BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION

DON GEREND, an individual, Petitioner, v. CITY OF SAMMAMISH, a Washington municipal corporation, Respondent.	No. 19-3-0015 CITY OF SAMMAMISH'S RESPONSE BRIEF

TABLE OF EXHIBITS

Per the Board's direction, a Table of Exhibits that references the index numbers and relevant page numbers of all cited exhibits accompanies this Response Brief.

I. INTRODUCTION

This matter arises out of Respondent City of Sammamish's adoption of Ordinance O2019-484 on May 23, 2019. *See* Exs. 11 & 175. The core of Petitioner Don Gerend's appeal is his allegation that the concurrency standards and measurement tools implemented in Ordinance O2019-484 are inconsistent with the City's adopted comprehensive plan and effectively preclude further growth and development in violation of the Growth Management Act. Petitioner is simply wrong. Petitioner's arguments rest on faulty factual assumptions and erroneous legal reasoning concerning the discretion afforded to city councilmembers to adopt

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

policies regulating concurrency to ensure that new development does not overtake the ability of local transportation facilities to accommodate it. For the reasons explained below, Petitioner's appeal should be denied in its entirety.

II. FACTUAL BACKGROUND

Petitioner challenges City of Sammamish ("City") Ordinance O2019-484, which implemented the City Council's chosen methods of measuring transportation concurrency and adopted levels of service ("LOS") for locally owned arterials, as required under the Growth Management Act ("GMA") and as set forth in the City's Comprehensive Plan.

Petitioner did not appeal the City's amended Transportation Element, which was adopted on September 18, 2018, and included policies for both Intersection LOS using traffic volumes in the AM and PM hours and Segment LOS using roadway volume-to-capacity ("V/C") ratios. Ex. 31 at 02852. Rather, Petitioner now challenges the Ordinance adopted to implement the policies in the Transportation Element. The City's process for adoption of Ordinance O2019-484 was lengthy; along the way it used many of the tools authorized by the Growth Management Act ("GMA") including a moratorium and interim development regulations adopted in accord with RCW 36.70A.390. The following is a timeline of dates on which public hearings were held or final action[1] was taken on the 2018 Transportation Element and Ordinance O2019-484:

[1] Petitioner's Opening Brief misrepresents City Council actions in multiple locations: Petitioner's Opening Brief at 4 (describing the Council as having "voted to apply the V/C standards to just two segments," even though the motion actually failed); *Id.* at 4 ("Highly Irregular Process" as characterized by Petitioner was simply a Resolution adopted to give staff direction; no final policy decisions were made); *Id.* at 6 (describing "the plan to add the V/C standards for two segments," but failing to note this "plan" had never been adopted by Council); *Id.* (stating that "Council held a public hearing with the expectation that [intersection LOS] and V/C standards for 244th would be adopted as part of the emergency comprehensive plan update on September 18," which erroneously presupposes a prior Council decision that had not been made); *Id.* (misrepresenting that the Council "decided to move forward with adopting [intersection LOS standards] through the comprehensive plan update on September 18 [while] separately direct[ing] staff to work on" the V/C policy," when, in fact, the Transportation Element included V/C policy); *Id.* at 7 (claiming that the Council "effectively precluded any meaningful public participation" in formulating V/C standards, when, in fact, public hearings were hold on the V/C standards on May 7 and May 23, 2019).

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

- **June 21, 2018** Planning Commission public hearing on proposed amendments to Transportation Element (Ex. 112)
- **July 10, 2018** City Council public hearing on proposed amendments to Transportation Element (Ex. 40)
- **September 18, 2018** City Council public hearing on proposed amendments to Transportation Element, adoption of amended Transportation Element, and extension of moratorium on land use applications, with multiple exemptions (Ex. 32)
- **November 20, 2018** City Council adoption of interim development regulations (Ex. 24)
- **December 4, 2018** City Council repeals moratorium (Ex. 22)
- **January 15, 2019** City Council public hearing on interim development regulations (Ex. 20)
- **March 7, 2019** Planning Commission public hearing on proposed permanent development regulations (Ex. 167)
- **May 7, 2019** City Council public hearing on proposed permanent development regulations (Ex. 16)
- **May 23, 2019** City Council public hearing on proposed permanent development regulations, and adoption of permanent development regulations in Ordinance O2018-484 (Ex. 175; Ex. 11)

The final concurrency ordinance adopted by the City Council moves in a different direction than the previous Sammamish City Councils that Petitioner Gerend previously served on, but this City Council used its policy authority granted to it by the GMA to establish LOS for its arterials.

A concurrency ordinance is not intended by the GMA to be the answer to all problems and goals that cities have, or even all traffic problems and goals that cities have. A concurrency ordinance has a specific, but limited job: "[to] prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development." RCW 36.70A.070(6)(b), SMC 14A.10.040(3). Ordinance O2019-484 references but does not itself set out the transportation improvements or the transportation strategies if failure occurs. Ex. 175; SMC 14A.10.040(3) and SMC 14A.10.050(3). Ordinance O2019-484 references but does not determine the Capital Facility Plan Element provisions required to achieve the LOS standards. RCW 36.70A.070(6)(a)(iii)(D), SMC 14A.10.050(6).

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Ordinance O2019-484 replaced a prior concurrency ordinance implementing the City's prior transportation element. Exs. 31, 175. Petitioner laments the alleged "complexity" of Ordinance O2019-484 as compared to the prior version but ignores the intricacies of the prior intersection LOS standards. Petitioner's Opening Brief at 3. Notably, however, Policy T.1.3 in the 2015 transportation element specifically included LOS for arterial corridors determined by averaging the forecast traffic *volume* over the arterial *capacity* (V/C) ratios of the segments within each corridor. Ex. 31 at 02853. The 2015 City Council's version of "capacity" adopted the policy that if nonmotorized amenities like sidewalks or bike lanes are absent then vehicle capacity is reduced, and non-motorized capacity and safety are affected. *Id*. at 02910. Additional *capacity* was determined for each such design feature and added to base capacity *Id*. at 02910, 02913-02914. Forty-nine roadway segments were given a "concurrency threshold" based on these calculations. *Id.* at 02910 - 2912.

The 2018 City Council went in a different direction; it no longer wanted to rely on non-motorized facilities to increase motorized capacity. Ex. 31 at 02853. The 2018 Transportation Element included an assessment of existing conditions updated since the 2015 Comprehensive Plan information. *Id.* at 02869. To give a more thorough and up-to-date picture of traffic conditions on the City's transportation system, nine new collector arterials and 48 miles of roadway were added between the 2015 Transportation Element and the 2018 Transportation Element. *Id.* at 02874 – 77. For the 2018 Transportation Element, new traffic counts were collected at 74 intersections throughout the City, and intersection turning-movement counts were collected at 43 locations. *Id.* at 02885. This new and expanded information was of course then used in the 2018 Transportation Element.

The 2018 Transportation Element explicitly included "Segment Level of Service" in its policies in addition to Intersection LOS. Segment performance was to be "based on roadway volume to capacity ratios." Ex. 31 at 02852-02854. To implement and ensure

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

consistency with these Transportation Element policies, Ordinance O2019-484 included a definition of concurrency test that included road corridors or road segments, and a definition of level of service that includes road corridors and road segments. Ex. 175 at 17919.

Ordinance O2019-484 does include existing and projected future failures of corridors. Ex. 175 at 17921 – 17925, SMC 14A.10.050(2). By the definition of what a concurrency ordinance is supposed to achieve, however, this does not mean that Ordinance O2019-484 is a failure itself. RCW 36.70A.070(6)(b). The GMA provides multiple options if there is an existing or projected failure. First, the *proposed development* must be the *cause* of the LOS to decline. Second, the applicant has the opportunity to show that transportation improvements or strategies made concurrent with the development alleviate the anticipated decline in LOS. RCW 36.70A.070(6)(b), SMC 14A.10.040(2)-(3), SMC 14A.10.050(3).

As required by the GMA, the 2018 Transportation Element, not the concurrency ordinance, includes the City plans for deficient facilities. RCW 36.70A.070(6)(a)(iii)(D), Ex. 31 at 02938. It uses the City's Six Year Transportation Improvement Program ("TIP"). Ex. 31 at 02919 – 22. "In addition to construction of new capital facilities, infrastructure may include transit service, ride share programs, transportation demand management (TDM) strategies, or transportation system management (TSM) strategies." Ex. 31 at 02865, 02952, 02953. The Transportation Element adopts the use of traffic-calming devices like digital speed boards, traffic circles, chokers, speed humps, and curb bulbouts. *Id.* at 02918 – 02919, 02951. The plan includes use of non-motorized facilities like trails and bikeways, and roadway design guidelines. *Id.* at 02951, 02954 – 02955.

The City Council adopted a 2020-2025 six-year TIP on June 18, 2019, after holding a public hearing. Ex. 6 at 00934 – 00935. The 2018 Transportation Element discussed funding for TIPs and explained that funding for some TIP projects "is secured, while funding for other projects is not. Detailed evaluation of future conditions should assume completion only of

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

financially committed projects." Ex. 31 at 02919. The 2018 Transportation Element also includes a "Contingency Plan" in the event of revenue shortfall, given that some revenue sources are "difficult to predict with confidence, including grants, joint agency funding, the motor vehicle registration fee, general obligation bonds, and mitigation payments (which have not been enacted), and which fluctuate with the amount of new development." *Id.* at 02960. If there is a revenue shortfall, the Contingency Plan describes "several options" to the City: add new sources of revenue; increase the amount of revenue from existing sources; require developers to provide such facilities at their own expense; reduce the number of proposed projects; change the Land Use Element to reduce the travel demand generated by development; or change and/or lower the LOS standard." *Id.* at 02960.

Ordinance O2019-484 included implementing regulations in section 14A.10.010(1) SMC that provide as follows:

> . . . For the purposes of the City's concurrency requirement, "concurrent with development" shall mean that improvements or strategies are in place at the time of development, or that a **financial commitment** is in place to complete the improvements or strategies within six years.

Ex. 175 at 17919 (emphasis added).

When the City Council adopted the TIP on June 18, 2019, it openly discussed the funding concerns for the TIP and specific financial concerns with the project included in the TIP for the Sahalee corridor shown in LOS failure:

> Councilmember Hornish: "But I have a real concern that if we really say that we are going to reasonably be expected to come up with $74 million between now and six years from now that we don't know where it's coming from, we're being – we're being disingenuous to actually adopt a TIP with a $74 million-over-the-next-six-years funding shortfall.[2]

[2] Ex. T5 at 70. Note: Citations to Exhibits bearing the prefix "T" refer to transcripts of the City Council meetings listed in the Second Amended Index of Record under the corresponding tab number. Accordingly, "Ex. T5 at 70" refers to page 70 the transcript of the June 18, 2019 Council Meeting, which is listed as Tab 5 in the Second Amended Index of Record. For the Board's convenience, all transcripts cited in this brief have their own tab in the accompanying exhibit binders and Table of Exhibit.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

> Councilmember Ritchie: I think the concern I have about it is that this is a planning document, and I don't think anybody in their right mind thinks we're going to spend $56 million on a third lane on Sahalee that's going to get us, you know, two or three dozen extra trips, so . . .[3]

The City Council adopted by motion an amended TIP for 2020-2025 and explicitly required the subject of the TIP to be brought back to the City Council's July 16, 2019 meeting so that Council could continue the discussion of the list of projects in the TIP.[4] Ex. 6 at 00936. At its August 20, 2019 meeting, the City Council did not take the Sahalee corridor project out of the 2020-2025 TIP. Instead, it passed a motion that removed the Sahalee corridor project from the concurrency model because the financial commitment required by the Transportation Element and Ordinance O2018-484/SMC 14.10.010(1) was not in place.[5]

III. LEGAL STANDARD

Comprehensive plans and development regulations, and amendments thereto, are presumed valid upon adoption. RCW 36.70A.320(1). This presumption creates a high threshold for challengers, as the burden of proof lies with Petitioner to demonstrate that the City's action in adopting Ordinance O2019-484 is not in compliance with the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by the City is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA." It is not sufficient for Petitioner merely to disagree with the City's action, nor to identify technical problems in the process leading up to adoption of the challenged ordinance. *Black Diamond Trees, Roads, Envmt., Engagement Team (BD TREE) v. Black Diamond*, CPSGMHB Case No. 19-3-0013, Final Decision and Order (FDO) (Jan. 6, 2020), at 3. Rather, an action is clearly erroneous

[3] Ex. T5 at 76 – 77.
[4] Ex. T5 at 135.
[5] Ex. T180 at 62, 82; Ex. 180 at 18247.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

only when the Board reviewing the record is "left with a definite and firm conviction that a mistake has been committed." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); *see also Quadrant v. GMHB*, 154 Wn.2d 224, 237-238, 110 P.3d 1132 (2005); *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 301, 936 P.2d 432 (1997).

Mere assertions are not enough to meet Petitioners' burden. *Friends of the San Juans v. San Juan Cty.*, WWGMHB Case No. 13-2-0012c, FDO (September 6, 2013), at 19. "Petitioner, as the party with the burden of proof, cannot simply refer in general terms to a statute or regulation as having been violated. Rather, Petitioner must come forward with *evidence* and *specific legal arguments* relating to the statute or regulation in an attempt to satisfy Petitioner's burden of proof." *Confederated Tribes and Bands of the Yakama Nation v. Yakima Cty.*, EWGMHB Case No. 10-1-0011, FDO (April 4, 2011), at 26-27 (emphasis added).

IV. ARGUMENT

Each of the nine issues raised in the Petition for Review are addressed sequentially, below. None has merit.

A. Issue 1: Ordinance O2019-484 Does Not Violate RCW 36.70A.020(11), 36.70A.035, or 36.70A.140 Because the City Provided Adequate Notice and Opportunity for Public Participation

Petitioner first asserts that the City failed to provide an adequate process for public participation when adopting Ordinance O2019-484. Relatedly, Petitioner asserts that the City failed to follow its own process for amending development regulations under the Sammamish Municipal Code. Petitioner claims these purported failures violate the public notice and participation requirements of RCW 36.70A.020(11), .035, and .140. Petitioner is wrong in all respects.

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MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

1. The City provided ample public notice and opportunity to comment on the concurrency regulations adopted in Ordinance O2019-484

One of the GMA's stated goals is citizen participation. RCW 36.70A.020(11) guides cities in developing comprehensive plans and regulations to "[e]ncourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." This broad goal is further refined, however, in subsequent sections of the GMA. For example, RCW 36.70A.035 sets forth specific requirements for public notice and participation. Under RCW 36.70A.035(1),

> The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, group A public water systems required to develop water system plans consistent with state board of health rules adopted under RCW 43.20.050, and organizations of proposed amendments to comprehensive plans and development regulation.

The key, therefore, is that the City employ notice procedures that are "reasonably calculated to provide notice to property owners and other affected and interested individuals." *KCAR v. Bainbridge Island*, CPSGMHB Case No. 18-3-0006, FDO (October 30, 2018), at 7.[6]

In addition to the public notice requirements of RCW 36.70A.035(1), the GMA also requires cities to establish and broadly disseminate a program "identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." RCW 36.70A.140. These public participation procedures "shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments." *Id.*

[6] The GMA provides a nonexclusive list of methods for satisfying the obligation to provide reasonable public notice. These include: publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal; notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered; and publishing notice in agency newsletters or sending notice to agency mailing lists. RCW 36.70A.035(1)(b), (c), & (e).

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Petitioner concedes, as he must, that "information was made publicly available on Friday, May 2, 2019" when the City published notice of the City Council meeting agenda, showing that the Council was considering taking action to amend Chapters 14A.05, 14A.10, and 21A.15 of the Sammamish Municipal Code (SMC) relating to transportation concurrency and levels of service for road segments and corridors. Petitioner's Opening Brief at 13 (citing Ex. 15 at 01317). Indeed, the Council meeting agenda posted on May 2, 2019, showed that there would be a public hearing on the proposed concurrency regulations at the Council meeting on May 7, 2019. Ex. 15 at 01317, 01432 - 01484. The agenda materials provided to the public in announcing the upcoming public hearing included the text of the proposed ordinance, a "redlined" and a "clean" version of the proposed changes to the then-existing SMC provisions relating to traffic concurrency, a Fehr & Peers memo explaining the Highway Capacity Manual Methods, the Planning Commission's recommendations on the proposed regulations, and a copy of the previously adopted emergency ordinance from November 20, 2018. *Id.* The agenda packet also included a copy of the V/C LOS presentation that was to be presented that evening by City staff. *Id.* These methods of public notice satisfy the requirements of the GMA. *BD TREE*, CPSGMHB Case No. 19-3-0013, FDO (Jan. 6, 2020), at 10-11. ("Public notice and dissemination encompasses a variety of techniques; the City provided numerous exhibits demonstrating its compliance.")

Moreover, the regulations adopted in Ordinance O2019-484 are "substantially the same" as the interim concurrency regulations that the City Council adopted nearly six months previously in November 2018. Ex. 15 at 01434. The public's opportunities to review and comment on the interim regulations are properly viewed as part of the public participation opportunities for adoption of the substantially similar permanent regulations. Following the adoption of the emergency ordinance O2018-477, the City held a public hearing on January 15, 2019, to receive public input. Ex. 19 at 01592, 01651 – 01684; Ex. 20 at 01828. Gerend

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

was one of several members of the public who provided comment. Ex. 93 at 08841 – 08842. The Planning Commission then held a public hearing on March 7, 2019, to receive additional public comments. Ex. 164 at 17829; Ex. 167 at 17902.

Thus, the suggestion by Petitioner that "the public had no idea what the City Council planned to do until the afternoon of Friday, May 2, 2019" rings hollow. Even if it was unclear by the night of the May 7, 2019 Council meeting how the Councilmembers would eventually vote, that does not diminish the fact that the public was given ample notice of the proposal under consideration and multiple public hearings at which to voice their opinions. Further, it is undisputed that the Ordinance was not adopted until two weeks after the May 7, 2019 Council meeting. The public had still more opportunities to provide input to the City Council and staff during between the May 7 public hearing and the May 23, 2019 adoption of Ordinance O2019-484. Indeed, the public hearing on O2019-484 was held open and continued over to the May 23, 2019 meeting. Ex. 11. The City met its obligations of public notice under the GMA. *See BD TREE,* CPSGMHB Case No. 19-3-0013, FDO (Jan. 6, 2020), at 10-12 (where the petitioner conceded that the FLUM had not changed between the August 2018 public hearing and the May 2019 adoption by the City Council, and "the record also show[ed] public notices preceded this hearing and many subsequent meetings and hearings at which the updated Comprehensive Plan, including the land use FLUM, was available for public comment," the Board concluded that the petitioner failed to prove a lack of adequate notice and meaningful public participation).

2. <u>Petitioner fails to explain how the City violated its own processes for public participation</u>

Even assuming the Board has jurisdiction to adjudicate this component of Petitioner's

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Issue 1,[7] Petitioner makes little to no effort to show *how* the published notices of multiple Council meetings, Planning Commission meetings, and public hearings on the interim and final concurrency regulations failed to comply with the City's process for adopting development regulations. Petitioner's Opening Brief makes a passing comment that some members of the Planning Commission "believed" that they didn't have time, or that the City Council wasn't interested in, a "meaningful recommendation." But the Planning Commission held a hearing and provided a written recommendation to the City Council, *see* Ex. 167 at 17902; Ex. 15 at 01464, so it is unclear how the City's adoption process was deficient or contrary to the SMC. *BD TREE*, CPSGMHB Case No. 19-3-0013, FDO (Jan. 6, 2020), at 11-12 (Board rejected the petitioner's argument that there was inadequate public participation because the planning commission purportedly didn't fully understand or adequately explain its recommendations regarding the final land use map in the comp plan update).

Petitioner references language in SMC 24A.15.010 requiring that the director of community development "ensure the broad dissemination of information" regarding development regulations, but Petitioner offers no more than the vague and conclusory allegation that "[t]he City's notice failed to inform the public about what was going on" or "provide notice in a timely fashion for any meaningful comment." Petitioner's Opening Brief at 14. Petitioner points to no evidence showing that the City's notice was ineffective. The evidence in the record shows quite the opposite. Gerend and many other members of the public were actively engaged in the City's deliberations around the topic of transportation concurrency, and the City received numerous public comment letters and oral statements throughout the process from citizens, including engineer Kevin Jones, who provided the

[7] The Board generally lacks jurisdiction to determine whether a city has adequately enforced or complied with its own regulations. *See McHugh v. Spokane Cty.*, EWGMHB Case No. 05-1-0004, Order on Motions (Sept. 16, 2005), at 6; *Camano Action for a Rural Envmt. v. Island Cty.*, WWGMHB Case No. 08-2-0026c, Order on Mot. For Reconsid. (Dec. 22, 2008), at 7 ("[h]ow the County enforces its critical areas ordinance is not an area over which the Board has jurisdiction.")

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Council with the same memos Petitioner relies on in this appeal. *See, e.g.*, Exs. 90, 144, 148, 151, 155, 166, 174, 187, 188.

Mere assertions of lack of notice and opportunity to comment are not enough to meet Petitioners' burden. *Friends of the San Juans*, WWGMHB Case No. 13-2-0012c, FDO (September 6, 2013), at 19. Rather, "Petitioner must come forward with *evidence* and *specific legal arguments* relating to the statute or regulation in an attempt to satisfy Petitioner's burden of proof." *Confederated Tribes*, EWGMHB Case No. 10-1-0011, FDO (April 4, 2011), at 26-27 (emphasis added). Petitioners have failed to prove that the City's actions regarding public notice and participation were "clearly erroneous." Issue 1 should be dismissed.

B. Issue 2: Ordinance No. 02019-484 Does Not Violate Chapter 43.21C RCW

Petitioner's Issue 2 fails for two reasons. First, Petitioner lacks standing to bring a SEPA claim in this appeal because he is not pursuing interests protected by SEPA. Indeed, Petitioner turns the very purpose of SEPA on its head by faulting the City for not using its SEPA authority to allow additional growth, additional traffic, and additional negative impacts for the environment. Second, assuming *arguendo* that Petitioner has the requisite standing, Petitioner's allegations of inadequate SEPA review fail on the merits, as they completely ignore the additional environmental review conducted by the City.

1. Petitioner lacks standing to bring a SEPA claim

A petitioner must meet a two-part test to establish SEPA standing in Growth Management Hearings Board cases: (1) the interest must be arguably within the zone of interests protected by SEPA; and (2) the petitioner must have injury in fact. *Leavitt v. Jefferson Cty.*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994); *Trepanier v. Everett*, 64 Wn. App 380, 382-83, 824 P.2d 524 (1992). As the Board has previously held, the petitioner must present evidentiary facts to show that the challenged SEPA determination will cause him or her "specific and perceptible harm." *Shoreline v. Snohomish Cty.*, CPSGMHB Case Nos. 09-

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

3-0013c and 10-3-0011c, Order on Dispositive Motions (Jan. 18, 2010), at 9-10. Further, petitioners who allege merely a threatened injury rather than an existing injury must also show that the injury will be "immediate, concrete, and specific"; a conjectural or hypothetical injury will not confer standing. *Id.* Here, Petitioner fails to even allege, much less prove, the elements required to establish that he has SEPA standing, contrary to the requirements of the Board's procedural rules. WAC 243-03-210(d).

Petitioner cannot meet the first part of the SEPA standing test. The zone of interests protected by SEPA covers "broad questions of environmental impact, identification of unavoidable environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources." *Kucera v. WSDOT*, 140 Wn.2d 200, 212-213, 995 P.2d 63 (2000) (quoting *Snohomish Cty. Property Rights Alliance v. Snohomish Cty. ("Property Rights Alliance")*, 76 Wn. App. 44, 52-53, 882 P.2d 807 (1994)). *See also Trepanier*, 64 Wn. App. at 382. Notably, however, economic interest is not within the zone of interests protected by SEPA. *Lowen Family Ltd. P'ship v. Seattle*, CPSGMHB Case No. 13-3-0007, Order of Dismissal (Sept. 30, 2013), at 8. "Purely economic interests include 'the protection of individual property rights, property values, property taxes [and] restrictions on the use of property.' Merely being a 'resident, property owner or taxpayer' or a party 'active in seeking full public participation in the planning procedure' is insufficient for SEPA standing." *Hood Canal Envmtl. Council v. Kitsap Cty.*, CPSGMHB Case No. 06-3-0012c, Order on Motions (May 8, 2006), at 8 (citing *Property Rights Alliance*, 76 Wn. App. at 52).

Petitioner has not pled an interest covered within SEPA's protected zone of interests. Petitioner points to the following facts in support of standing: (1) he owns and/or has a legally cognizable legal interest in property within Sammamish impacted by the challenged ordinance, (2) he has interests as a result of such property ownership, and (3) he is a former

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Councilmember/Mayor of the City who was actively engaged in the City's long-range planning both within the City and within PSRC. Petition for Review at 4. In short, Petitioner makes little more than the allegation that he is a "resident, property owner, or taxpayer," which is insufficient to confer SEPA standing. *Hood Canal Envmtl. Council*, CPSGMHB Case No. 06-3-0012c, Order on Motions (May 8, 2006), at 8-9 (core interest of petitioners was in unrestricted use of their properties; they did not suggest any potentially adverse environmental impacts they sought to avert). Likewise, Petitioner's past positions as Councilmember and Mayor do not establish that he has an interest within SEPA's protected zone of interests.

Similarly, Petitioner cannot meet the second part of the two-part test. "The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be 'immediate, concrete, and specific'; a conjectural or hypothetical injury will not confer standing." *West Seattle Defense Fund v. Seattle*, CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claim (Dec. 30, 1994), at 6-7 (quoting *Leavitt,* 74 Wn. App. at 679). The use and utility of property is not impacted until such time as development is proposed and site-specific environmental analysis is required. *Hood Canal Envmtl. Council*, CPSGMHB Case No. 06-3-0012c, Order on Motions (May 8, 2006), at 10. Potential loss from what might have been but never was is not immediate, concrete, or specific and does not constitute an injury in fact. *Lowen Family Ltd. P'ship,* CPSGMHB Case No. 13-3-0007, Order of Dismissal (Sept. 30, 2013), at 9. For example, the *potential* for increased surface water, subsequent *potential* runoff, and *potential* flooding and erosion damages are threatened future injuries and speculative. *Citizens for Resp. Growth of Greater Lake Stevens v. Snohomish Cty.*, CPSGMHB Case No. 03-3-0013, Order on Motions (Aug. 15, 2003), at 11.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Petitioner cannot show an injury-in-fact. Petitioner claims he is likely to incur injury, yet declines to specify what that injury is. Petition for Review at 5. An unknown injury of unknown duration and unknown severity fails the requirement to show a threatened injury that is immediate, concrete, and specific. Therefore, Petitioner fails the second part of the SEPA standing test. Accordingly, Issue 2 should be dismissed in its entirety.

2. The City conducted the additional environmental review required by law and regulation

Even assuming Gerend possesses the requisite SEPA standing, his allegations of inadequate SEPA review fail on their merits. Gerend challenges Sammamish's use of an addendum, erroneously alleging that an addendum was inappropriate because the proposal substantively changed. Petitioner's Opening Brief at 16.

First, Petitioner misstates the SEPA regulation regarding addenda. Petitioner claims "[a]n addendum is only appropriate for the *same* proposal, unchanged" (italics in original). However, the WAC itself anticipates change by its very terms. WAC 197-11-600 prescribes when existing environmental documents *must* be used unchanged by an agency and when they *may* be used by an agency to meet all or part of its SEPA responsibilities. Subsection (2) of this WAC provides that agencies "may" use previously prepared environmental documents (such as a SEPA DNS or checklist) to evaluate "proposals [that] may be the same as, *or different than*, those analyzed in the existing documents." WAC 197-11-600(2) (emphasis added). Under subsection (4) of this WAC, when an agency is authorized to use an existing environmental document to evaluate a proposal, it "may" employ one of several methods, including issuing an addendum. An addendum is expressly authorized when it "adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document." WAC 197-11-600(4); *see also* WAC 197-11-706 ("An addendum may be used at any time during the SEPA process.").

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Thus, Petitioner is simply wrong to contend that an addendum to an existing SEPA document may be used only if the modified proposal is exactly the same as the original proposal.

Regarding Ordinance O2019-484, Petitioner does not allege that there was a substantial change to the *analysis of significant impacts and alternatives*. Indeed, to the contrary, he objects that the City's analysis of significant impacts *did not change enough*.

Petitioner also incorrectly alleges that the City issued the addendum without updating the SEPA checklist or performing any additional analysis. Petitioner's Opening Brief at 15. However, Petitioner simply ignores the additional environmental review conducted by the City. Prior to issuing the addendum, the City created a revised SEPA checklist, including a *Transportation Issue Paper,* containing analysis of the potential environmental impacts associated with amended policy language in the Transportation Element. Ex. 150 at 17772-17792. Additionally, the City revised the comprehensive plan based on the revisions to the SEPA checklist. Ex. 137 at 10116-10119. Notably, these revisions reference the performance of key road segments and retain the language that "no significant environmental impacts are anticipated." *Id.* at 10117. The evidence disproves Petitioner's unfounded allegation that Ordinance O2019-484 was adopted without "any SEPA review" or "any substantive consideration of environmental impacts." Petitioner's Opening Brief at 16.

Petitioner also complains that the City utilized an addendum without notice or additional opportunity for public comment. Petitioner's Opening Brief at 16. However, no additional process is required under state law. WAC 197-11-600(4). *See also* WAC 197-11-625(5) ("Unless otherwise provided in these rules, however, agencies are not required to circulate an addendum."). Further, while a DNS must be withdrawn if there "are substantial changes to the proposal so that the proposal is likely to have significant environmental impacts," WAC 197-11-340(3)(a)(i), Petitioner does not cite evidence that changes to the City's concurrency regulations were likely to have significant environmental impacts.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Indeed, SEPA itself provides that a governmental action cannot be challenged on the grounds of noncompliance with RCW 43.21C.030 unless there has been a substantial change in the proposal "that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed." RCW 43.21C.080(2)(b). Petitioner does not identify any likelihood of adverse environmental impacts resulting from the Ordinance O2019-484 beyond the range of impacts previously analyzed. Ironically, Petitioner's apparent position is that the Ordinance improperly seeks to reduce environmental impacts from traffic congestion and sprawl by precluding development. In any event, Petitioner fails to meet his burden to show that Sammamish committed any SEPA procedural error.

C. Issue 3: Ordinance O2019-484 Was Guided by the Goals of RCW 36.70A.020

Petitioner alleges that Ordinance O2019-484 was not guided by the RCW 36.70A.020 Goals (specifically, goals 1, 2, 4, 5, 6, 7, 11, and 12), but this argument fails. First, Petitioner fails to meet his burden of proof. Second, Petitioner is simply incorrect. Ordinance O2019-484 is a direct result of the City Council's balancing of "mutually competitive" GMA goals.

1. Petitioner fails to meet his burden of proof

Petitioner's Brief is rife with conclusory statements without a single citation to the record evidence regarding Issue 3. Petitioner's Opening Brief at 16-18. Despite alleging that the Ordinance violates Goals 1, 2, 4, 5, 6, 7, 11, and 12, the only goals that Petitioner pays even lip service to are Goals 7, 11, and 12. Petitioner's Opening Brief at 17. Yet, Petitioner's brief fails to discuss how the Ordinance purportedly violates Goals 7, 11, and 12. Petitioner's use of conclusory statements are insufficient and cannot substitute for concrete evidence, supported by citations to the record and the appropriate legal authorities.

Further, Petitioner attempts to bolster his arguments by impermissibly alleging a violation of WAC 365-196-840(3)(c), *see* Petitioner's Opening Brief at 18, even though that WAC was not included in Issue 3 in either his Petition for Review or the Board's Prehearing

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Order. Pursuant to the Prehearing Order and WAC 242-03-545(2), this allegation must be rejected. *See also* WAC 242-03-260(1) (time limit for amending legal bases for challenge).

2. Ordinance O2019-484 is the result of the city's balancing the "mutually competitive" GMA goals

The GMA does not require that any particular goal be afforded priority over the others. Many of the GMA goals are "mutually competitive" and thus, the Board defers to the local government's balancing of such goals, so long as none of the goals are violated. *Skagit D06, LLC v. Mount Vernon*, WWGMHB Case No. 10-2-0011, FDO (Aug. 4, 2010), at 14; *Quadrant*, 154 Wn.2d at 246. The GMA does not require that the local government make specific findings, although they may be helpful in demonstrating how the City has considered various GMA goals. *See Master Builders Ass'n of King and Snohomish Counties v. Sammamish ("Camwest III")*, CPSGMHB Case No. 05-3-0041, FDO (Feb. 21, 2006), at 29. "RCW 36.70A.320 requires the Board to presume that . . . development regulations are valid. It does not condition this presumption on the record containing an explicit statement by the local government that it considered the Act's planning goals. Instead, substantive compliance with those goals remains a requirement of the Act that all jurisdictions are presumed to have met unless and until a petitioner proves otherwise." *Alberg v. King Cty.*, CPSGMHB Case No. 95-3-0041c, FDO (Sept. 13, 1995), at 11-12.

Petitioner must meet a high burden of proof by specifically alleging and proving violation of the GMA goals. In order to show substantive noncompliance with a planning goal, a petitioner must identify a portion of the challenged regulation that is purportedly inconsistent with or that thwarts the planning goal and explain why the portion of the regulation does not comply with the planning goal. *Rabie v. Burien*, CPSGMHB Case No. 98-3-0005c, FDO (Oct. 19, 1998), at 6. Petitioner here makes no attempt at the required specific explanations with respect to any of the goals allegedly violated.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

i. Ordinance O2019-484 does not violate Goal 1 (urban growth)

Goal 1 states that cities shall "encourage development in urban areas ***where adequate public facilities and services exist or can be provided in an efficient manner***." RCW 36.70A.020 (Emphasis added.) Petitioner makes no effort to prove that the Ordinance violates Goal 1. Petitioner does not identify a specific portion of the Ordinance that allegedly violates Goal 1, nor how it would do so. Petitioner has therefore abandoned any claim that the Ordinance violates Goal 1. *Rabie*, CPSGMHB Case No. 98-3-0005c, FDO (Oct. 19, 1998), at 6.

However, the record evidence establishes that the Sammamish City Council considered GMA Goal 1. Petitioner emphasizes only the first portion of Goal 1 (encouraging growth) but conveniently disregards the rest of the Goal mandating that growth be encouraged where adequate facilities exist or can be provided in an efficient manner. Further, a concurrency ordinance must "prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development." RCW 36.70A.070(6)(b). The City correctly concentrated on the entirety of the Goal, coupled with the constraints imposed by RCW 36.70A.070(6)(b). Indeed, the Council expressed extensive concern about areas in Sammamish where the Council perceived that adequate public transportation facilities do not exist. *See, e.g.*, Ex. T11 at 10:1 – 15:9. *See also id.* at 21:11-19. Goal 1 does not require a City to allow unfettered growth within its boundaries; indeed, the City must balance Goal 1 with the other, "mutually competitive" Goals. Sammamish did just that. Accordingly, Ordinance O2019-484 does not violate Goal 1.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

ii. Ordinance O2019-484 does not violate Goal 2 (reduce sprawl)

Goal 2 states that cities shall aim to "[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020. Petitioner again does not demonstrate that the Ordinance violates Goal 2. Petitioner does not identify a specific portion of the Ordinance that allegedly violates Goal 2, nor how it would do so. Indeed, the relevance of Goal 2 to a concurrency ordinance is not readily apparent; it is hardly axiomatic that a concurrency ordinance that Petitioner believes is too strict will automatically lead to sprawl. The Ordinance does not modify the density permitted for any property within Sammamish. With no evidence cited in support, Petitioner has abandoned any claim that Ordinance violates Goal 2. *Rabie*, CPSGMHB No. 98-3-0005c, FDO (Oct. 19, 1998), at 6.

Ordinance O2019-484 did not reduce density within Sammamish. It did not expand Sammamish's urban growth area. Petitioner cannot even show the Ordinance halted development within Sammamish. Indeed, the City continued issuing concurrency certificates under the new Ordinance, including a concurrency certificate for the high-density Town Center project as discussed further *infra*. *See* Ex. 189; Ex. 180 at 18245. Therefore, the Ordinance does not violate GMA Goal 2.

iii. Ordinance O2019-484 does not violate Goal 4 (housing)

Goal 4 requires cities to "[e]ncourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock." RCW 36.70A.210.

Again, Petitioner fails to even attempt to meet his burden of proof and does not discuss how the challenged ordinance purportedly thwarts the housing-diversity and preservation objectives embodied in Goal 4. Indeed, the record evidence clearly disproves Petitioner's theory that the Ordinance freezes or halts development of new housing. Council expressed

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

acute concerns regarding increased housing, and especially, housing diversity. Ex. T11 at 59:6 – 60:19. To that end, the City has issued 16 concurrency certificates since September 2019. Ex. 189. The City also issued concurrency for the Town Center sub-area. Ex. 180 at 18245 ("STCA provided information and the City staff followed the City's concurrency test procedures . . . for the two proposed Town Center projects, both of which passed concurrency.") Petitioner's argument that the City is attempting to halt all growth through concurrency standards is patently incorrect. Ex. 180 at 18245; Ex. 189. The Ordinance does not violate Goal 4.

iv. Ordinance O2019-484 does not violate Goal 5 (economic development)

GMA Goal 5 requires cities to encourage economic development, with a special emphasis on promotion of opportunity for all citizens of the state, balanced with the capacities of the state's natural resources, public services, and public facilities. RCW 36.70A.020. Again, Petitioner does not explain at all how the Ordinance purportedly violates Goal 5, save for the conclusory (and incorrect) allegations that the Ordinance is a *de facto* moratorium.

Even if Petitioner had made some attempt to meet his burden of proof, the record evidence establishes that the Ordinance does not violate Goal 5. Even assuming *arguendo* that Petitioner is correct that new development that adds trips to Sahalee Way is precluded (which is not true), Petitioner still cannot prevail without showing that the Ordinance precludes economic development in the City. In *Skagit D06,* WWGMHB Case No. 10-2-0011, the Board failed to find a violation of Goal 5 when the City of Mount Vernon adopted a policy delaying extension of sewer service to the periphery of the UGA. In that case, the petitioner was unable to show that opportunities for development were "so limited elsewhere in the City that the refusal to extend sewer beyond the City limits inhibits economic development." *Skagit D06,* FDO (Aug. 4, 2010), at 14. Similarly, the Petitioner here does not even allege, much less prove, that the opportunities for development are so limited elsewhere

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

in the City that Ordinance O2019-484 inhibits economic development. The Ordinance does not violate Goal 5.

v. Ordinance O2019-484 does not violate Goal 6 (property rights)

Goal 6 provides that "private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6). The property rights goal, while an important cornerstone of the GMA, is not supreme among the 13 goals. *Vashon-Maury v. King Cty.*, CPSGMHB No. 95-3-0008c, FDO (Oct. 23, 1995), at 89. To establish that a city has not complied with this goal, a petitioner must show by preponderance of the evidence that the city's action was both arbitrary and discriminatory. *Litowitz v. Federal Way*, CPSGMHB Case No. 96-3-0005, FDO (Jul. 22, 1996), at 24-25. Additionally, it must also show the action has impacted a legally recognized right. *Skagit D06,* WWGMHB No. 10-2-0011, FDO (Aug. 4, 2010), at 15. Development regulations that restrict the use of property do not *per se* violate Goal 6. For example, zoning that limits the use of a property does not require compensation for the uses that are not allowed. *Alberg*, CPSGMHB No. 95-3- 0041c, FDO (Sept. 13, 1995), at 45.

Petitioner fails to allege how the Ordinance violates Goal 6. He has not alleged, much less established, that the City's actions were arbitrary or discriminatory. Nor has he alleged that the Ordinance impacts a legally recognized right. Even if Petitioner had offered some evidence, he could not show clearly erroneous action in violation of Goal 6. Like a zoning ordinance limiting the use of a property, concurrency ordinances will always entail some limitation on the use of a property. Despite such limitations, property owners within the City are proceeding with development. The City issued no fewer than 16 concurrency certificates between September 2019 and January 20, 2020. Ex. 180 at 18245; Ex. 189. The Ordinance does not violate Goal 6.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

vi. Ordinance O2019-484 does not violate Goal 7 (permits)

RCW 36.70A.020(7) provides that "[a]pplications for both state and local government permits should be processed in a timely and fair manner to ensure predictability."

Petitioner alleges, without proof and despite evidence to the contrary, that the Ordinance is "confusing and unpredictable" and results in applicants having "no meaningful ability to plan for any future development." Petitioner's Opening Brief at 17. Evidence-free characterizations do not meet Petitioner's burden of proof. In fact, the plain language of the Ordinance disputes this unfounded characterization. The Ordinance uses a formulaic approach to determining concurrency, with the result being either pass or fail. *See* Ex. 175 at 17919 - 17925 (SMC 14A.10.040, which sets out a straightforward process for applying for a concurrency certificate, and SMC 14A.10.050(2), which sets forth the volume-to-capacity ratios and measurement periods, applied per the City's traffic model to defined set of intersections, road segments, and corridors). Therefore, the results of any capacity analysis are entirely predictable based upon the computerized traffic model and the set V/C ratios.

Further disproving Petitioner's unfounded allegation is the fact that actual developers have not found the process confusing and unpredictable. The City has issued no fewer than 16 concurrency certificates since September of 2019—potential developers are making use of the concurrency ordinance that Petitioner alleges is unworkable. Ex. 180 at 18245; Ex. 189. Indeed, the formulaic nature of the City's concurrency test as described in SMC Chapter 14A.10 stands in stark contrast to a case where the Board found a permitting system violated Goal 7 by introducing too much unpredictability. *See Camwest III*, CPSGMHB Case No. 05-3-0041, FDO (Feb. 21, 2006), at 29-37 (city's former growth-phasing lottery violated Goal 7 by introducing luck into the permitting system, which by nature leads to unpredictability). Unlike the lottery system in *Camwest III*, Sammamish's Ordinance O2019-484 is

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

nondiscretionary, nonarbitrary, and formulaic. As such, it does not violate GMA Goal 7.

vii. Ordinance O2019-484 does not violate Goal 11 (citizen participation and coordination)

Goal 11 requires cities to "[e]ncourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." Goal 11 provides an umbrella under which all the GMA public participation requirements fit; however, the Board looks first to the requirements section of the Act to determine compliance. *Wilma v. Colville,* EWGMHB Case No. 02-1-0007, FDO (Sept. 4, 2002), at 7.

As established in the discussion of Issue 1 *supra*, the City's adoption of Ordinance O2019-484 met the GMA requirements for public notice and participation. Accordingly, Petitioner cannot show that the Ordinance violates GMA Goal 11 with respect to public participation.

viii. Ordinance O2019-484 does not violate Goal 12 (public facilities and services)

Goal 12 requires a city to "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12). "Goal 12 requires a jurisdiction to establish minimum standards so as to provide the basis for an objective measurement of needs and system performance for those facilities which the jurisdiction has identified as necessary and, read in conjunction with RCW 36.70A.070(3), directs that these standards be contained in the CFP." *Fallgatter v. Sultan*, CPSGMHB Case No. 07-3-0017, FDO (Sept. 5, 2007), at 12. Local governments are entitled to exercise their discretion in making reasoned determinations of which public facilities and services are necessary to

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

support development within the jurisdiction. *McVittie v. Snohomish Cty.*, CPSGMHB Case No. 99-3-0016c, FDO (Feb. 9, 2000), at 26.

Petitioner does not explain how Ordinance O2019-484 allegedly fails to ensure that public transportation facilities are adequate to serve development at the time of occupancy without decreasing current service levels below locally established minimum standards. To the contrary, based upon its text, Ordinance O2019-484 does just that. *See, e.g.*, Ex. 175 at 17921 (SMC 14A.10.040(3), setting forth options for the applicant if the impact of the proposed development will cause the level of service to decline below the standards set by the City).

Further, Petitioner's characterization of the concurrency ordinance as the sole solution to transportation is misplaced. In effectuating Goal 12 in particular, cities rely on their comprehensive plans, their TIPs, their budget, and their concurrency ordinance. Here, the Ordinance performs its portion of the Goal 12 objective by regulating development to prevent transportation service levels from falling below minimum standards. Petitioner does not meet his burden to show Ordinance O2019-484 violates Goal 12.

D. Issue 4: Ordinance O2019-484 Does Not Violate RCW 36.70A.040, 36.70A.070, or 36.70A.120, or WAC 365-196-800 and/or 365-196-810, either procedurally or substantively

Petitioner argues that the V/C Standards should have been, but were not, integrated into the Comprehensive Plan. Petitioner's Opening Brief at 19. However, Petitioner's argument fails. First, Petitioner has not met his burden of proof with respect to this issue. Second, Petitioner's theory is incorrect; Ordinance O2019-484 implements the City's Comprehensive Plan as required by law and regulation.

1. Petitioner Does Not Meet His Burden of Proof

In his Petition for Review, Petitioner alleged violations of RCW 36.70A.040, RCW 36.70A.070, RCW 35.70A.120, WAC 365-196-800, and/or WAC 365-196-810 in Issue 4.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Of those authorities, Petitioner cites only two—RCW 36.70A.070 and RCW 36.70A.120—in his discussion of Issue 4 in the brief. He has therefore waived argument on the other code sections. Furthermore, Petitioner does not tie the City's actions to any alleged violations of any of the other statutory or administrative authorities pled in his Petition for Review. While Petitioner's arguments on Issue 4 are replete with conclusory statements and accusations,[8] they cannot replace citations to the evidentiary record, coupled with relevant legal citations. To wit, Petitioner's brief contains zero citations to record evidence in support of Issue 4. The burden of proof is squarely upon Petitioner, who has not even attempted to meet it.

2. The Transportation Element of the Comprehensive Plan Contains Level of Service Standards as Required by Statute; Ordinance O2019-484 Implements Those Standards

The City's Comprehensive Plan (including the Transportation Element) includes level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system, as required by RCW 36.70A.070. "Comprehensive plans contain broad policy benchmarks—not specific measures designed to implement such policies; they do not specify measures by which such policies must be implemented." *Sammamish Comm'y Council v. Bellevue*, 108 Wn. App. 46, 56, 29 P.3d 728 (2001). Petitioner's complaint is one regarding the City's adoption of LOS methodology, which previous Board decisions and caselaw have rejected.

For example, the Sammamish Community Council challenged Bellevue's adoption of a Traffic Standards Code, arguing that such action was only proper through adoption of a comprehensive plan amendment—not an ordinance. *Id.* The court of appeals rejected that argument, finding that:

[8] *See, e.g.*, Petitioner's Opening Brief at 19 (alleging improper motive for the Council's adoption of the Ordinance without even a single citation to the record evidence). *See also id.* at 20 (again ascribing bad motives to the City Council and surmising their intent without any record citations whatsoever).

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

> Ordinance 5081 did not change the LOS standards. Rather, it simply sets forth methodology for determining whether the LOS specified in the comprehensive plan has been satisfied. ***The comprehensive plan does not—nor must it—contain provisions regulating how LOS is measured.*** Comprehensive plans contain broad policy benchmarks--not specific measures designed to implement such policies; they do not specify measures by which such policies must be implemented. RCW 36.70A.030(4); *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wash.2d 861, 873, 947 P.2d 1208 (1997). Indeed, the comprehensive plan's LOS standards have never specified any measurement methodology. The measurement, administrative, and enforcement provisions have always been in the [Traffic Standards Code] TSC as contemplated by the GMA. RCW 36.70A.070(6)(b); WAC 365-195-835. . . . It is within the City's discretion to adopt measures that in its judgment reflect a more accurate measurement of traffic volume and capacities.

Id. (emphasis added).

A review of Ordinance O2019-484 establishes that, like Bellevue Ordinance 5081, it too sets forth a methodology for how LOS is measured. Indeed, SMC 14A.10.050 adopts a modified Highway Capacity Manual, 6th Edition methodology, as described by a memo prepared by Fehr and Peers. Ex. 23 at 02143 – 02153. Ordinance O2019-484 contains the "measurement, administration and enforcement provisions" of the City's LOS, as explicitly permitted by the GMA. *Sammamish Comm'y Council*, 108 Wn. App. at 56. Therefore, like the challenger's arguments in *Sammamish Community Council*, Petitioner's arguments also fail.

Further, Petitioner's claim that the V/C standards were required to be contained in the Comprehensive Plain ignores the plain language of the plan. The City's Comprehensive Plan expressly directs the City to adopt ordinances to define level of service standards:

> **In order to monitor concurrency, the City must adopt standards** to identify deficiencies, which were presented earlier in this plan. While the GMA requires that LOS standards be adopted for concurrency, it does not mandate how those standards should be defined. Thus, **the City is free to adopt by ordinance whatever standards it deems appropriate**.

Ex. 31 at 02957 (emphasis added).

Ordinance O2019-484 does just that, implementing the directives of the Comprehensive Plan by further defining and refining the LOS standards for segments and

MADRONA LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

corridors. SMC 14A.10.050 defines the level of service standards for intersections (subsection (1)), and for segments/corridors (subsection (2)). Ex. 175.

In short, the Ordinance implements the standards contained in the Comprehensive Plan, as required by law and by the Comprehensive Plan itself.

Finally, Petitioner is incorrect that the V/C standards for segments and corridors are not addressed in the Comprehensive Plan. Indeed, elsewhere in his Opening Brief, Petitioner admits that the Comprehensive Plan contains references to V/C (although denigrating them as mere "lip service to the concept"). Petitioner's Opening Brief at 19. For example, the 2018 Transportation Element included the following revision to incorporate segment analysis (underline and strike-through):

> Concurrency
>
> *Policy T.1.1* *Maintain a concurrency management system that monitors the impacts of growth and development on the transportation system and ensures that level-of-service standards are met within required timeframes. Focus level-of-service standards for transportation on the performance of key intersections during the AM and PM peak periods, and segments that impact citywide mobility ~~movement of people and goods instead of only the movement of vehicles~~.*

Ex. 31 at 02852.

Similarly, the Transportation Element policy contains the following explanation of level of service for both intersections and segments, with explicit reference to use of volume-to-capacity ratios:

> Intersection and Segment Level of Service (LOS)
>
> *Policy T.1.3* *Calculate (~~On a case by case basis calculate I~~intersection LOS ~~is calculated~~ using traffic volumes during the AM and PM peak hours,*

MADRONA LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

> *and segment performance based on roadway volume to capacity ratios.* ~~*Alternatives may be considered and utilized on a case by case basis.*~~

Ex. 31 at 02854.

Additionally, the City's Capital Facilities Plan chapter includes a discussion of V/C and segments and corridors:

> Transportation
>
> > The intersection LOS is calculated using standard HCM analysis procedures for the PM peak hour. The adopted standard is LOS D or E for intersections that include Principal Arterials and LOS C for intersections that include Minor Arterial or Collector roadways. The LOS for intersections with principal arterials may be reduced to E for intersections that require more than three approach lanes in any direction. Corridor LOS is based on the performance of key corridors and is **determined by averaging the incremental corridor segment volume over capacity (v/c) ratios within each adopted corridor.** This has the effect of tolerating some congestion in a segment or more within a corridor while resulting in the ultimate completion of the corridor improvements.

Sammamish Comprehensive Plan Capital Facilities Element at 122 (emphasis added).

As plainly established by the GMA and caselaw, neither a city's comprehensive plan nor its concurrency ordinance can stand alone—they must work together. Sammamish's Comprehensive Plan sets out the broad policy benchmarks with references to general measurement approaches, and Ordinance O2019-484 is the "action forcing" ordinance with specific methodologies, measurement tools, and ratios to implement the Plan and assure that development permits are denied unless there is concurrent provision for transportation impacts. *Bellevue v. East Bellevue Comm'y Mun. Corp.*, 119 Wn. App. 405, 411, 81 P.3d 148 (2003). Sammamish's Comprehensive Plan and Ordinance O2019-484 meet GMA standards. Consequently, Petitioner's argument in Issue 4 fails.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

E. Issue 5: Ordinance O2019-484 Does Not Violate RCW 36.70A.070, RCW 36.70A.120, RCW 36.70A.130(d), WAC 365-196-800, and/or 365-196-810

The GMA requires comprehensive plans to be internally consistent documents and that "[a]ny amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." RCW 36.70A.130(1)(d). "Consistency" under the GMA does not mean that features of a plan and the corresponding development regulations are identical; rather, it means "that one plan provision or regulation does not preclude achievement of any other plan provision." *Central Wash. Growers Ass'n. v. Chelan Cty.*, EWGMHB Case No. 16-1-0002, FDO (May 19, 2017), at 5-6.

In order to show that Ordinance O2019-484 is inconsistent with the City's Comprehensive Plan, Petitioner must point to specific language therein that is either incompatible with or that thwarts specific language in the City's existing Comprehensive Plan. *Coyne v. West Richland*, EWGMHB Case No. 13-1-0005, FDO (March 5, 2014), at 14. Alleged impacts are not sufficient to constitute an inconsistency with the Comprehensive Plan. *Id.* Moreover, Ordinance O2019-484 is presumed valid and the burden is on Petitioner to overcome this presumption of validity and demonstrate that the City's adoption of this Ordinance was clearly erroneous in light of the goals and requirements of the GMA. RCW 36.70A.320.

Petitioner alleges that City's current Comprehensive Plan has not been substantively amended to reflect the V/C Standards adopted in Ordinance O2019-484, and that Ordinance O2019-484 is therefore inconsistent with the Comprehensive Plan and its foundational Background Information chapters. This is simply not the case. The V/C Standards adopted in Ordinance O2019-484 were considered in Policies T.1.1 and T.1.3 of the Transportation Element of the City's Comprehensive Plan. Ex. 31, 02852. While Petitioner may feel that the discussion of the V/C Standards in the Transportation Element is not thorough enough, Petitioner is no longer the City's Mayor, and this is not his call to make. Compliance with

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

the GMA, including consistency between the Comprehensive Pan and the City's development regulations, is all that is required. RCW 36.70A.3201 provides, in relevant part: "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 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter." Petitioner has not provided evidence to show that the City exercise of discretion in this matter is inconsistent with the GMA. And Petitioner even *admits* that the V/C Standards are addressed in the Comprehensive Plan; he simply argues that they have not been "meaningfully" incorporated, without providing any supporting evidence for this claim.

Petitioner further alleges that Ordinance O2019-484 fails to carry out the goals, policies, standards, and directions contained in the Comprehensive Plan and will thwart the managed growth and affordable housing goals adopted by the City in its current Comprehensive Plan. Yet, Petitioner once again provides no evidence to support this speculative argument and, in fact, contrary to his allegations, growth in Sammamish has continued. At least 16 certificates of concurrency have been issued by the City since adoption of Ordinance No. 2019-484. Ex. 180 at 18245; Ex. 189. No certificates of concurrency have been denied. As such, Ordinance No. 2019-484 is clearly not hindering the managed growth contemplated by the City in its Comprehensive Plan.

Petitioner has failed to identify specific language in Ordinance O2019-484 that is inconsistent with language in Comprehensive Plan Goal T.1, Policies T.1.1, T.1.3, T.1.4, T.1.5, Goal T.2, Housing Goal H.5, or Policy H.2.8, nor has he shown how these goals and policies will be thwarted by Ordinance O2019-484. Ex. 31 at 02852, 02854; Sammamish Comprehensive Plan Housing Element at 76, 81. His unsupported allegations that Ordinance O2019-484 will prevent the City from meeting its targets for growth as set forth in its Comprehensive Plan are not enough to establish inconsistency under the GMA.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Similarly, Petitioner has not identified language in Ordinance O2019-484 that is inconsistent with Comprehensive Plan Policies LU.7.2, 7.4, or 7.7. Sammamish Comprehensive Plan Land Use Element at 34-35. These policies require the City to use the future land use pattern to address traffic congestion and to promote and plan for road connectivity, but Petitioner has done nothing more than point out these facts. He has not identified any specific language from Ordinance O2019-484 that is in conflict with these policies nor any evidence to suggest the Ordinance is inconsistent with these goals or that the City will not meet them. Nor has he provided evidence to show that in adopting Ordinance O2019-484 the City failed to provide meaningful civic engagement in violation of Policy LU.7.10. To the contrary, and as discussed in detail above, Ordinance O2019-484 was adopted following many open public meetings of the City Council.

While Petitioner claims that Ordinance O2019-484 will prevent realization of the land use assumptions contained on page T.41 of the Transportation Background, he has once again failed to offer evidence of this or to point out specific language from Ordinance O2019-484 that it inconsistent with those assumptions. Further, Petitioner's contention that Ordinance O2019-484 is invalid and will frustrate Capital Facilities Goal CF.1 and Polices CF1.1, CF1.2, CF2.5, and CF2.6 because it does not include a financing strategy to address level of service shortfalls is misplaced. Sammamish Comprehensive Plan Capital Facilities Element at 120, 125. The GMA does not require this of a concurrency ordinance. Instead, the GMA requires funding strategies and capabilities to be addressed within the Comprehensive Plan and certain elements thereof. RCW 36.70A.070. The City properly addresses financing in other elements of the Comprehensive Plan, as required under the GMA, and Petitioner has not provided any evidence to the contrary. More importantly, however, the City's Comprehensive Plan and its elements are not the subject of this appeal and the Board lacks

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
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jurisdiction to consider them here. *Cainion v. Bainbridge Island*, CPSGMHB Case No. 10-3-0013, Order on Motion to Dismiss (January 7, 2011), at 4.

Petitioner's argument that Ordinance O2019-484 violates WAC 365-196-810 is also without merit. WAC 365-196-810 requires the City to review the terms of any development regulation to ensure that it is consistent with and implements the City's Comprehensive Plan and to "make a finding in the adopting ordinance to that effect." The City has done so by including findings in Ordinance O2019-484 stating that "Chapters 14A.05, 14A.10, and 21A.15 of the Sammamish Municipal Code ("SMC") . . . must be consistent with the City's Comprehensive Plan and particularly its Transportation Element" and "the City Council has determined that the proposed amendments [to the City's concurrency ordinance] meet the City's goals and objectives for transportation concurrency and level of service for road segments and corridors." Ex. 175 at 17917. Petitioner claims that the City should have instead included a specific finding that the V/C Standards are consistent with the Comprehensive Plan. But this level of specificity is not required by the plain language of WAC 365-196-810. The findings in Ordinance O2019-484 make it clear that the City has reviewed the regulations to ensure consistency with its Comprehensive Plan ensure that it is consistent with and implements the City's Comprehensive Plan and is therefore compliant with WAC 365-196-810.

Based on the forgoing, it is clear that Petitioner has failed to satisfy his burden of proof to come forward with evidence demonstrating that adoption of Ordinance O2019-484 was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA statutes and regulations referenced in Issue 5.

F. Issue 6: GMA Does Not Dictate a "Correct" LOS Methodology and Instead Leaves the Choice of Method Up to Local Governments

Petitioner alleges in Issue 6 that the City has adopted an "erroneous" LOS

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
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methodology in violation of RCW 36.70A.040, RCW 36.70A.070(6), WAC 365-196-840, and WAC 365-196-430. No argument is made by Petitioner, however, regarding RCW 36.70A.040 and WAC 365-196-840. Those argument are therefore to be considered abandoned. WAC 242-03-590; *Hood Canal Sand & Gravel, LLC, et al. v. Jefferson Cty. and Dep't of Ecology*, WWGMHB Case No. 14-2-0008c, FDO (March 16, 2014), at 12-13. Petitioner's citation in the Opening Brief to WAC 365-196-430(e) will also not be addressed as it has no bearing on LOS methodology, and instead deals with intergovernmental coordination with adjacent jurisdictions. Petitioner's Opening Brief at 23.[9]

The remaining statute cited in Petitioner's Opening Brief—RCW 36.70A.070(6)—is not a requirement for a concurrency ordinance like Ordinance O2019-484, but rather a requirement for the transportation element of a comprehensive plan. RCW 36.70A.070(6)(a)(iii)**(A)** (cited in Petitioner's Opening Brief at page 23) is assumed to be a typographical error; instead, we assume the citation was intended to be to RCW 36.70A.070(6)(a)(iii)**(B)**, which provides as follows:

> (a) The transportation element shall include the following subelements:
> (iii) Facilities and services needs, including:
> (B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated[.]

Using principals of statutory construction, the Board must "discern the legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 667, 381 P.3d 1 (2016) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*,

[9] WAC 365-196-430(e) refers to "Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions."

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

146 Wn.2d 1, 9–19, 43 P.3d 4 (2002)). The meaning of RCW 36.70A.070(6)(a)(iii)(B) is plain and uncomplicated on its face. The LOS Standards in a transportation element will be a "gauge" to "judge performance" of a city's transportation system. A gauge is defined in Meriam-Webster Dictionary as "an instrument for or a means of measuring or testing; such as an instrument for measuring dimension or for testing mechanical accuracy."[10] No parameters are set in RCW 36.70A.070(6)(a)(iii)(B) for the gauge. It "is simply an objective way to measure traffic." *West Seattle Defense Fund v. Seattle*, CPSGMHB Case No. 94-3-0016, FDO (April 4, 1995), at 48.

Petitioner erroneously asserts, without citation or rationale, that there must be a test by which adopted LOS standards will be measured under the GMA. Petitioner's Opening Brief at 24. Petitioner would have the Board calibrate LOS standards for "reliability" and "accuracy," but provides no GMA tool by which to evaluate this gauge. The Board in *West Seattle Defense Fund* required objectivity, but no other, more specific test.

Petitioner faults the Segment LOS standard adopted in Ordinance O2019-484 because it was late to the table and a change from the direction Petitioner assumed the LOS standard would go. Petitioner's Opening Brief at 24. So long as procedural and public process requirements are satisfied, however, new and unexpected revisions are not a violation of RCW 36.70A.070(6)(a)(iii)(B), and Petitioner cites to no such authority. As demonstrated in Issue 1, the City provided ample public notice and multiple opportunities for participation and comment, including multiple public hearings.

Petitioner additionally faults the City Council's adoption of its Segment LOS standard because it was not the first choice of the Council's retained expert, Fehr & Peers. Petitioner's Opening Brief at 24 – 25. Under RCW 36.70A.070(6)(a)(iii)(B), an expert's choice, recommendation, or preference is not the test. Rather, "[u]nder the GMA, setting the desired

[10] Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/gauge, last visited Feb. 12, 2020.

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LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

level of service standard is a *policy decision left to the discretion of local elected officials*." *West Seattle Defense Fund,* CPSGMHB Case No. 94-3-0016, FDO (April 4, 1995), at 48 (emphasis added). Kendra Breiland of Fehr & Peers herself recognized this distinct policy role of the City Council in her response to questions during an October 22, 2018, City Council meeting:

> Ms. Breiland: Well that was my recommendation, although I'm listening to Council and I think you guys are going in a different way.[11]

And in her role as an expert, Breiland provided the City Council with the subsequent Memorandum dated November 16, 2018, "Measuring Concurrency for Segments and Corridors: HCM 6th Edition, Modified" ("F&P Memo") upon which the Segment LOS standard adopted by the City Council is based. Ex. 23 at 02143 – 02153. The F&P Memo used the well-documented Highway Capacity Manual ("HCM") and Florida Department of Transportation ("FDOT") methodologies.[12] The F&P Memo "leveraged the default values provided by the HCM, but also made adjustments to better account for roadway characteristics like the presence of left turn lanes and medians" from FDOT. Ex. 23 at 02143. Combining the two methodologies enhanced the sensitivity to measures within the City's control such as adaptive signal control and flashing yellow arrows. *Id.*

Petitioner objects to the "capacity" used in the F&P Memo as being the wrong kind of capacity necessary for compliance with RCW 36.70A.070(6)(a)(iii)(B). But this statute includes nothing even resembling a required definition of capacity. Petitioner argues that Fehr & Peers created a "misunderstanding" as to what capacity meant in the F&P Memo. Kendra Breiland and Interim Public Works Director Cheryl Paston, however, persistently and accurately explained during the October 16, 2018, Council Meeting that capacity in the F&P Memo did not mean that the segment could not take one more car; instead it meant stop and

[11] Transcript of October 22, 2018, Council Meeting at 39-40 (see Petitioner's Opening Brief Table of Exhibits).
[12] Ex. T27 at 7, 8 and 16.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

go conditions.[13] As one Councilmember explained, "[i]t's not literally how many cars you can put down there."[14] And while capacity did not reflect exactly the measured counts on the road,[15] Breiland explained that the proposed capacity for Segment LOS was a "big picture observation" where V/C failures were being matched with where city staff was already observing failures on the ground.[16]

Petitioner contends that a table used in the F&P Memo unravels any validity "capacity" had as a gauge under RCW 36.70A.070(6)(a)(iii)(B). Petitioner's Opening Brief at 28. But the City is not arguing that capacity cannot be measured as the actual number of vehicles that can fit on a road segment. The City Council simply chose a different "capacity" measurement for the Segment LOS standard in Ordinance O2018-484. A concurrency ordinance is a general planning exercise. It must be adopted to prohibit a development project that would cause the level of service to decline below the adopted standard. RCW 36.70A.070(6)(b). A concurrency ordinance does not dictate design standards or specific improvements on a particular road segment; it only establishes whether the segment meets concurrency.

The HCM table 16-16[17] is also "provided for general planning use" only.[18] It is "useful in evaluating the overall performance of a larger number of urban streets within a jurisdiction, as a first pass to determine where problems might exist or arise, or in determining where improvements might be needed."[19] This is exactly what table 16-16 was used for in the F&P memo.[20] The HCM explains that table 16-16 "should not be used to analyze any

[13] Ex. T27 at 11.
[14] Ex. T27 at 33.
[15] Ex. T27 at 16.
[16] Ex. T27 at 12.
[17] Ex. 23 at 02151.
[18] Ex. 177 at 18022.
[19] *Id.*
[20] Ex. 23.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

specific urban street facility or to make final decisions on important design features."[21] As such, it is suitable for the planning efforts of a concurrency ordinance, which identifies whether concurrency is satisfied—not which new or modified features might bring a failing project into concurrency.

Petitioner's focus is trained on the HCM, but the F&P Memo used more than table 16-16 for capacity. The F&P Memo explains that it combined HCM with adjustments from the Florida Department of Transportation ("FDOT"). *See* Ex. 23 at 02144 - 2145.

Petitioner fails to cite any authority for his contention that RCW 36.70A.070(6) required the Sammamish City Council to adopt his preferred methodology for measuring road capacity, or any other specific methodology. The GMA leaves such measurement tools up to the discretion of the City Council. Here, the Sammamish City Council relied on professional traffic engineers in selecting their preferred measurement tools. And Petitioner has come nowhere near meeting his burden of proof to establish that the City Council's exercise of this discretion was clearly erroneous. Issue 6 should be dismissed.

G. <u>Issue 7: Ordinance O2019-484 Does Not Violate RCW 36.70A.110(1), (2), (3), or (4)</u>

Once again, Petitioner provides nothing more than unsubstantiated allegations and conclusory statements to argue that the City violated its duty to affirmatively foster and stimulate growth under RCW 36.70A.110(1)-(4) when it adopted Ordinance O2019-484. Instead, Petitioner continues his critique of the City's process in adopting Ordinance O2019-484, which, as discussed further in Issue 1 above, are wholly without merit. Further, Petitioner *admits* that he really does not know whether the V/C Standards adopted in Ordinance O2019-484 are *actually* inconsistent with the City's 20-year growth target. Petitioner's Brief at 32. This failure of proof is fatal.

[21] *Id.*

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

Additionally, RCW 36.70A.110(1)-(3) are, by their plain language, inapplicable to the matter at hand. Each of these subsections involve requirements for the location and designation of *urban growth areas*; Ordinance O2019-484 is a concurrency ordinance and has nothing to do with the designation of urban growth areas within the City. RCW 36.70A.110(4) is likewise irrelevant here; that subsection of the statute simply states that, in general, it is not appropriate for urban governmental services to be extended to or expanded in rural areas. Ordinance O2019-484 in no way relates to the establishment of urban growth areas or provision of urban governmental services within rural areas. As such, RCW 36.70A.110(4) is also inapplicable here.

Petitioner's claims that adoption of Ordinance O2019-484 will result in a "critical failure to plan for any growth that adds trips to Sahalee Way"[22] is not only factually unsupported, it fails to take into account the options available to a developer under the Ordinance should a proposed development not pass the City's concurrency test. SMC 14.10.050(3) provides "[i]f any concurrency intersection, corridor or segment operates worse than the level of service standards, the concurrency certificate will be denied, **or the applicant may select one of the options described in SMC 14A.10.040(3).**" Ex. 175 at 17921 (emphasis added). SMC 14.10.040(3)(c) states that in the event the concurrency test is not passed, the applicant may "[a]rrange to provide for public facilities that are not otherwise available and that cause the level of service to rise to the standards set forth in the SMC 14A.10.050." *Id.* The required public facility improvements necessary to meet the City's concurrency test would then be individualized to each project to ensure the City's level of service did not decrease below the thresholds set forth in SMC 14A.10.050.

Further, Sahalee Way is but one corridor in the City, and Petitioner has provided nothing to show that appropriate locations for development no not exist elsewhere in the City.

[22] Petitioner's Opening Brief at 31.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
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Finally, Petitioner's conclusory statement and allegations regarding *possible* impacts of Ordinance O2019-484 on the City's ability to meet its growth targets are insufficient to meet his burden to show inconsistency between Ordinance O2019-484 and the City's current Comprehensive Plan, as he fails to identify language therein that is either incompatible with or that thwarts specific language in the City's existing Comprehensive Plan, as discussed further above.

H. Issue 8: Ordinance O2019-484 Does Not Violate RCW 36.70A.115

RCW 36.70A.115 requires that a city's development regulations provide sufficient land capacity for development to accommodate their allocated housing and employment growth as adopted in applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

In order to demonstrate a violation of RCW 36.70A.115, Petitioner must show that adoption of Ordinance O2019-484 would result in a deficit of land suitable for development within the 20-year planning horizon so as to create insufficient capacity to accommodate the City's allocated growth projections. *Wenatchee v. Chelan Cty.*, EWGMHB Case No. 08-1-0015, FDO (May 6, 2009), at 10.

Petitioner asserts that by adopting Ordinance O2019-484, the City has precluded the Town Center Plan from being built out to as contemplated in the City's 2015 Comprehensive Plan. Petitioner's Opening Brief at 34. These allegations are once again conclusory, as Petitioner fails to provide any actual evidence to demonstrate that adoption of the City's current concurrency ordinance will curb development so much as to create a deficit of land suitable for development, in violation of RCW 36.70A.115. *See Brown v. Everett*, CPSGMHB Case No. 15-3-0018, FDO (June 7, 2016), at 11 (finding that Petitioner's argument that the city could not accommodate its allocated population growth forecast based on conclusory statements was insufficient to meet his burden of proof).

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

A concurrency certificate for the Town Center Development was issued in 2019; thus, Petitioner's concerns regarding potential impacts on future development of the land within the Town Center subarea are not only conclusory, but baseless. Further, contrary to Petitioner's allegation, Ordinance O2019-484 *does* include a means to cure concurrency failures. SMC 14.10.050(3) and SMC 14.10.040(3). Ex. 175 at 17921-17925. Based on the foregoing, Petitioner has failed to meet his burden to show that adoption of Ordinance O2019-484 hinders development in violation of RCW 36.70A.115.

I. Issue No. 9: Ordinance O2019-484 Did Not Impose a *De Facto* Moratorium on Development

Petitioner does not meet his burden of proof to establish that Ordinance O2019-484 is a *de facto* moratorium. First, the cases cited by Petitioner are inapposite. The *SHAG v. Lynnwood* case concerned an actual moratorium, not an alleged *de facto* moratorium. CPSGMHB Case No. 01-3-0014, Order on Motions (Aug. 3, 2001), at 5-6. Similarly, the *Camwest I* case also concerned an actual moratorium, not a *de facto* moratorium. *Master Builders Ass'n of King and Snohomish Counties v. Sammamish ("Camwest I")*, CPSGMHB Case No. 05-3-0030c, Order Segregating Case No. 05-3-0027 from the Consolidated Case and FDO in Case No. 05-3-0027 (Aug. 4, 2005), at 1. While moratoriums do indeed trigger certain procedural requirements under RCW 36.70A.390, ordinary development regulations do not trigger such processes (although they may trigger other process).

The Board consistently rejects claims that development regulations are *de facto* moratoriums. If a petitioner cannot prove that the challenged regulation completely freezes or precludes acceptance of **any or all** development applications, the Board will not find the regulation to be a *de facto* moratorium. For example, this Board rejected the argument that Sammamish's previous growth-phasing lottery constituted a *de facto* moratorium

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

because it did not freeze development or preclude all development, and some applications were accepted.[23] *Camwest III*, CPSGMHB Case No. 05-3-0041, FDO (Feb. 21, 2006), at 28. Citing its decision in *Camwest III*, this Board also refused to hold Lynnwood's adoption of City Center Sub-Area Plan implementation ordinances a *de facto* moratorium, finding that the plan "permits development within the City Center Area, but imposes conditions and requirements for such development to proceed." *Prie Second Family Ltd. P'ship v. Lynnwood*, CPSGMHB Case No. 06-3-0029, FDO (Apr. 9, 2007), at 33-34. *See also Skagit D06, LLC. v. Mount Vernon*, WWGMHB Case No. 10-2-0011, FDO (Aug. 4, 2010), at 7 (ordinance prohibiting sewer connections outside of the city limits was not a *de facto* moratorium because it did not deny a property owner the ability to submit an application for an otherwise permissible use or activity); *Master Builders Ass'n of King and Snohomish Counties v. Arlington*, WWGMHB No. 04-3-0001, FDO (Jul. 14, 2004), at 11 (annexation condition as prerequisite to provision of sewer service was neither a denial of sewer service nor a *de facto* moratorium on development within the UGA.).

Petitioner's argument is akin to the others previously considered and rejected by the Board. First, nothing from the text of Ordinance O2019-484 freezes or refuses development applications. Indeed, Petitioner does not allege that the Ordinance freezes or precludes the submission of ***all*** development applications. Petitioner alleges only that development applications that result in addition of trips to Sahalee Way would be precluded. Petitioner's Opening Brief at 34 ("Without an enforceable TIP for Sahalee Way, no development applications can be submitted if they add trips to this corridor under the V/C Standards."). By Petitioner's own admission then, the Ordinance is no *de facto* moratorium because it does not freeze or prohibit the City from accepting development applications. Conceivably, there could be development applications that do not result in the addition of trips to Sahalee Way,

[23] The Board did hold the lottery was GMA non-compliant on other grounds.

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

and Petitioner has not demonstrated otherwise despite bearing the burden of proof.

Further, Petitioner offers zero evidence in support of his theory. The evidence establishes the contrary—that the Ordinance does not freeze or prohibit development applications. Indeed, Acting Public Works Director Paston explained at the June 18, 2019 City Council meeting that Issaquah School District's new school on Issaquah-Pine Lake Road did pass concurrency. Ex. T5 at 87. Further, the City issued no fewer than 16 certificates of concurrency dating between September 13, 2019 and January 20, 2020. Ex. 180 at 18245; Ex. 189. These issued concurrency certificates are concrete proof that Ordinance O2019-484 does not use concurrency to foreclose development. Finally, even if a proposed project would result in more than one trip down Sahalee way, an applicant would have options, one of which is to pay for improvements. Tab 175, pp. 17921. Petitioner's theory fails—Ordinance O2019-484 is no *de facto* moratorium.

V. CONCLUSION

For the foregoing reasons, all nine of the Issues raised in the Petition for Review should be denied.

DATED this 12th day of February, 2020.

MADRONA LAW GROUP, PLLC

By: 

Kim Adams Pratt, WSBA No. 19798
David A. Linehan, WSBA No. 34281
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Telephone: (425) 201-5111
Email: kim@madronalaw.com
david@madronalaw.com

Attorneys for Respondent
City of Sammamish

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MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

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LAW GROUP, PLLC

14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

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LAW GROUP, PLLC

14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

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MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com

DECLARATION OF SERVICE

I, Tori Harris, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 12th day of February, 2020, I served a true copy of the foregoing *City of Sammamish's Response Brief* on the following counsel of record using the method of service indicated below:

Duana T. Koloušková, WSBA No. 27532 Johns, Monroe, Misunaga Koloušková, PLLC 1201 SE 8th Street, Suite 120 Bellevue, Washington 98004 *Counsel for Petitioner*	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: kolouskova@jmmlaw.com williams@jmmlaw.com

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

DATED this 12th day of February, 2020, at Seattle, Washington.

Tori Harris

MADRONA
LAW GROUP, PLLC
14205 SE 36th Street
Suite 100, PMB 440
Bellevue, WA 98006
Phone: 425-201-5111
www.MadronaLaw.com