Honorable Michael K. Ryan
Trial Date: April 24, 2020

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

FEDERAL WAY CAMPUS, LLC, a Delaware limited liability company registered in Washington, v. CITY OF FEDERAL WAY, a Washington municipal corporation, and SAVE WEYERHAEUSER CAMPUS, a Washington nonprofit corporation.	No. 19-2-30502-9 KNT Consolidated REPLY BRIEF OF PETITIONER SAVE WEYERHAEUSER CAMPUS
SAVE WEYERHAEUSER CAMPUS, a Washington non-profit corporation v. 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.

The briefs[1] of Cross Petitioner Federal Way Campus ("IRG") and the Respondent City of Federal Way ("City") unleash a veritable tsunami of words opposing SWC's petition; 71 pages for IRG and 58 for the City.[2] Most of this briefing eddies around a single issue: *Should IRG's "Development Plan" be the subject of cumulative review that takes account of its three projects, Warehouses A, B, and the Business Park?* Indeed IRG vigorously opposes the single, modest part of the Examiner's Decision on Reconsideration that addresses cumulative impacts, for fear that it will be a foot in the door to expand cumulative impacts review. That part, Condition 11, provides:

> 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 [Traffic Impact Analysis].

Tr. 7744. Condition 11 is more noteworthy for what it does *not* do: it does not vacate IRG's approvals and it does not, on its own, require payments or severe changes to IRG's three development projects.

Nevertheless, IRG opposes Condition 11 because it implodes its strategy to force the City to consider its three developments separately, and sequentially (Brief at 8/10-15), notwithstanding IRG's admission that they are all part of one Development Plan. See Development Plan at AR 3178.

The Examiner's decision to impose Condition 11 is appropriate for traffic, but the Examiner fails to apply cumulative impact review to other areas, including stormwater impacts on the Hylebos Basin, as will be described in this brief.

This brief also confirms that the Warehouse A proposal violates a long-standing and plain language provision of the comprehensive plan, incorporated into the land use code, that development on this property must "*create office and corporate park*

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[1] The briefs will be referenced by page and line number; e.g. page 32, line 18 is abbreviated as "Brief 32/18."

[2] The City's brief at pages 48-58 opposes IRG's petition.

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development that is known regionally, nationally and internationally for its design and function."[3] This brief will respond specifically to arguments of the City that the Court should ignore the obligation created, even though all admit the standard is not met.

In addition, SWC responds to *post hoc* rationalizations offered by the City that in fact cumulative impacts have been considered, when the written record indicates just the opposite.

In summary, SWC's briefing demonstrates that its LUPA petition should be granted and that the decisions of the City should be reversed or remanded.

II. STANDARD OF REVIEW.

As described here, the Examiner's decision contained several errors of fact and law, requiring reversal under LUPA. IRG and the City contend that the standards of review under RCW 36.70C.130(1) are not met.

RCW 36.70C.130(1)(b) provides that reversal is appropriate where:

> (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;

As described herein, the Examiner made multiple interpretations of the meaning of SEPA and the SEPA Rules (WAC Chap. 197-11). However, because SEPA is a state law:

> the hearing examiner's legal conclusions in this case are not entitled to any deference under RCW 36.70C.130(1)(b) because they involve interpretations of state law, rather than Tacoma city ordinances. Accordingly, we review the hearing examiner's legal conclusions de novo, without any special deference. *Quality Rock,* 139 Wash.App. at 133, 159 P.3d 1.

City of Federal Way v. Town & Country Real Estate, LLC, 161 Wn.App. 17, 38, 252 P.3d 382 (2011).

Next IRG and the City argue that the clearly erroneous standard of RCW 36.70C.130(1)(d) is not met here. However, in the *Town & Country case, supra,* the

[3] Indeed, George Weyerhaeuser, the President of the company when the iconic property was developed in the late 1960s, stated in a letter to the Examiner that: "In developing the property for Weyerhaeuser's world headquarters in the late 1960's, I never imagined it would be used for industrial development or large warehouses." AR 7352 (August 1, 2019).

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court reversed the Tacoma Hearing Examiner under the clearly erroneous standard where there were violations of transportation level-of-service standards in the neighboring City of Federal Way. Under WAC 197-11-330(3)(e)(iii), "*conflicts with local, state or federal laws or requirements for the protection of the environment*," here, traffic "level of service standards," are the basis for determining a proposal's significance in deciding whether an EIS is required.

In the present case, the Hearing Examiner interpreted provisions of the Federal Way codes, including FWRC 19.100.030(2), 19.90.120(2), and the provisions of the Federal Way Comprehensive Plan which are incorporated in the zoning code. Generally:

> The interpretation of a municipal ordinance is a question of law reviewed de novo. *Ellensburg Cement Prods., Inc., v. Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). We construe a municipal ordinance according to the rules of statutory interpretation. *Ellensburg Cement,* 179 Wn.2d at 743.

Dep't of Transportation v. City of Seattle, 192 Wn.App. 824, 837, 368 P.3d 251 (2016).

When the meaning of statutory code language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). A municipal ordinance is presumed to mean exactly what it says, and those words are given their plain and ordinary meaning. See *Ockerman v. King County Dept. of Development and Environmental Services*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2000).

Both IRG and the City claim substantial deference ought to be given to the Examiner's legal interpretations of the Federal Way codes. But deference is limited:

> ¶ 7 Under RCW 36.70C.130(1)(b), a court may overturn a land use decision that 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." This standard does not require a court to give complete deference, but rather, " 'such deference as is due.'" *Ellensburg Cement,* 179 Wn.2d at 753 (quoting RCW 36.70C.130(1)(b)). We do not defer to an interpretation that conflicts with the plain language of the grading code exemption. Waste Mgmt. of Seattle v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)).

Dep't of Transportation, 192 Wn.App. at 838-39.

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The record before the Court demonstrates that the Hearing Examiner committed errors of law as described herein, requiring remand or reversal under RCW 36.70C.140.

III. THE CUMULATIVE REVIEW OF IRG'S THREE DEVELOPMENT PROJECTS IS FULLY CONSISTENT WITH LOCAL REGULATIONS AND GUIDANCE, AS WELL AS STATE LAW.

3.1. IRG'S DEVELOPMENT PLAN.

In response to the Examiner's requirement for evaluation of cumulative traffic impacts, IRG claims it is exempt from such requirements because it chose to make separate applications for its three projects. Brief at pages 6-9. IRG claims the City must review "these three independent projects separately and will sequentially review each project's Code compliance (under Process III standards) and environmental impacts (under SEPA)." Brief at 8/12-15.

IRG readily admits that complete applications for all three projects were submitted between June 2016 and November 2017; the chronology of the applications is set forth in SWC's opening brief at pages 4–8. As noted, these projects have been lying fallow over the last two years, due to IRG's unwillingness to move them forward. In the meantime, IRG contends that each project must essentially be quarantined, with the City (and Hearing Examiner) prohibited from looking at all three cumulatively.

Significantly, IRG insists that the regulatory bodies abide by its project Balkenization, except when it wants City concessions based on the claimed merits of its Development Plan, as described in IRG Executive Vice President Dana Ostenson's March 21, 2019, letter to Federal Way's Mayor seeking that the City approve all three of its projects together, at once. AR 3458.

IRG's "separate application" ploy attempts to apply a regulatory protection never intended for a "Development Plan" on a single-ownership, uniquely zoned property. As discussed below, the limitation sought on cumulative review is intended to insure property owners are not responsible for other private owner's regulatory obligations, akin to the proposition that one is not his brother's keeper.

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3.2. CITY OF FEDERAL WAY REGULATIONS REQUIRING CUMULATIVE REVIEW.

IRG contends that the Hearing Examiner's decision to require cumulative traffic evaluation of IRG's three projects 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." Brief at 46/16-17. SEPA does indeed impose this "basic obligation," as discussed in section 2.6 below. But the fundamental obligation to consider cumulative impacts of IRG's three projects arises from Federal Way regulations, not SEPA alone.

In his Final Decision at page 18, lines 19-22 (AR 7862), the Examiner stated:

> It is concluded that consideration of cumulative impacts is required for the three projects for both Process III and SEPA review. The legal basis for cumulative impact review in Process III decisions is outlined in the Examiner's May 26, 2019 partial dismissal ruling referenced in Finding of Fact No.2.

In his Partial Dismissal Ruling at page 9 (AR 7796), the Examiner explained, after citing to SEPA and the Shoreline Management Act:

> [I]t is reasonable to conclude that regulating cumulative impacts is within the police powers of a City and that, therefore, a regulation requiring consistency with the full expanse of a City's police powers to regulate impacts of development includes the mitigation of cumulative impacts.

On the following page of his ruling, the Examiner stated:

> FWRC 19.100.030(2) requires consideration of cumulative impacts is assessing whether mitigation is necessary for direct impacts.

Partial Dismissal Ruling at 10/21-23 (AR 7797).

Indeed, as described in SWC's opening brief at pages 42-45, the Federal Way code has multiple provisions requiring review of cumulative impacts of traffic and other environmental impacts. These include the following:

a) **FWRC 19.100.030(2)**, which requires that the consequences of development be considered "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."

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b) **FWRC 19.90.120(2)** in the transportation concurrency ordinance requires that:

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

c) The City's "Guidelines for Preparation of Traffic Impact Analysis" at Section IV(B) (AR 7920) require that the number of trips generated by a proposal include:

> Development proposals with multiple phases of construction shall include all phases of the development for calculating trip generation. If only a portion of the subject land parcel is proposed for development, trip generation shall include the build out of the remainder of the land parcel under current zoning. . .

d) The same Guidelines also require that any traffic impact analysis: *"Add impact of Adjacent Major Development Pending and Approved." Id.*

The Federal Way Code thus obligates the Hearing Examiner to consider cumulative impacts of all phases of pending development. As of November 2017, IRG had complete applications, together with traffic and stormwater reports, for its three proposals. Cumulative impact review under the authorities cited above is mandatory under Federal Way codes.

3.3. CITY REGULATIONS REQUIRED THRESHOLD DETERMINATIONS ON IRG'S PROJECTS MORE THAN TWO YEARS AGO.

One of the continuing themes in IRG's brief is that analysis of its several projects will be coming along soon. Thus at page 8/11-12, IRG says, "Applicant submitted separate applications for each project." And on lines 13-14, "the City is reviewing these independent projects separately and will sequentially review each project's Code compliance. . . ." Later, IRG urges patience, because "the pending review processes for Building B and the Business Park will provide opportunities for the City to impose any necessary traffic mitigation." Brief at 41/6-8. As to the Business Park, IRG says the important traffic congestion impacts in the afternoon peak hour "will be determined by the City during its concurrency review[; t]hat review is ongoing, as is the rest of the

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Business Park application process." (Brief at 45/22-23.) The attitude is decisively *mañana*, we'll get to it later, once Warehouse A is permitted.

While a certain amount of delay in project review by the City might be expected, IRG concedes it submitted complete applications for Warehouse B and Greenline Business Park years ago, respectively in September 2017 (Brief at 6/21) and in November 2017 (Brief at 7/1-2). While IRG's brief is careful to defend "separate and sequential" review, IRG's letter to the City in March 2019 insisted that it would not support community-sponsored mitigation measures"until our development approvals are issued by the City and all appeals withdrawn in a timely manner." AR 3458.

The holding off of "separate and sequential" analysis is in fact not allowed under SEPA, which sets mandatory deadlines for threshold SEPA decisions. The statute itself requires that a threshold determination be completed within 90 days, unless the applicant requests an additional 30 days. RCW 43.21C.033. The Federal Way SEPA ordinance imposes the same mandatory deadline under FWRC 14.10.020(a):

> *A final determination shall be made within 90 days from the receipt of the applicant's response for additional information, unless the applicant requests an additional 30 days as provided in this section.*

(Emphasis supplied.) Under the statute and Federal Way implementing regulations, appealable threshold determinations for all three of the IRG proposals were due years ago. The Code's mandatory deadlines assure that the public will be able to exercise its appeal rights in a timely manner.[4]

Through delay, IRG's "separate and sequential" strategy keeps the decisions on its companion proposals outside the Federal Way appeal processes until it concludes the Warehouse A proceedings, the subject of this review. In that manner, it can continue the fiction that the projects are separate and immune from the cumulative impacts review mandated by the Federal Way codes and SEPA.

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[4] Of course, the Warehouse A threshold determination under appeal here was due 120 days from its June 2016 application date, but was made only in the fall of 2018, more than two years late.

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3.4 ACTUAL EVALUATION OF CUMULATIVE IMPACTS OF IRG'S THREE PROJECTS REQUIRED BY CITY CODES HAS NOT OCCURRED.

The underlying legal issue is whether IRG's "separate and sequential" strategy should be accepted or whether "cumulative impact analysis" is required per Federal Way codes.

The debate is clear in the IRG brief at 22/12-22, where IRG argues that it is "standard industry practice" that the City not change its analysis of a permit's impacts based on proposals that come after the initial application date. While that may be a reasonable position for the City to take when handling scattered proposals from different developers, in the present case it cannot be accepted because it is contrary to the plain language of the City code.

As noted above, FWRC 19.100.030(2) requires review of any "impact of future development in the immediate vicinity";[5] FWRC 19.90.120(2) requires "consideration of the cumulative impacts of all development applications for contiguous properties that are owned or under the control of the same owner"; and City Guidelines for preparation of Traffic Impact Analysis require that trip generation for one portion of a land parcel "shall include the build out of the remainder of the land parcel under current zoning." See AR 7911.

The mandate of the Federal Way code is clear: "No official or body shall approve a development unless provisions are made to mitigate identified direct impacts that are a consequence of such development." FWRC 19.100.050. The Hearing Examiner has followed the mandate of the code in imposing Condition 11, requiring evaluation of the cumulative *traffic* impacts of the three IRG projects and resulting mitigation. However, as discussed below, he erred in not requiring cumulative impact analysis for stormwater and historic impacts and not remanding for continuing review in a public process.

[5] FWRC 19.100.030, adopted in 1990, before the Weyerhaeuser property was annexed into the City.

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The City transportation manager (Mr. Perez) freely admitted that he made a "distinction" between the traffic analysis he performed and the cumulative impacts requirements of the various sections of the code. Tr. 907/19-22. His analysis considered only traffic impacts of projects that have "been applied for up to that point in time that a given application is deemed complete." Tr. 908/8-9. Essentially his analysis was retroactive only, and did not consider projects with pending applications if they were applied for even a day after the Warehouse A application, or future projects. Since the Warehouse A application dates back to June 2016, the City blanked out all projects from then until it made the project decision in February 4, 2019, neatly excluding the cumulative impacts from Warehouse B and Greenline Business Park.[6]

This analysis was not consistent with the plain language of Federal Way code requirements set forth in detail at pages 42 to 45 of SWC's opening brief, *"cumulative effect of impacts when aggregated with similar impacts of future development in the immediate vicinity*" (FWRC 19.200.030(2)); "*consideration of cumulative impacts of all development applications for contiguous properties that are owned or under control of the same owner"* (FWRC 19.90.120(2)); trip calculation based on "*all phases of the development*" (TIA standards, Subsection IV(B)), and *"add impact of adjacent major development pending and approved*."

There is no question but that the required cumulative impact analysis may be difficult, as the City's witness states, but his interpretation cannot override the plain and mandatory code provisions. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Moreover, the Federal Way code resolves concerns about addressing conflicts in the code in FWRC 19.05.310, which makes clear "*the most restrictive provision or the provision imposing the highest standard prevails*."

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[6] The severity of the traffic impacts in the area is indicated by data complied by the American Transportation Research Institute that makes the nearby intersection of SR 18 and I-5 the 46th most congested truck bottleneck in the country in 2019, up from 72nd in 2018. AR 7355-56.

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Even without the application of SEPA, Federal Way codes mandate consideration of the cumulative impacts of contemporaneous and adjacent projects.

3.5 SEPA ANALYSIS MUST FOLLOW LOCAL FEDERAL WAY CODES AND PROCEDURES.

Much of the argument by both the City (pages 16-38) and IRG (pages 35-56) relates to their contention that the cumulative impacts of the five buildings (the 1.5 million square feet described in the Development Plan) cannot legally be reviewed under SEPA. That issue was addressed generally in SWC's opening brief at pages 18-34 and, as related specifically to traffic, at pages 41-48; it will be discussed in the next section of this brief as well. However, it is worthwhile to note that SEPA has been described by Professor Settle[7] as "parasitic," that is, SEPA requirements "exist only in relation to a "host regulatory action or other governmental action." Settle, §13.01[4][a].

Accordingly, SEPA processes *"shall be integrated with agency activities at the earliest possible time"* (WAC 197-11-055(1)) and the *"content"* of environmental review *"depends on an agency's existing planning and decision-making processes"* (WAC 197-11-060(2)(a)); implementation requires that SEPA analysis *"shall accompany proposals through existing agency review processes, as determined by agency practice and procedure"* (WAC 197-11-655(2)). As the statute says, SEPA is *"supplementary"* to local regulations. RCW 43.21C.060.

This is important because SEPA cannot be read to negate or overrule local policies. Federal Way regulations described above mandate review of cumulative impacts of proposals. Thus SEPA review takes the Federal Way code and its requirements as it finds them. SEPA analysis must accept the obligations for review of direct impacts and cumulative analysis set forth in FWRC 19.100.030(2) and 19.90.120(2). In addition, as noted in the next section of this brief, the SEPA rules are complimentary to those of Federal Way in requiring cumulative impact analysis.

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[7] See SWC's opening brief at page 19, footnote 12.

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3.6. SEPA REQUIRES CUMULATIVE IMPACT ANALYSIS.

IRG claims that cumulative impact analysis for its Development Plan is not required because it has applied for its three projects separately and has asked that they be considered sequentially. Brief, 8/12-15. The City however, is ambivalent. On one hand, it says that the cumulative impact analysis "was properly conducted with respect to all relevant aspects of the Warehouse A proposal" (Brief 35/10-12), but then says that in the imposition of Condition 11 the Examiner "recognized that environmental review under SEPA involves consideration of cumulative harm that would result from the underlying proposal."[8] Brief at 54/1-2.

This disparity is resolved by the City's later proposition. Cumulative impacts are required whenever multiple proposals are proposed by the same developer on a common site. WAC 197-11-060(4)(a) states:

> (4) Impacts.
>
> (a) SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC 197-11-740 and of "impacts" in WAC 197-11-752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-080 on incomplete or unavailable information.)

(Emphasis supplied.) There is nothing speculative here: IRG has applied for three projects and has detailed information and plans for each. WAC 197-11-060(4)(c) provides:

> (c) Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.

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[8] Cumulative analysis was also requested by King County Traffic Engineer in a November 9, 2018 letter to the city (AR 7616):

> King County also requests that the five warehouses proposed to be built on the former Weyerhaeuser property, be reviewed together under SEPA, to ensure that cumulative traffic volume and congestion impacts to the regional road network are understood and appropriately mitigated.

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(Emphasis supplied.) Here the "lifetime of the proposal" includes the construction of the three IRG projects applied for but waiting on the back burner at the City.

Indeed, on several occasions, and in several documents, IRG has made clear that its "Development Plan" is a "single course of action" under WAC 197-11-060(3)(b), which requires "evaluation in the same environmental document." The letter from IRG's Executive Vice President to the Federal Way Mayor explains that approval of the whole Development Plan is required before important elements of the proposal can move forward:

> *Preservation of the lakefront is only made possible by the subsidy created by the timely execution of our innovative development plan which creates thousands of jobs for the entire region by attracting companies to Federal Way. Development and preservation can only move forward together so we can restore living wage jobs, create revenue for essential public services and protect the lakefront. When the approval process is held up, everyone loses.*

(Emphasis supplied.) AR 3458. The "lakefront" discussed is a waterfront parcel on North Lake and was acquired by IRG as part of the Weyerhaeuser transaction in 2015. North Lake is the large body of water east of Weyerhaeuser Way shown on the IRG Development Plan. The relationship between the approval of the three IRG proposal is made clear further in the letter:

> This letter will notify you that we are not now and will not be a seller of the lakefront property until our development approvals are issued by the City and all appeals withdrawn in a timely manner. There is no point to seek or obtain funding in pursuit of lakefront property acquisition until we achieve this threshold.

(Emphasis supplied.) See AR 1328.

The Ostenson letter followed public statements and pronouncements concerning development of the "Woodbridge Corporate Park" provided by IRG on February 13, 2019 (AR 3485), again showing the development plans for five buildings on the property. AR 3495. This presentation describes how full approval of the entire property plan is IRG's necessary element for fulfillment of its overall plan:

> The successful entitlement of new structures on the property provides the

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> funding for preservation, including the adaptive reuse of the headquarters building, large buffers and green space, open access to the trails and wooded areas for bikes and pedestrians, an undeveloped waterfront on North Lake, and maintaining the Rhododendron Species Botanical Garden and Bonsai Museum.

AR 3498. Indeed, one of the conclusions of Ordinance 94-219 (AR 1867), adopting the zoning for the Weyerhaeuser property, stated:

> B) Unusual environmental features of the site will be preserved, maintained and incorporated into the design to benefit the development in the community because the Subject Property has widely recognized natural features ranging from North Lake and Lake Killarney to the Weyerhaeuser Bonsai Collection and Rhododendron Garden which attracts visitors on an international scale. The Concomitant Agreements will provide property owners the means to preserve and protect these natural features as well as providing the City with the ability to ensure that all natural features are adequately protected.

AR 1871. Thus IRG's intentions for the Development Plan are consistent with the purpose of the zoning some 25 years ago.

Thus IRG's own representations show that the pursuit of the development plan is in reality a "single course" of action requiring discussion in the same environmental document:

> *(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. (Phased review is allowed under subsection (5).) 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*

As IRG admits, "the successful entitlement (permitting) of new structures on the property provides the funding for preservation "of multiple important features of the project." AR 3498. Further, IRG makes clear that "part of the proposal" to set aside important mitigation "will not proceed" unless the Development Plan for all three projects is approved.[9]

Based on the foregoing, it is clear that cumulative review of the several IRG

[9] Further, WAC 197-11-330(3)(e)(iv), describing the threshold determination process, requires that, "in determining an impacts' significance, the responsible official shall take into account" that a proposal "establish a precedent for future actions with significant effects, . . ." The IRG Development Plan goes beyond "precedent" to action.

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proposals is not only required by the plain language of the Federal Way zoning code, but also by SEPA, because the proposals are "closely related" under WAC 197-11-060(3)(b).

IV. VIOLATION OF THE FEDERAL WAY COMPREHENSIVE PLAN.

As described in SWC's opening brief pages 35 to 41, the Warehouse A proposal fails to meet the Process III requirement that it be "consistent with the comprehensive plan." At issue here is the "Corporate Park" section of the plan, which only "applies to the Weyerhaeuser Corporate Campus generally located east of Interstate Highway 5." AR 1328. As the comprehensive plan says: "Development standards and conditions for the Corporate Park designation are unique to the Weyerhaeuser's property. . .." *Id.* Land Use Goal 8 for the Corporate Park Designation states: "*Create office and corporate park development that is known regionally, nationally and internationally for its design and function*." *Id.* Both IRG (brief at 62-64) and the City (at 41-47) content that this provision is not enforceable by its terms.

The one point on which there is no disagreement is that Warehouse A fails to meet the standard, as the Examiner found at page 34, lines 7-9 of his decision (AR 7878).[10] The issue is the consequence of that failure.

Both IRG and the City claim their reading of the plan provision yields "absurd results" (IRG at 64/11, the City at 46/11), apparently based on the assumption that a tilt-up concrete warehouse cannot meet the standard, but without any support in the record or indication that there was any effort to meet the standard. But it was the City that included the contested language in its Comprehensive Plan in 2015 (AR 1328) and IRG never objected in the proper forum, the Growth Management Hearings Board. See SWC opening brief at 37-38.

[10] The Examiner said:

> Although Warehouse A appears to be of high-quality development (see discussion below), it is unlikely that by itself it will be know regionally, let alone nationally or internationally.

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The City cites *Lakeside Industries v. Thurston County,* 119 Wn.App. 886, 83 P.3d 433 (2004) for the proposition that a comprehensive plan's "general purpose statements overrule the specific authority granted by the zoning." Brief at 63/4-7. The argument fails, first because LUG 8 is not a "general purpose statement," it specifically and only applies to the former Weyerhaeuser property, not elsewhere in the city. Second, the requirement to*"Create office and corporate park development that is known regionally, nationally and internationally for its design and function"* doesn't overrule anything in the zoning code; it only requires that construction of Warehouse A meet a specific design standard consistent with the award winning development of the property by Weyerhaeuser.

Finally, both IRG and the City take special pains to avoid the verb in LUG 8: "*create."* Thus IRG urges that the court overlook the warehouse it wants to build and gaze upon the Weyerhaeuser Headquarters Building (and other site features) to meet the standard, claiming LUG 8 "is already satisfied in this area." The City goes so far as to substitute the word "encourage" for "create" in the text of the condition. Brief at 41/23. But one does not "create" an existing building, one "preserves" it; "create" regulates what will be built in the future, not what is already there.

The Hearing Examiner is not entitled to deference when he fails to apply the code as written. The proposal is inconsistent with Process III standards, requiring reversal of the Examiner's decision to the contrary.

V. POST HOC RATIONALIZATION.

In its opening brief at pages 48-51, SWC described the attempt of the City to protect itself from its failure to consider cumulative impacts by testimony from City witnesses during the hearing. The City claims that the doctrine does not apply. Brief at 18-21.

The issue has its origins in the original land use and SEPA decisions issued by the City. Despite comments from local citizens, state agencies (Washington State Departments of Transportation and Archeology and Historic Preservation) and King

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County (Departments of Transportation and Natural Resources) that the cumulative impacts of the three IRG projects must be reviewed, the City claimed it was legally prohibited from conducting this analysis. See discussion in SWC brief at 9.

When SWC's appeals challenged the city decisions because there was a lack of cumulative review, the City and IRG confidently filed a motion with the Examiner to dismiss SWC's claims. However, the Examiner ruled that cumulative impacts were relevant, relying in part on FWRC 19.100.030(2) (requiring consideration of "the cumulative effect of such impact when aggregated with similar impacts of future development in the immediate vicinity of the proposed development"). The City was now in a spot: it had not performed that cumulative impact analysis the Examiner said was necessary, and had not even mentioned FWRC 19.100.030(2) in either the SEPA or Land Use decisions. Plainly time for catch up.

Thus at hearing, the City's counsel claimed that the city had produced "overwhelming evidence" that "the substance of the FWRC 19.100.030(2) analysis had in fact been performed during the regulatory reviews process for Warehouse A." Brief at 18/10-13. In support of its claims, the City provides transcript references, including the following for Planning Director Davis at TR. 732:

> 9· · · · · ·Mr. Davis, looking at the analysis that that is
> 10· · · · contemplated by 19.100.030(2) in the preface statement,
> 11· · · · was the substance of this analysis performed in
> 12· · · · relation to the Warehouse A project?
> 13· ·A· · Yes.
> 14· ·Q· · Thank you.

Evidence? Yes. Overwhelming? No. Caselaw establishes that before a DNS can be approved, a court:

> must be presented with a record sufficient to demonstrate that actual consideration was given to the environmental impact of the proposed action . . . .

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Lassila v. City of Wenatchee, 89 Wn.2d 804, 814, 576 P.2d 54 (1974), as well as other cases set forth at pages 50-51 of SWC's opening brief. See also *Ellensburg Cement Products, Inc v. Kittitas County*, 171 Wn.App. 691, 712, 287 P.3d 718 (2012) ("[T]he record of a negative threshold determination by a governmental agency must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA", citing *Pease Hill Cmty. Grp. v. County of Spokane*, 62 Wn.App. 800, 810, 816 P.2d 37 (1991)). A single word ("Yes") without elaboration of any kind, or support in the documentary record, simply does not meet the standard.

The City's eleventh hour attempt to demonstrate cumulative impact review fails and the Examiner's decision accepting it was not supported by substantial evidence under RCW 36.70C.130(1)(c).

VI. THE IRG/FWC CROSS PETITION SHOULD BE DENIED.

IRG has filed a LUPA action which seeks to void two conditions that the Examiner placed on the approval of the project. The City brief defends and supports the Hearing Examiner's decision regarding those Conditions, 11 and 43, at pages 47-57. Because of limited space, SWC will rely on and incorporate this portion of the City's brief, subject to the additional analysis below.

Much of the content of this brief above supports Conditions 11 and 43. The Examiner's decision, based on both Federal Way codes and SEPA, recognizes that he has authority to require consideration of cumulative impacts from IRG's Development Plan. The Examiner, and the City, recognize that the blinders put on by the City's transportation witness Perez, limiting review to only projects pending when an application is filed, is a crabbed and inappropriate interpretation of City codes.

As indicated in its opening brief, however, SWC parts company with the City as to the consequences that follow from the City's errors, manifested in Conditions 11 and 43. First, as set forth at pages 16-18 of its opening brief, the violations of traffic congestion standards support requiring the preparation of an environmental impact

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statement. Second, even if an EIS is not mandated, keeping the traffic and basin plan issues caged up at the City with no opportunity for public comment, input or appeal is not appropriate. See SWC Opening Brief at pages 30-35.

The Examiner's invitation to this court to order "the favored limited scope remand" (AR7738) is the appropriate relief under RCW 36.70C.140. See SWC's opening brief at 32.

6.1. CONDITION 43 IS SUPPORTED BY THE EVIDENCE, BUT THE EXAMINER ERRED IN NOT INCLUDING THE CUMULATIVE IMPACT OF STORMWATER FROM IRG'S THREE PROJECTS.

In its brief at pages 67-70, IRG claims that the Examiner erred in imposing Condition 43, requiring compliance with the Hylebos Basin Plan. This issue was discussed at pages 27-34 of SWC's opening brief.

The City defends the Examiner's Condition 43 at pages 47-49 of its brief. However the City and IRG both err in the supposition that the rules and regulations of the Hylebos Plan may be superceded (City brief at 49/4-11; IRG at 69/24-27), as even a facial examination of the City's codes reveals.

In fact, as indicated in FWRC 16.25.010(2)(a), it is the Hylebos Basin Plan that supercedes the drainage requirements of the King County Surface Water Design Manual (KCSWDM), not vice-versa. As set forth in SWC's opening brief at 29/24-27: "where conflicts occur between the two, the requirements of the adopted area-specific regulation shall supercede those in the KCSWDM and the Federal Way Addendum." It may be that new, improved drainage provisions have been adopted in the KCSWDM, but the Hylebos Basin Plan supercedes them. As a "belt and suspenders" measure, FWRC 19.05.310 sets the hierarchy of regulations in the City:

> *If the provisions of this title conflict or overlap one with another, or if a provision of this title conflicts or overlaps with the provision of another ordinance of the city, the most restrictive provision or the provision imposing the highest standard prevails*.

While Condition 43 is appropriate as far it goes, it curiously leaves compliance with the condition to IRG ("The applicant shall supplement its stormwater plan . . .") without City

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supervision or opportunity for the public (or tribes or agencies) to comment on the supplementation. The condition creates an inherent conflict of interest if "compliance and consistency" with the Hylebos Plan creates financial consequences or other land use limitations for IRG. Given the Hylebos Plan supercedes the existing stormwater regulation, responsibility for compliance with the Plan is a public, not private matter, and local government should be in charge. The "Potential Error in Delegation of Decision Making" the Examiner correctly identified at AR 7738 is a real error that requires remand by this court.

The same is true of the obligation to consider cumulative impacts on drainage and stormwater runoff. Though much of the review and briefing has centered on traffic, "drainage and stormwater detention facilities" are equally a part of the "determination of direct impact" in FWRC 19.100.030(1), as are "city streets." Here, Greenline Business Park stands out; the building itself is 1,067,000 square feet (24.5 acres) and will have 2,947,175 square feet (67.6 acres) of impervious surface contributing to drainage and stormwater impacts.[11]

Both IRG and the City claim SWC did not present evidence that cumulative impacts of stormwater are significant. However, under FWRC 19.100.030 the responsibility here is on Federal Way officials:

> *Before any development is given the required approval or is permitted to proceed, the official or body charged with deciding whether such approval should be given shall determine direct impacts, if any, that are a consequence of the proposed development* . . . .

(Emphasis supplied.) One of the factors to be considered is the "cumulative impact" of the development. As we have noted above, the City in its decision expressly stated it could not consider cumulative impacts.

As with traffic, the City contends that it "in fact evaluated the cumulative drainage impacts" (Brief at 31/14), citing transcript at Tr. 644-45, but again this is

[11] These figures are taken directly from the Environmental Checklist for the Greenline Business Park prepared by IRG. See AR 3228-29. The checklist was dated October 13, 2016.

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simple affirmative response. And again, there is no documentation that indicates the substance of such analysis. The City defends the lack of cumulative analysis because 1) the discharge from the Business Park will be from a separate parcel (Brief at 31/17), and 2) the Examiner applied criteria from the KCSWDM in his Final Decision (AR 7882, lines 1-8). Both arguments miss the point. First, all the stormwater from Warehouse A, Warehouse B and the Business Park will all end up in Hylebos Creek, which is in King County. See letter from King County Department of Natural Resources at AR 2046. Second, cumulative impact review required by FWRC 19.100.030(2) prevails because it is "the most restrictive provision or the provision imposing the highest standard" under 19.05.310.

The failure to require evaluation of the Hylebos Plan in a public process and the continuing lack of cumulative impact review of drainage impacts required remand or reversal.

VII. CONCLUSION.

SWC has set forth the relief that the Court is requested to grant in its opening brief at pages 51-52 and that request is reaffirmed here. In addition, the IRG/FWC petition for review should be denied.

Respectfully submitted this 16th day of April, 2020.

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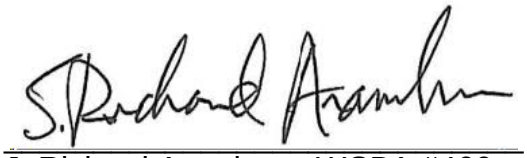

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DECLARATION OF SERVICE

I am an employee in the Law Offices of J. Richard Aramburu, PLLC, over eighteen years of age and competent to be a witness herein. On the date below, I emailed copies of the foregoing document to parties of record, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: This 16th day of April, 2020.

/s/_____
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