

**Supreme Court Case No. _____
(Court of Appeals Case No. 83905-5-I)**

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

FRIENDS OF SAMMAMISH VALLEY, A Farm in the
Sammamish Valley LLC, Marshall Leroy d/b/a Alki Market
Garden, Eunomia Farms, LLC, Olympic Nursery Inc., C-T
Corp., Roots of Our Times Cooperative, Regeneration Farm
LLC., Hollywood Hills Association, Terry and David R.
Orkiolla, Judith Allen, and FUTUREWISE,

Respondents.

FUTUREWISE'S PETITION FOR REVIEW

Tim Trohimovich, WSBA No. 22367
Futurewise
816 Second Ave. Ste. 200
Seattle, Washington, 98104
(206) 343-0681 Ext. 102/ Mobile 206-853-6077
Email: tim@futurewise.org
Attorney for Futurewise

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I. IDENTITY OF THE PETITIONER

The Petitioner is Futurewise, a Washington State nonprofit corporation. Futurewise was a petitioner before the Growth Management Hearings Board (Board) and a respondent before the Court of Appeals.

II. CITATION TO THE COURT OF APPEALS DECISION

The Petitioner seeks review of the following published Court of Appeals decision: *King County v. Friends of Sammamish Valley and Futurewise*, Case No. 83905-5-I filed June 12, 2023, hereinafter Opinion. A copy of this opinion is enclosed as Appendix A.

The Opinion reversed *FOSV et al. v. King County*, Central Puget Sound Region Growth Management Hearings Board (CPSRGMHB) Case No. 20-3-0004c, Order Nunc Pro Tunc Correcting Scrivener's Errors in Final Decision and Order (Jan. 27, 2022), hereinafter FDO. A copy of the FDO is enclosed as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Opinion’s baseline that considered only uses and the Opinion’s failure to consider absolute impacts in conflict with SEPA and the *Wild Fish Conservancy* decision?

2. Does relying on a SEPA checklist prepared after adoption of an Ordinance comply with SEPA and is the checklist prepared for 19030 inconsistent with the *Spokane County* decision?

3. Did the Opinion correctly interpret the law when it labeled actual and likely impacts as “speculative”?

IV. STATEMENT OF THE CASE

A. Procedural History

The King County Council adopted Ord. 19030 (19030) in December 2019 on a 5-4 vote. 19030 became effective by operation of law after the County Executive did not sign it.¹ 19030 amended KingCo development regulations on siting and

¹ Certified Record (CR) 329. 19030 is at CR 217-338.

operating alcohol-related businesses, i.e., wineries, breweries, distilleries and remote tasting rooms (WBDs).² It was enacted based on a County staff State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) dated April 26, 2019, which dispensed with an environmental impact statement (EIS) and with the disclosure and examination of environmental impacts required by SEPA.³ The DNS, relied upon by the County Council in adopting 19030, was based on the April 24, 2019, SEPA Checklist.⁴

The Friends of the Sammamish Valley and affiliated individuals and groups (FoSV) and Futurewise timely filed petitions for review of 19030 with the Board.⁵ The Board issued a FDO finding that 19030 violated the GMA, including requirements to protect agricultural lands and rural areas, and

² CR 217-338.

³ CR 26-27.

⁴ CR 27; CR 29-33, 45. The 2019 SEPA Checklist is at CR 29-48.

⁵ CR 49407.

SEPA.⁶ The Court of Appeals Opinion reversed the Board and held that 19030 complied with the GMA and SEPA.⁷

B. 19030

19030 legalized WBDs in 64 square miles of agricultural lands of long-term commercial significance zoned Agricultural (A) and 300 square miles of Rural Area (RA) zones.⁸ There, land and costs are cheaper than in GMA-designated urban growth areas (UGAs) where the infrastructure suited to the WBDs intensive retail and production businesses is available.⁹

19030 authorizes “Remote Tasting Rooms” as permitted uses in the Rural Area (RA) zones in Demonstration Area A subject to certain conditions and in the Community Business

⁶ CR 49403. The Board FDO is in Appendix B and at CR 49403-49457.

⁷ Opinion 2.

⁸ CR 9085; CR 9172 (This zoning map shows the KingCo areas with RA designations, as light blue, light green and mid green. Their square miles can be determined arithmetically using the mileage legend at the bottom.).

⁹ CR 9094, CR 10129-31.

(CB) and the Regional Business (RB) zones.¹⁰

Winery/Brewery/Distillery uses (WBDs) Is became permitted uses in the Rural Area (RA) zones subject to certain conditions.¹¹ WBD IIs became permitted uses in the Agricultural (A), Neighborhood Business (NB), the CB, the RB, and the Industrial (I) zones and permitted and conditional uses in the RA zones subject to special conditions.¹² WBD IIIs are conditional uses in the A, RA, NB, CB, RB, and I zones.¹³ Permitted uses are permitted outright.¹⁴ A “conditional use” is an allowed “exception to zoning ordinances; it allows a property owner to use his or her property in a manner that the

¹⁰ CR 239, CR 241-42, CR 317-23, CR 331, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29. The location of these zones can be found on the zoning map at CR 9172.

¹¹ CR 248, 19030 Sec. 18A.

¹² CR 248-49, 19030 Sec. 18A.

¹³ CR 249, *Id.*

¹⁴ *Hansen v. Chelan Cnty.*, 81 Wn. App. 133, 139, 913 P.2d 409, 412 (1996).

zoning regulations expressly permit under conditions specified in the regulations.”¹⁵

Before the adoption of 19030, the sale of alcoholic beverages in the A and RA zones was limited to sales of products produced on site and incidental items.¹⁶ K.C.C. 21A.08.070B.13 formerly read as follows:

Only as accessory to a winery or SIC Industry No. 2082-Malt Beverages, and limited to sales of products produced on site and incidental items where the majority of sales are generated from products produced on site.¹⁷

19030 repealed this requirement, substituting that at least two of the five stages of wine, beer, cider, or distilled spirits production identified by 19030 must occur on site.¹⁸ One of those stages of production must be crushing, fermenting, or

¹⁵ *Weyerhaeuser v. Pierce Cnty.*, 95 Wn. App. 883, 886, 976 P.2d 1279, 1281 (1999).

¹⁶ CR 000238-39, CR 000241-42, prior K.C.C. 21A.08.070A & B.13.

¹⁷ CR 241-242.

¹⁸ CR 248-49, CR 253, CR 257, 19030 Sec. 18A., B.3.f., & B.12.g.

distilling.¹⁹ If these requirements are met, tasting and retail sales of beverages is allowed.²⁰ So now retail sales in the A zones, RA zones, and other zones can consist of beverages mostly made, three of five steps, offsite and brought onsite.

190303 reduced the minimum lot size for WBD IIs in the RA zones from 4.5 to 2.5 acres, increasing the sites where they can be located.²¹

C. “Settlement Agreements”

To protect rural areas and preclude intensive urban uses on rural and agricultural lands, the GMA generally prohibits urban services such as sewers in rural areas.²² The lack of infrastructure has not deterred some intensive alcohol-related uses from locating in Rural Areas outside of the City of Woodinville to take advantage of lower land costs

¹⁹ CR 253, 19030 Sec. 18B.3.f.

²⁰ CR 253, CR 258, 19030 Sec. 18B.3.h. & B.12.i.

²¹ CR 000248-49, CR 000266, 19030 Sec. 18 K.C.C. 21A.08.080A. & B.30.a.; CR 10225-26.

²² RCW 36.70A.110(4); RCW 36.70A.030(35).

commensurate with rural zoning while escaping having to pay for urban infrastructure.²³ And, unfortunately, while occasionally citing them for violations, KingCo allowed this egregious code noncompliance.

Matthews Winery, a major illegal venue, continues in operation to this day. County Health Department and Code Enforcement records show that Matthews was cited in 2012 for illegally converting a recreational vehicle garage into a bar and event center and holding events and concerts in violation of zoning regulations. It was also cited, starting in 2006, for violating stormwater pollutant source control requirements, violations that remained unresolved until 2015. To comply with ground and surface water pollution regulations, the Matthews owners installed a 3,000-gallon holding tank from which every few days raw effluent generated by its intensive retail uses is pumped into a truck for off-site disposal. Matthews also has

²³ CR 9076; CR 9094.

relied on porta potties to accommodate crowds attending its events.²⁴ These steps highlight the daily incompatibility of these intensive retail uses which create burdens suitable for urban infrastructure, not for makeshift measures in protected Agricultural and Rural Areas.

Years of little or no KingCo enforcement action against illegal uses and resulting impacts on rural and agricultural lands with consequent public outcry, led to a KingCo “solution” that presaged 19030’s Finding AA, which announced an enforcement deferral.²⁵ The “solution” was “settlement agreements” allowing noncompliant uses to continue to operate.²⁶ This created a group of unlawful *faits accomplis* “anticipating code amendments” that would legalize them.²⁷

²⁴ CR 8146-71; CR 8173-8206.

²⁵ CR 8124-26; CR 8223; CR 8248-50; CR 229.

²⁶ CR 8323-28. Some violators expanded their business regardless, without County enforcement. CR 7480, 7482-84, 7487, and CR 8081 et seq. The number of violators escalated. CR 7480, 7482-84, 7487, and CR 8081 et seq.

²⁷ CR 8323-85.

The agreements were unsuccessful in restraining the illegal uses.²⁸

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Issue 1: Is the Opinion’s baseline that considered only uses and the Opinion’s failure to consider absolute impacts in conflict with SEPA and the *Wild Fish Conservancy* decision?

The Opinion concluded that “[u]nder both *Chuckanut Conservancy* and *Quadrant Corp.*, the appropriate baseline from which to gauge Ordinance 19030’s impact was the existing uses ongoing in the Sammamish Valley at the time Ordinance 19030 was enacted.”²⁹ This conclusion conflicts with this Court’s *Wild Fish Conservancy* decision where this Court concluded that: “Rather than establishing the baseline on the current *uses* of the land (as the WFC suggests), the

²⁸ See, e.g., CR 8119-20 (County notice of revocation/enforcement in light of egregious “settlement” violations); CR 8115-16 (County reverses revocation, owner announces it “can continue doing business under this settlement agreement as usual.”) CR 7480, 7482-84, 7487, and CR 8081 et seq.

²⁹ Opinion 41.

appropriate baseline to compare the proposal’s environmental impacts is the *condition* of the existing environment.”³⁰ This Court held “WDFW’s threshold determination was not clearly erroneous when it compared the impacts of steelhead farming to the current, existing condition of the environment of Puget Sound”³¹

The 2019 Checklist utterly fails to consider the impacts of 19030 on the condition of the Sammamish Valley and the County’s Agricultural and Rural Areas.³² For example, it fails to disclose the remote tasting rooms operating in the Sammamish Valley and the condition of the valley.³³ The Responsible Official’s memo justifying the County’s DNS focused on uses, not the condition of the Sammamish Valley or

³⁰ *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 872, 502 P.3d 359, 372 (2022) emphasis in the original.

³¹ *Id.*

³² CR 29-48.

³³ CR 29-48.

the condition of the County’s Agricultural and Rural Areas.³⁴

The DNS also does not consider the condition of the environment in the County’s Agricultural and Rural Areas.³⁵

Similarly, the Opinion focused on uses and not the condition of the Sammamish Valley or the condition of the County’s Agricultural and Rural Areas.³⁶ The Opinion conflicts with the Supreme Court’s *Wild Fish Conservancy* decision.³⁷

The Opinion conflicts with the *Wild Fish Conservancy* decision in a second way. In that decision this Court wrote that Ecology adopted WAC 197-11-330(3) “outlining the various factors that an agency must use in determining whether a proposal’s impacts will be ‘significant.’”³⁸ In *Wild Fish Conservancy* decision “the factor most relevant to this case states that “[t]he absolute quantitative effects of a proposal are

³⁴ CR 8509-11.

³⁵ CR 26-27.

³⁶ Opinion 40-42.

³⁷ *Wild Fish Conservancy*, 198 Wn.2d at 872, 502 P.3d at 372.

³⁸ *Id.*, 198 Wn.2d at 870, 502 P.3d at 372.

also important [in determining a proposal’s significance], and may result in a significant adverse impact *regardless of the nature of the existing environment.*’ WAC 197-11-330(3)(b) (emphasis added [by this Court]).”³⁹

While Futurewise argued that KingCo’s SEPA decision violated the requirement in WAC 197-11-330(3)(b), the Opinion never addressed this argument.⁴⁰ For example, none of the businesses operating as a remote tasting room in Demonstration Area A were permitted uses prior to adoption of 19030.⁴¹ Remote tasting rooms were not authorized at all in the A or RA zones under the prior regulations.⁴² Five remote tasting rooms are operating in Demonstration Area A and were

³⁹ *Id.*, 198 Wn. 2d at 871, 502 P.3d at 372.

⁴⁰ Brief of Respondent Futurewise Case No. 83905-5-I pp. 38-39 (Filed July 25, 2022); Opinion 1-49.

⁴¹ CR 010182, CR 010184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13; CR 239, CR 241-42, CR 317-23, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29, CR 331, Demonstration Project Overlay A: Sammamish Valley map.

⁴² CR 010182, CR 010184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13.

intended to be legalized by 19030.⁴³ The Opinion erred in not considering the environmental impacts of these newly authorized uses on the condition of the Sammamish Valley including its Agricultural and Rural Areas.⁴⁴ This conflicts with this Court's *Wild Fish Conservancy* decision. This Court should take review under RAP 13.4(b)(1) because the Opinion conflicts with *Wild Fish Conservancy* decision.

The Opinion's focus on *Quadrant Corp.* is also misplaced.⁴⁵ *Quadrant Corp.* addressed the question of whether an area qualified for being included in an UGA and said nothing about SEPA or baselines.⁴⁶

⁴³ CR 47652, Row 6 (Castillo de Feliciano), Row 7 (Cave B Estate Winery), Row 11 (Cougar Crest Estate Winery), Row 20 (Patit Creek Cellars/Forgeron), Row 25 (Sky River Meadery); CR 317-18, Ord. 19030 Sec. 29.

⁴⁴ Opinion at 45.

⁴⁵ Opinion 41.

⁴⁶ *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 228, 110 P.3d 1132, 1134 (2005).

B. Issue 2: Does relying on a SEPA checklist prepared after the adoption of an Ordinance comply with SEPA and is the checklist prepared for 19030 inconsistent with the *Spokane County* decision?

WAC 197-11-340(2)(a), provides that “[a]n agency shall not act upon a proposal for fourteen days after the date of issuance of a DNS if the proposal involves: ... (v) A GMA action.”

19030 was a GMA action.⁴⁷ WAC 197-11-055(2)(c) provides: “Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).” Therefore, KingCo was required to complete its environmental review before adopting 19030.

WAC 197-11-315(1) provides that counties “shall use the environmental checklist” to assist in deciding if a proposal requires an environmental impact statement. The SEPA Checklist for 19030 was submitted on April 24, 2019.⁴⁸ The DNS for 19030, dated April 26, 2019, was based on the SEPA

⁴⁷ CR 218-20, Ord. 19030 pp. 2 – 4.

⁴⁸ CR 30.

Checklist submitted on April 24, 2019.⁴⁹ A SEPA Checklist must be prepared and reviewed by the County responsible official before issuing a DNS.⁵⁰ The 2019 Checklist did not have an Attachment A or a table comparing 19030 with the former Code and an impact summary in the table.⁵¹ The County Council adopted 19030 on December 4, 2019.⁵²

Attachment A to SEPA Checklist for the WBD Ordinance (November 2020) is an attachment to a November 2, 2020, SEPA Checklist.⁵³ This Checklist and Attachment A were not used in the SEPA review for Ordinance 19030 having been prepared almost one year after Ordinance 19030 was adopted.⁵⁴

⁴⁹ CR 26-27; CR 29-33, 45.

⁵⁰ WAC 197-11-330(1)(a). The responsible official is the government “officer or officers, committee, department, or section of the lead agency designated by agency SEPA procedures to undertake its procedural responsibilities as lead agency” including issuing DNSs. WAC 197-11-788; WAC 197-11-330.

⁵¹ CR 29-45.

⁵² CR 329, 19030 p. 113.

⁵³ CR 8578-623. Attachment A to the November 2020 SEPA Checklist is at CR 8608-20.

⁵⁴ CR 8580; CR 329, Ord. 19030 p. 113.

The 2020 SEPA Checklist was prepared after the Board found the County’s SEPA review for Ordinance 19030 violated SEPA.⁵⁵ King County did not conduct the SEPA review for the 2019 adoption of Ordinance 19030 based on the 2020 Checklist.⁵⁶ The King County Council did not have that November, 2020 Checklist before it when adopting 19030 in December, 2019. The 2019 Checklist did not have an impact summary or a table comparing Ordinance 19030 with the former code.⁵⁷ The table the Opinion cited was attached to a 2020 Checklist.⁵⁸

Before the Court of Appeals, KingCo pointed to a table at CP 041839-44, but that table is different than Attachment A and does not include an “impact summary.”⁵⁹ Attachment A to the 2020 Checklist claims that only five parcels countywide known

⁵⁵ CR 8567; CR 008578.

⁵⁶ CR 8567; CR 26-27.

⁵⁷ CR 29-45.

⁵⁸ Opinion 14. The checklist is at CR 8578-623.

⁵⁹ CR 8608-20.

to be WBDs could hold events without a temporary use permit.⁶⁰ The table King County cited does not say that.⁶¹ But the Opinion relies on this claim in upholding 19030.⁶² The Opinion incorrectly concluded that Attachment A to the 2020 Checklist was based on and furthered an analysis of code changes already included in the Action Report which included the table KingCo cited.⁶³ The 2020 Checklist included new claims.⁶⁴ The Board never considered the 2020 Checklist and King County never argued the Board should.⁶⁵

However, the Opinion relied on the 2020 Checklist and attachments.⁶⁶ As the Opinion concluded on SEPA compliance:

⁶⁰ CR 8611.

⁶¹ CP 041839-44.

⁶² Opinion 14.

⁶³ Opinion 14 fn. 4.

⁶⁴ CR 8611.

⁶⁵ CR 49403-57; King County's Prehearing Brief pp. 8-10, pp. 50-58 and Appendix I in King County's Motion For Leave To File Over-Length Reply Brief, and To Supplement The Administrative Record, And For Additional Time For Oral Argument in Case No. 839055-I.

⁶⁶ Opinion 14-17, 45-46, 48.

“We agree with the County that when the appropriate baseline is used and the restrictive provisions of the Ordinance are taken into account, the 2020 Checklist is adequate to support the DNS.”⁶⁷ Note that the Opinion does not say the 2019 Checklist is adequate.⁶⁸ The Opinion wrote: “The 2020 Checklist discusses the likelihood that Ordinance 19030 will lead to the development identified as posing a risk to the Sammamish Valley and is supplemented by an analysis of the code changes Ordinance 19030 makes as compared to prior code.”⁶⁹ The Opinion also wrote: “The County did not postpone environmental analysis of the potential impacts of Ordinance 19030 to the extent they are probable and not speculative. The comparative analysis of code changes between Ordinance 19030 and prior code added to the 2020 Checklist bears out this conclusion.”⁷⁰

⁶⁷ Opinion 46 underlining added.

⁶⁸ Opinion 1-49.

⁶⁹ Opinion 46.

⁷⁰ Opinion 48.

KingCo did not use the 2020 Checklist and Attachment A to SEPA Checklist for the WBD Ordinance (November 2020) in the SEPA review before adopting Ordinance 19030 in 2019.⁷¹ Whether a government agency can use a SEPA checklist prepared a year after a decision subject to review under SEPA to comply with SEPA is an issue of substantial public interest that should be determined by the Supreme Court. The Supreme Court has held that “the initial determination by the ‘responsible official,’ See RCW 43.21C.030(2)(c), as to whether the action is a ‘major actions significantly affecting the quality of the environment’ is very important.”⁷² The checklist is an essential part of that process.⁷³ “A thorough review and written revisions to the checklist by the lead agency is critically important because the checklist (and other reports if available)

⁷¹ CR 329, 19030 p. 113.

⁷² *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn. 2d 267, 273, 552 P.2d 674, 678 (1976)

⁷³ WAC 197-11-330(1)(a).

supports the legal validity of the threshold determination.”⁷⁴ It is also “[i]mportant for receiving useful feedback from other agencies, tribes, and the public” and “necessary for providing other agencies with jurisdiction with environmental information prior to making decisions on the proposal ...”⁷⁵

Therefore, this case qualifies for review by the Supreme Court under RAP 13.4(b)(4).

The substantial public interests in this case are shown by the decisions of this Court on conserving agricultural lands and protecting the rural areas. This Court’s *Soccer Fields* decision held that “[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.”⁷⁶ *Soccer Fields* also held that “[t]he County was required to assure the conservation of agricultural lands

⁷⁴ WASH. STATE DEP’T OF ECOLOGY, STATE ENVIRONMENTAL POLICY ACT HANDBOOK p. 20 (2018).

⁷⁵ *Id.*

⁷⁶ *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

*and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.”*⁷⁷

This Court’s *Soccer Fields* decision held that “to constitute an innovative zoning technique [authorized by RCW 36.70A.177] consistent with the overall meaning of the Act, a development regulation must satisfy the Act’s mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry.”⁷⁸

This Court’s *Lewis County* and *Kittitas County* decisions again upheld the requirement that development regulations are required to conserve agricultural lands such as KingCo’s Agricultural (A) zones.⁷⁹ KingCo failed to conserve agricultural

⁷⁷ *Id.*, 142 Wn.2d at 556, 14 P.3d at 140 emphasis in original.

⁷⁸ *Soccer Fields*, 142 Wn.2d at 560, 14 P.3d at 142.

⁷⁹ *Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 509, 139 P.3d 1096, 1106 (2006); *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 172, 256 P.3d 1193, 1206 (2011); CR 8996, K.C.C. 21A.04.030B.

lands as the GMA requires when making the SEPA determination for 19030.⁸⁰

This Court has repeatedly held that the GMA requires county comprehensive plans and development regulations to protect rural areas.⁸¹ Rural areas include lands that are not in UGAs or designated for agriculture, forest, or mineral resources.⁸² The KingCo SEPA decision failed to protect rural lands.⁸³

The Opinion also conflicts with the *Spokane County* decision. There the Court of Appeals concluded the Spokane County’s “checklist did not tailor its scope or level of detail to address the probable impacts on, for example, water quality, resulting from” an amendment to the plan and development

⁸⁰ CR 26-27; CR 29-48; CR 8509-11.

⁸¹ *Kittitas Cnty.*, 172 Wn.2d at 162–65, 256 P.3d at 1201–03; *Thurston Cnty. v. Cooper Point Ass'n*, 148 Wn.2d 1, 12–13, 57 P.3d 1156, 1162 (2002); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 728, 222 P.3d 791, 793 (2009).

⁸² *Thurston Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 357, 190 P.3d 38, 51 (2008).

⁸³ CR 26-27; CR 29-48; CR 8509-11.

regulations.⁸⁴ “While the property is near potable water wells in a Critical Aquifer Recharge Area with high susceptibility, the proposal could ‘allow an on-site [wastewater disposal] system that will fail thus resulting in the degradation of the local environment.’”⁸⁵ “Despite these concerns, the checklist repeated formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards. Thus, the checklist lacked information reasonably sufficient to evaluate the proposal’s environmental impacts.”⁸⁶

Like the amendments adopted by Spokane County, the 2019 SEPA checklist for 19030 lacked information reasonably sufficient to evaluate the proposal’s environmental impacts. 19030 authorizes “Remote Tasting Rooms” as permitted uses in

⁸⁴ *Spokane Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 580, 309 P.3d 673, 685 (2013) *review denied* 179 Wn.2d 1015, 318 P.3d 279 (2014).

⁸⁵ *Id.*

⁸⁶ *Id.*, 176 Wn. App. at 580-81, 309 P.3d at 685.

the RA zones in Demonstration Area A and in the CB and RB zones.⁸⁷ WBDs Is are permitted uses in the RA zones.⁸⁸ WBD IIs are permitted uses in the A, NB, the CB, the RB, and the I zones and permitted and conditional uses in the RA zones.⁸⁹ WBD IIIs are conditional uses in the A, RA, NB, CB, RB, and I zones.⁹⁰ WBDs are no longer limited to only selling beverages produced onsite and remote tasting rooms were never allowed before in the RA zones.⁹¹

These zones cover critical aquifer recharge areas including the areas most susceptible to contamination.⁹² Wells are located throughout the aquifer recharge areas.⁹³ However, the regulations do not include updated measures to protect

⁸⁷ CR 239, CR 241-42, CR 317-23, CR 331, 19030 Sec. 17 K.C.C. 21A.08.070A & B13, Sec. 28-29.

⁸⁸ CR 248, 19030 Sec. 18A.

⁸⁹ CR 248-49, 19030 Sec. 18A.

⁹⁰ CR 249, *Id.*

⁹¹ CR 10182, CR 10184-85, Ord. 18791 Sec. 167 K.C.C. 21A.08.070A. & B.13.

⁹² CR 7631; CR 7516; CR 7575; CR 7695.

⁹³ CR 9027. The wells are shown as filled boxes; the legend colors indicate the water system class they serve.

groundwater even though state law does not allow “wastewater from alcohol production to be treated in onsite systems that are designed to treat wastewater from toilets, shower and kitchens.”⁹⁴ Further, WBDs are currently located in these areas⁹⁵ and already use onsite septic systems to treat their waste water.⁹⁶ “These systems can leach and/or overflow excess effluent into the groundwater, swamping the [Sammamish] Valley farm soils.”⁹⁷ Already, one of the remote tasting rooms in the RA zone had to abandon a septic tank and drain field and replace it with a holding tank and agree to connect to a sewer when available even though sewers are urban services, not rural services.⁹⁸

Most of these facts and all of the adverse impacts were not disclosed in the 2019 SEPA checklist for 19030. Instead, when

⁹⁴ CR 000251-70; CR 000036; Opinion p. 6 fn. 2.

⁹⁵ CR 009075-76.

⁹⁶ CR 009087, CR 009093; CR 009033.

⁹⁷ CR 009033.

⁹⁸ CR 009671-81; CR 009033; CR 009172; CR 009008; RCW 36.70A.030(30), (35).

asked to “[d]escribe waste material that will be discharged into the ground from septic tanks or other sources ...” the County wrote “[n]ot applicable for this nonproject action. No regulations governing waste disposal will be amended by the proposal.”⁹⁹ The SEPA Checklist does disclose that “most” WBDs will use septic tanks, but does not disclose their potential impacts, that tanks may have to be replaced with holding tanks and connect to sewers, or that they will be allowed in aquifer recharge areas.¹⁰⁰ The checklist did not disclose that septic systems for Remote Tasting Rooms and WBDs are failing and discharging to surface and ground water.¹⁰¹ The checklist did not disclose the impacts on wells including contaminated ground water.¹⁰² Like the checklist in the *Spokane County*, this checklist did not address the probable

⁹⁹ CR 000035-36.

¹⁰⁰ CR 000045.

¹⁰¹ CR 009033-34.

¹⁰² CR 000029-48; CR 009033.

impacts on water quality from 19030. Like *Spokane County*, KingCo violated SEPA.

Like *Spokane County*, the 19030 checklist repeated formulaic language and “lacked information reasonably sufficient to evaluate the proposal’s environmental impacts.”¹⁰³ KingCo’s checklist took the SEPA equivalent of the Fifth Amendment over 80 times. Most answers to the 19030 SEPA Checklist were some variation on “[n]ot applicable for this nonproject action.”¹⁰⁴ That was the answer for the question on agricultural lands of long-term commercial significance.¹⁰⁵

The checklist contends there will not be adverse impacts on prime farmlands pointing to the new requirement that 60 percent of the product processed onsite in the A zone must be grown onsite.¹⁰⁶ But the checklist does not disclose the adverse impacts of nearby development on farmland such as storm

¹⁰³ *Spokane Cnty.*, 176 Wn. App. at 581, 309 P.3d at 685.

¹⁰⁴ CR 33-45.

¹⁰⁵ CR 41.

¹⁰⁶ CR 47.

water runoff that make parts of the Agricultural Production District “too wet for farming” and polluted runoff from failing septic systems flowing onto farmland.¹⁰⁷ These impacts from existing remote tasting rooms and WBDs demonstrate the future impacts of 19030.

Damage to the environment is “an interest plainly protected by SEPA.”¹⁰⁸ The SEPA rules identify soils, surface and ground water, runoff, and agricultural crops as elements of the environment.¹⁰⁹ The SEPA determination failed to protect these important interests.¹¹⁰

While the Opinion correctly summarized *Spokane County*, the Opinion did not follow its holdings.¹¹¹ The Opinion conflicts with *Spokane County*, a published decision of the

¹⁰⁷ CR 9020; CR 9033.

¹⁰⁸ *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63, 70 (2000).

¹⁰⁹ WAC 197-11-444(1)(a)(ii), (1)(c), (2)(b)(vii).

¹¹⁰ CR 26-27; CR 29-48; CR 8509-11.

¹¹¹ Opinion 46-47.

Court of Appeals. This Court should review this Opinion as provided for in RAP 13.4(b)(2).

C. Issue 3: Did the Opinion correctly interpret the law when it labeled actual and likely impacts as “speculative”?

At the threshold determination stage “SEPA requires consideration of environmental impacts, ‘with attention to impacts that are likely, not merely speculative.’”¹¹² An impact is not speculative if it is “likely or reasonably likely to occur ...”¹¹³

The Opinion labeled the adverse impacts that had already occurred and were likely to occur as “speculative.”¹¹⁴ The record shows that WBDs located on rural and agricultural lands.¹¹⁵ The already occurring adverse impacts include traffic congestion, speculation in farmland, increasing farmland costs beyond what farmers can afford, failing septic systems,

¹¹² *Wild Fish Conservancy*, 198 Wn.2d at 873, 502 P.3d at 373.

¹¹³ WAC 197-11-782.

¹¹⁴ Opinion 44-45, 47-48, 49.

¹¹⁵ CR 9075-76; CR 9172.

stormwater impacts on farmland, impacts to irrigation water, and impacts on instream flows needed by salmon.¹¹⁶ 19030 did not include regulations addressing speculative farmland price increases, septic tanks, storm water, instream flows, or irrigation water.¹¹⁷ The effectiveness of the provisions related to traffic are contested.¹¹⁸ The SEPA checklist did not disclose any of these impacts.¹¹⁹ The Opinion waved the impacts away by labeling them speculative.¹²⁰

These impacts all adversely impact elements of the environment and SEPA protects the environment from damage.¹²¹ The GMA also requires the conservation of agricultural lands.¹²²

¹¹⁶ CR 8179-85, CR 009020, CR 009022, CR 009033, CR 009121, CR 9143, CR 009038, CR 10158.

¹¹⁷ CR 35-48.

¹¹⁸ CR 9020.

¹¹⁹ CR 35-48.

¹²⁰ Opinion 44-49.

¹²¹ *Kucera*, 140 Wn.2d at 212, 995 P.2d at 70; WAC 197-11-444(1)(a)(ii), (1)(c), (2)(b), (2)(c).

¹²² *Soccer Fields*, 142 Wn.2d at 562, 14 P.3d at 143.

This Court wrote that “[w]e therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.”¹²³ As was documented above, the uses allowed by 19030 have created actual significant adverse impacts and more of these impacts are probable as future development occurs. The Opinion is inconsistent with the *Boundary Review Board* decision and review should be granted under RAP 13.4(b)(1). The speculative issue also involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

¹²³ *King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty.*, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993).

VI. CONCLUSION

Futurewise respectfully requests that the State Supreme Court accept review and make the following legal holdings:

1. The focus on uses in the baseline, rather the condition of the environment, and the failure to consider absolute impacts violated SEPA and WAC 197-11-330(3) and conflicts with the *Wild Fish Conservancy* decision.¹²⁴
2. A SEPA checklist prepared after the completion of an action subject to SEPA review violates SEPA and the checklist prepared for 19030 is inconsistent with the *Spokane County* decision.
3. Actual and likely impacts are not “speculative” under SEPA.

This document contains 4,992 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: July 11, 2023, and respectfully submitted.

¹²⁴ *Wild Fish Conservancy*, 198 Wn.2d at 870-72, 502 P.3d at 372.

s/ Tim Trohimovich

Tim Trohimovich, WSBA No. 22367
Attorney for Futurewise

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of July 2023, he, she, or they caused the following document to be served on the persons listed below in the manner shown: Futurewise’s Petition For Review in Court of Appeals Case No. 83905-5-I with Appendixes.

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Peter J. Eglick
 Joshua A. Whited
 Eglick & Whited PLLC
 1000 2nd Ave Ste 3130
 Seattle, WA 98104-1046
 Tel. (206) 441-1069
 Attorneys for the Friends
 of Sammamish Valley *et*
al.

Lisa Petersen
 Assistant Attorney General
 800 Fifth Avenue, Suite 2000
 Seattle, WA 98104
 Tel. 206-464-7676
 Attorney for the Growth
 Management Hearings Board

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X	Through the Washington State appellate courts efile and service system or by Email: eglick@ewlaw.net ; phelan@ewlaw.net ; whited@ewlaw.net	X	Through the Washington State appellate courts efile and service system: Lisa.Petersen@atg.wa.gov ; lalseaef@atg.wa.gov

Rita V. Latsinova
 Anne M. Dorshimer
 Stoel Rives LLP
 600 University Street, Suite
 3600
 Seattle, WA 98101
 Tel.: 206.624.0900
 Attorneys for Tenor Wines,
 LLC; Castillo de Feliciano;
 and Chateau Lill and Lill
 Family Wines

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Signed and certified on this 11th day of July 2023,

s/ Tim Trohimovich

Tim Trohimovich, WSBA No. 22367
 Attorney for Futurewise