The Honorable Judge Michael K. Ryan
April 20, 2020, 10:00 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 OPENING 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

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I. INTRODUCTION

This appeal concerns a permit for a building ("Project") proposed by Federal Way Campus, LLC ("Applicant") on property it owns in the City of Federal Way ("City"). The City carefully and thoroughly reviewed the Project and issued the permit subject to numerous conditions. A group calling itself Save Weyerhaeuser Campus ("SWC") appealed this decision. The City's Hearing Examiner properly upheld the approval. Applicant requests that the Court affirm the approval and reject all of SWC's claims. Applicant also requests that the Court reverse two additional conditions imposed by the Examiner that are not supported by the law or facts of this case.

Applicant applied for the permit to construct the Project in June 2016. The City reviewed the application under the "Process III" procedure established in the Federal Way Revised Code ("FWRC," "City Code," or "Code"), including detailed environmental analysis under the State Environmental Policy Act ("SEPA"). This process took more than two years, involving hundreds of pages of technical analysis and numerous rounds of public comment, feedback by City reviewers, and revisions by Applicant. Ultimately, the City issued a SEPA Mitigated Determination of Nonsignificance ("MDNS") in November 2018 and a project approval ("Process III Approval") in February 2019. Along with these determinations, the City imposed more than 40 conditions of approval to mitigate the Project's impacts and ensure its compliance with applicable laws during construction and operation.

SWC is a group composed primarily of nearby residents that opposes the Project and other nearby development. SWC appealed both the MDNS and the Process III Approval to the City of Federal Way Hearing Examiner ("Examiner"). The Examiner held a five-day hearing and issued a comprehensive written decision ("Decision") that sustained both determinations and

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imposed two additional conditions of approval. SWC filed an appeal pursuant to the Land Use Petition Act ("LUPA"), RCW Chapter 36.70C, challenging the Examiner's decision to sustain the approval. Applicant also filed a LUPA Petition challenging the two additional conditions imposed by the Examiner. This Court consolidated the two appeals.

The Examiner's decision to sustain both the MDNS and the Process III Approval was manifestly correct, as are the factual findings and legal conclusions in the Decision supporting these approvals. For the reasons explained in this Opening Brief, SWC's claims of error are unavailing. SWC fails to meet its burden under LUPA to show that the Examiner's decision was an erroneous interpretation of the law, not supported by substantial evidence, or otherwise subject to reversal under LUPA's standards of review. The Court must reject SWC's claims.

In imposing two additional conditions on the Project, however, the Examiner erred. First, the Examiner imposed an additional SEPA condition of approval requiring the Applicant to analyze the collective impacts of the Project and two other independent projects still undergoing City review on traffic at a State Route 18 ("SR 18") intersection and impose any necessary mitigation. Second, the Examiner imposed an additional Process III condition of approval requiring the Project to demonstrate compliance with a drainage plan despite the fact that the issue was not properly raised below and the Project has already shown it is consistent with any applicable provisions. These conditions are not supported by the law or the facts. In these limited respects, the Decision was in error.

II. FACTUAL AND LEGAL BACKGROUND

A. The Project

Applicant is the owner of several parcels of property located in the City between I-5,

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South 320th Street, North Lake and State Route 18 ("SR-18"). Transcript 403.[1] These parcels are part of an area that the Weyerhaeuser Company ("Weyerhaeuser") formerly owned and used for its corporate headquarters and other commercial and industrial uses ("Campus"). When Weyerhaeuser purchased the Campus, the area was part of unincorporated King County, adjacent to the City's boundaries. In 1994, the City and Weyerhaeuser entered into a Concomitant Zoning Agreement ("CZA"), which provided for City annexation of the Campus property. The CZA was formally adopted by the Federal Way City Council ("Council") in August 1994 as Ordinance 94-219, and the Campus became part of the City. Among other things, the CZA created a new zoning designation, "Corporate Park" ("CP-1"), which was applied to most of the Campus. In the CZA, the City and Weyerhaeuser also agreed on the specific development regulations (such as allowable commercial and industrial uses, building heights, and landscaping requirements) that would apply in the CP-1 zone. During the annexation process Weyerhaeuser specifically negotiated industrial uses to be included in the CP-1 zone. These regulations remain the zoning standards applicable to the CP-1 zone today and control over any inconsistent provisions of the City's development regulations. *See* FWRC 19.190.040 (establishing that pre-annexation zoning regulations adopted by the City are "deemed to amend [the zoning and development code]").

In 2015, Weyerhaeuser sold most of the parcels comprising the former Campus to Applicant. Transcript 407. This appeal concerns Applicant's proposal to construct the Project on one of these parcels ("Project Site"), which is approximately 15 acres and is located northwest of the interchange between SR-18 and Weyerhaeuser Way South. AR 3650; Transcript 461.

[1] Verbatim transcripts for the five days of hearing on this matter below are provided as separate but sequentially paginated documents. For brevity, this Brief will cite them by page number only.

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The Project will consist of a 45-foot tall, 225,950 square-foot industrial building with accessory parking, limited commercial vehicle ingress and egress from Weyerhaeuser Way South; and a minimum 50-foot managed forest buffer along the northern, eastern, and western boundaries of the Project Site. AR 844. The parking lot and other areas of the Project Site are designed to collect runoff and direct it into a stormwater detention pond that will be constructed on the parcel immediately to the south of the Project Site. Transcript 461-63; *see* AR 152 (architectural rendering). The Project has previously been referred to as the "Preferred Freezer project" (after a former prospective tenant) and "Greenline Building A" and is now known as "Woodbridge Building A." *See* Transcript 413-14.

B. Process III Review and SEPA Threshold Determination

The City Code prescribes levels of review for development applications that vary based on a planned project's characteristics. FWRC 19.15.025, 19.15.030. The City conducted its land use review of the Project under Process III, which is established in FWRC Chapter 19.65. Process III land use review determines whether a development project is consistent with the uses, dimensional standards, and other considerations in the City's development code. FWRC 19.65.100(2)(a)(ii).[2] In the Process III decision, the City may impose additional "conditions of approval" on a project, requiring the applicant to take certain steps in the future that will ensure compliance with applicable requirements. FWRC 19.65.100(3).

Process III review is coordinated with the City's review under SEPA. FWRC 19.65.100(1)(a). SEPA requires permit issuers like the City to analyze and disclose the

[2] Under Process III, the City approves a project if it finds it (1) is consistent with the comprehensive plan; (2) is consistent with all applicable provisions of Title 19, the Zoning and Development Code; (3) is consistent with the public health, safety, and welfare; (4) the streets and utilities in the area of the subject property are adequate to serve the anticipated demand from the proposal; (5) the proposed access to the subject property is at the optimal location and configuration; and (6) traffic safety impacts for all modes of transportation, both on and off site, are adequately mitigated. FWRC 19.65.100(2)(a)(i)-(vi).

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environmental impacts of certain development projects. RCW 43.21C.030. After reviewing information about a proposed project, the City must make a "threshold determination" for the project, which requires a determination regarding whether the project will have any environmental impacts that are "probable," "significant," and "adverse." WAC 197-11-330(1). SEPA also gives an agency the authority to impose mitigation for a project's probable adverse environmental impacts. If a project, with mitigation, will not result in significant adverse impacts, the agency issues an MDNS, which concludes the SEPA process.

Multiple City departments and City-retained third-party consultants reviewed the Project application under both SEPA and Process III, provided comments to Applicant, and evaluated the revisions Applicant provided in response. *See, e.g.*, AR 821-43. Materials submitted with the original application or subsequent versions included technical reports on transportation, stormwater drainage, geotechnical considerations, wetlands and streams, cultural resources, and view impacts. The City also provided public notice and opportunity for public comment on multiple occasions, as required by both Process III and SEPA. FWRC 19.65.070, 19.65.090; WAC 197-11-500.

C. Permit Applications for Separate Projects

Applicant submitted its Process III application to construct the Project on June 17, 2016. AR 7852. More than a year later, in September 2017, Applicant submitted another development application for a second warehouse known as Greenline Building B, now Woodbridge Building B ("Building B"), on the parcel directly to the south of the Project Site. Transcript 415. If both projects are constructed, they will share the stormwater detention pond (which will be constructed on the Building B site) and a driveway providing access to and from Weyerhaeuser Way S. *Id*.

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In November 2017, Applicant applied for a permit to construct three buildings (the "Business Park") on a parcel to the north of Building A and Building B that is currently occupied by a technology center (the "Tech Center") and several parking lots. AR 7852. The Business Park site is not contiguous with the Project Site and is separated from it by intervening parcels and multiple roadways. Transcript 483.[3]

The graphic below, which appears at AR 3650, depicts the layout of most of the Campus. The Project Site is the northern half of the area indicated for "Buildings A and B." The Business Park is planned for the partially depicted area to the north, which is currently developed with the Tech Center. The graphic also shows the building that served as Weyerhaeuser's headquarters ("Headquarters") until 2015, labeled "Greenline HQ," to the west of the Project. The Headquarters is not affected by the Project. AR 7857-58.

[3] The record also includes some discussion of another separate development, referred to as "DaVita," which is being developed by another property owner to the north of the Business Park. This project is not at issue in this case.

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See also AR 228 (preliminary site plan for Project and Building B).

Both the Building B application and the Business Park application remain pending. While the Project, Building B, and the Business Park involve properties with the same owner in the same area of the City, the projects are on separate parcels and each of the three projects was designed and may be constructed, operated and owned independently from the other two. Transcript 414-16. As the Examiner correctly ruled, the three projects are "not interdependent," and "[e]ach project can proceed independently of the others in any order" – even the Project and Buildings B's "shared driveway and stormwater facility . . . can easily be modified if one or the other project isn't constructed." *Id.* Accordingly, Applicant submitted separate applications for each project. *Id.* While the City's review accounts for common infrastructure, such as the shared driveway and stormwater pond for the Project and Building B, the City is reviewing these independent projects separately and will sequentially review each project's Code compliance (under Process III) and environmental impacts (under SEPA).

This sequential review process will fully analyze each project's impacts. Building B and the Business Park will not be exempt from any of the procedural steps that apply to the Project. Moreover, the City considers the potential impacts of development projects not in a vacuum but instead in the context of projects that have been permitted, or have permits under review by the City, when the project permit is submitted. This means that review of Building B will assume that the Project has been constructed and will include the impacts created by the Project in its analysis for Building B. Likewise, review of the Business Park will account for the existence of the Project and Building B. The permit applications for the three projects will be considered sequentially, not in isolation.

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D. City Determinations and SWC Appeal

1. City Decisions

On October 26, 2018, the City issued the MDNS, documenting its conclusion that the Project as mitigated will not have probable significant adverse environmental impacts. The MDNS imposes nine conditions of approval on the Project. On November 30, 2018, the City issued an amended MDNS adding an additional condition.

On February 4, 2019, the City issued the Process III Approval. Attached to the approval document was a 28-page description of the City's factual and legal conclusions about the Project, including explanation of the Project's compliance with the Process III decisional criteria. The Process III Approval adopted all of the MDNS requirements and imposed more than 30 additional conditions of approval.

2. SWC Appeal

SWC appealed the MDNS and the Process III Approval to the Examiner on November 30, 2018 and on February 21, 2019, respectively. AR 2464, 2504. The Examiner consolidated SWC's appeals. Applicant and the City jointly moved to dismiss several of SWC's claims, including claims challenging the legitimacy of the CP-1 regulations and their applicability to the Project. The Examiner issued a written decision ("Partial Dismissal Ruling") that granted the motion in part, dismissing the CP-1 claims along with several others.

SWC's surviving claims essentially fell into three categories. First, SWC asserted an overarching critique of the review process. It argued that under both SEPA and Process III, the City was required to review the Project, Building B, and the Business Park together in a "combined and consolidated" process that SWC refers to as "cumulative" impact review. AR 2470. In particular, SWC claimed that SEPA required the three projects to be analyzed "in a

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single document" pursuant to WAC 197-11-060(3)(b) because the projects must be considered "interdependent parts of a larger proposal" to develop the Campus as a whole. AR 7539-40. SWC also argued that the projects must be combined under WAC 197-11-060(3)(c) due to their "*common owner* (IRG), *common timing* (all have complete pending applications), *common geography* (all on the former Weyerhaeuser Campus), *common impacts* and *common zoning* (CP-1, applicable only to this property)." AR 2472 (emphasis in original). SWC also argued that the City's Process III review had not complied with FWRC 19.100.030(2), a Code provision that requires the City to consider the "similar impacts of future development" when determining mitigation required for the direct impacts of a project under consideration.

SWC's second category of claims disputed the City's conclusions under SEPA that the Project, as mitigated, will not have probable significant adverse impacts to elements of the environment including transportation, drainage and stormwater, wetlands and streams, historic resources, land use, and aesthetics. SWC's third category of claims challenged the City's conclusions regarding the Project's compliance with various legal requirements applicable under Process III.

The Examiner held a five-day hearing on SWC's claims, on June 20 and 21 and on August 7, 8, and 9, 2019. The Examiner heard testimony and evidence from the parties and accepted public comment. Applicant offered testimony from multiple technical experts who had prepared materials supporting the Project application, each of whom explained how the Project elements they analyzed or designed complied with applicable standards. The City offered similar testimony from the experts on its staff and outside third-party technical consultants retained by the City, who had reviewed the application. Witnesses for SWC, many of whom did not qualify as experts, asserted generalized criticisms of the Project and the City's review, but

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none of these witnesses had conducted any independent quantitative or technical analysis of the Project. Much of these witnesses' testimony broadly asserted that the three projects must be analyzed collectively; they largely failed to allege specific issues with the Project itself or to acknowledge the existence of any mitigating elements. City staff, however, described how applicable Code provisions required analysis of certain "cumulative impacts" but that such an analysis did not mandate the consolidated review process sought by SWC.

On September 12, 2019, the Examiner issued the 42-page Decision, which contains detailed findings of fact and conclusions of law sustaining both the MDNS and the Process III Approval. Under SEPA, the Examiner concluded that SWC had not met its burden to establish that the Project will have probable significant adverse environmental impacts and thus that the City had properly issued the MDNS. The Examiner also concluded that the City was not required to conduct a consolidated SEPA review of the Project, Building B, and the Business Park under WAC 197-11-060(3)(b). AR 7863-67. Both of these determinations were correct.

However, the Examiner also determined that SEPA required him to look generally at the potential for "cumulative" impacts resulting jointly from Applicant's three projects. AR 7862-63. He concluded that the record indicated a "reasonable possibility" that future traffic generated by the three projects could have a significant adverse impact on the westbound ramp intersection of SR 18 and Weyerhaeuser Way. AR 7871-72. On this basis, the Examiner imposed an additional condition of approval for the MDNS ("MDNS Condition No. 11") requiring further analysis and (potentially) mitigation to avoid this impact. Imposition of this condition was error because SEPA does not require a project to mitigate for the impacts of separate, future projects.

Under Process III, the Examiner determined that "cumulative impact analysis was already built into City development standards" and that such analysis had properly factored into the

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City's conclusions. AR 7869. He also concluded that – with one exception – the City had correctly found the Project consistent with the six Process III criteria in FWRC 19.65.100(2)(a). The single exception concerned a document called the Executive Proposed Basin Plan Hylebos Creek and Lower Puget Sound (1991) ("Hylebos Basin Plan"). The Examiner concluded that the Code required the City to analyze the Project under standards established by the Hylebos Basin Plan but that the City had not done so. He imposed a requirement for Applicant to demonstrate compliance with the Hylebos Basin Plan as a second additional MDNS condition. Imposition of this condition was also error, both because the issue was not properly before the Examiner and because the record demonstrates the Project's compliance with any applicable provisions of the Hylebos Basin Plan.

3. SWC Motion for Reconsideration

SWC filed a motion for reconsideration, arguing that the additional conditions were insufficient to ensure compliance with applicable standards and requesting that the Examiner remand the Project to the City for additional review. The Examiner issued a written ruling on the motion ("Reconsideration Decision") holding that the Code did not authorize remand of the Project. AR 7734.

The Reconsideration Decision also amended both of the Examiner's additional conditions of approval. First, the Examiner concluded that the transportation report prepared for the Business Park indicated that a significant adverse traffic impact of the three projects and other development on the westbound ramp intersection of SR 18 and Weyerhaeuser Way was probable. He therefore amended MDNS Condition No. 11 to require additional analysis and (potentially) mitigation for this impact. AR 7735-37. Second, the Examiner clarified that the Hylebos Basin Plan condition was based not on SEPA but "exclusively" on the Code. AR 7740.

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The Examiner therefore renumbered this condition ("Condition No. 43") to reflect that it was a condition of the Process III Approval rather than the MDNS. AR 7749. The wording of Condition No. 43 itself did not change.

The Reconsideration Decision "superseded" and amended the original Decision with respect to these two conditions but did not wholly replace the original decision. AR 7740.

III. AUTHORITY

Applicant respectfully requests this Court uphold the Examiner's decision to affirm the MDNS and the Process III Approval. The Decision was correct in these respects and was well supported by the facts and the law. For the reasons explained below, this Court should reject the claims in the SWC Petition and affirm the Examiner's conclusions that (1) the Project will not have probable, significant, adverse environmental impacts to transportation, drainage, wetlands and streams, historic resources, land use, or aesthetics; (2) SEPA does not require joint, "cumulative" review of the Project, Building B, and the Business Park; (3) the City properly reviewed the Project for "cumulative impacts" under all applicable standards of the City Code; (4) the Project is consistent with the City's Comprehensive Plan; (5) SWC's claims relating to introductory provisions of the CZA do not create legal requirements applicable to the Project; and (6) the Examiner lacked authority to remand the Project to City reviewers.

Applicant also respectfully requests this Court modify the Decision in two respects. First, this Court should strike MDNS Condition No. 11 because SEPA does not allow the Examiner to require the Project to be analyzed in the same document with Building B and the Business Park, which are separate and independent projects that were not pending when the Project application was filed. Even if SEPA could impose such a requirement, MDNS Condition No. 11 is not based in statute, supported by substantial evidence, or in accordance with City

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process. Second, this Court should strike Condition No. 43 because this issue was not properly raised below and the record demonstrates the Project's consistency with the Hylebos Basin Plan.

A. Standard of Review

Both appeals in this consolidated action are brought under LUPA, which authorizes this Court to grant relief if a petitioner establishes that one of the six standards in RCW 36.70C.130(1)(a) – (f) has been met:

> (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.

Standards (a), (b), and (e) present questions of law that are reviewed *de novo*. *Cingular Wireless v. Thurston Cty.*, 131 Wn. App. 756, 768, 129 P.3d 300, 306 (2006). Standard (b) instructs courts to apply deference to local jurisdictions' expertise; however, a "hearing examiner's legal conclusions [regarding SEPA] are not entitled to any deference under RCW 36.70C.130(1)(b) because they involve interpretations of state law, rather than [] city ordinances." *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382, 392-93 (2011).

Standards (c) and (d) concern factual determinations. *Cingular Wireless*, 131. Wn. App at 768. Under standard (c), "[s]ubstantial evidence is evidence that would persuade a fair-

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minded person of the truth of the statement asserted." *Id.* Under standard (d), a determination is clearly erroneous if a court is "left with a definite and firm conviction that a mistake has been committed." *Id.*

B. The SEPA Process

For the reasons explained in this section, the Examiner's conclusions regarding the City's SEPA review of the Project were correct in all respects other than the imposition of MDNS Condition No. 11. Subsection 1 of this section, below, provides a brief overview of SEPA requirements and procedures. Subsection 2 describes how the City analyzed the relevant elements of the environment and why both the City and the Examiner correctly concluded that the Project will not have probable significant adverse environmental impacts. For the reasons described in Subsection 2, claim 7.4 in SWC's LUPA Petition – asserting that the Examiner erred by not requiring an EIS for the Project – fails.

Subsection 3 explains how SEPA applies to the issue of "cumulative impacts." As explained in Subsection 3.a, the Examiner correctly determined that SEPA did not require the City to conduct a simultaneous, consolidated review of the "cumulative impacts" of Applicant's three projects because the projects do not meet the criteria established by WAC 197-11-060(3)(b). For this reason, this Court should reject claims 7.2 and 7.8 in SWC's LUPA Petition.

As explained in Subsection 3.b, however, the Examiner erred in concluding that SEPA establishes a separate requirement to jointly review these separate projects as part of a threshold determination. There is no such "obligation" outside of WAC 197-11-060(3)(b). This erroneous legal conclusion formed the basis for the imposition of MDNS Condition No. 11. MDNS Condition No. 11 must be reversed both for this reason and because it lacks a factual foundation.

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1. Legal Background

SEPA requires state and local agencies to conduct environmental review before approving a development permit for any project (other than projects that SEPA regulations expressly exempt from this requirement). RCW 43.21C.030, 43.21C.120. The Department of Ecology has promulgated regulations known as the "SEPA Rules" that implement and interpret SEPA, codified in WAC 197-11. The City has adopted SEPA procedures, which mostly incorporate the SEPA Rules by reference, in the City Code. *See* FWRC Title 14.

a. SEPA Review Process

The "fundamental idea" of SEPA is simple: to ensure government decisionmakers "fully consider the environmental and ecological effects of major actions" before authorizing them. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 717, 47 P.3d 137, 141 (2002). SEPA review is primarily a procedural matter: the statute requires analysis and disclosure of the potential significant adverse environmental impacts of development projects.

SEPA also provides "agencies" (a term that includes local governments, such as the City) with "substantive authority" to impose mitigation for the adverse environmental impacts of development projects. WAC 197-11-660(1). SEPA imposes limits on an agency's substantive authority: (1) mitigation measures must be based on policies, plans, rules or regulations formally designated by the city as the basis for the exercise of its substantive SEPA authority; (2) mitigation measures must be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal; (3) mitigation measures must be reasonable and capable of being accomplished, (4) responsibility for implementing mitigation measures may be imposed on an applicant only to the extent attributable to the identified adverse impacts of its proposal, and (5) before requiring mitigation measures, cities must consider whether local, state

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or federal requirements and enforcement would mitigate an identified significant impact. WAC 197-11-660(1)(a)-(e). The policies that the City has designated as a basis for its substantive SEPA authority are listed in FWRC 14.25.070(4).

To serve these companion procedural and substantive functions, the City Code (through its adoption of the SEPA Rules) establishes the following process: First, the City determines whether a project is required to undergo SEPA review at all. Certain smaller projects (such as building a single house or repairing a sidewalk) are "categorically exempt" from SEPA.

Second, if a project is not exempt, the applicant must complete an "Environmental Checklist." WAC 197-11-315. The checklist is a form document requiring information about a project's effects on 14 "elements of the environment." WAC 197-11-742, 197-11-960. These elements include aspects both of the "natural environment" (such as air quality and stormwater runoff) and of the "built environment" (such as historic preservation and traffic). *See* WAC 197-11-444.

Third, the City uses the checklist to make a "threshold determination" for a project. WAC 197-11-330(1). This requires the City to determine whether the project will have any environmental impacts that are "probable," "significant," and "adverse." *Id.* There are three types of threshold determinations: First, if a project will not have probable significant adverse impacts, the City issues a Determination of Nonsignificance ("DNS"). No further SEPA review is required after a DNS. Second, if all impacts can be mitigated below the level of significance by mitigation measures, the City issues an MDNS including conditions of approval imposed under the City's substantive SEPA authority. WAC 197-11-350(2). No further SEPA review is required after an MDNS, though the project must comply with all conditions of approval. Third, if a project will have probable significant adverse impacts that cannot be fully mitigated, the City

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issues a Determination of Significance ("DS"). WAC 197-11-360. A project that receives a DS must be analyzed in a detailed report known as Environmental Impact Statement ("EIS") before the City issues a permit. WAC 197-11-330(4).

Here, Applicant completed a detailed environmental checklist ("Checklist") that attached and incorporated numerous technical reports and analysis documents. AR 2404. After reviewing the Checklist, the attached reports, and additional application information (a process that took more than two years), the City prepared and issued a Staff Evaluation for Environmental Checklist, which documented the conclusions of the City's technical staff regarding the accuracy and completeness of the information in the Checklist. AR 2392. On the basis of this evaluation, the City issued the MDNS, which it then revised, to include a total of 10 conditions. AR 2385.

b. Administrative Appeals

SEPA allows administrative appeals of DNSs and MDNSs. WAC 197-11-680(3). In the first instance, at the City level, that appeal is to a Hearing Examiner. FWRC 19.70.045. Review of a DNS or MDNS is subject to the "clearly erroneous" standard of review. *Norway Hill Preservation. & Protec. Ass'n v. King County Council.*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). Substantial weight is accorded to the City's decision. RCW 43.21C.090. *Murden Cove Preservation Ass'n. v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985); *Cougar Mountain Ass'n. v. King County,* 111 Wn.2d 742, 747-749, 764 P.2d 264 (1988); *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 431, 886 P.2d 209 (1994). Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain, supra,* 111 Wn.2d at 747; *Polygon Corp.*

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v. Seattle, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County,* 141 Wn.2d 185, 4 P.3d 115 (2000); *Moss v. Bellingham,* 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

To prove that a decision to issue an MDNS was clearly erroneous, an appellant must produce *affirmative evidence* showing that a new significant adverse impact will occur as a result of the project. Specifically, where an appellant claims a failure to adequately identify or mitigate adverse impacts, the appellant must produce evidence that such significant adverse impacts will occur for a decision to be overturned. Mere complaints or claims, without the production of affirmative evidence proving that the decision was clearly erroneous, are insufficient to satisfy an appellant's burden of proof as a matter of law. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 719-720, 47 P.3d 137 (2002); *Moss, supra,* 109 Wn. App. at 31.

Here, the City staff's decision to issue an MDNS was proper and the Examiner was required to uphold it unless Appellant provided affirmative evidence that the Project would result in significant adverse impacts. Appellant failed to produce this evidence.

2. No Probable Significant Adverse Impacts

In its appeal to the Examiner, SWC asserted that the Project would adversely impact transportation, stormwater, streams and wetlands, historic resources, land use, and aesthetics. As described below, the Examiner properly concluded that the City complied with SEPA's requirements to analyze each of these issues and that SWC failed to meet its burden to establish probable significant adverse impacts in any of these areas. Substantial evidence supports the Examiner's conclusion. SWC cannot meet its burden under LUPA to establish otherwise. Claim 7.4 in SWC's LUPA Petition must therefore be rejected.

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a. Transportation

SWC alleged that the Project would have probable significant adverse impacts in the areas of traffic on city streets, traffic on state facilities, and transportation safety. Both the City and the Examiner correctly rejected these claims. The City conducted a detailed analysis of the Project's transportation impacts and correctly concluded that they will not be significant.

(1) City Transportation Review Process

The City's transportation review of development projects is conducted by Richard Perez, a traffic engineer with 30 years of experience (23 of which are with the City), and by Sarady Long, a transportation planning engineer with 24 years of experience (22 years with the City). Transcript 851, 912-13. During the hearing, Mr. Perez and Mr. Long explained how the City conducts traffic analysis according to its adopted standards. Transcript 855-60. These standards establish two metrics for whether an intersection is functioning appropriately, focusing on the morning and evening rush hours (referred to as AM and PM "peak hours"). AR 1437-38, 7921-23; Transcript 882-83. First, turning movements at intersections must not exceed a certain average delay time per vehicle, or level of service ("LOS"), with ranges denoted by letter grades A through F. *Id.* Second, the intersection must maintain an acceptable volume/capacity ("v/c") ratio (which "directly compares the volume on a roadway segment or intersections with the capacity of that facility to carry traffic volumes"). *Id.* City standards require signalized intersections to maintain LOS E (average delay of 55 to 80 seconds per vehicle) and a v/c ratio below 1.2. AR 7923.

The City's traffic review process includes two primary components (which can occur in any order). First, the City conducts SEPA review. The applicant must submit a Transportation Impact Analysis ("TIA"). Transcript 783-84. The City has adopted detailed guidelines

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governing the contents of a TIA. AR 7919-24. An applicant must determine how many vehicle trips a project will generate; which nearby intersections those trips will affect; for intersections to which the project will add more than a threshold number of trips, the AM peak-hour LOS and v/c ratio at those intersections under current conditions; the AM peak-hour LOS and v/c ratios those intersections would experience both with and without the project; whether the project will cause any of the intersections to fall below an acceptable LOS or v/c ratio; and, if so, mitigation that would return the intersection to acceptable standards. Transcript 783-93. Non-traffic transportation issues, such as access and safety, are also discussed by the TIA. *Id*. The City assesses and confirms the information provided in the TIA (*see* Transcript 859-60). If the project under review will cause any intersections to fall below acceptable standards, the City may impose mitigation to mitigate the project's impact under its SEPA authority.

Second, the City reviews the project for "transportation concurrency," using the process established in FWRC Chapter 19.90. Concurrency analysis includes a review that is similar to the TIA analysis but that differs in at least three key ways: (1) the City's concurrency analysis considers all surrounding intersections, regardless of how many trips a project will add; (2) concurrency review concerns on the PM peak hour rather than the AM peak hour; and (3) concurrency review is performed by City staff rather than by the applicant. FWRC 19.90.010, 19.90.130; AR 7916; Transcript 834-35, 853-55. If concurrency review determines that project will not cause PM peak-hour LOS failures, the City issues a "capacity reserve certificate" ("CRC") for the project. FWRC 19.90.050. The Code authorizes the City to mitigate impacts to the PM peak-hour level of service as part of the concurrency process. *See* FWRC 19.90.150. A project that will generate net new PM peak-hour trips may not be approved under Process III unless it has received a CRC. FWRC 19.90.120(1). A CRC is subject to administrative appeal.

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FWRC 19.90.160.[4]

The City ensures consistency by reviewing applications sequentially, in the order in which they were submitted. As aptly described by the Examiner, this approach means the City "require[s] that a concurrency analysis and TIA take into account existing traffic and traffic from projects in the 'pipeline' – those whose applications were submitted *prior* to the application for the project under review and are pending or approved." AR 7871 (emphasis added). The process ensures that no project's impacts slip through the cracks, as the City's "study of each proposed project [] considers the additive impact of *all* projects that have come before." *Id.* (emphasis added); *see also* Transcript 856, 860-61.

This sequential approach also means that, as is standard industry practice, the City's analysis of a permit application does not change based on information in another permit application with a later application date. Transcript 795. The City does not consider a project's impacts in light of applications that are neither "pending" nor "approved," only those that truly constitute "existing" or "pipeline" traffic with regard to the project under review. *See* AR 7871. Similarly, the City does not require TIAs to be updated every time a new project is proposed in the area or a new traffic study is filed. Transcript 795-96. Mr. Perez explained that requiring these types of updates would "create an endless do loop for every development in the city," rendering it "nearly impossible to identify which mitigation measures would apply to which development." Transcript 884.

(2) City Transportation Review of the Project

The TIA for the Project was prepared by Jeff Schramm, a transportation engineer with 25

[4] Notably, every project in the City above a certain threshold size also pays a "transportation impact fee." This fee is assessed at the time a building permit is issued. This fee goes toward planned transportation improvements to be constructed by the City. AR 2433. The project will pay this fee. The fee is not at issue here.

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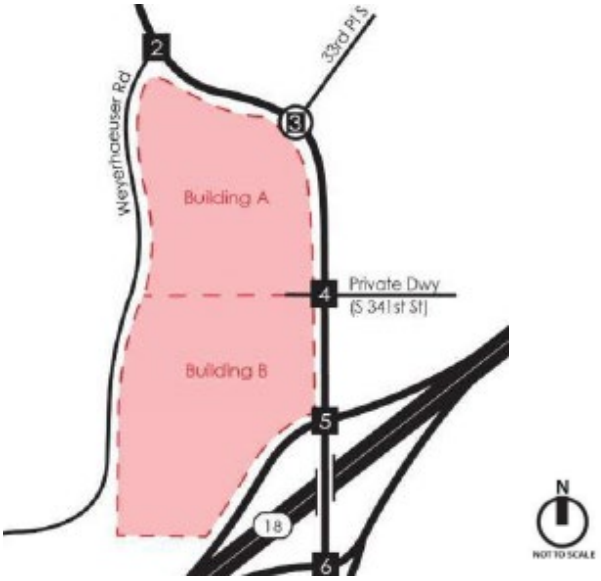
years of experience who is the Planning Manager of Transportation Engineering NorthWest ("TENW"). AR 4575. In accordance with the TIA guidelines, Mr. Schramm based his projections in part on traffic-count and turning-movement data that the City had collected in 2016. Transcript 818-19. Mr. Schramm submitted the initial TIA in April 2017 and later revised it several times in response to City comments. Transcript 785, 793. During this time, Mr. Schramm also completed transportation analysis for Building B, including analysis related to the driveway shared by Building B and the Project. Transcript 785-87. Mr. Schramm determined that because of the shared access, it would be most efficient to prepare a single TIA that contained all required information for the Project and Building B. *Id*. Accordingly, in March 2018, he prepared and submitted a TIA covering both projects ("Project TIA"). AR 222-379.

The Project TIA indicates that the Project will generate 994 trips per weekday, 795 of which will be passenger-vehicle trips and 199 of which will be truck trips. AR 234. These will include 129 AM peak-hour trips (26 of which will be truck trips) and 100 PM-peak hour trips (20 of which will be truck trips). *Id*. The Project TIA also examined current and future LOS at six nearby intersections, five of which are shown in the map below (taken from AR 235):



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In this map, the road that runs along the east side of the Project Site is Weyerhaeuser Way South, and the diagonal double line is SR-18. The driveway for the Project and Building B is on the west side of Intersection #4. To access the Project, trucks traveling west on SR-18 will leave the highway via the exit ramp, proceed through the traffic light at Intersection #5, and turn right (north) on Weyerhaeuser Way S. The Examiner imposed MDNS Condition No. 11 to address traffic at this Intersection #5 (the "Weyerhaeuser Way/SR-18 Intersection").

(a) Traffic impacts to City streets

In the Project TIA, Mr. Schramm documented the current LOS at each intersection. AR 233. The TIA then calculates the AM and PM peak-hour LOS[5] and v/c ratio anticipated for each intersection under three scenarios: (1) expected 2019 traffic if the Project is not constructed; (2) expected 2019 traffic if the Project is constructed; and (3) expected 2020 traffic if both the Project and Building B are constructed. AR 246-48. Each scenario assumed a 2-4% annual level of "background growth" in trips at each intersection to account for traffic from unrelated development projects. Transcript 788. No intersection is anticipated to operate below LOS D even if both projects are constructed. AR 246-48.

Mr. Perez and Mr. Long reviewed the Project TIA and conducted the City's concurrency review of the Project. Transcript 852, 857-58. Like Mr. Schramm, Mr. Perez and Mr. Long concluded that traffic from the Project would not cause LOS failure during the PM peak hour at any intersection. Transcript 857-58. Accordingly, no mitigation was required to ensure compliance with LOS standards, and the City issued a CRC for the Project in July 2016.

[5] As discussed above, the Project TIA was only required to calculate LOS for the AM peak hour; the only required PM peak-hour analysis was performed by the City as part of concurrency review. However, while the City's concurrency review of the Project was in progress, Mr. Schramm conducted his own "redundant" PM peak-hour analysis because Applicant had asked whether PM traffic was likely to cause LOS issues. Transcript 848. This information was included in the Project TIA, but it did not form the basis for the City's concurrency determinations.

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Transcript 862. No party timely appealed the CRC for the Project.

The City 's consideration of traffic also considered access issues related to the driveway that will be shared by the Project and Building B. In particular, the City raised a concern that trucks driving north from SR-18 could cause backups while queueing to turn left into the driveway. Transcript 789-91. Some public commenters also asserted that trucks leaving the Project would cause congestion by driving north (turning left out of the project to travel on smaller city streets) rather than turning right and driving south, directly back onto the highway. Transcript 830-32. In response, Applicant proposed the construction of additional "left-turn storage" (essentially, a longer turning lane) on Weyerhaeuser Way S to avoid congestion from arriving trucks for both the Project and Building B. The project signs and curb modifications that will ensure departing trucks travel south toward the highway. Transcript 789-91, 830-32.

These determinations provided the basis for the City's conclusion that the Project, as mitigated, will not cause probable significant adverse impacts by increasing traffic on City streets. Transcript 875.[6] Pursuant to the City's substantive authority to require mitigation under SEPA, the MDNS imposed the left-turn storage, the signage and curb modifications, and several other transportation-related requirements as conditions of project approval. AR 2390-91. The Examiner correctly affirmed the City's conclusion. AR 7870.

(b) Traffic impacts to State highways

The Washington State Department of Transportation ("WSDOT") is responsible for operating SR-18 and I-5, including the exit ramp that leads from westbound SR-18 to the Weyerhaeuser Way/SR-18 intersection. AR 3653-54; Transcript 805-07. On November 9, 2018,

[6] Additional detail regarding the City's traffic-related conclusions is included in the Examiner's Decision, the City's closing brief, and Applicant's closing brief. *See* AR 7414-26, 7453-55, 7486-97, 7870-75.

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WSDOT sent a comment letter to the City indicating concerns about the ramp – specifically, the adequacy of the "right-turn storage area" (the portion of the ramp on which exiting traffic waits before turning right to go north on Weyerhaeuser Way S). *Id.* The WSDOT letter indicated that traffic generated by the Project "would result in a queue length of 142 feet . . . , which exceeds the storage capacity of the existing 100-foot turn lane." AR 7854. "The letter opined that the other Applicant projects and the Davita project would necessitate a 300-foot right turn lane." *Id.* The City accommodated WSDOT's request by imposing an additional condition of approval, requiring Applicant to construct additional right-turn storage "to the satisfaction and with approval of WSDOT." AR 2378, 2384.[7]

As described by the Examiner, a WSDOT representative who testified during the hearing "affirmed that the traffic impacts to the westbound SR 18 offramp identified in the November 9, 2018 comment letter were adequately mitigated by the condition added to the revised MDNS." AR 7854. The Examiner also correctly held on this basis that the Project "will not create any probable significant adverse impacts to state transportation facilities." AR 7869.

(c) Traffic safety

SWC claimed that the Project will have a significant adverse impact on traffic safety. Evidence at the hearing, however, showed that the City carefully considered this issue and required safety-related frontage improvements and access management elements in accordance with FWRC chapter 19.135. These improvements included installation of an ADA-compliant sidewalk and a pedestrian pathway; relocation of and improvements to bus shelters and pedestrian crossings; additional street lighting; and a bike lane. *See* AR 7497-98. The MDNS

[7] The City initially issued the MDNS for the Project on October 26, 2018. AR 2391. WSDOT sent the letter requesting additional right-turn storage on November 9, 2018. The City accommodated WSDOT's request by issuing a modified MDNS, incorporating the additional condition of approval, on November 30, 2018. AR 2378.

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also expressly recognized the additional left-turn storage required on Weyerhaeuser Way S as a means "to provide safer . . . access into the site." AR 2390. Mr. Perez testified that no further consideration of safety issues was needed "based on existing collision history." Transcript 872.

The Examiner correctly concluded that the City's detailed analysis of safety issues outweighed any contrary suggestions by SWC. SWC's evidence on this point consisted only of (1) a transportation planner's "generic reference to traffic safety" that "did not identify any factors that created a safety hazard other than an increase in truck traffic"; and (2) the "anecdotal evidence" contained in the "lay testimony" of a single neighborhood resident, which largely concerned "existing conditions" (rather than future conditions created by the Project). AR 7854-55. The Examiner correctly concluded that the "City's frontage standards and the staff's careful and expert consideration of traffic safety issues . . . are more compelling than the anecdotal evidence presented by [SWC]." AR 7875. Moreover, the resident's "observations did not in any way undermine the [City's] conclusion that the safety improvements undertaken by the Applicant will be sufficient to mitigate [the Project's] impacts to traffic safety." AR 7856.

The Examiner's conclusions that the Project, as conditioned, will not have probable significant adverse impacts to traffic or transportation safety were correct and should be affirmed by this Court.

b. Stormwater, stream, and wetland impacts

SWC raised several claims relating to stormwater drainage, wetlands, and streams. Although some aspects of these claims overlapped, they essentially made two broad assertions: (1) the addition of impervious surface to the Project Site would increase and accelerate drainage of stormwater runoff, adversely impacting the downstream environment; (2) development of the

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Project would "dewater" on-site streams and adversely affect on-site wetlands.[8]

The Project's stormwater conveyance system was designed by Laura Bartenhagen, a licensed professional engineer with 20 years' experience who specializes in stormwater hydrology and hydraulics. Transcript 459-60. At the hearing, Ms. Bartenhagen described her design of this system and her preparation of a "preliminary technical information report" that analyzed drainage conditions on the Project Site, the Building B site, and downstream. Transcript 459-500. Cole Elliott, a civil engineer who serves as the City's Development Services Manager, testified regarding the City's detailed review of Ms. Bartenhagen's conclusions. Transcript 566-87, 595-654. Jennifer Marriott, a registered professional wetland scientist, served as lead ecologist and analyzed wetland, stream, and habitat issues associated with the Project. Transcript 501. The City engaged Jessica Redman, a registered professional wetland scientist, to perform a "peer review" analysis of Ms. Marriott's conclusions. Transcript 568, 656. Ms. Marriott and Ms. Redman both concluded that the Project will not have significant adverse impacts on these elements of the environment. Transcript 501-525, 655-692.

SWC's attempt to contravene these experts' conclusions relied primarily on the testimony of Sarah Cooke, a wetland ecologist who is not an engineer and who has not conducted any independent, quantitative analysis of drainage from the Project. Dr. Cooke's conclusions were largely contained in a rambling and conclusory letter that the Examiner accurately described as containing "anecdotal evidence" but "no formal studies" that provided a basis for Dr. Cooke's specific assertions about the Project Site. AR 7860; *see* AR 2969-3003. SWC also relied on the testimony of Alex Anderson, an engineer who prepared a memorandum criticizing some aspects

[8] SWC also asserted that the Project would adversely impact wildlife. This claim was unavailing for the reasons stated in Applicant's closing brief, *see* AR 7485-86, and SWC did not pursue the issue in its closing brief.

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of Ms. Bartenhagen's report but who (like Dr. Cooke) had not performed any calculations or testing specific to the Project Site. Transcript 268-71. The Examiner correctly determined that the Project will not have probable significant adverse impacts relating to stormwater, streams, or wetlands.

(1) City Drainage Review Process

Before issuing a development permit, the City must determine that a project is compliant with Code requirements for storm drainage. FWRC 16.15.030. As with transportation review, the City relies on information regarding a project's compliance with City drainage standards to make its SEPA threshold determination regarding potential impacts to surface water and runoff. *See* AR 2396-97, 2409.

The City's drainage code appears in FWRC Title 16 and largely consists of the 2016 King County Surface Water Design Manual ("KCSWDM"), which the Code adopts by reference. FWRC 16.25.010. During Process III review, the City determines compliance with KCSWDM standards on a preliminary or conceptual basis, based on the information in the applicant's preliminary technical information report. Transcript 467. Here, the City analyzed the Project's compliance with KCSWDM standards under the "full drainage review" process, which is required for projects of this size. FWRC 16.25.020(2)(b). This required the Project to demonstrate compliance with the eight "core requirements" listed in FWRC 16.25.010(1), concerning issues such as whether the flow-control mechanisms in the stormwater system will meet KCSWDM engineering specifications. Full drainage review also requires a project to demonstrate compliance with any of the five "special requirements" in FWRC 16.25.010(2) that apply to it. While core requirements apply to all projects, special requirements only apply under certain circumstances. After the Process III approval, a proposed project continues to undergo

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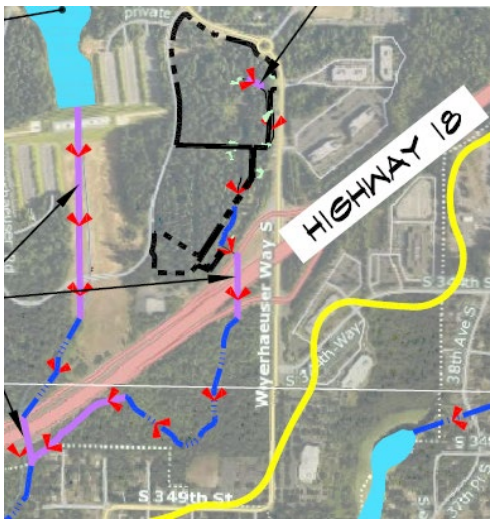
City review as plans are refined and finalized in preparation for construction. Transcript 467, 573.

(2) City Drainage Review of the Project

Ms. Bartenhagen analyzed drainage issues for the Project Site and Building B site together and designed a system that will accommodate the eventual construction of both projects with a shared stormwater detention pond. Transcript 461-66. Ms. Bartenhagen also explained that if only one of the Projects is constructed, her conclusions would not change and the stormwater system would accommodate the development that occurs. *Id.*, *see* AR 7853.

Drainage from the Project Site and the Building B site currently flows towards the southeast, discharging into an intermittent, artificial channel known as Stream EA. AR 461-64. As shown on the graphic below, which appears at AR 4628, Stream EA (the blue line) flows to the south off the Building B parcel (the lower/southerly of the two parcels marked in black). From Stream EA, water continues south through a culvert under SR-18 and empties into a wetland. Outflow from the wetland converges with drainage from other portions of the Campus approximately 1 mile downstream of the Project Site, at the lower left corner of the graphic, and flows from there into the East Branch of Hylebos Creek:



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In accordance with KCSWDM requirements, Ms. Bartenhagen mapped the downstream area and performed a field inspection along the drainage path. This inspection examined a full mile of the downstream area, significantly exceeding the KCSWDM requirement of ¼ mile, and provided no indication that mitigation beyond compliance with KCSWDM standards was necessary. AR 7859-60; Transcript 478-79.

As relevant to the issues in this appeal, the KCSWDM standards seek to prevent two overall harms: erosion from stormwater runoff after the addition of impervious surface area, and water-quality issues caused by pollution. To ensure that the Project will not result in downstream erosion, Ms. Bartenhagen designed the stormwater system to channel stormwater from the Project Site through a pipe into the shared stormwater detention pond on the Building B Site. Transcript 466-470. The system is designed for "flow control," meaning that even if a storm results in a large amount of water entering the detention pond, the system will constrain the water flowing out of the pond and into Stream EA to the natural flow rate. Transcript 465-66; *see* FWRC 16.25.010(1)(c). Indeed, Ms. Bartenhagen designed the system to limit drainage to a "pre-development" flow rate, which is even lower than the current rate and will further guard against erosion. *Id.* The system design also ensures that drainage continues to flow from the Project Site into Stream EA – *i.e.* at its existing "natural location." Transcript 481; *see* FWRC 16.25.010(1)(a). Although applicable standards require the pond to accommodate the volume of water that would result from a 50-year storm, Ms. Bartenhagen's design significantly exceeds this standard: the pond will accommodate runoff from both the Project Site and the Building B site during a 100-year storm, plus a 27 percent safety factor. Transcript 470. The stormwater system will also maintain water quality by directing outflows from the pond through a filter that removes pollutants. Transcript 468.

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SWC failed to meet its burden to establish any flaw in Ms. Bartenhagen's analysis or any probable significant adverse drainage impacts resulting from the Project. As described in detail in Applicant's closing brief before the Examiner, *see* AR 7477-82, Dr. Cooke's written and oral testimony largely ignored the fact that the Project will incorporate a stormwater detention system or water filtration of any kind. Instead, Dr. Cooke provided only conclusory assertions regarding the supposed harms that would be caused by unmitigated runoff from the impervious surface that will be added by the Project. Mr. Anderson's memo contained similarly conclusory statements, including suggestions that Ms. Bartenhagen had incorrectly modeled stormwater flows from the site and had improperly disregarded the amount of infiltration that could occur. AR 3136-38. Ms. Bartenhagen, however, persuasively explained why she had used the correct flow rate and why her conclusion regarding infiltration (which was supported by a geotechnical report prepared by an engineer who, unlike Mr. Anderson, had visited and evaluated the Project Site) was accurate. Transcript 470-74.

Mr. Elliot described how the City evaluated Ms. Bartenhagen's design in four rounds of independent review, concluded that her analysis met the required standard of care for stormwater engineering, and otherwise agreed with all of her relevant conclusions. Transcript 571-574. Based on this testimony and the detailed technical analysis in Ms. Bartenhagen's report, the Examiner correctly concluded that stormwater drainage from the Project will not result in significant adverse impacts. AR 7859-60, 7880-82.

(3) Wetland and stream analysis

Ms. Marriott analyzed relevant scientific literature, conducted several field evaluations of the Project Site, and prepared a Critical Areas Report and Buffer Averaging Plan that analyzed the Project's likely impacts on wetlands, streams, and habitat. AR 380-488. During the hearing,

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she explained why this analysis disproved SWC's claim that the addition of impervious surface would disrupt the infiltration of groundwater on the Project Site and thereby "dewater" the "headwaters" of Stream EA. *See* AR 3137. Ms. Marriott concluded that Stream EA is a not a natural stream but a "constructed" channel with "no perennial baseflow." Transcript 509-10. Ms. Redman, the wetland scientist engaged by the City for peer review of Ms. Marriott's conclusions, likewise concluded that Stream EA is a "manmade ditch." Transcript 666-67. Both Ms. Marriott and Ms. Redman testified that Stream EA *lacks* "headwaters" because it is a manmade channel fed by precipitation rather than groundwater. Transcript 509-10, 666-67. As noted by the Examiner, SWC's groundwater claims are also undermined by the fact that the Project will "retain nearly 60% of the [Project Site] as pervious surface." AR 7859. As a result of these conclusions, the Examiner correctly ruled that "even incrementally, the [Project] will not create any material significant impact to groundwater infiltration and associated hydration of streams and wetlands." AR 7859.

Ms. Marriott's report also delineated 13 small on-site wetlands and concluded that construction of the Project would require filling seven wetlands and impacting the buffers of two additional wetlands, for a total of 9,922 square feet of affected wetland area. AR 389-91, 398-99. Although Dr. Cooke asserted that these effects should be considered significant adverse impacts, her assertions were again unsupported by any quantitative or site-specific analysis. Ms. Marriott's evaluation determined that the wetlands are "very small, relatively isolated systems" that do not perform significant ecological functions because they "are not heavily integrated into anything else in the area," and that they contain "habitats that are not unique." Transcript 511-13. Thus, there was no basis for Dr. Cooke's assertion that a significant environmental impact would result from the Project's impacts to these wetlands. Moreover, as the Examiner noted, the

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CZA standards applicable to the Project provide that impacts to wetlands totaling less than 10,000 square feet in area are "exempt from sensitive area regulations," which means that the City does not require "any mitigation" for such impacts (although the Project is providing mitigation). AR 7858-59. On these bases, the Examiner correctly concluded that the SWC had not "demonstrated any adverse impacts associated with the elimination of these wetlands." AR 7859.

c. Historic Resources

SWC next asserted that the Project would cause significant adverse impacts to "historic and cultural preservation." *See* WAC 197-11-444(2)(b)(vi). This claim was primarily based on SWC's assertion that the architectural significance of the Headquarters building and its setting would be adversely impacted by development of the Project.

As Applicant argued in its closing brief, *see* AR 7500-01, SWC's claim could not have succeeded regardless of the testimony of its witnesses because SEPA substantive mitigation must be based on a government's formally designated SEPA policies. WAC 197-11-660(1)(a); FWRC 14.25.060(1)(e), (2)(c). None of the City's designated policies, however, would provide for protection of the Headquarters or the Campus as a historic resource because neither facility is listed in any federal, state, or local historic register, nor is either designated as a landmark under the procedures established by FWRC Chapter 19.285. The City's policies do not provide any basis for requiring mitigation of an impact to an undesignated historic resource.

But even if that were not the case, Applicant established that no significant adverse impacts would result from the Project in any case. Michelle Sadlier, a practicing architectural historian who meets the Secretary of the Interior's Historic Preservation Professional qualification standards, analyzed the historic significance of the Project Site and the

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Headquarters in the context of the Campus as a whole. Transcript 526-27. Ms. Sadlier concluded first that development on the Project Site had long been planned as part of the Campus and would therefore be consistent with the "historic intent" of the Campus's design. Transcript 540; AR 7907-10. Thus, development on the Project Site does not *per se* impact historic resources. *Id.*

More specifically, Ms. Sadlier determined that the potential historic significance of the Project Site related not to its interior but to its forested buffers – particularly those buffers adjacent to the Headquarters. Transcript 541. As the Examiner noted, "[A] significant part of the architectural significance of the project site is the corporate headquarters' integration into the natural landscape, most notably the numerous tree stands of the campus." AR 7857. Based on her analysis of the intent of the Campus's designers, Ms. Sadlier concluded that "the critical feature was that each of the [development] sites" on the Campus "would have a buffer around the other so they stood independent from the next." Transcript 545. In other words, if the forested buffer around the Headquarters would be sufficient to visually screen the Project and maintain the perception of a forested setting, the Project would not significantly impact historic resources. Applicant provided evidence in the form of landscaping plans, view analyses and photographic examples establishing that the buffer planned for the Project Site would, indeed, be sufficient to maintain the integrity of views both of and from the Headquarters. AR 7503; *see also* AR 146, 864-68, 896, 2544-48, 7903.

As described in detail in Applicant's closing brief, AR 7501-07, SWC's evidence to the contrary consisted of the testimony of two staff members of the Washington Trust for Historic Preservation. These witnesses made broad assertions regarding their "concerns" about the potential impacts the Project could have, *see* Transcript 254, but they failed to dispute any of

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Applicant's specific evidence disproving that such impacts would occur. Moreover, the Washington Trust had not conducted an analysis of viewshed impacts, and one witness even indicated that he had "not reviewed" the actual plans for the Project. Transcript 258, 263.

The Examiner correctly found that SWC had "presented no view impact analysis or any other evidence showing that the [P]roject would be visible from the headquarters or that [it] would encroach in or impair viewsheds to or from the headquarters." AR 7858. Thus, "given the extensive tree buffering on all sides of the [P]roject," the Examiner correctly concluded that "the mass and scale of the building is sufficiently obscured from view to not create any probable significant adverse impacts to historical resources" and that the Project overall will "adequately protect the historic character of the [C]ampus and thereby does not create probable significant adverse impacts." *Id.*

d. Land use, aesthetics, and scenic resources

SWC's notice of appeal to the Examiner included claims that the Project would have significant adverse impacts to land use, aesthetics, and scenic resources. AR 2466. SWC did not pursue these claims under SEPA in its closing brief; instead, it addressed its arguments on these topics to the issue of the Project's compliance with the Comprehensive Plan under FWRC 19.65.100(2)(a)(i). This Brief accordingly addresses the issues of the Project's design and aesthetics *infra*, in Subsection III.C.2. For the reasons explained in that section (as well as in the Decision, *see* AR 7876-79), even if these issues were to be considered under SEPA, SWC has not established probable significant adverse impacts.

3. Cumulative Impacts

SWC's central argument throughout this litigation has been that the City violated SEPA by failing to consider the permit applications for the Project, Building B, and the Business Park

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as if they were a single application for a single project – a process that SWC refers to as "cumulative" impacts analysis. For the reasons explained below, this is an inaccurate description of the law. Instead, because these three projects do not meet the criteria established by WAC 197-11-060(3)(b), the City was *not* required to analyze them in a single environmental document and did not err in reaching a threshold determination for the Project only. SWC's claims to the contrary are unavailing.

The Examiner correctly rejected SWC's claims under WAC 197-11-060(3)(b). However, the Examiner went on to hold that SEPA nonetheless imposed a "basic obligation" the City to conduct a joint analysis of the expected impacts from all three Projects, an erroneous conclusion that was based on an out-of-context reading of the word "cumulative" as used by other legal authority. The authority cited by the Examiner in no way establishes that a project's impacts must be considered jointly with the impacts of *separate*, future projects. Instead, it concerns consideration of a project's additive impacts in its existing context – impacts that may be more or less significant depending on surrounding circumstances.

As explained below, the City's independent review of the Project complied with SEPA because the Project, Building B, and the Business Park are not parts of a larger proposal or dependent upon one another and thus were not required to be reviewed together under WAC 197-11-060(3)(b). Beyond these considerations, the City's review was not required to incorporate analysis of Building B or the Business Park, nor does it contain any other requirement for joint review. MDNS Condition No. 11, which was based on the Examiner's erroneous legal conclusion to the contrary, must therefore be reversed.

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a. SEPA requires joint review only of interdependent projects

(1) Interdependent projects vs. similar projects

Section 197-11-060 of the SEPA Rules establishes the "content of environmental review," *i.e.* the "range of proposed activities, alternatives, and impacts to be analyzed in an environmental document." WAC 197-11-060(1). Subsection (3) of this section, entitled "Proposals," requires cities preparing an environmental document to "make certain that the proposal that is the subject of environmental review is properly defined." WAC 197-11-060(3)(a).[9] WAC 197-11-060(3)(b) and (3)(c) govern when proposals or parts of proposals must be analyzed together:

> (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 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. . . .

[9] "Proposal" is defined as a "proposed action." WAC 197-11-784. An "action" is the government decision that must be preceded by SEPA review. WAC 197-11-704(1). An action may be a "nonproject action," such as adopting legislation or other policy changes, or a "project action" involving the permitting of a particular development project. WAC 197-11-704(2). In this appeal, the Project is the proposal, action, and project action at issue. Like the caselaw, this Brief uses these terms (as well as generic terms such as "project" and "development") interchangeably unless otherwise noted.

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

Although these provisions do not use the word "cumulative," courts have referred to evaluation of multiple components of a project in the same environmental document as "cumulative" impacts review. In *Indian Trail Prop. Ass'n v. Spokane*, 76 Wn. App. 430, 443, 886 P.2d 209, 218 (1994), for example, the Court upheld the city's review of a shopping mall proposal because the City's analysis appropriately included analysis of a car wash and gas station planned as part of the mall. The Court concluded that the city had properly complied with WAC 197-11-060(3)(b) by considering "the cumulative effects of the entire project." *Id.* When an appellant claims the cumulative impacts of all components of a project were not considered, the appellant will often assert that the project was improperly "piecemealed" or "segmented." *Murden Cove Pres. Assoc. v. Kitsap County*, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985) ("Piecemeal review is impermissible where a 'series of interrelated steps [constitutes] an integrated plan' and the current project is dependent on subsequent phases")

Courts have repeatedly and in no uncertain terms affirmed that WAC 197-11-060(3)(b) requires joint review of projects only if they are so closely related to one another as to be truly interdependent. *Gebbers v. Okanogan Cty. Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 386, 183 P.3d 324, 331 (2008) (emphasis added) ("[If] any future project is not dependent on the proposed action, *no cumulative impacts analysis is required*."). The converse is also true. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137, 142 (2002) ("[T]he cumulative impact argument must fail unless the Boehms can demonstrate that the project is dependent on subsequent proposed development."); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 614-15, 744 P.2d 1101, 1105 (1987) (county did not err in "refusing to consider the development's future cumulative impact" because the project under review was not "dependent upon subsequent

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proposed development."); *see also Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 343, 552 P.2d 184 (1976) (city not required to consider road project and future residential development together because the road "is in no way dependent upon or intertwined with development of the property."). Regardless of the terminology used (conducting "cumulative" review or not "piecemealing" review), the rule is the same: projects need not be analyzed together unless they are interdependent parts of the same course of action. *See Cathcart - Maltby - Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 210, 634 P.2d 853, 859 (1981) ("Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed.").

Instead, proposals that have common aspects but are not interdependent are the "similar actions" referred to by WAC 197-11-060(3)(c). "Similar" – as defined by this provision – means that proposals may have common aspects or impacts but are not dependent upon one another, such that agency approval of one proposal will not require approval of another. For this reason, WAC 197-11-060(3)(c) not only allows but emphasizes the non-mandatory nature of consolidated evaluation of "similar" projects. Subsection (3)(c) could not be more clear. Its first word is "Optional." It states: "This section *does not require* agencies or applicants to analyze similar actions in a single environmental document." WAC 197-11-060(3)(c)(i)(emphasis added). Moreover, it expressly identifies "common . . . impacts" as elements that make two projects "similar," whereas subsection (3)(b) does not mention "impacts" or any related term. WAC 197-11-060(3)(c) forecloses any reading of SEPA that requires consolidated review of separate and independent projects on the basis of their common characteristics alone.

(2) Applicant's projects are not interdependent

The Examiner correctly determined that the Project, Building B, and the Business Park

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do not exhibit the interdependence that is "required by WAC 197-11-060(3)(b) to compel [] joint review." AR 7864. And although he found that the Project, Building B, and the Business Park share "common features" such as "shared interior and exterior circulation, a shared drainage basin and shared historical and aesthetic impacts," he recognized that such features are only a "discretionary basis for consolidated review" under WAC 197-11-060(3)(c). *Id.* What is more, he recognized that the pending review processes for Building B and the Business Park will provide opportunities for the City to impose any necessary traffic mitigation. AR 7871-72. This decision was correct and is determinative of the issue of whether any aspect of Building A, Building B and the Business Park must be analyzed together in one document. There is no such requirement.

b. No "basic obligation" to review impacts from multiple projects

Despite correctly identifying and applying the requirements (and limitations) of WAC 197-11-060(3)(b), the Examiner erroneously concluded that SEPA imposes a separate but parallel requirement to evaluate the common impacts of multiple pending proposals even when the proposals do not depend on one another. The Examiner referred to this so-called requirement as a "basic obligation to review cumulative impacts," *see* AR 7864, and he imposed MDNS Condition No. 11 on that basis. AR 7847, 7871. This was legal error. The Examiner's decision essentially nullifies, or renders superfluous, the standards of WAC 197-11-060(3)(b), in violation of well-established principles of statutory interpretation. *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 585-586, 192 P.3d 306 (2008) (a court must "give effect to every word, clause and sentence of a statute."). In addition, the authority the Examiner interprets as establishing a "basic obligation to evaluate cumulative impacts" consists of a single case and a single provision of the SEPA Rules, neither of which supports this proposition.

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(1) Review in light of existing conditions

The Decision suggests that the Examiner's conception of a "basic obligation" arose partly from an incorrect reading of *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 285, 232 P.3d 1154, 1159 (2010), which establishes that SEPA review of a project must examine any "cumulative harm that results from its contribution to existing adverse conditions." *Chuckanut* affirms that environmental review must consider a project in the context of its surroundings, including whether it will have any additive impacts that worsen an existing harm. In other words, an impact that would be insignificant in one context could, in another context, "represent the straw that breaks the back of the environmental camel." *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

Chuckanut does not address when projects should be considered together. Instead, the case concerned whether the environmental impacts of new conservation strategies in a formerly logged forest should be evaluated against a "no logging" use rather than against the "existing" use, which included logging. Appellant claimed the latter standard would avoid analysis of the "cumulative impacts" of future logging activities, many of which would individually exempt from SEPA review. The Court rejected this claim. This is not, as the Decision suggests, support for a "basic obligation" to review a project alongside other pending, nearby projects, but rather a clear requirement for the other type of "cumulative" consideration: the recognition that an impact's significance depends on its context.

Applying this principle in other contexts, courts have held that an impact may be deemed significant because it worsens an existing adverse condition. For example, in *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 423-24, 225 P.3d 448, 456 (2010), the Court determined that a city had erroneously issued an MDNS for a residential development

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planned for a fire-prone area and remanded for preparation of an EIS to address emergency evacuation. Evacuation options were already insufficient for the existing population, and the development would add to this deficiency. The Court concluded that the "cumulative effect of traffic from the new development" would constitute a "probable significant adverse" impact "on the ability to safely evacuate the area." *Id.* at 424. The development's traffic impacts were deemed significant because of their probable effect on existing conditions – *i.e.* because of their "cumulative" nature.[10]

These cases use the term "cumulative" to mean only review of a project in light of existing conditions. They do not blur the distinction between the cumulative effects of a project in relation to *existing conditions* and the cumulative impacts of *multiple projects*. Nor can they be read as requiring a threshold determination to include analysis of common impacts from other projects outside of the framework of WAC 197-11-060(3). They do not support the proposition that SEPA provides a "basic obligation" to evaluate the cumulative impacts of multiple pending proposals.

(2) Content of EIS

The Examiner also relied on WAC 197-11-792(2)(c), which provides that the range of impacts analyzed in an EIS may include impacts that are "direct," "indirect," or "cumulative." *See* AR 7862-63. As stated in the Decision, the Examiner determined that this section establishes that "cumulative impacts are one type of 'environmental impact,'" and therefore,

[10] In SWC's closing brief before the Examiner, it cited *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 30, 252 P.3d 382, 389 (2011). That case concerned whether RCW 82.02.020 allowed a city to require a developer to pay traffic impact mitigation fees on the basis of the "cumulative" effects that traffic from the developer's projects would have on nearby intersections. The case is inapplicable here because it does not support SWC's claim that SEPA requires joint review of separate projects that do not meet WAC 197-11-060(3)(b) criteria. To the contrary, the *City of Fed. Way* Court concluded that the project at issue would have significant adverse impacts solely on the basis of *its own* traffic along with projected population growth. 161 Wn. App. at 55.

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because a threshold determination also "require[s] evaluation of environmental impacts," it would be "reasonable to conclude" that a threshold determination must always consider cumulative impacts. AR 7847, 7863.

This chain of reasoning does not follow from its source. WAC 197-11-792 defines the "scope" of actions, alternatives and impacts to be evaluated in an EIS. In that context, it states impacts may be direct, indirect or cumulative. WAC 197-11-792(2)(c). This definition is expressly limited to an EIS and does not apply to a threshold determination. *See id.* The Examiner's reading of WAC 197-11-792 improperly conflates these two types of documents. Moreover, although WAC 197-11-792(2) is one of the SEPA Rules' definitional provisions, it does not define "impact." The actual definition of "impact" does *not* include the word "cumulative. WAC 197-11-752 ("'Impacts' are the effects or consequences of actions."). This further contravenes the Examiner's apparent conclusion that every reference to "impacts" in the SEPA Rules should be interpreted as "impacts and cumulative impacts from other pending proposals." In addition, the Examiner's reading confuses the *content of an environmental document* (here, the "range of . . . impacts to be analyzed" in an EIS) with the definition of the *proposal under review* (here, the Project alone). *Compare* WAC 197-11-060(2)(c) and WAC 197-11-792(1) *with* WAC 197-11-060(3)(a).

WAC 197-11-792 establishes that the content of an EIS may include discussion of cumulative *impacts*; it provides absolutely no basis for the conclusion that the existence of common impacts from multiple projects requires joint review of those *projects*. Indeed, such a conclusion would directly conflict with the express text of another provision of the SEPA Rules – WAC 197-11-060(3)(c). As described above, WAC 197-11-060(3)(c) unambiguously establishes that joint review of "similar" projects is "optional," not required.

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The "basic obligation" posited by the Examiner is unsupported by any applicable authority and represents an erroneous conclusion of law.

c. Imposition of MDNS Condition No. 11 was legal error

(1) The Examiner decision

Under the premise of the general obligation to review the "cumulative impacts" of Applicant's three projects, the Examiner reviewed record evidence regarding Building B and the Business Park. In particular, the Examiner looked at the TIA for the Business Park, which Mr. Schramm prepared in conjunction with Applicant's separate application for the Business Park in April 2018. AR 3906. Pursuant to the City's additive methodology, the intersection LOS analysis in the Business Park TIA assumes the construction and full occupancy of all "pipeline" projects, including the Project, Building B, the Headquarters, the Davita project (a separate project not owned by Applicant and not at issue here), and a proposed office development east of Weyerhaeuser Way S (also not owned by Applicant and not at issue here), as well as a 2% annual growth rate. AR 3922. Mr. Schramm determined that given these background conditions, the intersection of Weyerhaeuser Way S and the entrance and exit ramps to SR-18 westbound would operate at LOS E in the AM peak hour with or without the addition of Business Park. AR 3929. The intersection will have a volume/capacity ratio of 1.28 if the Business Park is not constructed and 1.29 if it is. *Id.* The Business Park TIA does not calculate LOS effects for the PM peak hour, which will be determined by the City during its concurrency review. That review is ongoing, as is the rest of the Business Park application process. Transcript 889.

In the Decision, the Examiner concluded that because the Business Park TIA predicted acceptable LOS at nearby intersections after the construction of all three projects (and others), all

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"cumulative" traffic impacts had been sufficiently identified and mitigated. AR 7847. The Examiner determined, however, that there was one "missing piece of information": the concurrency analysis for the Business Park, which would provide information regarding PM peak hour. Moreover, the Examiner determined that the Business Park TIA "raise[d] the reasonable possibility that there could be a failing PM peak hour LOS" at the Weyerhaeuser Way S/SR-18 westbound off-ramp after all three projects (and others) are constructed. AR 7871-72. Although this outcome would not arise until construction of the Business Park, and would result from multiple future projects, the Examiner determined that traffic from the Project could "push the existing [traffic] conditions closer to trigger levels" and thereby enable the Business Park to "push those levels beyond adopted level of service standards." AR 7863. Thus, he concluded, "in order for the City to sufficiently review environmental information of cumulative traffic impacts[,] the concurrency review for the business park should be completed before traffic mitigation requirements for the [Project] are finalized." AR 7872. This would allow the City to require Applicant, as part of its mitigation for the Project, to "pay any proportionate share mitigation found necessary for the SR 18 off-ramp intersection as a result of the completed business park concurrency review." *Id.* The Decision imposed this requirement as a condition of approval for the MDNS ("MDNS Condition No. 11").

SWC's Motion for Reconsideration asserted that the predicted traffic impacts of the three projects must be fully and jointly mitigated as part of the MDNS. In the Reconsideration Decision, the Examiner rejected this argument, but he nonetheless amended the condition. He concluded that the Decision had contained an "error of fact" – specifically, that the Decision had failed to recognize that the Business Park TIA predicted an AM peak-hour LOS violation at the Weyerhaeuser Way S/SR-18 if all three projects were constructed, because it focused only on

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concurrency analysis of the PM peak hour. AR 7735-37. The Examiner therefore amended MDNS Condition No. 11 to read as follows:

> 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.

AR 7740-41.

(2) The Examiner committed legal error in imposing Condition 11

Imposition of MDNS Condition No. 11 was legal error for the reasons explained in the previous subsection: namely, that it was based entirely on the proposition that SEPA imposes a "basic obligation," separate from WAC 197-11-060(3)(b), to review the cumulative impacts of multiple projects. This is not the case, which alone invalidates the condition.

Considering how MDNS Condition No. 11 would work (or, rather, not work) in practice provides a further indication of why the so-called "basic obligation" is inconsistent with SEPA as a matter of law. Notably, MDNS Condition No. 11 is not limited to requiring the City to simply evaluate the common impacts of Applicant's projects. Instead, the Examiner held that because the Business Park TIA indicated that the SR-18 WB Intersection will exceed the applicable LOS in the foreseeable future, the Project may require mitigation because it will, in the future, "be contributing traffic to a failing intersection." AR 7737. The imposition of this additional condition violates fundamental principles of SEPA relating to threshold determinations and

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mitigation.

(a) No significant adverse impact results from the Project

The Examiner's new MDNS Condition 11 violates SEPA in that it mandates the City to impose mitigation for impacts that are less than significant. Under SEPA, an MDNS is appropriate if mitigation reduces the impacts of a project to levels that are less than significant. WAC 197-11-340(1); WAC 197-11-350(2). Notably, there is no requirement that all incremental impacts of a project be mitigated in order for an agency to issue an MDNS. *Id*. Instead, an MDNS may be reversed only if the appellant demonstrates there is a significant adverse impact that was not mitigated. *Boehm, supra,* 111 Wn. App. at 719-720; *Moss, supra,* 109 Wn. App. at 31. Here, SWC did not make that showing before the Examiner. The TIA for the Project establishes, and the Examiner properly found, that the Project itself would not cause any significant adverse traffic impacts. AR 246-247. Those impacts would occur, if at all, only as the result of future development, including the Business Park and numerous unrelated developments. Since SWC did not meet its burden of proof, the Examiner should simply have denied its claim, rather than imposing a new and legally unjustifiable condition.

In imposing Condition 11, the Examiner invented new legal requirements from whole cloth and turned the SEPA process on its head. Under WAC 197-11-060(3), SEPA directs reviewing agencies to first ask whether there is a basis on which proposals must be combined and then whether the proposals will together have any significant cumulative impacts. The process invented by the Examiner, by contrast, would look first at whether a project's impacts could be significant if considered cumulatively with the impacts of any other pending projects that may be developed in the future – before determining whether anything justified combining the projects in the first place. The only "operative limit on what cumulative impacts must be

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evaluated and mitigated" suggested by the Examiner is "the SEPA definition for 'probable,' which identifies that "remote and speculative impacts do not qualify as probable impacts." AR 7847. Again, this suggests if any proposal will contribute, along with any other future proposal or proposals, to any significant adverse impact whose likelihood is more than "speculative," SEPA requires all of those proposals to be mitigated – regardless of whether their impact is significant. The unworkability of such a test is as obvious as its lack of legal foundation, as there is a nearly infinite range of potentially significant future impacts to which *any* project could be said to contribute to in some incremental way. The Examiner's formulation simply suggests a process that parallels WAC 197-11-060(3) but that lacks any discernible standards. "If each agency may create procedures not contemplated by the statutory scheme, the problem the scheme was meant to address will be exacerbated rather than alleviated." *Ellensburg Cement Prods., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 750-51, 317 P.3d 1037, 1044 (2014). The Examiner must apply SEPA as written and may not create new requirements that were not enacted by the Legislature.

The Examiner also suggested that *Chuckanut* and other "existing conditions" cases could provide a basis for finding a project significant because of its foreseeable "cumulative" impacts because even if a project "may not push existing conditions to adverse levels on its own, [] it can very well push the existing conditions closer to trigger levels" that would enable another project to "push" the conditions into significant adversity. AR 7863. But this too is reasoning backwards. A project may have a significant adverse effect because it worsens an existing significant adverse impact – as with the "cumulative effect of the traffic" from the development discussed in *Lanzce G. Douglass*, 154 Wn. App. at 423. But this is very different from the situation here, where the only analysis in the record shows the Project will not cause significant

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adverse effects, when considered in light of existing conditions. AR 246-247. *Chuckanut* and related cases hold only that a project may be significant and adverse because of its own contribution to existing adverse conditions. No case, however, holds that a project may be significant simply because it increases the likelihood that a condition may become adverse if other projects are developed in the future. Instead, if the agency "determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS)." WAC 197-11-340(1) (emphasis added).

(b) No substantive authority for Condition 11

MDNS Condition 11 also violates WAC 197-11-660, which imposes limits on an agency's substantive authority. Under that section, SEPA mitigation measures "shall be based on policies, plans, rules, or regulations formally designated . . . as a basis for the exercise of substantive authority." WAC 197-11-660(1)(a). The policies that the City has designated as a basis for its substantive SEPA authority are listed in FWRC 14.25.070. The City's adopted SEPA policies include Title 19 of the City Code. The City has an adopted manual for implementing certain provisions of Title 19, which describes the City processes for TIAs. The Examiner's Condition 11 ignores, and is in conflict with, these adopted City processes.

As described by Mr. Perez, the City's TIA process, which examines intersection capacity in the AM peak hour, and its concurrency process, which looks at the PM peak hour, both take an "additive" approach to project sequencing. Transcript 855-56, 860-61. This means that the City considers each pending project in light of the background traffic as well as "all the development projects that have not been occupied but have been submitted prior to a particular development's application." Transcript 856. For concurrency evaluation, this approach is

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established in FWRC 19.90.130(1) and (3), which establish that "[t]he most recent concurrency management transportation impact analysis shall be the beginning point for each succeeding concurrency management transportation impact analysis" and that an applicant must demonstrate that a project can meet LOS standards in light of "the capacity that is or shall be generated by all existing, reserved, and approved development." The TIA process is established in the City's Development Services Manual. AR 7920 ("Add Impacts of Adjacent Major Developments Pending and Approved."); Transcript 910.

The Examiner noted that the City had consistently applied this approach since the 1990s and described it as 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." AR 7871, 7873-74. He further recognized that SWC's suggested alternative approach – "constantly updating and supplementing project-specific transportation studies with new information" – is "neither required by the City's TIA guidelines nor feasible in practice." AR 7873. Requiring updates in this manner, the Examiner agreed, would "render project review chaotic and impractical by effectively requiring 'an endless loop' of transportation review for every new development." *Id.*

Despite recognizing both the validity of the methodology and the City's application of it to Applicant's three projects, the Examiner disregarded it. He determined in the Decision that there was a "missing link in cumulative trip generation" caused by the "lack of completed concurrency review for the Business Park," which could require the City to impose mitigation for the Project based on PM traffic from the Business Park. AR 7871-72. In the Reconsideration Decision, he reached a similar conclusion regarding AM traffic. AR 7736-37. Although the Examiner approvingly described the City's additive approach, he nonetheless rendered a decision

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that is fundamentally inconsistent with these City processes.

The Examiner essentially concluded that because later-submitted information indicated a later-occurring LOS failure resulting from future projects, it must be that the City's methodology missed it, so SEPA had to supplement. What this conclusion failed to grasp, however, was that the additive approach is not simply how the City happens to evaluate its transportation standards. Instead, the sequential, additive approach is *part* of the standards. That is why Mr. Perez testified repeatedly that the City conducted its "standard concurrency analysis" and determined that "there were no level of service failures as a result of the Project," Transcript 857-58, and why the City's analysis of the Project did not include the Business Park "because it had not been submitted, and that is an important element in both the traffic impact analysis as well as concurrency analysis . . . If you combine them, it gets very difficult to distinguish what mitigation goes where." Transcript 864; *see also, e.g.*, Transcript 878 ("We have done the cumulative impact consistent with our guidance and state law."); Transcript 881 (city completed its "cumulative impact analysis as part of our concurrency and the TIA guidelines as defined"). It was not that the City's methodology did not provide for mitigation for later-occurring projects; rather, according to the City's adopted standards, there *are no failures* resulting from the Project. Impacts from later projects will be reviewed and, if necessary, mitigated in connection with the concurrency and SEPA review for those later projects.

TIA and concurrency management are not simply processes for grading intersections; they are complex analyses that balance numerous considerations, from transportation-specific issues to more general considerations of administrability, fairness, and the need to maintain consistency. Transcript 859-60. That is why, when asked repeatedly by SWC's counsel if it would "make sense" to continually update traffic-count information, Mr. Perez said, "Based on

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our guidelines, no." Transcript 903. He also testified that it would be unfair and unworkable to administer a process based on non-sequentially updated information, because "moving the goalpost" would result in inconsistent treatment of applicants, and also that it would be "impossible under that scenario to distinguish which development is generating which impacts." Transcript 903-04, 909. The Examiner's exclusive focus on whether an intersection would exceed the LOS standard, considered in isolation, failed to grasp the nature of the City's process and used it in a way it was not intended. Requiring continual updating of background traffic counts suffers from the same problem consideration of newly filed project applications – it creates an "endless loop" of review.

(c) LUPA requires reversal of Condition 11

The Examiner's imposition of MDNS Condition No. 11, which was based on the conclusion that evidence of LOS failure at one intersection in the Business Park TIA constituted a significant adverse impact to which the Project must contribute mitigation, failed to follow the City's prescribed process for transportation review because the Project is not required to account for later-submitted applications. *See* RCW 36.70C.130(1)(a).

FWRC 19.70.120, entitled "Burden of proof," establishes that in agency appeals, the Examiner "shall give great deference to the agency's interpretation of its own properly promulgated regulations, matters within its expertise, and procedural determinations." The Examiner did not grant any deference to Mr. Perez regarding the compliance of the Project and the importance of sequential mitigation to the City's process. This failed to follow the City's prescribed process for agency decision appeals and exceeded the Examiner's authority. *See* RCW 36.70C.130(1)(a), (e).

Imposition of the condition erroneously applied the law to facts, and was not supported

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by substantial evidence, because under City standards the Project does not result in LOS failures or other significant adverse impacts. *See* RCW 36.70C.130(1)(c), (d).

d. Condition 11 is not supported by substantial evidence

The Examiner imposed MDNS Condition No. 11 based on the conclusions that the Business Park TIA (1) "established that there would be [] AM peak hour LOS violations resulting from all three projects," and (2) "established the reasonable probability that the trips generated by all three proposals would push PM trip generation to violate adopted LOS standards." AR 7736. Neither of these conclusions is supported by substantial evidence.

The Project TIA analyzes traffic impacts of the Project and the adjacent Building B. For the AM peak hour, the Project TIA indicates that the SR-18 WB Intersection will operate at LOS D and within the City's volume/capacity ratio before any of the projects are constructed. AR 246. The Project TIA also assumes occupancy of the Headquarters and office buildings east of Weyerhaeuser Way and an additional 2% annual growth rate to take into account other unspecified projects. Even with these other projects and growth assumed, the Project TIA determined that the intersection would remain well within acceptable standards in the 2019 condition with the Project and the 2020 condition with both the Project and Building B. AR 233. Thus, the only quantitative traffic analysis in the record shows the Project will not result in significant adverse impacts to this intersection.

The Business Park TIA analyzes traffic impacts from the Business Park and other anticipated future development. In determining future without-project traffic volumes, the Business Park TIA conservatively assumes construction and/or full occupancy of: (1) the Project; (2) Building B (as currently proposed); (3) the Business Park (as currently proposed); (4) the Headquarters; (5) the Davita project, an unrelated development; (6) the East Campus Corporate

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Park, another unrelated development; and (5) a 2% annual growth rate. AR 2922. With all of this growth, the Business Park TIA shows that in the 2020 *without project* conditions the Weyerhaeuser Way S/SR-18 westbound ramp intersection will operate at LOS E with a v/c ratio of 1.28. The addition of Business Park traffic does not change the "without project" LOS and increases the volume/capacity ratio by only 0.01, to 1.29. AR 3929.

In the Decision, the Examiner determined that Business Park TIA did not indicate that there would be any LOS failures in the AM peak hour but nonetheless included "high traffic counts" that "raise[d] the reasonable possibility that there could be a failing PM peak hour LOS" with all three projects. AR 7871. The Examiner noted that the record was "unclear" regarding whether City or WSDOT jurisdiction applied to the intersection, but he suggested that a failure of LOS under City standards "more likely than not would be considered inadequate by WSDOT" as well. AR 7872. On this basis, the Examiner determined that the City must complete its concurrency review of the Business Park before finalizing traffic mitigation requirements for the Project, and that it must require Applicant to "pay any proportionate share mitigation found necessary for the SR 18 off-ramp intersection as a result of the completed business park concurrency review." *Id.* The Decision imposed this requirement as the initial version of MDNS Condition No. 11.

In the Reconsideration Decision, the Examiner determined that he had made a factual error in his prior ruling by failing to recognize that the Business Park TIA predicts that there an AM peak hour LOS failure in 2020 under either City or WSDOT standards. AR 7735-36; *see also* AR 3929. The Reconsideration Decision concludes that there will be "AM peak hour LOS violations resulting from all three projects," requiring mitigation for the Project. AR 7736.

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This conclusion is not supported by substantial evidence; indeed, it is contradicted by the record. The Project TIA unequivocally shows that the future traffic conditions with the Project and Building B would not exceed either City or WSDOT LOS standards. AR 234. The Business Park TIA predicts that 2020 traffic at the Weyerhaeuser Way S/SR-18 westbound ramp intersection will hardly change whether or not the Business Park is constructed. Indeed, the minuscule change between the "with project" and "without project" alternatives in the Business Park – which is the only record evidence indicating the effect that the Business Park will have on the intersection – also disproves the assertion that the Business Park would by itself cause a significant adverse impact if it was constructed along with the Project and Building B.

Mr. Perez testified that the LOS E operation in the Business Park TIA "would not be exclusively" from the Project and Building B because of "other background growth and other development projects within the City that could contribute." Transcript 900. The only conclusion that can be reached from the Business Park TIA is that LOS standards at the Weyerhaeuser Way S/SR-18 westbound ramp intersection would operate at LOS E with projected future traffic volumes from construction and/or full occupancy of the Project, Building B (as currently proposed), the Business Park (as currently proposed), the former Weyerhaeuser Headquarters, Davita, the East Campus Corporate Park and a 2% annual growth rate. The Business Park TIA says nothing about the impacts of the Project, Building B and the Business Park in isolation.

In sum, there is no evidence that the Project will cause an LOS failure. AR 233. There is no evidence that the Project together with Building B will cause an LOS failure. AR 234. And there is no evidence that the three projects together will cause an LOS failure. AR 3929. Instead, the three projects (if they are completed) will generate vehicle trips that will join with

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trips generated by many other future projects. If these projects are all constructed and/or fully occupied, and no mitigation is imposed on any of those projects, the Weyerhaeuser Way S/SR-18 westbound ramp intersection will operate at LOS E. Based on this, the record does not support an assertion that the three projects will cause an LOS failure or that the Project will cause or contribute to an LOS failure. The Examiner's conclusion otherwise was not based on substantial evidence. *See* RCW 36.70C.130(1)(c).

e. SWC's claim regarding Condition 11 fails

Claim 7.9 in SWC's LUPA Petition also challenges MDNS Condition No. 11, though on different grounds. Regardless of whether or not this Court agrees with Applicant's arguments regarding this condition, SWC's Claim 7.9 fails to present a viable ground for relief under LUPA and must be denied.

In Paragraph 7.9.2 of its Petition, SWC argues that MDNS Condition No. 11 is "vague and ambiguous" because the condition allows the City to conduct its additional traffic analysis and impose any necessary mitigation through the use of whichever type of document "the City finds most consistent with its regulations." *See* AR 7740-41. This aspect of the claim fails for multiple reasons. First, there is nothing vague or ambiguous about this aspect of the additional condition. Instead, the Examiner's wording clearly and appropriately defers to the City – not to use whichever process it feels like, but to determine in the first instance which process is required by SEPA, as implemented by the SEPA Rules and City Code. This is fully consistent with SEPA. The City is the "lead agency," and therefore has "responsibility for complying with SEPA's procedural requirements." WAC 197-11-758. Second, the substantive issue to be reviewed – the LOS and v/c ratio expected at the Weyerhaeuser Way/SR-18 intersection after all

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three projects are constructed – is unambiguous, and SWC thus cannot claim that a traffic impact that may affect it may go unaddressed as a result.

The statements in Paragraph 7.9.3 are nonsensical. In this paragraph, SWC first challenges the portion of MDNS Condition No. 11 that states, "The City shall determine if WSDOT has jurisdiction over the SR 18 intersection," *see* AR 7741, arguing that the Examiner "cannot determine jurisdiction over state facilities." This willfully misreads the Reconsideration Decision, portraying the Examiner's routine instruction to assess which of two authorities actually exercises jurisdiction over the intersection as a supposed mandate to rewrite the legal standard. That is not at all what MDNS Condition No. 11 suggests. Next, SWC challenges the Examiner's instruction to the City to formulate any necessary mitigation in consultation with WSDOT. SWC asserts that the Examiner "cannot determine whether, or what type of mitigation, is appropriate in advance of technical analysis of traffic impacts by WSDOT." SWC Petition, Paragraph 7.9.3. Again, this willfully misreads the condition. Under the wording of the condition, the Examiner is not deciding anything about mitigation, only instructing the City to do so in consultation with WSDOT – a process that will certainly accommodate any additional analysis WSDOT wishes to perform.

For the reasons stated in this subsection and above, this Court should reverse the imposition of MDNS Condition No. 11 and deny SWC's Claim 7.9. In the alternative, if this Court determines that the Examiner properly imposed MDNS Condition No. 11, this Court should nonetheless deny Claim 7.9.

C. The Examiner properly upheld the Process III Approval

The City Code establishes different levels of land use review. The Project was subject to Process III review. Under Process III, the City approves a project if it finds that the Project (1) is

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consistent with the comprehensive plan; (2) is consistent with all applicable provisions of Title 19, the Zoning and Development Code; (3) is consistent with the public health, safety, and welfare; (4) the streets and utilities in the area of the subject property are adequate to serve the anticipated demand from the proposal; (5) the proposed access to the subject property is at the optimal location and configuration; and (6) traffic safety impacts for all modes of transportation, both on and off site, are adequately mitigated. FWRC 19.65.100(2)(a)(i)-(vi). The City Community Development Department determined that all of these criteria were satisfied and imposed numerous conditions in connection with its Process III Approval. The Examiner upheld the Process III Approval and imposed one additional condition relating to review of the Project for compliance with the Hylebos Basin Plan.

The Examiner's decision to uphold the Process III Approval was proper. The record, including the analysis in the Process III Approval itself, extensive technical study, and expert testimony at hearing, establishes that the Project meets all applicable criteria. AR 2417-47, 7510-26, 7876-85. First, the Process III Approval contains a thorough explanation of the Project's consistency with the Comprehensive Plan. AR 2439-2440. SWC challenges the Project's consistency with only one goal and one policy of the Comprehensive Plan. For the reasons discussed below, this claim is without merit. The Project is consistent with the Comprehensive Plan.

Second, the Process III Approval contains an exhaustive analysis of the Project's consistency with the standards of Title 19 (as well as other Code and CZA standards). AR 2420, 2423-2439. SWC does not challenge the City's findings regarding the vast majority of these zoning standards; its claims are limited to standards relating to comprehensive plan consistency, cumulative impacts, and the CZA's conclusions of law. For the reasons discussed below, these

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claims have no merit. The Project is consistent with Title 19.

Third, the Process III Approval concludes the Project is consistent with the public health, safety and welfare. AR 2441. SWC's only claim relating to this criterion on appeal is that it is not met because the Project is allegedly not consistent with the Hylebos Basin Plan. This claim fails for the reasons discussed below. The Project is consistent with the public health, safety and welfare.

Fourth, the Process III Approval concludes that streets and utilities in the area of the subject property are adequate to serve the anticipated demand from the Project. AR 2441. This conclusion is based on the detailed analysis of these issues reflected in the Process III approval. This determination is also supported by extensive evidence and testimony at the hearing in this matter relating to transportation and stormwater, discussed previously in this brief. Streets and utilities are adequate to serve the project.

Fifth, the Process III Approval concludes the proposed access to the subject property is at the optimal location and configuration. AR 2441. This conclusion is supported by the analysis in the Process III Approval as well as evidence and testimony at the hearing in this matter. SWC does not challenge compliance with this criterion in this appeal. The Project access satisfies this criterion.

Sixth, the Process III Approval determines that traffic safety impacts for all modes of transportation, both on and off site, are adequately mitigated. AR 2441. This conclusion is based on the transportation analysis and conditions contained in the Process III approval. This determination is also supported by extensive evidence and testimony at the hearing in this matter relating to transportation, which was discussed previously in this brief. The Project is consistent with this criterion.

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SWC raises four challenges to the Examiner's decision upholding the Process III approval. SWC asserts that the Examiner incorrectly (1) concluded that all cumulative analysis required by FWRC 19.100.030 and related City Code provisions occurred; (2) determined the Project is consistent with the Comprehensive Plan, (3) dismissed claims alleging noncompliance with the CZA's conclusions of law; and (4) concluded he lacked authority to remand the Process III decision. All these claims are without merit. SWC fails to meet its burden of proof under LUPA to show these aspects of the Examiner's decision are an erroneous interpretation of the law, not supported by substantial evidence, or otherwise subject to reversal under LUPA's standards of review. The new condition imposed by the Examiner is not warranted, however, and should be reversed by this Court, since the record establishes that the Project complies with any applicable provisions of the Hylebos Basin Plan.

1. The Examiner correctly concluded that any cumulative impact analysis required by the Process III criteria took place

SWC asserts that the Examiner erred in "not requiring cumulative impact analysis" under the City Code. SWC Petition, p. 9 (Paragraph 7.5). This claim mischaracterizes the Examiner's decision. As SWC acknowledges several pages later (SWC Petition, p. 16 (Paragraph 7.8.4), the Examiner determined that "the City and Applicant conducted a thorough cumulative impacts analysis." SWC then asserts the Examiner erred in making this determination. SWC Petition, p. 10 (Paragraphs 7.5.2, 7.5.3), pp. 15-17 (Paragraphs 7.8.1-7.8.7), p. 12 (Paragraph 7.6.7). SWC is incorrect. The Examiner properly concluded that any required cumulative impact analysis occurred and was adequate.

The City Code section governing consideration of cumulative impacts for purposes of Process III review is FWRC 19.100.030(2), as SWC admits. *See* SWC Petition, p. 9 (Paragraph

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7.5.1.1).[11] Section 19.100.030 is entitled "Determination of direct impacts." Subsection (2) requires the City to "determine direct impacts" for any development "which require mitigation," considering 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." As Mr. Davis testified during the hearing below, the City performed this review and incorporated its conclusions in the Process III Approval. Transcript 53-57, 61, 65, 92-93. This uncontested testimony more than establishes compliance.

Paragraph 7.5.1 of SWC's Petition suggests SWC's belief that this provision requires the equivalent of treating the Applicant's three separate development projects as a "single course of action" under WAC 197-11-060(3)(b) – specifically, issuance of a document that discusses every possible impact of every nearby project together. But that is not what the provision says. It does not require consideration of the aggregate impacts of all nearby developments in a single document, but rather the specific determination of whether *the direct impacts of the project under consideration* would require mitigation due to the cumulative effect of the impacts when aggregated with similar impacts of future development in the immediate vicinity. The City conducted this analysis, as it explained at hearing. SWC failed to introduce evidence of any impacts that will not be fully addressed when other projects are permitted and thus require mitigation as part of *this* Project.

SWC also alleges that the City was required to analyze the stormwater systems of the three separate projects together. SWC Petition, p. 12 (Paragraph 7.6.7). Yet the City Code does

[11] SWC also refers to FWRC 19.90.190. FWC Petition, p. 10 (Paragraph 7.5.1.2). This section relates to the City's concurrency process, which is not at issue in this case, and does not mention cumulative impacts.

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not require such review. The Code requires a "mater drainage plan" only for contiguous parcels with development totaling more than 50 acres of new impervious surface. The Business Park site is not contiguous with the Project Site or the Building B site. In addition, the Project and B together total well under 50 acres of new impervious surface. The master drainage plan requirement does not apply. Transcript 472.

The Examiner properly rejected this claim.

2. The Examiner correctly concluded the Project is consistent with the Comprehensive Plan

SWC asserts that the Project is inconsistent with the Comprehensive Plan, specifically, with Goal LUG 8 and Policy LUP 49. SWC Petition, pp. 13-15 (Paragraphs 7.7.1-7.7.11). SWC is incorrect.

Section 4 of the CZA, entitled "Comprehensive Plan Designation," establishes that "to the extent Federal Way policies impose development standards conflicting with this Agreement, this Agreement shall control," and that any comprehensive plan designation for the Property must be "compatible with the zoning agreed to in Section 3 of this Agreement." AR 1791-92. Consistent with the Concomitant Agreement, the Comprehensive Plan provides a designation for the Property as follows:

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

AR 1328 (emphasis added). As the Comprehensive Plan itself recognizes, the applicable regulations governing development on the Property are those provided by the CZA. Because the

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Project is consistent with the CP-1 regulations, it is necessarily consistent with the Comprehensive Plan. *See id.*

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

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

AR 1308 (emphasis added). In this passage, the Comprehensive Plan clearly provides its goals are not "mandates" and its policies are only "general policy" guides. The Comprehensive Plan prohibits a person from asking whether a specific project would fulfil a particular policy. Yet this is exactly what SWC is doing in its appeal.

Even if the goal and policy on which SWC relies are considered individually, the Project is consistent with them. LUP 49 states: "In the East Campus Corporate Park area, encourage quality development that will complement existing uses and take advantage of good access to I-5, Highway 18 and future light rail as well as proximity to the City Center." AR 1328. The record shows the Project is fully consistent with these provisions. The City determined that the Project takes advantage of its highway access and reviewed and approved the Project's site plan

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and design. Transcript 422-23, 721-22, 737; AR 844-45, 2440. The Project is consistent with LUP 49. SWC's argument fails.

LUG 8 provides: "Create office and corporate park development that is known regionally, nationally, and internationally for its design and function." This goal is already satisfied in this area. The building that formerly housed the Weyerhaeuser corporate headquarters is regionally, nationally and internationally known. However, other existing buildings on the property do not enjoy this status. SWC appears to read this provision to mean that no additional development can take place unless it is "regionally, nationally and internationally" known even before its construction. *See* SWC Petition, p. 14 (Paragraph 7.7.6). That reading is not logical and yields absurd results. Instead, LUG 8, like LUP 49, requires the City to exercise consideration of the design aspects of development in this area. Mr. Davis testified that the City did so, that it "concur[red]" with Applicant about the Project's architectural qualities, and that the Project furthers the goals of the CZA, "which speaks to both preservation and development of the property." Transcript 422-23, 721-22, 736-37; AR 844-45, 2440. SWC's claim fails.

In sum, the Examiner properly determined the Project is consistent with the Comprehensive Plan.

3. The Examiner correctly dismissed claims related to CZA conclusions of law

SWC claims that the Examiner improperly dismissed the claims in Paragraphs 3.3, 3.6.10, and 3.6.11 in its appeal of the Process III Approval to the Hearing Examiner. SWC Petition, pp. 18-19 (Paragraphs 7.10.1-7.10.3). In these claims, SWC asserts that the Process III Approval violates the Conclusions of Law contained in Ordinance 94-219, which adopted the zoning applicable to the Property. The Examiner properly dismissed these claims because the

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Conclusions of Law are not, and do not purport to be, development regulations or any other type of legal requirement in their own right. Under the procedures established in the City Code in effect when Ordinance 94-219 was adopted, the City Council's approval of a zoning classification to be applied to newly annexed property, and of a pre-annexation concomitant agreement governing that property, required it to make findings under specific "Decisional Criteria." *See* AR 1869. Section 2 of Ordinance 94-219 accordingly includes several Conclusions of Law reached by the City Council "with respect to the Decisional Criteria necessary to approve an initial zone classification and to approve the proposed Concomitant Agreements." AR 1870.

The claim that the Approval "violates" these Conclusions of Law must be dismissed because the Conclusions do not establish requirements of any kind. They are not phrased so as to mandate any further action, in contrast to other provisions of Ordinance 94-219 – for example, section 3 of the Ordinance provides that the Property is "hereby designated" according to several zoning categories; section 4 states that the City's zoning map "shall be amended"; and section 5 provides when the zoning regulations and map amendments "shall become effective." AR 1871-72. By contrast, section 2 states that the Council "makes the following Conclusions," which do not apply to anything other than the action the Council is taking. AR 1870. As such, the Conclusions are akin to legislative findings – while they might guide the interpretation of a provision of the Agreement, they are not themselves development regulations or otherwise independent requirements. Nothing in the Concomitant Agreement, the adopting ordinance or the FWRC remotely supports a contrary conclusion.

A basic rule of interpretation is that the substantive components of a document will control over prefatory and other, less mandatory provisions. *See, e.g., Lakeside Industries v.*

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Thurston County, 119 Wn. App. 886, 898, 83 P.3d 433 (2004); *Martel v. City of Vancouver*, 35 Wn. App. 250, 255, 666 P.2d 916 (1983). SWC's attempt to elevate non-binding content over the actual substance of the Concomitant Agreement violates this well-established principle of construction. The Examiner properly dismissed claims 3.3, 3.6.10, and 3.6.11.

4. The Examiner correctly concluded he lacked authority to remand

SWC asserts that the Examiner erred in determining he did not have the authority to remand the Process III Approval and MDNS to the City staff for further consideration of traffic impacts to the westbound ramp intersection of SR 18 and Weyerhaeuser Way and the Hylebos Basin Plan. SWC Petition, pp. 7-8 (Paragraphs 7.3.1-7.3.5). SWC is incorrect. Remand is neither allowed nor appropriate here.

"As a quasi-judicial official, the Hearing Examiner "has only the authority granted it by statute and ordinance." *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003). "The jurisdiction, powers and authority of the hearing examiner, as these relate to matters covered by FWRC Title 19, are established in Chapters 19.65, 19.70 and 19.75 FWRC." FWRC 2.95.040. Under these chapters, the Examiner's appellate jurisdiction is sharply limited: The Code authorizes the Examiner only to "affirm, reverse, or modify the decision being appealed." FWRC 19.70.150. Similarly, the Hearing Examiner Rules provide that the Examiner may "vacate, affirm or modify the underlying appealed from decision." HER 4(c). None of the words in these provisions means "remand" – even though that word appears elsewhere in the Code, indicating that the City's lawmakers are perfectly able to authorize such a remedy when they choose. *See* FWRC 19.285.060 (authorizing Examiner to "remand" a decision by the landmarks commission); FWRC 19.75.140(4) (Council may "remand" rezone decision to hearing examiner).

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SWC seeks to create another permit review, public comment, decision and appeal loop, thereby delaying the Applicant's Project. But the City Code and Examiner rules prohibit such a remand. FWRC 19.70.150; HER 4(c). In addition, SEPA regulations forbid the second appeal that SWC seeks; they expressly limit city codes "to provid[ing] for only one administrative appeal of a threshold determination . . .; successive administrative appeals on these issues within the same agency are not allowed." WAC 197-11-680(3)(a)(iv); FWRC 14.25.040 (adopting WAC 197-11-680 by reference). The second appeal period would violate this limitation.

SWC's request for a remand seeks relief that is not authorized by the Code and is forbidden by SEPA regulations. As such, it constitutes a "request for modification or waiver of applicable requirements of [FWRC Title 19]" as well as those of "other law" and must be denied. FWRC 19.70.125. The Examiner properly denied this request.

5. The Examiner erred in imposing Condition 43

a. The Examiner exceeded his authority and failed to follow prescribed process

FWRC 19.70.125 provides that the "scope of agency decision appeals is limited to the errors of law raised or the specific factual findings and conclusions disputed in the notice of appeal." SWC's claim 3.7.5 in its appeal to the Examiner asserted that the City had improperly concluded that the Project is "consistent with the public health, safety, and welfare," pursuant to FWRC 19.65.100(2)(a)(iii), because the Project allegedly "did not consider or comply with executive basin plans for the Hylebos Watershed." AR 2510. However, SWC did not specifically identify the Hylebos Basin Plan in its appeal or submit a copy of the Plan to the record of the Examiner proceeding. Nevertheless, the Examiner determined that the Project had to demonstrate *prima facie* compliance with the Hylebos Basin Plan, which is adopted by FWRC 16.25.010(2)(a), and included this requirement in new Condition 43. AR 7882-84. In imposing

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Condition 43, the Examiner improperly reached beyond the specific allegations in SWC's notice of appeal.

b. The City demonstrated *prima facie* compliance

Under the Examiner's rules, in an appeal of a Process III decision, "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." In determining if this standard is met, the Examiner "shall give great deference to the agency's interpretation of its own properly promulgated regulations, matters within its expertise, and procedural determinations." FWRC 19.70.120.

The City and Applicant amply demonstrated prima facie compliance with FWRC 19.65.100(2)(a)(iii), the provision under which SWC asserted its claim and the only provision the Examiner had the authority to apply. FWRC 19.70.125. The Project's compliance was apparent from the voluminous evidence of comprehensive drainage review, all other aspects of which the Examiner found sufficient to meet applicable requirements. *See* AR 7859-60, 7880-82. In particular, the Examiner concluded that the Project will conform to or exceed KCSWDM drainage requirements in a number of ways, including downstream analysis, stormwater collection and treatment, and detention pond sizing. *Id.*

Appellant and City witnesses also testified regarding various plans for the Hylebos. Ms. Bartenhagen testified that King County had updated the hydraulic model it used in 2001, the year the Hylebos Basin Plan was published. Because of this change, many of the concerns in old plans are longer applicable. Transcript 476. The Examiner acknowledged this fact, stating that the Hylebos Basin Plan was finalized in 1991, making it "entirely possible that Basin Plan drainage requirements have been subsumed into more effective and protective modern-day stormwater standards." AR 7739. Ms. Bartenhagen testified that she reviewed a more current

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plan for the Hylebos, the 2016 Hylebos Watershed Plan prepared by EarthCorps, and that the plan provided "no specific concerns as to the area of the east Hylebos that we are connecting into." Transcript 477. Applicant witness Jennifer Marriott, who conducted the wetland and stream analysis, testified that she reviewed "eight different reports," including the "Hylebos watershed plans." Transcript 515, 523. She concluded that several of the reports were "outdated" and primarily contained guidance regarding "stormwater manuals that don't exist." Transcript 515. Ms. Marriott had "conversations and discussions" about the Hylebos watershed plans but did not include them in her report because "they were not relevant." Transcript 523. Mr. Elliott testified that the City had "looked to" the basin plans that the City had "adopted." Transcript 615.

The Decision inaccurately described some of the record evidence. In particular, the Decision does not mention Ms. Marriott's or Mr. Elliott's statements that they had reviewed the applicable basin plans. The Decision indicates that SWC witness Sarah Cooke had "cited" a particular provision of the Hylebos Basin Plan, but neither the transcript nor the page from Appellant's closing brief cited by the Examiner indicate that Dr. Cooke mentioned this provision (or called the Hylebos Basin Plan by its name). AR 7570, Transcript 278. The Decision states that the "Basin Plan was called to the attention of the City by the Puyallup and Muckleshoot Tribes in November 2018," AR 7884, but the cited exhibits do not mention the Basin Plan specifically. AR 7622-57.

The record demonstrates the City's and Applicant's *prima facie* compliance with the requirements of FWRC 19.65.100(2)(a)(iii) with respect to drainage. The Examiner's conclusion to the contrary was not supported by substantial evidence and a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(c), (d).

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c. In the alternative, the Examiner correctly determined the Plan must be read together with the Code

SWC claims that the Examiner "erred in determining that the requirements of the Basin Plan are subordinate to City Codes and he CZA." SWC Petition, p. 11 (Paragraph 7.6). The Examiner did no such thing. In the part of the Examiner decision SWC complains about (SWC Petition, p. 11 (Paragraph 7.6.6) the Examiner does nothing more than recognize that wetland and stream buffers proscribed in the code are not "rendered meaningless" by different buffers in the Plan. The Examiner did nothing more than apply well established principles of statutory interpretation providing that statutes on the same subject are to be harmonized if possible, the more specific statute controls over the general, and absurd results are to be avoided. AR 7740. This was not error. For the reasons discussed previously, the Court should eliminate Condition 43. In the alternative, if the Court retains this Condition, it should reject SWC's claim.

IV. CONCLUSION

For these reasons, 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.

DATED this 16th day of March, 2020.

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