

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 OLYMPIANS FOR SMART DEVELOPMENT
6 & LIVABLE NEIGHBORHOODS, et al.,

7
8 Petitioners,

9 v.

10 CITY OF OLYMPIA,
11

12 Respondent.
13

CASE No. 19-2-0002c

**ORDER DENYING MOTIONS TO
DISMISS (JURISDICTION) AND TO
RESCIND INVALIDITY**

14
15 This matter comes before the Board pursuant to two motions filed by the City of
16 Olympia (City):

- 17 1. The Respondent City of Olympia's Motions 1) For Reconsideration;¹ and 2) To
18 Rescind Declaration of Invalidity.²
19 2. The City's Renewed Motion to Dismiss,³ a motion originally filed on May 16, 2019.
20

21 **I. RELEVANT BACKGROUND**

22 The Board denied the City's original February 25, 2019, motion to dismiss SEPA
23 claims⁴ in that ESSHB 1923, legislation stripping the Growth Management Hearings Board's
24 (GMHB) jurisdiction over certain Growth Management Act (GMA) and State Environmental
25 Policy Act (SEPA) appeals of nonproject actions was not in effect until July 28, 2019. The
26 City subsequently filed another Motion to Dismiss on May 16, 2019, and then filed its
27 Renewed Motion the day after the effective date of ESSHB 1923, incorporating the original
28
29

30 _____
31 ¹ The Motion for Reconsideration was denied by order dated August 12, 2019.

² Filed July 22, 2019.

³ Filed July 29, 2019.

⁴ Order Denying Motion to Dismiss, Allowing Supplementation of the Record, Granting Summary Judgment and Deferring Consideration of Invalidity (March 29, 2019).

1 May 16 motion as well as a Declaration of Leonard Bauer that had been filed with that
2 motion. While the Board denied the Motion for Reconsideration by Order dated August 12,
3 2019, it deferred consideration of the Motion to Rescind Invalidity at the parties' request,
4 opting to consider the City's Renewed Motion to Dismiss in conjunction with the Motion to
5 Rescind Declaration of Invalidity. In considering the two City motions, the Board also
6 reviewed the following:
7

8 Petitioners' Opposition to City's Renewed Motion to Dismiss;⁵
9 The City's Supplemental Brief in Support of Motion to Rescind Determination of
10 Invalidity;⁶
11 Petitioners' Response Brief in Opposition to Rescission of Invalidity;⁷
12 Reply to Petitioners' Response to Respondent City of Olympia's Supplemental Brief
13 in Support of Motions to Dismiss and to Rescind Determination of Invalidity.⁸

14 In addition, the Board requested additional briefing from the parties addressing how
15 the *Matthews v. Kidder, Peabody* decision, 161 F.3d 156 (1998), and the cited
16 *Landgraf/Lindh analysis*, 511 U.S. 244 (1994), might bear on the question before the Board:
17 whether or not the ESSHB 1923 jurisdiction stripping amendments are to be applied
18 retroactively. The parties filed those briefs on October 11, 2019.⁹

19 The Petitioners filed their Petition for Review on January 10, 2019, alleging that the
20 City of Olympia's (City) adoption of Ordinance No. 7160 (the "Ordinance") violated
21 provisions of the GMA and SEPA. The Ordinance included development regulations
22 authorizing an increase in residential densities and housing types within a significant portion
23 of the City's residential zones.

24 The governor signed ESSHB 1923 on May 9, 2019.¹⁰ ESSHB 1923 included an
25
26

27 ⁵ Filed August 8, 2019.

28 ⁶ Filed September 9, 2019. The City's Supplemental Brief exceeded the 20 page limit set by the Board in its
29 August 19, 2019 Order. The City declined the opportunity provided to choose the 2½ pages to be deleted.
30 Consequently, the Board will not consider pages 1-3 of the City's Supplemental Brief in Support of Motion to
31 Rescind Determination of Invalidity.

⁷ Filed September 19, 2019.

⁸ September 27, 2019.

⁹ The following briefs were filed in response to the Board's September 30, 2019, request: Petitioners' Brief Re:
32 *Matthews v. Kidder, Peabody, and Co., Inc.*; Supplemental Brief of Respondent City of Olympia.

¹⁰ Chapter 348, Laws of 2019.

1 effective date of July 28, 2019.¹¹ The Board issued an Order on Summary Judgment in
2 favor of the Petitioners on March 29, 2019, in which it concluded that the City's action in
3 adopting the Ordinance violated RCW 43.21C.030 by basing its issuance of a Declaration of
4 Non Significance (DNS) for the Ordinance on an inadequate SEPA Checklist.¹² That order
5 deferred ruling on the Petitioners' request for the imposition of invalidity on the Ordinance to
6 the Hearing on the Merits.¹³ The Board then issued its Final Decision and Order (FDO) on
7 July 10, 2019, in which it found that the Ordinance violated RCW 36.70A.130(1)(d) and
8 RCW 36.70A.120 in addition to the SEPA violation. The FDO imposed invalidity on the basis
9 that the failure to conduct a compliant SEPA review and the consequent failure to consider
10 the potential environmental significance of the regulations included in the Ordinance
11 mandated a finding and conclusion that the Ordinance was invalid. The continued validity of
12 the Ordinance was found to substantially interfere with the fulfillment of Goals 10 and 12,
13 RCW 36.70A.020(10) and (12).¹⁴
14
15

16 II. JURISDICTION

17
18 The City asserts that the Board must dismiss this matter, arguing that ESSHB 1923
19 has removed the Board's jurisdiction over the case, including both the GMA and SEPA
20 claims, based on the following provisions:

21 If adopted by April 1, 2021, ordinances, amendments to development
22 regulations, and other nonproject actions taken by a city to implement the
23 actions specified in subsection (1) of this section, with the exception of the
24 action specified in subsection (1)(f) of this section, are not subject to
25 administrative or judicial appeal under chapter 43.21C RCW.¹⁵ (SEPA)
26 Any action taken by a city prior to April 1, 2021, to amend their comprehensive
27 plan, or adopt or amend ordinances or development regulations, solely to

28
29 ¹¹ ESSHB 1923 encouraged cities fully planning under the GMA to take certain defined actions "to increase
30 residential building capacity." House Bill Report at 2.

31 ¹² *Olympians v. City of Olympia*, GMHB No. 19-2-0002c (Order Denying Motion to Dismiss, Granting Summary
32 Judgment, March 29, 2019).

¹³ *Id.* at 12, 13.

¹⁴ *Olympians v. City of Olympia*, GMHB No. 19-2-0002c (Final Decision and Order, July 10, 2019) at 34-40.

¹⁵ ESSHB 1923, Section 1, Subsection 3, amending chapter 36.70A RCW, now codified at RCW
36.70A.600(3).

1 enact provisions under subsection (1) of this section is not subject to legal
2 challenge under this chapter.¹⁶ (GMA)
3 If adopted by April 1, 2021, amendments to development regulations and other
4 nonproject actions taken by a city to implement section 1(1) or (4) of this act, with
5 the exception of the action specified in section 1 (1)(f) of this act, are not subject to
6 administrative or judicial appeals under this chapter.¹⁷ (SEPA)

7 The City states that challenged Ordinance No. 7160 was adopted prior to April 1,
8 2021, and therefore, the Board no longer has jurisdiction.¹⁸ The City observes that the
9 Legislature has the ability to adopt legislation affecting pending cases¹⁹ and contends that
10 the “legislative intent” is clarified by the testimony of three individuals before two State
11 Senate Committees.²⁰ The City also states that there is “no need to deem its application
12 ‘retroactive’” as ESSHB 1923 deals only with procedure.²¹

13 It asserts that Washington follows the federal rule that new legislation applies in
14 pending cases, citing *Xieng*, which the City contends held that legislation applies to pending
15 cases absent a manifest injustice, statutory direction, or contrary legislative history.²²
16 However, the reference quoted in its brief regarding “manifest injustice, statutory direction,
17 or contrary legislative history” is to a decision referred to by the Court as an example of
18 “somewhat conflicting guidance.”²³ The *Xieng* quote set out in the City’s brief does not refer
19 to the Ninth Circuit’s “most convincing rationale.” In fact, the Supreme Court in *Xieng* based
20 its decision on the holding that “where the congressional intent [concerning retroactivity] is
21 clear, it governs,” and “resort to a presumption is unnecessary.”²⁴

22 The Board does not dispute that the legislature has the power to adopt legislation
23 affecting a pending case, with some exceptions not relevant here. It also agrees that the
24
25

26
27 ¹⁶ ESSHB 1923, Section, Subsection 4, amending chapter 36.70A RCW, now codified at RCW 36.70A.600(4).

28 ¹⁷ ESSHB 1923, Section 4, amending chapter 43.21C RCW, now codified at RCW 43.21C.495.

29 ¹⁸ City’s Motion to Dismiss filed May 16, 2019, at 4, 5; City of Olympia’s Renewed Motion to Dismiss filed July
30 29 at 3. Transcript of October 2, 2019, Motion Hearing at 9, 10, and 26-28.

31 ¹⁹ City’s Motion to Dismiss filed May 16, 2019 at 6.

32 ²⁰ *Id.* at 3, 4.

²¹ Supplemental Brief in Support of Motion to Rescind Determination of Invalidity at 21.

²² *Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512 (1993).

²³ *Xieng* at 529.

²⁴ *Id.*

1 Board would be required to dismiss a matter when it lacks jurisdiction. However, under the
2 facts of this case, it is not clear that ESSHB 1923 was intended to apply to this pending
3 case. While the legislation’s jurisdiction stripping provisions apply to the specific actions set
4 forth in ESSHB 1923 if adopted prior to April 1, 2021, it is also clear that the legislation’s
5 effective date was July 28, 2019. The Legislature did not clearly express an intent to apply
6 ESSHB 1923 retroactively.²⁵
7

8 The testimony of those appearing before the senate committees is of little value.
9 First, “testimony before a legislative committee is given little weight.”²⁶ Beyond that,
10 nowhere in the testimony or in the questions from legislators is there any opinion expressed
11 regarding the legislation’s effect on pending matters. There was no reference whatsoever to
12 retroactive application. In fact, the testimony of Messrs. Schroeder and Yadon appear to
13 refer to the proposed legislation’s effect on future city actions.²⁷
14

15 The City also suggests that ESSHB 1923 is merely a procedural amendment,²⁸ citing
16 *Severson v. Penski* in which the court stated “. . . where a new statute deals only with
17 procedure, prima facie it applies to all actions [including those pending] . . .”²⁹ The
18 amendment involved in that case was clearly procedural; it required that additional notices
19 be sent to a judgment debtor during the redemption period following a sheriff's sale of real
20 estate. An amendment that serves to remove administrative and judicial jurisdiction over
21 GMA and SEPA appeals cannot be considered merely “procedural”; stripping jurisdiction is
22 a substantive change.
23

24 The Board views the question presented in the City’s motion to dismiss for lack of
25 jurisdiction as whether the above quoted sections of ESSHB 1923 apply retrospectively to
26

27
28 ²⁵ *Evergreen Islands, Futurewise, and Skagit Audobon Society v. City of Anacortes*, GMHB No. 05-2-0016
29 citing *Puyallup v. Pac. Northwest Bell Tel. Co.*, 98 Wn.2d 443, 450 (1982). See also *Amburn v. Daly*, 81 Wn.2d
30 241, 246 (1972).

31 ²⁶ *United States Dist. Court for the E. Dist. of Wash. v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64
32 (1991).

²⁷ Declaration of Leonard Bauer attached to the City’s Motion to Dismiss filed May 16, 2019 at 4, 5: “You
couldn’t be sued . . .” “You just couldn’t appeal . . .”

²⁸ Supplemental Brief in Support of Motion to Rescind Determination of Invalidity at 21.

²⁹ *Severson v. Penski*, 36 Wn. App. 740, 745 (1984).

1 eliminate the SEPA and GMA claims presented in this matter, motions that were pending on
2 July 28, 2019, or filed the day after the effective date of ESSHB 1923. As observed above,
3 the City argues that they apply. With this order, the Board holds that they do not.

4 Laws may operate either prospectively or retrospectively, or both. A
5 prospective law is one which is to operate in the future -- that is, is applicable
6 only to cases arising after its enactment. A retrospective law is one which is
7 made to operate upon some subject, contract, or crime which existed before
8 the passage of the law. A retrospective law, in the legal sense, is one which
9 takes away or impairs vested rights acquired in the existing laws, or creates a
10 new obligation and imposes a new duty, or attaches a new disability, in
11 respect to transactions or considerations already past.³⁰ (Citations deleted)

12 Whether a statute operates retrospectively, or prospectively only, is a question of
13 legislative intent.³¹ ESSHB 1923 does not include a directive that it is to be applied
14 retroactively. It merely states that certain described actions taken by a city prior to April 1,
15 2021 are not subject to administrative or judicial appeal under the GMA or SEPA. It also
16 includes the following: "EFFECTIVE DATE: July 28, 2019 – Except for section 11, which
17 becomes effective July 1, 2019."

18 Statutes are presumed to apply prospectively.³² The Washington Supreme Court
19 stated in *Pape* ". . . the courts have evolved a strict rule of construction against a
20 retrospective operation, and indulge in the presumption that the legislature intended statutes
21 or amendments thereto to operate prospectively only."³³ By enacting a statute that
22 materially changes the law, the Legislature indicates its intent that the statute apply
23 prospectively only.³⁴ Here, the legislature materially changed the law by removing the
24 jurisdiction of the GMHB and the judicial system over GMA and SEPA challenges involving
25

26
27 ³⁰ *Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 740-741 (1953).

28 ³¹ *Id.* at 741.

29 ³² *Id.* at 740-741. See also *In re Estate of Wind*, 32 Wn.2d 64, 69 (1948): That a statute will be construed as
30 having a prospective operation only, unless it is plainly indicated that it shall operate retrospectively, is so well
31 settled that it needs no citation. See also Lewis H. Orland & David G. Stebing, "Retroactivity in Review: The
32 Federal and Washington Approaches" 16 Gonz. L. Rev. 855 (1981): "In dealing with civil statutory law, the
basic assumption is that the statute will have prospective effect only . . ."

³³ *Pape* at 741.

³⁴ *In re Mota*, 114 Wn.2d 465, 471 (1990), citing *Strunk v. State Farm Mut. Auto. Ins. Co.*, 90 Wn.2d 210, 213-
14 (1978).

1 actions described in Section 1 of ESSHB 1923.

2 The United States Supreme Court analyzed the question of retroactivity of statutory
3 amendments on pending matters in *Landgraf*³⁵ and that analysis has been cited with
4 approval by our Supreme Court.³⁶ The *Landgraf* court stated:

5 When a case implicates a federal statute enacted after the events in suit, the
6 court's first task is to determine whether Congress has expressly prescribed
7 the statute's proper reach. If Congress has done so, of course, there is no
8 need to resort to judicial default rules. When, however, the statute contains no
9 such express command, the court must determine whether the new statute
10 would have retroactive effect, *i.e.*, whether it would impair rights a party
11 possessed when he acted, increase a party's liability for past conduct, or
12 impose new duties with respect to transactions already completed. If the
13 statute would operate retroactively, our traditional presumption teaches that it
14 does not govern absent clear congressional intent favoring such a result.³⁷

14 In the matter before us, there is no clear indication providing for retroactivity of the
15 jurisdiction stripping subsections. It is therefore appropriate to apply normal statutory
16 construction rules to determine if the legislature intended to only apply those provisions to
17 future cases.³⁸ Again, ESSHB 1923 does not include such an expressed intent. To the
18 contrary, the literal effect of the new statutory language is to create a window of time
19 between the effective date of ESSHB 1923, July 28, 2019, and an expiration date, April 1,
20 2021, during which actions that qualify under [Section 1(1) and (4) of 1923] are exempted
21 from appeal under GMA or SEPA. The adoption of Ordinance 7160, published November
22 15, 2018, did not fall within this window.

24 As the legislation fails to indicate either an intent to apply retrospectively or
25 prospectively, it is then necessary to consider the effect the legislation would have if applied
26 retrospectively.³⁹ Does it have "retroactive effect,"⁴⁰ *i.e.*, does it impair any rights the
27

28 ³⁵ *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 264-66, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). *See also*
29 *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156 (1998).

30 ³⁶ *Densley v. Dep't. of Ret. Sys.*, 162 Wn.2d 210, 223 (2007).

31 ³⁷ *Landgraf*, 511 U.S. at 280.

32 ³⁸ *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 161 (1998).

³⁹ *Id.*

⁴⁰ *Id.* at 160 n.5: "Retroactive effect" refers not to a statute's temporal reach--which is the ultimate question to be answered in these cases--but to the effect the statute would have if applied retrospectively; *i.e.*, would it

1 Petitioners possessed when they challenged the City's adoption of the Ordinance?⁴¹

2 Conversely, does the statute affect only prospective relief, change procedural rules, or
3 simply allocate jurisdiction among fora?⁴²

4 In this instance, the Board finds and concludes that ESSHB 1923 would have a
5 retroactive effect. It would reach back in time and alter the rights of the Petitioners on which
6 they relied. The Board agrees with the City that the Petitioners did not have a "vested right"
7 in that the Petitioners "right" to pursue their cause of action was established by statute.⁴³
8 Such a right can indeed be extinguished retroactively. But here there was no expressed
9 legislative intent that the legislation was to be applied retroactively.⁴⁴

10
11 The Petitioners had a right to pursue a cause of action alleging violations of the GMA
12 and SEPA and, on findings of such violations, to ask that the City be required to achieve
13 compliance.⁴⁵ Petitioners' right was not "vested" *per se*, but neither was it extinguished
14 retroactively by an express provision of ESSHB 1923. Further, the legislation did not merely
15 change procedural rules; it effected a material substantive change in the law. Finally, it did
16 not "allocate jurisdiction among fora," it removed the jurisdiction of the GMHB and the
17 judicial system over GMA and SEPA claims based on a city's legislation taken to implement
18 actions described in ESSHB 1923.⁴⁶ As the U.S. Supreme Court stated in *Landgraf*:

19
20 Requiring clear intent assures that Congress itself has affirmatively considered
21 the potential unfairness of retroactive application and determined that it is an

22
23 reach back in time and alter the rights or obligations on which the parties relied prior to the statute's passage?
24 If so, the statute is said to have "retroactive effect" and, as discussed in the text, its application to pending
25 cases is disfavored. To minimize confusion, we refer to a statute that applies to pending cases as one with
26 "retrospective" application. (Emphasis added)

27 ⁴¹ *Id.* at 161.

28 ⁴² *Id.* at 166.

29 ⁴³ Supplemental Brief of Respondent City of Olympia at 2.

30 ⁴⁴ See *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 618 (2006) where the
31 court found "clear legislative intent" to apply retroactively. Similarly, in *1000 Virginia Ltd. v. Vertecs*, 158 Wn.2d
32 566, 584, the court observed that "an amendment to a statute may be retroactively applied if the legislature"
intends that it apply retroactively

⁴⁵ *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 163 (1998): "Defendants admit that, in a sense,
retrospective application of the statute would impair some rights that Mathews had, for prior to the passage of
the Act, he had a RICO cause of action based upon defendants' alleged actions, but afterward he would not."

⁴⁶ See *Landgraf* at 511 U.S. 244, 274 where the Court observed: "Application of a new jurisdictional rule
usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" See also
Mathews at 163, 164.

1 acceptable price to pay for the countervailing benefits. Such a requirement
2 allocates to Congress responsibility for fundamental policy judgments
3 concerning the proper temporal reach of statutes, and has the additional virtue
4 of giving legislators a predictable background rule against which to legislate.⁴⁷

5 So too here: it is the right and responsibility of the state legislature to address fundamental
6 policy judgments. In this matter, it is not at all clear that the legislature affirmatively
7 considered retroactivity.

8 *State v. Belgarde* provides further support the Board's conclusion. There, the
9 Washington Supreme Court stated:

10 The key to determining if Const. art. 4, § 7 (amend. 80) operates retroactively
11 is whether the event triggering its application occurred before or after the
12 amendment took effect.⁴⁸

13 *Belgarde* then quoted *Aetna*:

14 A statute [such as ESSHB 1923] operates prospectively when the precipitating
15 event for [its] application . . . occurs after the effective date of the statute, even
16 though the precipitating event had its origin in a situation existing prior to the
17 enactment of the statute.⁴⁹

18 The ESSHB 1923 jurisdiction stripping provisions apply to comprehensive plan or
19 development regulation amendments adopted by a city to implement specified provisions of
20 that act. ESSHB 1923 became effective on July 28, 2019. Did the event triggering its
21 application occur before or after the effective date? The event which triggers the application
22 of the GMA, both prior to and following the effective date of ESSHB 1923, is the adoption
23 and publication of the notice of adoption of an ordinance or resolution amending a
24
25
26

27 ⁴⁷ *Landgraf*, 511 U.S. 244, 272-273. Similarly, the *Matthews* court, citing *Landgraf*, stated: "Absent clear
28 evidence . . . we are extremely reluctant to create causes of action that did not previously exist, or--as in this
29 case--to destroy causes of action and remedies that clearly did exist before Congress acted." *Matthews*, 161
30 F.3d 156, 170, 171.

31 ⁴⁸ *State v. Belgarde*, 119 Wn.2d 711, 722 (1992). In *Belgarde*, the question was whether the provisions of a
32 constitutional amendment applied retrospectively to preclude a judge from continuing to preside over a
pending case following retirement without express consent from the parties. The court held that the triggering
event occurred after the effective date of the constitutional amendment and thus application was not
retroactive.

⁴⁹ *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Assn.*, 83 Wn.2d 523, 535 (1974).

1 comprehensive plan or development regulations.⁵⁰ Here, the precipitating or triggering event
2 occurred long before the effective date of ESSHB 1923 (as did the filing of the Petition for
3 Review in this case). Consequently, ESSHB 1923 operates prospectively as the
4 precipitating event for its application occurred before its effective date.

5 The Board finds and concludes that it retains jurisdiction over the Petitioners'
6 challenge of Ordinance No. 7160. The Board denies the City's motion to dismiss based on a
7 lack of jurisdiction.
8

9 The Board observes that any ordinance adopted on compliance in this matter would
10 most probably be subject to ESSHB 1923. Similarly, if the City elected to rescind the
11 challenged ordinance and readopt it, it would appear to be subject to the amendatory
12 legislation. The Board further notes that ESSHB 1923 sets out specific actions which may
13 be taken by a city and which would be subject to the jurisdiction stripping provisions of that
14 legislation. This Board does not have the authority to issue advisory opinions⁵¹ and thus
15 cannot address the applicability of the specific sections and subsections of ESSHB 1923 to
16 any compliance action that may be taken by the City. Nor are we able at this time to address
17 whether the City's Ordinance No. 7160 actions are subject to jurisdictional stripping as we
18 have found and concluded that ESSHB 1923 is not applicable to this matter at this time.
19
20

21 III. INVALIDITY

22 The City moved pursuant to RCW 36.70A.302(6) for an order rescinding the Board's
23 imposition of invalidity.⁵² In its motion, the City asserts that the Board lacked the legal
24 authority to invalidate Ordinance No. 7160. Its position is that invalidity may only be based
25 on a finding of substantial interference with a GMA goal(s) and that interference with a
26 goal(s) must include demonstration of probable significant adverse environmental impacts. It
27

28
29 ⁵⁰ RCW 36.70A.280 and RCW 36.70A.290.

30 ⁵¹ RCW 36.70A.290(1).

31 ⁵² A county or city subject to a determination of invalidity may file a motion requesting that the board clarify,
32 modify, or rescind the order. The board shall expeditiously schedule a hearing on the motion. At the hearing on
the motion, the parties may present information to the board to clarify the part or parts of the comprehensive
plan or development regulations to which the final order applies. The board shall issue any supplemental order
based on the information provided at the hearing not later than thirty days after the date of the hearing.

1 states that the Board did “not support its bald conclusion that there was such interference.”
2 Rather, it states that the Board “assumed interference based on its SEPA ruling.” In
3 summary, the City concludes that invalidity may not be based on a “mere procedural
4 violation of SEPA.”⁵³

5 The Board does not agree. Invalidity requires two separate conclusions: 1. A finding
6 of noncompliance combined with an order of remand, and; 2. A determination supported by
7 findings of fact and conclusions of law that the continued validity of part or parts of the
8 regulations would substantially interfere with a GMA Goal(s). In this matter, the Board found
9 noncompliance with SEPA and remanded. It further concluded that City’s failure to conduct
10 the required SEPA review would substantially interfere with Goals 10 and 12.

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

12 On the appropriate facts, the Board could find that failure to properly conduct
13 the required environmental review for a city or county action interfered with
14 fulfillment of the GMA’s environmental goal and, upon such a finding, could
15 invalidate the relevant ordinance.⁵⁴

16 A city’s authority to act is qualified by the requirements of SEPA. A determination of
17 nonsignificance is a legal prerequisite to the City’s action.⁵⁵ In issuing a DNS, it is incumbent
18 upon a jurisdiction to establish *prima facie* SEPA compliance.

19 Moreover, we hold that RCW 43.21C.030(c) necessarily requires the
20 *consideration* of environmental factors by the appropriate governing body in
21 the course of all state and local government actions before it may be
22 determined whether or not an Environmental Impact Statement must be
23 prepared. Thus, SEPA requires that a decision *not* to prepare an
24 Environmental Impact Statement must be based upon a determination that the
25 proposed project is *not* a major action significantly affecting the quality of the
26 environment. A decision by a branch of state government on whether or not to
27 prepare an Environmental Impact Statement is subject to judicial review, but
28 before a court may uphold such a decision, *the appropriate governing body*
29 *must be able to demonstrate that environmental factors were considered in a*

30
31 ⁵³ Respondent City of Olympia’s Motions 1) For Reconsideration; and 2) to Rescind Invalidity at 13.

32 ⁵⁴ *Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 158 (2010).

⁵⁵ *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 256 (1993).

1 *manner sufficient to amount to prima facie compliance with the procedural*
2 *requirements of SEPA.*⁵⁶ (emphasis added)

3 In this matter, the Board found there was no *prima facie* SEPA compliance.
4 The Board finds and concludes that it made no error of law in regards to its imposition of
5 invalidity. The Board denies the City's motion to rescind invalidity.
6

7 **ORDER**

8 Based on the foregoing, the City of Olympia's Motion to Rescind Declaration of
9 Invalidation and its Renewed Motion to Dismiss are **DENIED**.
10

11 Entered this 30th day of October 2019.
12

13
14 _____
15 William Roehl, Board Member

16
17 _____
18 Cheryl Pflug, Board Member

19
20 _____
21 Nina Carter, Board Member

22 **Note: This is a final decision and order of the Growth Management Hearings Board**
23 **issued pursuant to RCW 36.70A.300.**⁵⁷
24
25
26
27
28
29

30 _____
31 ⁵⁶ *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73 (1973).

32 ⁵⁷ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.