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3 **BEFORE THE CENTRAL PUGET SOUND**  
4 **GROWTH MANAGEMENT HEARINGS BOARD**  
5 **STATE OF WASHINGTON**

6 DON GEREND, an individual  
7 Petitioner,

8 vs.

9 CITY OF SAMMAMISH, a Washington  
10 municipal corporation,  
11 Respondent.

**NO. 19-3-0015**

**PETITIONER DON GEREND'S  
OPENING BRIEF**

12 **I. INTRODUCTION**

13 In September 2018, after eighteen months of review and a year under moratorium, the  
14 City of Sammamish unanimously updated its Comprehensive Plan with substantially  
15 expanded level-of-service standards for intersections throughout the City (Expanded  
16 Intersection Standards). This Plan update quadrupled the City's intersection level of service  
17 (LOS) testing. Petitioner Don Gerend (Gerend), the City's Mayor when the update began,  
18 had no objections to this update. This Petition challenges what happened next.

19 Instead of implementing the Expanded Intersection Standards and lifting the  
20 moratorium, the City Council extended the moratorium for a third time. Disregarding its own  
21 traffic consultant's recommendation, a Council 4-3 majority directed staff and the consultant  
22 to develop a new, second layer of LOS testing in the form of "volume-to-capacity" (V/C  
23 Standards). In a hasty and chaotic process involving procedural shortcuts and substantive  
24 errors, the City Council adopted these new V/C Standards first as interim development  
25 regulations in November 2018 and then as permanent development regulations in May 2019.

1 The methodology used to develop these standards is unprecedented, is rooted in  
2 demonstrably inaccurate capacity numbers, and results—by design—in an ongoing de facto  
3 moratorium. This Petition challenges those permanent development regulations, Ordinance  
4 O2019-484.

5 The City of Sammamish has a long history of trying different tactics to avoid its  
6 obligations to support and foster urban growth. Gerend asks this Board to reject the City's  
7 misuse of the GMA to adopt a new concurrency system deliberately designed to shut the  
8 City's doors to urban growth without meaningful solution. Were other cities to adopt a  
9 similar approach to concurrency, urban growth around the region would grind to a halt just  
10 when housing is most desperately needed. Gerend asks the Board to invalidate Ordinance  
11 O2019-484. The City's current Expanded Intersection Standards already appropriately, and  
12 extensively, govern transportation concurrency consistent with the Comprehensive Plan.

## 13 II. STATEMENT OF FACTS

### 14 A. The City's Ongoing Moratorium.

15 The City adopted twelve successive moratoria between 1999 and 2005.

16 the continuing moratorium on project applications is counter to the GMA requirement  
17 that a city shall adopt development regulations that are consistent with and implement  
18 the comprehensive plan . . . A city may not continually refuse to implement its plan  
through the device of a moratorium.

19 *Master Builders Association et al. v. City of Sammamish*, CPSGMHB No. 05-3-0030c, FDO  
20 (August 4, 2005).

21 On October 3, 2017, the City again imposed a moratorium until it finished  
22 overhauling the City's transportation concurrency standards. Ordinance O2017-445. Despite  
23 thoughtful advice,<sup>1</sup> the City Council has since ensured that, with the exception of a few  
24

25 <sup>1</sup> Michael Walters of the Washington Cities Insurance Authority gave a presentation to remind the Council of  
the consequences of using rolling moratoria. *Tab 143*.

1 weeks, from June 17 to August 20, 2019, a development moratorium now remains  
2 continuous since October 3, 2017, first by the three successive development moratoria, and  
3 now through Ordinance 2019-484, the subject of Gerend's Petition for Review.

4 **B. The City's Transportation Concurrency System Consists of Both (a) Expanded**  
5 **Intersection Standards Adopted in the Comprehensive Plan and (b) V/C**  
6 **Standards Adopted as Development Regulations in Sammamish Municipal**  
7 **Code.**

8 The 2015 Comprehensive Plan contained concurrency standards based on intersection  
9 levels of service.<sup>2</sup> In the spring of 2017, the City hired a transportation-consulting firm, Fehr  
10 & Peers, to assist with developing the City's Transportation Master Plan (TMP). *Tab 31*,  
11 02550–02551.<sup>3</sup> The TMP was intended to supplement the Transportation Element of the  
12 2015 Comprehensive Plan by creating “a 20-year road map (out to 2035) to achieve the  
13 community's vision for a safe, accessible, and reliable multimodal transportation system.” *Id.*  
14 at 02862–02964. However, abandoning the TMP update, City Council then imposed a  
15 moratorium on accepting land use applications while it went through a lengthy process to  
16 modify the concurrency standards. *Tab 141*, 17466. The City ultimately updated its  
17 Comprehensive Plan on September 18, 2018, adopting the new and expanded intersection  
18 LOS (the Expanded Intersection Standards). *Tab 31*, 03104. The City went from having a  
19 total of 23 tests (one AM test at 23 intersections) to 86 tests (an AM and PM test at 43  
20 intersections). *See Tab 188*. This represented an unprecedented degree of concurrency  
21 testing. *See Tab 151*, 17793.

22 Rather than lifting the moratorium and implementing this near quadrupling of  
23 concurrency review under Expanded Intersection Standards, a 4-3 majority of the City

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24 <sup>2</sup> While that plan gave some lip service to the concept of V/C, that concept was totally different from what was  
25 adopted ultimately in Ordinance O2019-484

<sup>3</sup> All references to “Tab” indicate the City's Tab number in its Second Amended Index of the Record. All cited  
Tabs and pages are attached hereto relying on the Tab number and bates stamped page numbers. Referenced  
Ordinances, Resolutions, transcript excerpts and Comprehensive Plan excerpts are also attached hereto.

1 Council decided to extend the development moratorium beyond a year while it added a  
2 second layer of concurrency in the form of roadway Volume-to-Capacity standards (the V/C  
3 Standards). The Council initially voted to apply the V/C Standards to just two segments on  
4 244<sup>th</sup> that might otherwise have been outside the scope of the Expanded Intersection  
5 Standards. *Tab 38*, 04164. However, by a 4-3 vote, the Council ultimately chose to abandon  
6 that limited scope and ultimately imposed V/C Standards on 22 road “corridors” and 70 road  
7 “segments,” in both directions, during both the AM and PM peak hour—thus a total of 184  
8 V/C tests. *See* SMC 14A.10.050; *Tab 188*. Combined with the 86 intersection LOS tests, this  
9 means the City’s concurrency program now involves 270 “mini-tests,” every one of which  
10 must pass before a concurrency certificate can be issued. *Tab 188*. The improper process by  
11 which the City adopted these V/C Standards as development regulations rather than as a  
12 Comprehensive Plan update is discussed in detail in Section D below.

13 **C. The City Only Adopted Its Novel V/C Standards after Highly Irregular Process.**

14 In order to adopt the new V/C Standards, the City went out of its way to avoid further  
15 comprehensive planning and environmental review, taking advantage of the moratorium  
16 umbrella to adopt interim and then permanent V/C Standards as development regulations.

17 *1. Council Limits New Concurrency Standards to Intersection LOS.*

18 After nearly a year of concurrency review and six months into the moratorium, the  
19 City Council adopted a Resolution on April 17, 2018, finalizing the type of LOS standards  
20 the concurrency update would adopt. *See* RESOLUTION No. R2018-789. Critically, the  
21 Resolution directed staff to develop *intersection LOS standards only*. *Id.* at Section 1. Those  
22 ended up being the Expanded Intersection Standards. Nothing suggested the City would later  
23 pursue V/C Standards. The Resolution set a date of July 17, 2018, for final adoption of the  
24 Expanded Intersection Standards through amendments to the Transportation Element of the  
25 Comprehensive Plan. *Id.* At that point, the moratorium could be lifted.

1           2. *Council Reverses Course and Pursues V/C Standards.*

2           On July 10, 2018, City staff presented the Council with the Expanded Intersection  
3 Standards, consistent with the direction in the Resolution and a unanimous recommendation  
4 of the Planning Commission. *See Tab 39, 04225.* These included 20 additional intersections  
5 to the concurrency test, for a total of 43 intersections, and added an AM peak hour test. With  
6 the Transportation Improvement Plan adopted the month before, any failures created by these  
7 expanded intersection LOS Standards could be cured. *See 3/7/19 Transcript at 22-23*  
8 (comments of Deputy Public Works Director Cheryl Paston). Thus, concurrency certificates  
9 and development permit applications could be accepted after the moratorium was lifted.

10           However, at the last minute, a 4-3 majority of the Council decided that the Expanded  
11 Intersection Standards were not satisfactory, and a new volume-to-capacity test (the V/C  
12 Standards) should be added. This was contrary to the approach and direction the Council had  
13 given to City staff for several months. In fact, the Council had already voted five times to  
14 proceed with the expanded intersection level of service standard as the City's only  
15 concurrency standard, *see 7/10/18 Transcript at 23*, as confirmed in the April Resolution. The  
16 abrupt change in direction was in the words of one Councilmember, "a pretty crazy left turn"  
17 at the "11th hour." *See 7/10/18 Transcript at 23.*

18           Despite the differences of views, all Councilmembers understood—as did staff—that  
19 any new V/C Standards would require an amendment to the City's Comprehensive Plan. The  
20 only question was whether it would be done through the 2018 emergency Comprehensive  
21 Plan process or the regular 2019 Comprehensive Plan process. At no point during the lengthy  
22 discussion with City staff and the City attorney was there any discussion of trying to enact  
23 V/C Standards as an interim *development regulation*. *See 7/10/18 Transcript.* Accordingly,  
24 the approved motion was "to approve no comp plan changes tonight, and we incorporate the  
25 capacity table *into the comp plan* at a future date." *See 7/10/18 Transcript; Tab 40, 04630.*

1 The four Council members promoting these surprising V/C Standards offered no  
2 coherent explanation for abandoning the intersection-only approach unanimously adopted in  
3 the April Resolution. Vague references were made to the need for a “check and balance,” and  
4 a better approximation of “user experience,” although none of this was supported by staff, the  
5 traffic consultant, or data. *See, e.g., 7/10/18 Transcript at 6, 15.*

6 3. *City Council Directs Staff to Provide V/C Standards for Two Segments on 244<sup>th</sup>*  
7 *Only.*

8 On July 17, 2018, the Council directed staff to produce a V/C standard for 244<sup>th</sup>  
9 Avenue. *Tab 38, 04164.* The plan was to add the V/C Standards for these two segments on  
10 244<sup>th</sup> to the Expanded Intersection Standards when updating the Comprehensive Plan in  
11 September 2018, and two public hearings were scheduled. *Id.* The rationale for applying V/C  
12 Standards to these two segments of 244<sup>th</sup> was that those were uniquely outside the Expanded  
13 Intersection Standards.

14 4. *City Council Again Changes Course, and Directs City-Wide V/C Standards.*

15 On September 4, 2018, City staff and the City’s consultant Fehr & Peers presented  
16 the Expanded Intersection Standards with a V/C standard for the two segments on 244<sup>th</sup>  
17 Avenue. *Tab 35, 03676.* The Council held a public hearing with the expectation that the  
18 Expanded Intersection Standards and V/C Standards for 244<sup>th</sup> would be adopted as part of the  
19 emergency comprehensive plan update on September 18. *Tab 32, 03163.* That would allow  
20 the moratorium to expire on its terms on October 1, 2018.

21 On September 11, the Council decided to move forward with adopting the Expanded  
22 Intersection Standards through the comprehensive plan update on September 18. *Tab 34,*  
23 *03400.* But separately, the Council also directed staff to continue to work on a “V/C (volume  
24 to capacity ratio) policy,” and for the Council “to determine a V/C scope and methodology  
25 by October 16, 2018.” *Id.* Thus, the Council decided to pursue the adoption of the V/C

1 Standards *outside* the comprehensive plan process. By setting a deadline of October 16, 2018  
2 for adoption of a scope and methodology, the Council effectively precluded any meaningful  
3 public participation in the formulation of this second layer of LOS testing. *Id.* at 03401.

4 On September 18, 2018, the City Council adopted the Expanded Intersection  
5 Standards as an update to its Comprehensive Plan. *Tab 32*, 03164. Not a single commenter  
6 with expertise on traffic models or concurrency, including City staff and Fehr & Peers,  
7 expressed any concerns with this option. *Tab 32*, 03164–03166. Staff explained that the  
8 proposed LOS standards, even though far more extensive than before, would be met both  
9 under existing conditions and in the 6-year timeframe relevant for purposes of concurrency  
10 testing. *Tab 35*, 03677. Thus, if the City were to lift the moratorium, new development  
11 permitting could again move forward. Recognizing this fact, the same Council majority  
12 extended the moratorium for a third time at this meeting. *Tab 32*, 03165-03166.

13 By another 4-3 vote, the Council also rejected City's staff's proposal which Fehr &  
14 Peers had been developing over the weeks since July 17, 2018. *Id.* The Council majority  
15 directed Fehr & Peers to abandon the work it had been doing based on a Florida Department  
16 of Transportation methodology and embark on a quest to develop V/C Standards based on  
17 the Highway Capacity Manual (HCM), despite Fehr & Peers' concerns that the HCM is not a  
18 well-documented methodology for the purposes the City wanted to use it. Deputy Public  
19 Works Director Cheryl Paston previously cautioned Council:

20 As we move forward, as we look at our options, if it's not FDOT [Florida Department  
21 of Transportation], *we'll have to come up with some other method that, frankly, might*  
22 *not be documented*, which we heard clearly from the council that you wanted  
23 something that was clearly documented and had been put in practice so that we  
24 weren't you know, completely on the cutting edge.

25 *See 9/4/18 Transcript at 94-95 (emphasis added).*

1           5. *City Adopts New V/C Standards as Interim Development Regulations.*

2           In a rush, from September 4 to November 20, 2018, and devoid of any plan for public  
3 participation, the County majority adopted a new layer of concurrency standards in the form  
4 of V/C Standards that apply to 22 corridors and 70 segments in both directions throughout  
5 the entire City—a total of 182 V/C measurements. *Tab 28*, 02459. At no point did the  
6 Council ask for advice or recommendation from City staff or Fehr & Peers about whether  
7 such an expansion was warranted in light of the Expanded Intersection Standards. Moreover,  
8 rather than taking the time to adopt these standards through the Comprehensive Plan after an  
9 orderly public participation process, the Council pushed the new V/C Standards through as  
10 interim development regulation under Ordinance O2018-477.

11           6. *New V/C Standards Create a De facto Moratorium on Development in the City.*

12           Of the 182 road corridors and road segments tested under the new V/C Standards,  
13 only one created a concurrency failure: the northbound corridor on Sahalee Way in the AM  
14 peak hour. *See* SMC 14A.10.050, Figures 1 and 2. The failure was minor—the corridor  
15 would operate at a 1.16 V/C ratio in the 6-year time horizon rather than the allowable 1.10—  
16 but the consequence was severe. Even if a development proposal passed *all* 86 intersections  
17 of the Expanded Intersection Standards and 181 of the 182 V/C Standard road segments and  
18 corridors, the City would not issue a concurrency certificate—and thus could not accept a  
19 development permit application—if the new development were to add a single car to Sahalee  
20 Way during the AM peak hour. *See* 3/7/19 Transcript at 34, 58-59 (Paston comments).

21           On December 4, 2018, only after having secured this de facto moratorium in the form  
22 of the new V/C Standards did the City Council lift the formal moratorium that had been in  
23 place for over a year. *See* ORDINANCE O2018-479. Under the V/C Standards, a formal  
24 moratorium was no longer necessary as no new development could be applied for if it were  
25 to add a single car trip to Sahalee Way at the AM peak hour.



1           7. *City Council Makes the V/C Standards Permanent.*

2           The City Council then directed City staff to undertake the process to make the interim  
3 V/C Standards permanent. At the one public hearing held by the Planning Commission on  
4 March 7, 2019, Commission members expressed frustration about the backwards process  
5 under which it was asked to somehow make a “recommendation” about V/C Standards that  
6 had already been adopted by the City Council:

7           Member Indapure: “typically, you know, the Planning Commission would take  
8 something on, deliberate on that and make recommendations to the city council. For  
9 me, this seems a little bit the other way around. I think we have been given a solution,  
10 and so I’m a little confused on what to do with that going forward, especially after  
11 hearing all the comments. So for me, it just seems that the council has already come  
12 to a decision on what they want to do so . . . I would like to recommend that we do  
13 not take any formal recommendation on this—on the especially V/C, and maybe the  
14 council is probably the best body to take this forward.

15           Member Armato: “I don’t know that I could vote to recommend at this point, so I  
16 think based on our purview, to me, the best bet might be to just not make a  
17 recommendation. They’ve already made up their minds.”

18           3/7/19 Transcript at 78–79. The Planning Commission was not presented with any SEPA  
19 analysis or consistency analysis under the Comprehensive Plan. One Commissioner  
20 commented that the Sahalee Way “failure” under the V/C Standards was minor and asked  
21 whether the City had developed information about the costs of curing the failure; he wanted  
22 to make an informed judgment about whether it might be advisable to increase the allowable  
23 V/C ratio rather than forcing potentially very expensive improvements to cure a minor  
24 failure. *Id.* at 40. The City staff and consultant acknowledged they had not yet developed  
25 such cost estimates. *Id.* at 40-52. Despite this lack of information and reservations about the  
process, the Planning Commission recommended approval of the already-adopted V/C  
Standards on the same night as the hearing.

          The City held hearings on the V/C Standards on May 7 and May 23. During these  
meetings and throughout the concurrency process, the Council received comments in several

1 memos from Kevin Jones of the Transpo Group. Mr. Jones is a licensed Professional  
2 Engineer, a certified Professional Traffic Operations Engineer, and a member of the Institute  
3 of Transportation Engineers with over 20 years of traffic engineering and transportation  
4 planning consulting experience. *See Tab 148.* Transpo's concerns were echoed and  
5 confirmed by a Memo prepared by another traffic consultant, Jeff Schramm of  
6 Transportation Engineering Northwest (TENW), on behalf of the Master Builders  
7 Association. *See Tab 84.* Mr. Jones and Mr. Schramm provided a comprehensive critique of  
8 the basic underpinnings the City's V/C Standards, in particular the blatant flaws in the way  
9 "capacity" was determined through the novel, untested, and unprecedented "HCM-plus"  
10 methodology. *See id. and Tabs 181, 152 and 174.*

11 In light of the new and untested nature of the methodology the City used to develop  
12 the V/C Standards (discussed in Section F below), one would have expected the City Council  
13 to provide a robust public participation process, meaningfully engage the Planning  
14 Commission, conduct SEPA review and ask its consultants to respond to the cogent critiques  
15 of Mr. Jones and Mr. Schramm. None of this happened. The Council adopted V/C Standards  
16 as permanent development regulations on May 23, 2019 under Ordinance O2019-484.

17 *8. City Adopts a TIP that Temporarily Lifts the De facto Moratorium.*

18 When the time came to adopt the annual update to its Transportation Improvement  
19 Plan in June 2019, the City did not put the effort into performing a consistency analysis or  
20 updating the Comprehensive Plan based on the foregoing actions. However, City staff did  
21 advise the Council of its GMA obligation to address the concurrency failure on Sahalee Way  
22 created by the V/C Standards. *Tab 15, 01432–01435* (staff advises Council that it "must now  
23 address" the Sahalee Way concurrency failure in its June TIP). A 4-2 majority of the Council  
24 eventually accepted this recommendation and adopted a TIP on June 18, 2019 that involved  
25

1 additional improvements to Sahalee Way that cured the existing concurrency failure. *Tab 6*,  
2 00934–00935.

3 *9. City Council Reinstates De facto Moratorium.*

4 Two months after the TIP was adopted, City staff issued a concurrency certificate for  
5 a phase of development in the Town Center. *See Tab 180*, 018245 (*see link to City’s News*  
6 *Release of 8/15/19, announcing issuance of concurrency certificates for Town Center*  
7 *Projects*). This was the first Town Center project to seek approval since the City had imposed  
8 the moratorium. It included approximately 300 apartment units and 57 townhomes in the  
9 Town Center A-1 zone. *Id.* The City’s Comprehensive Plan notes that “given the cost of  
10 single-family housing and because mixed use and multifamily housing types are typically  
11 more affordable than single-family, detached housing, the City recognizes the importance of  
12 having sufficient zoned capacity for multi-family and Town Center mixed use residential  
13 development in order to meet [housing] affordability needs.” Comprehensive Plan at 79.

14 Immediately upon its issuance, the 4-member majority scheduled a Special Meeting  
15 of the full Council on August 20, 2019 to question staff about concurrency. City staff  
16 prepared a Memo explaining how issuance of the concurrency certificates for the Town  
17 Center was an administrative decision that had been issued in the normal course in adherence  
18 to all regular standards and protocols. *Tab 180*, 18247 (the minutes reflect an immediate  
19 motion to audit the Town Center concurrency certificates). The City Attorney explained to  
20 the Council that “the Council adopted a TIP [on June 18, 2019], so it is in force. It not only  
21 is—applicants and property owners and citizens are not only entitled to take advantage of it,  
22 they’re required to follow it because this Council approved it.” 8/20/19 Transcript at 47-48.

23 At the end of the meeting, the 4-member majority passed a motion that prohibited  
24 City staff from applying the Sahalee Way project to future concurrency testing, even though  
25 that project had been specifically labeled a concurrency project in the June TIP. Resolution

1 R2019-839. *See Attachment A* (including Sahalee Way Project Nos. TR-05 and TR-\_\_ [sic]  
2 among those projects needed to address a concurrency failure). The effect of this motion,  
3 which was not on the agenda for the special meeting or provided to the public in advance, is  
4 that there is now again a concurrency failure on Sahalee Way because the Council removed  
5 the cure in the June 2019 TIP. Thus, the City has re-imposed a now ongoing *de facto*  
6 moratorium on any development adding one trip to the Sahalee corridor.

### 7 **III. AUTHORITY AND ARGUMENT**

#### 8 **A. Standard of Review.**

9 Gerend recognizes he bears the burden to demonstrate that the action taken by the  
10 City of Sammamish, Ordinance No. O2019-484, fails to comply with the Growth  
11 Management Act (“GMA”). RCW 36.70A.320(2). However, the City’s discretion is limited  
12 by the goals and requirements of the GMA. *King County v. Central Puget Sound Growth*  
13 *Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000). If Gerend  
14 demonstrates to the Board that the City’s action is a clearly erroneous application of the  
15 GMA, that deference is no longer appropriate and the Board will find that the action is  
16 noncompliant. *Quadrant Corporation et al. v. State of Washington GMHB*, 154 Wn.2d 224,  
17 248, 110 P.3d 1132 (2005).

#### 18 **B. The GMA’s Framework for Transportation Concurrency.**

19 The GMA requires all adopted Comprehensive Plans to include a “transportation  
20 element.” RCW 36.70A.070(6). That transportation element must include certain “sub-  
21 elements.” One such sub-element is “level of service standards for all locally owned arterials  
22 and transit routes to serve as a gauge to judge performance of the [transportation] system.”  
23 RCW 36.70A.070(b). Future development applications cannot be approved—or in the case of  
24 Sammamish the application process cannot even start—unless the applicant obtains a  
25 “concurrency certificate” from the City confirming that any additional traffic resulting from

1 the proposal will not cause levels of service to fall below City-adopted standards. SMC  
2 14A.10.040.

3 A cardinal rule of GMA planning is that all aspects of an adopted Comprehensive  
4 Plan must be internally consistent. RCW 36.70A.070. Among other things, this means LOS  
5 concurrency standards must be consistent with the comprehensive plan, including its future  
6 land use map and growth targets. *Id.* GMA regulations specifically highlight the risk that  
7 jurisdictions might utilize concurrency standards to inhibit or even stop the managed growth  
8 called for in an adopted Comprehensive Plan:

9 Counties and cities should set level of service to reflect realistic expectations  
10 consistent with the achievement of growth aims. Setting levels of service too high  
11 could, under some regulatory strategies, result in no growth. *As a deliberate policy,*  
*this would be contrary to the [GMA].*

12 WAC 365-196-840(3)(c) (emphasis added).

13 **C. Issue 1: Ordinance No. O2019-484 violates RCW 36.70A.020(11), RCW**  
14 **36.70A.035 and RCW 36.70A.140, for failing to provide an adequate public**  
15 **participation process and failing to follow the City's prescribed development**  
16 **regulation process as set forth in chapters 2.60 and 24A.15 SMC.**

17 A central guiding goal is that a city provide meaningful opportunity for public  
18 comment. RCW 36.70A.020(11); RCW 36.70A.035. The purpose of a robust public  
19 participation process is to ensure that notice of hearings are given in a manner “reasonably  
20 calculated to provide notice to property owners and other affected individuals.” *Brandi Blair*  
21 *et al. v. City of Monroe*, CPS-GMHB No. 14-3-0006c, FDO (August 26, 2014).

22 In the weeks preceding adoption of Ordinance O2019-484, it was unclear even to  
23 sophisticated participants what the City Council was planning to do at the expiration of the  
24 interim V/C Standards. With only two regular meetings left prior to the expiration, May 7<sup>th</sup>  
25 and May 21<sup>st</sup>, the public had no idea what the City Council planned to do until the afternoon  
of Friday, May 2, 2019, when information was made publicly available that City Council was  
considering making the interim concurrency regulations permanent. *See Tab 15* at 01317.

1 The challenged action, Ordinance O2019-484, was passed mere weeks later.

2 This Board has previously found that notice is the core of public participation and that  
3 without effective notice, the public does not have a reasonable opportunity to participate. *See*  
4 *Weyerhaeuser Real Estate Co. v. City of Dupont*, CPSGMHB No. 98-3-0035, FDO (May 19,  
5 1999) at 6. This Board has also stated that for notice to be effective it must, at a minimum,  
6 provide the general nature and magnitude of the proposal. *Orton Farms, et. al. v. Pierce*  
7 *County*, CPSGMHB No. 04-3-0007c, FDO (Aug. 2, 2004), at 13. In this instance, the City  
8 provided almost no notice at all.

9 It is the Planning Commission's role to substantively review and make  
10 recommendations to the City Council relating to land use ordinances and regulations. SMC  
11 2.60.040(2). Yet, it was clear from the rhetoric of the Planning Commission they believed the  
12 City Council wanted nothing more than a rubber stamped approval. 3/7/19 Transcript at 78-  
13 79. The Commission was not given the time, resources or leeway to adequately review the  
14 proposal to make the V/C Standards permanent and provide a meaningful recommendation.

15 Further, "the director of community development shall ensure the broad  
16 dissemination of information regarding the periodic update" to the Plan and development  
17 regulations. SMC 24A.15.010. The City's notice failed to inform the public about what was  
18 going on and failed to provide notice in a timely fashion for any meaningful comment.

19 **D. Issue 2: Ordinance O2019-484 violates Chapter 43.21C, including section**  
20 **43.21C.030 and WAC 197-11-070, WAC 197-11-310, and WAC 197-11-600, for**  
21 **being adopted without an adequate threshold determination and due**  
**consideration of the potential environmental impacts.**

22 Adoption of development regulations is subject to the State Environmental Policy Act  
23 (SEPA). WAC 197-11-704(b). SEPA is "an environmental full disclosure law;" the City  
24 must consider environmental impacts sufficiently to show "compliance with the procedural  
25 requirements of SEPA." *Blair et al.*, CPS-GMHB No. 14-3-0006c, 2014 WL 4627163, at 14.

1 SEPA is critical in evaluating a significant change to one of the most fundamental of the  
2 City's GMA-based obligations: transportation concurrency directly impacts the City's urban  
3 provider role. SEPA review includes not only impacts to the natural environment, but to the  
4 "built environment" as well, and that specifically includes a consideration of the impacts of  
5 the proposed regulation's "relationship to existing land use plans and to estimated  
6 population," and to various topics related to "transportation." WAC 197-11-444(2)(b)-(c).  
7 When a city drastically changes its concurrency system and introduces a significant overlay  
8 of additional regulation, comprehensive SEPA environmental review is absolutely critical.  
9 *See* WAC 197-11-704(b)(i). A city must conduct SEPA review "at the earliest possible time  
10 to ensure that planning and decisions reflect environmental values." WAC 197-11-055.

11 The City issued a Determination of Non-Significance (DNS) on June 19, 2018, when  
12 the City's concurrency system and proposed amendments to the Transportation Element were  
13 based only on the Expanded Intersection LOS standards. *See Tab 130*, 09946–967.  
14 Accordingly, everything about the June DNS only referenced these intersection-based  
15 updates to the Comprehensive Plan and Transportation Element. *Tab 130*, 09950–09972.  
16 There was no discussion in the original SEPA checklist of new V/C Standards that would  
17 radically change concurrency, planning and budgetary obligations, and how to manage  
18 development into the future.

19 The Council then proceeded with the idea of V/C Standards on July 10, 2018, albeit  
20 limited to 244<sup>th</sup> Ave on July 17, 2018. However, on September 11, 2018, the Council  
21 directed Fehr & Peers to develop the completely new V/C methodology. Then, merely two  
22 days later, the City issued an Addendum to the DNS. *Tab 130*, 09946-09947. The City did  
23 not update the checklist or perform any substantive environmental review to support this  
24 Addendum. The limited time to analyze the environmental impacts of the V/C proposal is  
25 reflected in the text of the Addendum. *Id.* at 09976–09995. Instead of seriously considering

1 how a completely new and untested V/C methodology to be applied city-wide might impact  
2 the “natural” and “built” environmental elements listed in WAC 197-11-444(1)-(2), the City  
3 added a few token sentences. *Id.* at 09975. Despite its complete change to concurrency, the  
4 City failed to perform meaningful SEPA review, issuing the Addendum with no notice or  
5 opportunity for comment. *Tab 130*, 09976–09995.

6 As a result of the emergency justification to adopt the interim regulations without a  
7 public hearing, the City did not take the time it should have to conduct SEPA review even for  
8 the initial DNS. That said, the City certainly then had many months to conduct SEPA review  
9 before its final adoption in May 2019. Yet, without explanation, and despite public input  
10 asking for SEPA review, the City disregarded its statutory duty and did not perform any  
11 SEPA review.

12 An addendum is only appropriate for the *same* proposal, unchanged. WAC 197-11-  
13 600.<sup>4</sup> Here, the proposal substantively *changed* from the LOS model to add the V/C  
14 Standards. This was a new proposal under SEPA, meaningfully changing how the City  
15 handles concurrency. WAC 197-11-784. The City’s use of an addendum was simply not  
16 appropriate. The City erred in shoe-horning the completely new V/C Standards into the prior  
17 SEPA review pertaining to the Expanded Intersection Standards without any substantive  
18 consideration of environmental impacts.

19 **E. Issue 3: In Ordinance O2019-484, the City failed to be guided by RCW**  
20 **36.70A.020 Goals (1) Urban Growth; (2) Reduce Sprawl; (4) Housing; (5)**  
21 **Economic Development; (6) Property Rights; (7) Permits; (11) Citizen**  
22 **Participation and Coordination; (12) Public Facilities and Services**

23 RCW 36.70.020 identifies a series of goals to be achieved within a city’s  
24 comprehensive plan. Cities “must use the planning goals to point the way for the enactment

25 <sup>4</sup> “Existing documents may be used for a proposal by employing one or more of the following methods: . . . (c)  
An addendum, that 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)(c).



1 of development regulations and comprehensive plans that *substantively* comply with the  
2 GMA.” *Association of Rural Residents v. Kitsap County*, CPSGMHB 93-3-0010, FDO (June  
3 3, 1994) at 423 (code publishing) (emphasis original).

4 [T]he substantive element of RCW 36.70A.020 is the heart of the GMA. All  
5 development regulations and comprehensive plans must comply with the Act's  
6 planning goals. . . . Comprehensive plans and implementing development regulations  
will be held to the highest standard of compliance ...

7 *ARL*, 93-3-0010, page 424 (FDO); *accord Rabie v. Burien*, CPSGMHB No. 93-3-0005c,  
8 FDO (October 19, 1998), at 5-6. In its haphazard path toward a foregone conclusion, the City  
9 failed to weigh the Goals in adopting the V/C Standards. Ordinance O2019-484 fails to  
10 promote *any* GMA Goal, instead thwarting several Goals in fundamental ways that destroy  
11 the effectiveness of the GMA.

12 As shown by the various arguments throughout this brief, several GMA Goals are  
13 particularly relevant for the City’s consideration in this situation: (1) Urban Growth, (2)  
14 Reduce Sprawl, (4) Housing; (5) Economic Development; (6) Property Rights; (7) Permits;  
15 (11) Citizen Participation and Coordination; and (12) Public Facilities and Services.  
16 Adoption of any regulations, including interim, without due consideration of these goals is a  
17 violation of the Growth Management Act.

18 The reason the GMA imposes an obligation on the City to meaningfully consider  
19 these goals is that such deliberation will help guide the planning process and regulatory  
20 outcome. For example, without thinking about the effect of changing a concurrency system  
21 on the larger permitting process, the City would not be able to address the confusing and  
22 unpredictable permitting process that will result in light of Goals 7, 11 and 12. If the City  
23 maintains these regulations, an applicant for concurrency will have no meaningful ability to  
24 plan for any future development. Due to the V/C Standards and the City’s reinstatement of  
25 the concurrency failure on Sahalee Way created by those V/C Standards, both staff and any

1 applicant will remain confused about, for example, whether an applicant should proceed with  
2 the pre-application process since there is no way to know what available options would exist  
3 for any new project, anywhere in the city, that would add even one car to Sahalee Way.

4 The City's disregard of these Goals is nowhere more apparent than in the actions of  
5 Council following the issuance of a concurrency certificate for the Town Center project. City  
6 staff advised the Council that it had a legal obligation under the GMA to address the  
7 concurrency failure on Sahalee Way created by the new V/C Standards, in furtherance of  
8 Goals (1), (5), (7), (11) and (12). The June 18, 2019 TIP did this, but as soon as Council  
9 realized that the TIP made it possible for Town Center development to continue, Council  
10 scheduled a special meeting—during their ordinary August recess—to prohibit staff from  
11 applying the Sahalee Way project to future concurrency testing. *See Section II.A.9.* This  
12 deliberate use of the concurrency system to stop growth flies in the face of Goals (1), (2), (4),  
13 (5), (6), (7), (11), and (12), and the admonition in WAC 365-196-840(3)(c) that cities may  
14 not misuse concurrency standards to thwart growth .

15 **F. Issue 4: Ordinance O2019-484 procedurally and substantively violates RCW**  
16 **36.70A.040, RCW 36.70A.070, RCW 36.70A.120, WAC 365-196-800, and/or 365-**  
17 **196-810, because it imposes new level-of-service standards through a**  
18 **development regulation rather than as an amendment to the Transportation**  
19 **Element of the City's Comprehensive Plan.**

20 The Transportation Element of the City's Comprehensive Plan is required to include  
21 "level of service standards for all locally owned arterials and transit routes to serve as a  
22 gauge to judge performance of the system. These standards should be regionally  
23 coordinated." RCW 36.70A.070(6)(a)(iii)(B). Transportation level of service standards must  
24 include "specific actions and requirements for bringing into compliance locally owned  
25 transportation facilities or services that are below an established level of service standard." *Id*  
at (D). The comprehensive plan is also the necessary tool for updating level of service

1 standards because the City must “make capital budget decisions in conformity with its  
2 comprehensive plan.” RCW 36.70A.120. Yet, the Plan’s Transportation Element and  
3 Background rely entirely on the Expanded Intersection Standards – without any substantive  
4 incorporation of the new V/C Standards (again, adopted only as development regulations. *See*  
5 attached Transportation Element and Background excerpts. While the Plan pays limited lip  
6 service to the concept of V/C, it does not actually adopt or integrate that as part of its  
7 transportation concurrency system in any meaningful manner. Again, Ordinance O2019-484  
8 solely adopted new development regulations with complete disregard for the Plan.

9         The City clearly has known how to adopt concurrency into its Comprehensive Plan,  
10 but utterly failed to explain why it deviated from the above requirements and simplistically  
11 adopted the V/C Standards as development regulations rather than integrating them into the  
12 Comprehensive Plan. After the adoption of the Expanded Intersection Standards as  
13 emergency updates to the Comprehensive Plan on September 18, 2018, the Council faced a  
14 self-imposed dilemma regarding the V/C Standards being developed. The Council could not  
15 adopt the V/C Standard as another emergency update because that would require additional  
16 public participation. RCW 36.70A.130(2)(b). Nor could it adopt the V/C Standards in the  
17 regular 2018 Comprehensive Plan update because they had not been docketed as required by  
18 the City Code. The Council also could not wait to adopt them as part of the 2019  
19 Comprehensive Plan update without either renewing the moratorium for a fourth time or  
20 risking opening the City to development applications (an outcome opposed by the majority).  
21 So the Council chose a shortcut: adopt the V/C Standards as interim, then permanent  
22 development regulations. The critically important requirements of the GMA were cast aside  
23 in an effort to achieve the desired substantive result.

24         The City’s review process reveals the permanent adoption of a foregone conclusion;  
25 using development regulations allowed the City to circumvent the Comprehensive Plan

1 amendment process and attendant SEPA review. Further, the City could avoid notices to  
2 public agencies and surrounding jurisdictions, thereby avoiding its duty to regionally  
3 coordinate its standards. Finally, the City could then play with its concurrency regulations  
4 without having to make the resulting capital budget decisions in conformity with  
5 comprehensive plan policies.

6 **G. Issue 5: Ordinance O2019-484 violates RCW 36.70A.040 and RCW 36.70A.070,**  
7 **RCW 36.70A.120, RCW 36.70A.130(1)(d), WAC 365-196-800, and/or 365-196-**  
8 **810 by being inconsistent with the Comprehensive Plan, Land Use and**  
9 **Transportation Elements, and/or the Town Center Plan**

10 Development regulations must be consistent with Comprehensive Plans. RCW  
11 36.70A.130(1)(d); RCW 36.70C.040; WAC 365-196-430; *Town of Woodway v. Snohomish*  
12 *County*, 180 Wn.2d 165 (2014). The *Woodway* Court explained that “communities must  
13 create comprehensive plans to express general land use policies in the community and  
14 development regulations to implement those plans.” *Woodway*, 180 Wn.2d at 173.

15 “Implement” in this context has a more affirmative meaning than merely “consistent.”  
16 “Implement” connotes not only a lack of conflict but also a sufficient scope to fully  
17 carry out the goals, policies, standards and directions contained in the comprehensive  
18 plan.

19 WAC 365-196-800.

20 Adopting an entirely new set of LOS standards as development regulations is in direct  
21 conflict with the GMA’s hierarchy and frustrates not only Sammamish’s GMA obligations,  
22 but those of neighboring jurisdictions. As the City’s own consultant testified: “setting V/C’s  
23 can feel a bit arbitrary if we’re doing that in a vacuum, not thinking about things like  
24 pedestrian connectivity, safety, cost.” 10/22/18 Transcript at 18.

25 Disregarding the foregoing, Ordinance 2019-484 is inconsistent with the current  
Comprehensive Plan, as well as the foundational Background Information chapters. The Plan

1 simply has never been substantively amended to consider the V/C Standards.<sup>5</sup> The result is  
2 inconsistency between the permanent development regulations in Ordinance O2019-484 as  
3 well as internal inconsistency and confusion within these Comprehensive Plan chapters. The  
4 thoughtful decision-making required by the GMA and addressed in Issue 4, for example, is to  
5 avoid these inconsistencies and internal document confusion.

6 The City's current Comprehensive Plan provides that the City will meet its 20-year  
7 growth target of 4,640 housing units through: (i) the 2,000 units planned for the Sammamish  
8 Town Center, and (ii) up to 3,120 units outside the Town Center. *See* Land use Background,  
9 LU.7-LU.8, LU.14. The City has previously represented that its obligation to provide  
10 housing, including affordable housing, is met through this Plan for accommodating  
11 additional housing units.<sup>6</sup> As recognized by the state's GMA regulations, however, such  
12 commitments are hollow if a City Council manipulates its concurrency standards to prevent  
13 the managed growth and affordable housing in its adopted Plan.

14 Ordinance O2019-484 fails to be consistent with Goal T.1 and Policies T.1.1, T.1.3,  
15 T.1.4 and T.1.5; Goal T.2; Housing Goal H.5, and Policy H.2.8. There was absolutely no  
16 recognition of the city's and region's growth strategy; to the contrary, the V/C Standards as  
17 implemented deliberately thwart the city's and region's growth strategies as shown by the  
18 City's action in August to remove the Sahalee Way cure after learning of Town Center  
19 concurrency certificate. The lip service to V/C in the Comprehensive Plan, without  
20 meaningful incorporation, as discussed in Issue 4, above, is shown by Policies T.1.3 and  
21

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22 <sup>5</sup> Although the City adopted limited changes to its Comprehensive Plan in September 2018, those changes were  
23 made only to accommodate the interim regulations, nothing more. Ordinance 02018-464. Those changes were  
24 focused on limited portions of the Transportation Element, leaving unchanged the more detailed concurrency  
25 system adopted in the Transportation Background Information chapter. Further, the changes made were limited  
to changes to terminology and definitions rather than a thoughtful analysis of the V/C methodology and how  
that would impact LOS decisions previously made on the basis of the intersection-based concurrency system.

<sup>6</sup> *See Stickney v. CPSGMHB*, 453 P.3d 25, 26–28 (2019); *Stickney v. City of Sammamish*, CPSGMHB Case No.  
15-3-0017, FDO (June 13, 2016); *Stickney*, Order on Compliance (March 10, 2017).

1 T.1.4, which utterly fail to recognize that the V/C Standards are now the primary regulatory  
2 tool and entirely eclipse the former LOS standard without justification or reconciliation.  
3 Otherwise, concurrency modeling is purely limited to the intersection LOS Standards. *See*  
4 *e.g.* Transportation Background, pages T.23-28.

5 Policy LU.5.2 requires the City to use the future land use pattern to address traffic  
6 congestion. Yet, the V/C Standards provide no meaningful tie to the City's adopted future  
7 land use patterns. Policies LU.7.2, 7.4 and 7.6 require the City to promote and plan for  
8 connectivity and road connections. Policy LU.7.10 requires the City to encourage  
9 engagement in the creation of plans and regulations; as shown in Issue 1, the City's process  
10 in adopting Ordinance 2019-848 utterly failed to provide meaningful civic engagement.

11 The Plan acknowledges that the land use assumptions used in calculating future  
12 traffic demand are based upon the Land Use Element of the Plan, which is in turn based on  
13 King County's and the cities' residential and employment allocations for Sammamish.  
14 Transportation Background, page T.41. "Key elements of the land use forecast include infill  
15 single family residential development in vacant and underdeveloped land identified in the  
16 buildable land analysis and the realization of the Town Center." *Id.* Ordinance O2019-484  
17 actively prevents realization of these assumptions.

18 The failure to incorporate these radical V/C Standards in the Comprehensive Plan  
19 means there is a lack of any financing strategy to address shortfalls in contravention of the  
20 Plan's policy directives. Capital Facilities Goal CF.1, Policies CF1.1, CF 1.2, CF 2.5, and CF  
21 2.6, require the City to identify and provide facilities and services to support existing and  
22 new development as that is envisioned in the land use element. CF2.5 and 2.6 require the  
23 City to identify needs for facilities based on the adopted levels of service and provide those  
24 necessary facilities. Yet, nothing in Ordinance O2019-484 provides a mechanism to address  
25 these policies – as shown by the \$53 million failure on Sahalee Way deliberately created by

1 the V/C Standards. While there are several “options” in the event of revenue shortfalls  
2 identified in the Comprehensive Plan, Ordinance O2019-484 considers none of them and the  
3 June 2018 TIP has been precluded from doing so. Again, as discussed in the next issue, using  
4 concurrency as a strategy to limit growth is contrary to the GMA. WAC 365-196-840(3)(c).

5 Finally, in adopting “any development regulation intended to carry out a  
6 comprehensive plan,” the City must make a specific finding in the Ordinance that the  
7 regulation is consistent with and implements the comprehensive plan. WAC 365-196-810.  
8 The Council did not do this. Ordinance O2019-484 certainly mentions the fact that certain  
9 chapters of the Sammamish Municipal Code must be consistent with the City’s  
10 Comprehensive Plan and Transportation Element, but there is no finding that the V/C  
11 Standards are consistent. Instead, there is a finding that “the proposed code amendments  
12 meet the City’s goals and objectives for transportation concurrency and level of service for  
13 road segments and corridors.” In essence, the 4-member majority of Council determined only  
14 that Ordinance O2019-484 is consistent with their goals, which apparently include stopping  
15 urban development in the City indefinitely and without a plan for “bringing into compliance  
16 locally owned transportation facilities or services that are below an established level of  
17 service standard.” RCW 36.70A.070(6)(a)(iii)(D).

18 **H. Issue 6: Ordinance O2019-484 violates RCW 36.70A.040, RCW 36.70A.070(6),**  
19 **WAC 365-196-430 and/or WAC 365-196-840 by imposing new level of service**  
20 **standards based on an erroneous methodology for determining roadway**  
21 **capacities.**

22 LOS standards judge performance of the City’s transportation system. RCW  
23 36.70A.070(6)(a)(iii)(A); *see also* WAC 365-196-430(e) (LOS standards “serve to monitor  
24 the performance of the system, to evaluate improvement strategies, and to facilitate  
25 coordination between city, county, and state transportation investment programs”). They  
guide a city’s future decision-making about needed capital improvements and extent of

1 development allowed before further improvements are needed. *See generally*  
2 RCW 36.70A.060(6)(a)-(b). A City violates these GMA rules if the methodology used to  
3 develop concurrency is so defective that the standards cannot accurately and reliably perform  
4 these functions. Such fundamentally defective LOS standards must be declared clearly  
5 erroneous under RCW 36.70A.320(3).

6 The City applies the V/C Standards in concurrency testing as follows:

7 (1) The City's V/C Standards consist of AM and PM peak-hour concurrency  
8 standards for 11 roadway corridors and 35 roadway segments, in both directions, during both  
9 the AM and PM peak-hour—thus a total of 184 V/C Standards. SMC 14A.10.050.

10 (2) A "corridor" is simply a collection of "segments." Thus, for example, the  
11 Sahalee Way—228<sup>th</sup> Avenue North Corridor consists of five segments.

12 (3) The City adopted a V/C Standard of 1.4 for "segments" and 1.1 for "corridors."  
13 For concurrency purposes, this means that if the vehicles trips generated by a proposed  
14 development cause the volumes of a measured segment to exceed 1.4 times its "capacity", or  
15 a corridor to exceed 1.1 times its "capacity" (calculated as the weighted average of the  
16 segments' capacity), a concurrency certificate cannot be issued.

17 *1. Fehr & Peers Recommended that the City Council Not Use V/C Standards for*  
18 *Concurrency Testing.*

19 The Council's decision to create new V/C Standards came at the last minute, just as it  
20 was on the brink of adopting the expanded intersection LOS standards that its traffic  
21 consultant, Fehr & Peers, had been working on for nearly a year. Initially, the Council tasked  
22 Fehr & Peers with developing V/C Standards for just two segments on 244<sup>th</sup> that may have  
23 escaped intersection LOS concurrency review. However, the City eventually directed Fehr &  
24 Peers to develop V/C Standards that would apply expansively regardless of whether a given  
25 segment or corridor was already tested through intersection LOS standards.

The Council held a Special Study Session on October 22, 2018, to receive an update  
from Fehr & Peers on the effort to develop V/C Standards. After some discussion, one  
Councilmember raised a concern that the Council was "kind of winging it" in trying to set



1 V/C Standards in such a compressed timeframe and without sufficient consideration of the  
2 recommendations of its consultants. He asked Ms. Breiland of Fehr & Peers for her  
3 recommendation. She responded that her recommendation has been to use the “intersection  
4 level of service that’s now in your concurrency program.” 10/22/18 Transcript at 18. The  
5 Councilmember returned to the question later in the meeting:

6 Councilmember Valderrama: And from what I’m hearing Victor [Salemann] and  
7 Kendra [Breiland] and staff saying, and it makes a lot of sense to me is stick with  
8 levels of services of intersection initially, use this as an analysis tool that we can look  
9 at hot spots, prioritization to be able to look at what’s taking place. Is that correct or  
10 am I mischaracterizing?

11 Mr. Breiland: Well that was my recommendation, although I’m listening to Council  
12 and I think you guys are going a different way.

13 10/22/18 Transcript at 39-40. In short, the record demonstrates that the professional  
14 recommendation of the City’s traffic consultant, Fehr & Peers, was that the City rely on the  
15 expanded intersection LOS standards only—as indeed was the Council’s intention as  
16 expressed in the April 2018 recommendation. Fehr & Peers counseled that if for some reason  
17 the Council felt compelled to impose V/C concurrency standards, it should not do so until, at  
18 a minimum, the Council had considered (i) the Transportation Master Plan and its variety of  
19 multi-modal solutions for improving transportation in the City, and (ii) the costs of curing  
20 whatever “failure” the new V/C Standards might create.<sup>7</sup>

21 The Council chose to ignore these key recommendations. Only *after* adoption of both  
22 the interim and permanent V/C Standards, when the time came for the annual TIP update, did  
23 the Council finally consider the costs of curing the concurrency failure it had created on the  
24 Sahalee Way corridor. The failure was only by 1.8%,<sup>8</sup> but the cost to cure that failure was

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25 <sup>7</sup> The City’s consultant Victor Salemann noted that a different V/C Standard would be advisable for a corridor  
such as Sahalee Way if the cost of curing the failure caused by a 1.1 V/C Standard was too expensive. *See*  
10/22/18 Transcript at 35-36; *see also* 10/22/18 Hearing Transcript at 52-53; 11/13/18 Hearing Transcript at 27.

<sup>8</sup> *See* SMC 14A.10.050, Figure 1 (showing the Sahalee Way—228<sup>th</sup> Avenue North Corridor operating at a V/C  
ratio of 1.12 for northbound traffic in the AM peak hour, .02 over the 1.1 maximum).

1 \$53 million as reflected in the June 2019 TIP. R2019-839. The City's consultant Mr.  
2 Salemann had specifically cautioned the Council that such disparity between the extent of the  
3 failure (1.8%) and the cost of the cure (\$53 million) would be a situation where the City  
4 would want to adjust the V/C Standard. 10/22/18 Transcript at 35. But instead of following  
5 this straightforward recommendation, the Council pursued a sleight of hand: First, it adopted  
6 the \$53 million fix in the June 2019 TIP to meet its legal obligation to address a concurrency  
7 failure. Then, Council immediately deleted this fix for concurrency purposes as soon as it  
8 learned it was allowing development in the Town Center in August 2019.

9 *2. The "HCM-Plus" Methodology.*

10 After receiving Council's direction on October 16, 2018, to establish a V/C test based  
11 on the Highway Capacity Manual (HCM), Fehr & Peers endeavored to deliver the Standards  
12 to the Council for adoption a month later. Fehr & Peers came up with what it called an  
13 "HCM-Plus" methodology to calculate capacity. The methodology is described in a  
14 memorandum prepared by Fehr & Peers and provided to the City Council and made available  
15 to the public on November 16, 2018 (hereafter, "Methodology Memo"), just two business  
16 days before the Council adopted the interim V/C Standards.<sup>9</sup> The validity of the City's V/C  
17 Standards depends entirely on the validity of this HCM-Plus methodology that Fehr & Peers  
18 was forced to cobble together in a matter of weeks, outside any thoughtful and deliberative  
19 public participation process. If the "capacity" numbers that result from this methodology do  
20 not reliably reflect the roadway's actual capacity, the resulting V/C standard cannot serve any  
21 of the purposes LOS standards are intended to serve under the GMA. As shown below,  
22 HCM-Plus is a clearly erroneous methodology for purposes of establishing GMA level-of-  
23 service standards.

24  
25 <sup>9</sup> See SMC 14A.10.050(2)(The corridor and segment capacities were calculated as described in the November  
16, 2018, Memo prepared by Fehr & Peers).

1                   a. *Fehr & Peers Never tried to Calculate “Capacity” as Defined in the*  
2                   *HCM.*

3                   The “capacity” numbers that the City adopted with the V/C Standards in SMC  
4                   14A.10.050, Figures 1 and 2, do not reflect the actual “capacity” of those roadways as that  
5                   term is used in the HCM and is generally understood by traffic engineers.<sup>10</sup> As Kevin Jones  
6                   of Transpo noted, the “capacity” numbers that Fehr & Peers Memo provided and the Council  
7                   eventually adopted were far below capacity as defined in the HCM. *Tab 174*, 17912. That  
8                   point was eventually acknowledged by the City’s consultants.<sup>11</sup> Unfortunately Fehr & Peers  
9                   regularly used the term “capacity” throughout the process in communications with the  
10                  Planning Commission and the City Council, creating a misunderstanding that the numbers in  
11                  the V/C tables reflected capacity as that number is understood in the HCM and traffic  
12                  engineering professionals. City staff and Fehr & Peers should have clarified this point and  
13                  explained that what they were calling capacity was, in fact, simply an estimated LOS E peak-  
14                  hour service volume derived from Table 16-16 of the HCM (as explained further below). *See*  
15                  *Tab 177*, 18022. The continued use of the term “capacity” in public and Council  
16                  communications, and ultimately in the development regulations (SMA 14A.10.050, Figures 1  
17                  and 2), is clearly erroneous in that it suggests the roadways are far more degraded or closer to  
18                  actual capacity than they are.

19                   b. *The HCM Table 16-16 is Not a Valid Basis to Establish a Concurrency*  
20                   *Test.*

21                  If the numbers referenced as “capacity” in the City’s V/C Standards are not, in fact,

22                  <sup>10</sup> The HCM defines capacity as “the maximum sustainable hourly flow rate at which persons or vehicles  
23                  reasonably can be expected to traverse a point or a uniform segment of a lane or roadway during a given time  
24                  period under prevailing roadway, environmental, traffic, and control conditions.” *Tab 177*, 17944.

25                  <sup>11</sup> Victor Salemann of Transportation Solutions, Inc. explained to the Council that the maximum capacity of  
                  East Lake Sammamish Parkway is *not* the 881 trips that the City’s V/C Standards indicate is the capacity, but  
                  rather at least 1250 trips based on the historical measurements. 11/13/18 Transcript at 41-42. Mr. Salemann  
                  also acknowledged that the capacity of Sahalee Way was understated. *Id.* at 55; *see also* 11/13/18 at 59-60 (Mr.  
                  Salemann confirming that the number in the capacity table for Sahalee Way was at least 25% less than its actual  
                  capacity). The City’s other expert, Ms. Breiland of Fehr & Peers, agreed. 10/16/18 Transcript at 13.

1 capacity numbers, then what are they? As explained below, they are extremely approximate  
2 and unreliable estimates of peak-hour service volumes that cannot serve as GMA-compliant  
3 LOS standards due to the errors below.

4 As stated in the Fehr & Peers Methodology Memo, the “capacity” numbers are based  
5 on Table 16-16 of Chapter 16 of the HCM. The Table allows an estimate of *daily* traffic  
6 volumes if one has actual volumes for a particular *peak hour*. In the City’s case, Fehr &  
7 Peers did the reverse: it started with the daily volume estimate in Table 16-16 for an LOS E  
8 roadway condition, and then backed into a peak-hour volume by applying the factors in the  
9 Table. Three key points about Table 16-16 demonstrate its fundamental unsuitability as a  
10 concurrency methodology.

11 First, as the HCM expressly states, the Table provides volumes for a given roadway  
12 only by assuming the roadway has certain characteristics. *Tab 177, 18021*. The long list of  
13 assumed conditions—at least *fifteen* in all—are stated in the “NOTES” that follow the table.  
14 *See Tab 177, 18022*. They include specific assumptions about the length of the roadway, the  
15 spacing of traffic signals, the traffic signal’s cycle time, and number of cars turning at each  
16 signal. If a roadway lacks any of these assumed conditions, the resulting volumes it is  
17 estimated to handle is drastically different. It is undisputed that neither Fehr & Peers nor City  
18 staff ever evaluated whether given roadways contained these fifteen conditions. Fehr & Peers  
19 tried to make some adjustments to the Table 16-16 numbers based on four characteristics  
20 (turn lanes, medians, flashing yellow lights, and ITS), but as stated in unrebutted comments  
21 provided by Transpo, these small adjustments did not come close to overcoming the  
22 significant errors created by the grossly simplistic assumption that a given roadway had  
23 fifteen characteristics when it, in fact, may not have had *any* of those conditions. *Tab 188,*  
24 *18962.*

1 Second, after assuming all of these conditions, Table 16-16 then estimates capacity  
2 based on just two factors: the number of lanes and the speed limit. This means that other  
3 ways to improve traffic flow—such as the installation of roundabouts—will not register as  
4 increased capacity under Table 16-16’s extremely simplistic methodology. If roundabouts  
5 were installed at the intersection of Sahalee Way and SR 202, and traffic flow thus improved  
6 along Sahalee Way, the measured V/C ratio would actually become *worse* under the HCM-  
7 Plus methodology. *Tab 174*, 17913. Volumes would increase, but measured capacity would  
8 remain the same because Table 16-16 does not recognize roundabouts as a capacity  
9 improvement. As stated by Transpo in comments during the Council hearing in May 2019:  
10 “This absurd result is yet another way in which the City’s roadway LOS standards are  
11 fundamentally flawed.” *Id.*

12 Third, given the number of assumed conditions, the HCM counsels extreme caution  
13 in how the service volumes in Table 16-16 are used:

14 Exhibit 16-16 is provided for general planning use and *should not be used to analyze*  
15 *any specific urban street facility or to make final decisions on important design*  
16 *features*. A full operational analysis using this chapter's methodology is required for  
such specific applications.

17 *Tab 177*, 18022 (emphasis added). Because the numbers in Table 16-16 are only rough  
18 approximations based on fifteen assumed roadway conditions, the HCM then includes three  
19 full paragraphs *immediately* below the Table that caution how the information should be  
20 used. *Id.*

21 [16-16] is useful in evaluating the overall performance of a large number of urban  
22 streets within a jurisdiction, *as a first pass* to determine where problems *might* exist  
or arise, or in determining where improvements *might* be needed.

23 *Id.* However, contrary to the HCM’s intent, the Council overlooked these cautions and tried  
24 to use Table 16-16 to establish specific GMA levels-of-service standards. As Kevin Jones of  
25 Transpo explained in public hearing comments:

1 The reason the HCM inserts these caveats is that it recognizes that the capacity  
2 numbers are based on an extremely limited set of factors (number of lanes and posted  
speed limit), with no consideration of local factors.

3 The HCM states specifically that it should be used as a “first pass” analysis, yet the  
4 City is now using those numbers for a definitive PASS/FAIL test to determine  
whether a proposed development can proceed.

5 *Tab 188, 18962.* Notably, although Fehr & Peers cut and pasted Table 16-16 into the  
6 Methodology Memo, it conspicuously omitted the three cautionary paragraphs that  
7 immediately followed. The record is devoid of any effort by the consultant to explain to these  
8 warnings to City Council, when the HCM expressly stated it should not be used for such a  
9 purpose. If the three paragraphs following Table 16-16 had been provided in the  
10 Methodology Memo, both the Council and the public would have been afforded a full  
11 opportunity to provide informed comments about why Table 16-16 was such an unsuitable  
12 foundation for GMA level-of-service standards. The above flaws are not minor ones that  
13 might be overlooked and cast aside as within the City’s discretionary authority. They are  
14 foundational flaws that render the V/C Standards clearly erroneous level-of-service standards  
15 under the GMA.

16 **I. Issue 7: Ordinance No. O2019-484 violate RCW 36.70A.110(1)-(4) by precluding**  
17 **urban densities, failing to provide areas and densities sufficient to permit**  
18 **projected growth, locating growth in areas that have adequate public facilities or**  
**are characterized by urban growth, and failing to provide urban services.**

19 The GMA imposes an affirmative duty on Sammamish to encourage urban growth.  
20 To the extent the arguments below allege that Ordinance O2019-484 is inconsistent with the  
21 City’s Comprehensive Plan, Petitioner hereby incorporates them into Issue 5 above.

22 [J]ust as the GMA has required counties to alter past practices by discouraging more  
23 dense and intense development in rural areas, so, too must cities alter past practice by  
24 now actively encouraging urban growth within their corporate limits and their county-  
designated UGAs.

25 . . .

1        *The Board holds that the GMA imposes an affirmative duty upon cities to “give*  
2        *support to,” “foster” and “stimulate” urban growth throughout the jurisdictions’*  
3        *UGAs within the twenty-year life of their comprehensive plans.*

4        *Kaleas v. Normandy Park*, CPSGMHB Case No. 05-3-0007c, Final Decision and Order (July  
5        19, 2005) *citing Benaroya et al. v. City of Redmond (Benaroya I)*, CPSGMHB Case No. 95-  
6        3-0072c, Finding of Compliance (March 13, 1997) at 8 (emphasis in original).

7        Cities are required to encourage urban growth and act as the primary providers of  
8        urban governmental services. RCW 36.70A.020(1); RCW 36.70A.110. A City’s duty does  
9        not end at the point when it determines it can accommodate growth targets that it has been  
10       assigned. *Kaleas*, FDO at 13. For example, the Board ruled that Normandy Park was out of  
11       compliance with the GMA even though it was able to accommodate the 20-year growth  
12       target because Normandy Park zoned 84% of the City for low density, large lot development.

13       Therefore, Normandy Park *may not close its eyes, or borders, to growth just because*  
14       *it can accommodate the growth targets it is assigned.* It must also foster and stimulate  
15       urban growth within its borders—in appropriate locations and in a compact urban  
16       form.

17       *Kaleas*, FDO at 13 (emphasis added).

18       The City violated its duty to affirmatively foster and stimulate growth under RCW  
19       36.70A.110 when it adopted Ordinance No. O2019-484 because there is a critical failure to  
20       plan for any growth that adds trips to Sahalee Way, meaning that the City is not locating  
21       sufficient development in areas with adequate public facilities and/or failing to provide urban  
22       governmental services to those areas.

23       Requiring V/C Standards to be adopted through a Comprehensive Plan update, and  
24       specifically as a sub-element of the Plan’s Transportation Element, ensures that the other  
25       goals and policies of the Comprehensive Plan are considered, so that the goal of internal  
26       comprehensive plan consistency can be achieved. For example, it ensures that the 20-year  
27       (2035) growth forecast and land use assumptions are appropriately integrated with the LOS

1 Standards as required by the GMA. Any responsible LOS standard will take into account the  
2 20-year growth horizon, and will not set a V/C Standard inconsistent with the growth  
3 anticipated over the 20-year time horizon.

4 Petitioner is not arguing that the V/C Standards are inevitably inconsistent with the  
5 City's 20-year growth target but that the rushed methodology and adoption process is flawed.  
6 The V/C Standards are improper because the City Council failed to even consider how  
7 meeting growth targets would be accomplished without sufficient urban governmental  
8 facilities, and did not give City staff and Fehr & Peers the time to undertake that critical  
9 analysis. Without that information, the City Council was unable to determine extent of  
10 "failures," what failures were already cured with the existing TIP, what additional failures  
11 would occur, and what the incremental cost of those cures would be, and whether, in light of  
12 those costs, the V/C Standards could be modified to avoid a cure. The City Council was  
13 flying in the dark and trying to set V/C Standards in a vacuum without regard to the other  
14 goals and objectives of the City's Comprehensive Plan.

15 In light of the GMA requirements regarding internal consistency, the City's  
16 consultant Victor Salemann recommended the City Council consider the 20-year growth  
17 horizon before adopting any V/C Standards. 10/16/18 Transcript at 31.

18 ...before you make a decision [about V/C Standards], I think you might want to see  
19 what these V/C ratios are for the forecast 2035 volumes. Because you're just looking  
20 at today. You have a comprehensive plan that predicts traffic in the future. You  
21 might want to know what this V/C decision tells you for each one of those roads in  
22 the future, both their current state and the potential improvement.

23 *Id.*; See also 10/22/18 Transcript at 35-36 ("I do want to see the model run with all the land  
24 use anticipated for 2035 so we can go, okay, 228th is predicted to be 1.25 in 2035. So let's  
25 make that our standard."). This substantive recommendation accords with the procedural  
requirements of the GMA that LOS standards be approved with the Comprehensive Plan so



1 that all elements of the Plan can be properly coordinated and made internally consistent.  
2 This includes the establishment of LOS standards that are consistent with and take into  
3 account the 20-year growth forecast.

4 The City presented information showing what V/C Standards would be met under  
5 existing conditions, and what V/C Standards would be met under the 6-Year timeframe  
6 considered in concurrency analysis. See SMC 14A.10.050, Figures 1 and 2. What was  
7 critically missing was any information about how the standards would be met in the 20-Year  
8 timeframe. The City's consultant Fehr & Peers assured the Council that it could certainly  
9 generate a 20-year "trip growth number," to inform the Council as to whether the new V/C  
10 Standards were realistic in light of that trip growth number. See 10/22/18 at 75 (Breiland:  
11 "We as a city actually do know what your current growth target is in terms of the new  
12 households, in terms of the new, you know, commercial square footage that's coming in. So  
13 that can be used to derive a trip growth number.""). It would simply take time. *Id.* at 75-76.

14 Rather than waiting for that information so that the V/C Standards could be integrated  
15 into the framework of the Comprehensive Plan, the City Council rushed through the interim  
16 development regulations, reviewing those in isolation and outside the context of other goals,  
17 policies and objectives that it would have had to consider if it followed the correct procedural  
18 step of adopting any new V/C Standards through a Comprehensive Plan amendment.  
19 Following the adoption of the interim V/C Standards, the Council undertook no new efforts  
20 to compare the effect of the V/C Standards on its 2035 growth targets.

21 **J. Issue 8: Ordinance No. O2019-484 violates RCW 36.70A.115 by failing to**  
22 **provide sufficient land capacity for development.**

23 Without providing for a means to cure the existing failures created by Ordinance  
24 O2019-484, the Council has precluded the Town Center Plan from serving as the critical  
25 urban density center that was the largest single provider of land capacity for development in

1 the 2015 Comp. Plan. Cities must ensure that development regulations provide sufficient  
2 capacity of land suitable for development within their jurisdictions to accommodate their  
3 allocated housing and employment growth. RCW 36.70A.115. The land use designations of  
4 the City's Comp. Plan may provide this capacity, but if there is no means to meet the  
5 concurrency requirements to actually build in a critical area like the Town Center, the City  
6 must provide land elsewhere or this GMA requirement is not met.

7 **K. Issue 9: Ordinance No. O2019-484 violates RCW 36.70A.390 by imposing a de**  
8 **facto moratorium on development without complying with RCW 36.70A.390.**

9 Moratoria are exclusively regulated under RCW 36.70A.390, which expressly limits a  
10 moratorium to either six months or one year with an express work plan. A moratorium is  
11 defined as a temporary, draconian measure only to justify time for a City to undertake  
12 necessary planning. *SHAG v. City of Lynnwood*, CPSGMHB No. 01-3-0014, Order on  
13 Motions (August 3, 2001). RCW 36.70A.390 allows for only “temporary, interim or stopgap  
14 measures to manage development activity while appropriate analysis and planning can  
15 occur.” *Id.*

16 As this Board previously ruled, Sammamish “may not continually refuse to  
17 implement its plan through the device of a moratorium.” *MBA/Camwest I*, FDO page 13 of  
18 25. Likewise, in this case, the City cannot avoid or evade its obligations as an urban,  
19 incorporated area under the GMA by ignoring the practical effects of Ordinance O2019-  
20 484. If there was any doubt as to the intended effect of Ordinance O2019-484, it was erased  
21 by the events of August 2019. Without an enforceable TIP for Sahalee Way, no development  
22 applications can be submitted if they add trips to this corridor under the V/C Standards.  
23 When Council realized that the June TIP allowed applications to proceed, they removed *only*  
24 the Sahalee Way project from consideration. Once again, Sammamish is refusing to  
25 implement its plan and take their growth targets seriously by means of a de facto moratorium,

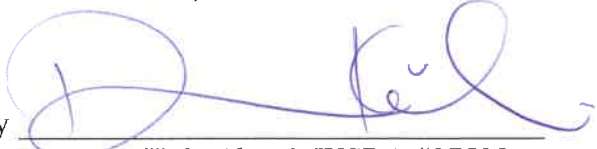
1 without any justification or even an attempt to claim that additional planning is necessary.

2 **L. The City's Approach under Ordinance O2019-484 Justifies Invalidity.**

3 Invalidity is appropriate where the continued validity of an ordinance will  
4 substantially interfere with the goals of the GMA. RCW 36.70A.302. Ordinance O2019-484  
5 substantially interferes with the goals of the GMA by perpetuating a pattern of legislative  
6 action that avoids the City's duties under the GMA. Instead of encouraging urban  
7 development and providing a transportation concurrency system that is consistent with the  
8 GMA and SEPA, one that the City had in place with the Expanded Intersection Standards,  
9 the City went to great lengths to find yet another new way to artificially halt urban  
10 growth. The City entirely failed to consider the impact of perpetuating an impossible  
11 concurrency system and ongoing de facto moratorium on the City's GMA duty to  
12 affirmatively foster and stimulate urban growth. If this Board validates Ordinance O2019-  
13 484, promulgation of similar ordinances by other jurisdictions would result in a regional  
14 long-range planning disaster and major exacerbation of the housing crisis. Gerend requests  
15 this Board not to condone the City's disregard of GMA and SEPA mandates and requests this  
16 Board issue a determination of invalidity regarding Ordinance No. O2019-484.

17 DATED this 21<sup>st</sup> day of January, 2019.

18  
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