The Honorable Judge Michael K. Ryan
April 24, 2020, 9:00 AM
With Oral Argument

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

FEDERAL WAY CAMPUS, LLC, a Delaware limited liability company registered in Washington, Petitioner, v. CITY OF FEDERAL WAY, a Washington corporation, Respondent, SAVE WEYERHAEUSER CAMPUS, a Washington nonprofit corporation, Additional Party.	**CONSOLIDATED CASE NO.** NO. 19-2-30502-9 KNT RESPONDENT CITY OF FEDERAL WAY'S BRIEF
SAVE WEYERHAEUSER CAMPUS, a Washington nonprofit corporation, v. CITY OF FEDERAL WAY a Washington municipal corporation, and FEDERAL WAY CAMPUS, LLC, a Delaware limited liability company registered in Washington.	NO. 19-2-30577-1 KNT

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I. INTRODUCTION

At issue in this consolidated Land Use Petition Act (LUPA) appeal is the regulatory approval granted by the City of Federal Way ("City") authorizing Petitioner Federal Way Campus, LLC ("FWC") to develop a portion of the former Weyerhaeuser corporate campus as a warehouse facility. The land use permit issued by the City, together with its supporting State Environmental Policy Act (SEPA) determination, are challenged in this case primarily by Petitioner Save Weyerhaeuser Campus ("SWC"), a neighborhood group that opposes FWC's proposed project.

SWC's various arguments are without merit, and do not satisfy the strict standards for judicial relief under LUPA. The City's permit decision and SEPA determination were collectively supported by over 35 pages of detailed findings and conclusions documenting the project's compliance with applicable regulatory standards, evaluating its environmental impacts, and imposing numerous conditions to protect the public health, safety and welfare. Both determinations were subsequently upheld by the City's independent Hearing Examiner following a five-day administrative appeal hearing. The Hearing Examiner's September 12, 2019 and October 29, 2019 rulings—which together comprise the "land use decision" challenged in the above-captioned case—in turn contained over 51 pages of careful analysis and citations to the factual record. Numerous technical reports and other written exhibits in the administrative record, as well as countless hours of expert testimony by City and FWC witnesses, supported the Examiner's conclusions. The factual underpinnings of SWC's challenge are clearly outweighed by the sheer weight of this evidence.

SWC's chief contention is that the City failed to adequately evaluate whether FWC's warehouse proposal would create various "cumulative impacts" when aggregated with other pending and/or future development projects in the vicinity of the project site. The Hearing Examiner correctly rejected this argument. Under the controlling SEPA standard, FWC's warehouse facility simply lacks the type of interdependence with these other proposals to require evaluation in the same environmental

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document. Numerous witnesses likewise testified that the City did in fact carefully review FWC's proposal to identify the potential for any cumulative impacts. Unable to cite any contrary evidence, SWC attempts to deprecate this undisputed testimony as "post hoc rationalization"—an argument that defies every applicable presumption and standard of review. Finally, and most fundamentally, the overwhelming weight of evidence, including the testimony of numerous experts, refutes any suggestion that FWC's warehouse proposal will actually cause any unmitigated cumulative impacts in the first instance. The other appeal claims raised by SWC are equally unavailing, as they variously rely upon an incorrect interpretation of the City's permit approval standards and/or disregard relevant evidence.

The Superior Court should likewise reject FWC's limited challenge to the two minor conditions of approval imposed by the Hearing Examiner. By their terms, the added conditions do nothing more than ensure that the underlying warehouse project will comply with applicable regulations and will mitigate a proportionate share of its own impacts. This is hardly an actionable outcome under Washington law.

In sum, neither Petitioner has met its burden under LUPA of demonstrating that the City's exceptionally thorough, detailed land use decision was clearly erroneous or was otherwise factually unsupported. The Court is respectfully requested to deny both appeals and to affirm the underlying decision.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Detailed descriptions of FWC's proposed warehouse development and the project site are set forth in the City of Federal Way Community Development Director's February 4, 2019 Process III Approval decision.[1] The most pertinent aspects of this background information, together with the relevant procedural history, are briefly summarized below.

[1] AR 2417-2447.

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2.1 The Warehouse "A" Project Site and FWC's Proposal.

FWC's proposed development is referred to throughout the administrative record as the Greenline or Woodbridge Warehouse "A" project. The proposal is for a 45-foot tall, 225,950 square-foot general commodity warehouse facility, an associated office and on-site parking spaces, together with wetland fill and other incidental site work. The project site itself is comprised of 15.46 acres. The scope of the project includes installation of a stormwater pond and other minor site work on the adjacent parcel to the south. FWC's current proposal is a modified version of the original project application (the "Preferred Freezer" submittal) that was previously filed for the underlying property in June 2016.[2]

The Warehouse "A" project site is comprised of two vacant parcels located on the former Weyerhaeuser campus property in Federal Way, which FWC acquired in 2015.[3] Since 1994, the Weyerhaeuser property has been governed by a recorded concomitant zoning agreement (the Weyerhaeuser Company Concomitant Pre-Annexation Agreement ("CZA")) adopted under Ordinance No. 94-219, as well as the zoning regulations in place at the time of the CZA's August 23, 1994 effective date.[4] The Warehouse "A" site is zoned Corporate Park ("CP-1") and is likewise classified as Corporate Park (CP) under the City of Federal Way Comprehensive Plan. It is undisputed that FWC's proposed warehousing, distribution and corporate office uses for the project site are allowed under the applicable CP-1 zoning designation and the CZA.[5]

FWC is also the applicant, and the underlying landowner, for two other land use projects located on the former Weyerhaeuser property. The first is the Warehouse "B" proposal, which is

[2] AR 2420-2421; Tr. 412.

[3] TR 407; Tr. 696.

[4] AR 1788-2001.

[5] AR 2420; AR 1791; AR 1818-1819.

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located adjacent and to the south of the Warehouse "A" project site. The second is the proposed Greenline Business Park, which is located approximately one quarter mile to the north of the Warehouse "A" site and across 336th Street. Except for the shared driveway access and storm facilities referenced below, both of these proposals are located on separate parcels distinct from the Warehouse "A" project site.[6]

The 2016 Warehouse "A" project application was filed with the City first in this sequence, followed by the applications for Warehouse "B" in September 2017 and the Business Park in November 2017, respectively. FWC did not propose a master plan or otherwise request any other type of consolidated review of the Warehouse "B" and Business Park proposals together with Warehouse "A." Honoring the applicant's preference, the City has processed the Warehouse "A" proposal first—reflecting its primacy in the relative order of application submittals.[7] No project decision and/or SEPA threshold determination has been issued for either Warehouse "B" or the Business Park; the applications for both projects remain pending and under administrative review.[8]

2.2 The City's Regulatory Review of the Warehouse "A" Proposal.

The City processed FWC's Warehouse "A" application under the standards and procedures for Process III Approvals in accordance with Chapter 19.65 of the Federal Way Revised Code (FWRC). The Process III decisional criteria are enumerated at FWRC 19.65.100(2)(a):

> The director may approve the application only if:
>
> (i) It is consistent with the comprehensive plan;
>
> (ii) It is consistent with all applicable provisions of this title
>
> (iii) It is consistent with the public health, safety, and welfare;
>
> (iv) The streets and utilities in the area of the subject property are adequate to serve the anticipated demand from the proposal;

[6] Tr. 414-416.

[7] AR 7313.

[8] AR 2422; Tr. 41-43; Tr. 697-698.

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(v) The proposed access to the subject property is at the optimal location and configuration; and

(vi) Traffic safety impacts for all modes of transportation, both on and off site, are adequately mitigated.

Following published, posted, and mailed public notice of the application, the City received approximately 300 written comments, all of which were considered as part of the City's regulatory review process.[9]

In support of the Warehouse "A" application, FWC submitted numerous technical reports documenting the project's regulatory compliance and addressing its anticipated impacts. These reports analyzed, *inter alia*, critical areas; geotechnical issues; transportation impacts; trees and landscaping; noise; air quality; drainage; aesthetic and visual impacts; and historical resource concerns.[10] The City and its own review consultants carefully evaluated these technical submittals and provided responsive comments and correction directives, which in turn FWC's project team addressed during multiple rounds of review.[11]

The City's SEPA Responsible Official, Community Development Director Brian Davis, reviewed the Environmental Checklist[12] for the proposal and issued a mitigated determination of nonsignificance (MDNS) on October 26, 2018.[13] The MDNS was subsequently modified to address concerns raised by the Washington Department of Transportation ("WSDOT").[14] On November 30,

[9] AR 2421; AR 2027-2377; TR 700-701.

[10] A list of the technical reports prepared for or in relation to the Warehouse "A" proposal is set forth in the City's staff report to the Hearing Examiner. *See* AR 2-4.

[11] *Id*.; AR 821-843.

[12] AR 2392-2416.

[13] AR 2385-2391. Under SEPA, a mitigated determination of nonsignificance is an agency's threshold determination that the underlying proposal, as conditioned with the mitigation measures imposed by the agency, is not likely to have significant adverse environmental impacts. *See* WAC 197-11-766; WAC 197-11-734; WAC 197-11-350.

[14] AR 2378.

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2018, the City issued the modified MDNS, which included a new finding and condition of approval requiring FWC to construct, to WSDOT's satisfaction and approval, right-turn storage for the westbound State Route18 off-ramp.[15]

On February 4, 2019, Director Davis issued the Process III Approval decision approving the Warehouse "A" proposal. The Director's 42-page decision was supported by 28 pages of detailed findings and conclusions which evaluated the project's consistency with the applicable FWRC decisional criteria, the CZA and the vested 1994 regulations. The decision also imposed over 40 specific conditions of approval to ensure the project's regulatory compliance and to mitigate its anticipated impacts.[16]

2.3 SWC's Administrative Appeals.

SWC filed a Notice of Appeal of the Warehouse "A" MDNS on November 30, 2018.[17] SWC subsequently filed a separate Notice of Appeal challenging the Process III Approval decision on February 21, 2019.[18] No other timely appeals of either determination were filed by any other party, including the numerous government agencies and tribes that received formal notice of the project application. Pursuant to FWRC 19.65.100(1), both of SWC's administrative appeals were consolidated and processed together in a combined proceeding before the City of Federal Way Hearing Examiner.

[15] AR 2378-2384.

[16] AR 2417-2447.

[17] AR 2464-2503.

[18] AR 2504-2542.

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On May 26, 2019, the Hearing Examiner granted the joint motion of the City and FWC to summarily dismiss, primarily on subject matter jurisdictional grounds, several issues that had originally been raised in SWC's Notices of Appeal.[19]

2.4 The Administrative Appeal Hearing.

In accordance with FWRC 19.70.100, the Hearing Examiner conducted a quasi-judicial, open-record hearing on SWC's remaining appeal issues. The hearing was held on June 20-21 and August 7-9 and spanned five full days.[20] Written exhibits and live witness testimony were presented by the City, FWC and SWC.[21] Testimony at the hearing was offered under oath. All parties were afforded an opportunity for cross-examination and to present rebuttal testimony. Members of the public were also allowed to testify and submit written comments.[22]

A substantial portion, if not an outright majority, of the hearing involved direct witness testimony offered by FWC and the City addressing how various aspects of the Warehouse "A" proposal satisfied the applicable FWRC criteria for approval and how the anticipated impacts of the project had been identified and adequately mitigated.[23] Much of this testimony was provided by technical experts, including professional engineers, scientists, and similarly credentialed specialists.[24] The City's witnesses, including Director Davis and several other City staff members, also testified regarding the substantive and procedural aspects of the City's regulatory review process.[25]

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[19] AR 6253-6264.

[20] AR 7851.

[21] AR 7849-7850.

[22] TR 372-392.

[23] *See, e.g.,* TR 401-587; TR 595-751; TR 781-929.

[24] *See, e.g.,* TR 459; TR 501; TR 526-527; TR 566-567; TR 655-657; TR 781; TR 851-852; TR 912-913.

[25] *See, e.g.,* TR 566-587; TR 595-686; TR 698-752; TR 852-932.

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Following the conclusion of the hearing, the parties were afforded an opportunity to submit post-hearing briefs addressing the legal and factual issues relevant to the appeal.[26] On August 14, 2019, the Hearing Examiner issued a post-hearing ruling summarily dismissing numerous appeal issues that SWC had failed to support with meaningful testimony or other evidence during the proceeding.[27]

2.5 The Hearing Examiner's Final Decision.

The Hearing Examiner issued his 42-page Findings of Fact, Conclusions of Law and Final Decision on September 12, 2019 ("Final Decision") denying both of SWC's administrative appeals and sustaining the City's Process III Approval decision.[28] The Final Decision likewise upheld the Warehouse "A" MDNS, but added two conditions of approval. The first (new Condition No. 11) was a requirement for FWC to acquire its Capacity Review Certificate[29] for the Business Park prior to any construction of Warehouse "A", and to remit payment to the City for any proportionate share mitigation necessary from the Warehouse "A" project to meet PM level of service requirements prior to occupancy of the Warehouse "A" facility.[30] The second condition added by the Hearing Examiner required FWC to supplement its stormwater management plan to demonstrate compliance with the *Executive Proposed Basin Plan Hylebos Creek and Lower Puget Sound*, which the Examiner

[26] AR 7403-7575.

[27] AR 7851.

[28] AR 7845-7886.

[29] The City's concurrency review process, including the Capacity Review Certificate mechanism, is codified at Chapter 19.90 FWRC and is described in Section 3.8(C), *infra*.

[30] AR 7885-7886.

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concluded had not been addressed in the Director's Process III Approval decision.[31] The Examiner affirmed the Process III Approval Decision and MDNS in all other respects. [32]

2.6 The Hearing Examiner's Reconsideration Decision.

SWC filed a timely motion for reconsideration of the Hearing Examiner's Final Decision.[33] After accepting responsive briefing from FWC and the City,[34] the Hearing Examiner issued his Findings of Fact, Conclusions of Law and Decision on Reconsideration on October 29, 2019 ("Reconsideration Decision").[35] The Examiner reaffirmed the substance of his Final Decision, but modified the two conditions he had previously imposed.

First, the Hearing Examiner agreed with SWC that the draft (unapproved) Traffic Impact Analysis (TIA) for the Business Park indicated that, upon completion of that facility, the resulting aggregate traffic would cause a minor volume-to-capacity (V/C) Level of Service (LOS) failure to the signalized intersection of Weyerhaeuser Way South and the State Route 18 westbound ramp.[36] As a result of this information, the Examiner concluded the Final Decision had erroneously determined that "all affected roads and intersections will operate within adopted levels of service[.]"[37] To address this concern, the Examiner revised Condition No. 11 of the MDNS to ensure that cumulative traffic impacts to the Weyerhaeuser Way/SR 18 westbound intersection were assessed and adequately mitigated. As revised, Condition No. 11 of the MDNS required such impacts, if any, to be evaluated

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[31] AR 7848, AR 7860-7861, AR 7886.

[32] AR 7885-7886.

[33] AR 7658-7678.

[34] AR 7684-7717.

[35] AR 7733-7741.

[36] AR 7735-7736.

[37] AR 7735-7736.

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and mitigated through a SEPA addendum or a revision to the Warehouse "A" TIA. The City was directed to determine which agency—the City or WSDOT—has jurisdiction over the SR 18 intersection facility, and to ensure that the required mitigation was assessed and applied consistent with the appropriate agency's standards. The Hearing Examiner emphasized repeatedly that any mitigation requirements imposed upon Warehouse "A" must be attributable and proportionate to the actual impacts of that project.[38]

Second, although the Hearing Examiner rejected SWC's various reconsideration arguments concerning drainage and stormwater impacts[39], the Examiner ultimately reclassified and re-numbered his original condition requiring compliance with the *Executive Proposed Basin Plan Hyblebos Creek and Lower Puget Sound*, noting that the measure was more appropriately formatted as a condition of the City's Process III Approval decision rather than a SEPA condition.[40] The substance of the Basin Plan condition remained unchanged by this action.

Apart from these two modifications, the Reconsideration Decision did not alter the Hearing Examiner's previous determination upholding the Process III Approval decision and MDNS for the Warehouse "A" project in any manner.[41]

2.7 SWC and FWC LUPA Appeals.

SWC and FWC both filed timely petitions under LUPA challenging the Hearing Examiner's Decision to this Court. Alleging numerous substantive and procedural errors by the City, SWC's appeal seeks an outright reversal of the Process III Approval decision and MDNS for the Warehouse

[38] AR 7735-7737, AR 7740-7741.

[39] AR 7738-7740.

[40] AR 7740-7741.

[41] For simplicity, this brief refers collectively to the Hearing Examiner's Final Decision and Reconsideration Decision as the "Decision" except where specifically noted.

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"A" proposal.[42] FWC's appeal is limited to challenging the two conditions imposed by the Hearing Examiner.[43] By order dated December 10, 2019, both appeals were consolidated under Case No. 19-2-30502-9 KNT.[44]

On January 20, 2020, the Superior Court conducted the initial LUPA hearing for the consolidated appeal pursuant to RCW 36.70C.080. At the hearing, the Court granted FWC's motion to summarily dismiss SWC's Growth Management Act compliance claim.[45]

III. STANDARD OF REVIEW AND BURDEN OF PROOF

Preliminarily, it is important to acknowledge the extraordinarily stringent standard of review and burden of proof in this case. Both the Land Use Petition Act and the State Environmental Policy Act contain specific, unique standards that govern appeals in this context. The review standards under both statutes are, by design, highly deferential to local decision makers and extremely difficult for appellants to overcome.

3.1 Standard of Review and Burden of Proof Under LUPA.

The Superior Court's review in a LUPA appeal is confined to the record created during the administrative proceedings below. RCW 36.70C.120(1); *CROP v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001). "Under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1) has been met." *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The six LUPA standards are as follows:

[42] *See* SWC Land Use Petition at 6-20,

[43] *See* FWC Land Use Petition.

[44] *See* Stipulation and Order of Consolidation (December 10, 2019).

[45] *See* Order on Federal Way Campus, LLC's Motion for Partial Dismissal (January 10, 2020).

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> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1) (emphasis added). As the Petitioners in this matter, SWC and FWC each bear, respectively, the exclusive and heavy burden of proving that one or more of these standards for relief has been satisfied. RCW 36.70C.130(1).

The Superior Court's review under LUPA is highly deferential to the expertise and fact-finding authority of local decision makers. "RCW 36.70C.130(1) reflects a clear legislative intention that. . . court[s] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004) (internal punctuation omitted). The construction of local ordinances, including the FWRC and the CZA adopted under Ordinance No. 94-219, will not be reversed absent clear error. *Mason v. King County*, 134 Wn. App. 806, 810, 142 P.3d 637 (2006). "A decision is clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made.'" *City of Medina*, 123 Wn. App. at 24. The same "clearly erroneous" test applies to whether the challenged land use decision was a clearly erroneous application of the law to the facts pursuant to RCW 36.70C.130(1)(d). *See, e.g., Citizens to Preserve Pioneer Park L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001).

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The Hearing Examiner's factual findings are reviewed for substantial evidence. *See, e.g., Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005). "A reviewing court must be deferential to factual determinations made by the highest forum below that exercised fact-finding authority." *Citizens*, 106 Wn. App. at 474. The Court must also "review the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Nagle*, 129 Wn. App. at 709. Accordingly, all reasonable inferences must be drawn in favor of the City as the prevailing party below.

Finally, any unchallenged findings of a local land use decision-making body are considered verities on appeal in a LUPA proceeding. *See First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 617 n.5, 191 P.3d 928 (2008); *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001). Accordingly, to the extent that either Petitioner has not specifically challenged any of the Hearing Examiner's findings, the substance of these determinations must be accepted without question for purposes of the instant appeal.

3.2 Process, Standard of Review and Burden of Proof Under SEPA.

The LUPA standards above are further enhanced where, as here, the underlying appeal involves a challenge to a local agency's SEPA determination. Washington courts have summarized the environmental review process under SEPA as follows:

> Before a local government processes a permit application for a private land use project, it must make a "threshold determination" of whether the project is a "major action significantly affecting the quality of the environment." A threshold determination, made by the "responsible official" of the "lead agency" reviewing the project, is required for any project constituting a SEPA "action" unless it is "categorically exempt." The lead agency must make its threshold determination based upon information reasonably sufficient to evaluate

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> the environmental impact of a proposal. The lead agency first reviews an environmental checklist prepared by the applicant. If the checklist does not contain sufficient information to make a threshold determination, the applicant may be required to submit additional information. The responsible official may also consider mitigation measures which an agency or the applicant will implement as part of the proposal.
>
> All threshold determinations must be documented in a determination of nonsignificance or a determination of significance (DS). A DS mandates the preparation of a full [Environmental Impact Statement] (EIS). Conversely, a DNS means that no EIS is required. Alternatively, under the "mitigated DNS" process, an applicant may avoid EIS preparation by clarifying, changing, or conditioning the project to mitigate its significant adverse environmental impacts.

Moss v. City of Bellingham, 109 Wn. App. 6, 14-15, 31 P.3d 703 (2001) (citations omitted).

Thus, an MDNS of the type challenged in this case is a threshold determination by the agency's SEPA responsible official that the underlying proposal will not have a significant adverse environmental impact if certain mitigating conditions are imposed. WAC 197-11-350; *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997); *Indian Trail Prop. Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994). The SEPA responsible official for the City of Federal Way is Community Development Director Brian Davis, the author of the Warehouse "A" MDNS. *See* FWRC 14.10.010.

In addition to the already-demanding standards of review under LUPA, appeals of an agency's SEPA threshold determination face an additional and even heavier burden under SEPA. In order to successfully challenge the November 30, 2018 MDNS under this standard, SWC must demonstrate that the City "clearly erred" in determining that the Warehouse "A" project would not have a probable significant adverse impact on the environment. *See, e.g., Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415-17, 225 P.3d 448 (2010) ("[T]he final decision for us is whether the examiner's decision . . . is clearly erroneous."); WAC 197-11-330. "Probable" in this context means "likely or reasonably likely to occur." WAC 197-11-782. While the standard for probability is not a

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strict statistical test, SEPA differentiates "likely" impacts from "those that merely have a possibility of occurring, but are remote or speculative." *Id.*

An impact is "significant" for purposes of SEPA review only if it implicates "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). Like the "probable" standard discussed above, the test for significance is not strictly formulaic or quantifiable, but instead is context-dependent and varies with the proposal's physical setting. WAC 197-11-794(2). Under this fluid standard, "[t]he severity of an impact should be weighed along with the likelihood of its occurrence." *Id.*

"A governmental agency's SEPA threshold determination is reviewed under the 'clearly erroneous standard." *Moss*, 109 Wn. App. at 13 (citing RCW 36.70C.130(1)(d); *Assoc. of Rural Residents v. Kitsap Co.*, 141 Wash.2d 185, 195–96, 4 P.3d 115 (2000)). Courts are highly deferential to the agency's SEPA responsible official and will not substitute their judgment for that of local decisionmakers in this context. *See, e.g., id.* at 13. Specifically, "[a]n agency's decision to issue a mitigated DNS and not to require an environmental impact statement (EIS) is accorded substantial weight." *Moss*, 109 Wn. App. at 13 (citation omitted); RCW 43.21C.090.[46] Indeed, use of an MDNS—as opposed to an EIS—is widely favored by courts as "conducive to efficient, cooperative reduction or avoidance of adverse environmental impacts." *Moss*, 109 Wn. App. at 21 (citing *Anderson*, 86 Wn. App. at 303–04).[47]

IV. ARGUMENT: SWC'S APPEAL SHOULD BE DENIED

[46] The deference afforded to a local agency's SEPA threshold determination extends throughout the administrative and judicial stages of any appeal. *See, e.g., See, e.g.,* RCW 43.21C.075(3)(d); RCW 43.21C.090; WAC 197-11-680(3)(a)(iii); FWRC 14.10.060(2); *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *Anderson v. Pierce County, supra*, 86 Wn. App. at 302; *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 224-25, 151 P.3d 1079 (2007); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 57-58, 52 P.3d 522 (2002).

[47] The Court should reject out of hand SWC's assertion that SEPA's "substantial weight" standard of deference is inapplicable in this appeal. *See* SWC Brief at 18. SWC cites no authority for this position, which is directly contradicted by the myriad cases, statutes and regulations referenced above.

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4.1 Summary of Argument.

The thrust of SWC's judicial appeal, like its administrative appeal below, focuses on its strained theory of "cumulative impacts"—a nebulous term for which no categorical, controlling definition exits under state law or the City's code. The dictionary defines "cumulative" in relevant part as "increasing by successive additions" or "made of accumulated parts".[48] As the Hearing Examiner noted, Washington courts have variously characterized a cumulative impact as "harm that results from a project's contribution to existing adverse conditions or uses in an affected area."[49] *Cf. Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 285, 232 P.3d 1154 (2010). Under this standard, cumulative impacts are distinct from "direct" impacts—i.e., harms that result exclusively and proximately from the underlying project itself, without regard to or contribution from other, external factors.

SWC's appeal claims confuse two distinct legal concepts in regard to cumulative impacts: First, the City's regulatory obligation to ensure that the anticipated, significant impacts of a development project are identified and mitigated. Second, the obligation—where applicable—to conduct a formal, *combined* review of separate development proposals within a single environmental document. As attested by numerous witnesses, the former obligation was unquestionably satisfied by the City's extensive administrative process below. The latter is inapplicable under the relevant circumstances as a matter of law. SWC's remaining arguments variously misconstrue applicable City regulations and/or are factually unfounded.

Notably, SWC does not acknowledge—much less apply—the LUPA standards of review in its 52-page Opening Brief. The apparent reason for this omission is largely self-evident: SWC cannot

[48] *See Merriam-Webster's Online Dictionary*, available at https://www.merriam-webster.com/dictionary/cumulative (7 April 2020).

[49] AR 7847 (citing *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137 (2002).

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demonstrate that the challenged land use decision is "clearly erroneous" or otherwise unsupported by substantial evidence in the administrative record. For the reasons explained below and set forth in FWC's Brief, SWC's appeal should be denied.

4.2 The City Properly Evaluated the Warehouse "A" Proposal for Potential Cumulative Impacts.

SWC's "cumulative impacts" argument is based in the first instance upon SEPA and FWRC 19.100.030(2). *See* SWC Brief at 21-22. Contrary to SWC's assertions, the City's review of the Warehouse "A" proposal appropriately considered the potential for cumulative impacts under both of these standards.

FWRC 19.100.030(2) is a generally applicable section of the City's land use code which provides as follows:

> Before any development is given the required approval or is permitted to proceed, the official or body charged with deciding whether such approval should be given shall determine direct impacts, if any, that are a consequence of the proposed development and which require mitigation, considering, but not limited to, the following factors:
> . . . .
> (2) Likelihood that a direct impact of a proposed development would require mitigation due to the cumulative effect of such impact when aggregated with the similar impacts of future development in the immediate vicinity of the proposed development;
> . . . .

FWRC 19.100.030(2) (emphasis added).

The preface statement to Chapter 19.100 FWRC clarifies that the chapter's purpose is to offer alternative methods for mitigating the *direct* impacts of development projects:

> It is the purpose of this chapter to provide alternatives for prospective developers of land within the city to mitigate the direct impacts that have been specifically identified by the city as a consequence of proposed development, and to make provisions for, including, but not limited to, the public health, safety and general welfare, for open spaces, drainageways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds and sites for schools and school grounds.

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FWRC 19.100.010 (emphasis added).

In his May 26, 2019 preliminary ruling, the Hearing Examiner concluded that the code basis for considering the cumulative impacts of the Warehouse "A" project is rooted in the "public health, safety and welfare" decisional criterion of the Process III Approval standards—i.e., FWRC 19.65.100(2)(a)(iii), *supra*.[50] Although SWC never cited FWRC 19.100.030(2) in its lengthy Notice of Appeal,[51] SWC emphasized this code provision throughout the administrative proceedings below.[52] SWC now attempts to recycle the same argument on appeal, contending that the City did not actually perform the analysis referenced in FWRC 19.100.030(2) in evaluating FWC's permit application.

SWC's assertion is refuted by overwhelming evidence in the administrative record. Multiple City witnesses stated unequivocally, under oath, that the substance of the FWRC 19.100.030(2) analysis had in fact been performed during the regulatory review process for Warehouse "A". Testimony to this effect was provided not only from Director Davis himself[53], but also from the City's Senior Planner[54] and from the City's transportation[55], stormwater[56] and wetlands/streams[57] experts in relation to the project elements within their respective areas of expertise. Based in large part on this testimony, the Hearing Examiner flatly rejected SWC's argument:

> In point of fact the City and Applicant conducted a thorough cumulative impact analysis that provides good assurance that no gaps in mitigation will result because of deficiencies in review. This cumulative analysis was done explicitly for the modest shared infrastructure that will have

[50] AR 6261-6263.

[51] AR 2504.

[52] *See, e.g.,* AR 7535-7558; AR 7566-7571.

[53] Tr. 732.

[54] TR 706-708.

[55] Tr. 907; Tr. 921.

[56] Tr. 643-644.

[57] Tr. 671-672; Tr. 684; Tr. 686-687.

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> to be built for the project as well as within a traffic study that jointly addresses the traffic impacts of Warehouses A and B. As explained in convincing detail by City and Applicant expert witnesses, cumulative impacts were addressed implicitly in the concurrency and traffic report standards adopted by the City.[58]

SWC does not—and cannot—cite any record evidence disproving the hearing testimony of the City's witnesses or otherwise undermining the Examiner's determination on this critical point. As such, SWC cannot satisfy its burden under LUPA of demonstrating that this aspect of the challenged land use decision is not supported by substantial evidence. *See* RCW 36.70C.130(1)(c).

4.3 The City Did Not Engage in Post Hoc Rationalization.

Unable to cite any actual evidence (none exists) that the City did not perform the environmental analysis at issue, SWC resorts to characterizing the sworn testimony of numerous City staff members and consulting experts as "post hoc rationalization". SWC Brief at 48-51. The Hearing Examiner properly dismissed this argument as well:

> The underlying premise to [SWC's] position is incorrect and it is found that the City did not engage in any post-hoc rationalization. The City explicitly identified that it had conducted a cumulative impact analysis and then presented testimony to explain how that analysis was conducted, much of it already built into City regulations.[59]

For several reasons, SWC's attempts to undercut the Examiner's conclusion on this point are without merit. First and foremost, SWC's "post hoc rationalization" claim suffers from the same fatal defect as its larger cumulative impacts theory: SWC deliberately conflates an agency's obligation to determine whether a particular proposal *should be analyzed for potential cumulative impacts* with the agency's obligation to actually *perform* a combined, aggregate, "cumulative" *review of multiple, separate projects* in the same environmental document. These are fundamentally separate and distinct issues. The City did in fact perform the former analysis, in the manner and to the extent dictated by

[58] AR 7847.

[59] AR 7867.

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applicable state and local standards. As explained in Section 3.5, *infra*, it was not legally required to perform the latter.

Second, to the extent SWC suggests that the voluminous witness testimony provided during the administrative hearing below is not cognizable "evidence", *see* SWC Brief at 49-50, this contention strains credulity. It is beyond any meaningful dispute that live testimony is a well-established form of evidence in any administrative or judicial proceeding. *See, e.g.* Black's Law Dictionary (11th ed. 2019 (**"**Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.").

Third, contrary to SWC's assertion, the City's process in issuing its extraordinarily thorough and detailed MDNS for the Warehouse "A" project easily satisfied any *prima facie* burden under SEPA. SWC Brief at 50-51. The *prima facie* requirement is procedural in nature rather than substantive. *Boehm* , 111 Wn. App. at 718 (citing *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54 (1978); *Moss*, 109 Wn. App. at 23. This standard is met where an agency follows the *procedures* dictated by SEPA—i.e., where it reviews the environmental checklist for the underlying proposal; solicits and considers comments from the public and other agencies; issues a threshold determination; imposes appropriate mitigation conditions; and conducts any necessary public hearings. *See, e.g., Pease Hill Cmty. Group v. Spokane County*, 62 Wn. App. 800, 810, 816 P.3d 37 (1991); *Anderson*, 86 Wn. App. at 304-05. The record demonstrates that the City dutifully took each of these actions.

Finally, in criticizing the Hearing Examiner for deducing the Director's intent in evaluating the environmental impacts of the Warehouse "A" proposal, *see* SWC Brief at 49-50, SWC fails to appreciate the irony in its own, virtually identical argument. Ultimately, SWC's "post hoc rationalization" claim distills to a factually unsupported attack on the honesty of the numerous City witnesses who provided sworn testimony on this issue. This contention fails as a matter of law, as

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public officials are entitled to a presumption that they have "regularly and faithfully" performed their duties. *Pleas v. City of Seattle*, 112 Wn.2d 794, 815, 774 P.2d 1158 (1989). SWC has presented no evidence whatsoever sufficient to rebut this presumption, and its "post hoc rationalization" argument should be rejected.

4.4 All Cumulative Impacts of the Warehouse "A" Proposal Were Identified and Mitigated Through the City's Administrative Review Process.

Notably, SWC itself offers scant evidence that the development of Warehouse "A," Warehouse "B," and the Business Park will actually result in any discernable cumulative impacts. As such, SWC's core appeal argument essentially assumes its own conclusion—i.e., that a more expansive or otherwise different cumulative impacts analysis was in fact required for all three projects in the first instance in order to ascertain these impacts. This is a false premise. As one City witness noted, the aggregate impact resulting from multiple projects is, as here, often simply "equal to the sum of its parts."[60] This fact, and not any deficiency in the City's regulatory review, is the reason that no meaningful cumulative impacts were identified during the administrative process below.

As explained *supra,* the record demonstrates that the City did in fact evaluate the Warehouse "A" proposal for potential cumulative impacts—in the manner and to the extent required by state law and the City's local standards.[61] More fundamentally, ***the overwhelming weight of witness testimony unequivocally recognizes that the project, as conditioned, would <u>not</u> result in any unmitigated cumulative impacts to <u>any</u> element of the environment.***[62] The only exception identified by the Hearing Examiner was the very minor V/C LOS failure related to Weyerhaeuser Way S/SR 18 facility.

[60] Tr. 663; Tr. 676; Tr. 687.

[61] Tr. 732; TR 706-708; Tr. 907; Tr. 921; Tr. 630-632; Tr. 643-645; Tr. 729-731;

[62] Tr. 91; Tr. 100-101; Tr. 480; Tr. 506-508; Tr. 512-514; Tr. 525; Tr. 542; Tr. 546-547; Tr. 599; Tr. 623; Tr. 645; Tr. 699; Tr. 671-672; Tr. 684; Tr. 708; Tr. 714-715; Tr. 734; Tr. 875; Tr. 917.

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The Examiner addressed this concern through Condition No. 11 by requiring further analysis and mitigation.

The sheer weight of this testimony is effectively dispositive of SWC's cumulative impacts argument on appeal. Notwithstanding any competing or contrary evidence cited by SWC, there is—at the very least—"a sufficient quantum of evidence in the record" supporting the Hearing Examiner's conclusion. *Nagle*, 129 Wn. App. at 709. This is particularly true where the underlying evidence must be viewed in favor of the City and FWC, as prevailing parties in the administrative appeal below. *Id.* SWC cannot meet its burden under LUPA pursuant to RCW 36.70C.130(1)(c).

4.5 The City Was Not Required to Evaluate the Warehouse "A", Warehouse "B" and Business Park Proposals in the Same Environmental Document.

SWC also contends that the City was required to evaluate the potential impacts of the Warehouse "B" and Business Park proposals in a single environmental document together with Warehouse "A". *See* SWC Brief at 21. The Hearing Examiner correctly rejected this argument.[63]

"Environmental document" is a SEPA term of art defined as "any written public document prepared under [Chapter 197-11 WAC]." WAC 197-11-744. The term necessarily includes SEPA threshold determinations such as the Warehouse "A" MDNS. The scope of an environmental document under SEPA is governed by WAC 197-11-060. Agencies are required under this regulation to "make certain that the proposal that is the subject of environmental review is properly defined." WAC 197-11-060(3)(a). WAC 197-11-060(3) clarifies the circumstances under which separate proposals, or parts thereof, *must* be analyzed jointly in the same environmental document, and, conversely, when an aggregated review of this type *may*, as a matter of agency discretion, be performed:

> (b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same

[63] AR 7846, AR 7852-7853, AR 7863-7864.

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> environmental document. . . . .) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
>
> (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
>
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.
>
> (c) **(Optional)** Agencies may wish to analyze "similar actions" in a single environmental document.
>
> (i) Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography. This section does not require agencies or applicants to analyze similar actions in a single environmental document or require applicants to prepare environmental documents on proposals other than their own.

WAC 197-11-060(3)(b)&(c) (emphasis added).

WAC 197-11-060 is unambiguous: Separate proposals, or parts of proposals, must be analyzed in the same environmental document under SEPA *only* if: (i) the first proposal cannot/will not proceed without the simultaneous implementation of the other proposal(s), or (ii) the proposals are interdependent parts of a larger scheme or plan. WAC 197-11-060(3)(b). Proposals lacking this type of interdependency but which share common timing, similar impacts and geographic proximity, *may*—but are not required to—be analyzed together in the same environmental document at the SEPA lead agency's discretion. WAC 197-11-060(3)(c). The variable usage of "shall" and may" in WAC 197-11-060(3) is legally dispositive. *See, e.g.,* WAC 197-11-700(3)(a)(&(b) ("'Shall' is mandatory.". "'May' is permissive."); WAC 197-11-906(1)(b) ("Permissive and optional rules shall *not* be construed as mandatory requirements.").

Washington courts have strictly emphasized and enforced the interdependency requirement in construing WAC 197-11-060(3). Under these standards, "the nature of cumulative impacts is prospective and not retrospective." *Boehm*, 111 Wn. App. at 720. A "cumulative impact argument

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must fail unless [the appellant] can demonstrate that the project is dependent upon subsequent proposed development"—not vice versa. *Id.* If the project in question would be constructed "without regard to future developments", the impact of that project may be evaluated independently in a separate SEPA determination. *SEAPAC v. Cammack II Orchards*, 49 Wn. App. 609, 614-15, 744 P.2d 1101 (1987).

The Hearing Examiner correctly determined that the requisite interdependency was absent under this standard. The only interdependency between the Warehouse "A" project and the other pending developments on the former Weyerhaeuser property relates to two discrete issues: (i) the access driveway that will be shared by Warehouse "A" and Warehouse "B", and (ii) the stormwater pond that will jointly serve both Warehouse "A" and "B". Except for these two limited components of the Warehouse "A" proposal—which unquestionably were identified and addressed together in the City's MDNS[64]—there is no other cognizable interdependency between Warehouse "A" and either Warehouse "B" or the Business Park. As the Hearing Examiner explained, "each proposal can be constructed and operate independently of the other."[65] The Examiner's determination in this regard was supported by the testimony of multiple witnesses at the appeal hearing.[66] The record contains no meaningful evidence to the contrary.

SWC's various arguments on this point are unavailing. SWC's subjective "belief" regarding the alleged interdependency of the three proposals is based almost entirely upon their economic relationship—i.e., FWC's ultimate intent to develop each of the parcels in question. *See* SWC Brief at 19-20. As the Hearing Examiner noted, however, economic concerns are irrelevant for purposes

[64] AR 2380.

[65] AR 7846.

[66] Tr. 90; Tr. 415; Tr. 865-866; Tr/ 916-917; Tr. 586-597; Tr. 578-579; Tr. 663-664.

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of SEPA review. *See* WAC 197-11-444.[67] The Examiner also properly concluded that the negative potential for improper "piecemeal" SEPA review was essentially an academic concern where—as here—the record demonstrates that an agency has in in fact carefully identified and mitigated all cumulative impacts of the underlying proposal.[68]

SWC resorts to straw man tactics in asserting that "[c]ourts have not created any 'bright line' test that *prohibits* cumulative impacts review if proposals are not legally interconnected with other proposals". *See* SWC Brief at 19 (emphasis added). The dispositive issue is not whether the City *could have* conducted a single-document evaluation of the three projects under SEPA in light of the common timing, common ownership, common zoning and the alleged common impacts of the three projects. At most, these factors demonstrate a potential basis for characterizing the subject proposals as "similar actions" for which single-document SEPA review would be *permissible*. *See* WAC 197-11-060(3)(c). Absent the requisite interdependency mandated by WAC 197-11-060(3)(b), however, the mere fact that the Warehouse "B" and Business Park actions are "similar" is not—as a matter of law—sufficient grounds for invalidating the Warehouse "A" MDNS. *See, e.g., Boehm* 111 Wn. App. at 720; *SEAPAC*, 49 Wn. App. at 614-15. The SEPA Rules themselves expressly convey this point:

> This section does not require agencies or applicants to analyze similar actions in a single environmental document or require applicants to prepare environmental documents on proposals other than their own.

WAC 197-11-060(3)(c) (emphasis added).

FWC's development of Warehouse "A" is categorically independent of the Business Park in every respect, and is dependent upon Warehouse "B" only with respect to the shared driveway access and stormwater pond that will be jointly utilized by both developments. As such, the City's November 30, 2018 MDNS appropriately confined its joint impacts analysis to the latter two issues. To the extent

[67] AR 7864, AR 7852-7853.

[68] AR 7864, AR 7867.

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that the City *could have* chosen to perform a more expansive, aggregate evaluation of the three projects in the same environmental document, this approach is "optional" for the City under the express terms of WAC 197-11-060(3)(c). SWC cannot, as a matter of law, demonstrate that the challenged MDNS was clearly erroneous on this basis.

SWC's reliance upon *Indian Trail Property Owners' Ass'n v. City of Spokane*, 76 Wn. App. 430, 886 P.2d 209 (1994), *see* SWC Brief at 20, 24-26, is misplaced, and the Hearing Examiner's detailed analysis of that case was correct.[69] The Court of Appeals in *Indian Trail* required an aggregate SEPA review for various components of a shopping center redevelopment proposal, concluding that these elements were "related to each other closely enough to be, in effect, a single course of action" within the meaning of WAC 197-11-060(3)(b). *Indian Trail*, 76 Wn. App. at 443. As the Examiner correctly noted, *Indian Trail* is distinguishable from the instant matter in several ways.

First, the various components of the development project in *Indian Trail* (e.g., installation of large underground storage tanks and a special use permit to authorize a car wash facility) were all identified parts of the applicant's singular, *unified* development proposal for the underlying property in that case—i.e., the redevelopment of a shopping center. *Id.* at 443-44. Indeed, the *Indian Trail* Court repeatedly characterized the applicant's undertaking in the singular throughout its decision, referring to; "the shopping center", the proposal" and "the project", which in turn was to be developed on "the site". *Id.* at 432-44 (emphasis added). By contrast, the Warehouse "A," Warehouse "B," and the Business Park projects are—except for the stormwater facility area jointly shared by Warehouses "A" and "B"—entirely distinct, independent proposals located on separate project sites. The unification of purpose implicated by the development is *Indian Trail* is simply lacking with respect to FWC's projects.

[69] AR 7865-7867.

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Second, the various components of the development in *Indian Trail* shared significantly more common infrastructure than the Warehouse "A", Warehouse "B" and Business Park proposals. This in turn reflects the significant disparity in the size of the underlying project sites, respectively. Unlike a modestly-sized shopping center property, the former Weyerhaeuser campus spans over *400 acres* and is comprised of *multiple* parcels. As the Hearing Examiner explained, the only shared infrastructure for the three FWC projects will be the access driveway and storm detention pond that will jointly serve Warehouse "A" and Warehouse "B". There is no interdependency whatsoever with the Business Park. In contrast, a retail shopping center of the type at issue in *Indian Trail* by necessity utilizes common parking, internal circulation, exterior access points, shared drainage facilities and other amenities. A project of that type also involves a much greater degree of simultaneous implementation, which in turn implicates various cumulative construction-related impacts.[70]

Finally, the Hearing Examiner acknowledged that, unlike the shopping center redevelopment proposal in *Indian Trail*, for which no cumulative impact analysis had been conducted, FWC's three Weyerhaeuser campus projects have "gone through significant cumulative impact analysis."[71] In sum, as the Examiner correctly determined:

> The interdependence and simultaneous features of the *Indian Trail* project were. . . far more pronounced than those of the three campus projects. Overall, project consolidation was necessary for a complete review of all environmental impacts for the *Indian Trail* project. There is no such necessity for the three campus projects since all cumulative and individual impacts of Warehouse A are fully addressed.[72]

Substantial record evidence, including witness testimony, supports this determination as noted above.

[70] AR 7866.

[71] AR 7867.

[72] AR 7867.

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For this reason, SWC's suggestion that the City's SEPA analysis will result in improper segmentation, or "piecemeal" review, *see* SWC Brief at 19-20, is false. In rejecting this argument, the Hearing Examiner correctly—and commonsensically—noted that "the adverse consequences of piecemealing that WAC 197-11-060(3)(b)(ii) is designed to prevent [are] avoided if a project properly addresses all cumulative impacts."[73] This, again, reflects the insurmountable reality that is fatal to SWCs appeal: *SWC cannot identify <u>any</u> impacts of the Warehouse "A" proposal, <u>direct or cumulative</u>, that were not adequately addressed through the City's regulatory process.*

4.6 The Hearing Examiner Correctly Refused to Remand the Process III Approval Decision for Review of the Hylebos Basin Plan.

As noted *supra*, the only aspect of the Process III Approval decision that was found deficient by the Hearing Examiner concerned the *Executive Proposed Basin Plan Hylebos Creek and Lower Puget Sound* ("Basin Plan"), which the Examiner concluded should have been addressed during the permitting process. To remedy this issue, the Hearing Examiner imposed an additional condition requiring FWC to supplement its stormwater management plan to demonstrate compliance with the Basin Plan.[74] SWC contends that the Examiner should have formally remanded the issue to allow for additional public comment and/or a new public hearing. *See* SWC Brief at 27-33. The Court should reject this argument for the reasons set forth below.

<u>First</u>, SWC's assertion that the Hearing Examiner *could have* remanded the Warehouse "A" decision for formal administrative proceedings and/or additional public comment is erroneous as a matter of law. *See* SWC Brief at 32-33. The City's "hearing examiners have only the authority delegated to them by the [City] Council." *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001); *see also Chausee v. Snohomish County Council*, 38 Wn. App. 630, 638,

[73] AR 7867.

[74] AR 7882-7886.

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689 P.2d 1084 (1984). As the Examiner correctly noted, the City's procedural regulations do not contemplate, much less authorize, the type of "continuing review" remand proposed by SWC.[75] In defining the Hearing Examiner's disposition authority for administrative appeals, the City's code is clear:

> In an agency decision appeal, the examiner shall affirm, reverse, or modify the decision being appealed based on the hearing examiner's findings and conclusions.

FWRC 19.70.150(1) (emphasis added).

No allowance under the code is made for remand as an appellate decisional option in this context. Likewise, no FWRC provision supports SWC's request for additional review and comment by the public. *See* FWRC 19.70.150. To the extent SWC is seeking an additional public hearing as part of its requested relief, state law categorically forecloses this option. *See, e.g.*, RCW 36.70B.050(2) (local project review procedures must "provide for no more than one open record hearing and one closed record appeal"). The Examiner correctly acknowledge and respected this controlling authority.[76]

Second, while the City's code categorically prohibits the type of remand sought by SWC, it expressly allows the Hearing Examiner to "modify" a permit decision on appeal. *See* FWRC 19.70.150(1). This is precisely what the Examiner did in the instant case: modifying the Director's Process III Approval decision to ensure compliance with the Basin Plan by requiring supplementation of the Warehouse "A" drainage report. This approach—i.e., conditioning local project approval upon the developer's subsequent compliance with applicable code standards, procedures, etc.—is exceedingly commonplace in the land use permitting context. Indeed, it is utilized throughout the

[75] AR 7738.

[76] AR 7738.

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Warehouse "A" Process III Approval decision itself in order to address numerous development-related issues.[77] SWC's contrary assertion, *see* SWC Brief at 33, is simply incorrect.

Third, the Hearing Examiner's condition is particularly appropriate in the present case, where, as the Examiner correctly noted, "application of the Basin Plan will likely involve only *minor and/or ministerial* decision making[.]"[78] The Hearing Examiner emphasized that he had imposed the condition in the first instance "not because there was an apparent compliance issue, but because it didn't appear that the Basin Plan had even been considered."[79] The Examiner also acknowledged the likelihood that the substance of the Basin Plan had been effectively eclipsed by the City's current, and more stringent, drainage requirements:

> Given the age of the Basin Plan (finalized in 1991) and the extent to which stormwater regulations have improved since then, it is entirely possible that [the] Basin Plan drainage requirements have been subsumed into more effective and protective modern-day stormwater standards.[80]

The Hearing Examiner's premise in this regard was supported by expert witness testimony at the hearing, which noted that the regulatory framework for drainage issues had "[d]rastically changed" during the intervening decades.[81] Indeed, in its lengthy argument on this subject, *SWC fails to cite*

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[77] AR 2441-2447. These include, *inter* alia, Condition No. 3 (requiring future parking analysis); Condition No.10 (requiring future Forest Practices approval); Condition No. 11 (requiring future amendments to critical areas report); Condition No. 16 (requiring future state, federal and other agency permits prior to wetland fill approval); Condition No. 19 (requiring future compliance with recycling and garbage storage requirements); Condition No. 21 (requiring future submittal of lighting plan); Condition No. 29 (requiring future execution of pavement impact mitigation implanting agreement); Condition No. 30 (requiring future WSDOT approval of traffic study and channelization plans); Condition No. 37 (requiring future analysis and potential mitigation to verify applicability and compliance with wetlands drainage standards); Condition No. 38 (requiring future submittal of peer-reviewed critical areas report); Condition No. 39 (requiring future WSDOT approval of storm drainage impacts on WSDOT facilities). *Id.*

[78] AR 7738 (emphasis added).

[79] AR 7739 (emphasis added).

[80] AR 7739.

[81] Tr. 622. In practice, the likely effect of developing the site under the City's current drainage standards will be to actually *reduce* storm runoff from the property. *See* Tr. 465-466; Tr. 581-582.

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any provision of the Basin Plan that would actually be implicated by the Warehouse "A" project—much less that would necessitate any substantive revision to FWC's drainage report. *See* SWC Brief at 28-34. SWC's silence in this regard is an implicit concession that the Basin Plan actually contains no such requirements.[82] Under these circumstances, the practical value of the public process remand sought by SWC would be *de minimus* and was correctly denied by the Examiner. *Cf. Tugwell v. Kittitas County*, 90 Wn. App. 1, 14, 951 P.2d 272 (1997) (rejecting proposed remand where it would accomplish nothing "other than further delay").

Equally without merit is SWC's assertion that the Basin Plan requires a "cumulative impacts" analysis more detailed or expansive than what was actually performed during the permit review process below. *See* SWC 34-35. The overwhelming weight of evidence in the administrative record demonstrates that: (i) FWC's stormwater plan complies with all applicable standards[83]; (ii) the underlying project *was* in fact evaluated for cumulative drainage impacts[84]; and, critically, (iii) *the proposal will not implicate any unmitigated drainage impacts, whether cumulative or direct*.[85] With specific respect to the Business Park, witness testimony also clarified that the storm runoff from that project site discharges from an entirely separate point across the Weyerhaeuser campus and is buffered

[82] This premise is further borne out by the Basin Plan itself, which is accessible through the following link: https://your.kingcounty.gov/dnrp/library/1991/kcr773.pdf. The Basin Plan is a policy guidance document, the relevant content of which is phrased as a series of basinwide (BW) "recommendations"—*not* requirements or binding, regulatory mandates with project-specific effect. *See, e.g., Executive Proposed Basin Plan Hylebos Creek and Lower Puget Sound* (King County Surface Water Management, 1991), at 2-9 (summarizing "Basinwide Recommendations" in the Plan); 3-9 – 3-10 (describing "recommendations" for stream and wetland protection); 3-13 – 3-14 (describing "recommendations" for clearing, grading and filling limitations); 3-15 (wetland and stream no net loss policy").

[83] Tr. 469; Tr. 573-574; Tr. 579-580.

[84] Tr. 644-645; Tr. 575-578; Tr. 611-612; Tr. 653-654.

[85] Tr. 474-475; Tr. 645; Tr. 576-578; Tr. 599; Tr. 611-612; Tr. 645.

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by existing ponds.[86] The testimony and other evidence presented by SWC was expressly refuted at length by City and FWC expert witnesses.[87]

The Hearing Examiner's detailed findings and conclusions are supported by this substantial evidence.[88] The only exception identified by the Examiner was the Basin Plan itself, compliance with which is now expressly required by the imposition of new Condition No. 43. No provision of the Basin Plan, and certainly none cited by SWC, purports to require any particular "cumulative" evaluation. SWC's argument should be rejected out of hand on that basis.

By requiring supplementation of FWC's stormwater plan to demonstrate compliance with the Basin Plan, the Hearing Examiner appropriately ensured that the Warehouse "A" project would be consistent with the applicable standards of that plan, if any. SWC cannot meet its burden under LUPA of demonstrating that this approach was clearly erroneous, and its arguments regarding the Basin Plan should be denied.

4.7 The Warehouse "A" Project Will Not Result In any Significant Adverse Historical Impacts.

For the reasons set forth below and in FWC's Brief, *see* FWC Brief at 34-36, the Court should also reject SWC's argument regarding alleged "cumulative impacts" to historic resources. *See* SWC Brief at 26-27.

Although a host of regulations at the federal, state and municipal levels establish various criteria for formally designating and protecting historic sites, *see, e.g.*, 36 CFR Parts 60-68; Chapter 27.34 RCW; Chapter 25-12 WAC; Chapter 19.285 FWRC, it is undisputed that no area or feature of

[86] Tr. 612.

[87] Tr. 469-484, Tr. 497-499; Tr. 566-587, Tr. 595-623; Tr. 637-650.

[88] AR 7859-7860, AR 7880-7882.

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the Weyerhaeuser campus has ever been listed under any of those standards.[89] The Hearing Examiner nevertheless found that parts of the campus, particularly the former Weyerhaeuser corporate headquarters building and its integration into the surrounding landscape, would likely be considered historically significant.[90] The Examiner ultimately determined, however, that any probable significant adverse impacts to these features would be avoided if development of the project site retained adequate tree buffers to visually screen the proposed Warehouse "A" building and if the building itself did not encroach into established view corridors.[91] The Examiner concluded that the careful design and placement of the Warehouse "A" proposal adequately addressed these concerns.[92] The Examiner's findings in this regard were based upon, and supported by, expert testimony, multiple visual impact studies, and numerous documents in the project file depicting the retention, placement and visual effect of the on-site forest buffer in relation to the site's topography and the height and orientation of the proposed Warehouse "A" building.[93]

In denying SWC's administrative appeal below, the Hearing Examiner noted that SWC had "presented no view analysis or any other evidence showing that the project would be visible from the headquarters or that Warehouse A would encroach in or impair viewsheds to or from the headquarters."[94] The Examiner specifically rejected SWC's "cumulative impacts" argument:

> A final relevant issue regarding historical impacts is. . . cumulative impacts. The Appellant wasn't very clear as to what those cumulative impacts would be, but it is reasonable to infer that concern raised over the scale and mass of proposed campus projects in toto can affect the perceived integration of building into landscape, which is one of the

[89] AR 7856; AR 7875-7876; Tr. 528-529; Tr. 714; Tr. 774.

[90] AR 7856-7857.

[91] AR 7857.

[92] AR 7857-7858; AR 7875-7876.

[93] AR 7857-7858; AR 7875-7876; Tr. 412.

[94] AR 7858.

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> primary historical features of the project site. Unfortunately, this is a highly subjective issue and persons of common intelligence. . .could differ as to whether the incremental aesthetic impacts of the Warehouse A project would push aesthetic impacts to the significant category when combined with the impacts of Warehouse B and the Greenline Business Park. Given the extensive amount of buffering around the Warehouse A site, it is entirely reasonable to conclude that those incremental impacts are too minor to make any difference in a cumulative impacts analysis. Giving substantial weight to the determination of the SEPA responsible official, it is determined that the proposal will not create any probable significant adverse cumulative impacts.[95]

On appeal to this Court, SWC's "cumulative impacts" argument suffers from the same lack of clarity and evidentiary support acknowledged by the Hearing Examiner. *See* SWC Brief at 26-27. SWC identifies no evidence warranting any evaluation different from and/or additional to what was previously conducted by the FWC and the City. *Id.* As such, SWC has not met its burden of demonstrating clear error or a lack of substantial evidence on this point, and its historic impacts claim should be rejected.

4.8 The City Correctly Conducted Its Traffic Impacts Analysis.

SWC's various arguments concerning the City's analysis of traffic impacts, *see* SWC Brief at 41-48, are equally without merit.

A. There Are No Unmitigated Traffic Impacts to Residential Areas.

Preliminarily, SWC's contention that traffic from the underlying project site "is imposed on a residential neighborhood", *see* SWC Brief at 41, is incorrect. FWC's proposed projects are located within the City's Corporate Park and Office Park land use designations, respectively, and not in residentially-zoned areas. None of the detailed, professional transportation studies prepared for any these proposals identify any meaningful traffic impacts to residential neighborhoods. No evidence of such impacts was presented at the administrative hearing below other than subjective lay testimony.

[95] AR 7876 (emphasis added).

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Indeed, the only evidence to this effect cited by SWC in the above-captioned proceeding is to SWC's *own* Notice of Appeal. *See* SWC Brief at 41 n.21. No actual evidence of any residential impacts exists.

B. The City Properly Identified All Cumulative Traffic Impacts of the Warehouse "A" Proposal.

SWC's citation to FWC 19.100.030(2) is similarly unavailing. *See* SWC Brief at 42. As noted *supra*, the analysis prescribed by this code provision—i.e., identifying the likelihood that a proposal's direct impacts would require mitigation "due to the cumulative effect of such impact when aggregated with the similar impacts of future development within the immediate vicinity"—was in fact properly conducted with respect to all relevant aspects of the Warehouse "A" project. Multiple witnesses within the City's project review team, including transportation engineers, testified to this effect.[96] SWC does not, and cannot, disprove this sworn testimony.

C. The City Properly Conducted Its Concurrency Review for the Warehouse "A" Proposal.

To the extent that SWC cites the reference to "cumulative impacts" in FWRC 19.90.120(2), *see* SWC Brief at 43, this code section is also unhelpful to SWC's appeal. Chapter 19.90 FWRC contains Federal Way's concurrency regulations,[97] which were summarized by the City's traffic engineers during the administrative hearing[98] and which are further detailed in FWC's brief. *See* FWC Brief at 21-22. The City's concurrency review for each new development project culminates in the issuance of a "Capacity Reserve Certificate" (CRC) that essentially allocates, or "reserves" a defined

[96] Tr. 907; Tr. 921.

[97] "Concurrency" is a Growth Management Act concept requiring municipalities to adopt and enforce local ordinances that ensure construction of certain transportation facilities "concurrent with. . . [new] development" in order to prevent violations of Level of Service (LOS) standards established in the municipality's comprehensive plan. *See* RCW 36.70A.070(6)(b).

[98] Tr. 854-859.

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quotient of transportation impact capacity to the development proposal at issue. *See* FWRC 19.90.050. This review framework is additive, with each new CRC taking into consideration all relevant CRCs for other, previous development projects.[99]

The code provision cited by SWC defines the City's capacity evaluation method for concurrency review, and provides as follows:

> For the purposes of this chapter, application for a development permit shall include consideration of the cumulative impacts of all development permit applications for contiguous properties that are owned or under the control of the same owner, when one or more development permits would be issued within two years of the date of issuance of a development permit for such contiguous property.

FWRC 19.190.120(2) (emphasis added).

To the extent that SWC contends that the City's concurrency review for Warehouse "A" requires a different or otherwise more expansive "cumulative impacts" analysis than what was actually performed, this argument fails as a matter law for several reasons.

First, the CFC for the Warehouse "A" proposal (known at that time as the "Preferred Freezer" project) was issued in July 2016, and was itself an independently appealable determination under the City's regulations.[100] *See* FWRC 19.90.160. It is undisputed that SWC did not timely appeal this determination. Any such challenge to the City's concurrency review for Warehouse "A" at this late date is clearly time-barred.

Second, the requirement for consideration of "cumulative impacts" in FWRC 19.90.120(2) is by its terms limited to the context of *that* chapter—i.e., the City's concurrency methodology. Any attempt to extend the reach of FWRC 19.90.120(2) to other aspects of the City's development project review framework fails under the plan language of that provision.

[99] Tr. 854-856.

[100] Tr. 413-14; Tr. 862.

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Third, the mandate of FWRC 19.90.120(2) is limited to consideration of development projects on contiguous[101] property "when one or more development permits would be issued within two years of the date of issuance of a development permit for such contiguous property." To the extent SWC contends that the City's concurrency review of the Warehouse "A"/Preferred Freezer proposal should have further encompassed Warehouse "B" or the Business Park, the application chronology of the three projects plainly refutes this assertion. The Warehouse "A"/Preferred Freezer CRC was issued in July 2016. It is undisputed that no permit application for the Warehouse "B" proposal was submitted until September 2017, and that the Business Park project application was not filed until November 2017. During its concurrency review of Warehouse "A" in 2016, the City could not have anticipated, much less accurately determined, that development permits would be issued for the other two proposals when applications for those projects had not even been submitted yet.

Finally, and most fundamentally, Chapter 19.90 FWRC is at best a double-edged sword for SWC's appeal claims. The additive nature of the City's concurrency review process under that chapter—including the "cumulative impacts" mandate of FWRC 19.90.120(2)—is a critical component of the City's regulatory framework for evaluating development proposals. The concurrency analysis, together with the City's adopted TIA Guidelines and the SEPA review process, collectively operates to ensure that all significant transportation impact are ultimately identified and mitigated during the project review process. The Hearing Examiner's decision acknowledged the

[101] The "cumulative impacts" mandate of FWRC 19.90.120(2) is by its terms expressly limited to development proposals on "contiguous" property. Because "contiguous" is left undefined by the City's land use code, it is appropriate to consult a dictionary to determine the meaning of that term. *See Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 192, 920 P.2d 1216 (1996). *Merriam-Webster's Online Dictionary*, available at https://www.merriam-webster.com/dictionary/contiguous (2 April 2020), defines "contiguous" as "being in actual contact: touching along a boundary or at a point." (Emphasis added.) *See also Cambridge's Online Dictionary*, available at https://dictionary.cambridge.org/us/dictionary/english/contiguous (2 April 2020) (defining contiguous as being "next to or touching another") (Emphasis added.) The Warehouse "A" project site is nor contiguous with the Business Park parcel under this well-established definition, as the boundaries of the two properties are physically separated by intervening parcels and S. 336th Street, and are thus not "touching" with "actual contact". *See* Tr. 483; Tr. 577.

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effectiveness of this coordinated, multi-tiered project evaluation regime.[102] In emphasizing the cumulative nature of the City's concurrency model, SWC effectively concedes this point on appeal.

D. The City Properly Applied Its Traffic Impact Analysis Guidelines to the Warehouse "A" Proposal.

SWC next suggests that a more expansive or otherwise different "cumulative analysis" was required under the City's *Guidelines for the Preparation of Traffic Impact Analysis* ("TIA Guidelines").[103] *See* SWC Brief at 43-45. SWC is mistaken.

Contrary to SWC's core assertion in this appeal, the Warehouse "A", Warehouse "B" and Business Park proposals do not comprise a unified "development plan". SWC Brief at 43-44. Instead, it is undisputed that these proposed facilities would be located on separate parcels, would have separate functions, and were separately identified as distinct, independent projects. Indeed, the email from FWC's project manager cited by SWC recognizes this point: By specifically requesting a particular permit processing sequence for the respective projects, the message underscores their lack of interconnection and/or interdependence. *See* SWC Brief at 43 (citing AR 7313). The legal characterization of these separate proposals is not altered by the single, oblique depiction of the Weyerhaeuser campus as the "Woodbridge Development Plan" cited by SWC, and SWC's out-of-context reliance upon that anomalous document is an attempt to elevate form over substance. *See* SWC Brief at 44 (citing AR 3178). In short, the three FWC proposals do not involve "phased review" of a single development project pursuant to Section IV.B of the TIA Guidelines, and that provision of the Guidelines is irrelevant to the instant case.[104]

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[102] AR 7847; AR 7869-7875.

[103] *See* AR 7919-7924. The content and methodology of the City's TIA Guidelines were explained by the City's traffic engineer, *see* Tr. 859-861, and they are further as described in FWC's Brief at 20-22. FWC's Brief likewise accurately describes how the City's transportation review was applied in this instance. FWC Brief at 22-27.

[104] Notably, even where "phased review" is utilized to evaluate the traffic impacts of a particular development proposal under the TIA Guidelines, Section III of the Guidelines clarifies that the various "phases" of the development are analyzed separately and sequentially where their anticipated horizon years are different. This approach is in turn consistent with the

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SWC is likewise in error to the extent it suggests that Section III.C of the TIA Guidelines required any further analysis of "cumulative impacts" than was actually performed. *See* SWC Brief at 44-45. The relevant text cited by SWC provides that the City will "Add [the] Impact of Adjacent Major Developments Pending and Approved" as part its transportation review process. SWC contends, erroneously, that the City's traffic evaluation of Warehouse "A" should have included the TIA for the Business Park under this standard.

This argument was specifically rejected by the City's traffic engineers. Under the City's longstanding methodology, review is confined to traffic conditions, including "pipeline" projects, extant on the date of the underlying proposal's application; there is no requirement to update or otherwise supplement a TIA whenever a new development project is identified.[105] Undisputed testimony demonstrates that the City has applied this standard consistently and evenhandedly for over 20 years.[106] The City's engineer explained that the contrary approach proffered by SWC would impede finality in the land use decisional process by effectively requiring "an endless loop" of transportation review for every new development.[107] As the Hearing Examiner noted, the City's methodology "is a sound approach that ensures that all applicants will be treated in a predictable and equal fashion and that traffic review can be completed in a timely manner."[108] SWC cannot demonstrate that this conclusion was clearly erroneous.

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methodology of the City's concurrency regulations. *See* FWRC 19.90.050(4) ("Commercial subdivisions and other projects constructed in phases shall be evaluated for concurrency as each phase is submitted for applicable development permits, notwithstanding any requirement to analyze the commercial subdivision as a whole under SEPA.") SWC does not cite or otherwise acknowledge this provision.

[105] Tr. 795-796. "Pipeline" projects are those proposed development for which land use applications have been filed as of the submittal date for the proposal under review. Tr. 860-861.

[106] Tr. 910.

[107] Tr. 884.

[108] AR 7873-7874.

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SWC errs in asserting that the Business Park project application was "pending" and thus should have been considered in the Warehouse "A" TIA. *See* SWC Brief at 45. As the Examiner correctly noted in rejecting this claim, "it is undisputed that the project application for the Greenline Business Park had not been submitted at the time the Warehouse 'A' TIA was performed and that the Business Park TIA had not been completed."[109]

The remainder of SWC's traffic argument is devoted to subjective criticisms of the Hearing Examiner's Condition No. 11, which required further analysis and, potentially, mitigation to address potential impacts to the SR 18 westbound ramp intersection with Weyerhaeuser Way S. *See* SWC Brief at 45-48. According to SWC, "the Examiner should have resolved the issue by a remand back to the City to reopen the record, collect additional evidence, and revise its decisions, all subject to appropriate public review." SWC Brief at 47.

For the reasons explained in Section 3.6, *supra*, a remand is unauthorized by the City's procedural regulations and state law and was properly rejected by the Hearing Examiner on that basis. SWC's reliance upon *Lanzce G. Douglass, Inc. v. City of Spokane Valley* for its contrary position is misplaced. SWC Brief at 47. As indicated in SWC's own quotation from *Lanzc G. Douglass*, the Hearing Examiner's "remand" in that case was simply an order for the agency to enter a different SEPA threshold determination—*not* to hold a second public hearing or otherwise to continue the public process on a particular component of the agency's original SEPA determination. *Lanzce G. Douglass, Inc.*, 154 Wn. App. at 427.

Regardless, a remand is patently unnecessary where, as the Examiner noted, resolution of the SR 18/Weyerhaeuser Way issue "is likely to be resolved by some modest mitigation."[110] Remanding

[109] AR 7873. As FWC's transportation engineer explained, the initial TIA for the Warehouse "A" proposal was completed in April of 2017. FC submitted an updated TIA in March 2018 to include Warehouse "B". AR 222-379; Tr. 785-787.

[110] AR 7738.

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the project under these circumstances would be wasteful, inefficient, and would contravene Washington's "strong public policy favoring administrative finality in land use decisions." *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (quoting *Deschenes v. King County*, 83 Wash.2d 714, 717, 521 P.2d 1181 (1974)); *Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 168, 269 P.3d 388 (2012); *Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002). SWC's contrary argument disregards this bedrock principle.

4.9 The Warehouse "A" Proposal Is Consistent with the City's Comprehensive Plan.

SWC next contends that the Warehouse "A" proposal violates the City's Comprehensive Plan. SWC Brief at 35-41. SWC is incorrect.

A. The FWRC 19.65.100(2)(a)(ii) Decisional Criteria and LUG8.

The City's Process III Approval standards include a decisional criterion requiring that the underlying project be "consistent with the comprehensive plan." FWRC 19.65.100(2)(a)(ii). The code does not specify any particular Comprehensive Plan provisions by which such consistency is to be measured, leaving this issue to the Director's discretion on a case-specific basis. *Id.* The Director's Process III Approval decision for the Warehouse "A" proposal identified seven relevant goals and policies from the Federal Way Comprehensive Plan for evaluation under FWRC 19.65.100(2)(a)(i).[111] At the appeal hearing, Director Davis and the City's Senior Planner both testified regarding how these goals and policies were selected, and attested to their particular relevance and application to the Warehouse "A" project.[112]

One of the Comprehensive Plan provisions identified and evaluated in the City's Process III Approval decision was Land Use Goal 8 (LUG8), which encourages "office and corporate park development that is known regionally, nationally, and internationally for its design and function." City

[111] AR 2439-2440.

[112] Tr. 705-706; Tr. 719-725.

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of Federal Way Comprehensive Plan, II-17. LUG8 is intended to supplement the Comprehensive Plan's Corporate Park (CP) land use designation, which in turn provides as follows:

> 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. The agreement governing the Corporate Park designation allows for a wide variety of uses, including, but not limited to, corporate offices, parks, production and light assembly of goods, conference center, warehousing and distribution, and forest uses. Accessory uses such as banking and financial services, restaurants, retail, and helistops are also allowed. This zoning presents unique opportunities for development. The City will evaluate how the property can best be utilized going forward.

City of Federal Way Comprehensive Plan, II-17 (emphasis added).

This description is significant for two reasons. First, it identifies warehouses facilities as a *primary* land use within the CP designation. This contrasts with the Professional Office and Office Park designations that apply on other portions of the former Weyerhaeuser campus, where the Comprehensive Plan either prohibits warehouses outright are allows only "light" or "limited" facilities of this type. *See* City of Federal Way Comprehensive Plan, II-17. Second, it acknowledges that the actual, binding standards for project development within the CP designation are those set forth in the CZA—not the Comprehensive Plan. *Id.*

B. The Process III Approval Decision and Hearing Examiner's Decision.

The City's February 4, 2019 Process III Approval decision evaluated the Warehouse "A" proposal under each of the cited goals and polices, including LUG8, and ultimately determined that the proposal was consistent with these standards.[113] Specifically, the Process III Approval decision found as follows with respect to LUG8:

> Craft Architects has considered the natural surroundings and existing built structures on the Federal Way Campus LLC Property. In their design, Craft Architects has included timber accents and artistic reveal patters to emphasize the history and character of the area. Entry node,

[113] AR 2439-2440.

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> visible to the public streets, are comprised of large expanses of glass, glue laminated timber framing façade modulation, large canopies and arcades.[114]

Director Davis explained the basis for his findings at the appeal hearing, emphasizing that it is primarily "[t]he campus itself" that has received widespread recognition.[115] As the Director further explained, FWC's site design would "preserve. . . the unique features of the site", would "fit in with the environment", and would "not create a significant impact".[116] The Director also noted that a detailed level of structural and design review for FWC's future Warehouse "A" building would occur not during the Process III Approval stage but rather after a building permit application is submitted for the structure.[117] None of SWC's witnesses provided testimony that meaningfully contradicted the Director's findings in this regard.

SWC originally challenged the Warehouse "A" proposal under numerous provisions of the City's Comprehensive Plan,[118] all of which were rejected by the Hearing Examiner.[119] In his Decision denying SWC's administrative appeal, the Examiner afforded "individualized attention" to LUG8.[120] However, the Hearing Examiner appropriately tempered his evaluation with common sense. Recognizing that warehouses were specifically allowed under the actual, binding regulatory standards of the CZA, the Examiner refused to construe LUG8 as "requiring that a warehouse can only be allowed if it is likely to win international awards for its architectural design."[121] The Examiner noted FWC's proposed development would retain the tree strands that "maintain the overall landscape integration" of the Weyerhaeuser campus and would preserve existing view corridors—particularly in

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[114] AR 2439-2440 (internal punctuation omitted).

[115] Tr. 720-721.

[116] Tr. 720.

[117] Tr. 750-751.

[118] AR 2506-2508.

[119] AR 7876-7878.

[120] AR 7878.

[121] AR 7878.

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relation to the corporate headquarters building.[122] Based upon these and other factors, the Examiner ultimately concluded that the Warehouse "A" proposal was consistent with LUG8.[123]

C.**SWC's Arguments Regarding LUG8 Are Incorrect.**

In its LUPA appeal, SWC has abandoned all of its Comprehensive Plan claims except for its challenge based upon LUG8. *See* SWC Brief at 35-41. SWC's various arguments regarding this goal are without merit.

1. SWC bears the exclusive burden of proof.

Preliminarily, SWC's emphasis on the burden of proof applicable to the administrative permit process below, *see* SWC Brief at 35-36, is unavailing. As the Petitioner in the above-captioned LUPA appeal, SWC bears the exclusive burden of demonstrating to the Court that the challenged Process III Approval decision for the Warehouse "A" proposal was clearly erroneous. *See* RCW 36.70C.130(1); *Wenatchee Sportsman*, 141 Wn.2d at 175-76. SWC cannot avoid this burden by citing the procedural standards applicable in the underlying administrative proceedings, which as a matter of law are irrelevant here.

2. **LUG8 has no binding regulatory effect.**

On a more fundamental level, SWC's various arguments regarding LUG8 attempt to enforce a level of binding specificity that is unrecognized by either the City's code or state law in this context.

A comprehensive plan is "a generalized coordinated land use policy statement of the governing body of a county or city." RCW 36.70A.030(4). Comprehensive plans do not directly control site-specific development, and they are subordinate to specific zoning regulations. *See, e.g., Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997); *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *Carlson v. Beaux Arts Village*, 41 Wn. App. 402, 408, 704 P.2d 663 (1985). Even where—as here—a local zoning code purports to require comprehensive plan consistency at the project approval level, only *general* consistency is required in this context unless the comprehensive plan itself contains specific mandates and/or

[122] AR 7878.

[123] AR 7878.

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prohibitions that expressly apply to the permit at issue; general statements from the Comprehensive Plan may not be invoked to overrule the specific land use authorization otherwise granted by the code. *See, e.g., Lakeside Indus. v. Thurston County,* 119 Wn. App. 886, 898, 83 P.3d 433 (2004).

As the Hearing Examiner correctly concluded, the Federal Way Comprehensive Plan—including LUG8—contains no specific, mandatory policies that are explicitly controlling upon the Warehouse "A" proposal in this manner.[124] To the contrary, the Introduction to the City's Comprehensive Plan emphasizes that "[t]he policy statements within each chapter are used to guide new or revised zoning and other regulations"—*not* to control individual development projects. City of Federal Way Comprehensive Plan, I-4 (emphasis added). The goals of the policies of the Plan are not intended to be rigidly enforced, but instead "offer[] a flexible framework for Federal Way's future, allowing for adaptation to real conditions over time." City of Federal Way Comprehensive Plan, I-4 (emphasis added). The Land Use Element of the Plan, where LUG8 itself is codified, likewise underscores that the goals and policies of that Element are foundational only:

> "The Land Use chapter serves as the foundation of the Federal Way Comprehensive Plan (FWCP) by providing a framework for Federal Way's future development and by setting forth policy direction for Federal Way's current and future land uses."

City of Federal Way Comprehensive Plan, II-1 (emphasis added).

SWC's claim collapses under this authority. The Hearing Examiner correctly concluded that LUG8 "was not intended to guide project-specific development" in light of the above standards.[125] It is undisputed that warehouses are permitted outright on the CP-designated areas of the Weyerhaeuser campus, and that FWC's Warehouse "A" proposal satisfies all dimensional, configurational and other standards applicable at the site development stage of project review. SWC's attempt to manufacture a binding, project-specific, regulatory prohibition from the language of LUG8 fails as a matter of law.

3. The Hearing Examiner's interpretation of LUG8 was correct.

SWC is further mistaken in suggesting that the Hearing Examiner erred by considering reasonableness and due process considerations when construing LUG8. *See* SWC Brief at 39-40. The

[124] AR 7876-7879.

[125] AR 7878.

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literal interpretation of that goal proffered by SWC is not merely nonsensical, but also unconstitutional. It cannot be credibly contended that the City must withhold development permit approval for projects within the CP zone unless and until each applicant's proposal has won an international design award. Construing and enforcing LUG8 in this rigid manner would be facially arbitrary and capricious, as well as unconstitutionally vague. *See, e.g., Anderson v. Issaquah*, 70 Wn. App. 64, 75-82, 851 P.2d 744 (1993); *Cingular* Wireless, 131 Wn. App. at 777-79.

The interpretation of LUG8 adopted by the Director and upheld by the Hearing Examiner was correct under this controlling legal standard. Contrary to SWC's assertion, the Hearing Examiner did not "change the criteria of LUG8". SWC Brief at 41. Instead, the Examiner afforded an interpretation to that goal that was both reasonable and constitutional. Ordinances should not be construed in a manner that leads to unlikely, unreasonable, unrealistic, strained, or absurd results. *Alderwood Water Dist. v. Pope and Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963); *Tahoma Audubon Soc. V. Park Junction Ptrs.* 128 Wn. App. 671, 682, 116 P.3d 1046 (2005); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 206, 810 P.2d 31 (1991). An ordinance must also be construed, if possible, in a manner that is consistent with relevant constitutional parameters. *See, e.g., DCR v. Pierce County*, 92 Wn. App. 660, 686, 964 P.2d 680 (1998). The Examiner's interpretation of LUG8 satisfies these well-established rules of construction; the interpretation proffered by SWC disregards them.

4. **The City's interpretation of LUG8 is entitled to deference on appeal.**

Finally, to the extent that differing interpretations of LUG8 are possible, the City's construction of that provision controls. Under LUPA, the Court must "give due deference to the local government's construction of the law within its expertise." *Rmg Worldwide LLC v. Pierce County*, 1 Wn. App.2d 257, 269-70, 409 P.3 1126 (2017) (citing *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wash.2d 242, 250, 218 P.3d 180 (2009)). Such deference is particularly warranted in the instant case, where the same interpretation of LUG8 was reached both by the Community Development Director and by the Hearing Examiner—the City's two highest administrative officials, respectively, with authority to interpret and render decisions under Federal Way's land use ordinances. *See* FWRC 19.50.010; FWRC 19.70.150. SWC's contrary construction of LUG8, based entirely upon its own subjective

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self-interest, is subordinate to the City's interpretation as a matter of law. SWC cannot demonstrate that the City's decision was clearly erroneous on this point.

In sum, SWC cannot meet its burden as an appellant under the standards of review set forth under LUPA or SEPA. The Court should reject SWC's various arguments and affirm the Hearing Examiner's Decision.

V. ARGUMENT: FWC'S APPEAL SHOULD BE DENIED

The Court should also deny FWC's challenge to MDNS Condition No. 11 and Process III Approval Condition No. 43, the two conditions imposed by the Hearing Examiner. As the Court noted during the parties' April 1, 2020 telephone conference, both of these measures are minor in context and effect. Compliance with each requirement will thus pose little practical difficulty in the first instance. The defensibility of both requirements is likewise clear under the applicable standards of review. Both conditions should be affirmed.

5.1 Condition No. 43 Should Be Affirmed.

Condition No. 43 provides in its entirety as follows:

> The Applicant shall supplement its stormwater plan to demonstrate compliance and consistency with the *Executive Proposed Basin Plan Hylebos Creek and Lower Puget Sound* (King County Surface Water Management, 1991).[126]

As explained above, the Hearing Examiner added this condition not because SWC (or any other party) had actually identified any compliance concerns with the provisions of the Basin Plan, but rather because the City had not considered the plan at all in evaluating the Warehouse "A" project.[127] In his October 29, 2019 Reconsideration Decision, the Examiner retained the substance of the condition but renumbered and re-designated it as a component of the City's Process III Approval

[126] AR 7886.

[127] AR 7860-7861.

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decision for the Warehouse "A" project rather than a condition of the MDNS.[128] FWC now challenges Condition No. 43 on both procedural and substantive grounds. *See* FWC Brief at 68-70.

This is not a close issue legally. It is beyond dispute that the Basin Plan is adopted by reference under FWRC 16.25.010(2)(a) as "Special Requirement #1" of the City's drainage review framework for development proposals. Where no burden of proof is definitively established by ordinance, the City's procedural rules define the following standard for administrative appeals:

> Where the applicable ordinance(s) do not provide that the appellant has the burden, the City shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

City of Federal Way Hearing Examiner Rules of Procedure §11(a)(3).

The City accordingly was required to make a *prima facie* showing that the Process III Approval decision for the Warehouse "A" project was compliant with all applicable City regulations. The Hearing Examiner's 42-page Decision painstakingly confirmed the City's satisfaction of this initial burden in all other respects, but it found—correctly—that the City had not considered the Basin Plan in evaluating FWC's proposal. While this singular, inadvertent and ultimately minor omission is easily remedied through the condition of approval imposed by the Examiner, it was admittedly an omission nonetheless.

FWC contends that the Hearing Examiner lacked jurisdiction over this issue because SWC failed to specifically identify the Basin Plan by name in its administrative Notice of Appeal. *See* FWC Brief at 68-69. FWC sleds uphill in making this argument. As FWC itself acknowledges, SWC's Notice of Appeal broadly alleged non-consideration and/or noncompliance with "executive basin plans for the Hylebos Watershed". FWC Brief at 68 (citing AR 2510). On its face, this reference was sufficient to bring the Basin Plan issue within the scope of the Examiner's appellate review authority.

[128] AR 7741.

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See FWRC 19.70.125 ("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"). No more specific or detailed statement in SWC's Notice of Appeal was required.

There is likewise no dispute that the Basin Plan has in fact been incorporated into the City's code. FWC instead devotes the bulk of its argument toward reciting testimony and other evidence that the outdated, obsolete standards in the Basin Plan have effectively been superseded by the City's current, and more environmentally protective, drainage requirements. *See* FWC Brief at 69-70. As the Hearing Examiner himself acknowledged,[129] FWC is almost certainly correct on this point. Nevertheless, this contention misses the mark. It remains uncontested that the Warehouse "A" Process III Approval decision did not actually address the Basin Plan at all—even if only to acknowledge the plan's supersession by the City's current stormwater standards. Given the overwhelming weight of expert testimony at the hearing,[130] documenting this point through the supplement required by the Examiner will presumably be a simple and expeditious undertaking.

FWC spends more effort opposing Condition No. 43 than will likely be needed to demonstrate compliance with it. Irrespective, the condition by its terms does nothing more than require the Warehouse "A project to satisfy one of the City's adopted code standards. This is hardly a novel approach, much less an objectionable result. *See, e.g.,* FWRC 19.65.100(3) (broadly authorizing Process III Approval decision to include conditions). And, as noted *supra*, the Process III Approval decision already contains numerous similar conditions requiring compliance with various other regulatory mandates. FWC cannot show that Examiner's imposition of this condition was clearly erroneous or factually unsupported, and its challenge to this requirement should be rejected.

[129] AR 7738-7740.

[130] Indeed, FWC itself correctly cites some of this evidence. *See* FWC Brief at 69-70 (citing AR 7859-7860; AR 7739; Tr. 476-477; Tr. 515, 523).

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5.2 Condition No. 11 Should Be Affirmed.

FWC's appeal of Condition No. 11 is likewise much ado about nothing—or, at the most, very little.

In his September 12, 2019 Final Decision, the Hearing Examiner meticulously evaluated the issue of traffic impacts and how traffic generation had been analyzed under the City's multi-tiered transportation review framework.[131] The Examiner ultimately concluded that the City's analysis had thoroughly identified, and mitigated for, all relevant traffic impacts—including cumulative impacts—to local and state transportation facilities.[132] The Examiner noted, however, that "[t]he one missing link in cumulative trip generation in the administrative record is the lack of completed concurrency review for the Business Park."[133] Acknowledging the future potential for a level of service failure at the Weyerhaeuser Way/SR 18 intersection, the Examiner added Condition No. 11 to the Warehouse "A" MDNS in order to address this concern:

> The Applicant shall acquire its Concurrency Review Certificate for the Greenline Business Park prior to any construction activity for Warehouse A. As part of that concurrency review, the City shall identify any proportionate share mitigation necessary from the Warehouse A project to meet PM level of service requirements. The Applicant shall pay any such funds or install any such mitigation prior to occupancy of Warehouse A. Any collected funds shall be subject to the limitations of RCW 82.02.020.[134]

With this additional condition, the Hearing Examiner concluded that the Warehouse "A" proposal, as mitigated, "would not create any probable significant adverse cumulative traffic impacts because all affected roads and intersections will operate within adopted level of service standards[.]"[135]

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[131] AR 7853-7856; AR 7869-7875.

[132] AR 7847; AR 7869-7875; AR 7885.

[133] AR 7871.

[134] AR 7871-7872; AR 7885-7886.

[135] AR 7872.

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In his October 29, 2019 Reconsideration Decision, the Examiner acknowledged that his original conclusion contained an error of fact. Information contained in the (draft) Business Park TIA indicated that cumulative traffic impacts from the three FWC projects would likely cause a slight failure in the volume to capacity ("V/C") LOS for the signalized intersection of Weyerhaeuser Way South and the State Route 18 westbound ramp.[136] To remedy this concern, the Examiner modified Condition No. 11 to require supplementation of the City's traffic impact analysis:

> Cumulative traffic impacts from Warehouse A and B and the Greenline Business Park to the SR 18 westbound ramp intersection with Weyerhaeuser Way South shall be evaluated and mitigated in a SEPA analysis addendum and/or revision to the Warehouse A and B TIA. PM peak hour cumulative impacts shall be included in the TIA analysis, or added to the concurrency review for Warehouse A as the City finds most consistent with its regulations. The City shall determine if WSDOT has jurisdiction over the SR 18 intersection. If WSDOT has jurisdiction over the SR 18 intersection, WSDOT LOS standards shall be applied to the intersection and any necessary pro-rata mitigation for Warehouse A shall be formulated in consultation with WSDOT as contemplated in Conclusion of Law No. 8 of the Final Decision. If WSDOT doesn't have jurisdiction over the intersection, City LOS standards shall be applied and pro-rata mitigation for Warehouse A imposed as necessary. All mitigation shall be subject to RCW 82.02.020 and constitutional nexus/proportionality.[137]

FWC's challenges to revised Condition No. 11, *see* FWC Brief at 41-57, are unavailing. By its terms, the revised condition does nothing more than to prevent a level of service failure at an already-congested intersection and ensure that Warehouse "A" ultimately mitigates its proportionate share of impacts to this facility. Like the Basin Plan compliance mandate imposed under Condition No. 43, the actual effort and time needed to comply with Condition No. 11 will likely be *de minimus*. For the reasons set forth below, the condition should be affirmed.

A. Condition No. 11 Is a Proper Exercise of the City's Police Power.

[136] AR 7735-7736. The draft TIA for the Business Park is set forth at AR 3907-4105.

[137] AR 7740-7741 (emphasis added).

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It is well-established that a municipality may impose conditions on local development projects in order to mitigate their impacts. This bedrock principle has been recognized by every level of the judiciary, including the United States Supreme Court. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("The government may choose whether and how a land use permit applicant is required to mitigate the impacts of a proposed development."). Innumerable Washington cases are in accord. *See, e.g., Trimen Dev. Co. v. King Cty.*, 124 Wn.2d 261, 275, 877 P.2d 187 (1994); *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 252 P.3d 382 (2011); *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 698, 26 P.3d 943 (2001); *J.L. Storedahl & Sons, Inc. v. Cowlitz Cty.*, 125 Wn. App. 1, 9, 103 P.3d 802 (2004), *View Ridge Park Associates v. Mountlake Terrace*, 67 Wn. App. 588, 598, 839 P.2d 343, 349 (1992); *Cobb v. Snohomish Cty.*, 64 Wn. App. 451, 457-58, 829 P.2d 169 (1991); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 890, 795 P.2d 712 (1990); *Miller v. City of Port Angeles*, 38 Wn. App. 904, 909-10, 691 P.2d 229 (1984). Condition No. 11 mitigates the traffic generation impacts of Warehouse "A" and falls squarely within the scope of this authority.

The primary legal constraint on local permit conditioning discretion is the nexus and proportionality requirement. "Mitigation requirements may be imposed where there is a reasonable and direct relationship between the effects of the proposed development and the required mitigation." *United Dev. Corp.*, 106 Wn. App. at 698. This limitation is rooted in the Fifth Amendment "takings" clause and is codified at RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 139, 990 P.2d 429 (1999), *aff'd on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Burton v. Clark County.*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998); *Vintage Const. Co., Inc. v. City of Bothell*, 83 Wn. App. 605, 611, 922 P.2d 828, 831 (1996*), aff'd sub nom. Vintage Const. Co. v. City of Bothell*, 135 Wn.2d 833, 959 P.2d 1090 (1998); *Donwood, Inc. v. Spokane County.*, 90 Wn. App. 389, 395, 957 P.2d 775, 778 (1998).

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Condition No. 11 is also facially compliant with this mandate, as it expressly—and repeatedly—emphasizes that any contribution imposed upon Warehouse "A" to mitigate the Weyerhaeuser Way S/SR 18 facility is strictly limited to that project's "pro-rata" share.[138] Indeed, by clarifying that "[a]ll mitigation shall be subject to RCW 82.02.020 and constitutional nexus/proportionality", the Hearing Examiner took the extraordinary step of formally acknowledging the body of law cited above.

B. **Condition No. 11 Is a Proper Exercise of the City's SEPA Authority.**

Condition No. 11 is also consistent with, and authorized by, SEPA. Several well-established SEPA principles underscore the propriety of this measure and support the Hearing Examiner's approach.

First, it is beyond any credible dispute that land development projects may be mitigated by appropriate conditions of approval under a local agency's SEPA authority. This power is enshrined in the State Environmental Policy Act itself, *see* RCW 43.21C.060 ("Any governmental action may be conditioned or denied pursuant to this chapter"); is further reiterated in the SEPA Rules, *see* WAC 197-11-660(1) ("Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact"); and has been repeatedly recognized by Washington Courts. *See, e.g., Cougar Mountain Associates*, 111 Wn.2d at 752; *Donwood*, 90 Wn. App. at 394-96; *Adams v. Thurston County*, 70 Wn. App. 471, 476, 855 P.2d 284 (1993); *Levine v. Jefferson County.*, 116 Wn.2d 575, 579, 807 P.2d 363 (1991). By definition, a mitigated determination of nonsignificance effectuates the exercise of this power under both state law and the City's local SEPA regulations. *See* WAC 197-11-350; FWRC 14.15.110.

[138] AR 7741.

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Second, the Hearing Examiner correctly recognized that environmental review under SEPA involves consideration of cumulative harm that would result from the underlying proposal.[139] (As the Examiner explained, this is a distinct concept from whether separate proposals must be jointly evaluated in the *same environmental document* under the interdependency standard of WAC 197-11-060.[140]) The authority cited by the Examiner to this effect is controlling. The SEPA Rules themselves expressly acknowledge that "impacts" may be "direct, indirect or cumulative." *See* WAC 197-11-792(2)(c) (emphasis added) (internal punctuation omitted). Contrary to FWC's assertion, *see* FWC 43-45, nothing in SEPA limits this principle to the context of an Environmental Impact Statement. Indeed, SEPA's broad definition of "impacts" as "the effects or consequences of actions" recognizes no such limitation either expressly or by context; rather, *all* "effects" and "consequences" are encompassed within its scope. *See* WAC 197-11-752. *Chuckanut Conservancy v. Dep't of Natural Resources*, 156 Wn. App. 274, 232 P.3d 1154 (2010), likewise underscores this point, emphasizing that SEPA review properly evaluates

> the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses within the affected area.

Chuckanut Conservancy, 156 Wn. App. at 285 (citing *Norway Hill Presev. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976)) (emphasis added). The Examiner's straightforward reading of *Chuckanut* was correct.[141] FWC fails to persuasively distinguish or otherwise avoid the plain import of that case. FWC Brief at 42.

Third, Washington courts have consistently upheld the required mitigation of cumulative impacts under SEPA where a development proposal would negatively affect failing infrastructure

[139] AR 7862-7863.

[140] AR 7862-7864.

[141] AR 7862-7863.

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facilities. *See, e.g., Town & Country*, 161 Wn. App. at 26-27 (upholding requirement for proposed plat to pay traffic mitigation for cumulative traffic impacts under SEPA where traffic from unrelated development projects would, when combined with traffic from the proposed plat, cause LOS failures at local intersections); *Lanze G. Douglass*, 154 Wn. App. at 424 (upholding requirement to prepare an EIS to mitigate fire danger where proposed development would further impact already-limited fire evacuation routes). FWC cites these decisions, *see* FWC Brief at 42-43 & n.10, but does not properly acknowledge the holdings and context of each. Regardless, the Weyerhaeuser Way S./SR 18 intersection LOS failure that Condition No. 11 seeks to prevent is precisely the type of significant adverse environmental impact for which projects may be conditioned under SEPA to avoid. *See, e.g.*, *Town & Country*, 161 Wn. App. at 26-27.[142]

Fourth, it is well-established that in reviewing proposed projects, a municipality must consider and mitigate for impacts to property and facilities located outside the municipality's own jurisdiction. *See, e.g., Cathcart-Maltby-Clearview Comm. Council v. Snohomish County*, 96 Wn.2d 201, 209, 634 P.2d 853 (1981); *SAVE v. City of Bothell*, 89 Wn.2d 862, 869, 576 P.2d 401 (1978). To the extent that Condition No. 11 ultimately requires FWC to obtain approval from, or contribute mitigation to, WSDOT for the Weyerhaeuser Way S./SR 18 intersection facility at issue, this approach is entirely consistent with the above authority.[143]

Fifth, to the extent that FWC contends that Condition No. 11 is inconsistent with or otherwise unsupported by the City's adopted SEPA policies, *see* FWC Brief at 50-53, this assertion is incorrect. The policies listed in the Warehouse "A" MDNS, including without limitation TP3.18 (requiring

[142] To the extent FWC contends that Condition No. 11 is unsupported by substantial evidence in this regard, *see* FWC Brief at 54-57, its own brief elsewhere effectively concedes the anticipated V/C LOS failure for the Weyerhaeuser Way S./SR 18 facility at issue. *See* FWC Brief at 45.

[143] To this effect, it is also noteworthy that various other provisions of the MDNS also require cooperation with and/or approval from WSDOT. *See* AR 2378; AR 2381; AR 2383-2384. None of these other conditions are challenged by FWC.

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incorporation of environmental factors into transportation decision-making) are facially sufficient to support Condition No. 11.[144] Indeed, it is unnecessary in the first instance for agencies to cite a specific SEPA policy to support each and every individual mitigation measure. *See, e.g., Brinnon Grp. V. Jefferson County*, 159 Wn. App. 446, 484, 245 P.3d 789 (2011). Irrespective, FWC's argument disregards the express language of Condition No. 11, which unambiguously requires the City to implement the condition in a manner that is "consistent with its regulations".[145] Finally, FWC forgets the fundamental purpose of SEPA review and mitigation as an effective "gap filler" with respect to local regulations:

> The legislature intends that a primary role of environmental review under chapter 43.21C RCW is to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed action.

Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd., 100 Wn. App. 341, 353, 997 P.2d 380, 387 (2000). Condition No. 11 properly fulfills this function, closing what the Examiner noted was a "missing link" in the otherwise complete cumulative traffic impacts analysis for Warehouse "A".[146]

Finally, it bears emphasis that revised Condition No. 11 is based almost entirely upon information contained in the current version of the Business Park TIA—a *draft* report that has not yet been approved by the City. Multiple witnesses explained that review of the TIA is, together with the balance of the Business Park permit application materials, ongoing. The draft Business Park TIA identified the intersection of Weyerhaeuser Way S and the SR 18 westbound off ramps as having a LOS E in the AM peak hour with a volume/capacity of 1.28 in the future without the development and

[144] AR 2381.

[145] AR 7741.

[146] AR 7871.

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1.29 with the development. At such time the City and/or WSDOT ultimately reviews the Business Park TIA, the underlying data assumptions and method used to derive LOS, including volume/capacity concerns, will be more closely examined. It is possible, if not outright likely, that the identified LOS E and volume/capacity of 1.28 and 1.29 could be improved with adjustments to signal timing and reasonable base data assumptions.

Even if signal timing changes or minor cycle length adjustments are ultimately insufficient to avoid an LOS failure, the concern is, as the Examiner noted, "likely to be resolved by some modest mitigation."[147] Thus, like the Basin Plan supplement imposed under Condition No. 43, it is highly improbable that Condition No. 11 will result in any meaningful burden or delay to FWC in any manner. FWC's opposition to this condition is severely disproportionate to its practical effect. Regardless, FWC cannot demonstrate that Condition No. 11 was erroneous and/or that the City exceeded its legal authority in imposing it.

[147] AR 7738.

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V. CONCLUSION

Like the Process III Approval decision and MDNS for the Warehouse "A" project, the Hearing Examiner's Decision was the culmination of an extraordinarily careful, lengthy and thorough review process. The Examiner's detailed findings and conclusions were supported by substantial evidence in the administrative record, including the testimony of numerous expert witnesses. The monolithic weight of this evidence clearly supports the Examiner's core conclusions: The Warehouse "A" proposal satisfies the applicable criteria for approval under the City's Process III standards, and, as mitigated, will not result in any significant adverse environmental impacts—either direct or "cumulative". As the Hearing Examiner correctly determined, the City's regulatory review process facially satisfied any requirement to identify the project's cumulative effects. The Examiner's Decision affirming the Process III Approval and MDNS was correct.

The Hearing Examiner likewise did not err by imposing Condition No. 43 and Condition No. 11. Requiring FWC to demonstrate compliance with the City's adopted Basin Plan and to mitigate a proportionate share of its own traffic impacts was entirely appropriate under the relevant circumstances. Both conditions are unremarkable and are clearly defensible in context.

Neither SWC nor FWC have satisfied their respective burden under the applicable LUPA and SEPA standards of review. The Hearing Examiner's Decision should accordingly be affirmed.

DATED this 7th day of April 2020.

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DECLARATION OF SERVICE

I, Gloria Zak, certify that on the date below I provided this document to the parties listed below via e-service:

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I further certify that per the Court's possessive direction to the parties at the April 1, 2020 telephone conference, a Thumbdrive containing the non-Washington state authority cited in this Brief has been mailed to the Court.

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

Executed at Seattle, Washington this 7th day of April 2020.

/s/ Gloria J. Zak
Legal Assistant

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