From:	Paul Stickney
To:	City Council
Cc:	Planning Commission; Dave Rudat; David Pyle; Kellye Hilde; Jeff Elekes; Aaron Antin; Anjali Myer; EIS; Mike Sugg; Debbie Beadle; Lita Hachey; Amy Koehnen
Subject:	Six Legal Documents Recently Filed by the City of Sammamish - Public Comment for the City Council Study Session of 9.14.21
Date:	Tuesday, September 14, 2021 4:58:41 PM
Attachments:	1. Sammamish Motion 14 -City of Sammamish Motion for Reconsideration UZDP2019-00562.pdf 1A. Sammamish Motion 14 -City of Sammamish Motion for Reconsideration UZDP2019-00562.pdf 2. Galt Order UZDP2019-00562 .pdf 2A. Galt Order UZDP2019-00562.pdf 3. Response City Mootness 21-2-01778-5.pdf 3A. Response City Mootness 21-2-01778-5.pdf 4. Reply City Consolitate and Certification 21-2-01778-5.pdf 4A. Reply City Consolitate and Certification 21-2-01778-5.pdf 5. City Reply Brief 21-2-01778-5.pdf 5A. City Reply Brief 21-2-01778-5.pdf 6. Reply City Consolitate and Certification 21-2-10047-0.pdf 6A. Reply City Consolitate and Certification 21-2-10047-0.pdf

[CAUTION - EXTERNAL EMAIL]

Written Public Comments for the City Council Study Session on September 14th, 2021.

This email is about a 3 minute read. PDF's 1 -6, and PDF's 1A -6A , as appropriate.

Esteemed City Council Members,

The documents in this email are all relevant to the BLUMA EIS and related analyses – which is item 5 on your Revised Agenda for the 9.14.21 City Council Study Session.

Six Legal Documents Recently Filed by the City of Sammamish

Two Legal Documents: re Reconsideration of the Hearing Examiner Remand Order on UZDP2019-00562 in the Southwest (SW) Quadrant of the Town Center.

- **PDF 1 - City of Sammamish's Motion for Reconsideration**
- **PDF 1A - My remarks on the City of Sammamish's Motion for Reconsideration**

- **PDF 2 - Order Accepting A Request for Reconsideration and Public Comments**
- **PDF 2A - My Remarks on Order Accepting A Request for Reconsideration and Public Comments**

Four Legal Documents: Pertaining to King County Superior Court Cases the City of Sammamish Initiated vs. 1) Gerend, No. 21-2-01778-5 SEA; 2) Gerend & STCA, No. 21-2-10047-0 SEA.

PDF 3 - Response to Respondent's Motion to Dismiss For Mootness (Case No. 21-2-01778-5 SEA)
PDF 3A - My Remarks on Response to Respondent's Motion to Dismiss for Mootness (Case No. 21-2-01778-5 SEA)

PDF 4 - Reply in Support of Motions to Consolidate and for Certification of Direct Review to the Washington State Court of Appeals (Case No. 21-2-01778-5 SEA)
PDF 4A - My Remarks on Reply in Support of Motions to Consolidate and for Certification of

Direct Review to the Washington State Court of Appeals (Case No. 21-2-01778-5 SEA)

PDF 5 - City of Sammamish's Reply Brief (Case No. 21-2-01778-5 SEA)
PDF 5A - My Remarks on City of Sammamish's Reply Brief (Case No. 21-2-01778-5 SEA)

PDF 6 - Reply in Support of Motions to Consolidate and for Certification of Direct Review to the Washington State Court of Appeals (Case No. 21-2-10047-0 SEA)
PDF 6A - My Remarks on Reply in Support of Motions to Consolidate and for Certification of Direct Review to the Washington State Court of Appeals (Case No. 21-2-10047-0 SEA)

There is much to discuss in the documents above. I look forward to having sincere, candid conversations about these recent City legal filings - and the BLUMA EIS - with each of you.

Civic Mindedly, First and Foremost,

Paul Stickney, Sammamish
425-417-4556

Please be aware that email communications with members of the City Council, City Commissioners, or City staff are public records and are subject to disclosure upon request.

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Hearing Examiner Galt

BEFORE THE HEARING EXAMINER
CITY OF SAMMAMISH

In re the Appeal of: Findings/Conclusions/ Decision Town Center Phase 1: SW Quadrant, Unified Zone Development Plan STCA, LLC & STC JV1, LLC, Appellant	**NO. UZDP2019-00562** CITY OF SAMMAMISH'S MOTION FOR REDCONSIDERATION

RECONSIDERATION REQUEST

The City of Sammamish Department of Community Development ("DCD", "Department") requests reconsideration of the Examiner's Decision ("Decision") dated August 30, 2021. The specific aspects of the Decision encompassed in this request are detailed below.[1]

I. INTRODUCTION

[1] Pursuant to HEROP 504b the request is made by DCD which is located in City Hall, and which can be reached through its counsel of record for this proceeding with the contact information noted below.

1000 SECOND AVENUE, SUITE 3130
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PHONE (206) 441-1069
FACSIMILE (206) 441-1089

1 Reviewing a massive record, including thousands of pages of exhibits and many hours
2 of testimony over seven hearing days is no small task, particularly within the constricted time
3 frame set by the Code. The Department appreciates the Examiner's efforts in this regard which
4 are reflected in the eighty-eight-page Decision. Per SMC 20.10.260 reconsideration is also part
5 of the hearing examiner review process and is particularly important here in light of the scope
6 of the underlying decision. The Department therefore brings the following to the Examiner's
7 attention and requests reconsideration/clarification.[2]
8
9 **II. RECONSIDERATION REQUESTS**
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11 **A. The Department was within its discretion in declining to approve STCA's townhome proposal.**
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13 The Decision presents as a determination that the Department erred with regard to
14 townhomes in denying the UZDP application Department, based on a Department misreading
15 of the Code to the effect that townhomes are forbidden in the A-1 zone. See, e.g., Decision
16 Section 12.2 (including 12.2.1). In doing so, the Decision does not acknowledge the facts and
17 analysis presented by DCD during the seven-day de novo hearing. The touchstone of DCD
18 testimony was that appropriately designed and placed townhomes could be interspersed as
19 part of an overall appropriate A-1 zone plan integrating pedestrian oriented and mixed-use,
20 rather than presented in "monoculture" blocks. As explained, this would be consistent with
21 the Code statement of the purpose of the A-1 zone, " to provide for a pedestrian-oriented mix
22 of retail, office, residential, and civic uses…" SMC 21B.10.030(1)(a). The Department's
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[2] The Department reserves the right to take exception to the Decision, including but not limited to those parts noted in this request, through a LUPA action in superior court.

1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
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testimony at the hearing was that in the Department's judgment the STCA proposal for townhomes does not meet this (and related) Code purposes. See, e.g., Tr. 1076 lines 11-16, at 1077 line 6 through 1078 line 15; Tr. 882-86.[3]

Respectfully, the Decision appears to remand because the Department cannot proceed on the basis that townhomes are not ever permitted in the A-1 zone. However, the factual record compiled during the hearing reflects the Department position that townhomes can be permitted, but not as proposed in the STCA application.

Therefore, with regard to this issue, the Decision appears to be based in whole or in part on erroneous facts or information and, in contravention of the Code, contradicts the Department's exercise per Code of its professional judgment and discretion, and substitutes the Examiner's. Reconsideration/clarification is therefore requested to the specific effect that, while townhomes may be part of a proposal for the A-1 zone, it was within the Department's Code-granted discretion to decline to approve the townhome plan presented to it by STCA.

B. Decisions On Other Projects Do Not Bind Here.

The Decision cites and relies on other DCD UZDP decisions as effecting a kind of estoppel, suggesting that what may have been approved for very different applications (in terms of scope, location, etc.) may bind DCD here.[4] It also appears to go further, suggesting

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[3] STCA testimony described its townhomes' private front yards as somehow fulfilling this explicit Code purpose. See Tr. 366-69. The Department, applying its professional judgment and Code discretion, disagreed.

[4] E.g. Decision sections 13.2.1, 13.2.2, 14.1.3,17.2.1,17.2.2,17.2.3, 19.1.12.

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

that, where particular Code requirements may not have been applied in other application contexts, they may not be applied here or if applied should lead to approval.

However, there is no requirement in the Code or elsewhere that the Department's discretionary decision on a current application must be justified in terms of past ones on other applicants' proposals. Processing of prior decisions may have called for less information/analysis and not raised the same issues in applying Code requirements. [5] This could be because their locations were different, their zoning differed in whole or in part, they were on existing established arterial streets with public infrastructure so they did not entail siting and dedication of significant city infrastructure as envisioned by the TCP, and/or they were reviewed and vested under older stormwater and public works standards with different processes for variations.

The preceding important factual/physical differences are not the first predicates for reconsideration here. Reconsideration is called for in the first place because the Decision rests on an acknowledged <u>extension</u> of *Sleasman v. City of Lacey, 159 Wash. 2d 639, 151 P.3d 990 (2007). Sleasman* involved fines in the specific context of a Code enforcement action and in that context held that "a nonexistent enforcement policy cannot provide notice to the Sleasmans."

[5] For example, Decision section 14.1.3 states that in three earlier UZDP decisions, all prepared by or under the supervision of a planner no longer with the City, no TCP Goals and Policies Compliance Analysis was documented, as if this demonstrates error by DCD in undertaking such an analysis here.

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

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Reliance on an extension of *Sleasman* is legal error; there are cases that directly apply to this application context. In *Buechel v. Dep't of Ecology*, 125 Wash. 2d 196, 211, 884 P.2d 910, 919-920 (1994) the Washington Supreme Court held:

> The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property. No authority is cited for the proposition that the Board can be estopped from enforcing existing regulations by prior decisions not ever even considered by the Board. In *Mercer Island v. Steinmann,* 9 Wn. App. 479, 483, 513 P.2d 80 (1973), the court stated that a municipality is not precluded from enforcing zoning regulations if its officers have failed to properly enforce zoning regulations. That court explained that the elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance; the public has an interest in zoning that cannot be destroyed. Therefore, the landowner's argument that the action of the Board is arbitrary or capricious is not well taken. First, the Board never reviewed the 1980 neighbor's variance decision and its review would have been de novo. Second, the Department is not estopped from attempting to enforce zoning law because of a prior decision regarding other property.

See also *Dykstra v. Skagit Cty.,* 97 Wash. App. 670, 677 985 P.2d 424 (1999).

In other words, decisions on land use applications, particularly where discretionary judgment is involved per Code, are not precedential. See *Buechel, supra,* at 209 ("The size, location, and physical attributes of a piece of property are relevant…").

DCD therefore requests reconsideration/clarification that the Decision is not intended to require the Department to: overlook or not apply Code requirements; to adhere to past discretionary decisions on unrelated applications; to grant variances, variations, deviations or dispensations from same, or to replicate processing errors or omissions that may have occurred with regard to past applications.

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

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C. Advance Payment For Street Vacation Is Not Required .

The Decision suggests that the City addressed the issue of street vacation "nonsensically" as an all or nothing proposition. See, e.g., Decision section 3.2.2 et seq. However, the Record reflects a considered approach by the Department that called for commencement of the street vacation process during the pendency of the UZDP so that there was a colorable basis for processing a UZDP application that includes STCA development on City right of way. The Decision rejects this approach:

> Why would one pay for right-of-way that might never be needed if a future land use application were not approved? And once vacated, it would seem highly unlikely that the municipality would be interested in refunding the compensation it received and re-acquiring the right-of-way.

Id at 3.2.2

This speculation is apparently based on statements in STCA's Posthearing Brief [6], to which the City was not able to reply, misreading Exhibit 1006, the Public Works Standards (PWS) applicable to vacations. The PWS provide in section I.2 cited by STCA that:

> Where the vacation was initiated by the City Council or was a requirement by the City as a condition of a permit or approval, the owners of the property abutting the area vacated shall not be required to pay such sum that includes the appraised value of the area and costs associated with the physical closure. [Emphasis added.] [7]

[6] Appellant's Posthearing Brief at 25.

[7] This is in keeping with state law which does not require that cities obtain payment from abutting owners. See *Greater Harbor 2000, ET AL. v. City of Seattle, ET AL.,* 132 Wash. 2d 267, 282-83, 937 P.2d 1082 (1997)

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
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In other words, STCA could have pursued the street vacation process, noted that the vacation would be required as part of a UZDP, and set the stage to obtain City Council approval for it.

There are middle ground and pragmatic approaches available, which the Decision appears to preclude. Deferral of a street vacation application until after a UZDP has been finally approved, including presumably through any appeal process, is highly prejudicial to the public, the Department, and the City Council -- and arguably even to UZDP applicants. Neither the Department, nor the Examiner, nor STCA can assume or grant a street vacation. These are at the complete discretion of City Council. Per SMC 20.05.040(1)q, the Department cannot issue a decision approving a plan entailing development of property[8] still in the City's domain.

STCA has apparently chosen not to seek a street vacation, despite staff admonishments to do so, because it is to its advantage to present the Council with a fait accompli in the form of a final UZDP that requires a vacation and leaves the Council no options other than to give an unqualified yes -- or require everyone to go back to the drawing board.[9] However, the Decision's speculation that the vacation is a foregone conclusion overlooks the Council's ability to place conditions on a vacation. Here, these could concern public access, use, and the like – which could require a UZDP to go back to the drawing board.

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[8] See Tr. 1008-1009; 1395-97. See also 1368-69.
[9] See Tr. 143.

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

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It is not the Department's responsibility to act as broker for an applicant to obtain approval/control of property from City Council ; that is the applicant's responsibility. And it is not up to the Department, or the Examiner, to assume or speculate upon whether or on what conditions a vacation not even requested might be granted.

The Department therefore respectfully requests reconsideration of Decision section 3 in its entirety, because it is based on erroneous information and does not comply with applicable law. This request includes, but is not limited to section 3.2.5, which unless clarified suggests that the Department is required to issue a UZDP approval despite the applicant's failure to even apply for a street vacation, which is subject to City Council, not DCD review and decision.

D. Dicta Concerning City Contribution to Capital Facilities (e.g. City Square) Should be Deleted

The Department requests reconsideration/clarification, specifically deletion, of Decision Section 10.2.3 as both outside the Examiner's jurisdiction[10] and based on speculation.[11] As worded this section appears to presume that the City Council must contribute some further unspecified amount. It further appears to presume that the City's "dedication" of property the City controls to Town Center development is not also a basis, separately or in concert with the contributions the City has already made, for the Department to make a discrete determination as to the appropriate location for City Square.

[10] See section 10.2.3 (construing RCW 82.02.020 concerning

[11] See, e.g., Section 10.2.3 (speculation concerning City contributions, concerning reviewing court determinations on need for City Square).

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
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The Decision's statements are effectively dicta, ultra vires and will contribute to rather than reduce confusion and contention.

Respectfully submitted September 9, 2021 by Co-Counsel for City of Sammamish:

By:

Peter J. Eglick, WSBA No. 8809
Joshua A. Whited, WSBA No. 30509
Eglick & Whited, PLLC
Email: eglick@ewlaw.net
whited@ewlaw.net
CC: phelan@ewlaw.net

By: /s/ Lisa M. Marshall
Lisa M. Marshall, WSBA No. 24343
Sammamish City Attorney
Email: lmarshall@sammamish.us

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
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PHONE (206) 441-1069
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DECLARATION OF SERVICE

Peter Eglick declares that I am well over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein. On September 9, 2021, I caused true and correct copies of the foregoing document to be delivered via Email to the parties listed below:

Duana T. Koloušková, WSBA No. 27532
Dean Williams, WSBA No. 52901
Johns, Monroe, Misunaga, Koloušková, PLLC
1201 SE 8th Street, Suite 120
Bellevue, Washington 98004
Kolouskova@jmmlaw.com
williams@jmmlaw.com
Counsel for Petitioner STCA

T. Ryan Durkan, WSBA No. 11805
Stephen H. Roos, WSBA No. 26549
Hillis Clark Martin & Peterson P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
ryan.durkan@hcmp.com
steve.roos@hcmp.com
Counsel for Petitioner STCA

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

DATED: This 9th day of September, 2021 at Lake Forest Park , Washington.

Attorney

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
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9.12.21 Draft Markups and Opinion Comments by Paul Stickney

Hearing Examiner Galt

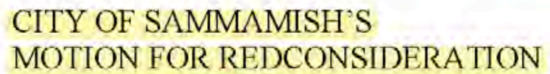
BEFORE THE HEARING EXAMINER
CITY OF SAMMAMISH

In re the Appeal of: Findings/Conclusions/ Decision Town Center Phase 1: SW Quadrant, Unified Zone Development Plan

STCA, LLC & STC JV1, LLC,

Appellant

NO. UZDP2019-00562



CITY OF SAMMAMISH'S
MOTION FOR REDCONSIDERATION

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The Decision presents as a determination that the Department erred with regard to townhomes in denying the UZDP application Department, based on a Department misreading of the Code to the effect that townhomes are forbidden in the A-1 zone. See, e.g., Decision Section 12.2 (including 12.2.1). In doing so, the Decision does not acknowledge the facts and analysis presented by DCD during the seven-day de novo hearing. The touchstone of DCD testimony was that appropriately designed and placed townhomes could be interspersed as part of an overall appropriate A-1 zone plan integrating pedestrian oriented and mixed-use, rather than presented in "monoculture" blocks. As explained, this would be consistent with the Code statement of the purpose of the A-1 zone, " to provide for a pedestrian-oriented mix of retail, office, residential, and civic uses…" SMC 21B.10.030(1)(a). The Department's

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However, there is no requirement in the Code or elsewhere that the Department's discretionary decision on a current application must be justified in terms of past ones on other applicants' proposals. Processing of prior decisions may have called for less information/analysis and not raised the same issues in applying Code requirements. [5] This could be because their locations were different, their zoning differed in whole or in part, they were on existing established arterial streets with public infrastructure so they did not entail siting and dedication of significant city infrastructure as envisioned by the TCP, and/or they were reviewed and vested under older stormwater and public works standards with different processes for variations.

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This is exactly what the City of Sammamish is doing to Town Center Plan and regulations.

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C. Advance Payment For Street Vacation Is Not Required .

The Decision suggests that the City addressed the issue of street vacation "nonsensically" as an all or nothing proposition. See, e.g., Decision section 3.2.2 et seq. However, the Record reflects a considered approach by the Department that called for commencement of the street vacation process during the pendency of the UZDP so that there was a colorable basis for processing a UZDP application that includes STCA development on City right of way. The Decision rejects this approach:

> Why would one pay for right-of-way that might never be needed if a future land use application were not approved? And once vacated, it would seem highly unlikely that the municipality would be interested in refunding the compensation it received and re-acquiring the right-of-way.

Id at 3.2.2

This speculation is apparently based on statements in STCA's Posthearing Brief [6], to which the City was not able to reply, misreading Exhibit 1006, the Public Works Standards (PWS) applicable to vacations. The PWS provide in section I.2 cited by STCA that:

> Where the vacation was initiated by the City Council or was a requirement by the City as a condition of a permit or approval, the owners of the property abutting the area vacated shall not be required to pay such sum that includes the appraised value of the area and costs associated with the physical closure. [Emphasis added.] [7]

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[6] Appellant's Posthearing Brief at 25.

[7] This is in keeping with state law which does not require that cities obtain payment from abutting owners. See *Greater Harbor 2000, ET AL. v. City of Seattle, ET AL.*, 132 Wash. 2d 267, 282-83, 937 P.2d 1082 (1997)

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

1 In other words, STCA could have pursued the street vacation process, noted that the vacation
2 would be required as part of a UZDP, and set the stage to obtain City Council approval for it.
3
4 There are middle ground and pragmatic approaches available, which the Decision
5 appears to preclude. Deferral of a street vacation application until after a UZDP has been
6 finally approved, including presumably through any appeal process, is highly prejudicial to
7 the public, the Department, and the City Council -- and arguably even to UZDP applicants.
8 Neither the Department, nor the Examiner, nor STCA can assume or grant a street vacation.
9 These are at the complete discretion of City Council. Per SMC 20.05.040(1)q, the
10 Department cannot issue a decision approving a plan entailing development of property[8] still
11 in the City's domain.
12
13 STCA has apparently chosen not to seek a street vacation, despite staff
14 admonishments to do so, because it is to its advantage to present the Council with a fait
15 accompli in the form of a final UZDP that requires a vacation and leaves the Council no
16 options other than to give an unqualified yes -- or require everyone to go back to the drawing
17 board.[9] However, the Decision's speculation that the vacation is a foregone conclusion
18 overlooks the Council's ability to place conditions on a vacation. Here, these could concern
19 public access, use, and the like – which could require a UZDP to go back to the drawing
20 board.
21
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[8] See Tr. 1008-1009; 1395-97. See also 1368-69.

26 [9] See Tr. 143.

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

It is not the Department's responsibility to act as broker for an applicant to obtain approval/control of property from City Council ; that is the applicant's responsibility. And it is not up to the Department, or the Examiner, to assume or speculate upon whether or on what conditions a vacation not even requested might be granted.

The Department therefore respectfully requests reconsideration of Decision section 3 in its entirety, because it is based on erroneous information and does not comply with applicable law. This request includes, but is not limited to section 3.2.5, which unless clarified suggests that the Department is required to issue a UZDP approval despite the applicant's failure to even apply for a street vacation, which is subject to City Council, not DCD review and decision.

D. Dicta Concerning City Contribution to Capital Facilities (e.g. City Square) Should be Deleted

The Department requests reconsideration/clarification, specifically deletion, of Decision Section 10.2.3 as both outside the Examiner's jurisdiction[10] and based on speculation.[11] As worded this section appears to presume that the City Council must contribute some further unspecified amount. It further appears to presume that the City's "dedication" of property the City controls to Town Center development is not also a basis, separately or in concert with the contributions the City has already made, for the Department to make a discrete determination as to the appropriate location for City Square.

[10] See section 10.2.3 (construing RCW 82.02.020 concerning

[11] See, e.g., Section 10.2.3 (speculation concerning City contributions, concerning reviewing court determinations on need for City Square).

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

1 The Decision's statements are effectively dicta, ultra vires and will contribute to rather than
2 reduce confusion and contention.

Respectfully submitted September 9, 2021 by Co-Counsel for City of Sammamish:

By:

Peter J. Eglick, WSBA No. 8809
Joshua A. Whited, WSBA No. 30509
Eglick & Whited, PLLC
Email: eglick@ewlaw.net
whited@ewlaw.net
CC: phelan@ewlaw.net

By: /s/ Lisa M. Marshall

Lisa M. Marshall, WSBA No. 24343
Sammamish City Attorney
Email: lmarshall@sammamish.us

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

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DECLARATION OF SERVICE

Peter Eglick declares that I am well over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein. On September 9, 2021, I caused true and correct copies of the foregoing document to be delivered via Email to the parties listed below:

Duana T. Koloušková, WSBA No. 27532
Dean Williams, WSBA No. 52901
Johns, Monroe, Misunaga, Koloušková, PLLC
1201 SE 8th Street, Suite 120
Bellevue, Washington 98004
Kolouskova@jmmlaw.com
williams@jmmlaw.com
Counsel for Petitioner STCA

T. Ryan Durkan, WSBA No. 11805
Stephen H. Roos, WSBA No. 26549
Hillis Clark Martin & Peterson P.S.
999 Third Avenue, Suite 4600
Seattle, WA 98104
ryan.durkan@hcmp.com
steve.roos@hcmp.com
Counsel for Petitioner STCA

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

DATED: This 9th day of September, 2021 at Lake Forest Park , Washington.

Attorney

E&W LAW
EGLICK & WHITED PLLC
1000 SECOND AVENUE, SUITE 3130
SEATTLE, WASHINGTON 98104
PHONE (206) 441-1069
FACSIMILE (206) 441-1089

BEFORE THE HEARING EXAMINER for the
CITY of SAMMAMISH

ORDER ACCEPTING A REQUEST FOR RECONSIDERATION and INVITING COMMENTS

FILE NUMBER: UZDP2019-00562

APPELLANTS: STCA, LLC & STC JV1, LLC
C/o Duana T. Koloušková/Dean Williams
Johns Monroe Mitsunaga Koloušková, PLLC
11201 SE 8th Street, Suite 120
Bellevue, WA 98004
kolouskova@jmmlaw.com/williams@jmmlaw.com
SERVICE BY E-MAIL

and

C/o Steven Roos/T. Ryan Durkan
Hillis Clark Martin & Peterson, PS
999 Third Avenue, Suite 4600
Seattle, WA 98104
steve.roos@hcmp.com/ryan.durkan@hcmp.com
SERVICE BY E-MAIL

RESPONDENT: City of Sammamish
Department of Community Development
ATTN: Lisa Marshall, City Attorney
801 228th Avenue SE
Sammamish, WA 98075
lmarshall@sammamish.us
SERVICE BY E-MAIL

and

C/o Peter J. Eglick/Joshua A. Whited
Eglick & Whited, PLLC
1000 Second Avenue, Suite 3130
Seattle, WA 98104
eglick@ewlaw.net/whited@ewlaw.net
SERVICE BY E-MAIL

APPLICANTS: Same as Appellants

TYPE OF CASE: Appeal from denial of a Unified Zone Development Plan

WHEREAS, on August 30, 2021, the City of Sammamish Hearing Examiner ("Examiner") issued a Decision in the above-entitled matter; and

WHEREAS, on September 9, 2021, Respondent Department of Community Development filed a timely Motion for Reconsideration (the "Motion"); and

WHEREAS, the Examiner has read the Motion and desires to allow parties of record to present written comments in response to the Motion before acting upon it, as authorized by Hearing Examiner Rule of Procedure 504(d)(3).

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

1. City Staff shall mail or otherwise provide a copy of the Motion and this Order to all parties of record.

2. All parties of record (other than Respondent which submitted the Motion) may submit written comment in response to the Motion on or before close of business on Friday, September 24, 2021 (which is the 10th working day after the date of this Order). Comments shall be submitted to Cynthia Schaff, Hearing Examiner Clerk, preferably by e-mal to cschaff@sammamish.us, or by USPS to 801 228th Avenue SE, Sammamish, WA 98075. Ms. Schaff will forward timely received written comments to the Examiner after the end of the comment period. Comments or portions of comments which address matters beyond the scope of the Motion will not be considered.

3. The Examiner will issue a final Order on the merits of the Motion within 14 days after the close of the comment period.

ORDER issued September 10, 2021.

\s\ John E. Galt

John E. Galt
Hearing Examiner

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

BEFORE THE HEARING EXAMINER for the
CITY of SAMMAMISH

ORDER ACCEPTING A REQUEST FOR RECONSIDERATION and INVITING COMMENTS

FILE NUMBER: UZDP2019-00562

APPELLANTS: STCA, LLC & STC JV1, LLC
C/o Duana T. Koloušková/Dean Williams
Johns Monroe Mitsunaga Koloušková, PLLC
11201 SE 8th Street, Suite 120
Bellevue, WA 98004
kolouskova@jmmlaw.com/williams@jmmlaw.com
SERVICE BY E-MAIL

and

C/o Steven Roos/T. Ryan Durkan
Hillis Clark Martin & Peterson, PS
999 Third Avenue, Suite 4600
Seattle, WA 98104
steve.roos@hcmp.com/ryan.durkan@hcmp.com
SERVICE BY E-MAIL

RESPONDENT: City of Sammamish
Department of Community Development
ATTN: Lisa Marshall, City Attorney
801 228th Avenue SE
Sammamish, WA 98075
lmarshall@sammamish.us
SERVICE BY E-MAIL

and

C/o Peter J. Eglick/Joshua A. Whited
Eglick & Whited, PLLC
1000 Second Avenue, Suite 3130
Seattle, WA 98104
eglick@ewlaw.net/whited@ewlaw.net
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John E. Galt
Hearing Examiner

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

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Honorable Kristin Richardson
Noted: September 17, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation, Petitioner, v. DON GEREND, an individual, Respondents, GROWTH MANAGEMENT HEARING BOARD, Agency Respondent.	No. 21-2-01778-5 SEA RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS

I. INTRODUCTION

Under threat of sanctions sought by the Growth Management Hearings Board ("the Board") the City of Sammamish repealed the moratorium that was the foundation for the Board's two orders finding the City had failed to comply with the Growth Management Act, ("GMA") RCW ch. 36.70A. This case is not moot because this Court can provide the City effective relief by reversing the Board's noncompliance orders and confirming that the City can reinstate its moratorium or adopt one in the future without fear of sanctions. Respondent Gerend's mootness argument rests largely on the erroneous premise that compliance with a judgment or order waives a party's right to challenge the judgment or order on appeal. As the Board itself has

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

confirmed that this case involves an important public issue of first impression that is likely to recur, this Court should review the Board's determination that the City has not complied with the GMA.

II. STATEMENT OF FACTS

Sammamish is a Washington city that undertakes its growth planning pursuant to the GMA. RCW 36.70A.070(6)(b) requires municipalities to create transportation "concurrency" requirements to ensure that development does not outstrip the capacity of the City's infrastructure, including roads, to serve it. On May 23, 2019, the City adopted Ordinance O2019-484, amending the development regulations in SMC 14A.10.050 related to transportation concurrency, and establishing a new section, SMC 14A.10.050(2), that adopted concurrency standards focused on local road corridors, as opposed to the existing standards based on local intersections. (1st AR 7-16, 2070)[1] Respondent Don Gerend, a former Sammamish Councilmember and Mayor, challenged Ordinance O2019-484 by filing a petition for review with the Board pursuant to RCW 36.70A.290. (1st AR 2-6)

In April 2020, the Board issued a Final Decision and Order ("FDO") invalidating SMC 14A.10.050(2). The Board held that the ordinance was adopted without proper review under the State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C, and improperly amended the City's comprehensive plan through a development regulation. (1st AR 2065-2110) The City initially appealed the FDO, but dismissed its appeal after the Board clarified the City had discretion in deciding how

[1] As explained in more detail below, the City has filed two petitions for judicial review, one for each non-compliance order, and asked that this Court consolidate the two petitions because they involve the same issues. Currently they are pending in this Court as two separate cause numbers, No. 21-2-01778-5 SEA and No. 21-2-10047-0 SEA. The administrative record in the first case, No. 21-2-01778-5 SEA, is Sub. No. 9 dated March 9, 2021, and is cited as "1st AR __." The administrative record in the second case, No. 21-2-10047-0 SEA, is Sub. No. 15 dated August 30, 2021, and is cited as "2nd AR __."

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

to comply with the FDO and could do so by performing a new SEPA analysis. (1st AR 2145-55) The City thus instructed its Code Revisor to add a notice to its code explaining that SMC 14A.010.050(2) had been invalidated and "repealed by operation of law." (1st AR 2145) The City then initiated a new SEPA analysis in the form of an Environmental Impact Statement (EIS), including study of potential alternatives, impacts, and mitigation relating to concurrency standards, land use, and related matters. (1st AR 2145)

The City also adopted a moratorium, as authorized by RCW 35A.63.220 and RCW 36.70A.390, to prevent vesting of new development applications and concurrency certificates that might be inconsistent with new standards adopted after completing its SEPA analysis. (1st AR 2189-94) The City replaced its initial moratorium with a new moratorium on July 28, 2020. (1st AR 2195-97)

The Board held a hearing on December 17, 2020, to determine whether the City had complied with the FDO. During the hearing the Board questioned the legality of its own regulation, WAC 242-03-920, and criticized the City for directing the Code Revisor to announce that SMC 14A.10.050(2) had been repealed instead of taking "some legislative action." (*See* Sub. No. 11 at 52-53 (transcript of the December 17, 2020, hearing))[2] To address this, the City expedited the adoption of an ordinance confirming that SMC 14A.10.050(2) had been repealed. (1st AR 2332-33)

In a January 22, 2021, order the Board deemed the City's repeal of the invalidated regulation and the City's initiation of a new SEPA EIS process, at a cost of approximately $500,000, non-compliance with the FDO. (1st AR 2339-49) Although the Board acknowledged that "[t]he repeal of SMC 14A.10.050(2) resolves the issues

[2] As the City pointed out, WAC 242-03-920 allows municipalities to assert compliance based on "the legislation adopted *or other action* taken to comply with the board's order." (emphasis added)

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

of SEPA compliance and the requirement that a level of service be included in a City's comprehensive plan addressed in the FDO," it nonetheless ruled the City had not complied with the FDO because its moratorium "amounts to interference with the goals of the GMA and is unnecessary to achieve compliance with the FDO." (1st AR 2346-47) In what the Board acknowledged is a matter of first impression, the Board held that it has the authority to hold the City in noncompliance because the City adopted moratoria to preserve the status quo while it performs the SEPA review the Board had held was required before adopting potential replacement regulations. (1st AR 2344-48)

The City enacted a new moratorium on January 19, 2021, that now included exceptions that allowed development of single-family residences on existing lots and accessory dwelling units. (Sub. No. 37, Kolouskova Dec., Ex. E) On April 20, 2021, the City replaced this moratorium with a new one that expanded what was allowed to include development of affordable duplexes on existing vacant lots. (Sub. No. 37, Kolouskova Dec., Ex. F)

After a second compliance hearing on May 28, 2021, the Board ruled the City's new moratorium violated the FDO. (2nd AR 321-41) The Board then wrote to the Governor and asked him to impose sanctions against the City under RCW 36.70A.330(3)(b), alleging that the City was "resist[ing] complying with Board's FDO" "through serial moratoria." (2nd AR 343-44)

In the face of the Board's request for sanctions, the City adopted Ordinance No. O2021-532, repealing its last moratorium, "to formalize the GMHB's invalidation of O2021-529." (2nd AR 354-55) However, in its statement of compliance required by the Board, the City declared that it had repealed the moratorium in response to "the Second Order on Noncompliance, to which the City of Sammamish takes exception

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

and on which the City of Sammamish reserves all rights (including but not limited to appeal rights) concerning its legality." (2nd AR 351) After the City repealed its moratorium, the Board issued a new order finding that the City had complied with the FDO and rescinded its request that the Governor sanction the City. (2nd AR 359-60)

The City has sought judicial review of both of the Board's noncompliance orders in this Court under the Administrative Procedures Act, RCW ch. 34.05. The City's appeal of the first noncompliance order is pending as No. 21-2-01778-5 SEA, and the City's appeal of the second noncompliance order is pending as No. 21-2-10047-0 SEA. The City has pending before this Court concurrent motions for consolidation and for certification of both cases to the Court of Appeals, pursuant to RCW 34.05.518. (*See* No. 21-2-01778-5 SEA, Sub. Nos. 51-52; No. 21-2-10047-0 SEA, Sub. Nos. 10-11) If these motions are granted, all issues concerning the Board's orders, including Gerend's motion to dismiss for mootness, would be resolved in the first instance by the Court of Appeals.

III. ARGUMENT AND AUTHORITY

A. This Court can grant the City effective relief by reversing the Board's invalidation of its moratorium and confirming the City's authority under the GMA to enact a moratorium while it considers replacements for the invalidated regulation.

"[A]n issue is not moot if a court can provide any effective relief." *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006). Federal courts have stricter standing requirements under Article III than do Washington courts of general jurisdiction. *See* Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3522 (3rd ed. 2021 update) ("It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction."). Yet the federal courts have consistently rejected respondent's argument that repeal of a legislative enactment in response to a judicial

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 declaration of invalidity moots a dispute over the enactment's validity, especially
2 where—as here—the legislative body explains the repeal is for the purposes of
3 compliance and that it reserves its right to appeal. *See, e.g.*, *Maher v. Roe*, 432 U.S.
4 464, 468 n. 4, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (adoption of a new regulation "only
5 for the purpose of interim compliance with the District Court's judgment and order"
6 did not moot an appeal when the "appeal was taken and submitted on the theory that
7 [the state] desires to reinstate the invalidated regulation"); *Doe v. City of*
8 *Albuquerque*, 667 F.3d 1111, 1117 n.5 (10th Cir. 2012) (case was not moot because "the
9 City clearly indicated its intent to reenact the challenged ban should this Court reverse
10 the District Court's decision striking it down"); *Ballen v. City of Redmond*, 466 F.3d
11 736, 739 (9th Cir. 2006) (case was not moot because Redmond's "new ordinance was
12 adopted only as an interim regulation in response to the district court's summary
13 judgment ruling . . . pending the outcome of the litigation").

14 This Court can provide the City effective relief by reversing the Board's
15 noncompliance orders and confirming the City's authority to impose a moratorium to
16 preserve the status quo while it studies replacements for the invalidated concurrency
17 regulation, without fear of the Board's sanctions. Gerend himself admits that the City
18 repealed its ordinance "in response to an order from the Board." (Mot. 7)[3] When the
19 City did so, the repealing ordinance expressly stated it repealed the moratorium "to
20 formalize the GMHB's invalidation" of the moratorium, a step the Board made clear
21 was necessary by chastising the City for not taking "some legislative action" in
22 response to the FDO and instead having its Code Revisor add a notice to its municipal
23 code stating the invalidated regulation had been "repealed by operation of law." (Sub.
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[3] Gerend also inexplicably asserts—in the same sentence—that the City repealed its moratorium "of its own accord." (Mot. at 7) As explained above, the City did not voluntarily repeal the moratorium.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

No. 11 at 52; 1st AR 2145) As the City further explained in its compliance statement to the Board, "the City of Sammamish takes exception" to the Board's second noncompliance order and "reserves all rights (including but not limited to appeal rights) concerning its legality." (2nd AR 351)

The GMA confirms this case is not moot. RCW 36.70A.300(5) provides that "[a]ny party aggrieved by a final decision of the hearings board may appeal the decision to superior court." As the Court of Appeals has explained, "[a]n 'aggrieved' party is one whose proprietary, pecuniary, or personal rights are substantially affected." *Harris v. Griffith,* 2 Wn. App.2d 638, 646, 413 P.3d 51, *rev. denied*, 191 Wn.2d 1012 (2018). The City's proprietary and pecuniary interests remain directly at issue because it cannot impose a moratorium without the risk of sanctions that could include a decrease in appropriations from the state and the withholding of revenues to the City from a number of critical taxes, *e.g.*, the motor vehicle fuel tax, sales tax, and liquor excise tax. *See* RCW 36.70A.340.

Gerend mistakenly argues this case is moot because the July 2020 moratorium has expired and thus a court "cannot go back now and tell the City that the Ordinance can be reinstated." (Mot. at 8) But the City has asked for that precise relief, which is well within the reviewing Court's power. (*See* Petitions for Judicial Review, No. 21-2-01778-5 SEA & No. 21-2-10047-0 SEA (both asking the Court to "[s]et aside/vacate, reverse, and remand the challenged Order including its findings and conclusions and determinations that the City is not in compliance with the GMA and that invalidation of the moratorium is authorized and warranted"))

Gerend's argument that the expiration of the July 2020 moratorium renders this case moot is also diametrically opposed to the arguments he made before the Board. Gerend argued to the Board that, despite the expiration and replacement of

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

the City's July 2020 moratorium, the question of whether to "invalidat[e] . . . any moratorium on concurrency certificate applications . . . . is ***not moot***" because "there still is an ordinance that is having the same offensive effect." (2nd AR 175)[4] The Board likewise observed—after the expiration of the July 2020 moratorium—that this case "clearly has not been dismissed as moot" and that this "case . . . has not changed." (2nd AR 67) In other words, both Gerend and the Board have previously acknowledged that the ability of a local government to reenact an invalidated ordinance precludes a finding of mootness. Gerend is judicially estopped from arguing otherwise. *Urbick v. Spencer L. Firm, LLC*, 192 Wn. App. 483, 488, 367 P.3d 1103 (2016) ("Judicial estoppel . . . prevent[s] a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."), as corrected (Feb. 3, 2016).

None of the cases cited by Gerend support his mootness argument. *Clark Cty. v. Growth Management Hearings Board*, 10 Wn. App.2d 84, 448 P.3d 81 (2019) (Mot. 7), *rev. denied*, 194 Wn.2d 1021 (2020) did not involve the repeal of an ordinance prompted by a declaration of invalidity and a request for sanctions. In *King Cty. v. Snohomish Cty.*, CPSGMHB Case Nos. 03-3-0011, 03-3-0025, 04-3-0012, 2004 WL 3275205 (May 26, 2004) (Mot. 9), the Board ruled that the validity of a Snohomish County moratoria was moot *at the request of Snohomish County*, which conceded it was no longer aggrieved. *See* 2004 WL 3275205, at *1 ("The Board agrees with Snohomish County that the . . . challenges . . . are moot."). Here, in contrast, because the City's planning authority has been and continues to be limited by the

[4] The City argued before the Board that Gerend's petition was moot because it challenged the January 2021 moratorium that—unlike the April 2021 moratorium—did not include an exception for affordable duplexes on existing vacant lots and that Gerend should have filed a new petition for review challenging the April 2021 moratorium. (*See* 2nd AR 200) The City thus was not—as the Board found—trying to evade review of its moratoria, but *inviting* review of them, asking only that any proceeding ruling on their validity account for all subsequently added exceptions.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Board's determinations, it has expressly reserved its right to and is vigorously pursuing its pre-existing superior court petitions for review of the Board's noncompliance orders.

B. This case involves important public issues of first impression that are likely to recur.

This case requires this Court to decide if, after a municipality has repealed a regulation invalidated by the Board, the Board can nonetheless sanction it for adopting a moratorium to preserve the status quo while it evaluates replacements for the invalidated regulation. This Court should review the validity of the City's moratorium because it is an important public issue of first impression that is likely to recur.

A court should not dismiss a case on mootness grounds "[i]f an issue presented is of continuing and substantial public importance." *Dependency of T.P.*, 12 Wn. App.2d 538, 545, 458 P.3d 825 (2020). To determine whether an issue is of substantial and continuing public importance, a court considers whether "(1) the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *T.P.*, 12 Wn. App. 2d at 545 (internal quotation and quoted source omitted). "As a fourth factor, courts may also consider the level of adversity between the parties and the quality of the advocacy of the issues." *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152-53, 437 P.3d 677 (2019).

Here, all four of these factors support review. The first, second, and third factors are met because, as the Board explained, one of the central issues in this case is "a matter of first impression . . . does the Board have authority to review, as part of a compliance hearing, a legislative action not identified by a jurisdiction in its

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 statement of actions taken to comply?" (1st AR 2345) The Board answered this
2 question of first impression by ruling that it had the authority to review the City's
3 moratorium under RCW 36.70A.302(7)(a). (1st AR 2345-46) Gerend's assertion that
4 "this situation is not unique" cannot be squared with the Board's express
5 acknowledgement that this case involves an issue of first impression. (Mot. 10)[5]

6 The City has challenged the Board's interpretation of RCW 36.70A.302(7)(a) in
7 both its superior court petitions for review, because the Board's interpretation of its
8 authority to invalidate a development moratorium put in place to preserve the status
9 quo conflicts with the GMA's express authorization in RCW 36.70A.390 to adopt such
10 moratoria and because it unlawfully expands the Board's jurisdiction. (*See* Petition
11 for Review No. 21-2-01778-5 SEA at 10-12; Petition for Review No. 21-2-10047-0 SEA
12 at 24-31) The fact that the proper interpretation of the Growth Management Act is at
13 the core of this case confirms that the issues are public in nature and likely to arise
14 again, and that public officers need future guidance on how to navigate those issues.
15 *See Randy Reynolds*, 193 Wn.2d at 153 ("Matters of statutory interpretation tend to
16 be more public, more likely to arise again, and helpful to public officials.").

17 Absent additional guidance, public officers will continue to face the catch-22
18 created by Gerend's mootness argument—they can either repeal an invalidated
19 enactment, thus according to Gerend forfeiting the right to appeal, or leave the
20 enactment in place and risk the imposition of sanctions that could deprive their
21 municipality of critical funding. The City's ability to reinstate a moratorium to
22 preserve the status quo while it considers potential replacements for the invalidated
23
24
25

[5] Contrary to Gerend's assertion that the Board's logic is "unimpeachable" (Mot. 10), the Board's interpretation of RCW 36.70A.302(7) erroneously inserts the word "moratorium" into the statute, violating the cardinal rule that "[s]tatutory construction cannot be used to read additional words into the statute." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, ¶ 15, 173 P.3d 885 (2007); *see generally* Petition for Judicial Review, No. 21-2-10047-0 SEA, at 24-31.

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concurrency regulation is thus not merely "academic," as Gerend suggests. (Mot. 10) *Cf. Harley H. Hoppe & Assocs., Inc. v. King Cty.*, 162 Wn. App. 40, 53, 255 P.3d 819 (2011) ("the same issue is likely to recur until it is resolved" because appellant's counsel "expressed his intention to continue to return to court with a new plaintiff should these cases be dismissed without a resolution on the merits"), *rev. denied*, 172 Wn.2d 1019 (2011).

Gerend's unwarranted accusations the City, acting in public session observed by Gerend, has improperly attempted "to hide legislative actions from the Board" and to "thwart the Board's compliance orders" (Mot. 8) confirm that the parties remain genuinely adverse. The Court should be loathe to allow the Board, or any agency, to perpetually insulate its decisions from judicial review by coercing compliance with its order under the threat of severe economic sanctions and then declaring its orders moot as soon as the party complies.

Gerend relies on Board decisions to support his contention this case is not unique, ignoring that the Board—unlike a reviewing court—"serve[s] a limited role under the GMA, with [its] powers restricted to a review of those matters *specifically delegated by statute*." *Viking v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005) (emphasis added), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). Decisions from the Board interpreting its limited jurisdiction are thus irrelevant to a court's review of a Board decision under the APA.

In any event, even the Board decision cited by Gerend confirms that this case should not be dismissed. Gerend relies on *King Cty.*, which involved whether Snohomish County had improperly used a moratorium to prevent the siting of an essential public facility. (Mot. 9) The Board acknowledged that the issue in that case had been rendered moot but nonetheless addressed it because the mootness doctrine

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
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(206) 624-0974 FAX (206) 624-0809

has "flexibility for matters of continuing and substantial public interest" and answering "the legal question regarding moratoria posed in this case . . . [would] serve matters of continuing and substantial public interest." 2004 WL 3275205, at *14 (internal quotation and quoted source omitted).

Gerend contends *King Cty.* involved "an identical legal situation" (Mot. 9), but here the City did not "simply re-adopt as an 'interim' ordinance that which had just been found noncompliant and invalid." *King Cty.*, 2004 WL 3275205, at *15. Rather than reenacting the invalidated ordinance—its concurrency standard—as an "interim" measure, the City repealed it and undertook a SEPA review so it could impose new standards that comply with the GMA. *King Cty.* is thus far from "identical" to this case and it underscores that this Court should review "the legal question regarding moratoria posed in this case," as the Board did in *King Cty.* 2004 WL 3275205, at *14.

C. Because compliance with a judgment does not moot an appeal, the City's compliance with the Board's order does not moot the City's appeal.

At its core, Gerend's mootness argument is that the City forfeited the right to appeal by doing exactly what the Board ordered it to do—rescind the moratorium it ruled was inconsistent with the GMA. (2nd AR 321-41) But "a party who complies with an outstanding judgment . . . may still pursue an appeal." *LaRue v. Harris*, 128 Wn. App. 460, 464, 115 P.3d 1077 (2005); *see also* Washington State Bar Association, Appellate Practice Deskbook, § 13.2(1) (4th ed. 2016) ("satisfaction of a judgment does not preclude review"). As one of the cases cited by Gerend explains, "the inquiry is whether a court can grant effective relief . . . *not whether the party complied with the trial court's order*." *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981) (cited at Mot. 8) (emphasis added). Other courts have likewise rejected the argument that a case becomes moot when an appellant "simply complie[s]

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
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(206) 624-0974 FAX (206) 624-0809

with the order . . . during the pendency of th[e] appeal because of the coercive effect of that order." *In re Barlow*, 160 Vt. 513, 631 A.2d 853, 857 (1993); *see also Tidwell v. Schweiker*, 677 F.2d 560, 565 (7th Cir. 1982) (appeal was not moot because the agency altered its form "only after the three-judge court declared it illegal and this conduct was in compliance with the judgment of the court"), *cert. denied*, 461 U.S. 905 (1983).

As Gerend's own authority confirms, this case was not rendered moot simply because the City complied with the Board's order under the duress created by the Board's precipitous request for sanctions. *See Pentagram*, 28 Wn. App. at 223 (case was not moot even though "the City Council complied with the trial court's order and approved the issuance of the special permit" because "effective relief [could] be granted" by determining whether the trial court had properly ordered the city to issue a permit). Indeed, Gerend *nowhere* acknowledges the Board's request for sanctions in its second noncompliance order. The fact that the second noncompliance order—unlike the first—was coupled with a request that the Governor sanction the City provides the obvious answer to Gerend's question "why did [the City] repeal the moratorium this time?" (Mot. 10)

Contrary to Gerend's assertion, the only entities trying to "evade review of [their] actions" (Mot. 10) in this case are Gerend and the Board itself, which coerced the City into repealing its moratorium with a threat of sanctions and then immediately declared its decision moot. But where a statute—like the GMA—expressly provides for APA review, *see* RCW 36.70A.300(5), Washington courts have a duty to conduct that review. *See Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 333, 310 P.3d 780 (2013) (reviewing the governor's decision to approve a project under the energy facilities site locations act ("EFSLA") as "the

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

granting of a 'license'" under the APA because otherwise it would be "insulated from judicial review despite EFSLA's direction otherwise"). This Court should reject Gerend's mootness argument that conflicts with fundamental precepts of appellate review and would allow the Board to insulate its orders from the judicial review mandated by the GMA.

IV. CONCLUSION

This Court should deny Gerend's motion to dismiss.

I certify that this memorandum contains 4,131 words, in compliance with the Local Civil Rules.

Dated this 7th day of September, 2021.

CITY OF SAMMAMISH
City Attorney

By: */s/ Lisa M. Marshall*
Lisa M. Marshall
WSBA No. 24343

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

EGLICK & WHITED PLLC

By: */s/ Peter J. Eglick*
Peter J. Eglick
WSBA No. 8809
Joshua A. Whited
WSBA No. 30509

Attorneys for Petitioner

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 7, 2021, I arranged for service of the foregoing Response to Respondent's Motion to Dismiss for Mootness, to the court and to the parties to this action as follows:

Office of Clerk King County Superior Court County Courthouse, Room E-609 516 Third Avenue, M/S 6C Seattle, WA 98104	____ Facsimile ____ Overnight Mail ____ U.S. Mail _X_ E-File
Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 7th day of September, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

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CASE #: 21-2-01778-5 SEA

Honorable Kristin Richardson
Noted: September 17, 2021

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

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CITY OF SAMMAMISH, a Washington municipal corporation, Petitioner, v. DON GEREND, an individual, Respondents, GROWTH MANAGEMENT HEARING BOARD, Agency Respondent.	No. 21-2-01778-5 SEA RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS

16

I. INTRODUCTION

17 Under threat of sanctions sought by the Growth Management Hearings Board
18 ("the Board") the City of Sammamish repealed the moratorium that was the
19 foundation for the Board's two orders finding the City had failed to comply with the
20 Growth Management Act, ("GMA") RCW ch. 36.70A. This case is not moot because
21 this Court can provide the City effective relief by reversing the Board's noncompliance
22 orders and confirming that the City can reinstate its moratorium or adopt one in the
23 future without fear of sanctions. Respondent Gerend's mootness argument rests
24 largely on the erroneous premise that compliance with a judgment or order waives a
25 party's right to challenge the judgment or order on appeal. As the Board itself has

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 confirmed that this case involves an important public issue of first impression that is
2 likely to recur, this Court should review the Board's determination that the City has
3 not complied with the GMA.

4 ## II. STATEMENT OF FACTS

5 Sammamish is a Washington city that undertakes its growth planning pursuant
6 to the GMA. RCW 36.70A.070(6)(b) requires municipalities to create transportation
7 "concurrency" requirements to ensure that development does not outstrip the capacity
8 of the City's infrastructure, including roads, to serve it. On May 23, 2019, the City
9 adopted Ordinance O2019-484, amending the development regulations in SMC
10 14A.10.050 related to transportation concurrency, and establishing a new section,
11 SMC 14A.10.050(2), that adopted concurrency standards focused on local road
12 corridors, as opposed to the existing standards based on local intersections. (1st AR
13 7-16, 2070)[1] Respondent Don Gerend, a former Sammamish Councilmember and
14 Mayor, challenged Ordinance O2019-484 by filing a petition for review with the Board
15 pursuant to RCW 36.70A.290. (1st AR 2-6)

Development in Sammamish has not outstripped sewer, road or school infrastructure capacities.

It was entirely appropriate to challenge O2019-484 as it precluded implementation of land uses in the adopted Comprehensive Plan

16 In April 2020, the Board issued a Final Decision and Order ("FDO")
17 invalidating SMC 14A.10.050(2). The Board held that the ordinance was adopted
18 without proper review under the State Environmental Policy Act ("SEPA"), RCW Ch.
19 43.21C, and improperly amended the City's comprehensive plan through a

Not stated here was board deferred ruling on whether the ordinance was internally consistent with the Comp Plan.

20 development regulation. (1st AR 2065-2110) The City initially appealed the FDO, but
21 dismissed its appeal after the Board clarified the City had discretion in deciding how
22

23 [1] As explained in more detail below, the City has filed two petitions for judicial review, one for each non-compliance order, and asked that this Court consolidate the two petitions because they
24 involve the same issues. Currently they are pending in this Court as two separate cause numbers, No. 21-2-01778-5 SEA and No. 21-2-10047-0 SEA. The administrative record in the first case, No. 21-2-01778-5 SEA, is Sub. No. 9 dated March 9, 2021, and is cited as "1st AR ___." The administrative record
25 in the second case, No. 21-2-10047-0 SEA, is Sub. No. 15 dated August 30, 2021, and is cited as "2nd AR ___."

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1619 8TH AVENUE NORTH
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(206) 624-0974 FAX (206) 624-0809

to comply with the FDO and could do so by performing a new SEPA analysis. (1st AR 2145-55) The City thus instructed its Code Revisor to add a notice to its code explaining that SMC 14A.010.050(2) had been invalidated and "repealed by operation of law." (1st AR 2145) The City then initiated a new SEPA analysis in the form of an Environmental Impact Statement (EIS), including study of potential alternatives, impacts, and mitigation relating to concurrency standards, land use, and related matters. (1st AR 2145)

The City also adopted a moratorium, as authorized by RCW 35A.63.220 and RCW 36.70A.390, to prevent vesting of new development applications and concurrency certificates that might be inconsistent with new standards adopted after completing its SEPA analysis. (1st AR 2189-94) The City replaced its initial moratorium with a new moratorium on July 28, 2020. (1st AR 2195-97)

This is the **CRUX**. Improper use of concurrency that not only did NOT support Comp Plan land uses, but using that concurrency TO reverse engineer attempts to lessen all currently allowed residential land uses.

The Board held a hearing on December 17, 2020, to determine whether the City had complied with the FDO. During the hearing the Board questioned the legality of its own regulation, WAC 242-03-920, and criticized the City for directing the Code Revisor to announce that SMC 14A.10.050(2) had been repealed instead of taking "some legislative action." (*See* Sub. No. 11 at 52-53 (transcript of the December 17, 2020, hearing))[2] To address this, the City expedited the adoption of an ordinance confirming that SMC 14A.10.050(2) had been repealed. (1st AR 2332-33)

In a January 22, 2021, order the Board deemed the City's repeal of the invalidated regulation and the City's initiation of a new SEPA EIS process, at a cost of approximately $500,000, non-compliance with the FDO. (1st AR 2339-49) Although the Board acknowledged that "[t]he repeal of SMC 14A.10.050(2) resolves the issues

[2] As the City pointed out, WAC 242-03-920 allows municipalities to assert compliance based on "the legislation adopted *or other action* taken to comply with the board's order." (emphasis added)

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1619 8TH AVENUE NORTH
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1 of SEPA compliance and the requirement that a level of service be included in a City's
2 comprehensive plan addressed in the FDO," it nonetheless ruled the City had not
3 complied with the FDO because its moratorium "amounts to interference with the
4 goals of the GMA and is unnecessary to achieve compliance with the FDO." (1st AR
5 2346-47) In what the Board acknowledged is a matter of first impression, the Board
6 held that it has the authority to hold the City in noncompliance because the City
7 adopted moratoria to preserve the status quo while it performs the SEPA review the
8 Board had held was required before adopting potential replacement regulations. (1st
9 AR 2344-48)

True, it did.

"Preserve the status quo" is a false statement. The moratoria did not allow the status quo - implementation of the Comp Plan.

10 The City enacted a new moratorium on January 19, 2021, that now included
11 exceptions that allowed development of single-family residences on existing lots and
12 accessory dwelling units. (Sub. No. 37, Kolouskova Dec., Ex. E) On April 20, 2021,
13 the City replaced this moratorium with a new one that expanded what was allowed to
14 include development of affordable duplexes on existing vacant lots. (Sub. No. 37,
15 Kolouskova Dec., Ex. F)

Annual average of single family on existing lots + accessory dwelling units (ADU's) + affordable duplexes total less than 30 units per year. This level is far below what the Comp Plan allows.

16 After a second compliance hearing on May 28, 2021, the Board ruled the City's
17 new moratorium violated the FDO. (2nd AR 321-41) The Board then wrote to the
18 Governor and asked him to impose sanctions against the City under RCW
19 36.70A.330(3)(b), alleging that the City was "resist[ing] complying with Board's FDO"
20 "through serial moratoria." (2nd AR 343-44)

City was non compliant with the Sammamish Comp Plan and GMA Goals - **1** (urban growth), **4** (housing) and **5** (economic development).

21 In the face of the Board's request for sanctions, the City adopted Ordinance No.
22 O2021-532, repealing its last moratorium, "to formalize the GMHB's invalidation of
23 O2021-529." (2nd AR 354-55) However, in its statement of compliance required by
24 the Board, the City declared that it had repealed the moratorium in response to "the
25 Second Order on Noncompliance, to which the City of Sammamish takes exception

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1619 8TH AVENUE NORTH
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1 and on which the City of Sammamish reserves all rights (including but not limited to
2 appeal rights) concerning its legality." (2nd AR 351) After the City repealed its
3 moratorium, the Board issued a new order finding that the City had complied with the

The GMHB board closed both of the two active cases on these matters. This fact is conveniently omitted here.

4 FDO and rescinded its request that the Governor sanction the City. (2nd AR 359-60)

5 The City has sought judicial review of both of the Board's noncompliance orders
6 in this Court under the Administrative Procedures Act, RCW ch. 34.05. The City's
7 appeal of the first noncompliance order is pending as No. 21-2-01778-5 SEA, and the
8 City's appeal of the second noncompliance order is pending as No. 21-2-10047-0 SEA.
9 The City has pending before this Court concurrent motions for consolidation and for
10 certification of both cases to the Court of Appeals, pursuant to RCW 34.05.518. (*See*
11 No. 21-2-01778-5 SEA, Sub. Nos. 51-52; No. 21-2-10047-0 SEA, Sub. Nos. 10-11) If
12 these motions are granted, all issues concerning the Board's orders, including
13 Gerend's motion to dismiss for mootness, would be resolved in the first instance by
14 the Court of Appeals.

15 ## III. ARGUMENT AND AUTHORITY

16 **A. This Court can grant the City effective relief by reversing the Board's**
17 **invalidation of its moratorium and confirming the City's authority under the GMA to enact a moratorium while it considers**
18 **replacements for the invalidated regulation.**

Cannot adopt moratoria when their effect is the same as the invalidated development regulation.

19 "[A]n issue is not moot if a court can provide any effective relief." *City of*
20 *Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006). Federal courts have
21 stricter standing requirements under Article III than do Washington courts of general
22 jurisdiction. *See* Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3522 (3rd ed. 2021
23 update) ("It is a principle of first importance that the federal courts are tribunals of
24 limited subject matter jurisdiction."). Yet the federal courts have consistently rejected
25 respondent's argument that repeal of a legislative enactment in response to a judicial

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
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declaration of invalidity moots a dispute over the enactment's validity, especially where—as here—the legislative body explains the repeal is for the purposes of compliance and that it reserves its right to appeal. *See, e.g., Maher v. Roe*, 432 U.S. 464, 468 n. 4, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (adoption of a new regulation "only for the purpose of interim compliance with the District Court's judgment and order" did not moot an appeal when the "appeal was taken and submitted on the theory that [the state] desires to reinstate the invalidated regulation"); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1117 n.5 (10th Cir. 2012) (case was not moot because "the City clearly indicated its intent to reenact the challenged ban should this Court reverse the District Court's decision striking it down"); *Ballen v. City of Redmond*, 466 F.3d 736, 739 (9th Cir. 2006) (case was not moot because Redmond's "new ordinance was adopted only as an interim regulation in response to the district court's summary judgment ruling . . . pending the outcome of the litigation").

This Court can provide the City effective relief by reversing the Board's noncompliance orders and confirming the City's authority to impose a moratorium to preserve the status quo while it studies replacements for the invalidated concurrency

"Preserve the status quo" is a false statement. The moratoria did not allow the status quo - implementation of the Comp Plan.

regulation, without fear of the Board's sanctions. Gerend himself admits that the City repealed its ordinance "in response to an order from the Board." (Mot. 7)[3] When the City did so, the repealing ordinance expressly stated it repealed the moratorium "to formalize the GMHB's invalidation" of the moratorium, a step the Board made clear was necessary by chastising the City for not taking "some legislative action" in response to the FDO and instead having its Code Revisor add a notice to its municipal code stating the invalidated regulation had been "repealed by operation of law." (Sub.

[3] Gerend also inexplicably asserts—in the same sentence—that the City repealed its moratorium "of its own accord." (Mot. at 7) As explained above, the City did not voluntarily repeal the moratorium.

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1619 8TH AVENUE NORTH
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(206) 624-0974 FAX (206) 624-0809

1 No. 11 at 52; 1st AR 2145) As the City further explained in its compliance statement to
2 the Board, "the City of Sammamish takes exception" to the Board's second
3 noncompliance order and "reserves all rights (including but not limited to appeal
4 rights) concerning its legality." (2nd AR 351)

5 The GMA confirms this case is not moot. RCW 36.70A.300(5) provides that
6 "[a]ny party aggrieved by a final decision of the hearings board may appeal the
7 decision to superior court." As the Court of Appeals has explained, "[a]n 'aggrieved'
8 party is one whose proprietary, pecuniary, or personal rights are substantially
9 affected." *Harris v. Griffith*, 2 Wn. App.2d 638, 646, 413 P.3d 51, *rev. denied*, 191
10 Wn.2d 1012 (2018). The City's proprietary and pecuniary interests remain directly at
11 issue because it cannot impose a moratorium without the risk of sanctions that could
12 include a decrease in appropriations from the state and the withholding of revenues
13 to the City from a number of critical taxes, *e.g.*, the motor vehicle fuel tax, sales tax,
14 and liquor excise tax. *See* RCW 36.70A.340.

Not mentioned here are REET 1, REET 2, grants and other non-property tax revenue sources, if any.

15 Gerend mistakenly argues this case is moot because the July 2020 moratorium
16 has expired and thus a court "cannot go back now and tell the City that the Ordinance
17 can be reinstated." (Mot. at 8) But the City has asked for that precise relief, which is
18 well within the reviewing Court's power. (*See* Petitions for Judicial Review, No. 21-2-
19 01778-5 SEA & No. 21-2-10047-0 SEA (both asking the Court to "[s]et aside/vacate,
20 reverse, and remand the challenged Order including its findings and conclusions and
21 determinations that the City is not in compliance with the GMA and that invalidation
22 of the moratorium is authorized and warranted"))

23 Gerend's argument that the expiration of the July 2020 moratorium renders
24 this case moot is also diametrically opposed to the arguments he made before the
25 Board. Gerend argued to the Board that, despite the expiration and replacement of

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1619 8TH AVENUE NORTH
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the City's July 2020 moratorium, the question of whether to "invalidat[e] . . . any moratorium on concurrency certificate applications . . . . is ***not moot***" because "there still is an ordinance that is having the same offensive effect." (2nd AR 175)[4] The Board likewise observed—after the expiration of the July 2020 moratorium—that this case "clearly has not been dismissed as moot" and that this "case . . . has not changed." (2nd AR 67) In other words, both Gerend and the Board have previously acknowledged that the ability of a local government to reenact an invalidated ordinance precludes a finding of mootness. Gerend is judicially estopped from arguing otherwise. *Urbick v. Spencer L. Firm, LLC,* 192 Wn. App. 483, 488, 367 P.3d 1103 (2016) ("Judicial estoppel . . . prevent[s] a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."), as corrected (Feb. 3, 2016).

None of the cases cited by Gerend support his mootness argument. *Clark Cty. v. Growth Management Hearings Board,* 10 Wn. App.2d 84, 448 P.3d 81 (2019) (Mot. 7), *rev. denied,* 194 Wn.2d 1021 (2020) did not involve the repeal of an ordinance prompted by a declaration of invalidity and a request for sanctions. In *King Cty. v. Snohomish Cty.*, CPSGMHB Case Nos. 03-3-0011, 03-3-0025, 04-3-0012, 2004 WL 3275205 (May 26, 2004) (Mot. 9), the Board ruled that the validity of a Snohomish County moratoria was moot *at the request of Snohomish County,* which conceded it was no longer aggrieved. *See* 2004 WL 3275205, at *1 ("The Board agrees with Snohomish County that the . . . challenges . . . are moot."). Here, in contrast, because the City's planning authority has been and continues to be limited by the

[4] The City argued before the Board that Gerend's petition was moot because it challenged the January 2021 moratorium that—unlike the April 2021 moratorium—did not include an exception for affordable duplexes on existing vacant lots and that Gerend should have filed a new petition for review challenging the April 2021 moratorium. (*See* 2nd AR 200) The City thus was not—as the Board found—trying to evade review of its moratoria, but *inviting* review of them, asking only that any proceeding ruling on their validity account for all subsequently added exceptions.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Board's determinations, it has expressly reserved its right to and is vigorously pursuing its pre-existing superior court petitions for review of the Board's noncompliance orders.

Here is what the City is trying to do: use concurrency to **NOT** support land uses in the adopted comp plan **+** claim status quo is extremely low development vs. the Comp Plan **+** significantly reduce adopted land uses based on arbitrary concurrency volume over capacity (V/C) LOS.

B. This case involves important public issues of first impression that are likely to recur.

This case requires this Court to decide if, after a municipality has repealed a regulation invalidated by the Board, the Board can nonetheless sanction it for adopting a moratorium to preserve the status quo while it evaluates replacements for

"Preserve the status quo" is a false statement. The moratoria did not allow the status quo - implementation of the Comp Plan.

the invalidated regulation. This Court should review the validity of the City's moratorium because it is an important public issue of first impression that is likely to recur.

A court should not dismiss a case on mootness grounds "[i]f an issue presented

In this case the City attempted an end run around the GMHB. If V/C cannot severly restrict growth, moratoria can - same effect.

is of continuing and substantial public importance." *Dependency of T.P.*, 12 Wn. App.2d 538, 545, 458 P.3d 825 (2020). To determine whether an issue is of substantial and continuing public importance, a court considers whether "(1) the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *T.P.*, 12 Wn. App. 2d at 545 (internal quotation and quoted source omitted). "As a fourth factor, courts may also consider the level of adversity between the parties and the quality of the advocacy of the issues." *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152-53, 437 P.3d 677 (2019).

Here, all four of these factors support review. The first, second, and third factors are met because, as the Board explained, one of the central issues in this case is "a matter of first impression . . . does the Board have authority to review, as part of a compliance hearing, a legislative action not identified by a jurisdiction in its

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

statement of actions taken to comply?" (1st AR 2345) The Board answered this question of first impression by ruling that it had the authority to review the City's moratorium under RCW 36.70A.302(7)(a). (1st AR 2345-46) Gerend's assertion that "this situation is not unique" cannot be squared with the Board's express acknowledgement that this case involves an issue of first impression. (Mot. 10)[5]

The City has challenged the Board's interpretation of RCW 36.70A.302(7)(a) in both its superior court petitions for review, because the Board's interpretation of its authority to invalidate a development moratorium put in place to preserve the status quo conflicts with the GMA's express authorization in RCW 36.70A.390 to adopt such moratoria and because it unlawfully expands the Board's jurisdiction. (*See* Petition for Review No. 21-2-01778-5 SEA at 10-12; Petition for Review No. 21-2-10047-0 SEA at 24-31) The fact that the proper interpretation of the Growth Management Act is at the core of this case confirms that the issues are public in nature and likely to arise again, and that public officers need future guidance on how to navigate those issues. *See Randy Reynolds*, 193 Wn.2d at 153 ("Matters of statutory interpretation tend to be more public, more likely to arise again, and helpful to public officials.").

Absent additional guidance, public officers will continue to face the catch-22 created by Gerend's mootness argument—they can either repeal an invalidated enactment, thus according to Gerend forfeiting the right to appeal, or leave the enactment in place and risk the imposition of sanctions that could deprive their municipality of critical funding. The City's ability to reinstate a moratorium to

In this case the City attempted an end run around the GMHB. If V/C cannot severly restrict growth, moratoria can - same effect.

preserve the status quo while it considers potential replacements for the invalidated

The word "moratorium" or "mortoria" do not need to use interim, that would be redundant. The very nature of moratoria is interim.

[5] Contrary to Gerend's assertion that the Board's logic is "unimpeachable" (Mot. 10), the Board's interpretation of RCW 36.70A.302(7) erroneously inserts the word "moratorium" into the statute, violating the cardinal rule that "[s]tatutory construction cannot be used to read additional words into the statute." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, ¶ 15, 173 P.3d 885 (2007); *see generally* Petition for Judicial Review, No. 21-2-10047-0 SEA, at 24-31.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

concurrency regulation is thus not merely "academic," as Gerend suggests. (Mot. 10) *Cf. Harley H. Hoppe & Assocs., Inc. v. King Cty.*, 162 Wn. App. 40, 53, 255 P.3d 819 (2011) ("the same issue is likely to recur until it is resolved" because appellant's counsel "expressed his intention to continue to return to court with a new plaintiff should these cases be dismissed without a resolution on the merits"), *rev. denied*, 172 Wn.2d 1019 (2011).

Gerend's unwarranted accusations the City, acting in public session observed by Gerend, has improperly attempted "to hide legislative actions from the Board" and to "thwart the Board's compliance orders" (Mot. 8) confirm that the parties remain genuinely adverse. The Court should be loathe to allow the Board, or any agency, to perpetually insulate its decisions from judicial review by coercing compliance with its order under the threat of severe economic sanctions and then declaring its orders

The court should not allow the "effect" ruse to be perpetuated. V/C LOS and moratoria have same effect - extremely low growth.

moot as soon as the party complies.

Gerend relies on Board decisions to support his contention this case is not unique, ignoring that the Board—unlike a reviewing court—"serve[s] a limited role under the GMA, with [its] powers restricted to a review of those matters *specifically delegated by statute*." *Viking v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005) (emphasis added), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). Decisions from the Board interpreting its limited jurisdiction are thus irrelevant to a court's review of a Board decision under the APA.

In any event, even the Board decision cited by Gerend confirms that this case should not be dismissed. Gerend relies on *King Cty.*, which involved whether Snohomish County had improperly used a moratorium to prevent the siting of an essential public facility. (Mot. 9) The Board acknowledged that the issue in that case had been rendered moot but nonetheless addressed it because the mootness doctrine

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

has "flexibility for matters of continuing and substantial public interest" and answering "the legal question regarding moratoria posed in this case . . . [would] serve matters of continuing and substantial public interest." 2004 WL 3275205, at *14 (internal quotation and quoted source omitted).

Gerend contends *King Cty.* involved "an identical legal situation" (Mot. 9), but here the City did not "simply re-adopt as an 'interim' ordinance that which had just been found noncompliant and invalid." *King Cty.*, 2004 WL 3275205, at *15. Rather than reenacting the invalidated ordinance—its concurrency standard—as an "interim" measure, the City repealed it and undertook a SEPA review so it could impose new standards that comply with the GMA. *King Cty.* is thus far from "identical" to this case and it underscores that this Court should review "the legal question regarding moratoria posed in this case," as the Board did in *King Cty.* 2004 WL 3275205, at *14.

C. Because compliance with a judgment does not moot an appeal, the City's compliance with the Board's order does not moot the City's appeal.

At its core, Gerend's mootness argument is that the City forfeited the right to appeal by doing exactly what the Board ordered it to do—rescind the moratorium it ruled was inconsistent with the GMA. (2nd AR 321-41) But "a party who complies with an outstanding judgment . . . may still pursue an appeal." *LaRue v. Harris*, 128 Wn. App. 460, 464, 115 P.3d 1077 (2005); *see also* Washington State Bar Association, Appellate Practice Deskbook, § 13.2(1) (4th ed. 2016) ("satisfaction of a judgment does not preclude review"). As one of the cases cited by Gerend explains, "the inquiry is whether a court can grant effective relief . . . *not whether the party complied with the trial court's order.*" *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981) (cited at Mot. 8) (emphasis added). Other courts have likewise rejected the argument that a case becomes moot when an appellant "simply complie[s]

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

with the order . . . during the pendency of th[e] appeal because of the coercive effect of that order." *In re Barlow*, 160 Vt. 513, 631 A.2d 853, 857 (1993); *see also Tidwell v. Schweiker*, 677 F.2d 560, 565 (7th Cir. 1982) (appeal was not moot because the agency altered its form "only after the three-judge court declared it illegal and this conduct was in compliance with the judgment of the court"), *cert. denied*, 461 U.S. 905 (1983).

As Gerend's own authority confirms, this case was not rendered moot simply because the City complied with the Board's order under the duress created by the Board's precipitous request for sanctions. *See Pentagram*, 28 Wn. App. at 223 (case was not moot even though "the City Council complied with the trial court's order and approved the issuance of the special permit" because "effective relief [could] be granted" by determining whether the trial court had properly ordered the city to issue a permit). Indeed, Gerend *nowhere* acknowledges the Board's request for sanctions in its second noncompliance order. The fact that the second noncompliance order—unlike the first—was coupled with a request that the Governor sanction the City provides the obvious answer to Gerend's question "why did [the City] repeal the moratorium this time?" (Mot. 10)

Contrary to Gerend's assertion, the only entities trying to "evade review of [their] actions" (Mot. 10) in this case are Gerend and the Board itself, which coerced the City into repealing its moratorium with a threat of sanctions and then immediately

Extremely misleading statement. The truth is City brought this on itself by not allowing adopted comp plan land uses to develop.

declared its decision moot. But where a statute—like the GMA—expressly provides for APA review, *see* RCW 36.70A.300(5), Washington courts have a duty to conduct that review. *See Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 333, 310 P.3d 780 (2013) (reviewing the governor's decision to approve a project under the energy facilities site locations act ("EFSLA") as "the

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

granting of a 'license'" under the APA because otherwise it would be "insulated from judicial review despite EFSLA's direction otherwise"). This Court should reject Gerend's mootness argument that conflicts with fundamental precepts of appellate review and would allow the Board to insulate its orders from the judicial review mandated by the GMA.

IV. CONCLUSION

This Court should deny Gerend's motion to dismiss.

I certify that this memorandum contains 4,131 words, in compliance with the Local Civil Rules.

Dated this 7th day of September, 2021.

CITY OF SAMMAMISH
City Attorney

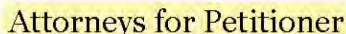
By: */s/ Lisa M. Marshall*
Lisa M. Marshall
WSBA No. 24343

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

EGLICK & WHITED PLLC

By: */s/ Peter J. Eglick*
Peter J. Eglick
WSBA No. 8809
Joshua A. Whited
WSBA No. 30509



The City of Sammamish used five attorneys to prepare this legal pleading.

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 DECLARATION OF SERVICE

2 The undersigned declares under penalty of perjury, under the laws of the State 3 of Washington, that the following is true and correct:

4 That on September 7, 2021, I arranged for service of the foregoing Response to 5 Respondent's Motion to Dismiss for Mootness, to the court and to the parties to this 6 action as follows:

7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

Recipient	Method
Office of Clerk King County Superior Court County Courthouse, Room E-609 516 Third Avenue, M/S 6C Seattle, WA 98104	____ Facsimile ____ Overnight Mail ____ U.S. Mail __X__ E-File
Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 **DATED** at Seattle, Washington this 7th day of September, 2021.

2 /s/ Andrienne E. Pilapil
Andrienne E. Pilapil

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SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

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Chief Civil Department
Honorable Regina S. Cahan
Noted: September 10, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation, Petitioner, v. DON GEREND, an individual, STC JV1, LLC, STCA, LLC, & SUNNY OAK, LLC, Respondents, GROWTH MANAGEMENT HEARING BOARD, Agency Respondent.	No. 21-2-01778-5 SEA No. 21-2-10047-0 SEA REPLY IN SUPPORT OF MOTIONS TO CONSOLIDATE AND FOR CERTIFICATION OF DIRECT REVIEW TO THE WASHINGTON STATE COURT OF APPEALS

I. INTRODUCTION

Respondent Don Gerend does not oppose consolidation of these two related matters, agreeing that "the legal issues stemming from th[e] facts" of these two appeals under the Administrative Procedure Act "are likely identical." (Opp. 3) Nor does Gerend directly oppose the City's request that, after consolidation, these appeals be certified to the Court of Appeals for direct review. Gerend seeks only to delay a ruling by this Court on the instant motions for consolidation and certification to the Court of Appeals until the Court has ruled on his pending motion to dismiss No. 21-2-01778-5 SEA as moot. Gerend's current musings that he might not appeal an adverse decision

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

cannot be squared with the contentious history of this case, which confirms that review by the Court of Appeals is inevitable, no matter how this Court rules on his mootness argument or any other dispositive legal issue raised by the parties in these two actions. There is therefore no reason to delay the consolidation and transfer of these cases to the Court of Appeals in the interest of judicial economy, as the Legislature has mandated.

II. REPLY ARGUMENT

Gerend's request to delay ruling on the City's motions is premised on the erroneous notion that "it makes little sense to consolidate a moot case with another case, or to certify a moot case to the Court of Appeals." (Opp. 3) As the City already explained, "Gerend's contention . . . that the termination of the City's moratoria renders the issue moot . . . raises a purely legal issue that will eventually be addressed by the appellate court" on de novo review. (Certification Mot. 4)

It makes little sense to have two courts address identical legal arguments in reviewing the Board's authority to sanction a city for adopting a moratorium to preserve the status quo while, as mandated by the Board's original decision, it conducts a SEPA review to consider a new regulation. As the Legislature noted in passing the 2021 amendment to RCW 34.05.518, "direct appeal promotes timely resolution and is a better use of court resources." House Bill Report SB 5225 at 4 (April 2021). Thus, regardless whether this Court agrees with Gerend or with the City on mootness or on the merits, consolidating these cases for direct review will allow the Court of Appeals to decide the mootness issue, along with any other dispositive legal issues, in one proceeding. Gerend instead proposes the issues be tackled in four separate actions by forcing both this Court and the Court of Appeals to adjudicate two cases that Gerend concedes involve legal issues that "are likely identical." (Opp. 3)

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Gerend otherwise engages in a series of ad hominem attacks, accusing the City of gamesmanship, failing to recognize the economies that consolidation and direct review will achieve for all parties and the Court. Ignoring that the City expressly acknowledged his pending motion to dismiss in both of its motions (*see* Certification Mot. 3; Consolidation Mot. 3), Gerend accuses the City of failing to "recognize . . . the imminent hearing schedule" on his motion to dismiss. (Opp. 2) Gerend's accusation that the City has engaged in "opportunistic timing" to achieve "untold months to work on its Reply and retool its Opening Brief" (Opp. 3) is similarly unfounded. It ignores that, if direct review is granted then Gerend, as well as the City, will have "untold months" to retool their briefing under a briefing schedule set by Division One of the Court of Appeals. Gerend's allegations of prejudice ring hollow.

Gerend's contention that the City failed to "timely" seek direct review in No. 21-2-01778-5 SEA (Opp. 2-3), similarly ignores the Legislature's express directive. Gerend cites WAC 242-03-970(3), without acknowledging it has been superseded by the 2021 amendments to RCW 34.05.518, effective June 13, 2021, that eliminated the previous 30-day deadline for seeking direct review. *See* Laws of 2021 ch. 305 § 2.[1] Gerend also ignores that the need to seek direct review in the Court of Appeals was not apparent when the City filed its first petition for review. The City could not have predicted that the Board would issue an unprecedented request that the Governor sanction the City, especially in light of the separate moratorium imposed by the Sammamish Plateau Water and Sewer District that precluded much of the same development as the City's moratorium.

[1] Effective September 12, 2021, WAC 242-03-970 will also have been amended to remove the 30-day deadline for seeking direct review. *See* WSR 21-17-069.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

By relying on the statutory provision for direct review expressly provided by the Legislature, the City is not "skipping" anything, let alone "the standard order of operations set by State law." (Opp. 4) Moreover, Gerend's assertion that this case does not involve an issue of first impression that should be addressed by the Court of Appeals to provide guiding precedent, is contradicted by his concession that direct review is proper if the case is not first dismissed on mootness grounds. The Board itself recognized that the issue of whether, after a municipality has repealed a regulation invalidated by the Board, the Board can nonetheless sanction it for adopting a moratorium to preserve the status quo while it evaluates replacements is "a matter of first impression." (*See* Petition for Judicial Review, No. 21-2-01778-5 SEA, appendix at 7)

In the end, Gerend's concession that direct review may be appropriate also concedes that there is no reason for this Court to perform a redundant review and analysis of the legal issues presented in these related cases, rather than certifying them to the Court of Appeals. This Court should consolidate and certify these cases for direct review as expressly authorized by RCW 34.05.518.

III. CONCLUSION

This Court should grant the City's unopposed request to consolidate No. 21-2-01778-5 SEA and No. 21-2-10047-0 SEA, and certify the consolidated case for direct review in the Court of Appeals pursuant to RCW 34.05.518(1)(b).

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

I certify that this memorandum contains 981 words, in compliance with the Local Civil Rules.

Dated this 8th day of September, 2021.

CITY OF SAMMAMISH
City Attorney

By: */s/ Lisa M. Marshall*
Lisa M. Marshall
WSBA No. 24343

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

EGLICK & WHITED PLLC

By: */s/ Peter J. Eglick*
Peter J. Eglick
WSBA No. 8809
Joshua A. Whited
WSBA No. 30509

Attorneys for Petitioner

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 8, 2021, I arranged for service of the foregoing Reply in Support of Motion to Consolidate and Certification of Direct Review to the Washington State Court of Appeals, to the court and to the parties to this action as follows:

Recipient	Method
Office of Clerk King County Superior Court County Courthouse, Room E-609 516 Third Avenue, M/S 6C Seattle, WA 98104	____ Facsimile ____ Overnight Mail ____ U.S. Mail __X__ E-File
Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 8th day of September, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

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CASE #: 21-2-01778-5 SEA

Chief Civil Department
Honorable Regina S. Cahan
Noted: September 10, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation, Petitioner, v. DON GEREND, an individual, STC JV1, LLC, STCA, LLC, & SUNNY OAK, LLC, Respondents, GROWTH MANAGEMENT HEARING BOARD, Agency Respondent.	No. 21-2-01778-5 SEA No. 21-2-10047-0 SEA REPLY IN SUPPORT OF MOTIONS TO CONSOLIDATE AND FOR CERTIFICATION OF DIRECT REVIEW TO THE WASHINGTON STATE COURT OF APPEALS

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SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

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3 mootness argument or any other dispositive legal issue raised by the parties in these
4 two actions. There is therefore no reason to delay the consolidation and transfer of
5 these cases to the Court of Appeals in the interest of judicial economy, as the
6 Legislature has mandated.

7 ## II. REPLY ARGUMENT

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9 erroneous notion that "it makes little sense to consolidate a moot case with another
10 case, or to certify a moot case to the Court of Appeals." (Opp. 3) As the City already
11 explained, "Gerend's contention . . . that the termination of the City's moratoria
12 renders the issue moot . . . raises a purely legal issue that will eventually be addressed
13 by the appellate court" on de novo review. (Certification Mot. 4)

14 It makes little sense to have two courts address identical legal arguments in
15 reviewing the Board's authority to sanction a city for adopting a moratorium to

The "status quo" in Sammamish is Comprehensive Plan land uses, not severely constrained land uses by V/C LOS or moratoria

16 preserve the status quo while, as mandated by the Board's original decision, it
17 conducts a SEPA review to consider a new regulation. As the Legislature noted in
18 passing the 2021 amendment to RCW 34.05.518, "direct appeal promotes timely
19 resolution and is a better use of court resources." House Bill Report SB 5225 at 4
20 (April 2021). Thus, regardless whether this Court agrees with Gerend or with the City
21 on mootness or on the merits, consolidating these cases for direct review will allow the
22 Court of Appeals to decide the mootness issue, along with any other dispositive legal
23 issues, in one proceeding. Gerend instead proposes the issues be tackled in four
24 separate actions by forcing both this Court and the Court of Appeals to adjudicate two
25 cases that Gerend concedes involve legal issues that "are likely identical." (Opp. 3)

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

1 Gerend otherwise engages in a series of ad hominem attacks, accusing the City
2 of gamesmanship, failing to recognize the economies that consolidation and direct
3 review will achieve for all parties and the Court. Ignoring that the City expressly
4 acknowledged his pending motion to dismiss in both of its motions (*see* Certification
5 Mot. 3; Consolidation Mot. 3), Gerend accuses the City of failing to "recognize . . . the
6 imminent hearing schedule" on his motion to dismiss. (Opp. 2) Gerend's accusation
7 that the City has engaged in "opportunistic timing" to achieve "untold months to work
8 on its Reply and retool its Opening Brief" (Opp. 3) is similarly unfounded. It ignores
9 that, if direct review is granted then Gerend, as well as the City, will have "untold
10 months" to retool their briefing under a briefing schedule set by Division One of the
11 Court of Appeals. Gerend's allegations of prejudice ring hollow.

12 Gerend's contention that the City failed to "timely" seek direct review in No. 21-
13 2-01778-5 SEA (Opp. 2-3), similarly ignores the Legislature's express directive.
14 Gerend cites WAC 242-03-970(3), without acknowledging it has been superseded by
15 the 2021 amendments to RCW 34.05.518, effective June 13, 2021, that eliminated the
16 previous 30-day deadline for seeking direct review. *See* Laws of 2021 ch. 305 § 2.[1]
17 Gerend also ignores that the need to seek direct review in the Court of Appeals was not
18 apparent when the City filed its first petition for review. The City could not have
19 predicted that the Board would issue an unprecedented request that the Governor
20 sanction the City, especially in light of the separate moratorium imposed by the
21 Sammamish Plateau Water and Sewer District that precluded much of the same
22 development as the City's moratorium.

23 The City conveniently omits that the Sammamish Plateau Water (SPW) sewer moratorium expired on August 23rd, 2021

24

25 [1] Effective September 12, 2021, WAC 242-03-970 will also have been amended to remove the 30-day deadline for seeking direct review. *See* WSR 21-17-069.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

By relying on the statutory provision for direct review expressly provided by the Legislature, the City is not "skipping" anything, let alone "the standard order of operations set by State law." (Opp. 4) Moreover, Gerend's assertion that this case does not involve an issue of first impression that should be addressed by the Court of Appeals to provide guiding precedent, is contradicted by his concession that direct review is proper if the case is not first dismissed on mootness grounds. The Board itself recognized that the issue of whether, after a municipality has repealed a regulation invalidated by the Board, the Board can nonetheless sanction it for adopting a moratorium to preserve the status quo while it evaluates replacements is

The "status quo" in Sammamish is Comprehensive Plan land uses, not severely constrained land uses by V/C LOS or moratoria

"a matter of first impression." (*See* Petition for Judicial Review, No. 21-2-01778-5 SEA, appendix at 7)

In the end, Gerend's concession that direct review may be appropriate also concedes that there is no reason for this Court to perform a redundant review and analysis of the legal issues presented in these related cases, rather than certifying them to the Court of Appeals. This Court should consolidate and certify these cases for direct review as expressly authorized by RCW 34.05.518.

III. CONCLUSION

This Court should grant the City's unopposed request to consolidate No. 21-2-01778-5 SEA and No. 21-2-10047-0 SEA, and certify the consolidated case for direct review in the Court of Appeals pursuant to RCW 34.05.518(1)(b).

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

I certify that this memorandum contains 981 words, in compliance with the Local Civil Rules.

Dated this 8th day of September, 2021.

CITY OF SAMMAMISH
City Attorney

By: */s/ Lisa M. Marshall*
Lisa M. Marshall
WSBA No. 24343

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

EGLICK & WHITED PLLC

By: */s/ Peter J. Eglick*
Peter J. Eglick
WSBA No. 8809
Joshua A. Whited
WSBA No. 30509

Attorneys for Petitioner

The City of Sammamish used five attorneys to prepare this legal pleading.

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 8, 2021, I arranged for service of the foregoing Reply in Support of Motion to Consolidate and Certification of Direct Review to the Washington State Court of Appeals, to the court and to the parties to this action as follows:

Recipient	Method
Office of Clerk King County Superior Court County Courthouse, Room E-609 516 Third Avenue, M/S 6C Seattle, WA 98104	____ Facsimile ____ Overnight Mail ____ U.S. Mail _X_ E-File
Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 8th day of September, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

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The Honorable Kristin Richardson
Final Hearing: September 17, 2021 at 1:30pm

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation,

Petitioner,

V.

DON GEREND, an individual,

Respondent,

GROWTH MANAGEMENT HEARINGS BOARD,

Agency Respondent.

NO. 21-2-01778-5 SEA

CITY OF SAMMAMISH'S REPLY BRIEF

I. INTRODUCTION

The question before this Court remains whether the Growth Management Hearings Board ("Board", "GMHB") overstepped its statutory jurisdiction. The City has explained how the Board did so, including by conflating the terms "interim controls" and "moratoriums," contrary to the GMA statute itself as well as available legislative reports. As explained in the City's Reply below, Gerend's response argues that the Legislature's use of distinct terms does not signify any difference. Gerend also argues for a Board reach

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2 that goes beyond the well understood question of compliance (i.e. "Have you acknowledged
3 that the regulation we invalidated is no longer in effect?") to a more overbearing role ("How
4 dare you adopt a moratorium to prevent pre-emption of options for replacement of the
5 regulation we invalidated?). As explained below, the zeal underlying the latter approach may
6 be well meaning, but it is misguided and unlawful.

7
8 ## II. REPLY ARGUMENT

9 ### A. Moratoriums Are Not "Interim Controls" Under the GMA and the Board had No Jurisdiction under RCW 36.70A.302(7)(a) to Invalidate the City's Moratorium in the Compliance Proceeding About A Different Regulation.
10

11 The Board expressly relied on RCW 36.70A.302(7)(a) in concluding that the City's
12 moratorium was an "interim control" subject to Board review authority in a compliance
13 proceeding. CR 2345-2346.

14 Gerend argues generally that a moratorium is temporary and not permanent, that it
15 would be redundant to call a moratorium an "interim moratorium" and therefore a moratorium
16 must be an "interim control" as that term is used in RCW 36.70A.302(7)(a) and RCW
17 36.70A.302(5). Respondent Don Gerend's Brief ("Gerend Brief") at 18-19. However,
18 Gerend's "must be" arguments are contradicted by the specific distinction between "interim
19 controls" and "moratoriums" the Legislature took pains to include in the GMA, as reflected in,
20 *inter alia*, key legislative history. Further, Gerend's arguments (and the Board's actions)
21 contravene the key principles: that the GMA is <u>not</u> to be liberally construed, that the Board
22 <u>cannot</u> rewrite the statute or read unsaid language into it, and, that when a statute uses different
23 terms, <u>different meanings</u> are ascribed to each term. *Thurston Cty. v. W. Wash. Growth Mgmt.*
24 *Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38, 44 (2008); *Densley v. Department of*
25
26

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Retirement Systems, 162 Wn.2d 210, 219, 173 P.3d 885 (2007); *see* Responsible Shoreline Mngmt., et al. v. City of Bainbridge Island, et al., CPSGMHB Case No. 14-3-0012, Final Decision and Order, (April 6, 2015), 2015 GMHB LEXIS 43, at 189-190.

In advancing his general argument that moratoriums "must be" a type of "interim control" under the GMA, Gerend ignores entirely that the title of RCW 36.70A.390 identifies two different classes of legislation that can be adopted under that statute: "moratoria" and "interim zoning controls." This dichotomy is further emphasized in the legislative history, which refers again to "a moratorium" "or" "interim zoning controls." *See* City of Sammamish Opening Brief ("City Brief") at 19 (quoting Substitute Senate Final Bill Report for ESSB 5727 at 1; Substitute House Bill Report for ESSB 5727). While Gerend attempts to parse the legislative history wording, its gravamen is clear: there would be no reason to call out moratoriums separately if moratoriums were the same as the referenced interim controls.

RCW 36.70A.035(2)(b)(v) is equally if not more compelling in confirming that a moratorium is not an "interim control" under the GMA. Yet, Gerend offers no explanation regarding this statutory provision despite the fact that it was an integral part of the argument in the City's Opening Brief. *See* City Brief at 17-18. RCW 36.70A.035(2)(b)(v) clearly and expressly distinguishes between the terms "moratorium" and "interim control," exempting from public participation requirements proposed changes to an ordinance enacting "a moratorium or interim control adopted under RCW 36.70A.390." Gerend argues that "interim control" is a broad overarching term that includes moratoriums. Gerend Brief at 18-20. However, if this was the Legislature's intent, this statutory provision would need only refer to an "interim control

adopted under RCW 36.70A.390;" the separate, distinct reference to "moratorium" would be entirely superfluous.

The absence of any reference to "moratorium," "moratoriums," and/or "moratia" in RCW 36.70A.302(7)(a) confirms that the Legislature did not intend for the Board to have jurisdiction in a compliance proceeding to review moratoriums. If the Legislature had intended otherwise, there would be a reference to moratoriums in that statutory provision as was done in RCW 36.70A.035(2)(b)(v). Instead, RCW 36.70A.302(7)(a) only extends jurisdiction to the Board in a compliance proceeding over adopted "interim controls."[1]

Moreover, the Legislature's purpose in providing the Board authority to review "interim controls" in a compliance proceeding is established in both RCW 36.70A.302(5) and the legislative history. That purpose was to allow vesting of applications to interim controls when they do not substantially interfere with fulfillment of GMA goals. This has no relevance in the context of a moratorium. Moratoriums affirmatively preclude applications and, therefore, vesting while new development regulations and comprehensive plan amendments are being considered. *See* City Brief at 18-20.

Gerend offers a tangent, arguing that the references to vesting in RCW 36.70A.302(5) and the legislative history is "permissive ('may vest')", and that the language "does not cover every possible interim control" -- suggesting that interim stormwater regulations do not involve vested rights. Gerend Brief at 20. The language is "permissive" obviously because an

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[1] Contrary to Gerend's suggestion (Gerend Brief at 19), the City has explained what "interim controls" refers to: it refers to those three tools identified in RCW 36.70A.390 that are preceded by the word "interim." See City Brief at 17.

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application can only vest to an interim control if the Board concludes it does not substantially interfere with fulfillment of GMA goals. And, Gerend's suggestion that vested rights would not be implicated with respect to interim stormwater regulations of a local jurisdiction is not supported by the authority Gerend cites. The case cited by Gerend does hold the vested rights doctrine inapplicable to certain stormwater requirements, but that was because they were state and federal requirements (which are not regulated under the GMA):

> The legislative history and our precedent demonstrate that the vesting statutes were intended to restrict **municipal** discretion with respect to local zoning and land use ordinances. Because state and federal law direct the permittees to implement the storm water regulations at issue in this case, **the regulations are not the sort of local municipal land use and zoning ordinances the legislature was concerned with**.

Snohomish Cty. v. Pollution Control Hr'gs Bd., 187 Wn.2d 346, 374, 386 P.3d 1064, 1077 (2016) (emphasis added). In any event, a moratorium is not an "interim control" and a moratorium does not establish any substantive standards to which any application could ever vest – the very purpose of a moratorium is to preclude vesting.

Gerend cites Board rules regarding what issues and evidence the Board will consider during a compliance hearing as if the Board by promulgating a procedural rule can somehow broaden the jurisdiction the Legislature actually defined in RCW 36.70A.302(7)(a). *See* Gerend Brief at 11-12 (citing WAC 242-03-940). This is not the first time that an attempt has been made to extend the Board's reach. The Washington Supreme Court has rejected such attempts in particularly pointed terms: "The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute." *Viking v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

Further, Gerend's theory that the moratorium adopted by the City is somehow "within the nature, scope and statutory basis of the conclusions of noncompliance in the prior order" does not square with the facts here. Gerend Brief at 11-12. The Board invalidated one, single City concurrency development regulation – which the City then repealed. There was no moratorium at issue. Contrary to Gerend's suggestion, the moratorium separately adopted by the City did not function "as improper amendments to the City's transportation concurrency system." Gerend Brief at 11. The moratorium adopted no substantive standards regarding concurrency requirements. It simply imposed a temporary pause on development so that the City would have time to consider what if any amendments concerning concurrency might be adopted going forward -- exactly what the Legislature intended when it granted moratorium authority to local jurisdictions.

Ultimately, Gerend's theory (which the Board erroneously endorsed) is that the moratorium authority the Legislature enacted for local jurisdictions vanishes when a jurisdiction is in a compliance proceeding and that, to be in compliance, a jurisdiction must not only repeal the invalidated regulation, but also not adopt a moratorium. *See* Gerend Brief at 14-15, 22. The theory would lead to anomalous outcomes. Under it, a local jurisdiction could repeal an invalidated regulation, obtain an expedited compliance hearing (per Board procedural rules), quickly be found in compliance so that the compliance proceeding was permanently closed -- and then immediately thereafter adopt a moratorium. Nothing in the GMA statute supports this anomalous approach.[2] The Legislature did not say in the GMA that local

[2] Gerend cites a general GMA provision, RCW 36.70A.040(3), for the proposition that local jurisdictions are required to implement their comprehensive plans through consistent development regulations and that this

jurisdictions are divested of moratorium authority when they are subject to a compliance order.[3] Indeed, that is arguably one of the times when the moratorium authority is most needed by local jurisdictions.

B. The Issue Presented Here, *i.e.* whether a "Moratorium" is an "Interim Control" Subject to Review in a Compliance Proceeding, is a Matter of First Impression.

Gerend faults the City for not identifying the moratorium as a compliance action and focuses on how the Board itself characterized the issue of first impression before it, *i.e.* whether in a compliance proceeding, the Board has authority to review "a legislative action not identified by a jurisdiction in its statement of actions taken to comply?" Gerend Brief at 8, 11-14. The City did not identify the moratorium as a compliance action because it was not an action taken to comply with the Board's FDO and the Board had no jurisdiction to consider it; instead the actions taken to comply with the Board's FDO were the City's express acknowledgment of the Board's invalidation of the single traffic concurrency regulation at issue and the City's legislative repeal of it. *See* CR 2144-2171; CR 2308-2328; CR 2329-2333. Thus, the "legislative action" taken and identified by the City to achieve compliance was the repeal of the regulation the Board invalidated.

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somehow precludes moratoriums. Gerend Brief at 13, 22. However, the Legislature in RCW 36.70A.390 specifically authorized local jurisdictions to put a pause on implementation so that they have time to review plans, policies and regulations and make necessary updates and modifications without development vesting to soon to be outdated requirements.

[3] Gerend complains more than once about the amount of time it has taken the City to consider amendments. However, RCW 36.70A.390 authorizes use of moratoriums for an initial period of one year where a work plan has been developed, and further allows for extensions of moratoriums for "one or more six-month periods." RCW 36.70A.390. The 16 months of study time that Gerend complains of is well within what was contemplated by the Legislature when it adopted RCW 36.70A.390.

The Board's characterization of the "issue of first impression," is but one formulation. Another, more specifically apt, is whether the Board overreached in a compliance proceeding by punishing the City for having the "audacity" to use the very moratorium authority the Legislature expressly granted – even though the City had already repealed the single concurrency regulation invalidated by the Board?[4] As the argument above and the City Brief explain, the answer is no.

Gerend, citing a prior Board decision in *King County et al. v. Snohomish County et al.*, asserts that the issue of whether the Board can consider a moratorium in a compliance setting is not a matter of first impression. Gerend Brief at 16. That assertion is misleading and ultimately incorrect. The Board did consider a moratorium in that particular compliance proceeding. However, whether a moratorium is or is not an "interim control" under the GMA framework was not an issue in that proceeding. To the contrary, all the parties and the Board presumed without discussing or deciding the issue (and without examining other relevant GMA provisions or legislative history) that a moratorium was the same as an "interim control" and the Board therefore had jurisdiction under RCW 36.70A.302(7)(a). *See King County et al. v. Snohomish County et al.*, CPSGMHB No. 04-3-0012, Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing (May 26, 2004), 2004 GMHB LEXIS 31, at 21-22.[5] In other words, the issue presented here was never raised or decided in the *King County* decision.

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[4] The City in its Petition for Review expressly acknowledged and took exception to how the Board framed the issue of first impression. *See* Petition for Review dated February 9, 2021 at 2.

[5] A copy of the decision is attached as Exhibit B to the Declaration of Duana T. Kolouskova in Support of Respondent Don Gerend's Brief ("Kolouskova Declaration").

Even were the preceding not the case, the *King County* decision is also highly distinguishable. In *King County*, the Board had invalidated regulations adopted by Snohomish County precluding essential public facilities. In response, the County adopted a moratorium again precluding essential public facilities. In other words, the case focused on essential public facilities ("EPFs"), which are treated specially under the GMA, which mandates that EPFs may not be precluded by local jurisdictions. *See* RCW 36.70A.200(5). The Board had found in its initial decision that EPFs were improperly precluded under Snohomish County's initial regulations. Snohomish County then doubled down by adopting a moratorium again precluding EPFs. *Id.* at 2, 8, 21-22. However, prior to the Board's compliance decision, the County repealed the moratorium. The Board therefore concluded that the challenge to the moratorium was technically moot and dismissed it, but nonetheless went on to provide guidance on issues related to the moratorium. *Id.* at 21-22. In this context, the Board concluded that allowing Snohomish County's moratorium to enjoy a presumption of validity when the moratorium was simply a readoption of that "which had just been found noncompliant and invalid" was inappropriate. *Id.* at 22. This contrasts with the present case in which the City's moratorium does not put back in place what the Board invalidated and the City repealed.

The *King County* case arose in a unique context. Almost any legislation precluding EPFs will be found to violate the GMA – whether it be an interim control, moratorium, or permanent development regulation. *See* City Brief at 11-12 (quoting *Phoenix Development LLC, et al., v. City of Woodinville* ("*Phoenix*"), CPSGMHB Consolidated Case No. 07-3-0029c, Final Decision and Order, (Oct. 12, 2007), 2007 GMHB LEXIS 115, at 8-9 for, *inter alia*, the

proposition that preclusion of the siting of an essential public facility is a "blatant violation of a GMA requirement").[6]

Master Builders Association et al v. City of Sammamish, CPSGMHB No. 05-3-0030c, FDO (August 4, 2005),[7] which Gerend relies on,[8] also did not address or decide whether a moratorium is an "interim control" subject to Board review in a compliance proceeding under RCW 36.70A.302(7)(a). However, the case does confirm how the Board has historically reviewed moratoriums, which is drastically different than how the Board reviewed the moratorium at issue here.

Master Builders did not arise in a compliance context; in *Master Builders,* a petition for review was filed challenging a Sammamish moratorium that had been renewed twelve times over six years. The Board concluded that the moratorium was a permanent fixture amounting to a "development regulation" subject to full Board review rather than what the Board loosely referred to as an "interim regulation" under RCW 36.70A.390. *Master Builders* at 10-12, 18.[9]

Gerend disingenuously asserts that in Ma*ster Builders* "[n]o party argued that the Board was conflating interim controls with moratoriums in that case, because the parties understood they were one and the same. This also demonstrates that Board jurisprudence has treated moratoria as 'interim regulations,' indistinguishable from "interim controls,' for at least sixteen

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[6] A copy of the Board's *Phoenix* decision is attached as Exhibit C to the Kolouskova Declaration.

[7] A copy of the Board's *Master Builders* decision is attached as Exhibit D to the Kolouskova Declaration.

[8] Gerend Brief at 21.

[9] Gerend asserts that the argument made here regarding the distinction between "interim controls" and moratoriums is similar to the argument made by the City in *Master Builders* that "moratoria" are not in the list of development controls itemized in the definition of "development regulations" in RCW 36.70A.030. That is highly inaccurate because the list of development controls itemized in that definition is preceded by "including, but not limited to" language. *See* RCW 36.70A.030(8).

years." Gerend Brief at 21. These assertions are starkly misleading. No one argued about conflating terms in *Master Builders* because the terms used did not matter there. The entire case did not arise in a compliance proceeding. The Master Builders filed a petition for review appropriately challenging the moratorium in a non-compliance setting and the Board was operating under its traditional approach to review of moratoriums. Moreover, the terms used there are not the same terms at issue here.

Master Builders' loose parlance, referring to "interim regulations' in a non-compliance context, does not amend the GMA statute, RCW 36.70A.302(7)(a), in which the Legislature expressly and specifically provided the Board with jurisdiction in a compliance proceeding to consider only "interim controls," but not moratoriums. Notably, the term "interim regulation" is not even a term used in the GMA or in RCW 36.70A.390 or RCW 36.70A.302(7)(a) specifically. The Board used the term in *Master Builders* to refer generally to temporary legislation adopted under RCW 36.70A.390 and to distinguish such temporary legislation from a permanent development regulation subject to full Board review.

As explained in the *Phoenix* decision, which is quoted at length in the City Opening Brief, the Board has entertained challenges to moratoriums in the past when a petition for review has been filed, but the review has been extremely limited. *See* City Brief at 11-12. Absent a blatant GMA violation (such as precluding an essential public facility), a moratorium is only reviewed for compliance with the procedural requirements of RCW 36.70A.390 unless the moratorium has been "systematically and continuously extended for a significant period of time, to the extent that the measure takes on the attributes of a 'permanent' regulation." *Id.* In *Master Builders*, the moratorium had been extended for so long that it was subject to substantive

review by the Board and, consistent with its prior precedent, invalidated as an improper development regulation. *Master Builders* has no bearing here beyond demonstrating how the moratorium should have been challenged and reviewed, *i.e.* not as an add-on to a compliance proceeding, but via a petition for review under the Board's standard approach to review of moratoriums.

C. Gerend Is Attempting to Improperly Shift the Burden of Proof – Not the City.

By pulling a discrete City moratorium into its compliance proceeding, the Board changed the otherwise applicable standard of review, which would have placed the burden on Gerend in any regular petition for review proceeding before the Board about the moratorium, and put the burden on the City to justify an action authorized by the Legislature in the GMA. Ironically, Gerend argues that the City is attempting to improperly shift the burden of proof. Gerend Brief at 9-11. However, the City is merely seeking to have the GMA review framework applied as the Legislature intended it. The jurisdiction granted to the Board by the Legislature in RCW 36.70A.302(7)(a) precludes review of a moratorium in a compliance proceeding.

This does not mean that the City's moratorium(s) will evade review or that the City can adopt moratoriums unfettered year after year. The City's moratorium(s) can be challenged via the filing of a proper petition for review with the Boar, per statute. If the Board concludes that a moratorium has been in place for too long so as to constitute a permanent fixture, then its substance can be reviewed consistent with how the Board has historically reviewed such matters. But there is no basis for what the Board has done here: creating a "rocket docket" and summarily reviewing the substance of a moratorium in a compliance proceeding where no petition for review was filed and the standards applicable to moratoriums were not even

considered or applied. Any development regulation or comprehensive plan amendments that are adopted by the City following the completion of its BLUMA Study will also be subject to review by the Board.

The City took the Board's original FDO to heart and repealed the invalidated development regulation. The City has been working diligently at significant expense to explore potential amendments to its concurrency regulations in light of local circumstances and traffic impacts that are not accounted for under the current regulations. The City is entitled to pursue that course and, in doing so, is entitled to utilize without summary interdiction the moratorium authority granted by the Legislature to preclude vesting which would undermine the work being undertaken.

III. CONCLUSION

The City respectfully requests that the Court reverse the Board, vacate its January 22, 2021 Order and enter an Order declaring and concluding that: the City complied with the GMA and the Board's January 22, 2021 Order when it repealed the only provision invalidated by the Board in its FDO, and the Board acted beyond its authority and outside of its jurisdiction in reviewing and invalidating the City's moratorium in the compliance proceeding.

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2 Dated this 10th day of September, 2021.
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EGLICK & WHITED PLLC
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6
By: /s/ Joshua A. Whited

Peter J. Eglick, WSBA No. 8809
Joshua A. Whited, WSBA No. 30509
Eglick & Whited, PLLC
1000 Second Avenue, Suite 3130
Seattle, WA 98104
Phone: (206) 441-1069
Fax: (206) 441-1089
Email: eglick@ewlaw.net
whited@ewlaw.net
CC: phelan@ewlaw.net
Co-Counsel for Petitioner City of Sammamish

CITY OF SAMMAMISH

By: /s/ Lisa M. Marshall

Lisa M. Marshall, WSBA No. 24343
City Attorney
City of Sammamish
801 228th Ave SE
Sammamish, WA 98075
Phone: (425) 295-0508
Fax: (425) 295-0600
Email: lmarshall@sammamish.us
CC: cschaff@sammamish.us
Co-Counsel for Petitioner City of Sammamish

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DECLARATION OF SERVICE

I, Cynthia Schaff, an employee of the City of Sammamish Legal Department, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein. On September 10, 2021, I caused true and correct copies of foregoing to be delivered via Email and King County Superior Court E-Service to the parties listed below:

Duana T. Koloušková, WSBA No. 27532 Johns, Monroe, Misunaga, Koloušková, PLLC 1201 SE 8th Street, Suite 120 Bellevue, Washington 98004 koulouskova@jmmklaw.com williams@jmmklaw.com cc: charlot@jmmklaw.com *Counsel for Respondent Gerend*	Lisa M. Petersen, WSBA No. 30372 Assistant Attorney General Office of the Attorney General 800 Fifth Avenue, Suite 2000 MS TB-14 Seattle, WA 98104 Lisa.Petersen@atg.wa.gov *Counsel for Growth Management Hearings Board*

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

DATED: September 10, 2021 at Federal Way, Washington.

____
Cynthia Schaff
Paralegal

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

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FILED
2021 SEP 10 04:22 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 21-2-01778-5 SEA

The Honorable Kristin Richardson
Final Hearing: September 17, 2021 at 1:30pm

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation,

Petitioner,

v.

DON GEREND, an individual,

Respondent,

GROWTH MANAGEMENT HEARINGS BOARD,

Agency Respondent.

NO. 21-2-01778-5 SEA

CITY OF SAMMAMISH'S REPLY BRIEF

I. INTRODUCTION

The question before this Court remains whether the Growth Management Hearings Board ("Board", "GMHB") overstepped its statutory jurisdiction. The City has explained how the Board did so, including by conflating the terms "interim controls" and "moratoriums,"

Terms were not conflated. Moratoriums are interim by their very nature, using interim before moratorium is redundant and silly.

contrary to the GMA statute itself as well as available legislative reports. As explained in the City's Reply below, Gerend's response argues that the Legislature's use of distinct terms does not signify any difference. Gerend also argues for a Board reach

1
2 that goes beyond the well understood question of compliance (i.e. "Have you acknowledged
3 that the regulation we invalidated is no longer in effect?") to a more overbearing role ("How
4 dare you adopt a moratorium to prevent pre-emption of options for replacement of the
5 regulation we invalidated?). As explained below, the zeal underlying the latter approach may
6 be well meaning, but it is misguided and unlawful.

7
II. REPLY ARGUMENT

8
Oh yes they are.

A. Moratoriums Are Not "Interim Controls" Under the GMA and the Board had No Jurisdiction under RCW 36.70A.302(7)(a) to Invalidate the City's Moratorium in the Compliance Proceeding About A Different Regulation.

9
10
They are interim controls. Moratorium, Moratoriums, Moratoria are interim, as they always expire in 6 months or one year.

11 The Board expressly relied on RCW 36.70A.302(7)(a) in concluding that the City's
12 moratorium was an "interim control" subject to Board review authority in a compliance
13 proceeding. CR 2345-2346.

14 Gerend argues generally that a moratorium is temporary and not permanent, that it
15 would be redundant to call a moratorium an "interim moratorium" and therefore a moratorium
16 must be an "interim control" as that term is used in RCW 36.70A.302(7)(a) and RCW
17 36.70A.302(5). Respondent Don Gerend's Brief ("Gerend Brief") at 18-19. However,
18 Gerend's "must be" arguments are contradicted by the specific distinction between "interim
19 controls" and "moratoriums" the Legislature took pains to include in the GMA, as reflected in,
20 *inter alia*, key legislative history. Further, Gerend's arguments (and the Board's actions)
21 contravene the key principles: that the GMA is not to be liberally construed, that the Board
22 cannot rewrite the statute or read unsaid language into it, and, that when a statute uses different
23 terms, different meanings are ascribed to each term. *Thurston Cty. v. W. Wash. Growth Mgmt.*
24 *Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38, 44 (2008); *Densley v. Department of*
25
26

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Retirement Systems, 162 Wn.2d 210, 219, 173 P.3d 885 (2007); *see* Responsible Shoreline Mngmt., et al. v. City of Bainbridge Island, et al., CPSGMHB Case No. 14-3-0012, Final Decision and Order, (April 6, 2015), 2015 GMHB LEXIS 43, at 189-190.

In advancing his general argument that moratoriums "must be" a type of "interim control" under the GMA, Gerend ignores entirely that the title of RCW 36.70A.390 identifies two different classes of legislation that can be adopted under that statute: "moratoria" and "interim zoning controls." This dichotomy is further emphasized in the legislative history, which refers again to "a moratorium" "or" "interim zoning controls." *See* City of Sammamish

Deceptive. Zoning can be either permanent or interim. Moratorium are always interim they are never permanent.

Opening Brief ("City Brief") at 19 (quoting Substitute Senate Final Bill Report for ESSB 5727 at 1; Substitute House Bill Report for ESSB 5727). While Gerend attempts to parse the legislative history wording, its gravamen is clear: there would be no reason to call out moratoriums separately if moratoriums were the same as the referenced interim controls.

Moratoriums (moratoria) are always interim, so no need to call them interim. City trying to use word games to try tricking the court.

RCW 36.70A.035(2)(b)(v) is equally if not more compelling in confirming that a moratorium is not an "interim control" under the GMA. Yet, Gerend offers no explanation

City was attempting to make something that is not true sound feasible - but is patently false. Moratoriums are ALWAYS interim, always.

regarding this statutory provision despite the fact that it was an integral part of the argument in the City's Opening Brief. *See* City Brief at 17-18. RCW 36.70A.035(2)(b)(v) clearly and expressly distinguishes between the terms "moratorium" and "interim control," exempting from public participation requirements proposed changes to an ordinance enacting "a moratorium or interim control adopted under RCW 36.70A.390." Gerend argues that "interim control" is a broad overarching term that includes moratoriums. Gerend Brief at 18-20. However, if this was the Legislature's intent, this statutory provision would need only refer to an "interim control

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adopted under RCW 36.70A.390;" the separate, distinct reference to "moratorium" would be

Not true. What is superfluous is to expect to put the word "interim" in front of moratorium, as a moratorium can only be interim.

entirely superfluous.

The absence of any reference to "moratorium," "moratoriums," and/or "moratia" in RCW 36.70A.302(7)(a) confirms that the Legislature did not intend for the Board to have

This stake in the ground speculation is far-fetched. The Board has ability to review interim regulations. Moratoriums are interim.

jurisdiction in a compliance proceeding to review moratoriums. If the Legislature had intended otherwise, there would be a reference to moratoriums in that statutory provision as was done in RCW 36.70A.035(2)(b)(v). Instead, RCW 36.70A.302(7)(a) only extends jurisdiction to the Board in a compliance proceeding over adopted "interim controls."[1]

All moratoriums are interim controls. This is all they can ever be, as they always expire and are never, ever permanent.

Moreover, the Legislature's purpose in providing the Board authority to review "interim controls" in a compliance proceeding is established in both RCW 36.70A.302(5) and the

Interim controls are interim zoning ... and interium regulations ... and moratoriums

legislative history. That purpose was to allow vesting of applications to interim controls when they do not substantially interfere with fulfillment of GMA goals. This has no relevance in the context of a moratorium. Moratoriums affirmatively preclude applications and, therefore,

This attempts to tie all moratoriums to land use. Not true. There could be moratoriums on many other things, ie land acquisition, new roads, hiring staff ...

vesting while new development regulations and comprehensive plan amendments are being

The city did not use moratium's during the second comprehensive plan, critical area updates of 2013±, or tree retention increases of 2015± ....

considered. *See* City Brief at 18-20.

Gerend offers a tangent, arguing that the references to vesting in RCW 36.70A.302(5) and the legislative history is "permissive ('may vest')", and that the language "does not cover every possible interim control" -- suggesting that interim stormwater regulations do not involve vested rights. Gerend Brief at 20. The language is "permissive" obviously because an

The city is trying to sell an inaccurate position, that moratoriums are not interim controls ... THEY ARE.

[1] Contrary to Gerend's suggestion (Gerend Brief at 19), the City has explained what "interim controls" refers to: it refers to those three tools identified in RCW 36.70A.390 that are preceded by the word "interim." See City Brief at 17.

Moratoriums are interim controls every time, they cannot be anything else as moratoriums are never permanent.

1
2 application can only vest to an interim control if the Board concludes it does not substantially
3 interfere with fulfillment of GMA goals. And, Gerend's suggestion that vested rights would
4 not be implicated with respect to interim stormwater regulations of a local jurisdiction is not
5 supported by the authority Gerend cites. The case cited by Gerend does hold the vested rights
6 doctrine inapplicable to certain stormwater requirements, but that was because they were state
7 and federal requirements (which are not regulated under the GMA):
8
9 > The legislative history and our precedent demonstrate that the vesting statutes were intended to restrict **municipal** discretion with respect to local zoning and land use ordinances. Because state and federal law direct the permittees to implement the storm water regulations at issue in this case, **the regulations are not the sort of local municipal land use and zoning ordinances the legislature was concerned with**.
10
11
12
13 *Snohomish Cty. v. Pollution Control Hr'gs Bd.*, 187 Wn.2d 346, 374, 386 P.3d 1064, 1077
14 (2016) (emphasis added). In any event, a moratorium is not an "interim control" and a
15 moratorium does not establish any substantive standards to which any application could ever

Once again city is attempting to "sell" all moratoriums are to preclude vesting land use. There can be a multitude of other types of moratoriums

16 vest – the very purpose of a moratorium is to preclude vesting.

A crucial distinction in these GMHB cases, V/C LOS precluded most vesting. V/C was invalidated. Moratoriums that did the same thing were invalidated too.

17 Gerend cites Board rules regarding what issues and evidence the Board will consider
18 during a compliance hearing as if the Board by promulgating a procedural rule can somehow
19 broaden the jurisdiction the Legislature actually defined in RCW 36.70A.302(7)(a). *See* Gerend
20 Brief at 11-12 (citing WAC 242-03-940). This is not the first time that an attempt has been
21 made to extend the Board's reach. The Washington Supreme Court has rejected such attempts
22 in particularly pointed terms: "The hearings boards are quasi-judicial agencies that serve a
23 limited role under the GMA, with their powers restricted to a review of those matters
24 specifically delegated by statute." *Viking v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).
25
26

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Further, Gerend's theory that the moratorium adopted by the City is somehow "within the nature, scope and statutory basis of the conclusions of noncompliance in the prior order" does

On the contrary, this squares with the facts perfectly. V/C stopped most Comp Plan adopted land uses. Moratoriums enacted did the same thing.

not square with the facts here. Gerend Brief at 11-12. The Board invalidated one, single City concurrency development regulation – which the City then repealed. There was no moratorium at issue. Contrary to Gerend's suggestion, the moratorium separately adopted by the City did not function "as improper amendments to the City's transportation concurrency system."

The intent and effect of V/C LOS was to thwart land uses in the adopted comprehensive plan. Same goes for the serial mortoria the city adopted.

Gerend Brief at 11. The moratorium adopted no substantive standards regarding concurrency

Another artful play on words. But rings hollow. Why? Because it did exactly what V/C LOS did, to NOT SUPPORT adopted Comp Plan land uses.

requirements. It simply imposed a temporary pause on development so that the City would

Temporary pause on development - HAH! Either serial moratoria or V/C LOS have precluded most development since Fall of 2017 - about 4 years.

have time to consider what if any amendments concerning concurrency might be adopted going forward -- exactly what the Legislature intended when it granted moratorium authority to local jurisdictions.

Ultimately, Gerend's theory (which the Board erroneously endorsed) is that the

Which the board appropriately agreed with.

moratorium authority the Legislature enacted for local jurisdictions vanishes when a jurisdiction is in a compliance proceeding and that, to be in compliance, a jurisdiction must not

Yet again, another craftily constructed sentence. A city cannot adopt a moratorium that has the same **EFFECT** as an invalidated regulation.

only repeal the invalidated regulation, but also not adopt a moratorium. *See* Gerend Brief at 14-15, 22. The theory would lead to anomalous outcomes. Under it, a local jurisdiction could repeal an invalidated regulation, obtain an expedited compliance hearing (per Board procedural rules), quickly be found in compliance so that the compliance proceeding was permanently closed -- and then immediately thereafter adopt a moratorium. Nothing in the GMA statute supports this anomalous approach.[2] The Legislature did not say in the GMA that local

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[2] Gerend cites a general GMA provision, RCW 36.70A.040(3), for the proposition that local jurisdictions are required to implement their comprehensive plans through consistent development regulations and that this

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jurisdictions are divested of moratorium authority when they are subject to a compliance order.[3]

In some cases this would be true, in this case it is not. As the moratorium's had the same effects that the invalidated ordinance did.

Indeed, that is arguably one of the times when the moratorium authority is most needed by local

Indeed, it is arguably the most flagrant abuse of political power to use a moratoria to achieve just what the invalidated regulation did.

jurisdictions.

B. The Issue Presented Here, *i.e.* whether a "Moratorium" is an "Interim Control" Subject to Review in a Compliance Proceeding, is a Matter of First Impression.

Gerend faults the City for not identifying the moratorium as a compliance action and focuses on how the Board itself characterized the issue of first impression before it, *i.e.* whether in a compliance proceeding, the Board has authority to review "a legislative action not identified by a jurisdiction in its statement of actions taken to comply?" Gerend Brief at 8, 11-14. The City did not identify the moratorium as a compliance action because it was not an action taken to comply with the Board's FDO and the Board had no jurisdiction to consider it; instead

The city did not want the Board to recognize the Moratoriums had the same effects as the invalidated regulation - to thwart most growth.

the actions taken to comply with the Board's FDO were the City's express acknowledgment of the Board's invalidation of the single traffic concurrency regulation at issue and the City's legislative repeal of it. *See* CR 2144-2171; CR 2308-2328; CR 2329-2333. Thus, the "legislative action" taken and identified by the City to achieve compliance was the repeal of the

This would have achieved compliance if intersection concurrency LOS was used (without V/C) and Comp Plan land uses were advamced.

regulation the Board invalidated.

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somehow precludes moratoriums. Gerend Brief at 13, 22. However, the Legislature in RCW 36.70A.390 specifically authorized local jurisdictions to put a pause on implementation so that they have time to review plans, policies and regulations and make necessary updates and modifications without development vesting to soon to be outdated requirements. Strong proof of premeditated, reverse engineered, intentional changes to land uses.

[3] Gerend complains more than once about the amount of time it has taken the City to consider amendments. However, RCW 36.70A.390 authorizes use of moratoriums for an initial period of one year where a work plan has been developed, and further allows for extensions of moratoriums for "one or more six-month periods." RCW 36.70A.390. The 16 months of study time that Gerend complains of is well within what was contemplated by the Legislature when it adopted RCW 36.70A.390.

Serial moratoria or V/C LOS have precluded most development since the Fall of 2017 - about 4 years - three times as long as "16 months".

The Board's characterization of the "issue of first impression," is but one formulation. Another, more specifically apt, is whether the Board overreached in a compliance proceeding by punishing the City for having the "audacity" to use the very moratorium authority the Legislature expressly granted – even though the City had already repealed the single concurrency regulation invalidated by the Board?[4] As the argument above and the City Brief explain, the answer is no.

The answer is not only yes it is HECK YES. The board invalidated the moratirium as it was an end run by the city to do just what V/C LOS did.

Gerend, citing a prior Board decision in *King County et al. v. Snohomish County et al.*, asserts that the issue of whether the Board can consider a moratorium in a compliance setting is not a matter of first impression. Gerend Brief at 16. That assertion is misleading and ultimately incorrect. The Board did consider a moratorium in that particular compliance proceeding. However, whether a moratorium is or is not an "interim control" under the GMA framework was not an issue in that proceeding. To the contrary, all the parties and the Board presumed without discussing or deciding the issue (and without examining other relevant GMA provisions or legislative history) that a moratorium was the same as an "interim control" and

A moratorium is the same as an interim control when its effects are the same as the invalidated ordinance.

the Board therefore had jurisdiction under RCW 36.70A.302(7)(a). *See King County et al. v. Snohomish County et al.*, CPSGMHB No. 04-3-0012, Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing (May 26, 2004), 2004 GMHB LEXIS 31, at 21-22.[5] In other words, the issue presented here was never raised or decided in the *King County* decision.

Let's ask the 64,000 dollar question. Was the moratorium in the King County decision the same circumstances as this case? Was there an invalidated regulation, and then King County enacted a moratorium to achieve the same effect as the invalidated regulation?

[4] The City in its Petition for Review expressly acknowledged and took exception to how the Board framed the issue of first impression. *See* Petition for Review dated February 9, 2021 at 2.

[5] A copy of the decision is attached as Exhibit B to the Declaration of Duana T. Kolouskova in Support of Respondent Don Gerend's Brief ("Kolouskova Declaration").

Even were the preceding not the case, the *King County* decision is also highly distinguishable. In *King County*, the Board had invalidated regulations adopted by Snohomish County precluding essential public facilities. In response, the County adopted a moratorium again precluding essential public facilities. In other words, the case focused on essential public facilities ("EPFs"), which are treated specially under the GMA, which mandates that EPFs may not be precluded by local jurisdictions. *See* RCW 36.70A.200(5). The Board had found in its initial decision that EPFs were improperly precluded under Snohomish County's initial regulations. Snohomish County then doubled down by adopting a moratorium again precluding EPFs. *Id.* at 2, 8, 21-22. However, prior to the Board's compliance decision, the County repealed the moratorium. The Board therefore concluded that the challenge to the moratorium was technically moot and dismissed it, but nonetheless went on to provide guidance on issues related to the moratorium. *Id.* at 21-22. In this context, the Board concluded that allowing Snohomish County's moratorium to enjoy a presumption of validity when the moratorium was simply a readoption of that "which had just been found noncompliant and invalid" was inappropriate. *Id.* at 22. This contrasts with the present case in which the City's moratorium does not put back in place what the Board invalidated and the City repealed.

What a blatant, inaccurate statement. In this present case the moratorium enacted had the SAME EFFECT as the invalidated V/C LOS.

The *King County* case arose in a unique context. Almost any legislation precluding EPFs will be found to violate the GMA – whether it be an interim control, moratorium, or permanent development regulation. *See* City Brief at 11-12 (quoting *Phoenix Development LLC, et al., v. City of Woodinville* ("*Phoenix*"), CPSGMHB Consolidated Case No. 07-3-0029c, Final Decision and Order, (Oct. 12, 2007), 2007 GMHB LEXIS 115, at 8-9 for, *inter alia*, the

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proposition that preclusion of the siting of an essential public facility is a "blatant violation of a GMA requirement").[6]

Master Builders Association et al v. City of Sammamish, CPSGMHB No. 05-3-0030c, FDO (August 4, 2005),[7] which Gerend relies on,[8] also did not address or decide whether a moratorium is an "interim control" subject to Board review in a compliance proceeding under RCW 36.70A.302(7)(a). However, the case does confirm how the Board has historically reviewed moratoriums, which is drastically different than how the Board reviewed the moratorium at issue here.

Master Builders did not arise in a compliance context; in *Master Builders*, a petition for review was filed challenging a Sammamish moratorium that had been renewed twelve times over six years. The Board concluded that the moratorium was a permanent fixture amounting to a "development regulation" subject to full Board review rather than what the Board loosely referred to as an "interim regulation" under RCW 36.70A.390. *Master Builders* at 10-12, 18.[9]

Gerend disingenuously asserts that in Ma*ster Builders* "[n]o party argued that the Board was conflating interim controls with moratoriums in that case, because the parties understood they were one and the same. This also demonstrates that Board jurisprudence has treated moratoria as 'interim regulations,' indistinguishable from "interim controls,' for at least sixteen

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[6] A copy of the Board's *Phoenix* decision is attached as Exhibit C to the Kolouskova Declaration.

[7] A copy of the Board's *Master Builders* decision is attached as Exhibit D to the Kolouskova Declaration.

[8] Gerend Brief at 21.

[9] Gerend asserts that the argument made here regarding the distinction between "interim controls" and moratoriums is similar to the argument made by the City in *Master Builders* that "moratoria" are not in the list of development controls itemized in the definition of "development regulations" in RCW 36.70A.030. That is highly inaccurate because the list of development controls itemized in that definition is preceded by "including, but not limited to" language. *See* RCW 36.70A.030(8).

years." Gerend Brief at 21. These assertions are starkly misleading. No one argued about conflating terms in *Master Builders* because the terms used did not matter there. The entire case did not arise in a compliance proceeding. The Master Builders filed a petition for review appropriately challenging the moratorium in a non-compliance setting and the Board was operating under its traditional approach to review of moratoriums. Moreover, the terms used there are not the same terms at issue here.

Master Builders' loose parlance, referring to "interim regulations' in a non-compliance context, does not amend the GMA statute, RCW 36.70A.302(7)(a), in which the Legislature expressly and specifically provided the Board with jurisdiction in a compliance proceeding to

Moratoriums by their very temporary nature (six or 12 months) are interim controls

consider only "interim controls," but not moratoriums. Notably, the term "interim regulation" is not even a term used in the GMA or in RCW 36.70A.390 or RCW 36.70A.302(7)(a) specifically. The Board used the term in *Master Builders* to refer generally to temporary legislation adopted under RCW 36.70A.390 and to distinguish such temporary legislation from a permanent development regulation subject to full Board review.

As explained in the *Phoenix* decision, which is quoted at length in the City Opening Brief, the Board has entertained challenges to moratoriums in the past when a petition for review has been filed, but the review has been extremely limited. *See* City Brief at 11-12. Absent a blatant GMA violation (such as precluding an essential public facility), a moratorium is only reviewed for compliance with the procedural requirements of RCW 36.70A.390 unless the moratorium has been "systematically and continuously extended for a significant period of

Or, as what happened in this case is that a moratorium has the same **EFFECTS** as the regulation that was invalidated by the Board.

time, to the extent that the measure takes on the attributes of a 'permanent' regulation." *Id.* In *Master Builders*, the moratorium had been extended for so long that it was subject to substantive

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review by the Board and, consistent with its prior precedent, invalidated as an improper development regulation. *Master Builders* has no bearing here beyond demonstrating how the moratorium should have been challenged and reviewed, *i.e.* not as an add-on to a compliance proceeding, but via a petition for review under the Board's standard approach to review of moratoriums.

C. Gerend Is Attempting to Improperly Shift the Burden of Proof – Not the City.

By pulling a discrete City moratorium into its compliance proceeding, the Board changed the otherwise applicable standard of review, which would have placed the burden on Gerend in any regular petition for review proceeding before the Board about the moratorium, and put the burden on the City to justify an action authorized by the Legislature in the GMA. Ironically, Gerend argues that the City is attempting to improperly shift the burden of proof. Gerend Brief at 9-11. However, the City is merely seeking to have the GMA review framework

The legislature cleary fully understands that all moratoriums are INTERIM measures as they are only allowed for 6 or 12 months.

applied as the Legislature intended it. The jurisdiction granted to the Board by the Legislature in RCW 36.70A.302(7)(a) precludes review of a moratorium in a compliance proceeding.

This does not mean that the City's moratorium(s) will evade review or that the City can adopt moratoriums unfettered year after year. The City's moratorium(s) can be challenged via the filing of a proper petition for review with the Boar, per statute. If the Board concludes that a moratorium has been in place for too long so as to constitute a permanent fixture, then its

Being a permanent fixture is one way the Board can review a moratorium. Another is if the moratorium has the same effect as the invalided regulation.

substance can be reviewed consistent with how the Board has historically reviewed such matters. But there is no basis for what the Board has done here: creating a "rocket docket" and summarily reviewing the substance of a moratorium in a compliance proceeding where no petition for review was filed and the standards applicable to moratoriums were not even

considered or applied. Any development regulation or comprehensive plan amendments that are adopted by the City following the completion of its BLUMA Study will also be subject to review by the Board.

The City took the Board's original FDO to heart and repealed the invalidated

Amusing statement as the city passed a moratorium at light speed that had the same EFFECTS as the invalidated development regulation.

development regulation. The City has been working diligently at significant expense to explore potential amendments to its concurrency regulations in light of local circumstances and traffic

Not being considered are local circumstances to alleviate internal housing and economic imbalances that have persisted for decades.

impacts that are not accounted for under the current regulations. The City is entitled to pursue

Balanced sustainable housing supplies and balanced sustainable economic services are not accounted for under current regulations.

that course and, in doing so, is entitled to utilize without summary interdiction the moratorium authority granted by the Legislature to preclude vesting which would undermine the work being

The City does not have the right to reassess all land uses based mainly on arbitrary concurrency without including sufficient information"

undertaken.

"Sufficient information" that is absent consists of "The Chew" and "Single Family Buildout" - as outlined in Enrich & Sustain.

III. CONCLUSION

The City respectfully requests that the Court reverse the Board, vacate its January 22, 2021 Order and enter an Order declaring and concluding that: the City complied with the GMA

The City did not comply with the Board Order as it passed moratoriums having the same effect as the invalidated V/C LOS development regulation.

and the Board's January 22, 2021 Order when it repealed the only provision invalidated by the Board in its FDO, and the Board acted beyond its authority and outside of its jurisdiction in

The board acted within its authority and entirely appropriately to invalidate a moratorium with the same effect as V/C LOS regulations.

reviewing and invalidating the City's moratorium in the compliance proceeding.

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EGLICK & WHITED PLLC

By: /s/ Joshua A. Whited
Peter J. Eglick, WSBA No. 8809
Joshua A. Whited, WSBA No. 30509
Eglick & Whited, PLLC
1000 Second Avenue, Suite 3130
Seattle, WA 98104
Phone: (206) 441-1069
Fax: (206) 441-1089
Email: eglick@ewlaw.net
whited@ewlaw.net
CC: phelan@ewlaw.net
Co-Counsel for Petitioner City of Sammamish

CITY OF SAMMAMISH

By: /s/ Lisa M. Marshall
Lisa M. Marshall, WSBA No. 24343
City Attorney
City of Sammamish
801 228th Ave SE
Sammamish, WA 98075
Phone: (425) 295-0508
Fax: (425) 295-0600
Email: lmarshall@sammamish.us
CC: cschaff@sammamish.us
Co-Counsel for Petitioner City of Sammamish

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

DECLARATION OF SERVICE

I, Cynthia Schaff, an employee of the City of Sammamish Legal Department, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein. On September 10, 2021, I caused true and correct copies of foregoing to be delivered via Email and King County Superior Court E-Service to the parties listed below:

Duana T. Koloušková, WSBA No. 27532 Johns, Monroe, Misunaga, Koloušková, PLLC 1201 SE 8th Street, Suite 120 Bellevue, Washington 98004 koulouskova@jmmklaw.com williams@jmmklaw.com cc: charlot@jmmklaw.com *Counsel for Respondent Gerend*	Lisa M. Petersen, WSBA No. 30372 Assistant Attorney General Office of the Attorney General 800 Fifth Avenue, Suite 2000 MS TB-14 Seattle, WA 98104 Lisa.Petersen@atg.wa.gov *Counsel for Growth Management Hearings Board*

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

DATED: September 10, 2021 at Federal Way, Washington.

____
Cynthia Schaff
Paralegal

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G€GFÁÙÒÚÁ€Ì ÁFFKG€ÁCET
SQÞÕÁÔUWÞVŸ
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Chief Civil Department
Honorable Regina S. Cahan
Noted: September 10, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation,

Petitioner,

v.

DON GEREND, an individual, STC JV1, LLC, STCA, LLC, & SUNNY OAK, LLC,

Respondents,

GROWTH MANAGEMENT HEARING BOARD,

Agency Respondent.

No. 21-2-01778-5 SEA
No. 21-2-10047-0 SEA

REPLY IN SUPPORT OF MOTIONS TO CONSOLIDATE AND FOR CERTIFICATION OF DIRECT REVIEW TO THE WASHINGTON STATE COURT OF APPEALS

I. INTRODUCTION

Respondent Don Gerend does not oppose consolidation of these two related matters, agreeing that "the legal issues stemming from th[e] facts" of these two appeals under the Administrative Procedure Act "are likely identical." (Opp. 3) Nor does Gerend directly oppose the City's request that, after consolidation, these appeals be certified to the Court of Appeals for direct review. Gerend seeks only to delay a ruling by this Court on the instant motions for consolidation and certification to the Court of Appeals until the Court has ruled on his pending motion to dismiss No. 21-2-01778-5 SEA as moot. Gerend's current musings that he might not appeal an adverse decision

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

cannot be squared with the contentious history of this case, which confirms that review by the Court of Appeals is inevitable, no matter how this Court rules on his mootness argument or any other dispositive legal issue raised by the parties in these two actions. There is therefore no reason to delay the consolidation and transfer of these cases to the Court of Appeals in the interest of judicial economy, as the Legislature has mandated.

II. REPLY ARGUMENT

Gerend's request to delay ruling on the City's motions is premised on the erroneous notion that "it makes little sense to consolidate a moot case with another case, or to certify a moot case to the Court of Appeals." (Opp. 3) As the City already explained, "Gerend's contention . . . that the termination of the City's moratoria renders the issue moot . . . raises a purely legal issue that will eventually be addressed by the appellate court" on de novo review. (Certification Mot. 4)

It makes little sense to have two courts address identical legal arguments in reviewing the Board's authority to sanction a city for adopting a moratorium to preserve the status quo while, as mandated by the Board's original decision, it conducts a SEPA review to consider a new regulation. As the Legislature noted in passing the 2021 amendment to RCW 34.05.518, "direct appeal promotes timely resolution and is a better use of court resources." House Bill Report SB 5225 at 4 (April 2021). Thus, regardless whether this Court agrees with Gerend or with the City on mootness or on the merits, consolidating these cases for direct review will allow the Court of Appeals to decide the mootness issue, along with any other dispositive legal issues, in one proceeding. Gerend instead proposes the issues be tackled in four separate actions by forcing both this Court and the Court of Appeals to adjudicate two cases that Gerend concedes involve legal issues that "are likely identical." (Opp. 3)

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1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Gerend otherwise engages in a series of ad hominem attacks, accusing the City of gamesmanship, failing to recognize the economies that consolidation and direct review will achieve for all parties and the Court. Ignoring that the City expressly acknowledged his pending motion to dismiss in both of its motions (*see* Certification Mot. 3; Consolidation Mot. 3), Gerend accuses the City of failing to "recognize . . . the imminent hearing schedule" on his motion to dismiss. (Opp. 2) Gerend's accusation that the City has engaged in "opportunistic timing" to achieve "untold months to work on its Reply and retool its Opening Brief" (Opp. 3) is similarly unfounded. It ignores that, if direct review is granted then Gerend, as well as the City, will have "untold months" to retool their briefing under a briefing schedule set by Division One of the Court of Appeals. Gerend's allegations of prejudice ring hollow.

Gerend's contention that the City failed to "timely" seek direct review in No. 21-2-01778-5 SEA (Opp. 2-3), similarly ignores the Legislature's express directive. Gerend cites WAC 242-03-970(3), without acknowledging it has been superseded by the 2021 amendments to RCW 34.05.518, effective June 13, 2021, that eliminated the previous 30-day deadline for seeking direct review. *See* Laws of 2021 ch. 305 § 2.[1] Gerend also ignores that the need to seek direct review in the Court of Appeals was not apparent when the City filed its first petition for review. The City could not have predicted that the Board would issue an unprecedented request that the Governor sanction the City, especially in light of the separate moratorium imposed by the Sammamish Plateau Water and Sewer District that precluded much of the same development as the City's moratorium.

[1] Effective September 12, 2021, WAC 242-03-970 will also have been amended to remove the 30-day deadline for seeking direct review. *See* WSR 21-17-069.

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
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(206) 624-0974 FAX (206) 624-0809

By relying on the statutory provision for direct review expressly provided by the Legislature, the City is not "skipping" anything, let alone "the standard order of operations set by State law." (Opp. 4) Moreover, Gerend's assertion that this case does not involve an issue of first impression that should be addressed by the Court of Appeals to provide guiding precedent, is contradicted by his concession that direct review is proper if the case is not first dismissed on mootness grounds. The Board itself recognized that the issue of whether, after a municipality has repealed a regulation invalidated by the Board, the Board can nonetheless sanction it for adopting a moratorium to preserve the status quo while it evaluates replacements is "a matter of first impression." (*See* Petition for Judicial Review, No. 21-2-01778-5 SEA, appendix at 7)

In the end, Gerend's concession that direct review may be appropriate also concedes that there is no reason for this Court to perform a redundant review and analysis of the legal issues presented in these related cases, rather than certifying them to the Court of Appeals. This Court should consolidate and certify these cases for direct review as expressly authorized by RCW 34.05.518.

III. CONCLUSION

This Court should grant the City's unopposed request to consolidate No. 21-2-01778-5 SEA and No. 21-2-10047-0 SEA, and certify the consolidated case for direct review in the Court of Appeals pursuant to RCW 34.05.518(1)(b).

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

I certify that this memorandum contains 981 words, in compliance with the Local Civil Rules.

Dated this 8th day of September, 2021.

CITY OF SAMMAMISH
City Attorney

By: */s/ Lisa M. Marshall*
Lisa M. Marshall
WSBA No. 24343

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

EGLICK & WHITED PLLC

By: */s/ Peter J. Eglick*
Peter J. Eglick
WSBA No. 8809
Joshua A. Whited
WSBA No. 30509

Attorneys for Petitioner

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 8, 2021, I arranged for service of the foregoing Reply in Support of Motion to Consolidate and Certification of Direct Review to the Washington State Court of Appeals, to the court and to the parties to this action as follows:

Recipient	Method
Office of Clerk King County Superior Court County Courthouse, Room E-609 516 Third Avenue, M/S 6C Seattle, WA 98104	____ Facsimile ____ Overnight Mail ____ U.S. Mail _X_ E-File
Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

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Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

DATED at Seattle, Washington this 8th day of September, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

9.12.21 Draft Markups and Opinion Comments by Paul Stickney

FILED
2021 SEP 08 11:20 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 21-2-10047-0 SEA

Chief Civil Department
Honorable Regina S. Cahan
Noted: September 10, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

CITY OF SAMMAMISH, a Washington municipal corporation, Petitioner, v. DON GEREND, an individual, STC JV1, LLC, STCA, LLC, & SUNNY OAK, LLC, Respondents, GROWTH MANAGEMENT HEARING BOARD, Agency Respondent.	No. 21-2-01778-5 SEA No. 21-2-10047-0 SEA REPLY IN SUPPORT OF MOTIONS TO CONSOLIDATE AND FOR CERTIFICATION OF DIRECT REVIEW TO THE WASHINGTON STATE COURT OF APPEALS

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The City conveniently omits that the Sammamish Plateau Water (SPW) sewer moratorium expired on August 23rd, 2021

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4 CITY OF SAMMAMISH
City Attorney
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6 By: */s/ Lisa M. Marshall*
Lisa M. Marshall
7 WSBA No. 24343

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By: */s/ Ian C. Cairns*
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8 Howard M. Goodfriend
WSBA No. 14355

9 EGLICK & WHITED PLLC

10 By: */s/ Peter J. Eglick*
Peter J. Eglick
11 WSBA No. 8809
Joshua A. Whited
12 WSBA No. 30509

13 Attorneys for Petitioner

14

15 The City of Sammamish used five attorneys to prepare this legal pleading.

16 9.12.21 Draft Markups and Opinion Comments by Paul Stickney

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Peter J. Eglick Joshua A. Whited Eglick & Whited, PLLC 1000 Second Avenue, Suite 3130 Seattle, WA 98104 eglick@ewlaw.net whited@ewlaw.net phelan@ewlaw.net	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Lisa M. Marshall City Attorney City of Sammamish 801 228th Ave. S.E. Sammamish, WA 98075 lmarshall@sammamish.us cschaff@sammamish.us	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Duana T. Koloušková Dean Williams Johns, Monroe, Misunaga, Koloušková, PLLC 11201 S.E. 8th Street, Suite 120 Bellevue, WA 98004 kolouskova@jmmklaw.com williams@jmmklaw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

SMITH GOODFRIEND, P.S.
1619 8TH AVENUE NORTH
SEATTLE, WASHINGTON 98109
(206) 624-0974 FAX (206) 624-0809

Lisa M. Petersen WA State Attorney General's Office 800 5th Avenue, Suite 2000 Seattle WA 98104 3188 Lisa.Petersen@atg.wa.gov lalseaef@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 8th day of September, 2021.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

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