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 KING COUNTY

FEDERAL WAY CAMPUS, LLC, a Delaware limited liability company registered in Washington, Petitioner, vs. CITY OF FEDERAL WAY, a Washington municipal corporation, Respondent. SAVE WEYERHAEUSER CAMPUS, a Washington nonprofit corporation, Additional Party.	No. 19-2-30502-9 KNT PETITIONER FEDERAL WAY CAMPUS, LLC'S REPLY BRIEF
SAVE WEYERHAEUSER CAMPUS, a Washington non-profit corporation, vs. CITY OF FEDERAL WAY, a city in the State of Washington, and FEDERAL WAY CAMPUS, LLC, a Washington limited partnership.	No. 19-2-30577-1 KNT

PETITIONER FEDERAL WAY CAMPUS LLC'S REPLY BRIEF

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I. INTRODUCTION

Applicant Federal Way Campus, LLC ("Applicant") submitted permit applications to the City of Federal Way ("City") for three projects: Woodbridge Building A ("Project"), "Building B," and the "Business Park." This appeal concerns only the City's review of the Project, which culminated in the issuance of a State Environmental Policy Act ("SEPA") Determination of Nonsignificance ("DNS") and approval under City Code-required criteria ("Process III Approval"). Petitioner Save Weyerhaeuser Campus ("SWC") attempts to force the City to review the Project together with the later-filed applications for Building B and the Business Park, despite the fact that these are independent developments, in a transparent attempt to kill the Project through delay.

The Court can resolve the SEPA issues in this case based on a single regulation. WAC 197-11-060(3) requires that projects be analyzed together only if they are "interdependent parts of a larger proposal." Here, the record demonstrates – and the Examiner correctly determined – the projects are independent of each other. SWC argues that the projects are part of a larger proposal, but does so only through mischaracterization of the record, which flatly contradicts SWC.

SWC spends most of its Opening Brief ("SWC Brief") arguing that SEPA requires the three projects to be analyzed together notwithstanding the unequivocal provisions of WAC 197-11-060 to the contrary. But nothing in SEPA or the case law construing it requires this joint review. The Code also does not support SWC's argument. Further, SWC fails to meet its burden of proof to show that there will be significant adverse impacts resulting from the Project, or all three projects together, that are not mitigated.

SWC's arguments regarding the comprehensive plan also lack merit. The Court should

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uphold the Examiner's decision to affirm the MDNS and Process III Approval.

Finally, although the Examiner's Decision was almost entirely correct, its imposition of two additional conditions of approval was erroneous and the Court should strike them.

II. AUTHORITY

A. The projects are independent and WAC 197-11-060 does not require they be reviewed together.

SWC asserts that the three proposals are interdependent. SWC Brief, pp. 19-20. SWC strains to find evidence to support its conclusion, but the record contradicts it. SWC makes much of a single-page graphic labeled "Development Plan." *Id*., pp. 1, 20, citing AR 3178;*see also* AR 3483. Yet, the evidence in the record shows there is no such plan. Applicant's representative testified, "that's not a development plan," but only a picture "we put on our website to help the community . . . understand what those three separate projects look like." Transcript, 148. The Project "will be built and financed separately, [and is] not dependent on the others at all." *Id*. at 152.[1]

SWC also points to a statement by Applicant's representative that "it doesn't make a lot of sense to buy 400 acres and build 225,000 square feet." SWC Brief, p. 20 (quoting Transcript 152). This statement establishes that Applicant purchased the campus expecting to develop multiple projects. But nothing in SEPA requires joint review of multiple proposals simply because they are owned the same applicant or located on the same property. WAC 197-11-060(3)(c).

SWC's citation of a letter from Applicant to the City's mayor also does not support its case. SWC Brief, p. 20. In the letter, Applicant states it would like to dedicate some of its

[1] The Examiner's suggestion that the three projects are "economically interdependent" is incorrect. AR 7852-53, 7864.

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lakefront property for preservation, but cannot do so until its permits are issued, because the dedication is subsidized by the proposed development. AR 3458. The letter does not indicate that the projects are dependent on one another.

Finally, SWC cites a letter relating to the critical area report for Building B, which states that the wetland consultant "assumed" that Building B would only be constructed with the Project. SWC Brief, p. 20, citing AR 3710. This statement reflects the assumption of a consultant. There is no information in the letter contradicting Applicant's representative's statement that the projects can all proceed independently of each other. Transcript, p. 150.

SWC's abbreviated argument on this point lacks merit. The overwhelming evidence shows the projects are independent. The Examiner properly determined that, under WAC 197-11-060, they need not be analyzed together. The Court may reject SWC's argument on this basis alone.

B. No other provision of SEPA requires the three projects to be analyzed together.

SWC tries to distract the Court from the controlling regulation, WAC 197-11-060(3), asserting that even if the projects are not interdependent, SEPA still requires a "cumulative effects analysis of the three proposals." SWC Brief, p. 18. SWC is wrong.

1. The "standard of review" does not require the projects to be reviewed together.

The section of SWC's brief titled "standard of review" makes substantive arguments about joint review of the three projects. SWC Brief, pp. 15-18. None of the cases SWC relies on support its position.

First, it cites *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184, 188 (1976), a case concerning development of a roadway that facilitated access to a private parcel. SWC Brief, p. 15. The Court determined that because the road was not being built to encourage

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private development, the City was not required to analyze the impacts of that development. *Id.* at 346. *Cheney* references *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 662, 860 P.2d 1024, 1032 (1993), in which the Court determined that a city acquiring property through annexation must consider the effects of future development. SWC Brief, pp. 15, 23. Noting that development was a "virtual certainty" following annexation, the Court reasoned that "[w]hen government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences before the project picks up momentum, not after." *Id.* at 664-65.

Cheney and *King County* are easily distinguishable from this case. Both stand for the proposition that if future development is dependent on the proposal under review, it must be considered in SEPA review, a principle entirely consistent with WAC 197-11-060. But here each project can be constructed independently from the others. Transcript 89-90, 150, 152, 414-16; AR 2380. There is no evidence that approval of the Project compels the City (either legally or through "snowballing") to approve Building B or the Business Park. SWC's bare assertion to that effect, *see* SWC Brief, p. 15, was contradicted by City witnesses who testified that they would subject Applicant's remaining projects to the same standards as any others. *See e.g.,* Transcript, 854-861 (traffic standards).

SWC next cites *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 425, 225 P.3d 448, 457 (2010). SWC Brief, pp. 15-16. This case states that a City may require SEPA analysis or mitigation based on a project's contribution to an existing adverse condition. *See* Petitioner Federal Way Campus LLC's Opening Brief ("Applicant Opening Brief"), pp. 42-43. Here, there is no existing adverse condition; the uncontested evidence shows surrounding intersections meet LOS standards both without and with the Project. AR 246-247; Transcript,

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788, 858. The case does not consider whether a project must be reviewed together with other independent projects and does nothing to support SWC's contention that combined review of the three projects is required.

SWC also relies on *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 30, 252 P.3d 382, 389 (2011). SWC Brief, pp. 16-17. This case concerned whether RCW 82.02.020, which limits fees on development to those that are reasonably necessary as a direct result of the development, allowed fees charged by Tacoma for a project's impacts on Federal Way's intersections. The Court held that RCW 82.02.020 did not preclude mitigation of the project's contribution to existing adverse conditions. In this case, the intersections in question failed either prior to the project or as a result of the project (the evidence did not show which one). Thus, the project either contributed to an already failing condition or caused the failing condition. *Id.* at 26-28, 54-55. This is entirely different from the case here, where surrounding intersections meet LOS standards both without and with the Project. AR 246-247; Transcript, 788, 858. The case does not consider whether a project must be reviewed together with other independent projects and does not support SWC.

In sum, none of these cases override the clear standards of WAC 197-11-060 but, instead, they are consistent with this section.

2. SWC's additional argument that independent projects must be analyzed together under SEPA notwithstanding WAC 197-11-060 fails.

In the next section of its brief, SWC continues its argument that the three projects must be analyzed together, but still fails to provide any authority that contradicts WAC 197-11-060. SWC Brief, pp. 18-21.

SWC first asserts that Applicant has confused the "scope of proposals" with the "scope of

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environmental review." *See* SWC Brief, pp. 18. There is no confusion. Applicant is simply responding to SWC's improper attempt to expand the scope of review to include all three projects. When making a threshold determination, a reviewing agency must "[d]etermine if *the proposal* is likely to have a probable significant adverse environmental impact, based on the proposed *action* . . . ." WAC 197-11-330(1)(b) (emphasis added). Inferring a requirement for analyzing multiple "proposals" or "actions" together – other than as expressly provided elsewhere in the SEPA Rules – would be inconsistent with this section as well as WAC 197-11-060(3). In support of its argument, SWC references a treatise written by Professor Settle. *See* SWC Brief, p. 18-19 (quoting Richard L. Settle, The Washington State Environmental Policy Act ("Settle"), § 11.01[5] (2018)). But, in the section quoted by SWC, Professor Settle is merely reflecting the requirements of WAC 197-11-060. He states the SEPA Rules require that "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 environmental document." SWC Brief, p. 19, quoting Settle, § 11.01[5]. Nothing in this treatise suggests that a Court should ignore WAC 197-11-060 and require joint review of independent proposals that are <u>not</u> so closely related as to be a single course of action.

SWC next asserts that *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (2002), stands for the proposition that Courts do not follow the "bright line" rule in WAC 197-11-060 but rather apply a "rule of reason." SWC Brief, p. 19. SWC is mistaken. When deciding whether multiple projects must be analyzed together, Courts apply the principles of WAC 197-11-060. *Boehm* flatly contradicts SWC's argument on this point, stating, "the cumulative impact argument must fail unless the Boehms can demonstrate that the project is dependent on subsequent proposed development." 111 Wn. App. 720.

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SWC also relies heavily on *Indian Trail Prop. Ass'n v. Spokane*, 76 Wn. App. 430, 432, 886 P.2d 209, 212 (1994), a case relating to the expansion of the Indian Trail Shopping Center. SWC Brief, pp. 20, 24-26. The City issued an MDNS for the expansion of the shopping center, which included relocation of an existing service station. *Id.* The City also issued a separate DNS for associated underground storage tanks. *Id.* at 433. A car wash was also planned for the shopping center. *Id*. The Court considered both the fuel tanks and the car wash under WAC 197-11-060(3)(b) and concluded that they were "closely related" to the larger shopping mall proposal. *Id.* Thus, all of the components of the project must be considered together in a single document. *Id.*

According to SWC, *Indian Trail* is "dispositive" because the property owner "had a development plan which included several shopping center uses, but also included fuel storage tanks and a car wash," whereas Applicant "has three warehouse proposals." SWC Brief, p. 26. SWC's own description, however, demonstrates precisely why *Indian Trail* does not support its case: the fuel tanks and the car wash were components "included" in the shopping center expansion. The Project, by contrast, is one of three separate proposals. There is no overarching proposal under review (despite SWC's attempts to manufacture one). The Project, Building B, and the Business Park are not dependent upon one another. SWC refers to the square footage of the shopping center, which is relatively small compared with the total square footage of Applicant's three projects, as a "remarkable" contrast. But this fails to support SWC's argument, as it is entirely logical for the components of a single, compact shopping development to be "closely related" while three independent proposals separated by physical distance and time are not.

Finally, SWC relies on *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 82,

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867 P.2d 686 (1994) and *Hayes v. Yount*, 87 Wn.2d 280, 287, 552 P.2d 1038 (1976), but these cases do not support its position. *Tucker* concerned an owner's application to subdivide property in a scenic area for future development. The reviewing agency denied the application because of the potential "precedential effect" of encouraging future subdivisions in the area, and the Court found this to be a "justifiable" reason to deny the application. *Id.* The case does not concern SEPA and in no way establishes that a city errs if it does not consider multiple independent proposals together under SEPA. *Hayes* is also not a SEPA case, but interprets provisions of the Shoreline Management Act, Ch. 90.58 RCW, and its implementing regulations. 87 Wn.2d 287-288.

C. The City Code does not require the projects to be analyzed together.

SWC asserts that the City Code requires the projects to be analyzed together. SWC Brief, pp. 21-27. This argument is contradicted by the plain language of the Code.

SWC relies on FWRC 19.100.030(2), which provides that as part of its review of a development proposal, the City

> shall determine direct impacts, if any, that are a consequence of the proposed development and which require mitigation, considering, but not limited to, the . . . [l]ikelihood that a direct impact of the 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 (emphasis added); SWC Brief, p. 21. SWC cites this provision in support of its argument that the City must consider all three projects together. *See id.* But this is not what FWRC 19.100.030(2) requires. Instead, the provision requires the City to determine the direct impacts of the proposal that require mitigation when aggregated with similar impacts of future development. The City's Traffic Engineer testified that the City does this by considering traffic from a project together with existing traffic and traffic generated by projects whose applications

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were previously submitted; these projects are considered in the "pipeline." Without this date certain, TIAs would need to be updated on a "rolling" basis indefinitely. This iterative review process ensures each project mitigates its impacts. Here, there is no need for mitigation because the Project does not cause any intersection to fail, and the City's review process will ensure Building B and the Business Park mitigate any significant impacts they cause. AR 246-247; Transcript, 788, 858-861, 908-909.

During the hearing, City witnesses provided uncontested testimony describing their compliance with this requirement for the Project. Transcript 54-57, 92-93. The City's Community Development Director explained that the inquiry focused on whether the Project, Building B and the Business Park "would cause a cumulative impact that would be . . . unmitigated," specifically "tak[ing] into account the cumulative impacts that would apply to [the Project]." Transcript 54-55. In other words, the City considered whether any impacts might go unaddressed unless conditioned as part of the Project. By engaging in this inquiry, the City satisfied its obligation under FWRC 19.100.030(2). SWC has provided no evidence of a direct impact of the Project that would otherwise go unaddressed under the City's adopted process; it has only repeated that the three projects must be reviewed together. The Code does not establish any such requirement.

Following its brief and strained interpretation of this section, SWC pivots quickly to additional discussion of SEPA. SWC Brief, pp. 21-27. SWC asserts that the Code and SEPA must be read together and, in the case of conflict, the most protective provision prevails. *Id*. at 21. The latter statement is incorrect as State law prevails over a conflicting local ordinance. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). But in any case, reading the Code and SEPA together does not help SWC. Neither requires the three separate projects to be

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analyzed together.

In yet another attempt to persuade the Court to ignore the clear and determinative provisions of WAC 197-11-060, SWC relies on case law that does not support its position. In *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973) (SWC Brief, p. 22), a water right permit was approved without any SEPA review because SEPA was not yet effective, but the Court held SEPA applied because it was effective before the action was final. The case does not discuss when multiple projects must be analyzed together. In *Loveless v. Yantis*, 82 Wn.2d 754, 765-66, 513 P.2d 1023 (1973) (SWC Brief, pp. 22-23), the Court held an EIS was required for a subdivision when no party asserted the project would not have a significant environmental impact. The case does not discuss when multiple projects must be analyzed together. *King County, supra*, 122 Wn.2d. 648 (SWC Brief, p. 23), also does not support SWC. *See supra*, p. 11. SWC warns ominously of a "dangerous incrementalism," but there is no such thing here, when the projects are independent and each must meet adopted City standards. While SWC's traffic expert complains that the Project will be a "background condition" for the Business Park (SWC Brief, p. 23), this is inherent in the City's iterative traffic impact review process, in which each project mitigates its own significant impacts. Transcript, p. 858-861. SWC also alleges "incrementalism" with regard to wetlands, claiming the critical area plan for Building B fails to show wetlands because they will all be filled by the Project. SWC Brief, p. 23. But the Project critical area report shows all wetlands on the Project site and Building B site. AR 408-412. SWC states all information needed for joint review was available when the Project decision was issued, but this is irrelevant and incorrect. The law does not require consideration of these separate projects together, and all relevant information was not available when Project review was being conducted, because the Business Park application was

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submitted nearly a year and a half after the Project application.[2] Requiring Project approval to wait until after final review of the Business Park, a project whose application is in its infancy, would create lengthy and unnecessary delay – which is the very result SWC desires.

SWC also relies on the *Indian Trail* case, which does not support its position. SWC Brief, pp. 24-27; *see supra*, pp. 7-8. SWC asserts that review of all the projects together is important with regard to historic resources. But, it is uncontested that the Project site is not listed as a historic resource locally or at the state or national level. Transcript, 258-259. In addition, Applicant's architectural historian conducted a review of the entire campus and determined that the Project does not result in significant adverse impacts to historic resources. *Id*., 527, 542; *see also* Applicant's Opening Brief, pp. 34-36.

In sum, neither the Code nor SEPA requires review of all three separate projects together.

D. The Project is consistent with the Hylebos Basin Plan and the Examiner properly determined there are no significant adverse drainage impacts.

1. The Project is consistent with the Hylebos Basin Plan.

SWC asserts the Examiner should have remanded the Project to staff for consideration of the Hylebos Basin Plan. SWC Brief, pp. 27-33. SWC's claim is wrong. The Examiner lacked jurisdiction to remand. Applicant Opening Brief, pp. 66-67; Respondent City of Federal Way's Brief ("City Brief"), pp. 28-32. SWC asserts that remand for further review, public comment, and appeal would not constitute a second open record public hearing, only a "continuation of the first." SWC Brief, p. 32. But the first hearing on the Project is complete and the Examiner's jurisdiction terminated. FWRC 19.70.150(1), 19.70.260. If there were a remand and opportunity

[2] The Project application was submitted in June 2016. AR 2417. The Building B application was not submitted until September 2017, 15 months later. AR 3205. The Business Park application was submitted in November 2017. AR 3224.

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for appeal, this would be a second open record appeal hearing on the Project, which is expressly precluded by RCW 36.70B.060.

In addition, conditions of approval may require future study without public comment and appeal. In *West 514 v. County of Spokane*, 53 Wn. App. 838, 841, 770 P.2d 1065 (1989), the county approved an MDNS for a 97-acre, 1 million square foot shopping center that included conditions requiring future development of an air quality monitoring program, traffic and circulation plan, and drainage plan dealing with water quality and off-site disposal of flood waters. The appellant challenged the MDNS, claiming it "allowed the County to make a determination of nonsignificance before the full impact of the mall was understood." *Id*. at 848. The Court rejected this claim, holding that SEPA allows project approval with conditions. *Id*. at 849. *See also Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 460, 245 P.3d 789 (2011) (Following the Planning Commission's recommendation of a comprehensive plan amendment, the Board of Commissioners ("BOC") approved the amendment with 21 new conditions. The Court rejected the claim that the public should have had an opportunity to comment on the new conditions, holding that SEPA allows mitigation measures and does not require public comment on them.); *see also* FWRC 19.70.150(1).

Even if this were not the case, SWC's argument should still be rejected because SWC and the public have already had the opportunity to comment and file appeals relating to the Basin Plan. There was opportunity to comment when the notice of application was issued (AR 2378), when the MDNS was issued (AR 2384), and again at the Examiner hearing (Transcript 367-368). Any party with standing could have filed an appeal of the MDNS or Process III decision. FWRC

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19.65.120(1). Only SWC appealed.[3] At hearing, SWC had the ability to raise issues related to the Basin Plan, make arguments, and submit evidence. Notably, it did not – and to this day still does not – identify a single specific provision of the Basin Plan it claims the Project does not meet. SWC Brief, pp. 27-33. The Court may assume this is because none exist. *Lodis v. Corbis Holdings, Inc.,* 172 Wn. App. 835, 862, 292 P.3d 779 (2012). It is too late for SWC to attempt to make this claim on reply. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). SWC's failure to make its case does not mean it should get a second bite at the apple. *Anderson v. Pierce County*, 86 Wn. App. 290, 305, 936 P.2d 432 (1997) (MDNS will be upheld unless "appealing party proves that the project will still produce significant adverse environmental impacts"; "skepticism about the effectiveness of some mitigation measures" is insufficient).

2. The Project does not result in significant adverse drainage impacts.

SWC asserts that the City should have required "cumulative review of the drainage impacts" of all three of Applicant's proposals. SWC Brief, pp. 27, 34-35. This is a repeat of SWC's claim that all three separate projects should be analyzed in a single document. The Court need look no further than WAC 197-11-060(3)(c) to reject this argument. The projects are independent and there is no requirement to analyze them in a single document.

SWC first criticizes the Examiner for relying on the Code. But the provision in question is directly relevant. This provision requires "large project drainage review" only if certain thresholds are satisfied (more than 50 acres of new impervious surface in the same or connected drainage subbasins or a single site composed of contiguous parcels more than 50 acres in size).

[3] While SWC states two Tribes submitted comments, neither appealed or commented at the appeal hearing. *See* SWC Brief, p. 27.

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FWRC 16.25.020(2)(c). The uncontested evidence at hearing is that this requirement does not apply to the Project. Transcript 471-472, 482-483, 577-578. SWC claims that review of the projects together is "particularly important" due to the size of the Business Park (SWC Brief, pp. 28-29), but the Code precludes aggregating the Business Park with the Project in determining if large project review is required. In addition, the Code provides that drainage review concerns impacts ¼ mile downstream of a project site. Drainage from the Business Park does not join drainage from the Project until 1 mile downstream, well beyond the range for which analysis is required. Applicant Opening Brief, pp. 30-31; AR 7428, 7478-80, 7518.

SWC then asserts that joint review of the projects was required under FWRC 19.100.030, which requires the City to consider the "[l]ikelihood 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." (Emphasis added.) The record shows the City performed this review with regard to stormwater drainage. As required by the City's adopted Stormwater Design Manual, the stormwater system for the Project is designed to detain stormwater from the Project site and discharge it at its natural location a rate that mimics pre-development forested conditions. Water quality measures are also included. Transcript, 466-469; AR 587-631. These features mitigate potential downstream impacts. *Id*., 474-476. The City complied with FWRC 19.100.030. *Id*., 576-578, 611-612.

Finally, SWC asserts that, in the case of a conflict, the Basin Plan controls. But SWC never identifies a conflict between the Basin Plan and any other provision of the Code. The Court may assume there is none. *Lodis, supra,* 172 Wn. App. 835.

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E. The Code does not require the projects to be considered together for purposes of analyzing traffic impacts.

SWC asserts the three projects must be considered together for purposes of analyzing traffic impacts. SWC Brief, pp. 41-48. SWC first engages in hyperbole, asserting that the three projects will result in "unprecedented" traffic volumes. But the record shows that the projects – even considered together – will not result in any significant adverse impacts to City streets. AR 3929-3930. In addition, the Code provisions SWC cites do not impose the requirements it claims.

1. The Code does not support SWC's traffic argument.

SWC argues that "three specific provisions" of the Code "explicitly require consideration of cumulative traffic analysis." SWC Brief, pp. 42-45. It is incorrect.

First, SWC again invokes FWRC 19.100.030(2), asserting that because Applicant's three projects "are within the 'immediate vicinity' of one another and are all slated for future development," they must be reviewed as one. SWC Brief, p. 42. But as previously explained, FWRC 19.100.030(2) imposes a requirement to determine if a project's direct impacts require mitigation – not to analyze independent projects in a single document. The City conducted this analysis and determined the Project does not trigger the need for mitigation. If later projects do so, they will be required to mitigate their impacts. AR 246-247; Transcript, 788, 858-861.

Second, SWC cites FWRC 19.90.120(2), a provision of the City's transportation concurrency ordinance that requires review of project applications to 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 of the permits would be issued within two years of each other. Yet the City's concurrency determination is a separate decision not at issue here. FWRC 19.90.050. In addition, as the City's Traffic Engineer testified, the

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concurrency process considers applications that are in the "pipeline." Transcript, 854-864; AR 4633. The applications for Building B and the Business Park were submitted after Building A so these are not "pipeline" projects. There is also no evidence in the record about when the other permits will be issued. Transcript, 41-44. SWC's reliance on FWRC 19.90.120(2) is unavailing.

Third, SWC cites two provisions from the City's guidelines for the preparation of TIAs. Both are inapplicable. The first concerns the obligation for "[d]evelopment proposals with multiple phases of construction" to "include all phases of the development for calculating trip generation." AR 7920. But on its face this applies only to single proposals with multiple phases. Nothing about this requirement implies that other nearby independent projects are considered "phases of construction."

The second provision requires a TIA's forecast of the traffic conditions that would exist without the project under review to include "Impacts of Adjacent Major Developments Pending and Approved." As explained during the hearing by the City's traffic engineers, the City's transportation review process considers "pipeline" projects to be those whose applications were submitted prior to the application under review. *See* Applicant Opening Brief, p. 22; AR 7871. Although SWC professed not to understand why the City does not continuously update each TIA to account for every new project that is submitted, City staff explained that it would be impossible to know when to stop updating and difficult to attribute mitigation to specific projects. *See id.* SWC asserts that the Business Park application was submitted before the TIA for the Project, but it is the timing of the applications that is significant. The Project application was submitted in June 2016. AR 2417. The Business Park application was submitted almost a year and a half later, in November 2017. AR 3224. The TIA Guidelines do not establish the additional process that SWC seeks.

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2. The Examiner's imposition of MDNS Condition No. 11 is unwarranted and remand is not required.

SWC asserts remand is necessary to address the traffic impacts of the three projects. SWC Brief, pp. 45-48 SWC is incorrect.

Since there is no requirement to analyze the traffic impacts of the three projects in one document, the Examiner erred in imposing MDNS Condition No. 11. *See* Applicant's Opening Brief, pp. 44-56. Even if this condition were to remain, SWC misconstrues it. SWC states the Examiner "substantially agreed with SWC." This is not the case. SWC claims all three projects must be analyzed together. In contrast, the Examiner required only that the impacts of the projects on the Weyerhaeuser Way S/SR 18 westbound intersection be determined and any "necessary" mitigation assigned on a proportionate share basis. AR 7740-7741. This extremely limited-scope analysis is far different from what SWC requests in this case.

In addition, as previously discussed in connection with Condition 43, the Examiner lacked jurisdiction to remand to City staff. Applicant Opening Brief, pp. 66-67; City Brief, pp. 28-32. SWC asserts that *Lanzce*, *supra*, allows remand. 154 Wn. App. 427; SWC Brief, p. 47. But the action in *Lanzce* was reversal of the MDNS, which is not the case here. In addition, *Lanzce* case dealt with the City of Spokane Valley's code. Here, the rules of the City control. *Chaussee v Snohomish County Council*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984) (hearing examiners have only the authority delegated to them by the city council). In addition, conditions of approval may require future study without public comment and appeal. *West 514, supra,* 53 Wn. App. 841; *Brinnon Grp., supra,* 159 Wn. App. 460; *see also* FWRC 19.70.150(1).

F. The City did not engage in "post hoc rationalization."

SWC claims the City engaged in "post hoc rationalization" because it advanced a "new argument" at hearing that it properly considered cumulative impacts. SWC Brief, pp. 48-51.

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This claim fails on the facts and law.

First, the assertion that the City made a "new argument" at hearing is simply false. SWC Brief, p. 48; *see also* p. 10 (incorrectly asserting that the City "explicitly refused to analyze cumulative impacts"). The MDNS and Process III Approval each include discussions titled "Cumulative Impacts Analysis." AR 2380, 2439. These state that the three separate projects do not need to be considered together under WAC 197-11-060, but that the City considered the cumulative impacts of the Project. *Id*. These included, but were not limited to, impacts relating to the Project and Building B's shared driveway and stormwater pond. *Id*. The City ultimately concluded that, with mitigation, the Project's impacts were not significant. AR 2379, 2381-2384. At hearing, the City maintained the exact same position. City witnesses described the City's consideration of Project impacts in a manner completely consistent with the analysis in the MDNS and Process III Approval. They provided additional explanation, but did not change their position. Indeed, SWC can hardly complain about their testimony, since some of it was elicited by SWC's own attorney, and all of it was responsive to SWC's appeal claims. Transcript 46-49, 53-57, 64-66, 84-85, 89-94, 575-578, 611-612, 643-644, 662-664, 669, 671-672, 704-708, 728-732, 744, 854-866, 878; 915-919, 921-922; *see also* AR 7867-7869 (Examiner rejects SWC's post hoc rationalization claim). SWC's assertion that the City made a "new claim" is directly contradicted by the record.

In addition, the case law SWC relies on is inapposite. *Independence Mining Company, Inc. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997) ("Post hoc rationalization" applies only when an agency provides one justification for a decision when it is made but a different one on appeal; providing supplemental evidence is not post hoc rationalization. *Id*. at 511. Here, the City maintained a consistent rationale and its supplemental evidence was proper. Transcript, 46.);

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Securities and Exchange Comm'n. v. Chenery Corp., 318 U.S. 80 (1943) (Court reversed SEC decision that was based "equity" not on statute. Here the City decision expressly refers to applicable Code and statutory authority. AR 2380, 2439.); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (Court reversed because lower courts based their decisions solely on litigation affidavits and the entire record was not before the Court. Here the entire record of the 5-day hearing before the Examiner is before the Court. AR 7849-7851.); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962) (Court reversed a decision of the Interstate Commerce Commission because the Commission failed to make adequate findings. Here, the Examiner made extensive findings. AR 7845-7886, 7888-7899.); *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981) (Court upheld Department of Licensing rule despite the fact that DOL had not included a statement of purpose as required by statute. Here, the City expressly stated its rationale in its decision; no required statement is absent. AR 2380, 2439.); and *Ellis v. City of Seattle*, 142 Wn.2d 450, 465, 13 P.3d 1065 (2001) (In a wrongful discharge action, employer introduced evidence of justification that was not available when the termination occurred. Here, the City stated in its decision it had considered cumulative impacts, and its testimony before the Examiner was consistent. AR 2380, 2439; Transcript 46.)

Second, SWC's claim fails because the administrative appeal hearing before the Examiner was an open record hearing involving testimony and written evidence. FWRC 19.65.120; FWRC 14.10.060; FWRC 19.70.100 (testimony and written comments accepted in Examiner hearing); *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) (hearing examiner must resolve disputed factual issues, just as a trial court does). SWC's position is antithetical to the concept of an open record hearing. If SWC were to have its way,

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SWC would be able to present new evidence supporting its appeal claims to the Examiner, but the City would be precluded from responding because its testimony would be disregarded as a "post hoc rationalization." This is nonsense.

The evidence – consisting of hundreds of pages of documents and the testimony of numerous expert witnesses in every subject matter area at issue as well as extensive findings and conclusions by City staff and the Examiner – was more than sufficient to meet the City's *prima facie* burden. This distinguishes this case from those relied on by SWC. *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 816, 576 P.2d 54 (1978) (record on review was "totally inadequate"; City made no findings); *Gardner v. Pierce County Bd. of Com'rs*, 27 Wn. App. 241, 245-246,617 P.2d 743 (1980) (record contained "no showing" of whether or not subdivision met minimum lot size requirements; the "lack of a record" rendered the determination clearly erroneous). This is a transparent attempt on the part of SWC to avoid its heavy burden of proof to provide affirmative evidence of a significant adverse environmental impact. *Boehm,* 111 Wn. App. 719-720; *Moss v. Bellingham,* 109 Wn. App. 6, 31, 31 P.3d 703 (2001). SWC failed to do so and the Court must reject its claims.

G. The Project is consistent with the Comprehensive Plan.

SWC claims the Project is inconsistent with a single Comprehensive Plan goal, LUG8. SWC Brief, pp. 35-41. SWC first asserts that the burden of showing consistency is on Applicant. *Id*., p. 35. Yet SWC bears the burden to show that the Decision was in error under one of the standards of LUPA. RCW 36.70C.130(1). SWC fails to meet its burden.

SWC argues the Project is inconsistent with LUG8 because the Project will not be "known regionally, nationally and internationally for its design and function." SWC Brief, p. 36. But the law and the Comprehensive Plan itself are clear. Only general consistency with a

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Comprehensive Plan is required and, in determining consistency, "one cannot simply ask whether a specific action or project would fulfill a particular FWCP policy." AR 1308; *see also Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 897, 83 P.3d 433 (2004). SWC attempts to use the Comprehensive Plan in a manner forbidden by the Plan itself.

SWC also mischaracterizes the language of LUG8. This goal states: "Create office and corporate park development that is known regionally, nationally, and internationally for its design and function." AR 1328. On its face, this does not apply to individual new buildings but to the "corporate park development" as a whole. Testimony at hearing established that the Weyerhaeuser headquarters building is regionally and internationally known. The Project will not change the headquarters building but, instead, is consistent with historic plans for development and includes wooded buffers to protect views from the headquarters building. Transcript, 411-413, 418-423, 531, 538-547; AR 145, 862-868, 2544-2565, 7903, 7908-7910. The Project itself has superior design quality. Transcript, p. 418; AR 152-153, 844-847. SWC's arguments that Applicant was on notice of LUG8 when it bought the Property and that the Project must comply with it fail because that LUG8 does not say what SWC claims it does. *See* SWC Brief, pp. 37-41.

H. The Examiner erred in imposing Conditions 11 and 43.

In this appeal, the City is put in the awkward position of having to defend two conditions that its professional staff did not impose or support at the Examiner hearing. The City's expert staff had it right. The conditions are not warranted. The Court must strike them.

1. Condition 11 is not supported by the law or the facts.

While the Examiner correctly held that the three projects need not be analyzed in the same document under WAC 197-11-060, he inexplicably required the City to do just that when

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analyzing potential future impacts on the SR-18 westbound ramp intersection with Weyerhaeuser Way S. AR 7740-41.

This condition is contrary to the City's adopted transportation concurrency process and TIA guidelines as they have been consistently applied to hundreds of projects over the last 20 years, according to the City's Traffic Engineer Richard Perez. AR 851, 909-911. Mr. Perez testified that the City's concurrency review and TIA guidelines require consideration only of existing traffic, traffic from "pipeline projects," and traffic from the proposal under review. Pipeline projects are those whose application was submitted before the application for the project under review was deemed complete. Each project is reviewed sequentially. This process results in "additive" or "cumulative" review and ensures each project mitigates its own impacts. AR 854-861. The Project was reviewed consistent with these rules. AR 863-864. Mr. Perez testified deviating from this process "would be a rather unmanageable mess, and it wouldn't yield any additional information that would be useful in identifying which projects should mitigate which impacts." Transcript, p. 888; *see also* 908-909 (a "rolling" traffic analysis that incorporates projects whose applications were submitted after the one under review "becomes a very difficult process to administer because I don't know when you stop re-reviewing things. Secondly, it becomes impossible under that scenario to distinguish which development is generating which impacts."). Consistent with its witnesses' testimony, the City argued that the staff decision "thoroughly identified, and mitigated for, all relevant environmental impacts of the proposal, including any potential cumulative impacts." AR 7408; 7410-7414 (generally), 7414-7426 (traffic), 7685-7688 (traffic), 7691-7695 (while the City defended the condition in its brief on reconsideration below, the City also stated the Project "itself will not create any significant adverse impacts and therefore requires no additional mitigation." (Emphasis in original.)).

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In the face of this clear testimony from its own expert witness, and its own argument before the Examiner, the City's defense of the Examiner's condition rings hollow. First, the City argues that projects may be mitigated by "appropriate" conditions under SEPA. City Brief, p. 53. This principle does not save Condition 11, as this condition is not appropriate under the City's adopted processes for traffic analysis and mitigation. The condition improperly singles out the Project to pay "pro-rata mitigation" that is not imposed on any other development that contributes traffic to this intersection.

Second, the City argues that SEPA review properly evaluates the "absolute quantitative adverse environmental impacts of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions." City Brief, p. 54, quoting *Chuckanut Conservancy v. Dep't. of Natural Resources*, 156 Wn. App. 274, 232 P.3d 1154 (2010) (emphasis added). *Chuckanut* involved forest management strategies that would reduce logging by one-third. Appellant claimed an EIS was required because logging was authorized. The Court rejected this claim because, in two-thirds of the forest, existing logging would continue. In one-third of the forest, logging would cease. This case has nothing to do with the imposition of conditions under SEPA. In addition, the evidence is that the existing function of the Weyerhaeuser Way S/SR 18 westbound ramp intersection is acceptable and will remain so with the addition of Project traffic. AR 246-247; Transcript, 788, 858. *Chuckanut* does not support the City.

Third, the City argues that mitigation may be imposed when a proposal will negatively affect already failing infrastructure. City Brief, pp. 54-55, *citing City of Fed. Way*, 161 Wn. App. at 26-27 and *Lanzce*, 154 Wn. App. at 424. These cases are inapposite because no intersections are "already failing" nor will they fail with the Project. Further, these cases do not

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discuss consolidated review of independent development projects. They do not support the requirement for review of all three projects together, with regard to the Weyerhaeuser Way S/SR 18 westbound ramp intersection or otherwise. *Supra*, pp. 5-6.

Fourth, the City argues that a municipality may mitigate for impacts outside its jurisdiction. City Brief, p. 55. While accurate, this principle does not support Condition 11. The Project will not cause significant impacts to the intersection; the intersection will operate at acceptable levels with Project traffic. AR 246-247; Transcript, 788, 858.

Fifth, the City asserts that the Condition is consistent with its adopted SEPA policies. City Brief, pp. 55-56. While the City relies on a vague SEPA policy calling for the incorporation of environmental factors into transportation decision making, the Code identifies the more specific FWRC Title 19 and its adopted documents as the basis for the exercise of its substantive SEPA authority. FWRC 14.25.070(4)(b)(i). The condition is inconsistent with the City's adopted guidelines for traffic analysis. Transcript, p. 888. The City asserts that the condition may be viewed as filling "gaps" in the City's regulations but, according to Mr. Perez, no gaps exist. *Id*., 856-857. When a City's decision is not consistent with its past practice, the City's interpretation of its Code is not entitled to deference. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007).

The City asserts that it will be easy to comply with Condition 11. City Brief, p. 57. But the condition exposes Applicant to the risk it will need to continuously update TIAs for this or future projects, creating uncertainty and extending the review process. *See* Transcript, p. 888; 908-909. There is no corresponding benefit: irrespective of the condition, the City's existing process guarantees that any future project that would cause the intersection to degrade below

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acceptable levels will mitigate that impact so the intersection operates at acceptable levels. AR 854-861.

What is missing from the City's brief is any authority that would allow the City to impose a condition that runs contrary to its own adopted procedures and standards as well as more than 20 years of consistent City practice. Indeed, there is none. *J.L. Storedahl & Sons, Inc. v. Clark Cty.*, 143 Wn. App. 920, 932, 180 P.3d 848, 854 (2008) (agency must evaluate projects under legislatively established criteria, which constrain the agency's discretion); RCW 36.70C.130(1)(a). The Court should strike Condition 11.

2. Condition 43 is not supported by the law or the facts.

The City acknowledges that "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. City Brief, p. 47. This admission is determinative. The City's prima facie burden is set out in HER 11(a)(3), which provides that, "[w]here 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." (Emphasis added.) The City's burden was not to show that it considered the Basin Plan prior to the administrative decision. Rather, the City's burden was to show through evidence submitted at the hearing that the Project complies with the Plan. Evidence at hearing met this burden.

SWC presented a stream-of-consciousness style memorandum that alleged violations of "basin plans" generally, and listed a number of basin plans dated from 1990 to 2016 (although none of the plans themselves were placed in the record). AR 2970, 2972, 2980, 2981, 2986, 3114. With regard to the Plan at issue in this case, the memorandum discusses only a

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background document (the 1990 "Current and Future Conditions Report"), not the Plan itself. AR 2977, 2986. SWC failed to allege an inconsistency with any provision of the Plan. SWC has abandoned any such claim. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

To make sense of these vague and scattershot assertions regarding "basin plans," Applicant's wetlands expert Jennifer Marriott testified that she reviewed eight reports relating to the Hylebos, including those identified by SWC. A number of them were outdated and their guidance addressed by the current stormwater design manual. The elements that remain were "where they encourage things like you need to meet or exceed your existing stormwater manual, you need to incorporate LID [Low Impact Development]. . . measures where ever possible . . . So as much as they were applicable to our project, we did incorporate the concepts[.]" Transcript 515-516 (emphasis added). Cole Elliott, the City's Development Services Manager, testified that he agreed with Ms. Marriott's testimony. *Id*. at 599-600.

Applicant agrees with the City that showing compliance with the Basin Plan is a "simple and expeditious" matter (City Brief, p. 49) – so much so that it has already been done.

III. CONCLUSION

For the reasons stated above and in its Opening Brief, Applicant requests that the Court reverse the Decision's imposition of MDNS Condition No. 11 and Condition No. 43. Applicant requests that the Court uphold the Examiner decision in all other respects.

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