

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

DON GEREND,

Petitioner,

v.

CITY OF SAMMAMISH,

Respondent.

**Case No. 19-3-0015**

**FINAL DECISION AND ORDER**

**SYNOPSIS**

*Don Gerend (Petitioner) challenged City of Sammamish's (City) amendments to the Sammamish Municipal Code concerning transportation concurrency and level of service for road segments and corridors as adopted under Ordinance No. (Ordinance) O2019-484. The Board concluded passage of the Ordinance violated RCW 36.70A.070 by improper use of a development regulation, RCW 36.70A.130 by creating inconsistency within the elements of the comprehensive plan, and, RCW 43.21C.030 by failure to make an adequate threshold determination of potential environmental impacts and remands the challenged Ordinance to the City for compliance action. The Board denied the City's motion to dismiss the Petitioner's SEPA appeal based on standing. In addition to remanding the Ordinance for compliance, the Board invalidates SMC 14A.10.050(2).*

**I. INTRODUCTION**

Petitioner challenges the adoption of Ordinance O2019-484, an action that amended the City's development regulations related to transportation concurrency and the Level of

1 Service (LOS) for road segments and corridors.<sup>1</sup> As required by the Growth Management  
2 Act (GMA) in RCW 36.70A.130, the City previously updated its Comprehensive Land Use  
3 Plan (CP) in September 2018. The 2018 Update included a Transportation Element with  
4 policies addressing the level of service for roadways. The update also included a Land Use  
5 and Capital Facilities element.

6 The Petitioner and the City agree on the timeline of City actions:<sup>2</sup>

- 7 • **June 19, 2018**, City issues SEPA Determination of Non-Significance for
- 8 Expanded Intersection LOS Standard in Transportation Element.<sup>3</sup>
- 9 • **June 21, 2018**, Planning Commission public hearing on proposed amendments to
- 10 Transportation Element. (Ex. 112)
- 11 • **July 10, 2018**, City Council public hearing on proposed amendments to
- 12 Transportation Element. (Ex. 40)
- 13 • **September 11, 2018**, Council directed Fehr & Peers to develop a V/C (corridor
- 14 LOS) methodology.<sup>4</sup>
- 15 • **September 13, 2018**, City issues SEPA Addendum to DNS.<sup>5</sup>
- 16 • **September 18, 2018**, City Council public hearing and adoption of proposed
- 17 amendments to the City's Comprehensive Plan, including the Transportation
- 18 Element. (Ex. 32)
- 19 • **November 20, 2018**, City Council adoption of interim development regulations for
- 20 transportation concurrency. (Ex. 24)
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26 <sup>1</sup> Petitioner's Petition for Review (July 24, 2019) Attachment A: Ordinance No 02019-484. The specific section  
27 of the ordinance Chapter 14A.10 which is central to this challenge in 14A.10.050(2) which adopted road  
28 corridor and segment LOS standards "up to and including 1.1 for corridors and 1.4 for segments, respectively  
29 for the City's principal and minor arterials." That portion addressing intersection LOS standards, SMM  
30 14A.10.050(1), is not challenged here.

31 <sup>2</sup> See City's Response Brief (February 12, 2020) at 3 for timeline of City actions and Petitioner's Opening Brief  
32 (January 21, 2020) at 15 for this combined timeline.

<sup>3</sup> Petitioner's Opening Brief at 15.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

- 1 • **January 15, 2019**, City Council public hearing on interim development regulations  
2 for transportation concurrency. (Ex. 20)
- 3 • **March 7, 2019**, Planning Commission public hearing on proposed permanent  
4 development regulations for transportation concurrency. (Ex. 167)
- 5 • **May 7, 2019**, City Council public hearing on proposed permanent development  
6 regulations for transportation concurrency. (Ex. 16)
- 7 • **May 23, 2019**, City Council public hearing on proposed permanent development  
8 regulations, and adoption of permanent development regulations for  
9 transportation concurrency in Ordinance O2019-484. (Ex. 175; Ex. 11)

12 The GMA requires that jurisdictions adopt a comprehensive plan with certain  
13 mandatory elements, which “shall be an internally consistent document and all elements  
14 shall be consistent with the future land use map.”<sup>6</sup> In addition to the land use and  
15 transportation elements, the comprehensive plan must include a capital facilities element  
16 which includes a six year plan to finance capital facilities, including funding for transportation  
17 projects needed. The capital facilities element must include “a requirement to reassess the  
18 land use element if probable funding falls short of meeting existing needs and to ensure that  
19 the land use element, capital facilities plan element, and financing plan ... are coordinated  
20 and consistent.”<sup>7</sup>

22 To ensure coordination and consistency, the required transportation element in the  
23 comprehensive plan must implement, and be consistent with, the land use element.<sup>8</sup> To  
24 facilitate the determination of consistency, the transportation element must include  
25 identification of level of service standards for all locally owned arterials and transit routes.<sup>9</sup>  
26 This provides a method by which the consistency required in this subsection can be  
27 evaluated. The section is long and specific; jurisdictions must identify actions that will bring  
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30 <sup>6</sup> RCW 36.70A.070 preamble.

31 <sup>7</sup> RCW 36.70A.070(3)(d) and (e).

32 <sup>8</sup> RCW 36.70A.070(6).

<sup>9</sup> RCW 36.70A.070(6)(a)(iii)(B).

1 into compliance “locally owned transportation facilities or services that are below an  
2 established level of service” and identify financing for necessary improvements, including, if  
3 funding falls short, “a discussion of how funding will be raised, or how land use assumptions  
4 will be reassessed to ensure that level of service standards will be met ...”<sup>10</sup>

5 Local jurisdictions are directed to “adopt and enforce ordinances which prohibit  
6 development approval if the development causes the level of service on a locally owned  
7 transportation facility to decline below the standards adopted in the transportation element  
8 of the comprehensive plan ...”<sup>11</sup> thus emphasizing the need for consistency among the  
9 elements on adoption.

10  
11 Department of Commerce guidelines have long highlighted the risk that concurrency  
12 standards might be used to defeat growth goals:

13 Counties and cities should set level of service to reflect realistic expectations  
14 consistent with the achievement of growth aims. Setting levels of service too  
15 high could, under some regulatory strategies, result in no growth. As a  
16 deliberate policy, this would be contrary to the act.<sup>12</sup>

17 The statutory requirement for consistency and coordination within the comprehensive  
18 plan demands that the LOS standards in the comprehensive plan are adopted with sufficient  
19 specific information about their technical operation (i.e., methodology) so as to affirm the  
20 jurisdiction’s representation that its land use, transportation and capital facilities elements  
21 are consistent and achievable.

22  
23 Following a comprehensive plan update, a jurisdiction adopts or amends  
24 development regulations to give effect to the standards and methodology set out in the  
25 comprehensive plan so as to implement not just the capital facilities and transportation  
26 element but also the land use element. If the development regulations do not implement the  
27 land use and capital facilities elements, the statute would require a reevaluation of the  
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30 <sup>10</sup> RCW 36.70A.070(6)(a)(iii)(D) and RCW 36.70A.070(6)(a)(iv)(C).

31 <sup>11</sup> RCW 36.70A.070(6)(b).

32 <sup>12</sup> WAC 365-196-840(c)

1 legislation so that on adoption those development regulations are consistent with and  
2 implement the entire comprehensive plan. The transportation element, capital facilities  
3 element and land use element must be “coordinated and consistent.”<sup>13</sup>

4 Here, the City’s 2018 comprehensive plan update includes the following language to  
5 establish the level of service standards required by the GMA:

6 Policy T.1.1. Maintain a concurrency management system that monitors the  
7 impacts of growth and development on the transportation system and ensures  
8 that level of service standards are met within required timeframes. Focus level-  
9 of-service standards for transportation on the performance of *key intersections*  
10 *during the AM and PM peak periods, and segments that impact citywide*  
11 *mobility.* (Emphasis added)

12 Policy T.1.3. Calculate intersection LOS using traffic volumes during the AM  
13 and PM peak hours and *segment performance based on roadway volume to*  
14 *capacity ratios.* (Emphasis added)

15 The City’s definitions of these terms are set apart in an explanatory box: Level of  
16 Service (LOS) is defined as qualitative letter grades, A through F, with A representing very  
17 good operations and F representing undesirable operations. The box includes a definition  
18 of Volume to Capacity Ratio (V/C), “[t]he rate of comparison of roadway demand (vehicle  
19 volumes) with roadway supply (carry capacity).”

20 Definitions of intersection LOS and corridor LOS (an “as applied” description of the  
21 V/C ratio) appear in the Capital Facilities element:

23 Transportation	24 The <b><i>intersection LOS</i></b> is calculated using standard HCM analysis 25 procedures for the PM peak hour. The adopted standard is LOS D or 26 E for intersections that include Principal Arterials and LOS C for 27 intersections that include Minor Arterial or Collector roadways. The 28 LOS for intersections with principal arterials may be reduced to E for 29 intersections that require more than three approach lanes in any 30 direction. 31 <b><i>Corridor LOS</i></b> is based on the performance of key corridors and is 32 determined by averaging the incremental corridor segment volume
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<sup>13</sup> RCW 36.70A.070(3)(e).

1 over capacity (v/c) ratios within each adopted corridor. This has the  
2 effect of tolerating some congestion in a segment or more within a  
3 corridor while resulting in the ultimate completion of the corridor  
4 improvements. The average v/c of the segments comprising a corridor  
5 must be 1.00 or less for the corridor to be considered adequate. All  
6 corridors must pass the Corridor LOS standard for the transportation  
7 system to be considered adequate. Corridors comprised of just one  
adequate.

8 Transportation concurrency is a highly technical area of land use planning. To assist  
9 the reader, and for purposes of clarity, this order will use the following terms in describing  
10 the two concurrency standards adopted by the City and subject to examination here.  
11 "*Intersection LOS*" (with or without modifier) will identify the historic concurrency  
12 measurement used by the City and described both in the comprehensive plan and in SMM  
13 14A.10.050(1), with letter values as standards. "*Corridor LOS*" (with or without modifier) will  
14 identify the concurrency measurement using volume to capacity ratios for segments as  
15 described in SMM 14A.10.050(2) and referenced as Volume to Capacity Ratios in the  
16 Transportation Element. These terms correspond to the usage in the Capital Facilities  
17 Element.  
18

19 On May 23, 2019, the City adopted Ordinance O2019-484 as a development  
20 regulation to "implement the policies in the Transportation Element."<sup>14</sup> Although Ordinance  
21 O2019-484 purported to adopt development regulations to implement its comprehensive  
22 plan, Petitioner avers that the City actually adopted a new methodology using velocity and  
23 capacity ratios to calculate corridor LOS which differed from the methodology identified in  
24 the 2018 comprehensive plan update. In so doing, the Petitioner alleges that the City  
25 essentially amended its comprehensive plan, which had employed an A-F standard to  
26 calculate intersection LOS, and attempted to introduce a new standard and methodology by  
27 development regulation. Thus Petitioner complains the City violated GMA requirements for  
28 public participation, compliance with the State Environmental Policy Act (SEPA) and  
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30  
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32 <sup>14</sup> Petition for Review Attachment A at 3.

1 requirements for consistency between the comprehensive plan and development  
2 regulations, in addition to other assertions.

3 The procedural matters relevant to the case are detailed in Appendix A. Legal issues  
4 relevant to the case are detailed in Appendix B.

## 6 **II. BOARD JURISDICTION**

7 The Board finds the Petition for Review was timely filed, pursuant to RCW  
8 36.70A.290(2). The Board finds the Petitioner has standing to appear before the Board  
9 pursuant to RCW 36.70A.280(2)(a). The Board also finds it has jurisdiction over the subject  
10 matter of the petition pursuant to RCW 36.70A.280(1). The City's motion to dismiss SEPA  
11 claims is denied as set forth in Issue 2 below.

## 14 **III. STANDARD OF REVIEW**

15 Comprehensive plans and development regulations, and amendments to them, are  
16 presumed valid upon adoption.<sup>15</sup> This presumption creates a high threshold for challengers  
17 as the burden is on the Petitioners to demonstrate that any action taken by the City is not in  
18 compliance with the Growth Management Act (GMA).<sup>16</sup> The Board is charged with  
19 adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and  
20 development regulations.<sup>17</sup>

21 The scope of the Board's review is limited to determining whether a City has  
22 achieved compliance with the GMA only with respect to those issues presented in a timely  
23 petition for review.<sup>18</sup> The Board is directed to find compliance unless it determines that the  
24 challenged action is clearly erroneous in view of the entire record before the Board and in  
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29 <sup>15</sup> RCW 36.70A.320(1).

30 <sup>16</sup> RCW 36.70A.320(2).

31 <sup>17</sup> RCW 36.70A.280, RCW 36.70A.302.

32 <sup>18</sup> RCW 36.70A.290(1).

light of the goals and requirements of the GMA.<sup>19</sup>

#### IV. DISCUSSION AND ANALYSIS

The Board addresses Petitioner's issues in the following order:

- State Environmental Policy Act (SEPA) (Issue 2)
  - Standing
  - Sufficiency of Determination of Non-Significance (DNS).
- Comprehensive Plan (All other issues)
  - Improper use of development regulation (Issue 4)
  - Inconsistency (issue 5)
  - Failed to be guided by GMA Goals (Issue 3)
  - Failure of public participation (Issue 1)
  - Use of clearly erroneous methodology (Issue 6)
  - Precluding urban densities (Issue 7)
  - Insufficient land for development (Issue 8)
  - *De Facto* Moratorium (Issue 9)

#### **STATE ENVIRONMENTAL POLICY ACT (SEPA) (Issue 2)**

In this issue, Petitioner alleges that the Ordinance violates SEPA because it was adopted without an adequate threshold determination and without analysis of potential environmental standards.<sup>20</sup>

#### **Applicable Laws:**

#### **RCW 43.21C.030 Guidelines for state agencies, local governments—**

<sup>19</sup> RCW 36.70A.320(3). In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

<sup>20</sup> Issue 2: Whether Ordinance O2019-484 violates Chapter 43.21C including section 43.21C.030 and WAC 197-11-070, WAC 197-11-310, and WAC 197-11-600, because it was adopted without adequate and legally required threshold determination and due consideration of the potential environmental impacts of the new level-of-service standards and regulations contained in the Ordinance?



**Statements—Reports—Advice—Information.**

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action;
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) alternatives to the proposed action;
- (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented...

**WAC 197-11-600 When to use existing environmental documents.**

(4) Existing documents may be used for a proposal by employing one or more of the following methods: (a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or (b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference. (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.

(d) Preparation of a SEIS if there are:

- (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or
- (ii) New information indicating a proposal's probable significant adverse environmental impacts.

(e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

**Standing**

The City first seeks to dismiss Petitioner's SEPA claims because Petitioner failed to meet a two-part test to establish SEPA standing. The City requests the Board to dismiss Issue 2 because "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

1 rules. WAC 243-03-210(d)."<sup>21</sup> Petitioner replied that the City did not raise this question of  
2 SEPA standing during the time allowed for dispositive motions and thus the City's argument  
3 should be dismissed or allow the Petitioner to respond to the City's motion.  
4

5 *Board Discussion and Analysis*

6 Regarding timeliness of the motion, WAC 242-03-555 states that dispositive motions  
7 shall be filed by the date set forth in the prehearing order unless good cause is shown for a  
8 late motion. Here Petitioner rightly complains that the City did not raise the issue of  
9 Petitioner's standing until the Respondent's brief, which was well after the deadline for  
10 dispositive motions. Neither did the City identify any good cause for failing to bring the  
11 motion earlier. However, the Board's rules of procedure do not provide for a responsive  
12 pleading and thus the Board rules do not require that defenses not raised be waived. WAC  
13 242-03-555 provides only that the Board *may* refuse to hear a motion that is not timely filed.  
14

15 Turning to the merits of the motion, the Board acknowledges that the Central  
16 Regional GMHB panel has, in past years, applied the criteria in Chapter 43.21C RCW to  
17 cases before the Board in which SEPA violations are alleged. This has not been the case  
18 for the Eastern and Western Regions and, in recent years, the Central Puget Sound Region  
19 has also come to read RCW 36.70A.280(1)(a) and (2)(b) as allowing person(s) who have  
20 participated in the legislative process leading up to the challenged action to allege failure to  
21 comply with Chapter 43.21C as it relates to plans, development regulations, or amendments  
22 adopted under RCW 36.70A.040. The Petitioner did participate in the City's process, thus  
23 they have standing.<sup>22</sup> **The Board finds and concludes** that Petitioner has standing to  
24 raise issues of compliance with SEPA. The City's Motion to Dismiss is denied.  
25  
26  
27

28 <sup>21</sup> City Response Brief at 13-16.

29 <sup>22</sup> City's Response Brief at 12 "Gerend and many other members of the public were actively engaged in the  
30 City's deliberations around the topic of transportation concurrency, and the City received numerous public  
31 comment letters and oral statements throughout the process from citizens, including engineer Kevin Jones,  
32 who provided the Council with the same memos Petitioner relies on in this appeal. See, e.g., Exs. 90, 144,  
148, 2, 151, 155, 166, 174, 187, 188."

1 **Adequacy of the DNS and Addendum**

2 Petitioner argues the City must sufficiently consider environmental impacts to show  
3 "compliance with the procedural requirements of SEPA."<sup>23</sup> Here, Petitioner maintains the  
4 City did not consider the impact of Ordinance O2019-484 on existing land use plans,  
5 population and transportation in accordance with WAC 197-11-444 (2)(b-c). Petitioner  
6 claims the City was required to further analyze environmental elements from WAC 197-11-  
7 444 because the City's previous DNS was based on an intersection LOS.<sup>24</sup> Petitioner  
8 claims the City failed to calculate and analyze the difference in impacts between these two  
9 standards: (expanded) intersection LOS and (velocity and capacity) corridor LOS.  
10

11 "...everything about the June DNS only referenced these intersection-based  
12 updates to the Comprehensive Plan and Transportation Element. *Tab 130*,  
13 09950-09972. There was no discussion in the original SEPA checklist of new  
14 V/C Standards (*corridor LOS*) that would radically change concurrency,  
15 planning and budgetary obligations, and how to manage development into the  
16 future."<sup>25</sup> (emphasis added)

17 Petitioner argues the City's Addendum "meaningfully [changed] how the City handles  
18 concurrency" when it removed intersection LOS and replaced it with corridor LOS.  
19 Petitioner observes an Addendum as written would only be "appropriate for the same  
20 proposal, unchanged" as allowed in WAC 197-11-600.<sup>26</sup> Because the City did not update  
21 the checklist or perform any substantive environmental review on the changed standards,  
22 Petitioner argues the City could not simply rely on an Addendum without analyzing the  
23

24  
25 <sup>23</sup> Petitioner's Opening Brief at 14 citing WAC 197-11-704, *Blair, et al. v. City of Monroe* GMHB No. 14-3-  
0006c and 2014 WL 4627163.

26 <sup>24</sup> *Id.* at 15 "City issued a Determination of Non-Significance (DNS) on June 19, 2018, when the City's  
27 concurrency system and proposed amendments to the Transportation Element were based only on the  
Expanded Intersection LOS standards." See *Tab 130*, 09946-967

28 <sup>25</sup> Petitioner's Opening Brief at 15 "The City issued a Determination of Non-Significance (DNS) on June 19,  
29 2018, when the City's concurrency system and proposed amendments to the Transportation Element were  
30 based only on the Expanded Intersection LOS standards. See *Tab 130*, 09946-967. Accordingly, everything  
31 about the June DNS only referenced these intersection-based updates to the Comprehensive Plan and  
Transportation Element. *Tab 130*, 09950-09972."

32 <sup>26</sup> *Id.* at 15-16 and SEPA DNS Addendum at *Tab 130*, 09946-09947.

1 Ordinance's impacts as required in RCW 43.21C.030. Finally, Petitioner argues WAC 197-  
2 11-444(2)(b)-(c) required a "consideration of the impacts of the proposed regulation's  
3 "relationship to existing land use plans and to estimated population" and to various topics  
4 related to transportation." Petitioner concludes the City erred when it created a new  
5 proposal without adequate SEPA analysis.<sup>27</sup>

6  
7 In response the City explains it conducted additional environmental review on  
8 Ordinance O2019-484 and that WAC 197-11-600(2) "provides that agencies "may" use  
9 previously prepared environmental documents (such as a SEPA DNS or checklist) to  
10 evaluate "proposals [that] may be the same as, *or different than*, those analyzed in the  
11 existing documents." WAC 197-11-600(2)" (emphasis by City).<sup>28</sup> The City urges that WAC  
12 197-11-600(4) allows the use of addendum "when it adds analyses or information about a  
13 proposal but does not substantially change the analysis of significant impacts and  
14 alternatives in the existing environmental document."<sup>29</sup> Upon reply, Petitioner reiterated that  
15 the City's (expanded) intersection LOS "did not create a concurrency failure; the V/C  
16 Standards (corridor LOS) did, which results in a host of impacts not previously analyzed.  
17 Those impacts should have been evaluated in a separate SEPA document -- not an  
18 Addendum-so that informed public comment could occur."<sup>30</sup>

#### 21 *Board Discussion and Analysis*

22 The State Environmental Policy Act (SEPA) requires all government agencies to  
23 consider the environmental effects of a proposed action.<sup>31</sup> The Supreme Court has referred  
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26 <sup>27</sup> *Id.*

27 <sup>28</sup> City's Response Brief at 16.

28 <sup>29</sup> *Id.*

29 <sup>30</sup> Reply on Petitioner Don Gerend's Opening Brief (February 26, 2020) at 5; Petitioner's Opening Brief at 8 "In  
30 a rush, from September 4 to November 20, 2018, and devoid of any plan for public participation, the County  
31 majority adopted a new layer of concurrency standards in the form of V/C Standards that apply to 22 corridors  
32 and 70 segments in both directions throughout the entire City-a total of 182 V/C measurements. Tab 28,  
02459.

<sup>31</sup> RCW 43.21C.030.

1 to SEPA as an environmental full disclosure law. SEPA requires agencies to identify,  
2 analyze, disclose, and consider mitigation of impacts on both the natural and built  
3 environments resulting from a proposed action. The disclosure of environmental impact  
4 information to county or city decision-makers and to the public promotes the policy of fully  
5 informed decision-making by government bodies and better opportunities for meaningful  
6 public participation.<sup>32</sup>  
7

8 Thus, when a county or city amends its comprehensive plan or changes zoning, as  
9 was done here, a detailed and comprehensive SEPA environmental review is required.<sup>33</sup>  
10 The City must demonstrate environmental impacts were considered in a manner sufficient to  
11 show “compliance with the procedural requirements of SEPA,”<sup>34</sup> and “shall carefully  
12 consider the range of probable impacts, including short-term and long-term effects.”<sup>35</sup>  
13

14 The City did issue a SEPA Addendum in September 13, 2019,<sup>36</sup> but the methodology  
15 for corridor LOS was developed after that – by the City’s own admission, between  
16 September and December of 2019.<sup>37</sup> Thus the City’s Addendum has only three text  
17 changes to the original September 12, 2018, SEPA Checklist: the LOS Standard is  
18 changed by deleting a references to “segments and corridors” and replaced by references  
19 to performance of “key road segments” and “segments” and “key roadway segments.”<sup>38</sup>  
20 The Board notes that neither “velocity and capacity standards” nor the methodology to  
21 calculate those standards appear anywhere in the Addendum. The Board found no  
22 references to environmental analysis when changing to a corridor LOS standard nor an  
23 analysis of impacts resulting from the change. The Addendum is silent about the effect and  
24  
25  
26

27 <sup>32</sup> RCW 43.21C.030; RCW 36.70A.035; *Norway Hill Pres. & Prot. Assn. v. King County Council*, 87 Wn.2d 267  
28 (1976).

29 <sup>33</sup> WAC 197-11-704(b)(ii).

30 <sup>34</sup> *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977).

31 <sup>35</sup> WAC 197-11-060(4)(c).

32 <sup>36</sup> Petitioner’s Opening Brief at 15.

<sup>37</sup> Petitioner’s Opening Brief at 14, See Tab 130.

<sup>38</sup> *Id.* Tab 130 at 09993 and 09994.

1 impact of implementing Ordinance O2019-484 by changing standards from intersection LOS  
2 to corridor LOS.

3 When the City adopted the Addendum, it was required to analyze elements of the  
4 environment as specified in RCW 43.21C.030<sup>39</sup> and be guided by WAC 197-11-444 and  
5 WAC 197-11-600 regarding which environmental elements to analyze and when to include  
6 addenda to existing environmental documents.<sup>40</sup> WAC 197-11-444 specifies elements to be  
7 considered include, but are not limited to the built environment, relationships to existing land  
8 use plans, estimated populations, transportation, and vehicular traffic. WAC 197-11-  
9 600(4)(c) allows an addendum to existing environmental documents if the proposal does not  
10 substantially change the analysis of significant impacts.<sup>41</sup>

12 Ordinance O2019-484 as ultimately adopted significantly changed the method to  
13 calculate traffic impacts when the City replaced intersection LOS with corridor LOS. The  
14 Ordinance states "...In conducting the concurrency tests ...the road corridor and segments  
15 LOS standards are velocity and capacity ratio of up to and including 1.1 for corridors and  
16 1.4 for segments, respectively, for the City's principal and minor arterials."<sup>42</sup>

18 However, the City's Addendum does not mention these specific calculations nor does  
19 it analyze or inform a reader about the impact this change would have on city-wide land use  
20 plans or traffic patterns as required in RCW 43.21C.030 and WAC 197-11-444.<sup>43</sup> As noted  
21 above, challenged Ordinance O210-484 adopted development regulations purportedly  
22  
23  
24  
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26 <sup>39</sup> RCW 43.21C.030(c) Include in every recommendation or report on proposals for legislation and other major  
27 actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:  
28 (i) the environmental impact of the proposed action...

29 <sup>40</sup> WAC 197-11-444 Elements of the environment.

30 <sup>41</sup> WAC 197-11-600(4)(c) An addendum, that adds analyses or information about a proposal but does not  
31 substantially change the analysis of significant impacts and alternatives in the existing environmental  
32 document. (emphasis added)

<sup>42</sup> Petition for Review Attachment A: Ordinance O2019-484 at 3 Section 14.10.050 Level of Service Standard.

<sup>43</sup> Petitioner's Opening Brief at Tab 130 09993 and 09994.

1 implementing the City's comprehensive plan.<sup>44</sup> However, the City elected to issue an  
2 Addendum to the Comprehensive Plan DNS many months earlier before any specific  
3 information about the standards and methodology of this approach was available. It is  
4 apparent that further information was needed regarding the impacts of Ordinance O2019-  
5 484, but the Addendum fails to provide that information and the City was thus prevented  
6 from receiving the required "environmental full disclosure."<sup>45</sup>  
7

8 **The Board finds** that the City failed to meet criteria in WAC 197-11-600(4)(c) and (e)  
9 when it used an "addendum" onto existing SEPA documents even though significant  
10 changes were made to the proposed action.

11 Based on a thorough review of the DNS and the Addendum, **the Board finds and**  
12 **concludes** that the City of Sammamish failed to establish *prima facie* compliance with RCW  
13 43.21C.030 in the adoption of the challenged Ordinance. The Board is left with the firm and  
14 definite conviction that a mistake has been made as a result of the City issuance of an  
15 Addendum which failed to adequately address the environmental impacts of the proposed  
16 action and failed to adequately address the unavoidable environmental effects. The Board  
17 **concludes** that the City's action violated RCW 43.21C.030 by basing its decision on  
18 challenged Ordinance O2019-484 on an Addendum.  
19

20 **The Board finds and concludes the City:**

- 21
- 22 • Failed to meet WAC 197-11-600(4) criteria by relying on an Addendum for a
  - 23 significantly changed proposal.
  - 24 • Failed to analyze the overall impact of the new corridor standards as required in
  - 25 RCW 43.21C.030(d).
- 26

27 <sup>44</sup> Petitioner's Opening Brief at 15 "The City issued a Determination of Non-Significance (DNS) on June 19,  
28 2018, when the City's concurrency system and proposed amendments to the Transportation Element were  
29 based only on the Expanded Intersection LOS standards." See Tab 130, 09946-967.

30 <sup>45</sup> The function of SEPA determinations is to have "environmental considerations become part of normal  
31 decision making." *Loveless v. Yantis*, 82 Wn.2d 754, 765, (1973). [SEPA determinations are to] provide  
32 consideration of environmental factors . . . to allow decisions to be based on complete disclosure of  
environmental consequences. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663,  
(1993).

1 **COMPREHENSIVE PLAN**

2 **Improper use of development regulation (Issue 4)**

3 Here, Petitioner asserts that the challenged Ordinance violates the GMA because it  
4 imposes a new LOS standard through a development regulation rather than as an  
5 amendment to the Transportation Element of the comprehensive plan.<sup>46</sup>  
6

7 **Applicable Laws:**

8 **RCW 36.70A.070 Comprehensive plans—Mandatory elements.** The  
9 comprehensive plan of a county or city that is required or chooses to plan  
10 under RCW 36.70A.040 shall consist of a map or maps, and descriptive text  
11 covering objectives, principles, and standards used to develop the  
12 comprehensive plan. The plan shall be an internally consistent document and  
13 all elements shall be consistent with the future land use map. ... Each  
14 comprehensive plan shall include a plan, scheme, or design for each of the  
15 following:

16 (6) A transportation element that implements, and is consistent with, the land  
17 use element.

18 (a) The transportation element shall include the following subelements ...

19 (iii) Facilities and services needs, including...

20 (B) Level of service standards for all locally owned arterials and transit  
21 routes to serve as a gauge to judge performance of the system. These  
22 standards should be regionally coordinated;

23 Petitioner points out that the City's capital budget decisions must be in conformity  
24 with the comprehensive plan,<sup>47</sup> yet the Transportation Element and Background rely entirely  
25 on the (expanded) intersection LOS and, for purposes of consistency among the elements  
26

27 

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<sup>46</sup> Issue 4: Whether Ordinance O2019-484 procedurally and substantively violates RCW 36.70A.040, RCW  
28 36.70A.070, RCW 36.70A.120, WAC 365-196-800, and/or 365-196-810, because it imposes new level-of-  
29 service standards through a development regulation rather than as an amendment to the Transportation  
30 Element of the City's Comprehensive Plan?

31 Petitioner only briefed violations of RCW 36.70A.070; all other alleged violations in this issue are dismissed for  
32 failure of briefing.

<sup>47</sup> RCW 36.70A.120.



1 of the plan, do not rely on, or effectively incorporate, the (V/C) corridor LOS. Petitioner  
2 argues the City missed the opportunity to include (V/C) corridor LOS in its 2018 CP update  
3 and instead adopted the (V/C) corridor LOS in 2019 through amended development  
4 regulations in Ordinance O2019-484, thus violating RCW 36.70A.070(6)(a)(iii)(B) which  
5 requires LOS standards to be part of a comprehensive plan's Transportation Element.<sup>48</sup>  
6

7 Petitioner attempts to ascribe motive to the City's actions in taking this action, but  
8 those motives are secondary to the primary argument that the Transportation Element of the  
9 comprehensive plan "does not actually adopt or integrate that [corridor LOS] as part of its  
10 transportation concurrency system in any meaningful manner."<sup>49</sup>

11 The City defends its action as analogous to the action taken by the City of Bellevue  
12 and upheld in *Sammamish Cmty. Council v. Bellevue*, 108 Wn. App. 46, 56, 29 P.3d 728  
13 (2001). There the City of Bellevue adopted a traffic standards code to implement its  
14 comprehensive plan transportation policy, adopting a development code "set[ting] forth a  
15 methodology on how LOS is measured."<sup>50</sup> The City argues that their Transportation  
16 Element "expressly directs the City to adopt ordinances to define the level of service  
17 standards" ...and their "Ordinance... does just that..." citing transportation policies which  
18 reference both intersection LOS and (segment) corridor LOS.<sup>51</sup>  
19

20 On reply, Petitioner argues the *Sammamish Community Council* decision is "not on  
21 point" because the City of Bellevue had already adopted a substantive, numeric V/C  
22 standard; here the City had not adopted specific standards.<sup>52</sup> Petitioner clarifies that  
23 because the LOS is used as a basis for developing those capital facilities plans, the  
24

25 \_\_\_\_\_  
26 <sup>48</sup> Petitioner's Opening Brief at 19.

27 <sup>49</sup> *Id.*

28 <sup>50</sup> City's Response Brief at 27-28.

29 <sup>51</sup> *Id.* at 28 *Ex. 31* at 02957 "In order to monitor concurrency, the City must adopt standards to identify  
30 deficiencies, which were presented earlier in this plan. While the GMA requires that LOS standards be  
31 adopted for concurrency, it does not mandate how those standards should be defined. Thus, the City is free to  
32 adopt by ordinance whatever standards it deems appropriate." The City cites Policies T.1.1 and T.1.3.

<sup>52</sup> Petitioner's Reply Brief at 1-2 "[Bellevue's] ...minor changes are of an entirely different character than the  
massive additional layer of LOS Standards that the City [Sammamish] imposed here, outside the  
comprehensive planning process."

1 comprehensive plan must include substantive LOS standards in the comprehensive plan;  
2 these standards guide not only the City, but surrounding jurisdictions.<sup>53</sup> Petitioner faults the  
3 City for adopting vague and general references in their comprehensive plan “without making  
4 any effort to review if or how these standards are consistent with other elements....”<sup>54</sup>  
5

#### 6 *Board Discussion and Analysis*

7 RCW 26.70A.070 preamble establishes the expectation that a comprehensive plan  
8 will be an internally consistent document and all elements shall be consistent with the future  
9 land use map before setting out the required elements and their subelements, including  
10 those concerning the transportation element. RCW 36.70A.120 requires that jurisdictions  
11 make capital budget decisions in conformity with the comprehensive plan.  
12

13 Specifically, RCW 36.70A.070(6)(a)(iii)(B) requires that the transportation element  
14 include “level of service standards for all locally owned arterials and transit routes to serve  
15 as a gauge to judge performance of the system...[t]hese standards should be regionally  
16 coordinated.”  
17

18 The City argues that references in policies T.1.1 and T.1.3 are sufficient to authorize  
19 the development regulation here.

20 Policy T.1.1. Maintain a concurrency management system that monitors the impacts  
21 of growth and development on the transportation system and ensures that level of  
22 service standards are met within required timeframes. Focus level of service  
23 standards for transportation on the performance of *key intersections during the AM*  
24 *and PM peak periods, and segments that impact citywide mobility.* (Emphasis  
added.)

25 Policy T.1.3. Calculate intersection LOS using traffic volumes during the AM and PM  
26 peak hours and *segment performance based on roadway volume to capacity ratios*  
27 (Emphasis added).  
28  
29  
30

---

31 <sup>53</sup> *Id.* at 2.

32 <sup>54</sup> Petitioner’s Reply Brief at 3.

1 In reviewing the Transportation Element, however, the Board finds multiple changes  
2 to the prior comprehensive plan, but none offering specific information about the corridor  
3 LOS, the computation of those “volume-to-capacity (“V/C”) ratios” for purposes of  
4 establishing consistency and coordination with other elements of the plan.<sup>55</sup>

5  
6 Policy T 1.1 amended to add “performance of key intersections during the AM and  
7 PM peak periods and segments that impact citywide mobility.”<sup>56</sup>

8 Policy T.1.3 deleted instructions about case by case basis, but instead the policy is to  
9 calculate intersection LOS using traffic volumes during the AM and PM peak hours  
10 and segment performance based on V/C ratios.<sup>57</sup>

11 Traffic Intersection Operations Models have new concepts added about the SIDRA  
12 and VISUM software programs used to forecast future needs, analyze intersection  
13 capacity and the limitations of such programs.<sup>58</sup>

14 Traffic Level of Service Analysis is changed to discuss average delay of approaches  
15 for roundabouts, average delays and left turn movements. It refers to “following  
16 sections describe traffic counts that were collected...”<sup>59</sup>

17 A new section is added as “Intersection Level of Service” which goes into great detail  
18 about standard analysis for intersection LOS is based on AM and PM peak hours. It  
19 also defines which intersections are graded at certain levels.<sup>60</sup>

20 A new section on Concurrency describes the City’s Concurrency Management  
21 System (CMS) policy and procedures and these assist the City to determine  
22 adequate facilities.<sup>61</sup>

23 New recommendations proposed based on an analysis of land use assumptions from  
24 2016 to 2024 with a list of recommended improvement projects.<sup>62</sup>

25  
26  
27 <sup>55</sup> City’s Response Brief at Attachment A: Policies redlined 9/18/19.

28 <sup>56</sup> *Id.* at 2852.

29 <sup>57</sup> *Id.* 2854.

30 <sup>58</sup> *Id.* at 2886 and 2926.

31 <sup>59</sup> *Id.* at 2886.

32 <sup>60</sup> *Id.* at 2893-2899.

<sup>61</sup> *Id.* at 2903.

<sup>62</sup> *Id.* at 2938.

1 A long list of previous Level of Service Recommended projects are deleted with a few  
2 changes to existing projects.<sup>63</sup>

3 Deleted pre-existing sections in "Establishment of LOS Standards and Monitoring."

4 City replaces these LOS standards with a statement that it will monitor and evaluate  
5 the adequacy of concurrency policies and establish LOS standards as new development  
6 occurs and as traffic levels grow.<sup>64</sup> In sum, the Board did not find the concept or  
7 terminology of "volume-to-capacity" or a V/C LOS standard sufficient to establish a corridor  
8 LOS, or sufficient to establish a "gauge to judge performance of the system" in the City's  
9 Transportation Element.  
10

11 However, corridor LOS does appear in Capitol Facilities Element Policy CF 2.1, after  
12 a standard explanation of intersection LOS, with values adopted of LOS C, D and E.<sup>65</sup>  
13

14 Corridor LOS is based on the performance of key corridors and is determined  
15 by averaging the incremental corridor segment volume over capacity (v/c)  
16 ratios within each adopted corridor. This has the effect of tolerating some  
17 congestion in a segment or more within a corridor while resulting in the  
18 ultimate completion of the corridor improvements. The average v/c of the  
19 segments comprising a corridor must be 1.00 or less for the corridor to be  
20 considered adequate. All corridors must pass the Corridor LOS standard for  
21 the transportation system to be considered adequate. Corridors comprised of  
22 just one concurrency segment must have a v/c of 1.0 or less to be considered  
23 adequate.

24 At the time that this definition was adopted, the corridor LOS standards and  
25 methodology was speculative and clearly under development, as evidenced by the attention  
26 given to it in subsequent council and planning commission meetings.<sup>66</sup> Reduced to its  
27

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28 <sup>63</sup> *Id.* at 2938-2951.

29 <sup>64</sup> *Id.* at 2959.

30 <sup>65</sup> City's Response Brief at Tab 189 at 122.

31 <sup>66</sup> Petitioner's Opening Brief at 4-12 For example: at 4 *Council Limits Concurrency Standards to Intersection*  
32 *LOS*; at 5 *Council Reverses Course and Pursues V/C Standards*; at 6 *City Council Directs Staff to Provide VIC*  
*Standards for Two Segments on 244<sup>th</sup> Only*; at 6 *City Council Again Changes Course, and Directs City-Wide*  
*VIC Standards*; at 8 *City Adopts New VIC Standards as Interim Development Regulations*; *Etc.*

critical points, and for purposes of evaluating compliance with the GMA, the timeline is as follows:

**September 11, 2018**, the Council asked staff to go beyond a single two-segment corridor LOS analysis for 244<sup>th</sup> Avenue and to develop a (V/C) corridor LOS scope and methodology by October 16, 2018. Tab 34, 03400.

**September 18, 2018**, the Council adopts the Comprehensive Plan Update, with (expanded) intersection LOS and a reference to corridor LOS, scope and methodology undefined.

**November 20, 2018**, the Council adopts Ordinance O2018-477, adopting (V/C) corridor LOS as an interim development regulation. Tab 28, 02459.

**May 23, 2019**, the Council adopts Ordinance O2019-484, adopting the (V/C) corridor LOS a permanent development regulation.

It is impossible to assert that the impacts of imposition of this or any other (V/C) corridor LOS value had been considered in evaluating the consistency and coordination among the various elements of the comprehensive plan on the date of adoption, September 18, 2018. The language appearing in the comprehensive plan suggesting a corridor LOS cannot be said to be sufficient in identifying standards and methodology sufficient to provide a gauge for performance of the system, as the council was at pains to direct staff to create those standards and methodology at that point in time.

The comprehensive plan adopted in September 2018 suggests that corridors “comprised of just one concurrency segment must have a v/c of 1.0 or less to be considered adequate.” The challenged Ordinance adopted in May 2019 establishes (V/C) corridor LOS standards of 1.4 for ‘segments’ and 1.1 for ‘corridors’. The impact of those standards on the Land Use or Capital Facilities elements of the comprehensive plan are unknown and cannot have been known to the council when adopting this Ordinance.

Thus, when the City adopted Ordinance O2019-484, the City could not have been implementing the goals and policies of its comprehensive plan, because the Transportation Element did not include (V/C) corridor LOS sufficient to be said to be consistent with or to

1 implement that plan.<sup>67</sup> Without specific standards and methodology for (V/C) corridor LOS  
2 in the comprehensive plan, the City's Ordinance O2019-484 is premature. The Ordinance  
3 rather than the Comprehensive Plan imposes new level-of-service standards through a  
4 development regulation.

5 The sequence of action here is opposite to that found in RCW 36.70A.070(6) in  
6 which a transportation element is adopted and must include level of service standards that  
7 implement and are consistent with the land use element. Here the City's Ordinance is the  
8 wrong vehicle to impose those standards; they should be in the City's comprehensive plan.  
9

10 **The Board finds and concludes the City failed to meet requirements in RCW**  
11 **36.70A.070 preamble and RCW 36.70A.070(6)(a)(iii)(B)** because the City has attempted  
12 to amend its comprehensive plan through a development regulation, in contravention to the  
13 GMA; transportation concurrency standards and methodologies must be set out in the City's  
14 Comprehensive Plan so as to be evaluated for consistency with the land use element and  
15 the capital facilities element.  
16

17 **Inconsistency (Issue 5)**  
18

19 Petitioner alleges that the Ordinance violates RCW 36.70A.130(1)(d) because it is  
20 inconsistent with the Comprehensive Plan, Land Use and Transportation Elements.<sup>68</sup> RCW  
21 36.70A.130(1)(d) is plain and directive:  
22

23 Any amendment of or revision to a comprehensive land use plan shall conform  
24 to this chapter. Any amendment of or revision to development regulations shall  
25 be consistent with and implement the comprehensive plan.

26 <sup>67</sup> WAC 365-196-800 Relationship between development regulations and comprehensive plans.

27 (1) Development regulations under the act are specific controls placed on development or land use activities  
28 by a county or city. Development regulations must be consistent with and implement comprehensive plans  
adopted pursuant to the act.

29 "Implement" in this context has a more affirmative meaning than merely "consistent." See WAC 365-196-210.  
30 "Implement" connotes not only a lack of conflict but also a sufficient scope to fully carry out the goals, policies,  
standards and directions contained in the comprehensive plan. (emphasis added)

31 <sup>68</sup> Issue 5: Whether Ordinance O2019-484 violates RCW 36.70A.040 and RCW 36.70A.070, RCW  
32 36.70A.120, RCW 36.70A.130(1)(d), WAC 365-196-800, and/or 365-196-810 by being inconsistent with the  
Comprehensive Plan, Land Use and Transportation Elements, and/or the Town Center Plan?

1 This Board has addressed the need for consistency set out in RCW 36.70A.130(1)(d)  
2 in multiple cases, affirming the technical direction given in WAC 365-196-800 that  
3 regulations must implement the plan; the direction to implement “connotes not only a lack of  
4 conflict but also a sufficient scope to fully carry out the goals, policies, standards and  
5 directions contained in the comprehensive plan.” Petitioner argues that no portion of the  
6 comprehensive plan has been substantively reviewed or amended to consider the (V/C)  
7 corridor LOS standards adopted in the challenged Ordinance.<sup>69</sup>  
8

9 This raises the question as to whether the City’s representations concerning its land  
10 use and housing goals and policies conceivably can be met in the face of the new  
11 transportation concurrency standards established in the Ordinance O2019-484. The  
12 Petitioner notes that “such commitments are hollow if a City Council manipulates its  
13 concurrency standards to prevent the managed growth and affordable housing in its  
14 adopted Plan.”<sup>70</sup>  
15

16 Petitioner calls out a number of policies with which he believes the Ordinance, as  
17 implemented, is in conflict. Without reference to each one, Petitioner’s argument is  
18 essentially that absent incorporation of the (V/C) corridor LOS standards into the  
19 comprehensive plan as a policy, it is impossible to aver or allege that the elements of the  
20 comprehensive plan are consistent.<sup>71</sup>  
21

22 Specific to capital facilities policies, Petitioner notes that the failure to incorporate the  
23 standards in the plan “means there is a lack of any financing strategy to address shortfalls in  
24 contravention of the Plan’s policy directives.” Petitioner argues that “Capital Facilities Goal  
25 CF.1, Policies CF 1.1, CF 1.2, CF 2.5, and CF 2.6, require the City to identify and provide  
26 facilities and services to support existing and new development as that is envisioned in the  
27  
28

29  
30 <sup>69</sup> Petitioner’s Opening Brief at 21.

31 <sup>70</sup> Petitioner’s Opening Brief at 21.

32 <sup>71</sup> Petitioner’s Opening Brief at 20-23. Petitioner includes mention of a variety of Land Use, Housing, and  
Transportation policies, but offers little specific legal argument for many of them.

1 land use element. CF 2.5 and 2.6 require the City to identify needs for facilities based on the  
2 adopted levels of service and provide those necessary facilities.”<sup>72</sup>

3  
4 The identified policies are:<sup>73</sup>

5 CF 1.1 Plan capital facilities that have the capacity and are located to serve  
6 existing development and future growth planned in the Land Use Element.

7 CF 1.2 Provide all capital facilities necessary to support related services that  
8 are the responsibility of the City, including transportation, parks, police, surface  
9 water management, city hall and public works.

10 CF 2.5 Identify needs for additional capital facilities based on adopted levels of  
11 service and forecasted growth, and determine the means and timing for  
12 providing needed additional facilities.

13 CF 2.6 Provide capital facilities that achieve the levels of service concurrent  
14 with development as defined in City code and Washington State law.

15  
16 Petitioner argues that there is nothing in the challenged Ordinance which provides a  
17 mechanism to address the inevitable failure of these policies, as illustrated by the failure of  
18 the Sahalee Way project created by the (V/C) corridor LOS. By taking the project out of the  
19 Transportation Improvement Plan (TIP), Petitioner argues that the City’s own transportation  
20 plan has been precluded from addressing these capital facilities policies, especially CF 2.6.

21 The City in their response largely relies on their assertion that Petitioner must point to  
22 specific language in the Ordinance “that is either incompatible with or that thwarts specific  
23 language in the City’s existing Comprehensive Plan” citing *Coyne v. West Richland*.<sup>74</sup>

24  
25 *Board Discussion and Analysis*  
26

27 In analyzing allegations of inconsistency, the Board is charged with examining not  
28 only the words of the Ordinance, as the City notes in its response, but also the consistency  
29

30 <sup>72</sup> Petitioner’s Opening Brief at 22.

31 <sup>73</sup> Sammamish Comprehensive Plan Capital Facilities Element, 120 at 125.

32 <sup>74</sup> GMHB No. 13-1-0005 (FDO, March 5, 2014) at page 14.



1 implications of implementation of the Ordinance. The consistency requirement “means that  
2 differing parts of the comprehensive plan ‘must fit together so that no one feature precludes  
3 the achievement of any other.” *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 476-  
4 77, 245 P.3d 789, 804 (2011) quoting WAC 365-196-500(1).<sup>75</sup>

5 “The GMA requirement for internal consistency means that the planning policies and  
6 regulations must not make it impossible to carry out one provision of a plan or regulation  
7 and also carry out the others.” *Futurewise v. Whatcom County*, WWGMHB No. 05-2-0013,  
8 (Final Decision and Order January 9, 2012) at 169.

9 The Board asks three questions in these cases:

- 10
- 11 • Does the regulation IMPLEMENT the comprehensive plan policies?
  - 12 • Does the regulation PRECLUDE achievement of the comprehensive plan’s
  - 13 policies?
  - 14 • Is the regulation IN ACTUAL CONFLICT with the comprehensive plan policies?

15 Illustrative of this disconnect – and the conflict - in the elements of the  
16 comprehensive plan and this development regulation is the failure of the Sahalee Way  
17 project. The Council adopted a Transportation Improvement Plan (June 18, 2019) that  
18 included the Sahalee Way project, then removed the project (August. 20, 2019, Resolution  
19 2019-839) a few months after the adoption of the challenged Ordinance and as a result of  
20 its implementation. This illustrates an ongoing tension between the elements of the adopted  
21 Comprehensive Plan and the Council’s understanding of the role that the Transportation  
22 Element, Capital Facilities element and the concurrency requirements in the statute play in  
23 implementing it.

24 In this instance, we can say with some confidence that there is no indication that the  
25 City considered the impact of the implementation of the challenged Ordinance on the land  
26  
27

28  
29 <sup>75</sup> *Brinnon Grp. v. Jefferson Cty.*, 159 Wn. App. 446, 454, 245 P.3d 789, 793 (2011) Under the Growth  
30 Management Act (GMA), Wash. Rev. Code ch. 36.70A, a comprehensive plan must be an internally consistent  
31 document and all elements shall be consistent with the future land use map. Growth Management Act (GMA),  
32 Wash. Rev. Code ch. 36.70A.070. That requirement means that differing parts of the comprehensive plan  
must fit together so that no one feature precludes the achievement of any other. Wash. Admin. Code § 365-  
196-500.

1 use and capital facilities policies in the comprehensive plan prior to adopting the Ordinance.  
2 The removal of the Sahalee Way project illustrates that the City has not planned facilities to  
3 support the Land Use Element (CF 1.1) or provided the capital facilities necessary to  
4 support related services, including transportation (CF 1.2), or identified needs for “additional  
5 capital facilities based on adopted levels of service and forecasted growth, and determined  
6 the means and timing” for provided those facilities (CF 2.5) nor provided capital facilities that  
7 achieve the levels of service “as defined with City code.”<sup>76</sup> In short, the coordination and  
8 consistency among the land use, transportation and capital facilities elements and the  
9 development regulation adopted in Ordinance O2019-484 is lacking, indicating that the  
10 regulation adopted by this Ordinance may indeed PRECLUDE realization of the capital  
11 facilities policies.  
12

13 Without a full analysis of the corridor LOS in the context of a comprehensive plan  
14 update and the evaluation of its consistency with the other elements, it’s beyond this  
15 Board’s ability to say whether the challenged Ordinance may be in actual CONFLICT with  
16 the comprehensive plan.  
17

18 The Ordinance itself avoids any representation that it is consistent with and  
19 implements the comprehensive plan, averring only that “the proposed code amendments  
20 meet the City’s goals and objectives for transportation concurrency...”<sup>77</sup> The absence of  
21 such a finding might not be fatal in other circumstances, but the timeline with which this  
22 Ordinance was considered and adopted suggests that consistency with the comprehensive  
23 plan was not primary to the council’s consideration. **The Board finds and concludes** that  
24 the City is in violation of RCW 36.70A.130(1)(d) by the failure of consistency between  
25 elements of its comprehensive plan and the development regulation adopted by Ordinance  
26 O2019-484.  
27  
28  
29  
30

31 <sup>76</sup> Sammamish Comprehensive Plan Capital Facilities Plan, 120, 125.

32 <sup>77</sup> Ordinance O2019-484 at 2.

1 **Failure to be guided by GMA goals (Issue 3)**

2 Here, Petitioner alleges the City failed to be guided by the GMA goals when it  
3 adopted the Ordinance.<sup>78</sup> Petitioner argues that they acted “without thinking about the effect  
4 of changing a concurrency system on the larger permitting process....[thus] the City would  
5 not be able to address the confusing and unpredictable permitting process that will result in  
6 light of Goals 7, 11 and 12.”<sup>79</sup> Petitioner reiterates the perceived flawed process of how the  
7 City adopted Ordinance O2019-484 and claimed this “deliberate use of the concurrency  
8 system to stop growth flies in the face of Goals 1, 2, 4, 5, 6, 7, 11 and 12...”<sup>80</sup>

9  
10 The City responds that Petitioner does not offer specific evidence demonstrating the  
11 City was not guided by the GMA goals rather the Petitioner offers only conclusory  
12 statements. The City explains its Ordinance was adopted by balancing mutually exclusive  
13 GMA goals and then explains how each goal was reviewed and considered when the City  
14 adopted the Ordinance. In each case the City repeats that Petitioner did not provide specific  
15 portions of the Ordinance that allegedly violated GMA goals.<sup>81</sup>

16  
17  
18 *Board Discussion and Analysis*

19 The Board reviewed Petitioner’s arguments on the City’s failure to be guided by GMA  
20 goals and the City’s response. Within the parameters of this case, Petitioner has not met  
21 their burden of proof for many of the goals alleged, relying on a general argument that the  
22 City was not mindful of the other goals of the GMA when it adopted the challenged  
23 Ordinance. The Petitioner did allege a failure to be guided by Goal 12, public facilities and  
24 services, and through assertion of a SEPA violation in Issue 2, the Petitioner has at least  
25 made an initial showing that the City may not have been guided by Goal 10, the  
26

27  
28 <sup>78</sup> Issue 3: Whether, in adopting Ordinance O2019-484, the City failed to be guided by the goals contained in  
29 RCW 36.70A.020, specifically (1) Urban Growth; (2) Reduce Sprawl; (4) Housing; (5) Economic Development;  
30 (6) Property Rights; (7) Permits; (11) Citizen Participation and Coordination; (12) Public Facilities and  
31 Services?

31 <sup>79</sup> Petitioner’s Opening Brief at 17.

32 <sup>80</sup> *Id.* at 18.

<sup>81</sup> City’s Response Brief at 18-26.

1 Environment. The burden of proof is on the Petitioner, and the Board cannot find adequate  
2 legal argument in Petitioner's brief to sustain a conclusion that the City has failed to be  
3 guided by the multiple goals laid out in the issue statement. That said, the Board will  
4 address whether the City's actions are in keeping with the goals and requirements of the  
5 GMA in evaluating the appropriateness of the remedy of invalidity. **The Board finds and**  
6 **concludes** that Petitioner has failed to carry their burden of proof in demonstrating that the  
7 City failed to be guided by GMA goals.  
8

9  
10 **Failure of public participation (Issue 1)**

11 Here, Petitioner asks whether the Ordinance violates the GMA's public participation  
12 process and failed to follow the City's own development regulation process.<sup>82</sup>

13 Petitioner contends the City failed to meet the public involvement requirements in  
14 RCW 36.70A.020(11), .035, and .140 because during the week preceding the adoption of  
15 Ordinance O2019-484, Petitioner was unclear what the City County was planning to do with  
16 V/C standards.<sup>83</sup> Petitioner also claims the City's Planning Commission was not given  
17 sufficient "time, resources or leeway to adequately review the proposal to make V/C  
18 standards permanent." Lastly, Petitioner argues the City did not follow its own code to  
19 inform the public about the transportation standards about to be adopted.<sup>84</sup>  
20

21 The City counters they published notice of the City Council meeting in which  
22 transportation concurrency and level of service would be addressed. The City explains that  
23 its meeting notice was published May 2, 2019, for a May 7, 2019, City Council meeting,  
24 including the proposed text for the Ordinance plus background material. The City  
25 emphasized the adopted Ordinance was substantially the same as the interim transportation  
26  
27

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29 <sup>82</sup> Issue 1: Ordinance No. O2019-484 violates RCW 36.70A.020(11), RCW 36.70A.035 and RCW 36.70A.140,  
30 for failing to provide an adequate public participation process and failing to follow the City's prescribed  
31 development regulation process as set forth in chapters 2.60 and 24A.15 SMC.

32 <sup>83</sup> Petitioner's Brief at 13.

<sup>84</sup> *Id.* at 14.

1 concurrency regulation adopted in November 2018.<sup>85</sup> The City explained that after the  
2 interim Ordinance was adopted in November 2018, the City held a public hearing in January  
3 2019 and subsequently in March 2019 the City Planning Commission met to review  
4 transportation concurrency proposals.<sup>86</sup> Finally, the City argues Petitioner did not show how  
5 the published notices and multiple meetings held by the City failed to meet the City's public  
6 involvement codes.<sup>87</sup>

8 *Board Discussion and Analysis*

9  
10 The Board reviewed the record of public notices, public City Planning Commission  
11 meetings and City Council meetings. The City notified the public about planning  
12 commission meetings, public hearing and public meeting about the transportation  
13 concurrency topic. Petitioner does not provide evidence of a City meeting held without  
14 proper notice nor does the Petitioner demonstrate that the public was unaware of the  
15 discussions of transportation concurrency. In fact, Petitioner attended a public hearing in  
16 January 2019 about the very topic of transportation concurrency as evidenced in the  
17 record.<sup>88</sup> Petitioner's reply brief does not provide more evidence of the City's failure to meet  
18 GMA public involvement requirements. **The Board finds and concludes Petitioner has**  
19 **failed to carry their burden of proof demonstrating the City violated RCW**  
20 **36.70A.020(11), RCW 36.70A.035 and RCW 36.70A.140 and dismisses Issue 1.**  
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29 <sup>85</sup> City's Response Brief at 10; see also Ex. 15 at 01434 for prior ordinance.

30 <sup>86</sup> City's Response Brief at 10 "Following adoption of the emergency ordinance O2018-477, the City held a  
public hearing on January 25, 2019, to receive public input. Ex. 19 at 01592, 01651 – 01684; Ex. 20 at 01828"

31 <sup>87</sup> *Id.* at 11-12.

32 <sup>88</sup> City's Response Brief at 10; see also Ex. 93 at 08841 – 08842.

1 **Clearly erroneous methodology (Issue 6)**

2 This issue posits that Ordinance O2019-484 violates the GMA because the new level  
3 of service standards are based on an erroneous methodology for determining roadway  
4 capacities.<sup>89</sup>

5 Petitioner argues the City violated RCW 36.70A.070(6) concerning the requirements  
6 for a transportation element in the comprehensive plan because it adopted a flawed  
7 methodology for its transportation concurrency requirements. They believe “such  
8 fundamentally defective LOS standards must be declared clearly erroneous under RCW  
9 36.70A.320(3)”, the GMA provision which requires the Board to find compliance unless an  
10 action is “clearly erroneous.”<sup>90</sup> Petitioner questions the technical veracity of unverifiable  
11 assumptions and believes the City’s methodology is so fundamentally flawed that the  
12 volume it deems for roadways’ “capacity” is an erroneous and virtually meaningless  
13 number.<sup>91</sup> Petitioner requests the Board to find the City’s V/C LOS methodology  
14 noncompliant with RCW 36.70A.070(6) and not allow the City to adopt it under their  
15 discretionary authority.  
16  
17

18 The City responds the GMA does not dictate a “correct” LOS methodology and  
19 leaves that choice to a local jurisdiction, contending that RCW 36.70A.070(6) is a  
20 requirement for the transportation element of a comprehensive plan and not a level of  
21 service standard in a development regulation such as Ordinance O2019-484.<sup>92</sup>  
22

23 *Board Discussion and Analysis*

24 Petitioner abandoned all GMA claims in Issue 6 save for RCW 36.70A.070(6),  
25 alleging a flawed deliberation process and unverifiable technical calculations. This argument  
26 does not support a finding of a violation of RCW 36.70A.070(6), which is what the burden of  
27  
28

29 <sup>89</sup> Issue 6: Whether Ordinance O2019-484 violates RCW 36.70A.040, RCW 36.70A.070(6), WAC 365-196-430  
30 and/or WAC 365-196-840 by imposing new level of service standards based on an erroneous methodology for  
31 determining roadway capacities?

31 <sup>90</sup> Petitioner’s Opening Brief at 23-24.

31 <sup>91</sup> Petitioner’s Opening Brief at 29.

32 <sup>92</sup> City’s Response Brief at 35.

1 proof set out in RCW 36.70A.320 applies to. Petitioner does not identify which parts of GMA  
2 require specific criteria or definitions that must be in a transportation level of service  
3 methodology. The GMA states a jurisdiction must have a “level of service standards for all  
4 locally owned arterials and transit routes to serve as a gauge to judge performance of the  
5 system,”<sup>93</sup> and the City has them. **The Board finds and concludes Petitioner has not**  
6 **carried his burden of proof demonstrating the City violated RCW 36.70A.070(6) and**  
7 **dismisses Issue 6.**  
8

#### 9 **Preclusion of urban densities (Issue 7)**

10  
11 Petitioner argued here that the City violates the GMA because it precludes urban  
12 densities, fails to provide sufficient densities and areas with adequate public facilities and  
13 fails to provide urban governmental services.<sup>94</sup>  
14

15 Petitioner maintains the City violated RCW 36.70A.110, which requires identification  
16 of an urban growth area because, on adoption of Ordinance No. O2019-484, the City failed  
17 to plan “any growth that adds trips to Sahalee Way, meaning that the City is not locating  
18 sufficient development in areas with adequate public facilities and/or failing to provide urban  
19

20  
21 <sup>93</sup> RCW 36.70A.070(6) A transportation element that implements, and is consistent with, the land use element.  
22 (a) The transportation element shall include the following subelements:

23 (i) Land use assumptions used in estimating travel;

24 (ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to  
25 assist the department of transportation in monitoring the performance of state facilities, to plan improvements  
26 for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

27 (iii) Facilities and services needs, including:

28 (A) An inventory of air, water, and ground transportation facilities and services, including transit alignments  
29 and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future  
30 planning. This inventory must include state-owned transportation facilities within the city or county's  
31 jurisdictional boundaries;

32 (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;

<sup>94</sup> Issue 7: Does Ordinance No. O2019-484 violate RCW 36.70A.110(1), (2), (3) and (4) by precluding urban  
densities, failing to provide areas and densities sufficient to permit projected growth, locating growth in areas  
that have adequate public facilities or are characterized by urban growth, and failing to provide urban  
governmental services?

1 governmental services to those areas.” Petitioner claims he is “not arguing that the (V/C)  
2 standards are inevitably inconsistent with the City’s 20-year growth target, but that the  
3 rushed methodology and adoption process is flawed.”<sup>95</sup> Petitioner believes if the City had  
4 adopted LOS standards through a comprehensive plan amendment, then the City would  
5 have analyzed its 20-year growth projections and land use assumptions in compliance with  
6 the GMA.<sup>96</sup> City maintains “Petitioner’s conclusory statement and allegations about  
7 possible impacts of Ordinance O2019-484 on the City’s ability to meet its growth targets are  
8 insufficient to meet his burden of proof.”<sup>97</sup>

10  
11 *Board Discussion and Analysis*

12 RCW 36.70A.110 requires a county to designate urban growth areas for each city  
13 within that county and those cities are encouraged to provide urban governmental services  
14 within their urban growth boundaries. Petitioner claims the City should have adopted V/C  
15 standards through a CP amendment rather than a development regulation, thus requiring an  
16 analysis of urban growth areas and future population projections. While this is Petitioner’s  
17 opinion, he failed to carry his burden to show how the City violated RCW 36.70A.110.

18  
19 **Board finds and concludes Petitioner has failed to carry his burden of proof**  
20 **demonstrating the City violated RCW 36.70A.110 and dismisses Issue 7.**

21  
22 **Insufficient land for development – (Issue 8)**

23 Here, Petitioner alleges that Ordinance No. O2019-484 violates RCW 36.70A.115 by  
24 failing to provide sufficient land capacity for development.<sup>98</sup>

25 Petitioner contends that Ordinance O2019-484 precludes the Town Center Plan from  
26 being realized, which is one of the largest single locations of land capacity for development  
27

28  
29 <sup>95</sup> Petitioner’s Opening Brief at 32.

30 <sup>96</sup> *Id.* at 31.

31 <sup>97</sup> City’s Response Brief at 41.

32 <sup>98</sup> Issue 8: Does Ordinance No. O2019-484 violate RCW 36.70A.115 by failing to provide sufficient land capacity for development?



1 in the 2015 Comp Plan, arguing that there are no means to meet transportation concurrency  
2 requirements to build Town Center. Petitioner claims the City must provide land elsewhere  
3 to accommodate housing and employment as required in RCW 36.70A.115.<sup>99</sup>

4 The City responds that Petitioner has not demonstrated Ordinance O2019-484  
5 “would result in a deficit of land suitable for development within the 20-year planning horizon  
6 so as to create insufficient capacity to accommodate the City’s allocated growth  
7 projections.”<sup>100</sup> City states Petitioner’s arguments are conclusory and fails to provide  
8 evidence that the City violated RCW 36.70A.115.<sup>101</sup>

9 In reply to the City’s Response brief, Petitioner distinguishes between City of  
10 Everett’s analysis of land use capacity and the work not done by the City. Petitioner argues  
11 they could not demonstrate flaws in the City’s analysis because the City did not conduct an  
12 analysis.<sup>102</sup>

13  
14  
15 *Board Discussion and Analysis*

16 When cities or counties amend their comprehensive plans or development  
17 regulations, RCW 36.70A.115 requires them to provide enough land for development to  
18 accommodate their allocated housing and employment growth. To demonstrate a violation  
19 of RCW 36.70A.115, Petitioner must show a “deficit in land suitable for development within  
20 the 20 year planning horizon so as to create insufficient capacity to accommodate growth  
21 projections within the existing...UGA.”<sup>103</sup> Petitioner’s point that land cannot be considered  
22 developable if development will not be permitted for lack of traffic concurrency is well-taken.  
23 However, proving this allegation requires Petitioner to demonstrate some flaw in the City’s  
24  
25  
26  
27

28 <sup>99</sup> Petitioner Opening Brief at 33-34.

29 <sup>100</sup> City’s Response Brief at 41. *Wenatchee v. Chelan County*, EWGMHB No. 08-1-0015 (FDO, May 6, 2009)  
30 at 10.

31 <sup>101</sup> *Id.* at 41; see *Brown v. Everett*, GMHB No. 15-3-0018, FDO (June 7, 2016) at 11.

32 <sup>102</sup> Petitioner’s Reply Brief at 10.

<sup>103</sup> *City of Wenatchee v. Chelan County*, EWGMHB No. 08-1-0015 (FDO, March 6, 2009) at 10.

1 buildable lands analysis and their land capacity analysis, but Petitioner did neither.<sup>104</sup> The  
2 City previously conducted its land capacity analyses consistent with this section, and  
3 Petitioner has brought no evidence that these analyses were flawed. **The Board finds and**  
4 **concludes** Petitioner failed to carry his burden of proof demonstrating the City failed to  
5 comply with RCW 36.70A.115 and dismisses Issue 8.  
6

### 7 ***De Facto Moratorium – (Issue 9)***

8 Petitioner argues that Ordinance No. O2019-484 violates RCW 36.70A.390 by  
9 imposing a *de facto* moratorium on development without complying with the requirements of  
10 RCW 36.70A.390.<sup>105</sup>  
11

12 Petitioner cites RCW 36.70A.390 which allows a jurisdiction to impose a temporary  
13 measure moratorium of up to six months or one year. Petitioner claims Sammamish “may  
14 not continually refuse to implement its plan through the device of a moratorium.” Petitioner  
15 argues the City cannot ignore the “practical effects of Ordinance O2019-484” because the  
16 Ordinance removed an “enforceable TIP for Sahalee Way [and] .... did not allow  
17 development applications can be submitted if they add trips to this corridor under the V/C  
18 Standards. When Council realized that the June TIP allowed applications to proceed, they  
19 removed *only* the Sahalee Way project from consideration.” This action, claims Petitioner, is  
20 a *de facto* moratorium on development and cites two GMHB cases to bolster his  
21 argument.<sup>106</sup>  
22

23 The City responds that it did not adopt a moratorium under RCW 36.70A.390 and  
24

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25  
26 <sup>104</sup> *Brown v. Everett*, GMHB No. 15-3-0018 (FDO, June 7, 2016) at 6-7. “RCW 36.70A.115 requires counties  
27 and their cities to accommodate the Office of Financial Management’s twenty year population and employment  
28 growth projection by including “sufficient capacity of land suitable for development”. In this matter, two of the  
29 steps in achieving population accommodation are the development of a Buildable Lands Report (BLR) and a  
30 Land Capacity Analysis (LCA).”

31 *Friends of Skagit County, et al v. Skagit County*, GMHB No. 07-2-0025c (Order on Motions for  
32 Reconsideration, June 18, 2008) at 16.

<sup>105</sup> Issue 9: Whether Ordinance No. O2019-484 violates RCW 36.70A.390 by imposing a *de facto* moratorium  
on development without complying with the requirements of RCW 36.70A.390?

<sup>106</sup> Petitioner’s Opening Brief at 34.

1 states Petitioner did not carry his burden of proof to “establish Ordinance O2019-484 is a *de*  
2 *facto* moratorium” because not all development in the City has been stopped.<sup>107</sup> The City  
3 challenges Petitioner’s reference to previous Board decisions on moratoria because those  
4 cases were about actual moratoria adopted by local jurisdictions.<sup>108</sup>

### 6 *Board Discussion and Analysis*

7 RCW 36.70A.390 governs the process by which a jurisdiction may adopt a  
8 moratorium. The relevant points from this statute are for a city...

9 “...that adopts a moratorium... without holding a public hearing...shall hold a  
10 public hearing on the adopted moratorium... at least sixty days of its adoption,  
11 whether or not the governing body received a recommendation on the matter  
12 from the planning commission or department. If the [city] ...does not adopt  
13 findings of fact justifying its action before this hearing, then the [city] shall do  
14 so immediately after this public hearing. A moratorium... may be effective for  
15 not longer than six months, but may be effective for up to one year if a work  
plan is developed.”

16 The Board determines that Petitioner’s challenge based on RCW 36.70A.390 does not  
17 apply because the City did not adopt a moratorium and does not offer evidence that the City  
18 has stopped all development with the adoption of Ordinance O2019-484 or that it meets the  
19 Board’s prior requirements for a *de facto* moratorium. **The Board finds and concludes**  
20 **Petitioner failed to carry his burden of proof demonstrating the City violated RCW**  
21 **36.70A.390 and dismisses Issue 9.**

### 24 INVALIDITY

25 Petitioner requests the Board to impose invalidity on the City’s action to adopt  
26 Ordinance O2019-484 because continued validity ...

29 <sup>107</sup> City’s Response Brief at 42-43.

30 <sup>108</sup> *Skagit D06, LLC. v. Mount Vernon*, GMHB No. 10-2-0011 (FDO, August 4, 2010) at 7 (ordinance prohibiting  
31 sewer connections outside of the city limits was not a *de facto* moratorium because it did not deny a property  
32 owner the ability to submit an application for an otherwise permissible use or activity)

1 “...interferes with the goals of the GMA by perpetuating a pattern of legislative  
2 action that avoids the City’s duties under the GMA. Instead of encouraging  
3 urban development and providing a transportation concurrency system that is  
4 consistent with the GMA and SEPA, one that the City had in place with the  
Expanded Intersection Standards...”<sup>109</sup>

5 Invalidity may be imposed pursuant to RCW 36.70A.302(1) which provides:

6 The board may determine that part or all of a comprehensive plan or  
7 development regulations are invalid if the board:

- 8 (a) Makes a finding of noncompliance and issues an order of remand under  
9 RCW 36.70A.300;  
10 (b) Includes in the final order a determination, supported by findings of fact and  
11 conclusions of law, that the continued validity of part or parts of the plan or  
12 regulation would substantially interfere with the fulfillment of the goals of this  
chapter, and  
13 (c) Specifies in the final order the particular part or parts of the plan or  
14 regulation that are determined to be invalid, and the reasons for their invalidity.

15 Invalidity requires three separate actions by the Board:

- 16 1. A finding of noncompliance with the Act, with an order of remand.  
17 2. A determination that continued validity will interfere with the Act’s goals.  
18 3. Identification of the specific part of the regulation, and reason for invalidity.  
19

20 The finding of invalidity is a matter for the Board’s judgment; it is not subject to the  
21 burden of proof placed on the Petitioner for assertions of noncompliance.  
22

23 As the Court of Appeals stated in *Davidson Serles*:

24 On the appropriate facts, the Board could find that failure to properly conduct  
25 the required environmental review for a city or county action interfered with  
26 fulfillment of the GMA’s environmental goal and, upon such a finding, could  
invalidate the relevant ordinance.<sup>110</sup>  
27  
28  
29

30 <sup>109</sup> Petitioner’s Opening Brief at 35.

31 <sup>110</sup> *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 158  
32 (2010).

1 A city's authority to act is qualified by the requirements of SEPA. A determination of  
2 nonsignificance is a legal prerequisite to the City's action.<sup>111</sup> In issuing a DNS, it is  
3 incumbent upon a jurisdiction to establish *prima facie* SEPA compliance.

4 Moreover, we hold that RCW 43.21C.030(c) necessarily requires the  
5 *consideration* of environmental factors by the appropriate governing body in  
6 the course of all state and local government actions before it may be  
7 determined whether or not an Environmental Impact Statement must be  
8 prepared.

9 Thus, SEPA requires that a decision *not* to prepare an Environmental Impact  
10 Statement must be based upon a determination that the proposed project is  
11 *not* a major action significantly affecting the quality of the environment.

12 A decision by a branch of state government on whether or not to prepare an  
13 Environmental Impact Statement is subject to judicial review, but before a  
14 court may uphold such a decision, *the appropriate governing body must be*  
15 *able to demonstrate that environmental factors were considered in a manner*  
16 *sufficient to amount to prima facie compliance with the procedural*  
*requirements of SEPA.*<sup>112</sup> (emphasis added)

17 In meeting the first requirement of a finding of invalidity, the Board has determined  
18 that the City of Sammamish failed to comply with both GMA and SEPA and has remanded  
19 this matter to the City to achieve compliance under RCW 36.70A.300.

20  
21 Secondly, the Board determined that the timeline of the City's actions indicates that  
22 there could not have been any consideration of the environmental impacts of the City's  
23 impositions of the corridor LOS, because there was no standard nor methodology  
24 developed sufficient to gauge how such a corridor LOS would impact either the environment  
25 or the other elements of the comprehensive plan.

26 We have carefully considered the implications of the City's actions on GMA Planning  
27 Goals RCW 36.70A.020(10) and (12).

28  
29 (10) Environment. Protect the environment and enhance the state's high  
30 quality of life, including air and water quality, and the availability of water.

31 <sup>111</sup> *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 256 (1993).

32 <sup>112</sup> *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73 (1973).

1 (12) Public facilities and services. Ensure that those public facilities and  
2 services necessary to support development shall be adequate to serve the  
3 development at the time the development is available for occupancy and use  
4 without decreasing current service levels below locally established minimum  
5 standards.

6 Without SEPA analysis, the City had virtually no information regarding the  
7 foreseeable environmental effects of developing and implementing corridor LOS nor on its  
8 effects on public facilities and services. By adopting transportation concurrency LOS  
9 standards and methodology in a development ordinance instead of the comprehensive plan,  
10 the City created inconsistencies in violation of both RCW 36.70A.070 and RCW 36.70A.130,  
11 and thus cannot be said to have considered the foreseeable effects of those regulations on  
12 its environment or public facilities and services. The Board hereby finds and concludes that  
13 the continued validity of a portion of Ordinance O2019-484 would substantially interfere with  
14 the fulfillment of GMA Planning Goals 10 and 12.

15 Finally, the Board notes that the corridor LOS standard and methodology is  
16 contained in SMC Chapter 14A, specifically in 14A.10.050(2). This section of the Ordinance  
17 creates the standards and methodology for the corridor LOS. By invalidating this portion of  
18 the Ordinance, the Board is prohibiting the continued efficacy of a transportation  
19 concurrency standard which is in violation of SEPA and the requirements of the GMA. The  
20 City may continue to rely on its (extended) intersection LOS standards as it implements its  
21 comprehensive plan and pursues compliance with this Board's order.  
22

23 **The Board hereby finds and concludes** that the continued validity of SMC  
24 14A.10.050(2), as adopted in Ordinance O2019-484, would substantially interfere with the  
25 fulfillment of the GMA Planning Goals 10 and 12 and imposes invalidity on SMC  
26 14A.10.050(2).  
27

## 28 **V. FINDINGS OF FACT**

- 29
- 30 1. The City adopted Ordinance O2019-484 which amended the City's development  
31 regulations to impose corridor LOS as the transportation concurrency  
32 measurement against which development projects would be measured,

1 affecting permitting in the City and implementation of the land use and capital  
2 facilities sections of the comprehensive plan.

- 3 2. The comprehensive plan adopted September 2018 includes policies T.1.1 and  
4 T.1.3, which purport to establish standards for transportation system  
5 performance based on both intersection LOS and (segment or) corridor LOS.
- 6 3. Previous comprehensive plans had established intersection LOS standards and  
7 methodology using a graded system, A through F, generally accepted by local  
8 government and transportation advisors, and the standard for transportation  
9 system performance. No standard or methodology for a corridor LOS appears  
10 in the adopted comprehensive plan.
- 11 4. Neither the SEPA checklist in support of the comprehensive plan, adopted June  
12 6, 2018 nor the addendum thereto adopted September 12, 2018 includes  
13 standards or methodology for application of a corridor LOS.
- 14 5. Ordinance O2019-484, adopted May 23, 2019, creates standards and  
15 methodologies for transportation concurrency based on a corridor LOS as a  
16 development regulation, and not as an adopted policy in the comprehensive  
17 plan.
- 18 6. The City's comprehensive plan includes the following policies:
- 19 CF 1.1 Plan capital facilities that have the capacity and are located to  
20 serve existing development and future growth planned in the Land Use  
21 Element.
- 22 CF 1.2 Provide all capital facilities necessary to support related services  
23 that are the responsibility of the City, including transportation, parks,  
24 police, surface water management, city hall and public works.
- 25 CF 2.5 Identify needs for additional capital facilities based on adopted  
26 levels of service and forecasted growth, and determine the means and  
27 timing for providing needed additional facilities.
- 28 CF 2.6 Provide capital facilities that achieve the levels of service  
29 concurrent with development as defined in City code and Washington  
30 State law.
- 31 7. Ordinance O2019-484's imposition of corridor LOS is inconsistent with RCW  
32 36.70A.070 and RCW 36.70A.130 inasmuch as it has been passed as a

development regulation as opposed to a comprehensive plan policy, there has been no evaluation of the corridor LOS for consistency with other sections of the comprehensive plan.

8. The Board has found Ordinance O2019-484 to violate SEPA RCW 43.21C.030.
9. RCW 36.70A.070 requires that comprehensive plan must be an internally consistent document, and that the transportation element must implement and be consistent with the land use element, including level of service standards that serve as a gauge to judge performance of the system.
10. RCW 36.70A.120 requires that local jurisdictions which are required or choose to plan under RCW 36.70A.040 must perform its activities and make capital budget decisions in conformity with its comprehensive plan.
11. RCW 36.70A.130(1)(d) requires that any amendment or revision to development regulations shall be consistent with and implement the comprehensive plan.
12. The “environmental review” prior to adoption of Ordinance O2019-484 consisted of a Declaration of Non Significance based on an inadequate SEPA Environmental Checklist.
13. The State Environmental Policy Act (SEPA) requires all government agencies to consider the environmental effects of a proposed action.
14. Ordinance O2019-484 was a non-project action.
15. The City failed to “evaluate the impacts allowed under the changed designation at the time of the non-project action as required by SEPA.
16. The City’s decision makers had inadequate information regarding the foreseeable environmental effects of Ordinance O2019-484’s regulations (GMA Goal 10-Environment) and it had inadequate information regarding the foreseeable effects of those regulations on its public facilities and services (GMA Goal 12- Public facilities and services) based on the SEPA analysis done in conjunction with the Ordinance.

## **VI. CONCLUSIONS OF LAW**

- A. Ordinance O2019-484 violates SEPA.



- 1 B. Ordinance O2019-484 imposes a level of service as a development regulation  
2 that is violates RCW 36.70A.070 that such a level of service be included in a  
3 City's comprehensive plan.
- 4 C. Ordinance O2019-484 violates RCW 36.70A.130(1)(d) that requires any revision  
5 to development regulations must be consistent with and implement the  
6 comprehensive plan.
- 7 D. Ordinance O2019-484 violates RCW 36.70A.130(1)(d) because it either  
8 precludes or is in conflict with the following policies.

9 CF 1.1 Plan capital facilities that have the capacity and are located to  
10 serve existing development and future growth planned in the Land Use  
11 Element.

12 CF 1.2 Provide all capital facilities necessary to support related services  
13 that are the responsibility of the City, including transportation, parks,  
14 police, surface water management, city hall and public works.

15 CF 2.5 Identify needs for additional capital facilities based on adopted  
16 levels of service and forecasted growth, and determine the means and  
17 timing for providing needed additional facilities.

18 CF 2.6 Provide capital facilities that achieve the levels of service  
19 concurrent with development as defined in City code and Washington  
20 State law.

- 21 E. The SEPA Environmental checklist failed to demonstrate *prima facie* SEPA  
22 compliance.
- 23 F. The City violated RCW 43.21C.030 by basing its issuance of a Declaration of  
24 Non Significance on an inadequate Environmental Checklist.
- 25 G. The City's action in adopting Ordinance O2019-484 implicated GMA Planning  
26 Goals 10 and 12 which provide as follows:

27  
28 (10) Environment. Protect the environment and enhance the state's high  
29 quality of life, including air and water quality, and the availability of water.

30 (12) Public facilities and services. Ensure that those public facilities and  
31 services necessary to support development shall be adequate to serve  
32 the development at the time the development is available for occupancy

1 and use without decreasing current service levels below locally  
2 established minimum standards.

3 The failure to conduct a compliant SEPA review and the consequent failure to  
4 consider the potential environmental significance of the corridor LOS regulations included in  
5 Ordinance O2019-484, specifically corridor LOS identified in SMC 14A.10.050(2), mandate  
6 a finding and conclusion that the Ordinance is invalid. The continued validity of Ordinance  
7 O2019-484, in its adoption of corridor LOS through SMC 14A.10.050(2), would substantially  
8 interfere with the fulfillment of Goals 10 and 12, RCW 36.70A.020 (10) and (12).  
9

10 **The Board hereby finds and concludes** that the continued validity of Ordinance  
11 O2019-484, in its adoption of corridor LOS through SMC 14A.10.050(2) would substantially  
12 interfere with the fulfillment of the GMA Planning Goals 10 and 12 and therefore imposes  
13 invalidity on SMC 14.A.10.050(2).  
14

## 15 VII. ORDER

16 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
17 parties, the GMA, prior Board orders and case law, having considered the arguments of the  
18 parties, and having deliberated on the matter, the Board ORDERS as follows:  
19

- 20
- 21 • The City's adoption of Ordinance O2019-484 failed to comply with RCW  
22 36.70A.070 and 36.70A.130(1)(d).
  - 23 • The City's adoption of Ordinance O2019-484 failed to comply with RCW  
24 43.21C.030.
  - 25 • SMC 14A.10.050(2) as adopted in Ordinance O2019-484 is declared invalid.
  - 26 • Ordinance O2019-484 is remanded to the City for action to bring it into  
27 compliance according to the schedule set forth below.  
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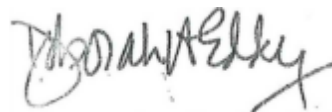
## COMPLIANCE SCHEDULE

Item	Date Due
Compliance Due	October 30, 2020
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	November 13, 2020
Objections to a Finding of Compliance	November 27, 2020
Response to Objections	December 7, 2020
<b>Telephonic Compliance Hearing</b> 1-800-704-9804 pin 7579646#	<b>December 17, 2020</b> <b>10:00 a.m.</b>

SO ORDERED this 20<sup>th</sup> day of April 2020.



Nina Carter, Board Member



Deb Eddy, Board Member



Cheryl Pflug, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>113</sup>**

<sup>113</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

## Appendix A: Procedural matters

On July 24, 2019, Don Gerend (Petitioner) filed a petition for review. The petition was assigned GMHB Case No. 19-3-0015.

A prehearing conference was held telephonically on August 16, 2019. Petitioner appeared through his attorney Duana T. Koloušková. Respondent City of Sammamish appeared through its attorney Kim Adams Pratt.

On August 28, 2019, the parties filed a Stipulated Request/Motion for 90-Day Extension of the Case Schedule. The motion was granted.

On December 11, 2019 Petitioner filed a Motion to Supplement the Record with 16 items in their motion and 9 items in their Reply to the City's Response to the Motion. The Board granted in part and denied in part the motion to supplement.<sup>114</sup>

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioner's Prehearing Brief, January 21, 2020 (Petitioner's Brief)
- Response Brief, February 12, 2020 (Response Brief)
- Reply Brief, February 26, 2020 (Petitioner's Reply Brief)

### Hearing on the Merits

Presiding Officer Nina Carter convened the Hearing on the Merits on March 6, 2020, in the City's chambers. Board members Cheryl Pflug and Deb Eddy were present. Petitioner Don Gerend was present with his attorney and the City was present with their attorney. The attorneys presented their arguments before the Board. The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

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<sup>114</sup> GMHB No. 19-3-0015 (Order on Motion to Supplement the Record, January 7, 2020).

## Appendix B: Legal Issues

Per the Prehearing Order, legal issues in this case were as follows:

1. Whether Ordinance No. O2019-484 violates RCW 36.70A.020(11), RCW 36.70A.035 and RCW 36.70A.140, for failing to provide an adequate public participation process and failing to follow the City's prescribed development regulation process as set forth in chapters 2.60 and 24A.15 SCC?
2. Whether Ordinance O2019-484 violates Chapter 43.21C including section 43.21C.030 and WAC 197-11-070, WAC 197-11-310, and WAC 197-11-600, because it was adopted without adequate and legally required threshold determination and due consideration of the potential environmental impacts of the new level-of-service standards and regulations contained in the Ordinance?
3. Whether, in adopting Ordinance O2019-484, the City failed to be guided by the goals contained in RCW 36. 70A.020, specifically (1) Urban Growth; (2) Reduce Sprawl; (4) Housing; (5) Economic Development; (6) Property Rights; (7) Permits; (11) Citizen Participation and Coordination; (12) Public Facilities and Services?
4. Whether Ordinance O2019-484 procedurally and substantively violates RCW 36.70A.040, RCW 36.70A.070, RCW 36.70A.120, WAC 365-196-800, and/or 365-196-810, because it imposes new level-of-service standards through a development regulation rather than as an amendment to the Transportation Element of the City's Comprehensive Plan?
5. Whether Ordinance O2019-484 violates RCW 36.70A.040 and RCW 36.70A.070, RCW 36.70A.120, RCW 36.70A.130(1)(d), WAC 365-196-800, and/or 365-196-810 by being inconsistent with the Comprehensive Plan, Land Use and Transportation Elements, and/or the Town Center Plan?
6. Whether Ordinance O2019-484 violates RCW 36.70A.040, RCW 36.70A.070(6), WAC 365-196-430 and/or WAC 365-196-840 by imposing new level of service standards based on an erroneous methodology for determining roadway capacities?
7. Does Ordinance No. O2019-484 violate RCW 36.70A.110(1), (2), (3) and (4) by precluding urban densities, failing to provide areas and densities sufficient to permit projected growth, locating growth in areas that have adequate public

1 facilities or are characterized by urban growth, and failing to provide urban  
2 governmental services?

3 8. Does Ordinance No. O2019-484 violate RCW 36.70A.115 by failing to provide  
4 sufficient land capacity for development?

5 9. Whether Ordinance No. O2019-484 violates RCW 36.70A.390 by imposing a  
6 *de facto* moratorium on development without complying with the requirements  
7 of RCW 36.70A.390?  
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