Hearing Examiner Phil Olbrechts

BEFORE THE HEARING EXAMINER
FOR THE CITY OF FEDERAL WAY, WASHINGTON

In Re: Appeal by Save Weyerhaeuser Campus of the Process III Project Approval for Greenline Warehouse A (File No. 16-402947-UP); In Re: Appeal by Save Weyerhaeuser Campus of the Mitigated Determination of Nonsignificance (MDNS) for Greenline Warehouse "A" (File Number 16-102948-S.E.)	RESPONSE OF APPELLANT SAVE WEYERHAEUSER CAMPUS TO MOTION TO DISMISS

1. INTRODUCTION.

The project applicant Federal Way Campus LLC ("Applicant") and the City of Federal Way (collectively, "Respondents") have filed a joint motion to dismiss certain sections of the project appeal filed by appellant Save Weyerhaeuser Campus (SWC). For the reasons stated below, the motion must be dismissed and the issue decided following a full evidentiary hearing.

As will be described herein, the application of judicial style motions to citizen administrative appeal proceedings is not supported by any authority from the Federal

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Way City Council or the Hearing Examiner. Motions to dismiss as styled here effectively create a two-stage hearing process, increasing costs and time for citizen appeals, not contemplated by the creation of administrative appeals in an informal atmosphere. It is particularly disturbing that the "City"[1] has joined in the motion, signaling an abandonment of any objective review of the applicant's several applications.

Though the code and Hearing Examiner Rules do not authorize these motions, as will be demonstrated herein, even if there were such authority, summary disposition of SWC's appeal is unsupported and the motion should be denied.

2. PROCEDURAL BACKGROUND.

2.1 SWC Comment on Applications.

The proposal before the Hearing Examiner is to construct two warehouse buildings, Warehouse "A" and Warehouse "B", and a "business park" known as the "Greenline Business Park". These buildings are proposed by the Industrial Realty Group (IRG) of Los Angeles, the recent purchaser of the property, and are proposed to be constructed entirely within the property formerly owned by the Weyerhaeuser Company on the east side of I-5.

Following initial application for a fish processing plant on the site of current proposed Warehouse "A," SWC was formed to preserve and protect the community and natural values of the Weyerhaeuser Campus. Even before SWC was incorporated, members of SWC filed comments on the original applications for development. See Comments on application by the North Lake Improvement Club (NLIC) dated August 21, 2016, Attachment A to the Declaration of J. Richard Aramburu in Opposition to Motion to Dismiss ("Aramburu Decl."). That was followed by a letter from counsel for

[1]At page 4, line 6, the motion indicates that it is being requested by "the City," but does not disclose whether the city's participation in the motion is at the direction of the mayor, the City Attorney, the Community Development Director or the City Council.

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the NLIC dated September 1, 2016, also commenting on the application. Attachment B to Aramburu Decl.

SWC also filed comments on the Warehouse "B" application on October 30, 2017 (Attachment C to Aramburu Decl.), on the Greenline Business Park application on May 29, 2018 (Attachment D to the Aramburu Decl.) and on the MDNS for Warehouse "A" on November 9, 2018 (Attachment E to the Aramburu Decl.).

Each of these letters raised substantial issues concerning the impact of the projects and their consistency with Federal Way codes, including the terms of Ordinance 94-219 that set terms for the use of the entire Weyerhaeuser Campus some twenty-five years ago.

2.2 Pending Appeals.

The proceeding now before the Hearing Examiner concerns two appeals, consolidated for review.

The first is the appeal of the MDNS for the Warehouse "A" proposal filed on November 30, 2018, File No. 16-102948-SE, which is part of the record here and incorporated by reference herein ("SEPA Appeal"). The MDNS is attached to that appeal. The second appeal challenges the project approval for Warehouse "A", File No. 16-102947 and was filed on February 21, 2019; it is also part of the record and incorporated by reference herein ("the Project Appeal"). The Process III Project approval is attached to the Project Appeal.

Following the receipt of exhibit and witness lists on June 7, the hearing on the merits is scheduled for June 20, 21 and 26.

3. AUTHORITY OF THE EXAMINER TO ISSUE A SUMMARY DISMISSAL, AND STANDARD OF REVIEW.

3.1 Authority of Hearing Examiner to Summarily Dismiss Appeal.

At page 6, lines 4-13, the Respondents claim that the Hearing Examiner has authority to issue summary dismissals of pending appeals and claim that their motion is

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"procedurally proper." They cite to the Hearing Examiner's Rules of Procedure ("HER") in support.

Respondents are correct that the rules of procedure allow motions to be filed, however their motion does not cite to any authority granted either by the HER or by the Federal Way Revised Code (FWRC) for summary dismissal of appeals. Unlike some Hearing Examiner rules, there is no reference to Superior Court rules. Nonetheless, Respondents claim HER 9(a) permits dismissal of a filed appeal for failure to comply with a "jurisdictional requirement," but the text of that rule makes clear that this is limited to procedural requirements, such as filing deadlines, fee payment or service of documents:

> Fee and content requirements are set by Code. Any applicable Code deadlines for filing an appeal or serving the appeal at specified places or upon specified persons shall be considered jurisdictional. The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal upon motion by a party or *sua sponte* by the examiner at any time prior to the issuance of a final decision.

(Emphasis supplied). Nothing in this rule permits summary dismissal of the merits of an appeal.

Further, the City Council in FWRC 2.95.040 describes the jurisdiction of the Hearing Examiner as follows:

> **2.95.040 Jurisdiction, powers and authority.**
> 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. In addition, the city council may, from time to time, grant to the hearing examiner such other jurisdiction, powers, duties and authority as city council deems appropriate, consistent with state and city law.

Respondents do not cite to any provisions of the referenced code chapters, or any special Council rules that support special jurisdiction to issue summary dismissals of appeals. Indeed, FWRC 19.70.125 provides:

> 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. The hearing examiner may only consider evidence, testimony, or comments relating to errors of law raised or the disputed findings and conclusions.

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The Respondents do cite the third sentence of this section in support of their claim, but it is also inapplicable because the appeal does not contain "any request for modification or waiver of applicable requirements of this title or any other law." The project appeal specifically addresses the terms of the project approval issued by the City and does not ask for modification of legal requirements. Again, nothing here requests summary dismissal of the application.

HER 6 includes as one of the "rights of a party" under Subsection (b) the "Presentation of Evidence." Moreover, HER 9(i) requires that:

> Copies of any written response to the appellant's objections and exceptions shall be sent to the Hearing Examiner and all parties to the appeal by the responding department prior to the appeal hearing.

Apparently the Motion to Dismiss is the "written response," but the rule does not suggest such "written response" can be transformed into a motion to dismiss. The rule anticipates that the "written responses" will be resolved in the appeal proceeding.

Moreover, HER 9(k) expressly rejects judicial motion practice and such formalistic rules, saying:

> The format for an appeal hearing will be informal, yet designed in such a way that the evidence and facts relevant to the proceeding will become readily and efficiently available to the Hearing Examiner.

Hearing Examiner acceptance of summary dismissal proceedings, with lengthy and complex motions, will transform the informal hearing process into a legalistic and technical one, greatly increasing the costs and complexity of citizen access to Federal Way land use decision making. There is no support in Federal Way codes that the Council intended such a result.

The respondents also claim that HER 9(e) permits dismissal of appeals that are "without merit on their face." However, that authority is very limited and reserved for appeals that are obviously outside the Federal Way appeal process jurisdiction. No authority is cited that permits summary dismissal of an appeal.

In fact, the content of the Respondent's dismissal motion plainly moves into the

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merits of the appeal, beyond facial merit. Thus Respondents request the Examiner to resolve GMA issues, vesting and comprehensive plan matters, none of which relate to the merit of the appeal on its face.

3.2 Standards for Summary Dismissal.

Even if the Examiner had authority to entertain motions for summary dismissal, the summary motion is not supported by the generally applicable rules regarding such motions.

As noted above, neither the HER nor the FWRC provide authority for summary dismissal. Accordingly, there are no criteria or standards for such summary dismissal and no rules governing standards for issuance of such motions.

By analogy, the rules for Superior Court Rules provide for possible dismissal under CR 12 (b)(6) or CR 56. However, any motions for dismissal are strictly limited. Under CR 12(b)(6), a high bar is established:

> To prevail on a CR 12(b)(6) motion, a defendant has the burden of establishing "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc.,* 89 Wash.2d 959, 961, 577 P.2d 580 (1978) (citing *Halvorson v. Dahl,* 89 Wash.2d 673, 674, 574 P.2d 1190 (1978); *Berge v. Gorton,* 88 Wash.2d 756, 759, 567 P.2d 187 (1977)); *Hoffer,* 113 Wash.2d at 153, 776 P.2d 963. The motion should be granted "sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1349, at 192-93 (2d ed. 1990); see *Orwick v. Seattle*, 103 Wash.2d 249, 254, 692 P.2d 793 (1984).

Fondren v. Klickitat County, 79 Wn.App. 850, 930, 905 P.2d 928, (1995). In this procedural context, all allegations in the complaint are accepted as true, and no matters outside the pleadings may be considered. *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978).

If the Respondents' motion is to be decided as a summary judgment motion, additional criteria apply. In review of a summary judgment motion, all the evidence and reasonable inferences thereto are viewed in the light most favorable to the non-moving party and doubts should be resolved in favor of allowing a case to proceed to trial.

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Roger Crane and Associates Inc. v. Felice, 74 Wn.App. 769, 775 (1994).

3.3. Conclusion Regarding Summary Dismissal.

The Hearing Examiner should decline the invitation of the Respondents to convert Process III appeal proceedings into a technical and legalistic proceeding. While prehearing disposition of appeals that are on their face defective is certainly within the authority of the Examiner, i.e. appeals that are untimely, brought for delay or facially inadequate, or plainly outside HE jurisdiction, nothing supports the importation of Superior Court procedures and motion practice into appeal proceedings intended to be informal and accessible to local residents.

4. EVIDENCE RELIED UPON.

This response is based on the file, records of the proceeding and the subjoined Declaration of J. Richard Aramburu in Opposition to Motion to Dismiss and its attachments.

5. THE EXAMINER HAS JURISDICTION OVER CHALLENGES TO THE CONCOMITANT AGREEMENT.

5.1 Jurisdictional Issues.

At pages 7-8 of their motion, Respondents claim that the Hearing Examiner lacks jurisdiction to review claims regarding the Concomitant Agreement. This confusing claim is not supported by the Federal Way code and Examiner rules.

As noted in the attachments to the Aramburu Decl., the application of the Concomitant Agreement to these proceedings is an issue that has been raised by SWC and its predecessors going back three years. Indeed, the letter of North Lake Improvement Club from as far back as August, 2016 (Exhibit A to the Aramburu Decl.), had extensive discussion of the application of the Concomitant Agreement. The Project decision dated February 4, 2019 (attached to SWC's project appeal) makes reference to the Concomitant Agreement and relies on it in making the decision. See February 4, 2019, cover letter to ESM Consulting. As the Respondents note, FWRC 19.70.125

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states appeals must be related to errors of law raised in the appeal. Motion at 14-16.

The Respondents claim that any challenge to the Concomitant Agreement must be in Superior Court. However, as discussed in Section 5.2 of this brief below, the Concomitant Agreement essentially lied fallow for at least 22 years before IRG purchased the property and made its application for the predecessor project to Warehouse "A".

Indeed, for the first several years, the Concomitant Agreement was contemporaneous with most standards. Though the Concomitant Agreement became more and more disengaged from zoning and environmental standards as the years went by, there was no project proposed that sought to employ its provisions. As noted below, review of the validity of the agreement must not only be tied to a specific project, but also challenged under available local appeal procedures.

Nor is SWC seeking a modification or waiver of the requirements of the Federal Way Code as the Respondents claim in their motion at page 8, lines 15-17. In fact, as discussed in Section 8 below, the City carefully did not codify or even reference Ordinance 94-219 in Title 19 of the zoning code. Indeed, it is IRG that is seeking to be relieved of current code requirements by their insistence on applying the Concomitant Agreement instead of contemporaneous standards.

These are issues that are not susceptible to summary disposition and the Respondents' motion in this regard should be denied.

5.2 SWC's Claims are Not Barred by Any Statute of Limitations.

The Respondents also allege that some sort of statute of limitation applies to claims related to the Concomitant Agreement. While they cite provisions of the 1994 Federal Way code, there is no citation to any legal authority for their proposition. As noted above, any such claim is well outside the authority of the Hearing Examiner to determine in a summary motion.

The procedural context is important here. Respondents correctly note that the

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Concomitant Agreement was adopted in 1994 and references the Federal Way code effective at the time, which had a deadline for challenge. Page 9 of Motion. However, there is no indication that the Concomitant Agreement was applied to any land use proposal while the Weyerhaeuser Company owned the property. It was only after Industrial Reality Group of Los Angeles bought the property that a development application was submitted (2016). As described in the letters to the city in August and September, 2016 (attached to the Aramburu Decl.), issues regarding the Concomitant Agreement were raised at the very outset of review by SWC and other concerned citizens.

As noted in the letters submitted by SWC, and in the Project Appeal, the challenge to the Concomitant Agreement is not its adoption in 1994, but rather whether this land use ordinance should continue to control land use decision-making 25 years later, ignoring the virtual flood of land use and environmental laws and regulations adopted in the interim.

Since there was no project over the years that might seek to apply the Concomitant Agreement to any land use proposal, there was no reason or basis to challenge the ordinance until now. Indeed, the Weyerhaeuser Company did not submit any applications, inconsistent with current land use standards or otherwise. Any challenge without an accompanying land use proposal would have been fully speculative and dismissed for that reason.

Thus our courts have dismissed land use actions for failure to allege an injury in fact under these circumstances:

> When a person or corporation alleges a threatened injury, as opposed to an existing injury, the person or corporation must show an immediate, concrete, and specific injury to themselves. *Trepanier*, 64 Wash.App. at 383, 824 P.2d 524 (citing *Roshan v. Smith*, 615 F.Supp. 901, 905 (D.D.C.1985)). " If the injury is merely conjectural or hypothetical, there can be no standing." *Trepanier*, 64 Wash.App. at 383, 824 P.2d 524, (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

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KS Tacoma Holdings, LLC v. Shorelines Hearings Bd., 166 Wn.App. 117, 129, 272 P.3d 876, (Div. 2 2012).

> [T]he only threatened injury alleged is that several sections of the new zoning code will reduce allowable densities and development potential within Everett, thereby transferring growth that cannot occur in Everett to unincorporated Snohomish County. His argument is based on the unsupported assumption that reducing densities in some areas will necessarily result in reduced development potential within Everett to such an extent that development will be forced into unincorporated Snohomish County. Trepanier's argument is fatally flawed because his bare assertion that the new code will likely create serious adverse impacts on unincorporated Snohomish County has absolutely no factual support in the record.

KS Tacoma Holdings at 166 Wn.App. at 179, citing *Trepanier v. City of Everett,* 64 Wn.App. at 383-84.

In the present circumstances, there was no basis to challenge the Concomitant Agreement on some hypothetical and potentially obnoxious proposal. As the caselaw indicates, review must await an actual, concrete proposal indicating land use damage to the community. Here that did not occur until 2016 when IRG presented its Warehouse "A" proposal, and SWC responded with its concerns in a timely manner by filing detailed comments.

Should SWC have challenged the Concomitant Agreement in 2016 when it found out about the Warehouse "A" proposal? Again, case law supports the proposition that any challenge must await a final administrative decision:

> This query brings into application the overlapping doctrines of the final order rule, exhaustion of administrative remedies and ripeness for review, which all deal with the problem of whether a petitioner seeking judicial review has prematurely resorted to the courts. What is sometimes called the 'final order doctrine' prevents review of an order which is not final under a statutory provision for review of an 'order.' *Federal Power Comm'n v. Metropolitan Edison Co.,* 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

State Dept. of Ecology v. City of Kirkland, 84 Wn.2d 25, 523 P.2d 1181, (1974).

Further, administrative remedies must be exhausted before a challenge can be made:

> But, where " 'a party affirmatively seeks declaratory or injunctive relief,... it must show that its remedies have been exhausted in order to show it has standing to raise even a constitutional issue.' " *Ryder v. Port of Seattle,* 50 Wash.App. 144, 152, 748 P.2d 243 (1987) (quoting *Ackerley Communications, Inc. v. City of*

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Seattle, 92 Wash.2d 905, 908-09, 602 P.2d 1177 (1979)).

Harrington v. Spokane County, 128 Wn.App. 202, 210, 114 P.3d 1233, (Div. 3 2005). This is based on the common sense proposition that the result of the administrative proceeding may be to otherwise prohibit or modify a proposal such that a challenge on other grounds is not required.

SWC promptly raised its concerns about the IRG proposal in comment letters discussing the deficiencies in application of the Concomitant Agreement, and promptly and timely filed the current appeal. Even if the Hearing Examiner had authority to determine statute of limitation claims in a summary motion to dismiss, the motion should be denied.

5. NO SUMMARY DISMISSAL OF THE CLAIMS REGARDING THE CONCOMITANT AGREEMENT IS APPROPRIATE.

On pages 9-11 of their motion, respondents seek to have the Hearing Examiner make a summary determination that the Concomitant Agreement is valid and binding. Again, review and determination of these issues is not appropriate on a summary proceeding.

The authority cited by respondents is inapposite to the issues before the Examiner. First, Respondents claim that RCW 36.70B.170(1) "acknowledges the validity of pre-1995 concomitant agreements." Motion at 10, lines 12-13. However, all the statute says, albeit in Subsection (2), is that "RCW 36.70B.170 through 36.70B.190 and section 501, chapter 347, Laws of 1995 do not affect the validity of a contract rezone, concomitant agreement, annexation agreement, or other agreement in existence on July 23, 1995." (Emphasis supplied.) Contrary to the statement of the Respondents, RCW 36.70B.170 does not retroactively validate an otherwise invalid Concomitant Agreement.

Second, the Respondents claim that the Concomitant Agreement "expressly permits subsequent City Councils to amend it under the procedures in section 22."

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Motion at 10, line 2-3. However, Section 22 actually says that the Concomitant Agreement "may be modified only by a written agreement duly executed by both parties." The owner of the property has complete veto power over any amendment of the agreement.

Third, Respondents claim the right to summary dismissal, relying on *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn.App. 771, 158 P.3d 1179 (Div. 1 2007) at Motion, lines 9-10. However, that case only states that in review of a municipal agreement the court must apply "a balancing test requiring courts to weigh the benefits and detriments to the public of an agreement." 138 Wn.App. at 777. Thus the Court indicated an inquiry into the facts was necessary to resolve the validity of such contracts; plainly not a resolution appropriate for summary dismissal.

The Respondents cited to the test adopted in the *Swinomish* case, which dealt with the establishment of instream flows to protect fisheries resources. However, the present case addresses a determination of the validity of a 25-year-old agreement that essentially provides no public benefits and froze land use regulations forever, or until the property owner consents to an amendment under Section 22 of the Concomitant Agreement. Given the one-sided nature of the Concomitant Agreement, it is likely that, following a complete hearing, it will fail under the balancing test of "weighing the benefits and detriments to the public."

Summary dismissal is not appropriate to these circumstances and the motion should be dismissed.

6. THE HEARING EXAMINER HAS JURISDICTION OVER CLAIMS WHICH REFERENCE THE GROWTH MANAGEMENT ACT.

At pages 11 and 12, the Respondents assert that the Hearing Examiner does not have jurisdiction over claims that implicate the GMA. As the claims are procedural, and are supported by the comprehensive plan, dismissal is not appropriate.

SWC asserts in their appeal that two key procedural elements of GMA have

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been ignored by the City in their continuing review of the IRG application. First, that the obligation to apply "best available science" (BAS) to project review was violated because the City refused to apply BAS principals to the current applications. See Appeal Statement Paragraphs 3.1.4, 3.4a. 3.7.1. Second, that the City has failed over the past twenty-five years to engage in periodic review of the land use and environmental regulations for the former Weyerhaeuser property. See Paragraph 3.1.3.

As is evident by reading these allegations, the appellants do not seek to apply substantive criteria of the GMA, but rather the procedural criteria. The GMA requires that each local government adopt best available science and periodically review its land use and critical area ordinances with the intent that the best and most up-to-date standards are applied. Note that the Respondents do not assert that they periodically reviewed the CP-1 regulations that apply to the property in question, nor do they contend that the applicable critical area regulations have been reviewed and amended to apply BAS. Rather, Respondents' claim is that the property has been inoculated against such review by virtue of their continued insistence to apply the Concomitant Agreement.

Respondents cite *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25, (2007) in support of their claim. However, the court in *Woods* dealt with a claim that the rezone violated the GMA because it allowed urban growth in a rural area. 162 Wn.2d at 606. But, in this case, the issue is whether the City applied periodic review and BAS regulations to the property in question. Though Respondents claim that City compliance with the pertinent provisions of GMA must be heard by the Growth Management Hearings Board (Motion at 12, line 8-12), they ignore the fact that the Growth Board does not entertain appeals on site-specific actions such as the project permit here as confirmed in *Woods*, 162 Wn.2d at 610.

Further, as discussed herein, FWRC criteria for review of Process III approvals require compliance with the Federal Way Comprehensive Plan. *Woods* confirmed:

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> If a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning code and the comprehensive plan. *Cingular Wireless, LLC v. Thurston County,* 131 Wash.App. 756, 770, 129 P.3d 300 (2006); see *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 43, 873 P.2d 498 (1994).

162 Wn.2d at 614.

In the present case, the 2015 Federal Way Comprehensive Plan incorporates both claims made by SWC in its appeal.

First, regarding periodic review the Land Use Element at page II-9 provides:

> **LUP6** Conduct regular reviews of development regulations to determine how to improve upon the permit review process.

There is no allegation that the City has conducted any review of the development regulations for the property covered by Ordinance 94-219 in the past twenty-five years.

Second, in Chapter 9, the "Natural Environment" Element of the Plan, there are policies that incorporate BAS:

> **NEP7** Implement and periodically update environmentally critical area regulations consistent with Best Available Science while also taking into consideration the City's obligation to meet urban-level densities and other requirements under the GMA
>
> . . . .
>
> **NEP11** Environmentally critical area regulations will be based on Best Available Science

(Emphasis supplied). Indeed, at page 9 of the Natural Environment Element of the 2015 Federal Way Comprehensive Plan, it states:

> Pursuant to the periodic major update policies of the GMA (RCW 36.70A.130(5)(a)), the City updated its environmentally critical area regulations in 2015 to meet Best Available Science requirements. Page IX-1.

What is not stated in the plan is that the City refused to conduct a "review of development regulations" nor to apply BAS-revised critical areas standards to the property in question. Again, the failure of the IRG proposal to comply with these applicable comprehensive plan elements is a criteria for review in these proceedings.[2]

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[2]Importantly, when the City Council amended the Federal Way Compehensive Plan in 2015, there was no application for any new project on the former Weyerhaeuser site, which came along only in 2016.

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Based on the foregoing, claims regarding both the obligation of the City to conduct periodic review and apply BAS to the current proposal are properly before the Hearing Examiner. There is no basis to eliminate them from this appeal on a summary dismissal and they should proceed to an evidentiary hearing.

7. THE FEDERAL WAY CODE REQUIRES REVIEW OF THE COMPREHENSIVE PLAN.

At pages 13-15 of their motion, the Respondents seek to dismiss all claims made by SWC that the proposal is inconsistent with the Comprehensive Plan. This claim is contrary to both the applicable code and the terms of the decision.

First, the Federal Way Land Use Code specifically requires in FWRC 19.65.100(2), the following:

> (2) Decisional criteria. The director shall use the criteria listed in this subsection and the provisions of this title describing the requested decision in deciding upon the application.
>
> (a) The director may approve the application only if:
>
> (i) It is consistent with the comprehensive plan;

(Emphasis supplied). Indeed, the cover letter (first page) to the decision specifically states a conclusion that the proposal is "consistent with the comprehensive plan." Exhibit A, the "Findings for Project Approval" conclude that the proposal is consistent with the Comprehensive Plan, citing eight specific provisions of the revised 2015 Comprehensive Plan, most of which are generic and not related specifically to the CP-1 designation.[3] See Pages 20-21. That the Director believed he should apply various sections of the Comprehensive Plan under FWRC 19.65.100(2)(a)(i) certainly indicates that summary dismissal is not appropriate and review should await testimony from the Director as to which Comprehensive Plan standards he applied, and why he did not apply others.

It is correct that ordinarily Comprehensive Plan provisions are not applied in

[3]The City's motion indeed seems to challenge these findings and conclusions of the Community Development Director. It is unclear which interests are represented in the City participation in the dismissal motion, that of the Director or someone else in the City determined to support the applicant proposal.

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specific land use decisions, but local governments have the authority to include compliance with the Plan as specific land use or environmental criteria. Accordingly, in *West Main Associates v. City of Bellevue*, 49 Wn.App. 513, 526, 742 P.2d 1266 (Div. 1, 1987) the court said: "Thus, if the standards in a Comprehensive Plan are adopted locally as SEPA policies or standards, they become enforceable standards for exercising SEPA authority."

The same rule applies if the zoning code incorporates the Comprehensive Plan as a decision criteria:

> However, the zoning code itself expressly requires that "[s]olid waste facilities that require a Solid Waste Permit shall indicate on a site plan that the facility *meets* ... any comprehensive land use plan." (Italics ours.) PCC 18.10.560. Thus, for landfills, the zoning code requires consistency with the comprehensive plan.

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 43, 873 P.2d 498, (1994)[4] To the same effect is *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 332 (2007):

> If a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning code and the comprehensive plan. *Cingular Wireless, LLC v. Thurston County*, 131 Wash.App. 756, 770, 129 P.3d 300 (2006); see *Weyerhaeuser v. Pierce County,* 124 Wash.2d 26, 43, 873 P.2d 498 (1994).

Based on the foregoing, the inclusion of the Comprehensive Plan as a project criteria, as applied by the Director, is consistent with the law and does not form the basis for a summary dismissal. That the Director failed to apply and require conformance with the comprehensive plan is appropriate for consideration during the evidentiary hearing.

8. THE HEARING EXAMINER MUST APPLY THE FULL CONTENT OF REGULATIONS ADOPTED BY THE CITY.

At pages 15-18 of their motion, the Respondents make a confusing and ambiguous argument that certain portions of adopted regulations, and the Concomitant

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[4]The Respondents' motion claims that this case supports their position. Motion at page 14, lines 16-17. However, the Court in *Weyerhaeuser* actually concluded that the landfill at issue "is not so incompatible with the rural-residential designation as to be proscribed by the Comprehensive Plan." 124 Wn.2d at 44.

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Agreement, cannot form the basis for an appeal. Again, there is no basis for parsing through criteria in a summary dismissal motion which requires that the decision maker accept all allegations as true. See Section 3.1 of this brief above.

As described above, the City Council has determined that the land use applications must be "consistent with the comprehensive plan" as codified in FWRC 19.65.100(2)(a)(I). There are no limitations stated that in the "Decisional Criteria" that consistency is limited to only certain parts of the Plan or that certain statements or content of the plan are off limits. Certainly the applicant could have requested, or the City Council could have added, qualifiers that limit this consistency requirement. However, the Examiner must interpret the code as written, not as someone would like it to be written.

Once again, the Respondents misapply *Lakeside Industries v. Thurston County,* 119 Wn.App. 886, 83 P.3d 433 (Div. 2 2004) at page 17, lines 1-4. They claim that the broad nature of an enactment "cannot be the basis for vacating a Process III approval." Motion at 17, lines 18-19. But the *Lakeside* Court actually applied the purpose section of the plan, finding that a landfill was consistent with the purpose section:

> Similarly, the sub-area plan allows accessory uses to existing mining operations and it recognizes the Holroyd site as an existing mine. And the zoning code allows asphalt manufacturing as an accessory use. Further, the sub-area plan allows existing commercial activities; only the broad purpose statement to preclude new large scale commercial development could conceivably prohibit Lakeside's proposed plant. Thus, the proposal fits within the plan's broadly stated commercial development purpose to allow existing activities with accessory uses but preclude new large scale activities.

119 Wn.App. at 899 (Emphasis supplied).

Next the motion contends that the certain portions of Ordinance 94-219 (which authorized the Concomitant Agreement) and "Conclusions" found in the Concomitant Agreement itself cannot be applied in the appeal. This is incorrect.

The present case differs from both *Lakeside Industries* and *Martel* as cited on page 17 of Respondents' Motion. In those cases, the prefatory material was contained

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in general legislative enactments, generically applicable to all development proposals in the community. Thus the prefatory language in *Martel* was applicable to all land within the City of Vancouver. 35 Wn.App. at 255. As noted above, the general purpose statement at issue in *Lakeside* was applied by the court and the land use proposal found to be consistent with it.

In the present case, Ordinance 94-219 and the Concomitant Agreement related to only a single property, owned in its entirety (at the time) by Weyerhaeuser. Indeed, Map II-2, Zoning Map for the City in the 2015 Comprehensive Plan and the Official Zoning Map for the City of Federal Way, shows the entire Weyerhaeuser property as governed by a Special Condition Number 5, referencing Ordinance 93-190. No explanation is provided was to why Ordinance 94-219 is not included in the map, but the plain indication is that the City intends to apply the <u>whole</u> applicable ordinance, not just selected parts. Moreover, the CP-1 zone described in the Concomitant Agreement is not set forth in the zoning and development code itself where prefatory material might be removed by a code reviser. Indeed, there is no reference in the Concomitant Agreement, or Ordinance 94-219, indicating that the Recitals or Conclusions are not part of the enactment or excluded therefrom.

In reviewing legislation. the enactment must be read as a whole:

> We have previously acknowledged that, in interpreting the GMA, as in other matters of statutory construction, " 'the Supreme Court is the final arbiter.' " *King County,* 142 Wash.2d at 555, 14 P.3d 133 (quoting *Nat'l Elec. Contractors Ass'n,* 138 Wash.2d at 19, 978 P.2d 481). " 'The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.' " *Id.* To discern legislative intent, "the court begins with the statute's plain language and ordinary meaning," but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with] related provisions and the statute as a whole. *Id.* at 555, 560, 14 P.3d 133.

Quadrant Corp. v. State Growth Management Hearings Bd., 154 Wn.2d 224, 238, 110 P.3d 1132, (2005).

There is no basis to decide this issue on a summary basis. The Hearing Examiner should review all evidence and the enactment in context, giving full meaning

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to all provision. The motion should be denied.

9. THE CONTENT OF ALLEGATIONS IN THE APPEAL STATEMENT IS SUFFICIENT FOR REVIEW.

On pages 18-19, the Respondents object to certain allegations in the Notice of Appeal.

At page 18, lines 16-22, Respondents request that the Hearing Examiner summarily dismiss claim 3.7.4 on the grounds that it refers to the entire code. However that claim specifically appeals the codes section described in Paragraph 3.6; accordingly it is not vague.

Next, the Respondents want summary dismissal of the SWC claims addressing cumulative impacts, with vague referencing of "nearby projects." Motion at 19, line 1. The Respondents conveniently fail to disclose that these other projects are their own proposals and also promoted by IRG's project entity.

As described above, the complete applications have been filed for both Warehouse "B" and the Greenline Business Park, and SWC has filed comment letters on each and continuously asserted that the cumulative review of the projects was necessary. See attachment to Aramburu Decl.

In addition, both Ordinances 93-190 and 94-210 regulate the entire site and not just that portion of the property for the Warehouse "A" application. Indeed, even the CP-1 zoning in Exhibit C to the Concomitant Agreement makes reference to the entire property without segmentation into individual sites. As indicated on page C-1:

> The provisions of this section apply to all property designated Corporate Park (CP-1) Zone on Exhibit B-1 of this Agreement. This property shall be subject to its own unique standards of review processes as set forth in the Agreement.

(Emphasis supplied). Other provisions apply to the entirety of the property, such as Section III.A dealing with Lot Coverage:

> The aggregate impervious surface coverage by all permitted uses, primary and accessory shall not exceed 70 percent of the total CP-1 zoned property.

(Emphasis supplied.) Section XIII.B regarding off-street parking provides:

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> New development shall require compliance with applicable off-street parking minimums, except in computing off-street parking requirements, the aggregate of all proposed and existing uses on the property may, subject to approval of the Director, be considered as a whole in establishing the minimum number of vehicle spaces required, based on the following:
>
> 1. Any excess capacity in existing parking spaces lying withinn eight hundred (800) feet of a proposed development may be used to reduce the requirement for additional parking development.
> 2. If the occupant of a proposed use provides van or alternative service between the proposed use and remote parking facilities, any excess parking on the entire property may be used to reduce the requirement for additional parking development.

Cumulative consideration of proposals in the CP-1 zone is an integral part of Ordinance 94-219 and cannot be disavowed after 25 years, even if IRG (and apparently the City) desire to avoid complete review by dividing the proposal into what they see as more manageable bites.

Again, summary judgment on this issue is inappropriate. There are multiple issues related to the cumulative impacts of the several complete applications filed by the applicant that require full consideration in an evidentiary hearing.

10. CLAIM 3.7.6 IS FULLY RELATED TO THE PROJECT APPLICATION.

Section 3.7.6 of the Appeal Statement references changes to the physical condition of the property undertaken by the current owner. Paragraph 14.3 of the Concomitant Agreement provides that the "existing drainage system" is "accepted by the City as meeting the pre-1990 King County drainage requirements, and no change will be required for current uses of the property." However, that section also provides that new development "shall be designed to comply with Federal Way drainage requirements applicable at the time of development application...". Changes in drainage not consistent with current code requirements, and done without permits, are inconsistent with the Concomitant Agreement. There is no basis here for summary dismissal.

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11. CONCLUSION.

Summary dismissal, CR 12(b)6) or summary judgment procedures are not permitted under Federal Way codes and Hearing Examiner rules. Such technical procedures add time, cost and uncertainty to the informal appeal procedures contemplated by City rules. Even if it were permitted, SWC has demonstrated that summary dismissal is not appropriate even under the technical standards found in the Superior Court Rules. Summary dismissal without an evidentiary hearing is likely to be rejected by a Court in any event, increasing time and expense for all.

The Respondents' motion should be denied.

Respectfully submitted this 9th day of May, 2019.

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