BEFORE THE HEARING EXAMINER
FOR THE CITY OF FEDERAL WAY

In Re: Appeal by Save Weyerhaeuser Campus of the Process III Project Approval for Greenline Warehouse A (File No. 16-102947-UP).	CITY OF FEDERAL WAY AND APPLICANT FEDERAL WAY CAMPUS'S JOINT MOTION FOR PARTIAL DISMISSAL
In Re: Appeal by Save Weyerhaeuser Campus of the Mitigated Determination of Nonsignificance (MDNS) for Greenline Warehouse A (File No. 16-102948-SE).	

I. INTRODUCTION AND RELIEF REQUESTED

This is a consolidated appeal of two decisions relating to respondent Federal Way Campus LLC's ("Applicant's") application to develop the Woodbridge (formerly Greenline) Warehouse A project ("Project"): the Mitigated Determination of Nonsignificance ("MDNS") issued by respondent City of Federal Way ("City") on October 26, 2018, and the Process III Project Approval ("Process III Approval") issued by the City on February 4, 2019.

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For the reasons provided in this motion, many of the claims raised in Appellant Save Weyerhaeuser Campus's ("Appellant's") appeal of the Process III Approval must be dismissed, as they variously implicate matters outside the Examiner's subject matter jurisdiction and/or are facially erroneous as a matter of law. These claims include the following:

- Challenges to Concomitant Agreement. The Examiner does not have jurisdiction over claims that the City erred in applying the Weyerhaeuser Company Concomitant Pre-Annexation Zoning Agreement ("Concomitant Agreement"), or the accompanying Corporate Park Zone ("CP-1") development regulations, to the Project. Even if the Examiner had the legal authority to consider such claims (he does not), they would be barred by the statute of limitations. Accordingly, the Examiner must dismiss claim 3.1, including subclaims 3.1.1, 3.1.2, and claim 3.6.1.[1] Even if the Examiner had jurisdiction over the appeals of the Concomitant Agreement (he does not), claims that the Agreement is invalid or inapplicable have no merit and should be summarily dismissed.
- Growth Management Act ("GMA") claims. The Appellant claims the City failed to conduct periodic review of its zoning regulations or apply best available science in violation of GMA. Examiner lacks jurisdiction over this claim. Cities are required to use best available science when formulating development regulations, and any alleged failure to do so must be timely raised in a petition for review to the Growth Management Hearings Board ("Growth Board"). The best available science requirement does not apply directly to project approvals of the type at issue in this

[1] Appellant's February 21, 2019 Notice of Appeal of the Process III Approval ("Notice of Appeal") includes "Statement[s] of Alleged Errors" that are numbered from 3.1 to 3.12.[1] Some of them are further subdivided into subclaims numbered 3.1.1, 3.1.2, etc. This motion refers to them by number and as either "claims" or "subclaims."

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administrative appeal. Similarly, any allegation of failure to conduct periodic review under GMA must be timely filed with the Growth Board, which has exclusive jurisdiction over such claims. Accordingly, the Examiner must dismiss subclaim 3.1.3, 3.1.4, claim 3.4a and claim 3.7.1.

- Claim of inconsistency with the Comprehensive Plan. The Concomitant Agreement provides that the CP-1 development regulations control over the Comprehensive Plan. Appellants' attempt to create new or different requirements based on the Comprehensive Plan must fail based on the plain language of the Concomitant Agreement and Comprehensive Plan itself. Accordingly, the Examiner must summarily dismiss claim 3.5, including all of its subclaims, and claim 3.8.4.
- Claims of violation nonregulatory findings and purpose statements. Appellant makes several claims that are based on nonregulatory legislative findings and general purpose statements, which do not, as a matter of law, constitute legal requirements and/or criteria that must be applied or complied with in a Process III decision. These claims include 3.3, 3.4, 3.6.2, 3.6.3, 3.6.4, 3.6.10, and 3.6.11. Since they lack a basis in any legal requirement, these claims must be summarily dismissed.
- Claim unsupported by allegation of specific error of law. Claim 3.7.4 states broadly that the Project does not meet the standards of the Federal Way Revised Code ("FWRC" or "City Code"). Claims 3.2, and portions of 3.5, 3.6, 3.7, and 3.8, and their subclaims, allege failure to consider "cumulative impacts" or that the Project is not "cumulatively" consistent with various requirements. The Examiner should dismiss this claim for failure to identify a specific alleged error of law in violation of FWRC 19.70.125.

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- Claim unrelated to the Project. Claim 3.7.6 asserts that the City has not taken action to remediate or mitigate for physical actions on the Project site that have changed the hydraulic regime. On its face, this claim does not relate in any manner to the Process III Approval at issue in this appeal and must be dismissed.

For the reasons described in this motion, Respondents Applicant and City respectfully request that the Hearing Examiner dismiss these claims.

II. STATEMENT OF FACTS

This appeal challenges the Project, a proposed 225,950 SF general commodity warehouse to be located on the former Weyerhaeuser campus, now owned by the Applicant.[2] The application was submitted June 17, 2016. Over more than two years, the City thoroughly reviewed the anticipated environmental impacts of the Project under the State Environmental Policy Act ("SEPA"). The City requested, received and independently reviewed extensive environmental analysis as part of this undertaking. Ultimately, the City issued the MDNS that is the subject of this appeal on October 26, 2018. The MDNS represents the City's conclusion that, as mitigated, the Project with not result in significant adverse environmental impacts.

The City also carefully reviewed the Project for compliance with applicable development standards under its Process III review. Again, the City methodically and thoroughly sought, received and independently analyzed extensive information from the Applicant regarding the Project's compliance with all applicable development standards, over a period of nearly three years. On February 2, 2019, the City issued its Process III Approval, concluding that the Project satisfies applicable development standards.

[2] This statement of facts is based on the Process III Approval, which is attached to the Notice of Appeal.

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The Project is located within the former Weyerhaeuser campus ("Campus"), now owned by the Applicant. The Campus as a whole is subject to the Concomitant Agreement, which specifies the development standards that are applicable to properties within the Campus, including the Project site. The City properly evaluated the Project under the standards of the Concomitant Agreement.

Following the City's approval of the Project, Appellant filed this appeal. As authorized by the Examiner's April 10, 2019 Prehearing Order, the Applicant and City now seek partial dismissal of those claims raised by Appellant that are either outside the Examiner's subject matter jurisdiction and/or that are facially untenable as a matter of law. Summary disposition of these claims will facilitate, streamline and appropriately narrow the focus of the multi-day June hearing on the merits for this appeal.

III. STATEMENT OF ISSUES

The issues raised in this motion are whether the Examiner should dismiss: (1) challenges to the Concomitant Agreement, over which the Examiner lacks jurisdiction; (2) GMA claims over which the Examiner lacks jurisdiction; (3) claims of inconsistency with the Comprehensive Plan, where as a matter of law the development regulations control over the Comprehensive Plan under the Concomitant Agreement and Comprehensive Plan itself; (4) claims of violation of nonregulatory finding and purpose statements; (5) claims unsupported by an allegation of a specific error of law; and (6) claims wholly unrelated to the Project.

IV. EVIDENCE RELIED UPON

This motion relies on the papers and pleadings in this matter, including the Notice of Appeal and its attachment, and the Declaration of Courtney A. Kaylor ("Kaylor Declaration") submitted concurrently with this motion.

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V. AUTHORITY

A. The Examiner may dismiss an appeal over which the Examiner lacks jurisdiction or that is without merit on its face.

Preliminary, this motion is timely and procedurally proper. Parties to a Hearing Examiner proceeding "shall have a right" to make a "[m]otion" seeking "specific relief or [an] order." Federal Way Hearing Examiner Rules of Procedure ("HER") 6(d) and 16. "The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal upon motion by a party . . . ." HER 9(a). "The Hearing Examiner shall dismiss an appeal without hearing when it is determined by the Hearing Examiner [to be] without merit on its face . . . ." HER 9(e). The Hearing Examiner's Prehearing Order specifically authorizes the parties to file prehearing motions and it established an April 25, 2019 deadline for this purpose. The instant motion is supported by and is facially timely under the above authority.

B. The Examiner lacks jurisdiction over Appellant's challenges to the Concomitant Agreement and they are barred by the statute of limitations.

Appellant asserts that the City erred in applying the development regulations specified by the Concomitant Agreement. Appellant challenges the Concomitant Agreement directly, claiming that (1) the City Council that adopted the Concomitant Agreement cannot bind a successor Council; (2) an ordinance can only be effective for a limited amount of time. Notice of Appeal, Claims 3.1, 3.1.1, 3.1.2, 3.6.1. These claims must be dismissed because the City Code does not provide the Examiner the authority to consider the validity of the Agreement or to modify or waive its requirements. Any such challenge by Appellant must instead be brought in Superior Court and would be barred by the applicable statute of limitations in any event. Accordingly, the Examiner should dismiss these claims.

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1. The Examiner lacks jurisdiction over the Concomitant Agreement.

The Examiner lacks jurisdiction to consider the validity of the Concomitant Agreement and may not modify or waive its requirements.

"As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003). "The jurisdiction, powers and authority of the hearing examiner, as these relate to matters covered by FWRC Title 19, are established in Chapters 19.65, 19.70 and 19.75 FWRC." FWRC 2.95.040. Under these chapters, certain specifically identified land use decisions classified as "Process III" approvals are subject to appeal to the Hearing Examiner. FWRC 19.65.120.3. Annexation decisions are not Process III. FWMC Ch. 1.35. The Examiner's appellate jurisdiction is sharply limited: "On appeals, the Hearing Examiner shall have the authority to vacate, affirm, or modify the underlying appealed from decision." HER 4(c). "The scope of agency decision appeals is limited to the errors of law raised or the specific factual findings and conclusions disputed in the notice of appeal." FWRC 19.70.125.

Appellant cannot establish that the City made an "error of law" in determining that the Corporate Park 1 ("CP-1") zoning regulations made applicable to the Project by the Concomitant Agreement govern Project III approvals on the Property because these regulations are themselves a part of Title 19 of the City Code. *See* FWRC 19.190.040 (establishing that pre-annexation zoning regulations adopted by the City are "deemed to amend [the zoning and development code]"). Appellant's claim is instead that the CP-1 regulations no longer apply because their adoption and enforcement represent an improper exercise of legislative and administrative power. This is not a claim that the City made an error of law in the Process III approval process but a challenge to the Concomitant Agreement's validity.

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The Hearing Examiner does not have jurisdiction over the validity of development regulations, concomitant agreements, or city ordinances. Instead, any such challenge by Appellant must be brought in Superior Court. Section 19-103(d) of the 1994 FWRC, which the City adopted in Ordinance 93-190 along with the other procedures governing the annexation of the Property, establishes that a challenge to the City's adoption of a zoning designation for annexed property "may be reviewed . . . in the County Superior Court." Kaylor Declaration, Ex. A, Ord. 93-190, p. 12. Section 19-104(h) applies the same procedure to an appeal of the concomitant agreement. *Id.*, p. 16. The current Code procedures governing annexation are essentially the same. *See* FWRC 1.35.040.4; 1.35.050.8.[3]

Just as the Hearing Examiner does not have the jurisdiction to declare the Concomitant Agreement invalid as a whole, the Examiner also lacks jurisdiction to "apply current code provisions to the application" rather than the CP-1 standards. *See* claim 3.1. This action is forbidden by the City Code, which provides that in an appeal proceeding the Examiner "may not consider any request for modification or waiver of applicable requirements of this title or any other law." FWRC 19.70.125. The Examiner does not have the authority to determine that particular provisions of CP-1 regulations (or of the Concomitant Agreement, or of Ordinance 94-219 which adopted it)[4] do not apply to projects on the Property. Any claim that these requirements should be waived or modified because they allegedly conflict with newer regulations must be dismissed.

[3] *See also Fed. Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790, 793 (1991) (Declaratory judgment is "the proper form of action to determine the facial validity of an enactment, as distinguished from its application or administration."). "Courts of record" have jurisdiction to render declaratory judgments, *see* RCW 7.24.010, but no law provides such authority to the Hearing Examiner.

[4] The Concomitant Agreement and Ordinance 94-219 are attached as Exhibits A and B to the Kaylor Declaration.

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In sum, the Examiner lacks jurisdiction over Appellant's claims relating to the Concomitant Agreement and these claims must be dismissed.

2. Appellant's challenges to the Concomitant Agreement are barred by the statute of limitations.

Even if the Examiner were authorized to consider challenges to the validity of the Concomitant Agreement or Ordinance 94-219, which he is not, the statute of limitations governing Appellant's pursuit of such claims has long since passed. "Any applicable City Code deadlines for filing an appeal or serving the appeal at specified places or upon specified persons shall be considered jurisdictional." HER 9(a). "The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal." *Id.*

The Federal Way City Council adopted Ordinance 94-219 on August 16, 1994, and the Concomitant Agreement was executed on August 23, 1994. Kaylor Declaration, Ex. B, p. 8, Ex. C, p. 16-17. The applicable provisions of the 1994 Federal Way Code required any challenges to Ordinance 94-219 or the Agreement to be brought "within fourteen days after the date of the hearing at which the council acted to pass the written ordinance." Kaylor Declaration, Ex. A, Ord. 93-190, 19-103(d) and 19-104(h); FWRC 1.35.040.4 and 050.8; *see also Bellewood No. 1, L.L.C. v. Loma*, 124 Wn. App. 45, 51, 97 P.3d 747, 750 (2004) ("[T]he triggering event for purposes of the time for appeal of the process leading to the adoption of the preannexation zoning ordinance was the enactment of that ordinance.").

Because Appellant failed to comply with this jurisdictional requirement, its challenges to the validity of the Agreement require dismissal as a matter of law.

3. The Concomitant Agreement is valid.

In claims 3.1, 3.1.1 and 3.6.1, Applicant argues that the Concomitant Agreement cannot be enforced because it impermissibly binds successive City Councils to its terms. As an initial

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matter, this claim is based on a false premise. Separate from any and all other options potentially available to the City, the Concomitant Agreement expressly permits subsequent City Councils to amend it under the procedures in section 22. Kaylor Declaration, Ex. C, Concomitant Agreement, p. 15. Indeed, the Agreement incorporates an amendment that was made in 2003. Kaylor Declaration, Ex. C.

Moreover, Washington courts have long since rejected the argument that a "contract between property owners and a city concomitant to zoning changes," or any other "agreement limiting the future exercise of a municipality's land use power," is "per se invalid." *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn. App. 771, 777, 158 P.3d 1179, 1182 (2007) (citing *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 422 P.2d 790 (1967)); *cf.* RCW 36.70B.170(1) (acknowledging validity of pre-1995 concomitant agreements). Instead, "[s]uch agreements would be invalid only if they are 'clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for the benefit of private speculators.'" *Id.* No credible argument to this effect is possible here. Ordinance 94-219 contains an extensive recitation of the reasons why the Federal Way City Council determined that the terms of the Agreement were consistent with public policy. *See* Kaylor Declaration, Ex. B, Ord. 94-219, sec. 2. Any challenge by Appellant to the correctness of the Council's determination is barred by the statute of limitations. *See* Section B.2, *supra*.

The case cited in claim 3.1.1, *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (1984), does not support these claims. The court in *Miller* rejected the argument that a pre-annexation contract imposing certain conditions on later development prevented a city from "imposing *any* additional conditions" on development. *Id.* at 913 (emphasis added). Applicant

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makes no such argument here; indeed, the Decision contains 42 specific conditions of approval, which Applicant does not challenge. Notice of Appeal, Attachment.

Additionally, Appellant asserts in claim 3.1.2 that the Concomitant Agreement cannot be enforced because it does not contain a "time interval" as required by RCW 35A.14.330. This misreads the statute, which provides that a legislative body considering annexation "*may* prepare a proposed zoning regulation to become effective upon the annexation," and that such a regulation "*may* provide" for a "time interval following an annexation during which the ordinance . . . must remain in effect before it may be amended." RCW 35A.14.330 (emphases added). Appellant's contention that the statute "requires" the inclusion of a specific time interval is flatly inconsistent with the text. Moreover, even if the statute utilized the term "shall" instead of "may," it would still not authorize the City or the Examiner to ignore the requirements of the Concomitant Agreement. The "interval" referred to by the statute is not an expiration date, but a time that must pass before the zoning regulation "may be amended." Applicant and City do not argue that the Concomitant Agreement may never be amended – again, it was in fact previously amended in 2003 – only that the standards in the Agreement govern *unless* they are amended or otherwise altered or terminated through a legally-recognized means. The Concomitant Agreement's lack of an expiration date neither *per se* invalidates it nor gives it the impermissible effect that Appellant claims.

Accordingly, even if the Examiner had jurisdiction to consider claims 3.1, 3.1.1, 3.1.2, and 3.1.6, which he does not, these claims should nevertheless be dismissed.

C. The Examiner lacks jurisdiction over GMA claims.

Claims 3.1.3, 3.1.4, 3.4a, and 3.7.1 assert that the City has failed to comply with GMA requirements to periodically update its zoning and critical areas ordinances, to incorporate the

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"best available science" in its development regulations, and to "appl[y] the [best available science analysis] to the review of the Warehouse 'A' proposal." Approval NOA, p. 2. To the extent these claims challenge the City's adoption of the Concomitant Agreement or its legislative actions since 1994, they are jurisdictionally barred as described in Section B, *supra*. To the extent that these claims challenge the criteria the City applied to the Process III Approval, they likewise must fail.

The Examiner lacks jurisdiction over this claim. Any challenge to the City's compliance with the GMA must be brought before the Growth Board, which has exclusive jurisdiction over appeals that allege noncompliance with GMA. RCW 36.70A.280(1). The City Code does not, and could not, give the Examiner jurisdiction over GMA claims. FWMC 2.95.040.

In addition, even if the Examiner had jurisdiction, which he does not, this claim would still fail. The GMA governs the adoption of comprehensive plans and development regulations, not project approvals. A city's development regulations and comprehensive plans must be consistent with the GMA, but individual permit decisions need not be. The GMA is not referenced in the decisional criteria listed in FWRC 19.65.100.2.a, and it does not otherwise "directly regulate site-specific land use activities." *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 612, 174 P.3d 25, 33 (2007); *see also Timberlake Christian v. King County*, 114 Wn. App. 174, 182, 61 P.3d 332, 336 (2002) ("The GMA does not have site-specific effect at the project level. Instead, it establishes a general framework in which local governments are required to plan."). Appellant's GMA-based claims disregard this well-established precedent and are facially inappropriate for consideration in this project-specific administrative appeal proceeding.

Accordingly, Claims 3.1.3, 3.1.4, 3.4a, and 3.7.1 must be dismissed.

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D. The Examiner must dismiss Appellant's claims based on the Comprehensive Plan.

Claims 3.5, its 12 subclaims, and claim 3.8.4 assert that the Project should not have been approved because it is not "consistent with the comprehensive plan" as required by FWRC 19.65.100.2.a.i. These claims must be dismissed because, under both the Concomitant Agreement and Comprehensive Plan, the CP-1 zoning requirements control. The Examiner must reject the Appellant's attempt to manufacture new and different requirements, beyond those contained in the applicable development regulations, based on the Comprehensive Plan.

Appellant argues that the City Code requires projects approved under a Process III decision to be "consistent with the comprehensive plan," FWRC 19.65.100.2.b.i, and that "where the zoning code itself expressly requires a site plan to comply with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan." *Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 895, 83 P.3d 433, 437 (2004). This argument is a red herring. Under both the Concomitant Agreement and the Comprehensive Plan itself, a Project that satisfies the CP-1 regulations complies with the Comprehensive Plan.

Section 4 of the Concomitant Agreement, entitled "Comprehensive Plan Designation," establishes that "to the extent Federal Way policies impose development standards conflicting with this Agreement, this Agreement shall control," and that any comprehensive plan designation for the Property must be "compatible with the zoning agreed to in Section 3 of this Agreement." Kaylor Declaration, Ex. C. As previously discussed, the Concomitant Agreement is valid and binding.

Consistent with the Concomitant Agreement, the Comprehensive Plan provides a designation for the Property as follows:

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Corporate Park

> The Corporate Park designation applies to the Weyerhaeuser Corporate Campus generally located east of Interstate Highway 5. The property is a unique site, both in terms of its development capacity and natural features. Development standards and conditions for the Corporate Park designation are unique to Weyerhaeuser's property and are outlined in a pre-annexation concomitant development agreement between the City and the Weyerhaeuser Company.

Kaylor Declaration, Ex. D, Comprehensive Plan, II-17 (emphasis added). As the Comprehensive Plan itself recognizes, the applicable regulations governing development on the Property are those provided by the Concomitant Agreement. Accordingly, because the Project is consistent with the CP-1 regulations, it is necessarily consistent with the Comprehensive Plan.

This result reflects the well established principle that review of a land use decision "may not invoke [a comprehensive] plan's general purpose statements to overrule the specific authority granted by the zoning code" – even when the applicable zoning criteria require comprehensive plan consistency. *Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 897, 83 P.3d 433 (2004), citing *Weyerhaeuser v. Pierce Cty.*, 124 Wn.2d 26, 873 P.2d 498, 507 (1994) (a "comprehensive plan is no more than a general policy guide," *id* at 44). Here, the Comprehensive Plan expressly acknowledges:

> Goals describe what the City hopes to realize over time, and are not mandates or guarantees. Policies describe actions that will need to be taken if the City is to realize its goals. Policies should be read as if preceded by the words, "It is the City's general policy to…." A policy helps guide the creation or change of specific rules or strategies (such as development regulations, budgets, or subarea plans[ )]. Implementation of most policies involves a range of City actions over time, so one cannot simply ask whether a specific action or project would fulfill a particular FWCP policy.

Kaylor Declaration, Comprehensive Plan, p. I-14 (emphasis added). In this passage, the Comprehensive Plan clearly provides its goals are not "mandates" and its policies are only "general policy" guides. The Comprehensive Plan prohibits a person from asking whether a

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specific project would fulfil a particular policy.[5] Yet this is exactly what Appellant is doing in its appeal.

For these reasons, the Examiner must dismiss Appellant's claim that the Project is inconsistent with the Comprehensive Plan.

E. The Examiner should dismiss claims based on nonregulatory legislative findings and general purpose statements.

Appellant makes several claims that are based on nonregulatory legislative findings and general purpose statements, which do not constitute legal requirements that must be applied or complied with in a Process III decision. These claims include claims 3.3, 3.4, 3.6.2, 3.6.3, 3.6.4, 3.6.10, and 3.6.11. Since they lack a basis in any legal requirement, these claims must be dismissed.

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[5] Indeed, many of the individual goals and policies referenced by Appellants are, on their face, inapplicable to project permits. In claims 3.5.1 and 3.5.2, Appellant asserts that the Project fails to comply with two provisions in the "Policy Background" section of the Plan's Land Use Chapter. The cited provisions, however, cannot be read as requirements applicable to development proposals. Instead, they are statements that certain "goals" are implemented by the Land Use Chapter, enabling the chapter to be "consistent with GMA, VISION 2040, and the [King County Countywide Planning Policies'] direction." Kaylor Declaration, Ex. D, Comprehensive Plan, II-1. They describe why the policies in the Comprehensive Plan comply with other laws, not what particular projects must do.

Similarly, claims 3.5.3, 3.5.4, and 3.5.5 rely on a list of "GMA goals pertain[ing] to land use." Kaylor Declaration, Ex. D, Comprehensive Plan, II-2. Like the statements discussed in the previous paragraph, these goals do not establish guidelines, policies, or any other applicable standard for approvals of individual projects. This is apparent both from the context of the list and from the specific statement in the introductory text that the goals are to be "used exclusively for the purpose of guiding *development of* comprehensive plans and development regulations." *See id* (emphasis added).

Claims 3.5.6 and 3.5.7 cite a Land Use Goal and a Land Use Policy from the "Urban Design and Form" section of the Chapter. Kaylor Declaration, Ex. D, Comprehensive Plan, II-8. The introductory text for this section indicates that it establishes "goals and policies" that will "serve as a basis from which to *develop* appropriate implementation measures." *Id* (emphasis). In other words, these provisions apply to the City's promulgation of development standards and design guidelines, *not* its consideration of individual projects. Accordingly, the policies under this section direct the City to take action such as "[u]se development standards and design guidelines" to accomplish broad goals. *Id.* They do not apply particular standards to projects.

Finally, claims 3.5.8, 3.5.9, and 3.5.10 cite standards from Section 2.7 of the Land Use Chapter, entitled "Land Use Designations." Kaylor Declaration, Ex. D, Comprehensive Plan, II-10. This section "set[s] forth locational criteria for each specific class of uses" designated by the Plan, including the Corporate Park designation among many others. *See id.* These policies guide zoning designations, not individual projects. Also, Appellant's claims cite standards from Section 2.7 that do not apply to the Project. Instead, the standards are applicable to areas designated single-family residential (3.5.8 and 3.5.9) or commercial enterprise (3.5.10), not Corporate Park. *See* Kaylor Declaration, Comprehensive Plan, II-11 and II-14.

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In claims 3.3, 3.6.10, and 3.6.11, Appellant asserts that the Approval violates the Conclusions of Law contained in Ordinance 94-219. These claims must be dismissed because the Conclusions of Law are not, and do not purport to be, development regulations or any other type of legal requirement in their own right. Under the procedures established in FWRC 19-103(b)(5) and 19-104(h) (1994), the City Council's approval of a zoning classification to be applied to newly annexed property, and of a pre-annexation concomitant agreement governing that property, required it to make findings under specific "Decisional Criteria." *See* Kaylor Declaration, Ex. A, Ord. 93-190, pp. 11, 16. Section 2 of Ordinance 94-219 accordingly includes several Conclusions of Law reached by the City Council "with respect to the Decisional Criteria necessary to approve an initial zone classification and to approve the proposed Concomitant Agreements." Kaylor Declaration, Ex. B, Ord. 94-219, p. 4.

The claim that the Approval "violates" these Conclusions of Law must be dismissed because the Conclusions do not establish requirements of any kind. They are not phrased so as to mandate any further action, in contrast to other provisions of Ordinance 94-219 – for example, section 3 of the ordinance provides that the Property is "hereby designated" according to several zoning categories; section 4 states that the City's zoning map "shall be amended"; and section 5 provides when the zoning regulations and map amendments "shall become effective." By contrast, section 2 states that the Council "makes the following Conclusions," which do not apply to anything other than the action the Council is taking. Kaylor Declaration, Ex. B. As such, the Conclusions are akin to legislative findings – while they might guide the interpretation of a provision of the Agreement, they are not themselves development regulations or otherwise independent requirements. Nothing in the Concomitant Agreement, the adopting ordinance or the FWRC remotely supports a contrary conclusion.

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A basic rule of interpretation is that the substantive components of a document will control over prefatory and other, less mandatory provisions. *See, e.g., Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 898, 83 P.3d 433 (2004); *Martel v. City of Vancouver*, 35 Wn. App. 250, 255, 666 P.2d 916 (1983). Appellant's attempt to elevate non-binding content over the actual substance of the Concomitant Agreement violates this well-established principle of construction. The Examiner must therefore dismiss claims 3.3, 3.6.10, and 3.6.11.

In claims 3.4 and 3.6.3, Appellant asserts that the Process III Approval is invalid because the Project does not comply with Recital C of the Agreement, which states: "Weyerhaeuser desires to develop its Property with maximum flexibility which will insure optimal development, while preserving the unique natural features of the site." Kaylor Declaration, Ex. C, Concomitant Agreement, pp. 1-2.[6] Like the Conclusions of Law, this Recital is not and does not purport to be a development regulation or other standard governing project approvals. Instead, it is a prefatory, factual statement about Weyerhaeuser, again akin to a legislative finding. It is not contained in the portion of the Concomitant Agreement that comes after the statement "the parties hereby agree as follows:". *Id.*, p. 3. It is not a legal requirement bearing on Process III approvals and cannot provide a basis for vacating the Process III Approval. *Cf. Lakeside Industries,* 119 Wn. App. at 898; *Martel,* 35 Wn. App. at 255.

Claims 3.6.2 and 3.6.4 are based on the "Purpose and Objectives" section of the CP-1 development regulations, which reads in full:

> The Corporate Park-1 Zone (CP-1) is designed for property which has or can be developed for corporate headquarters, corporate office uses, and associated uses as defined herein. These properties are characterized by large contiguous sites with landscape, open space amenities, and buildings of superior quality. The property appropriate for such uses is unique, and demands for such uses are rare. Consequently, special land use and site regulations are appropriate for such properties

[6] Applicant and City construe claim 3.6.3 as referring to Recital C.

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Kaylor Declaration, Ex. C, Concomitant Agreement, Ex. C, p. 1. Claims 3.6.2 and 3.6.4 assert that the Project is not consistent with the Code because it does not comply with portions of the second sentence of this section. But again, neither this sentence nor anything else in the "Purpose and Objectives" section purports to actually impose a requirement on the Process III approval process. It is instead phrased as an explanation of why the CP-1 regulations are what they are, not as a regulation that independently bears on project approvals within the zone. Like the Conclusions of Law in Ordinance 94-219 and the Recitals in the Agreement, the section contains no mandate, only descriptions and factual statements. It is does not contain any "applicable provisions" under FWRC 19.65.100.2.a.ii.

For these reasons, claims 3.3, 3.4, 3.6.2, 3.6.3, 3.6.4, 3.6.10, and 3.6.11 must be dismissed.

F. The Hearing Examiner should dismiss claims that are not based on a specific alleged error of law.

Appellant asserts in claim 3.7.4 that the Process III Approval "does not meet the standards of the City Code." This claim, baldly encompassing the entirety of the City Code, on its face lacks the specificity required by FWRC 19.70.125, which required that "the scope of agency decision appeals is limited to the errors of law raised or specific factual findings disputed in the notice of appeal." The Examiner should dismiss this claim and allow only those claims alleging specific City Code violations.

The same is true of those claims discussing "cumulative impacts." The Examiner's consideration of this appeal is limited to "errors of law" in the City's Process III consideration of the Project. FWRC 2.95.040, 19,70.125. These claims include claim 3.2, and portions of claims 3.5, 3.6, 3.7, and 3.8, and their subclaims. Nothing in the Process III decisional criteria requires

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the general consideration of cumulative impacts of nearby projects. *See* FWRC 19.65.100. To the extent these claims allege a deficiency in the SEPA process, they should be dismissed as duplicative of the claims in Appellant's separately filed SEPA Appeal. *See* Appellant's November 30, 2018 Notice of Appeal regarding the MDNS, p. 2. To the extent these claims challenge an aspect of the City's decision making for failure to consider cumulative impacts, they must be based on a specific provision of law requiring the analysis *as part of the relevant aspect of a Process III approval*. Because no applicable law requires this analysis, the portions of these claims that concern cumulative impacts must be dismissed.

These claims are not based on specific legal requirements governing Process III decisions and must be dismissed.

G. The Examiner should dismiss claims unrelated to the Project.

Appellant asserts in claim 3.7.6 that the Project is not consistent with the "public health, safety, and welfare" because the "City has not taken action to remediate or mitigate for physical actions taken on the site by the current property owner that have changed the hydraulic regime on the site." The Examiner does not have jurisdiction over this claim. The City's obligations with respect to actions outside the scope of the Application are not at issue in this appeal and have no bearing on the correctness of the Process III Approval. To the extent the Appellant asserts that current conditions on the Property violate other provisions of the Code (which they do not), any such issues may be handled by the civil enforcement process established in Chapter 1.15 FWRC.

VI. CONCLUSION

For these reasons, Respondents Applicant and City jointly request that the Hearing Examiner dismiss and/or modify this appeal in part.

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