IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 882287

WHIDBEY ENVIRONMENTAL ACTION NETWORK,

Appellant,

v.

CITY OF OAK HARBOR,

Respondent.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In 1997, the City of Oak Harbor passed Ordinance 1110 which provided, in relevant part, that "[d]eveloped City park property shall not be disposed of in any manner without citizen approval in an election."[1] As the City itself has recognized, "the legislative intent behind this code when it was first adopted in 1997 was to ensure that developed park property would not be sold or transferred to private parties for private use or economic gain."[2] With the adoption of Ordinance 1110, the City of Oak Harbor—as a municipal entity—effectively gave up its right to sell or otherwise transfer public parklands to private commercial interests. Thereafter, no park properties could be sold, exchanged, or commercially developed without the express permission of the citizens of City of Oak Harbor, as established

[1] A copy of Ordinance 1110 may be found at CP 95, Exhibit D to the Declaration of Raymond Lindenburg in Support of City of Oak Harbor's Motion for Summary Judgment (Jan. 27, 2025) (herein, "Lindenburg Decl.").

[2] CP 102 (Lindenburg Decl., Ex. F at 1) (Copy of Oak Harbor Ordinance 1728).

in a public vote of the people.

This changed, however, in August of 2024 when the Oak Harbor City Council passed Ordinance 1999, the ordinance challenged in this lawsuit. Conceived as a way of advancing a private hotel project that would encroach upon a beloved city park in downtown Oak Harbor—known as Hal Ramaley Memorial Park—Ordinance 1999 would now allow the City Council to unilaterally approve the sale or transfer of City parklands for private development, so long as they are accompanied by a "land swap" deemed by the Council to be adequate compensation. In other words, while the City previously had zero authority to authorize private commercial development of City-owned parklands under Ordinance 1999, except when specifically authorized by the citizens of Oak Harbor, Ordinance 1999 would now allow the City Council to do precisely that.

In this lawsuit and appeal, Whidbey Environmental Action Network ("WEAN")—a Washington nonprofit corporation

dedicated to protection of wild spaces, the promotion of healthy ecosystems, and the protection of public parklands—argues that the City's passage of Ordinance 1999 violates Washington's State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW. *See* CP 5–7 (Complaint, ¶¶ 15–21). With respect to SEPA, WEAN's claim is that the City's passage of Ordinance 1999 constitutes an "action" for which the City was required to evaluate potential adverse environmental impacts prior to adopting the challenged ordinance.

The superior court erred in granting the City summary judgment and dismissing WEAN's SEPA claim. WEAN now asks this Court to reverse.

ASSIGNMENTS OF ERROR

WEAN assigns error to the superior court's Order Granting City of Oak Harbor's Motion for Summary Judgment. Specifically, WEAN assigns error to the superior court's finding that Ordinance 1999 is not an "action" subject to environmental review under SEPA. WEAN also assigns error to the superior

court's finding that Ordinance 1999 is categorically exempt from SEPA on the alleged basis that the ordinance is procedural only and does not contain standards controlling the use or modification of the environment

ISSUES PRESENTED

1. Whether Ordinance 1999 adopts or amends a regulation that contains standards controlling the use or modification of the environment.

2. Whether Ordinance 1999 is categorically exempt from SEPA on the alleged basis that it is procedural only.

OVERVIEW OF THE CASE

A. Ordinance 1110—the City of Oak Harbor's prohibition on private commercial development of City-owned parklands.

As discussed above, Ordinance 1110 was passed on October 21, 1997, providing, among other things, that City-owned parklands may not be "disposed of in any manner" except when expressly authorized by the citizens of Oak Harbor through a public vote. Section 1 of that ordinance—titled "Sale or

exchange of real property"—provided in relevant part as follows:

> No real property of the City shall be sold, released, leased, demised, traded, exchanged or otherwise disposed of unless the same is authorized by the City Council after public hearing. Notice of such public hearing shall be given by publication of the notice in the City's official newspaper at least ten days prior to the hearing. ***Developed City park property shall not be disposed of in any manner without citizen approval in an election.***

CP 95 (Lindenburg Decl., Ex. D at 1) (emphasis added).

As the Oak Harbor City Council itself recognized, the "legislative intent" behind this enactment "was to ensure that developed park property would not be sold or transferred to private parties for private use or economic gain." CP 102 (Lindenburg Decl., Ex. F at 1).[3] Not unlike the hotel project giving rise to the City's actions at issue in this case (discussed below), Ordinance 1110 was passed in response to an earlier

[3] This statement about legislative intent was made in Oak Harbor Ordinance 1728, in which the City carved out a limited exception to the voting requirement when public parklands are needed for a "necessary public purpose," such as "water, sewer or roadway improvements." CP 103 (Lindenburg Decl., Ex. F at 2).

proposal to allow private commercial development of another park (Flintstone Park) within the City of Oak Harbor, to prevent that park from "becoming the site of development in a land swap." CP 482, 484 (K. Renninger Decl., ¶¶ 19–20 & Exs. A, B).

Through its adoption of Ordinance 1110, the City ceded its authority to dispose of City-owned parklands and gave that authority exclusively to the City's residents, to be exercised in a public vote. Thereafter, no municipal officer (or office) within the City had authority to sell or transfer public parklands to private interests for private development. Only the people could do that through the establishment of a public vote.

In 2010 and 2015, the Oak Harbor City Council made amendments to Ordinance 1110 and the citizen approval requirement survived both rounds of changes. CP 97–104 (Lindenburg Decl., Exs. E & F). The City has previously contemplated scenarios in which the citizen approval requirement "has the potential to impede or hinder accomplishment of necessary public purposes." CP 102

(Lindenburg Decl., Ex F at 1). To address that concern, the City created a special carveout for the "transfer of developed park property to another city department for public purposes including, but not limited to, water, sewer or roadway improvements" in the 2015 amendment and adoption of Ordinance 1728. *Id*. Even after those changes, park property could not be transferred out of the City's ownership and control without a vote of the people.

It is a testament to the foresight and wisdom of Ordinance 1110 that, since 1997, there has been no transfer of City-owned parklands to private development interests. Nor, until now, has there been any effort to repeal the requirement for a public vote before public parklands can be given over to private development.

B. The Hilton Hotel project, Hal Ramaley Memorial Park, and Ordinance 1999.

In 2023, the City was approached by a private land developer about building a mixed-use development project

adjacent to Hal Ramaley Memorial Park in downtown Oak Harbor, consisting of a brewpub, parking lot, and 16 residential dwelling units in two buildings. *See* CP 45, 49–84 (Lindenburg Decl. ¶ 5 & Ex. A). As described in the Declaration of Raymond Lindenburg, Senior Planner within the City's Department of Development Services, the City rejected that initial proposal, informing the developer that the City would instead prefer to see a much more "impactful" project with "more urban density, pedestrian activity, and business activity for downtown Oak Harbor." *Id*. at 45 (Lindenburg Decl., ¶ 7).

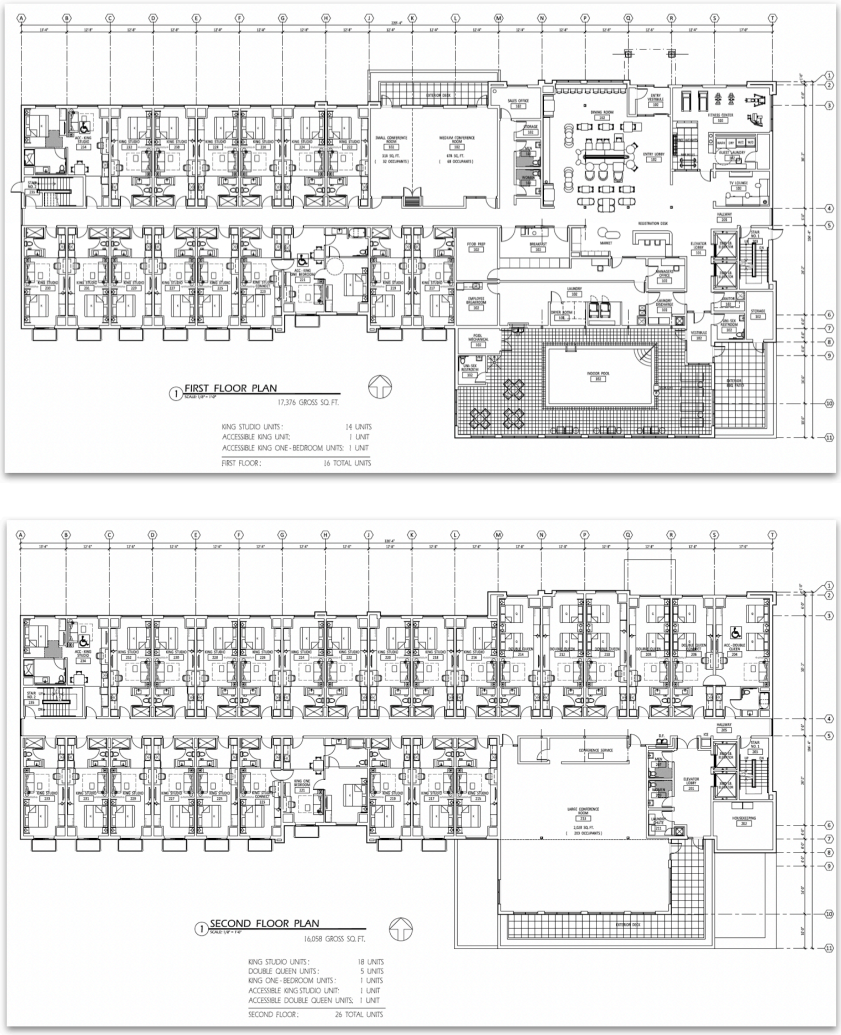
Heeding the City's call for a larger, more impactful project, the developer returned in 2024 with new plans for a much larger project consisting of a 16,981 square-foot, 109-room hotel to be branded as a Hilton "Home2 Suites" Hotel. CP 85-93 (Lindenburg Decl., Ex. B). Nevertheless, consistent with the stated purpose of "preapplication review" under the Oak Harbor Municipal Code ("OHMC")—namely, to "acquaint city staff with a sufficient level of detail about the proposed development

to enable staff to advise the applicant accordingly" and to "acquaint the applicant with the applicable requirements of this title and other applicable city regulations"[4]—the submitted plans were still quite detailed.

For example, the "preapplication proposal" contained detailed floor and façade plans for the proposed Hilton Hotel, two of which are excerpted in Figure 1 on the following page.

[4] *See* OHMC 18.20.310—titled "Preapplication review"—providing: "The purpose of preapplication review is to acquaint city staff with a sufficient level of detail about the proposed development to enable staff to advise the applicant accordingly. The purpose is also to acquaint the applicant with the applicable requirements of this title and other applicable city regulations. Further, the preapplication review is intended to provide the applicant with preliminary direction regarding the required content of the proposed application. However, the preapplication review is not intended to provide an exhaustive review of all the potential issues that a given application could raise. The preapplication review does not prevent the city from applying all relevant laws to the application." The full text of the Oak Harbor Municipal Code may be found online at https://www.codepublishing.com/WA/OakHarbor/.

Fig. 1: Hilton Hotel Floor Plans



Source: CP 304 & CP 305 (Telegin Decl., Ex. A).

The preapplication proposal for the new hotel contained a detailed landscaping plan, depicted on the following page in Figure 2.

Fig. 2: Hilton Hotel Landscaping Plan

Source: CP 300 (Telegin Decl., Ex. A).

The developer even submitted detailed project renderings, one of which is shown below in Figure 3.

Fig. 3: Hilton Hotel Project Rendering

Source: CP 325 (Telegin Decl., Ex. F at 4).

While this new hotel proposal responded to the City's request for a more "impactful" project with "more urban density, pedestrian activity, and business activity for downtown Oak Harbor," it also faced a significant roadblock. Specifically, due to the size of the proposal, the parking lot would need to encroach significantly into Hal Ramaley Memorial Park.

As discussed in the declarations of Marnie Jackson—WEAN's Executive Director—Hal Ramaley Memorial Park has been described by the City of Oak Harbor as an "oasis in the downtown area for passive recreation" and as an "important link in the waterfront trail system." CP 494-95 (Jackson Decl., ¶ 6). The park has been used over the years by nonprofits to distribute sack lunches and to register guests for night-to-night stays at a local homeless shelter. *Id*. ¶ 7. The park contains formal gardens, mature trees, seating, art, and open space. CP 476 (K. Renninger Decl., ¶ 11). The park is also home to the "Imagine" permaculture food forest, a self-sustaining urban garden and one of the first in the nation. CP 477-78 (K. Renninger Decl., ¶¶ 12–

14). As WEAN member Kyle Renninger explained below,

> [t]he food forest was envisioned by volunteers with close coordination with Spin Cafe, a nonprofit organization that serves and supports unhoused populations in the area. Today, the food forest provides free food to anyone who would like it. It continues to flourish with mature fruit trees, herbs, berries, and a wide assortment of other edible goodies that are free to everyone who visits and contributes to our community's food security.

CP 478. The park has been lovingly tended over the years by the Oak Harbor Garden Club, several of whom are also members of WEAN. CP 495 (Jackson Decl., ¶ 7).

Figure 4 on the next page contains several photographs of Hal Ramaley Memorial Park from Mr. Renninger's declaration. The entrance to the food forest can be seen in the image at the bottom of the following page.

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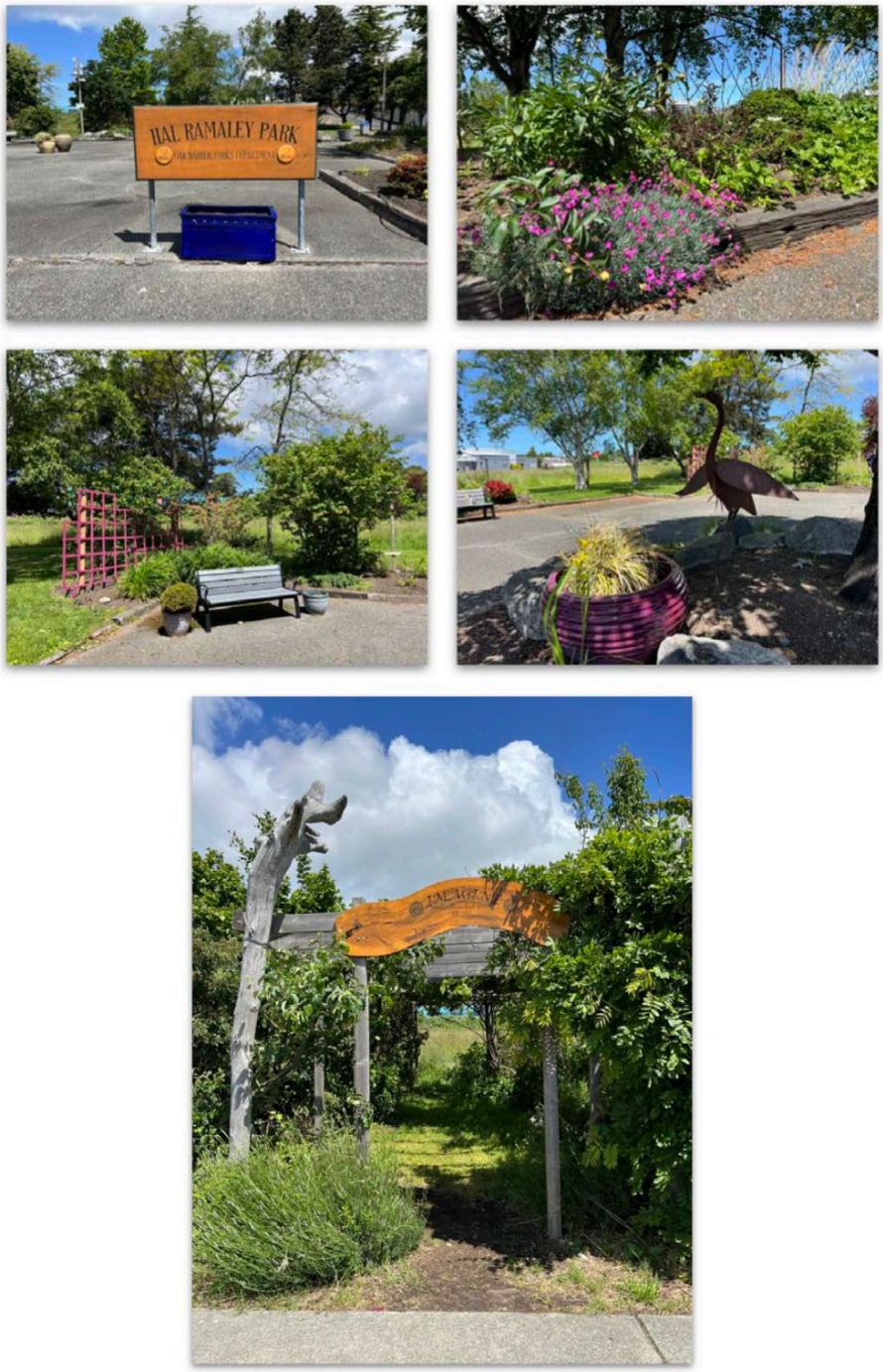
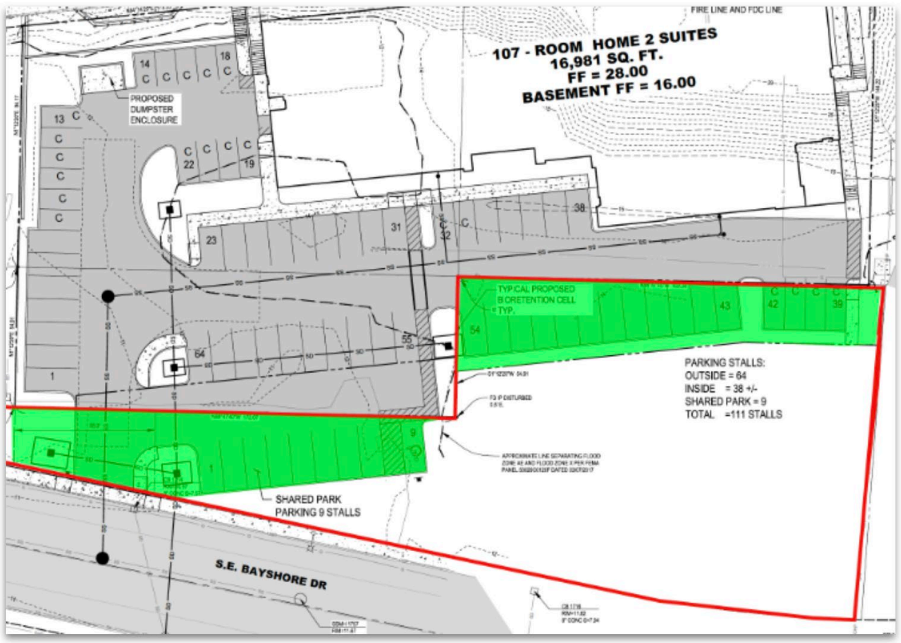
Fig. 4: Hal Ramaley Memorial Park & Imagine Food Forest



Source: CP 476-78 (K. Renninger Decl., ¶¶ 11–14).

To accommodate the proposed Hilton Hotel, much of Hal Ramaley Memorial Park would need to be paved over, including the food forest, to be used as part of the hotel's parking lot. Figure 5 below contains another excerpt from the developer's pre-application proposal to the City of Oak Harbor. In this figure, the red line denotes the location of Hal Ramaley Memorial Park. The green shaded areas show where portions of the park would be paved over to be used as part of the hotel's parking lot.

Figure 5: Hotel Parking Lot in Hal Ramaley Park



Source: CP 302 (Telegin Decl., Ex. A).

As discussed in the declaration of Raymond Lindenburg, when the City received the Hilton Hotel preapplication proposal, Mr. Lindenburg began working with the developer "to outline a potential swap or sale of park land" to accommodate the new parking lot, and those discussions "led to an idea to address any needed property swap, sale, or boundary line adjustment in a negotiated development agreement." CP 46. At that time, however, Mr. Lindenburg and the City's development review team were not aware that encroachments into the park would require citizen approval through a formal vote under Ordinance 1110. Only later did they "stumble across" that decades-old restriction in March of 2024. CP 311 (Telegin Decl., Ex. B).

Following the discovery of Ordinance 1110 by the City's legal staff, Mr. Lindenburg sent the following email to the developer outlining four options for "the path forward" to "allow for the land swap and additional parking for the site." The first option was to hold a public vote in accordance with Ordinance 1110. The second and third options were to reduce the size of the

project. The fourth was "[a] code amendment to change the [voting] requirement in some way." As Mr. Lindenburg wrote to the developer on March 11, 2024:

> After our meeting on Friday, we got some information back from the City attorney regarding the potential land swap:
>
> Our office just stumbled across 1.30.010(1) which provides –
>
> No real property of the city shall be sold, released, leased, demised, traded, exchanged or otherwise disposed of unless the same is authorized by the city council after public hearing. … ***Developed city park property shall not be disposed of in any manner without citizen approval in an election, except as provided in subsection (2) of this section.***
>
> * * *
>
> Based on this information, I'm not sure what the ***path forward may be to allow for the land swap and additional parking for the site***. There are a couple of options that I can see:
>
> 1. ***Holding an election to determine the ability of the city to swap the land.*** The election cycle would likely put that into August or November, which I understand would be difficult for your group.
> 2. It looks like there are about 86 parking spaces possible without the City land swap. Redesigning the H2 concept to have fewer rooms – removal of the 4th floor would bring the room count down to 77-ish, and resolve the upper floor setback issue.

3. Going back to the original hotel sans pool and other amenities. The conference room may still be salvageable, as we don't have a separate category and a conference room could reasonably be considered to be part of the normal design of a hotel – and be used during daytime hours rather than overnight.

4. ***A code amendment to change the requirement in some way – this could be a political landmine seen as benefitting one developer, but is an option, though could take some time as well.***

   Given this information, let me know if you'd like to discuss any of the above, we're always here to help.

CP 311 (Telegin Decl., Ex. B) (first emphasis in original; other emphases added).

The next day, on March 12, 2024, the developer responded to Mr. Lindenburg with additional ideas about how to move forward, including a proposal to "share" parking spaces with the City. *See* CP 313 (Telegin Decl., Ex. C). But those ideas were quickly shot down by City staff as not meeting the hotel's dedicated parking requirements. CP 316-17 (Telegin Decl., Ex. D). Ultimately, Mr. Lindenburg informed the developer that the "path forward" would be for the City's attorney to work on "a

draft ordinance to revise the code to *not* require a municipal election to dispose of/sell park properties." CP 319 (Telegin Decl., Ex. E) (emphasis in original).

That draft ordinance would ultimately become Ordinance 1999, passed by the Oak Harbor City Council at a public meeting on August 13, 2024, removing the requirement for a public vote when public parklands are commercially developed as part of a "land swap." In the lead-up to its passage, Ordinance 1999 faced significant public opposition, with the overwhelming majority of public comments opposing the new ordinance. *See* CP 497 (Jackson Decl., ¶ 11) (discussing how, according to the Council's own meeting minutes, the majority of public comments opposed the new ordinance). Nor was there any doubt that the purpose of Ordinance 1999 was to enable or further the specific Hilton Hotel project adjacent to Hal Ramaley Memorial Park. For example:

- At the Council's public meeting on August 13, 1999, Mr. Lindenburg gave a Power Point presentation with an overview of the proposed hotel project, arguing that the project

would "bring visitors and potential customers to downtown businesses" and "kickstart revitalization" in the downtown area. CP 347-50 (Telegin Decl., Ex. G at 21–24). Mr. Lindenburg's presentation also outlined the developer's plan to swap portions of Hal Ramaley Memorial Park for a portion of the hotel property, in order to enable the paving of parking lots within the public park. CP 349 (Telegin Decl., Ex. G).

- At the meeting, Mr. Lindenburg explained that the proposed ordinance came at the recommendation of the City's legal team, after they realized that the voting requirement of Ordinance 1999 would present a "roadblock" to the new hotel project. CP 420 (Telegin Decl., Ex. I at 60:1–7).

- Councilor Woessner explained that the purpose of the new ordinance was to "pave the way to have the good-faith negotiations with the developer to see if we can turn this into something that's favorable for the city," referring specifically to the proposed hotel project. CP 426 (Telegin Decl., Ex. I at 66:12–16). Mr. Lindenburg agreed that Councilor' Woessner's

characterization was a "fair statement" of the purpose of the new ordinance. *Id*. at 66:17.

- Mr. Lindenburg explained that without removing the requirement for a public vote, it may be difficult to convince the developer to invest the resources needed to pursue the land use application process. CP 411 (Telegin Decl., Ex. I at 51:7–10) ("As I mentioned before, it's really difficult to come up with a full set of plans and spend the money and go through that process with zero certainty at the end.").

- Councilor Marshall explained that while the City Council had "heard" the public's opposition, the new ordinance was still needed "to move forward with a long-stated public goal of having a hotel and conference center in our downtown." CP 433 (Telegin Decl., Ex. I at 73:15–22).

- The commenting public similarly understood that the purpose of the proposed ordinance was to enable or further the hotel project adjacent to Hal Ramaley Memorial Park. While greatly outnumbered by those opposed to the new ordinance,

those in favor almost unanimously cited the hotel project as the basis for their support, stating that they were "in favor of the hotel development," that the "Hilton was the right direction," and that they "support[ed] the addition of a Hilton hotel in the downtown Oak Harbor area." CP 497-98 (Jackson Decl., ¶ 12).

Ultimately, Ordinance 1999 passed by a six-to-one vote on August 13, 2024, with the sole "no" vote coming from Councilor Stucky, who explained:

> Personally, I'm for a Hilton, I'm for a convention center and I understand giving the city flexibility, but with this amount of feedback, I think my opinion's a little more irrelevant. I believe that doing anything other than leaving that vote of the people will be doing a disservice to our community and those who elected us to represent them.

CP 412 (Telegin Decl., Ex. I at 52:10–16).

Two days later—on August 15, 2024—Mr. Lindenburg emailed the developer to notify him of the passage of Ordinance 1999, and recommended additional changes to the proposed land swap, ending with the invitation that "[a]s always, let me know if you need any assistance or want to talk about future planning

and process." CP 466 (Telegin Decl., Ex. J).

C. Procedural history

On August 30, 2024, WEAN instituted the present lawsuit seeking to overturn the City's passage of Ordinance 1999. Substantively, this lawsuit alleges that in passing Ordinance 1999, the City violated SEPA by failing to first evaluate potential environmental impacts likely to be caused by the new ordinance.[5]

Procedurally, WEAN brings this claim under two different causes of action. The first is Washington's Uniform Declaratory Judgments Act, Chapter 7.24 RCW, which provides the superior court with jurisdiction to "determine questions of construction or validity of a statute or ordinance." *City of Federal Way v. King Cnty.*, 62 Wn. App. 530, 534–35, 815 P.2d 790 (1991) (Citing RCW 7.24.020). WEAN's second cause of action is the

[5] WEAN's complaint also included a claim that the City's elimination of the voting requirement for the Hilton Hotel project violates Washington's code of ethics for municipal officers at RCW 42.23.070. *See* CP 5-6 (Complaint, ¶¶ 15–19). However, WEAN is not raising that claim in this appeal.

constitutional writ of certiorari (also known as a "writ of review"), a cause of action guaranteed by Article 4, Section 6 of the Washington Constitution, under which the reviewing court has "inherent power" to review government actions that are "illegal or arbitrary and capricious." *Saldin Sec., Inc. v. Snohomish Cnty*., 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Under the constitutional writ of certiorari, "[a]n agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental." *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty*., 98 Wn.2d 690, 694, 658 P.2d 648 (1983).

The City moved for summary judgment on its claims on April 11, 2025. On April 11, 2025, the Honorable Carolyn Cliff held oral argument on summary judgment. Judge Cliff later issued an order granting the City of Oak Harbor's summary judgment motion on May 1, 2025. CP 628. WEAN filed this appeal of Judge

Cliff's ruling on May 8, 2025. CP 630

OVERVIEW OF THE LAW

SEPA is, in essence, an environmental full-disclosure law. *Norway Hill Pres. & Prot. Ass'n v. King County Council,* 87 Wn.2d 267, 272, 552 P.2d 674 (1976). It requires state and local government bodies to assess the potential impacts of their decisions, and if those impacts might be significant, to undertake a thorough environmental study known as an environmental impact statement. *See generally* RCW 43.21C.030; WAC 197-11-400 to -440. By requiring government actors to evaluate environmental impacts up front, SEPA aims to ensure that the future of our environment is shaped "by deliberation, not by default." *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973).

To accomplish its goal of fully informed and transparent decision making, "SEPA sets the guideline that agencies should include in every proposal for new legislation and major actions that significantly affect the environment, a detailed report about

(1) the environmental impact, (2) any adverse environmental effects, (3) alternative options, (4) the relationship between short-term uses and long-term productivity, and (5) any irreversible commitments of resources." *King Cnty. v. Friends of Sammamish Valley*, 3 Wn.3d 793, 814, 556 P.3d 132 (2024). To that end, SEPA requires every government body contemplating a decision that might affect the environment to issue a "threshold determination," the purpose of which is to determine whether the resulting environmental impacts might be "significant." If the government determines that there "will be no probable significant adverse environmental impacts from a proposal," then it issues a Determination of Non-Significance ("DNS"), ending the requirement for a full Environmental Impact Statement or "EIS." WAC 197-11-340(1); WAC 197-11-350. Conversely, if the government determines that significant adverse impacts are "probable," then it must issue a Determination of Significance ("DS") and an EIS will be required. *See* WAC 197-11-360.

The threshold determination must be based on "complete disclosure of environmental consequences." *Alpine Lakes Prot. Soc'y v. Washington Dep't of Nat. Res*., 102 Wn. App. 1, 15–16, 979 P.2d 929 (1999) (citing *King Cnty. v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 663, 860 P.2d 1024 (1993)). In general, "SEPA demands a 'thoughtful decision-making process' where government agencies 'conscientiously and systematically consider environmental values and consequences." *Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022) (quoting *ASARCO Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 701, 601 P.2d 501 and Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 3.01[2] at 3–4 (2021)).

The types of government actions to which SEPA applies are broad, including "[n]ew and continuing activities . . . entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies" (such as the issuance of government permits or licenses), "[new or revised agency rules, regulations,

plans, policies, or procedures," and "[l]egislative proposals." WAC 197-11-704(1)(a–c). In turn, these actions are classified into two categories—"project actions" and "nonproject actions."

Under SEPA, "project actions" are those that involve "a decision on a specific project, such as a construction or management activity located in a defined geographic area." WAC 197-11-704(2)(a).

In contrast, "nonproject actions" are those that involve "actions on policies, plans, or programs," including "[t]he adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment." *Id*. at (2)(b)(i). Although nonproject actions are sometimes entirely divorced from specific development projects, when future development projects are, in fact, known or anticipated at the time of an agency's adoption of a nonproject action, then the impacts from those anticipated development projects must be evaluated as part of the agency's SEPA review of the nonproject action itself. *Friends of Sammamish Valley*, 3

Wn.3d at 821–22. *See also Clark Cnty. v. Western Growth Mgmt. Hrgs. Bd.*, 33 Wn. App. 2d 1093, 2025 WL 752009, *3 (Mar. 10, 2025; unpublished).

Once triggered by an "action" meeting one of the above definitions, SEPA requires the proponent of the action to fill out an "environmental checklist," the form of which is codified at WAC 197-11-960. The checklist requires the applicant (including government applicants) to answer questions about many different elements of the environment, including aesthetics, transportation, land and shoreline use, and recreation. *See id*. For the recreation element of the environment, the checklist requires the applicant to describe affected "designated and informal recreational opportunities," to discuss whether the proposal will "displace any existing recreational uses," and to describe any "[p]roposed measures to reduce or control impacts on recreation." *Id*. There is also a special section at the end of the checklist for nonproject actions, which requires the applicant to describe, *inter alia*, how the proposal will affect "areas

designated for government protection" including "parks." *Id*.

The types of impacts that must be considered in a threshold determination include direct, indirect (or "growth-inducing"), and cumulative impacts on both the natural and built environments. *See, e.g.,* WAC 197-11-060(4) (discussing types of impacts); WAC 197-11-444 (listing elements of the environment, including land and shoreline use and recreation). SEPA requires the SEPA Responsible Official—the officer "designated by agency SEPA procedures to undertake [the agency's] procedural responsibilities as lead agency" (WAC 197-11-788)—to consider "any potential environmental impacts of a project." *Friends of Sammamish Valley*, 3 Wn.3d at 815. Among the elements of the environment that must be considered are aesthetics, light and glare, historic and cultural preservation, recreation, and "parks and other recreational facilities." WAC 197-11-444(1).

SEPA requires an agency, when acting on the same project proposal, to use existing and unchanged environmental

documents throughout the lifetime of that project. *See* WAC 197-11-600(3). An exception to this rule includes when there are substantial changes to a proposal with significant adverse environmental impacts. WAC 197-11-600(3)(b).

In Washington, an EIS is required if, based on the totality of the circumstances, future development is probable following the action and if that development will have a significant adverse effect upon the environment. *Wash. State Boundary Review Bd.*, 122 Wn.2d at 663–64 ("A proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action."); *Friends of Sammamish Valley*, 3 Wn.3d at 821 (when evaluating nonproject action under SEPA, agency must evaluate impacts from "specific developments and land use changes that are probable to result from the proposed action").

Under SEPA, certain actions are deemed to be so

insignificant that no SEPA review is required before they are taken. These are called "categorical exemptions," and the list of such exemptions is codified (in part) at WAC 197-11-800. At issue in this case is whether Ordinance 1999 is considered a "procedural action," one of the categorical exemptions under sub-section (a) of WAC 197-11-800(19):

> (19) **Procedural actions.** The proposal, amendment or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program shall be exempt if they are:
>
> > (a) *Relating solely to governmental procedures and containing no substantive standards respecting use or modification of the environment.*
> >
> > (b) Text amendments resulting in no substantive changes respecting use or modification of the environment.
> >
> > (c) Agency SEPA procedures.

WAC 197-11-800(19) (emphasis added to subsection (a)).

Actions that are not categorically exempt, and that are taken without necessary environmental review under SEPA, are ultra vires and void. *Noel v. Cole*, 98 Wn.2d 375, 380–81, 655

P.2d 245 (1982) (holding timber sale was ultra vires and void because state agency failed to comply with SEPA).

STANDARD OF REVIEW

When reviewing a superior court's order on summary judgment, this Court stands in the shoes of the superior court and reviews the issues presented by applying the same standard of review as the trial court. Questions of law are reviewed *de novo*. RCW 36.70C.130(1)(b); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 104.

ARGUMENT

A. The City's adoption of Ordinance 1999 is a nonproject action subject to SEPA review.

The first issue presented in this appeal is whether the City of Oak Harbor's adoption of Ordinance 1999 constitutes a "nonproject action" triggering SEPA review. As discussed above, a "nonproject action" includes the "adoption *or* amendment of

legislation, ordinances, rules, or regulations that contain standards controlling the use or modification of the environment." WAC 197-11-804(b)(i) (emphasis added). Here, if the adoption of Ordinance 1999 qualifies as a "nonproject action" within the meaning of WAC 197-11-804(b)—either by itself establishing rules for the use or modification of the environment, or by amending another ordinance that does—then the City should have evaluated potential adverse impacts under SEPA prior to its adoption of the new ordinance, and the challenged ordinance is invalid. For the reasons below, the adoption of Ordinance 1999 is, in fact, a "nonproject action" under both of these alternative standards and is, therefore, subject to SEPA review. The superior court erred in holding otherwise.

1. Ordinance 1999 adopts standards controlling use or modification of the environment.

First, Ordinance 1999 itself adopts substantive standards that control the use or modification of the environment, satisfying the test for a "nonproject action." These standards are

encompassed in the new exceptions to the citizen vote requirement, or in other words, the new circumstances under Ordinance 1999 where the City Council would itself be authorized (unilaterally) to dispose of public parklands and allow those lands to be used for non-park, private commercial purposes. *See* OHMC 1.30.010(2)(a).

As it is now codified at OHMC 1.30.010(2)(a), Ordinance 1999 allows the Oak Harbor City Council to convey public parklands for private commercial development whenever the City Council finds, *inter alia*, that there is a one-to-one property exchange ratio of land or greater in benefit to the City, that the privately owned land is of greater or greater market value than the publicly owned land, and that the privately owned land is an "appropriate replacement" for the park property to be conveyed. OHMC 1.30.010(2)(a). These criteria obviously do not encompass all development standards that would subsequently be applied to a proposal to build on former park property; such a proposal would also need to be reviewed for compliance with the City's zoning

and other development code requirements. But it is these very criteria—established by Ordinance 1999—that allow the City to take land out of public park use, and to convey that land for private, non-park use—for example, to be paved over for a hotel parking lot.

As discussed above, under SEPA, nonproject actions are defined, in part, to include "[t]he adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling *use* or modification of the environment." WAC 197-11-704(2)(b)(i) (emphasis added). By establishing substantive criteria for changing the use of public parklands, Ordinance 1999 qualifies as a nonproject action under the plain language of SEPA. For this reason, the ordinance may not be adopted without the City's first evaluating the environmental ramifications of that ordinance under SEPA.

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2. Ordinance 1999 amends OHMC Chapter 1.30, which contains standards controlling use or modification of the environment.

Second, going one step further, the adoption of Ordinance 1999 qualifies as a nonproject action because it amends Ordinance 1110, the ordinance passed in 1997 requiring a public vote before any City-owned parklands may be sold, exchanged, or otherwise disposed of for private commercial gain. Because Ordinance 1110 itself represented a rule controlling the use or modification of the environment, the amendment of that ordinance through Ordinance 1999 again constitutes a nonproject action under SEPA.

It is plainly evident that the voting requirement of Ordinance 1110 was intended to be a substantive restriction on the use and development of City-owned parklands. This is evident from the plain language and directive of Ordinance 1110, which begins with the prohibition (in mandatory terms) that "[d]eveloped City park property ***shall not*** be disposed of in any manner without citizen approval in an election." CP 95 (emphasis added). This is

also evident from what the City has stated about the purpose of that prohibition—namely, that its purpose "***was to ensure that developed park property would not be sold or transferred to private parties for private use or economic gain***." CP 102 (Lindenburg Decl., Ex. F at 1 (emphasis added)).

There is no question that Ordinance 1110 contained substantive restrictions on the disposal of public parklands for private commercial development. Following the passage of that ordinance in 1997, no municipal officer (or office) within the City of Oak Harbor, including the City Council, had authority to sell, exchange, or otherwise dispose of any parklands for private commercial development—only the public could do so after an open election. In turn, because Ordinance 1999 *amended* the restriction of Ordinance 1110—effectively carving out broad scenarios where the City Council now may unilaterally authorize the sale or exchange of public parklands for non-park private development projects—it represents a nonproject action for purposes of SEPA, which defines that term to include "[t]he

adoption *or amendment* of legislation . . . that contain[s] standards controlling the use or modification of the environment." WAC 197-11-704(2)(b)(i) (emphasis added).

Because Ordinance 1999 both adopts substantive standards *and* amends Ordinance 1110 (which contained standards controlling use or modification of the environment in its own right), Ordinance 1999 is a nonproject action under WAC 197-11-704 and is subject to SEPA review. The superior court erred in holding otherwise.

B. Ordinance 1999 is not categorically exempt from SEPA review.

The second issue presented in this appeal is whether the adoption of Ordinance 1999 is categorically exempt from SEPA as a "procedural action" under WAC 197-11-800(19). As mentioned above, a procedural action is one that "relat[es] *solely* to governmental procedures and contain[s] no substantive standards respecting use or modification of the environment." WAC 197-11-800(19)(a) (emphasis added).

The City relied upon this categorical exemption in its

summary judgment briefing, arguing, *inter alia*, that Ordinance 1999 has "no possible, or knowable, environmental impact" (even though the Ordinance itself was animated by a very specific hotel project). CP 22. The superior court, in turn, granted the City's argument and found the City's adoption of Ordinance 1999 to be categorically exempt under WAC 197-11-800(19), finding (wrongly) that Ordinance 1999 "merely relate[s] to procedures for the sale or other disposition of City-owned property." CP 627. In this, too, the superior court erred.

1. Ordinance 1999 is not solely procedural.

To characterize Ordinance 1999 as "relating solely to governmental procedures" is to miss the entire point of the enactment. Prior to the passage of Ordinance 1999, the City did not have the authority to sell, exchange, or otherwise dispose of City-owned parklands. Quite oppositely, the City had relinquished its authority to dispose of public parklands entirely through the passage of Ordinance 1110 in 1997—placing a clear prohibition on the development of public parklands for private

commercial gain without the express permission of the citizens of Oak Harbor. This is why Mr. Lindenburg—in presenting the new ordinance to the City Council—described the voting requirement as a "roadblock" to the proposed hotel project. CP 420 (Telegin Decl., Ex. I at 60:1–7). This is also why the City Council has stated that the purpose of Ordinance 1110 was not merely to codify a particular "procedure," but to ensure that public parklands "*would not* be sold or transferred to private parties for private use or economic gain." CP 120 (Lindenburg Decl., Ex. F at 1 (emphasis added)).

The public voting requirement was not meant to be a mere procedure, but to stand as a substantive blockade to the sale or exchange of public parklands for private use and economic gain. Nor is voting typically referred to as a "procedure," but as a "right." *See, e.g., City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (discussing the public's "right to vote" on municipal annexations under RCW 35.13.015). The new ordinance does not "change a procedure," but takes away the

public's substantive right to prevent public parks from being privately developed. It therefore does not fit within the categorical exemption at WAC 197-11-800(19).

2. Ordinance 1999 contains substantive standards relating to the use or modification of the park property.

In addition, Ordinance 1999 contains substantive standards respecting use or modification of the environment. In contrast to the original ordinance adopted in 1997, which flatly prohibited the disposal of public parklands without a vote of the people, Ordinance 1999 now provides that the City can, in fact, authorize the sale, exchange, or other disposal of public parklands if the developer takes certain actions, including offering a property exchange at a 1:1 ratio of land, where the Council determines that the exchanged property is "of equal or greater market value than the publicly owned land. CP 105-06 (*See* Lindenburg Decl., Ex. G at 1–2). Under the amended ordinance, a developer can also avoid the public vote requirement by agreeing to make improvements that are worth

"150% of the market value of the land granted by the city to the private entity." CP 106. These are "substantive standards respecting use . . . of the environment" because, if a developer chooses to comply with them, the City itself may authorize the sale or exchange of public parklands specifically for private development projects, converting public parklands to a non-park use. Conversely, if a developer does not comply with these requirements, the City itself has no authority to approve the sale or exchange of public parklands. Only the citizens of Oak Harbor can do that through a public vote.

In all, Ordinance 1999 does not "relate solely to governmental procedures." Instead, it relates to the fundamental question of whether the City itself—as a municipal entity—has any authority to sell or exchange public parklands for private commercial development. With the passage of Ordinance 1110 in 1997, the City gave up that authority, ceding it to the citizens of Oak Harbor. With Ordinance 1999, the City now desires to claw that authority back when certain criteria are met. In theory,

the City may be able to lawfully claw that authority back to itself. But it cannot do so without first evaluating the potential environmental consequences under SEPA.

Because Ordinance 1999 does not relate solely to governmental procedures and does, in fact, contain substantive standards relating to the use of the park property (an element of the environment under SEPA), it is not categorically exempt from SEPA review under WAC 197-11-800(19). The superior court erred in holding otherwise.

C. SEPA requires environmental review before the adoption of Ordinance 1999.

Finally, the superior court erred not only in finding that Ordinance 1999 is not subject to SEPA (either because it is not an "action" or because it is categorically exempt), but also in finding that SEPA review may lawfully be deferred to some later date when the hotel developer formally applies for a construction permit, or when specific park property is on the chopping block for sale to a private developer. *See* CP 627 (superior court

concluding that "[i]f the City does end up considering disposal of any park property, there will be a SEPA checklist and panoply of SEPA review in three phases"). This type of deferred SEPA review—where the consequences of nonproject actions are ignored at the time of adoption, only to be revisited later when specific project-level proposals are made—fundamentally violates SEPA's core tenets.

A core value embodied in SEPA is to conduct environmental review "at the *earliest possible time* to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems." WAC 197-11-055 (emphasis added). Washington courts have frequently warned that when SEPA review is deferred, the delay may allow a proposal to "snowball" and to "acquire virtually unstoppable administrative inertia." *Int'l Longshore & Warehouse Union, Loc. 19 v. City of Seattle*, 176 Wn. App. 512, 521, 309 P.3d 654 (2013) (citing Rodgers, The Washington Environmental Policy Act, 60 Wash.L.Rev. 33, 54

(1984)). Such deferrals undercut SEPA's core directive that "[d]ecision makers need to be apprised of the environmental consequences [of their actions] *before* the project picks up momentum, not after." *Id*.

Reflecting these same policy considerations, Washington Courts have consistently held that when evaluating a nonproject action under SEPA, an agency must also evaluate (*prior to adoption*) the environmental impacts of any foreseeable development projects that would be facilitated by the nonproject action itself.

For example, in *Friends of Sammamish Valley*, our Supreme Court reversed King County's adoption of zoning and business regulations for wineries, breweries, and distilleries, specifically because the County failed to evaluate the impacts of foreseeable development facilitated by those changes. *See Friends of Sammamish Valley*, 3 Wn.3d at 821–22.

In *Clark County*, Division I of the Court of Appeals recently upheld a decision of the Growth Management Hearings

Board overturning Clark County's adoption of a surface mining overlay, specifically because the county failed to evaluate the impacts of a mine that would be facilitated by the rule changes. *Clark County*, 2025 WL 752009, *4 (unpublished; citing *Washington State Boundary Rev. Bd.*, 122 Wn.2d at 656; *Spokane Cnty. v. Eastern Wash. Growth Mgmt. Hrgs. Bd.*, 176 Wn. App. 555, 581 309 P.3d 673 (2013); and *Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 805, 309 P.3d 734 (2013).

The underlying theme of all these cases is that SEPA review must occur at the earliest possible time. For nonproject actions, that means (among other things) that the impacts of foreseeable future development projects must be evaluated when the nonproject action is proposed, not later when the nonproject action is actually implemented and the new rules are used by developers for specific development projects.

In this case, one of the superior court's stated bases for granting the City's motion for summary judgment—and for

excusing the City's failure to evaluate Ordinance 1999 under SEPA—was that there will allegedly be a "panoply" of SEPA review later when specific park properties are on the chopping block, and when developers apply for actual construction permits. CP 627. We very much doubt there will be a "panoply" of SEPA review later, especially because after SEPA review is conducted once for a proposal, the City is required to use the fruits of that review "unchanged" unless significant changes are made to the proposal. *See* WAC 197-11-600(3). But panoply or not, deferring environmental review to a later date simply does not comply with SEPA's mandate that it occur early in the decision-making process and that the City evaluate the impacts of any foreseeable development project that may be facilitated by Ordinance 1999.

Here, the City has had ongoing discussions with a developer relating to the Hilton project that would pave over a significant portion of Hal Ramaley Memorial Park. The developer has submitted detailed plans for that project with floor

and façade details, as well as detailed project renderings. *See* CP CP 300–309 (Telegin Decl., Ex. A). This hotel project would clearly be facilitated by the passage of Ordinance 1999, an ordinance intended to remove a "roadblock" to that very hotel project. Under SEPA, whether the hotel project undergoes environmental review later or not, it is important that its impacts be evaluated now prior to the adoption of Ordinance 1999. That is what SEPA requires so that decisionmakers may be appraised of the consequences of their actions at the earliest possible time.

CONCLUSION

The City of Oak Harbor's adoption of Ordinance 1999 is a nonproject action that is not exempt from environmental review under SEPA. The ordinance is not purely procedural but adopts specific criteria for allowing the City Council to change the use of public parklands—*i.e.,* to convert them from park use to some other non-park use. The Ordinance was clearly designed to facilitate a specific development proposal, to remove a "roadblock" for a Hilton Hotel that would pave over much of Hal

Ramaley Memorial Park for use as a private parking lot. The superior court erred in holding that Ordinance 1999 is not subject to SEPA review. This Court should reverse the superior court and remand with instructions that, before the City adopts such an ordinance, it must evaluate the environmental consequences of doing so under SEPA. We respectfully ask that the superior court's order on summary judgment be reversed and remanded.

Dated this 22nd day of October, 2025.

Respectfully submitted,

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The undersigned certifies that this brief contains 10,160 words, in compliance with RAP 18.17(c)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a copy of the foregoing Appellant's Opening Brief by email on the following persons:

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