substituted its judgment for that of Monroe. For example, the Board spent several pages discussing whether there is a culvert at the east end of the slough. *CP 003862-3865*. The Board concluded that "reasonable minds can disagree" regarding whether such a culvert exists. *CP 003865*. Therefore under *Solid Waste*, if reasonable minds can disagree the Board should have given great weight and deferred to Monroe that the environmental analysis was sufficient. *Solid Waste*, 66 Wn. App. at 446. Yet instead of deferring to Monroe, the Board relied on its own opinions as to the nature of the culvert in evaluating the SEIS. The Board ultimately found that the landslide analysis was in part defective based on the Board's opinions regarding the culvert rather than giving Monroe's determination great weight. *CP 003873* (lines 24-25: finding fault with the landslide analysis because it relied on the other engineer's culvert determinations, which the Board terms 'assumptions').

The Board also made patently sweeping and unjustifiable conclusions that reflected the Board's predilection against the reclassification. A good example of this is the Board's conclusion that the SEIS stated construction of five residences would displace habitat while the commercial development would improve habitat. *CP 003850*. The

SEIS makes no such statements even looking to the sections cited to by the Board in isolation. Instead, the SEIS explained that both residential and commercial construction would have environmental impacts. *See e.g. CP 002881-2* (discussion of animals/habitat). However, under certain commercial development scenarios, mitigation requirements, such as those related to buffer enhancement and flood storage mitigation, may be extensive enough to meaningfully create or improve habitat, for example, through removal of invasive species. *CP 002882*.

The Board also absurdly questioned whether an NGPA had been recorded for the entire Property, going so far as to find that it had no evidence showing the boundaries of the NGPA. *CP 003860*. Yet, a copy of that recorded NGPA document had been in the Board's record since 2014. *CP 002178-9*. Here again, rather than referring to the record and giving great weight to Monroe's environmental analysis, the Board questioned even the most basic of uncontroverted evidence in the record.

Finally, the Board erroneously elevated both lay testimony and its own personal opinions above the qualified, independent expert analysis adopted by Monroe. Rather than giving that analysis 'great weight', the Board's concurring statements reflect dissatisfaction with Monroe's decision to rely on extensive expert analysis rather than lay comments.

CP 003880. The 2016 Order is grounded in the Board's dismissive treatment of Monroe's SEPA responsible official's determinations which were based on professional engineering and scientific analysis, despite there being no expert evidence to the contrary.

D. The SEIS Was Not Required to Analyze Environmental Impacts that Are Addressed by Monroe's Regulations, Such as Those Governing Critical Areas.

SEPA provides that an EIS or SEIS need not address environmental impacts which are already analyzed and mitigated for through a city's development regulations. RCW 43.21C.240; *see also* WAC 197-11-158. Where there are development regulations on point, such as critical area regulations governing wetlands, streams, habitat, and landslide/erosion hazard considerations, Monroe was "authorized to rely as much as possible on existing plans, rules and regulations, filling in the gaps where needed by imposing mitigation measures under SEPA." *Moss v. City of Bellingham*, 109 Wn. App. 6, 22, 31 P.3d 703 (2001).

The SEIS appropriately deferred to Monroe's legislatively adopted regulations where those govern the environmental impacts of development of the Property. Conversely, the Board erred by failing to follow the foregoing SEPA guidance. The Board did concur that an SEIS was a proper approach to address compliance. *CP 003847.* The Board concluded that the SEIS established an appropriate No Action/No

Development Alternative as well as properly reviewed offsite alternatives. *CP 003846; 003848*. However, the Board then went on to reject the SEIS because the Board felt the environmental review generally minimized the impacts of commercial development as compared to residential development. *CP 003852*. The Board failed to understand the interplay between Monroe's adopted critical area regulations and the role of SEPA.

The Board found the SEIS inadequate because the Board believed Monroe should have analyzed grading, excavation and fill which the Board felt might take place "within a Category II wetland and a Type I stream that provides salmon habitat." *CP 003861*. However, even a cursory review of the SEIS reveals that Monroe's critical area regulations strictly regulate development and that development of the site beyond the 11 acre developable area would be prohibited. *See CP 002866*.

The Board failed to recognize that Monroe already has legislatively weighed and determined appropriate protections for all critical areas and habitat under Monroe's Critical Areas Regulations. *CP 001060-001105*. Instead, the Board required Monroe to totally disregard its adopted critical area regulations and review the Property as if the entire 43 acres could be developed irrespective of Monroe's critical areas and the recorded NGPA. *CP 003853-003861*.

This is a highly improper use of SEPA. Again, SEPA may not supplant a city's development regulations where those analyze and provide mitigation for specific adverse environmental impacts. RCW 43.21C.240. This law is emphasized where, as here, a recorded NGPA expressly restricted development of the Property collectively except as permitted by Monroe's regulations. *CP 002718-2719*.

The same holds true for the Board's required evaluation of a "reasonable use exception." The Board concluded that Monroe should have considered whether there may be some way to develop in critical areas and buffers, for example through a "reasonable use exception." *CP 003857*. Such demand necessarily requires that Monroe completely disregard its adopted critical area regulations. The Board stated it believed reasonable use exceptions are foreseeable enough that Monroe's Municipal Code contains an application process for those, and therefore apparently the SEIS should review that scenario. *CP 003857*. Yet the Board failed to understand the concept of a 'reasonable use exception', which is only available if there is no way of developing the Property under a city's regulatory framework. *Lucas*, 505 U.S. 1003, 1033. Because the Property contains area which can be developed consistent with Monroe's adopted critical area regulations, the Board misused the concept of a

‘reasonable use exception’ to improperly require Monroe to disregard those very regulations.

The Board was also frustrated that Monroe’s development regulations also do not yet require compensatory flood mitigation to the extent the Board would like to see. *CP 003869-3871*. The Board’s frustration was misplaced; the Board should instead have found that the SEIS addresses compensatory flood storage mitigation and gives the City Council a warning that such would need to be considered whenever a specific land development application is submitted. Until then, the Board should have recognized that there is no way to know what the actual mitigation calculations would be until the development specifics, including how much dirt might have to be graded and filled, are known. The Board should have acknowledged that the SEIS attempts to disclose the various parameters which should be taken into account, but more than that would be impossible at this nonproject stage.

Instead, the Board expressed its frustration with the status of the flood plain review process between FEMA and Monroe, and found the SEIS to be inadequate on that basis, despite the extensive disclosure and analysis performed on this very topic therein. In fact, the only way the Board could engage in its discussion as to its displeasure with the flood plain review status was because the SEIS contained so much disclosure

and analysis on this topic. *CP 003869-3871* (footnotes therein citing extensively to the SEIS analysis). Not only should the Board have given Monroe's analysis of this issue great weight, but the Board should have left the detailed discussion of how flood storage mitigation would be calculated and the extent of that to the future, when a specific development application is submitted. *See* Section F, *supra*.

Finally, the Board found the SEIS inadequate because it did not outline specific designs for access within the property or a set access location onto SR 2. *CP003850-003851*. The Board failed to understand that access into and through the site would be governed by Monroe's critical area regulations, engineering standards governing design of access roads and driveways, and Washington State Department of Transportation standards for access to SR 2. Access was discussed originally under the EIS and Transportation Impact Analysis, wherein the independent traffic engineer explained that access would have to be established in conjunction with Department of Transportation requirements. *CP 002097*.

E. Review of the SEIS is Governed by the 'Rule of Reason'.

SEPA is an environmental disclosure statute: it does not demand a particular substantive result. *Moss*, 109 Wn. App. 6, 14. The principal purpose of SEPA is to provide information about potential adverse impacts of a proposed action. *Glasser v. City of Seattle*, 139 Wn. App.

728, 736, 162 P.3d 1134 (2007). The SEIS engaged in extensive detail and analysis, going far beyond the environmental review a city or county might normally perform to reclassify property. There is no debate that the SEIS (as well as the EIS) discusses every potential environmental aspect of reclassifying the Property to GC. The SEIS accomplishes SEPA's goal of ensuring that the Monroe City Council was completely informed of all environmental considerations and alternatives before it decided to reclassify the Property to GC.

i. The Rule of Reason does not require analysis of remote and speculative consequences.

The adequacy of an EIS (or SEIS) is tested under the "rule of reason." *Glasser*, 139 Wn. App. at 740. The rule of reason "does not require that every remote and speculative consequence of an action be included in the EIS." *Solid Waste*, 66 Wn. App. at 442 (citations omitted).

Instead, the rule requires that the EIS/SEIS include a reasonably thorough discussion of the significant aspects of probable environmental consequences. However, critical for the instant case, "[t]he discussion of alternatives in an EIS need not be exhaustive; the EIS must present sufficient information for a reasoned choice among alternatives." *Id.*

The selection of environmental review process and protection is left to the sound discretion of the planning body (Monroe), not the

reviewing body (the Board). *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). As such, the Board should have accorded Monroe's environmental analysis and decision based thereon, a presumption of validity regardless of the Board's review being conducted under compliance proceedings.

ii. The 2016 Order improperly required analysis of remote and speculative consequences.

Contrary to SEPA, the 2016 Order would require Monroe to engage in review of remote and speculative development possibilities. A primary example of this is the Board's conclusion that Monroe should have considered whether there may be some way to develop in critical areas and buffers through a 'reasonable use exception'. *CP 003857*. As it is readily agreed that 11 acres of the Property can be developed, there is no basis for Monroe to ever consider a 'reasonable use exception'. The Board's finding that the SEIS was inadequate for failing to consider development scenarios of the entire 43 acres improperly demanded review of remote and speculate impacts.

The Board found the erosion hazard and landslide analysis inadequate because the SEIS did not speculate as to what might happen if a force of nature, or actions by unrelated uphill property owners were to prompt a landslide of any magnitude into the slough/stream. *CP 003875*.

Such analysis does not relate to the impacts of reclassifying the Property to GC. Instead, it reflects the Board's predilection to preserve the Property in an open space capacity to serve as mitigation for remote and speculative scenarios. The Board readily admits that erosion and sloughing would be the result of nature and uphill property owner actions. *CP 003874*. Yet, the Board ignores the geological evaluation that the landslide history from such activities has been "shallow" in nature, resulting in minor erosion and sloughing at the base of the slope, away from the 11-acre developable area. *CP 003086-3087; 003090-3091*. The Board disregards the expert conclusion that no development activity under the reclassification to GC would trigger landslide or erosion activity, since the developable area is located physically well away from the slope on the northern Property boundary. *Id.* Instead, the Board finds fault with the SEIS because it does not provide hypotheticals as to what uphill property owners might do and how Heritage might deal with the results of those offsite/unrelated and totally hypothetical impacts. *CP 003875*. The Board fails to understand that if uphill neighbors cause erosion, they would be responsible for mitigation, not Heritage.

The Board also improperly presumed that Monroe should evaluate remote and speculative consequences by finding that the SEIS should have analyzed grading, excavation and fill which the Board felt might take

place “within a Category II wetland and a Type I stream that provides salmon habitat.” *CP 003861*. The only potential incursions into those areas would have to be consistent with Monroe’s critical area regulations; anything else would violate those regulations. *CP 002866*. To the extent the Board presumes that there would be some activity not authorized by Monroe’s adopted regulations, such presumption demands analysis of remote and speculative consequences.

It would verge on ludicrous for the Board to believe there would be commercial development within a Category II wetland and Type I stream (the slough). However because the Board does not refer to the record, Heritage is left guessing as to what development activity the Board was referring to. *CP 003861*. While there may be very limited activity allowed for mitigation, such would be permitted only under Monroe, Washington State Department of Ecology, and US Army Corps of Engineer permitting requirements, and would ultimately be required to restore and improve the quality of those sensitive areas. *See e.g. CP 001060-001105*; see also *CP 002929-2954* (discussion of regulatory restrictions and requirements for future development). As discussed above, SEPA does not require exploration of those environmental considerations that are already addressed by adopted regulation. RCW 43.21C.240.

F. The SEIS Pertained to a Nonproject Action Which Gives Monroe More Flexibility to Perform Environmental Review On the Basis of Less Detailed Information and to Evaluate Environmental Impacts at a Broad Level.

SEPA distinguishes between environmental review of a nonproject action versus a development-specific project. WAC 197-11-704. A development-specific project action involves a decision on a specific proposed development activity usually involving a physical alteration, such as a proposed subdivision or building permit application. WAC 197-11-704. In contrast, a nonproject action involves actions broader than development-specific projects, such as plans, policies and programs. WAC 197-11-704(2)(b).

Adoption of a reclassification of land from one zone and designation to another, i.e. amending the comprehensive plan and zoning maps and text, is a nonproject action. WAC 197-11-704(2)(b)(ii).

- i. Environmental analysis for a nonproject action is normally less detailed and may leave certain environmental impacts and alternatives for future review under a development-specific project action.*

SEPA gives greater flexibility to Monroe in reviewing nonproject actions, recognizing that there is normally less detailed information available on the environmental impacts of nonproject proposals. WAC 197-11-442. The corresponding environmental impact statement for a nonproject action, such as that for reclassification of the Property to GC,

should be less detailed than one for a development-specific project: “The lead agency [i.e. Monroe] shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals.” WAC 197-11-442(1); WAC 197-11-704(2)(b).

This Court has explained: “As a nonproject final EIS, the EIS defines alternatives and evaluates environmental effects at a relatively broad level.” *Cascade Bicycle Club v. Puget Sound Regional Council*, 175 Wn. App. 494, 514, 306 P.3d 1031 (2013) (emphasis added).

SEPA readily recognizes that the nonproject action will not address all impacts and alternatives, and that such further environmental review to address those would be completed with a development specific project action:

A nonproject proposal may be approved based on an EIS assessing its broad impacts. When a project is then proposed that is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS.

WAC 197-11-443 (emphasis added).

For nonproject proposals that involve a specific property or area, SEPA provides that “site specific analyses are not required, but may be included for areas of specific concern.” WAC 197-11-442(3). Otherwise,

the EIS (and here also the SEIS) “should identify subsequent actions that would be undertaken by other agencies as a result of the nonproject proposal, such as transportation and utility systems.” *Id.* The SEIS and supporting analysis are replete with discussion of what subsequent actions and ranges of mitigation may be required once a specific development application is submitted.

As discussed above, SEPA is primarily an environmental disclosure statute, not directing any substantive result but instead consideration of the environment when policy decisions are made. *Moss*, 109 Wn. App. at 14. This theme is significant when considering a non-project action such as this reclassification to GC: the question before the Board was, and before this Court is, whether the Monroe City Council had a reasonable analysis of the environmental impacts involved with the reclassification. *See Solid Waste*, 66 Wn. App. at 445-446. For this nonproject action, there cannot be any serious debate that the complete range of environmental considerations were addressed between the FEIS and SEIS in a level of detail far in excess of what might normally be anticipated for a non-project action.

- ii. *The Board erred by requiring Monroe to go beyond a nonproject level of analysis under this SEIS.*

The Board failed to recognize the difference between environmental impacts which can only be concretely evaluated at the time of development-specific environmental review versus those properly reviewed under the nonproject action the Board was reviewing. The Board found fault with the SEIS because it did not include sufficient details such as amount of fill that prospective development might require, compensatory flood storage area calculations, and habitat enhancements based on the extent of physical development. *CP 003862-003875*. None of these factors can be evaluated until there is a specific development proposal which has set quantities of fill and grade, specific plans reflecting actual impervious surface areas and a set of concrete calculations as to what elevations a building might need to be designed for depending on the location, size and use. Nonetheless, the Board found fault with the SEIS because it did not create hypothetical development scenarios that would involve such construction and engineering specifics.

The Board found the SEIS inadequate because, for example, the Board “has not entirely understood how the canary reed grass, seen growing in the slough in site photos, will be permanently replaced....” *CP 003867*. This type of critique is improper for a nonproject SEIS: the

specifics of what plant species might be impacted and how those would be restored cannot be known until there is a specific development proposal that identifies actual physical impacts and consequent mitigation.

The information and analysis that the Board demanded and found lacking in its Order would properly be included as part of a development-specific permit application, where those details could be reasonably known, rather than speculative and hypothetical. In contravention of SEPA rules, the Board improperly imported the elements that should be reviewed under a development-specific project proposal into this non-project proposal.

Nothing about the FEIS and SEIS would limit Monroe's ability to complete development-specific project level SEPA review if and when an application for land development is submitted. This non-project level SEPA review for the reclassification sets the stage for the City Council to understand the environmental factors at play and provides notice as to the necessary analysis and ranges of mitigation that would be involved whenever the property is developed in the unknown future. But for now, there can be no question that all potential environmental aspects have been disclosed for consideration prior to the City Council's legislative action reclassifying the Property *and* that the Council discussed those expressly in its findings and conclusions. *CP 002701-2743*.

It is important to recognize that even though the 2016 Order is particular to this Property's reclassification, the Order sets the precedent of requiring a significant expansion of SEPA environmental review for all non-project actions. The Board's approach of requiring substantially detailed project-oriented SEPA review at the non-project stage would drastically change the environmental review process for cities and counties across the State. This is simply not anticipated by the SEPA rules or the longstanding caselaw addressing non-project level SEPA review.

G. The Board Improperly Expanded the Non-Compliance Review Into Areas the Board Previously Dismissed in the Original 2014 Order.

The Board also did not resist the temptation to enlarge its scope of review beyond its remand instructions in the 2014 Order, making compliance an unpredictable moving target. For example, in the 2014 Order, the Board dismissed Petitioners' arguments that Monroe failed to properly consider transportation and traffic impacts. *CP 002903*. However, the Board claimed that the SEIS failed to address such impacts, even though the Board had specifically dismissed those issues, excluding them from its remand order. One Board member commented "I write concerning the additional failure of Monroe to assess the traffic impacts of its re-designation of the Property", calling the adjacent State Route 2 a "lethally-busy highway." *CP 003878*. The same Board member chided

Monroe that the SEIS “completely ignores analysis of transportation impacts...” *CP 003879*. While the Board had that found the Petitioners failed to carry their burden of proof regarding traffic impacts in 2014, which were addressed in the original EIS, now the 2016 Order improperly resuscitated or faulted the SEIS for not addressing that topic. The Board further failed to recognize that the SEIS expressly incorporated the original EIS and all its analysis, including transportation impacts. *CP 002816*.

H. The Board Erred in Basing its Determination of Invalidity Solely on SEPA.

This case presents a significant departure from this Court’s rulings as to how a Board may determine invalidity and the role of SEPA in that regard. The GMA provides the Board an extraordinary recourse only where a city or county action “substantially” interferes with the GMA: “If the flaw in the plan or regulation represents a major violation of the GMA, the growth board has the option of determining that the plan or regulation is invalid.” *Woodway*, 180 Wn.2d 165, 175.

Courts have consistently held that the Board may only impose invalidity where there is substantial interference with GMA goals or requirements; the Board cannot rely on SEPA alone to invalidate a city action. *Davidson Serles & Assocs. v. Central Puget Sound Growth*

Management Hearings Board, 159 Wn. App. 148, 244 P.3d (2010); *Woodway*, 172 Wn. App. 643, 291 P.3d 278 (2013), *affirmed* 180 Wn.2d 165, 322 P.3d 1219 (2014). Determination of invalidity is an extraordinary step because it departs from our State’s “strong vested rights doctrine.” *Woodway*, 180 Wn.2d at 179.

The legislature made clear that the Growth Board may declare a local enactment invalid *only* when that enactment substantially interferes with the fulfillment of the GMA's goals. A violation of SEPA alone is not a sufficient ground for invalidity.

Woodway, 172 Wn. App. at 660–61 (citations omitted; emphasis added).

In *Davidson Serles*, this Court discussed the interplay of GMA and SEPA in the context of determining invalidity: “no Board has ever invalidated an ordinance based solely on SEPA noncompliance.” *Davidson Serles*, 159 Wn. App. at footnote 8, page 158 (emphasis added).

Yet, in the 2016 Order, the Board violated GMA by invalidating the 2015 Ordinances only on the basis of SEPA. The Board provided no analysis as to why it felt this EIS/SEIS was so egregiously inadequate to justify the unique and unprecedented step of invalidating the 2015 Ordinances on the basis of SEPA alone. There is no way to distinguish the Board’s review of this SEPA process and the inadequacies it found from any other nonproject review. Regardless of the Board’s improper rulings on the SEIS itself, the Board should have explained why this case

warrants the extreme step of invalidity on the basis of SEPA alone. Without that, Heritage can only now presume that the Board believes that any time a city or county action is inconsistent with SEPA, the action can automatically be invalidated under the GMA. This approach, and the Board's determination of invalidity in the 2016 Order is in complete contravention of the existing case law and RCW 36.70A.302.

Because a determination of invalidity has such significant ramifications, the Board must support it with specific findings and conclusions. RCW 36.70A.302. The Board assumed that because it believed the 2015 Ordinances violated SEPA, the Ordinances also automatically substantially interfered with GMA Goal 10: "Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020. The Board provided no analysis for this conclusion; in fact, the Board never even addressed GMA Goal 10 in its 2016 Order except in the one summary conclusion regarding invalidity. *CP 003876*.

The Board's utter lack of analysis is particularly egregious in light of the hundreds of pages of environmental review based on voluminous public and extensive legislative findings supporting the 2015 Ordinances. The Board's determination of invalidity on the basis of SEPA is unsupported by the above established case law from this Court and our

Supreme Court. Heritage respectfully requests this Court reverse the Board's determination of invalidity.

I. The Board Erred by Failing to Support its Determination of Invalidity with Findings, Conclusions and Clear Remand Instructions.

Under the GMA, the Board must go to great lengths to make a determination of invalidity. The Board may find noncompliance, remand and declare an action invalid only if it:

(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.

RCW 36.70A.302 (emphasis added).

Nothing in the foregoing statute allows the Board to shirk this sizeable obligation when reviewing a compliance proceeding which involves new legislative action.

Here, Monroe did not merely issue the SEIS without any further legislative process; the Monroe City Council went through the entire legislative process for a second time, and adopted the entirely new 2015 Ordinances along with 43-pages of comprehensive findings and conclusions addressing compliance with the GMA and SEPA. *CP 002695-002743*; *CP 002745-2792*. The Council comprehensively

addressed all of the GMA Goals as well as Comprehensive Plan Policies in addition to the environmental analysis in the SEIS and original FEIS. As a result, when the Board reviewed the reclassification under the compliance process, the Board was faced with entirely new legislation which documented in great detail the public process and compliance analysis under the GMA and SEPA. *Id.* The Board completely failed to recognize the Council's findings, never substantively addressing those.

In its 2016 Order, the Board did not enter any substantive findings or conclusions to support its determination of invalidity. *CP 003876.* Instead, the Board simplistically stated that invalidity was warranted because it believed development of the Property would be “without ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’.” *Id.*

Further, the Board failed to specify the particular part or parts of either the 2015 Ordinances or SEIS that it believed specifically supported a determination of invalidity. In contrast to its 2014 Order, which contained direction as to which aspects the Board felt warranted invalidity, the 2016 Order contains no such analysis at all. Without such work, the parties, and this Court, are left with no substance to review in order to determine whether invalidity was warranted. Again, while the Board did point to GMA Goal 10, Environment, it gave absolutely no analysis as to

Goal 10 and how it believed the 2015 Ordinances interfere “substantially” with that Goal or demonstrate a “major violation of the GMA.”

Particularly in light of the significant problems with the Board’s analysis under SEPA, as discussed above, the lack of analysis regarding invalidity is a fatal flaw in the 2016 Order. The Board’s determination of invalidity does not meet the standards under RCW 36.70A.302 and should be reversed.

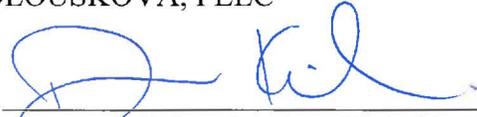
VI. CONCLUSION

Based on the foregoing, Heritage respectfully requests this Court to find that the SEIS appropriately disclosed environmental impacts at a nonproject level in a manner that fully informed the Monroe City Council before it adopted the 2015 Ordinances reclassifying the Property to General Commercial. Heritage respectfully requests the Court reverse the Board’s 2016 Order and conclude that the SEIS and, consequently the 2015 Ordinances are consistent with SEPA and the GMA. In the alternative, to the extent this Court concludes there is basis for further environmental review, Heritage respectfully requests this Court reverse the Board’s determination of invalidity.

DATED this 24th day of October, 2016.

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