Honorable Michael K. Ryan
Trial Date: April 20, 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 OPENING 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.

In 2016 Los Angeles-based Industrial Realty Group (IRG) purchased the former Weyerhaeuser headquarters property in Federal Way.[1] Lying just east of Interstate 5, the Weyerhaeuser campus is an iconic and ground breaking property, known internationally for its innovative design and recognized for its valuable architectural and historic resources. The headquarters building, constructed in 1969, was free of interior partitions and deeply integrated with the surrounding landscape. AR 3139.[2]

By the end of 2017, IRG had filed applications to build five new industrial-scale buildings on the property, divided into three projects, known as Warehouse "A" (about 225,000 square feet), Warehouse "B" (215,000 square feet) and the "Greenline Business Park" (1,068,000 square feet). The proposals constituted IRG's Development Plan, described above, which is attached as **Appendix A**.

This case deals with just Warehouse A, the first project granted approval. Notwithstanding three pending permit applications, IRG has insisted, and the City of Federal Way (City) has accepted, that in reviewing Warehouse A, City officials put on blinders and pretend that the other two projects, which together with Warehouse A will create over <u>two million square feet</u> of impervious surface, do not exist.

Their strategy is apparent: IRG is cutting up its "Development Plan" (AR 3178, Appendix A hereto) into smaller, bite-sized pieces to avoid review of the overall impacts of its large plan, all the while arranging for the initial projects to become background conditions, easing the review of the bigger projects to come.

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[1] IRG has created the Federal Way Campus LLC as owner of the overall former Weyerhaeuser property. The applicant has also recently re-branded the proposal to replace "Greenline" with "Woodbridge". Because Greenline was used throughout the permit review process and in these proceedings, Save Weyerhaeuser Campus ("SWC") retains the Greenline name throughout this brief and uses the name of the parent company when referring to the applicant.

[2] The Administrative Record contains all pertinent documents related to Federal Way's review of the IRG applications and the appeals heard by the Federal Way Hearing Examiner on the matter.

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The decisions made by the City seek to bury the cumulative impact of the IRG Development Plan by attempting to focus review almost entirely on Warehouse A. As will be demonstrated in this brief, applicable law requires that the City review all three pending IRG proposals to ascertain their cumulative environmental impacts and meet its burden of proving consistency with the State Environmental Policy Act ("SEPA") and Process III land use standards. In addition, Process III requires conformance with the City's comprehensive plan, which imposes substantive zoning requirements, unique to the former Weyerhaeuser property, to "create office and corporate park development that is known regionally, nationally, and internationally for its design and function."

Accordingly, appellant Save Weyerhaeuser Campus's ("SWC") petition under the Land Use Protection Act ("LUPA") should be granted. The City's mitigated determination of nonsignificance ("MDNS") for Warehouse A under SEPA should be reversed and the City directed to prepare a complete review pf cumulative impacts in an environmental impact statement. The Process III Land Use decision entered by the City should be similarly reversed as made without adequate SEPA review and as inconsistent with code criteria.

II. STATEMENT OF FACTS.

When Weyerhaeuser sold its former corporate headquarters property to IRG In 2016, the property included Weyerhaeuser's former Headquarters building and a research facility, known as the Technology Center, with the balance of the 400-acre campus largely in open space.[3] The "design of the Weyerhaeuser Campus was groundbreaking in the way it "seamlessly blended the elements or architecture and landscape" as stated by the Washington Trust for Historic Preservation ("Washington Trust"). AR 3139. Qualified experts have written that the Weyerhaeuser Campus is "one of the finest examples of corporate architecture integrated into the landscape from the second half of the twentieth century." *Id.* The Development Plan includes two

[3] Open space included the Rhododendron Species Botanical Garden and Pacific Bonsai Museum. The property also included a few smaller buildings, one of which IRG has sold.

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industrial warehouses, Warehouses "A" and "B," to the southeast of the former Weyerhaeuser Headquarters, and the much larger "Greenline Business Park" to the north, consisting of three buildings generally surrounding the former Weyerhaeuser Technology Center.

After acquiring the property, IRG moved forward quickly with its Development Plan.

In June 2016, it filed an application for the "Preferred Freezer" proposal, a 68-foot tall, 314,000 square foot building, including 239,000 square feet of freezer warehouse, 75,000 square feet of seafood processing, and offices and loading docks. See, Preferred Freezer/Orca Bay Seafood Process III Submittal Letter (AR 3637). Local Citizens, acting individually and through the North Lake Improvement Club, filed extensive comments on the proposal on August 21, 2016. AR 3241. Overall, there were about three hundred comments on the proposal. See the February 4, 2019 Land Use Decision (AR 2417) at Exhibit A Findings, Paragraph 5, page 2 (AR 2421).

Shortly thereafter, on October 13, 2016, IRG's consultant, ESM, submitted a SEPA Environmental Checklist for a binding site plan for the "Federal Way Campus Business Park" near the Technology Center (the "Business Park" or "Greenline Business Park").[4] AR 3226. It describes the proposal as follows:

> Binding site plan encompassing 4 adjoining parcels, totaling +-120 acres, to create 5 lots and 1 tract to accommodate a total of 1,067,000 square feet of new warehouse (with ancillary office space), reconfiguration of the parking that serves the existing Technology Center, and the necessary infrastructure, including stormwater management facilities to accommodate runoff from new or replacement impervious surfaces.

Exhibit S-19, page 3 (AR 3228). The Greenline Business Park would cover 57 percent of the site, or 2,947,175 square feet (67.6 acres), with impervious surfaces. *Id.* at page 4 (AR 3229).

[4] ESM and Mr. LaBrie were the engineers and planners for all three of the Development Plan projects (five buildings). Mr. LaBrie also signed the Environmental Checklist for the Warehouse B project. See page 13 of Exhibit S-16 (AR 3218).

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Addressing two of the major issues with IRG's overall Development Plan, the Business Park SEPA checklist said the following with regard to historic preservation (Question 13):

> The Weyerhaeuser Headquarters building located near the site was constructed in 1969, which makes it 47 years old. Pursuant to CFR 36, Chapter I, subsection 60.04 criteria for evaluation, the Weyerhaeuser Headquarters Building may be eligible for listing in national state or local preservation registers.

Id. at page 11 (AR 3236). Concerning traffic, the checklist stated, at page 12 (AR 3237):

> For new warehousing area of 1,067,000 the site will generate 756 total truck trips. It is estimated that the proposed development will create 271 new P.M. peak hour trips.

By December, 2016, IRG lost its potential lessee for the "Preferred Freezer" project and decided to delete the seafood processing and freezer components of the proposal and revise its application to "Warehouse A" (sometimes called "Greenline Building A"). AR 5072.

In January, 2017, IRG filed a Joint State Aquatic Resources Permit Application ("JARPA"), seeking approval from state and federal agencies to fill wetlands on the development site. The JARPA application covered not just the Warehouse A site but extended to cover "Greenline Buildings A & B." Exhibit F-1(p), page 1 (AR 541). The joint project description was as follows:

> The Applicant proposes to construct approximately 439,050 square feet of new building space with associated infrastructure, parking and stormwater facility.
>
> . . .
>
> The purpose of the project is to provide large commercial facilities that could serve as warehouse storage and distribution centers in response to market demands in the region within an area zoned Commercial.

Id. at page 5 (AR 545).

IRG filed its revised application for Warehouse A with the City April 3, 2017, for a garden variety commercial warehouse. See Exhibit F-1(hh) (AR 909). On September 1, 2017, IRG applied for a Master Land Use Application for its Warehouse B (immediately south of Warehouse A), which was noticed on October 13, 2017. AR

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3205. The Warehouse B application was for a 217,300 square foot "Warehouse/Distribution center." AR 3206. SWC filed comments on the Warehouse B project on October 30, 2017, addressing multiple issues. See AR 3281-3299. One of SWC's comments addressed cumulative impacts of the pending IRG projects:

> The cumulative impacts of traffic should be addressed, not just from Warehouses A and B, but also from the Davita project, the proposed 1.1 million square feet of warehouses near the Tech Center and the headquarters building when it is fully leased.

Id. at page 13 (AR 3293). All projects are shown on IRG's"Development Plan" at AR 3178 (Appendix A).

On October 19, 2017, just six days after the start of the comment period for Warehouse B (AR 3205), IRG's contractor, ESM Consulting Engineers, and the City held a pre-application conference for the Greenline Business Park. The City's November 3, 2017, letter to ESM summarized the conference and the City's comments. Exhibit S-25, page 1 (AR 3460). Among other things the letter identified "Major Issues," termed by the City as those "most significant to your project" and "to highlight critical requirements or issues." *Id.* The first subject listed was SEPA, stated as follows:

> [R]eview under the *State Environmental Policy Act* (SEPA) is required. This proposal has a significant size, scale and scope and if there are significant adverse impacts resulting from the prosed [sic] action, the proposal may rise to the level of warranting a Determination of Significance and preparation of an Environmental Impact Statement. No determination has been made in regard to an environmental threshold determination.

Id. at page 2 (AR 3461). The letter elaborated on scope of environmental review on page 3:

> "The proposed project will be evaluated for cumulative impacts, including any associated with Greenline Warehouses 'A & B.'"
>
> . . .
>
> "As part of land use and SEPA review, at minimum the following special studies/analyses will be required: noise analysis, air quality analysis and analysis per Department of Archaeology and Historic Preservation."[5]

[5] The Department of Archeology and Historic Preservation (also known as "DAHP") is Washington State's primary agency with knowledge and expertise in historic preservation. It had written a letter about the Weyerhaeuser Headquarters on October 31, 2017, copied to Jim Harris of the City (author of the letter to IRG on the Greenline Business Park application). See Attachment 1 to Exhibit S-8 (AR 3144). RCW

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(Emphasis supplied) The City also "encouraged" IRG to:

> review the technical review letters issued on a related project, Greenline Warehouses "A and B," for reference of other information and required studies and analysis as you put together your submittal.

(Emphasis supplied.) *Id.* at page 7 (AR 3466). Just after receiving the City's pre-application comments, on November 14, 2017, IRG filed its application for its Greenline Business Park. AR 3224, at PDF p.270.[6]

Thus over a period of 16 months, IRG filed applications for five buildings in three large developments on the former Weyerhaeuser Corporate Campus, The record includes a "fact sheet" (IRG Rebuttal Exhibit 4, AR 7904) which shows the extraordinary breadth of the pending proposals:

- 1,508,000 square feet of new development
- 2,108,930 square feet of new impervious surface
- Site area of 178.36 acres
- New weekday traffic volume of 5,165 vehicles
  - 4,357 autos
  - 808 trucks
- New P.M. peak hour volumes of 624 vehicles (529 autos, 95 trucks)
- 23 Wetlands filled
- 3,660 significant trees lost.

27.34.200 provides as follows. :

> **Archaeology and historic preservation—Legislative declaration.**
> The legislature hereby finds that the promotion, enhancement, perpetuation, and use of structures, sites, districts, buildings, and objects of historic, archaeological, architectural, and cultural significance is desirable in the interest of the public pride and general welfare of the people of the state; and the legislature further finds that the economic, cultural, and aesthetic standing of the state can be maintained and enhanced by protecting the heritage of the state and by preventing the destruction or defacement of these assets; therefore, it is hereby declared by the legislature to be the public policy and in the public interest of the state to designate, preserve, protect, enhance, and perpetuate those structures, sites, districts, buildings, and objects which reflect outstanding elements of the state's historic, archaeological, architectural, or cultural heritage, for the inspiration and enrichment of the citizens of the state.

[6] Some AR numbers in the record are partially obscured and difficult to read; for those record references the page number of the PDF within that section of the record is also supplied.

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IRG's own website describes these three projects, together with the former headquarters building and Technology Center, as its single "Development Plan for the campus," and boosts them as a unified, "light industrial development," with claims of job restoration and tax revenue from their development[7] (https://www.woodbridgecorporatepark.com/restoration; https://www.woodbridgecorporatepark.com/preservation; https://www.woodbridgecorporatepark.com/create; websites created in 2018).

From the very beginning, the record reflects that SWC and other interested citizens strenuously, and continuously, requested that the impacts of IRG's Development Plan (Appendix A) be considered cumulatively. See e.g. AR 3300, AR 3312. When the City issued its draft Mitigated Determination of Significance ("MDNS") for public comment on October 27, 2018, for just the Warehouse A proposal, AR 2385[8], it made clear the City was not going to review cumulative impacts, reversing its prior position. This caused several interested government agencies to join in the request for cumulative impact review; these agencies included the Washington State Department of Transportation ("WSDOT") (AR 2061, 2032, 7613), the King County Road Services Division (AR 7615), the King County Department of Natural Resources and Parks ("King County DNR") (AR 2039, 7617), and the Washington State Department of Archaeology and Historic Preservation (AR 7619), as well as the Muckleshoot and Puyallup Tribes (AR 7622 and 7624). These comments are summarized in Exhibit SWC-20.6 (AR 3344), the letter from counsel for SWC to the City, dated November 16, 2018.

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[7] IRG reinforced its corporate position that the three new projects are effectively one in a letter to the Mayor of Federal Way, in which it threatened not to participate in efforts by state and local governments to conserve open space within the Campus "*until our development approvals are issued by the City and all appeals withdrawn in a timely manner*." AR 3458.

[8] An MDNS is a determination by a local government it will not prepare an environmental impact statement, based on the adequate mitigation of what would otherwise be significant impacts. The procedures for MDNS adoption are found in the SEPA Rules, at WAC 197-11-350.

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Ignoring all of the community and government comments, the City's final MDNS decision on Warehouse A, AR 2378, explicitly refused to analyze cumulative effects. The only exception was the "modest shared infrastructure" (two driveways and a stormwater pond) where Warehouse A and Warehouse B physically overlap. Final Decision, page 3, AR 7845.[9] Otherwise, the City decided in the MDNS that it could not legally force IRG to combine its projects and therefore the City was relieved of providing cumulative impacts analysis of the three pending projects:

> Cumulative Impacts Analysis - Greenline Warehouse A is proposed on two adjacent parcels (6142600005 and 6142600200). A separate project, Greenline Warehouse "B" was submitted in September 2017 for parcel 6142600200. The city evaluated the projects for cumulative impacts on Warehouse "A" and identified and analyzed those parts of the projects that implicate such impacts in this determination. The two warehouse projects will utilize a common driveway access off of Weyerhaeuser Way. In addition, for both projects there are additional access points proposed off of the private loop road. Both projects will utilize the same stormwater pond on parcel 6142600200; although, the addition of Warehouse "B" will require the pond to be enlarged from its size if it only served Warehouse "A." The analysis of these cumulative impacts for Greenline Warehouse "A" is reflected throughout this determination. <u>There are no other cumulative impacts on the Greenline Warehouse "A" project.</u> The city has not received indication from the applicant that the two warehouse projects will be constructed simultaneously; therefore, there is no cumulative impacts analysis regarding construction.
>
> With regard to a cumulative impacts analysis for both warehouse projects, many of the project submittal documents for Greenline Warehouse "A" reference Greenline Warehouse "B." In particular the traffic study, IRG Greenline Buildings A and B Federal Way, WA Transportation Impact Study, TENW Transportation Engineering NorthWest, March 6, 2018, <u>addresses both projects</u>. In addition, regarding WAC 197-11-060(3)(b), Greenline Warehouse "A" can proceed without Greenline Warehouse "B" and is not reliant upon Greenline Warehouse "B" taking place in order to proceed. Greenline Warehouse "A" does not depend on Greenline Warehouse "B" as justification for its implementation and the projects are not interdependent parts of a larger proposal. In other words, Greenline Warehouse "A" and Greenline Warehouse "B" do not meet the WAC 197- 11-060(3)(b) threshold to require evaluation of the two projects in the same environmental document.
>
> Another separate project, the Greenline Business Park (GBP), was submitted in November 2017. The GBP is proposed on other parcels within the former Weyerhaeuser Campus. The GBP does not propose to share a common parcel, access point, or utility facilities with Greenline Warehouses "A" or "B." Regarding WAC 197-11-060(3)(b), Greenline Warehouses "A" and "B" can

[9] Note the Hearing Examiner included the traffic analysis for Warehouses A and B as an exception, but as the City's Final Decision shows, the City did not include the traffic impacts from Warehouse B in its decision on Warehouse A.

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> proceed without the GBP and are not reliant upon the GBP taking place in order to proceed themselves. Greenline Warehouses "A" and "B" are not interdependent parts of the GBP and do not depend on the GBP as justification for their implementation. The GBP does not meet the WAC 197-11-060(3)(b) threshold to require the evaluation of the other projects in the same environmental document.

Exhibit F-6(b) at page 3 (emphasis supplied) (AR 2422).

SWC appealed the MDNS decision as permitted by FWRC 14.10.060. AR 6408. SWC requested that the Federal Way Hearing Examiner reverse the decision of the city staff, order the preparation of an environmental impact statement for the proposal and order that the cumulative impacts of all three pending IRG proposals be subject to review and analysis.

Under Federal Way code, the MDNS appeal is held in abeyance until the decision on the underlying project is issued, at which time the SEPA and project decisions are consolidated for review and hearing before the Federal Way Hearing Examiner. FWRC 19.65.100(1).

On February 4, 2019, the City issued its decision approving the Warehouse A proposal. AR 2417. ("Land Use Decision" or "Process III Decision".) In the Land Use Decision, the City literally cut and pasted its cumulative effects rationale from the MDNS into its land use approval findings. Exhibit F-6(b) at page 20 (AR 2439). As in its earlier statements in the MDNS, the City emphasized its position that it was legally prohibited from analyzing cumulative impacts:

> The city also provides the following response with respect to the comments requesting a master plan, cumulative SEPA review, and/or an EIS for the project. A master plan was not proposed or otherwise requested by the applicant, and no applicable statutory or local code provision allows the city to unilaterally require preparation of a master plan. The applicant has also elected to submit separate complete application submittals for projects on the Greenline Campus, which the city is required by law to process. (Also see the finding below regarding "cumulative impacts analysis.") And unless there are significant adverse environmental impacts that cannot be mitigated, a SEPA Determination of Significance requiring preparation of an EIS is inappropriate. The city's SEPA Responsible Official has determined that this standard has not been met with respect to the project. Finally, the city is generally prohibited from requiring an applicant to provide mitigation of a project to an extent that exceeds the project's anticipated impacts. The city accordingly cannot require the Greenline Warehouse "A" project to mitigate an impact that it does not cause or otherwise contribute to.

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Id. at page 3 (emphasis supplied) (AR 2422).

Again, as permitted by Federal Way code (FWRC 19.65.120), SWC appealed the City's Process III decision on Warehouse A on February 21, 2019. AR 6408. In its appeals, SWC contended that cumulative review of the IRG Development Plan was required. See Paragraphs 3.2, 3.5, 3.6, 3.7, 3.8 and 3.9 of AR 6408. The Federal Way Hearing Examiner consolidated the SEPA Appeal and the appeal of the Land Use Decision for review as required by the Federal Way code.

On April 26, 2019, the City and IRG filed a joint motion with the Hearing Examiner to, *inter alia*, dismiss SWC's cumulative impacts claims. Following the filing of replies and responses, and oral argument, as well as supplemental briefing, the Examiner issued his "Ruling on Motion for Partial Dismissal" on May 26, 2019 (AR 7888) ("Partial Dismissal Decision"). The Examiner dismissed certain claims, but denied the City/IRG motion to dismiss SWC's cumulative impacts claims, holding: "the Federal Way Revised Code ("FWRC") mandates consideration of cumulative impacts for the mitigation of direct impacts". *Id.* at page 2. At page 11 (AR 7898), the Examiner stated: "For the reasons outlined above, cumulative impacts are found pertinent to Process III review. . . ." The Examiner also denied the City/IRG request that issues regarding compliance with the Federal Way Comprehensive Plan be dismissed. Pages 6-7, AR 7893-94.

On June 20 and 21, and August 7, 8 and 9, 2019, the Federal Way Hearing Examiner held quasi-judicial hearings on the consolidated SEPA and land use appeals, including receipt of testimony and documentary exhibits. The hearing record was left open through August 28, 2019, for written closing argument.

On September 12, 2019, the Hearing Examiner issued his decision on both the SEPA and Process III Land Use Decision appeals. AR 7845-7786 ("Final Decision"). In his decision, the Examiner added two conditions to address failures in the City's decisions (AR 7885-86), but he did not reverse or vacate either the SEPA MDNS or the Land Use Decision, denying both appeals. New Condition 11 was added to the

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Warehouse A MDNS, which required traffic analysis for the Greenline Business Park prior to construction activity on Warehouse A, but which fell short of an actual cumulative traffic analysis. New Condition 12 was also added to the MDNS, stating that "the Applicant shall supplement its stormwater plan to demonstrate compliance and consistency" with the Hylebos Basin Plan.

On September 27, 2019, SWC filed a motion for reconsideration of the Final Decision. AR 7658. Among other things, the motion took issue with the Examiner's decision to give over to City staff and applicant IRG all future decisions on Conditions 11 and 12 without public comment or further administrative review. The Hearing Examiner allowed responsive briefing from both IRG and the City and a reply by SWC, though no additional evidence was permitted. On October 29, 2019, the Examiner issued his "Findings of Fact, Conclusions of Law and Decision Upon Reconsideration" ("Reconsideration Decision"). AR 7733-41. The Reconsideration Decision is attached hereto as **Appendix B**.

In the Reconsideration Decision, the Examiner conceded the Final Decision contains a "Transportation Error of Fact." AR 7735-36. Though the Final Decision said that all roads and intersections impacted by the IRG project would operate within adopted standards, on reconsideration the Examiner acknowledged that a Traffic Impact Assessment ("TIA") indicated at least one impacted intersection (Weyerhaeuser Way S/SR 18) would fail adopted criteria because of impacts of the IRG projects.[10] Reconsideration Decision at 4-5, AR 7736-37. Because of the error, the Examiner revised Condition 11 in the Final Decision to require assessment of traffic congestion at

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[10] The Growth Management Act requires local governments to adopt and enforce limits on traffic congestion in RCW 36.70A.070(6)(b):

> (b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.

(Emphasis supplied.)

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the intersection of the main access street for the IRG proposals with State Highway 18. AR 7740-41.

In addition, on issues of stormwater impacts, the Examiner ruled that the Hylebos Basin Plan applied only to drainage matters and refused to require that the cumulative stormwater/drainage impacts of the three IRG development projects be analyzed. Reconsideration Decision at 8, AR 7740, at lines 1-9.

The Examiner's conditions did not provide for public comment nor for reopening the record for further evidence, nor for remand to staff for additional analysis with further administrative review. Rather it left compliance with the new conditions solely in the hands of the applicant and City staff, with no opportunity for public comment or administrative appeal. Reconsideration Decision at page 2, line 4 to page 3, line 3 (AR 7734-25). Though the Examiner made it clear he would prefer to remand or reopen the Final Decision, he said he was hemmed by existing law and could not do that. *Id.* at page 2, lines 13-19 (AR 7734). Nonetheless, the Examiner, in an usual conclusion, admitted that the failure to remand for additional public comment or administrative review amounted to a "Potential Error." AR 7738, line 1. Indeed, the Examiner indicated that he was taking a "modest risk" in imposing conditions instead of reversing the decisions under appeal, or at least remanding them for further review. AR 7734 at lines 14-16. Though the Examiner made it clear that he "favored" a remand (AR 7738, lines 18-19), he felt he could not order a remand under current law.

On November 18, 2019, SWC filed its timely Land Use Petition with this court. Consistent with the Case Schedule, this is the opening brief of SWC in its appeal.

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III. ARGUMENT.

A. SEPA STANDARD OF REVIEW.

The SEPA rules[11] provide that: "An EIS is required for proposals and other major actions significantly affecting the quality of the environment." WAC 197-11-330.

Since SEPA's adoption, cases such as *Cheney v. City of Mountlake Terrace*, 87 Wash.2d 338, 344, 552 P.2d 184 (1976), have held that SEPA requires that decision makers consider more than the narrow, limited environmental impact of the current proposal. Courts have also indicated that consideration of impacts must include the effect that projects will have on other project actions:

> An environmental impact statement must be prepared whenever significant adverse impacts on the environment are probable, not just when they are inevitable. *King County*, 122 Wash.2d at 663, 860 P.2d 1024. *King County* notes that government approval of a land use proposal may "acquire virtually unstoppable administrative inertia." Id. at 664, 860 P.2d 1024. Postponement of environmental review allows project momentum to build, carrying the project forward even if adverse environmental effects are discovered later. Id. (quoting William H. Rodgers, Jr., The Washington Environmental Policy Act, 60 WASH. L.REV.. 33, 54(1984)).

Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wn.App. 408, 425, 225 P.3d 448 (2010). Certainly, as discussed herein, the approval of the first smaller project, Warehouse A, will create project momentum to approve the other parts of IRG's Development Plan, Warehouse B and the Greenline Business Park.

In *Spokane Valley,* the Hearing Examiner had overturned the MDNS issued by staff. The Examiner decision was upheld, based on the following:

> The hearing examiner concluded that the mitigated determination of nonsignificance was clearly erroneous because " after reviewing the record as a whole, and according substantial weight to the MDNS [mitigated determination of nonsignificance]," he was " left with the definite and firm conviction that a mistake has been committed[,] even if there is some supporting evidence for the MDNS." CP at 84 (conclusion of law 12). The hearing examiner concluded that a " significant volume" of traffic from the project area " cannot be evacuated from the area in 30 minutes through the two Dishman-Mica exits." CP at 85 (conclusion of law 19). The fire evacuation analysis failed to consider the additional traffic generated by the Ponderosa development and other projects

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[11] The SEPA rules are found at chap. 197-11 WAC. The purpose of the rules "is to establish uniform requirements for compliance with SEPA." WAC 197-11-020(1). A local government such as Federal Way "must have its own SEPA procedures consistent with these statewide rules." *Id.*

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> that had been approved in the Ponderosa area. And he concluded that " [s]uch additional trips are relevant in determining the cumulative impact on community egress during an evacuation, and the ability of project traffic to timely evacuate." CP at 85 (conclusion of law 19).

154 Wn.App. at 423. In *Spokane Valley*, the developer argued that the Examiner's decision to require an EIS (overruling staff) was improper, because the access issue was a preexisting deficiency; the Court disagreed:

> Douglass's plat has not been conditioned on improving a preexisting deficiency. The hearing examiner here reversed the mitigated determination of nonsignificance and remanded for preparation of an environmental impact statement to address emergency evacuation. Yes, the hearing examiner refers to evacuation of the entire Ponderosa area and considers evidence that even the current population is inadequately served by the two egress roads. But his decision is not based on preexisting deficiencies. It focuses instead on the cumulative effect of the traffic from the Ponderosa development. An environmental impact statement analyzes the "direct, indirect, and cumulative impacts" of a proposed project. WAC 197-11-060(4)(e).

Id. at 424 (emphasis supplied). As discussed herein, the Federal Way rules require the consideration of future developments in the area as well as phases of the same development.

In a case closer to home, *City of Federal Way v. Town & Country Real Estate, LLC,* 161 Wn.App. 17, 252 P.3d 382 (2011), a land developer challenged SEPA impact fees imposed by the City of Tacoma for a plat impacting Federal Way streets. At the outset, a question arose whether the local government decision maker should be given deference “to the hearing examiner's legal conclusions based on SEPA". 161 Wn.App. at 38. However, the court held that such deference applied to only local land use regulations, not to SEPA as state law. *Id.*

The court went on to discuss the application of SEPA cumulative impacts:

> Third, and most importantly, superimposing WAC 197-11-792 on RCW 82.02.020 would frustrate the purpose of SEPA to ensure that " ‘ environmental amenities and values be given appropriate consideration in [government] decision[making].' " *Anderson v. Pierce County,* 86 Wash.App. 290, 300, 936 P.2d 432 (1997) (quoting *Stempel v. Dep't of Water Res.,* 82 Wash.2d 109, 118, 508 P.2d 166 (1973)). As *Town & Country* concedes, the SEPA rules provide that local governments may include " direct" and " cumulative" impacts when considering the environmental effects of a particular private land use. Br. of Resp't (*Town & Country*) at 40; see WAC 197-11-792(2)(c). SEPA also grants local governments authority to condition or to deny private land use based on the land's direct and cumulative impacts.

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161 Wn.App. at 48-49. The court then explained the predicate for issuance of an MDNS:

> Under SEPA rules, a local government may issue a DS only if the proposal is likely to have " a probable significant adverse environmental impact." WAC 197-11-360(1) (definition of DS). A local government may issue an MDNS only if the local government is likely also to issue a DS. [39] Thus, local governments may issue an MDNS (such Tacoma's MDNS conditioned on the traffic mitigation payment here) only if a proposal is likely to have a " probable significant adverse environmental impact." WAC 197-11-360(1).
>
> The SEPA rules define the concept of significance. Under WAC 197-11-794,
>
> > (1) Significant as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.
> >
> > (2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.
>
> Under WAC 197-11-330(3)(c), " [s]everal marginal impacts when considered together may result in a significant adverse impact." 161 Wn.App. 54-55. The Court concluded that violations of transportation standards will create a significant impact:
>
> > *Town & Country* argues that Scarsella-plat-generated traffic will be "insignificant" because Federal Way estimated that such traffic would contribute only 0.05% and 0.12% of the automobile trips that would use the two TIP locations in 2009. Br. of Resp't (*Town & Country*) at 49. But " significance" under SEPA is not limited to a " formula or quantifiable test." WAC 197-11-794(2). Rather, the dispositive factors are the " context and intensity." WAC 197-11-794(2). Based on these factors, the traffic that the Scarsella plat will generate, when taken in conjunction with projected population growth, would cause LOS Fs at the two intersections and is, therefore, a significant adverse impact under the SEPA rules. See *Tiffany Family Trust Corp. v. City of Kent,* 155 Wash.2d 225, 232, 119 P.3d 325 (2005) ("One accepted formula for determining the amount of a mitigation fee is based on the increased peak hour trips a given development will generate in the relevant area."). Accordingly, we reverse the hearing examiner's decision on this ground.

Id. at 55.

In the present case, there are identified violations of city traffic capacity standards when the impact of the IRG Development Plan is considered. See Exhibit S-5A, page 5 (AR 6461). These are admitted and verified by the Hearing Examiner in his decision. This unmitigated impact is a significant impact requiring an EIS.

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In the present case, substantial weight cannot be accorded City staff or the Examiner, when both which ignored serious traffic impacts, refused to consider traffic safety issues, failed to follow through on historic impact studies and failed to address impacts to adopted basin plans for stormwater. The magnitude of these impacts, and the magnitude of the Development Plan itself, indicate the need for cumulative impact review and for an environmental impact statement.

B. CUMULATIVE EFFECTS ANALYSIS IS NOT RESTRICTED TO "CLOSELY RELATED" PROPOSALS UNDER SEPA.

The City and IRG spend considerable time in the MDNS and at the hearing arguing that Warehouse A, Warehouse B and the Greenline Business Park are not "closely related" proposals for which SEPA requires review in the same environmental document under WAC 197-11-060(3)(b). They go to this effort because they assert that proposals must be "in effect, a single course of action," *id.*, to require consideration of cumulative effects.

The Hearing Examiner agreed with the City and the Applicant that the three IRG projects are not interdependent and do not require evaluation in a single environmental document under WAC 197-11-060(3)(b). See Final Decision at page 19, AR 7863-67. This was reiterated in the Reconsideration Decision at page 5, AR 7737.

As indicated in Paragraph 7.2 of SWC's Land Use Petition, the Examiner's rulings are in error on this point and in related findings of fact. However, the Hearing Examiner agreed with SWC that SEPA still requires cumulative effects analysis of the three proposals. See Final Decision at page 2, AR 7863-67 ("This Decision agrees with the Appellant that WAC 197-11-060(3) is not the only legal mandate for cumulative impact analysis.") The Hearing Examiner agreed with SWC that the City was confusing the scope of proposals with the scope of environmental review under SEPA. The appropriate scope of review is described by Professor Settle in his treatise on SEPA:

> Scope of environmental review is closely related to but is not identical to scope of a proposal. Likely future proposals and their impacts are characterized as secondary, indirect, or cumulative impacts of a present proposal. Thus, the scope of environmental review for a present proposal

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> may include, in addition to its own direct impacts, its indirect and cumulative impacts likely to arise from probable, closely related future proposals. Because such proposals do not exist, they generally are not defined as part of a present proposal subject to environmental review. But because they are likely and closely related to the present proposal, it may be appropriate to analyze and consider their probable impacts in deciding on the presently proposed action. *Functionally, it makes little difference whether closely related proposals are actually combined into one proposal or whether environmental review of one includes analysis of the impacts of the other.* In *Gebbers v. Okanogan County PUD No. 1,* the Court employed both a scope of proposal and a cumulative impacts analysis in concluding that an EIS for a new electric transmission line was not inadequate for failing to include the impacts of potentially rebuilding an existing transmission line in 10–15 years.

Richard L. Settle, The Washington State Environmental Policy Act § 11.01[5] (2018) (emphasis supplied).[12]

Courts have not created any "bright line" test that prohibits cumulative impacts review if proposals are not legally interconnected with other proposals. Instead, they analyze the facts and circumstances and generally apply a rule of reason in deciding cases in which cumulative effects are and are not considered. For example, *Boehm v. City of Vancouver*, 111 Wash.App. 711, 47 P.3d 137 (2002), states that "a cumulative impacts analysis need only occur when there is 'some evidence' that the project under review will facilitate future action that will result in additional impacts." *Id.* at 720, 47 P.3d 137. This is hardly the same as legally interconnected projects. But in *Boehm* the appellants had presented no evidence of future impacts, leading the court to conclude that the project's impacts were "merely speculative" and therefore need not be considered. *Id.*

SWC believes the three IRG proposals *are* in fact interdependent and meet the SEPA standard requiring consideration in one document, which SEPA requires be combined to avoid piecemeal review:

> To avoid misleading, piecemeal environmental review, the SEPA Rules require that "proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.

[12] Professor Settle is by a "recognized authority on SEPA," *Waterford Place Condominium Ass'n v. City of Seattle*, 58 Wn.App. 39, 45, 791 P.2d 908, (1990)

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Settle, *supra,* at § 1101[5] (citing WAC 197-11-060(3)(b)). The Examiner disagrees, repeating the mantra that the projects cannot be evaluated together because *the applicant* has filed for them separately. However, this fails for two reasons. First, it ignores the reality of IRG's plans for the property. As Mr. Ostensen stated at the hearing: "it doesn't make a lot of sense to buy 400 acres and build 225,000 square feet." Testimony, June 20, 2019 (TR 152 at lines 8-9). The record before the City includes abundant evidence that the three projects pending before it are interdependent,[13] including IRG's website touting the Development Plan for the entire campus and its continuing position that it must have approvals for all three of its projects and *"all appeals withdrawn in a timely manner"* before it will consider open space conservation strategies that would benefit the community. See AR 3458.

Second, even if the three projects are not legally interdependent under SEPA, the City must still evaluate the impacts of Warehouse A in light of the cumulative effects of Warehouse B and the Greenline Business Park. *See Indian Trail Prop. Owner's Ass'n v. Spokane,* 76 Wn. App. 430, 886 P.2d 209 (1994). In the present case the future impacts of Warehouse B and the Greenline Business Park are not at all hypothetical or speculative; there were complete applications for each filed with the City. Future impacts are "probable" and cannot be ignored. *See King County v. Boundary Review Board*, 122 Wash.2d 648, 665, 860 P.2d 1024 (1993); *Hayes v. Yount*, 87 Wash. 2d 280, 287, 552 P.2d 1038 (1976). As stated in *Tucker v. Columbia River Gorge Comm'n,* 73 Wn. App. 74, 82, 867 P.2d 686 (1994):

> Cumulative effect is a justifiable reason to deny Tucker's application. In *Hayes v. Yount,* 87 Wash.2d 280, 552 P.2d 1038 (1976), the Supreme Court held that consideration of future development was permissible in determining "cumulative environmental harm". *Hayes,* at 287, 552 P.2d 1038. The court also found no error in the Shorelines Hearings Board's consideration of the precedential effect of approving the application before it. *Hayes,* at 291, 552 P.2d 1038.

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[13] *See, e.g.,* Critical Areas Report Review; Response to Comments dated 13 December 2017, Talasaea Consultants, Inc. (6/26/18) ("Greenline Buildings A and B are separate projects, but it is assumed that Building B will only ever be constructed after Building A, never before or without Building A. For that reason, the Building A built condition is considered to be the existing condition for Building B.") AR 3708.

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SEPA requires the three IRG projects be considered cumulatively for purposes of SEPA and Federal Way code review. The Examiner's decision to the contrary should be reversed.

C. THE FEDERAL WAY CODE REQUIRES CONSIDERATION OF THE CUMULATIVE EFFECTS OF ALL PROJECTS IN THE IMMEDIATE VICINITY OF WAREHOUSE A.

The City and IRG's argument that SEPA limits cumulative impact review to "closely related" proposals also fails because Federal Way code explicitly requires cumulative impact review.

The Federal Way development code requires that a project decision maker consider the aggregated, cumulative impacts of future projects. This is explicitly stated in FWRC 19.100.030:

> **19.100.030 Determination of direct impact.**
>
> Before any development is given the required approval or is permitted to proceed, the official or body charged with deciding whether such approval should be given shall determine direct impacts, if any, that are a consequence of the proposed development and which require mitigation, considering, but not limited to, the following factors:
> (1) Predevelopment versus postdevelopment need for services such as city streets, sewers, water supplies, drainage and stormwater detention facilities, parks, playgrounds, recreational facilities, schools, police services, fire services and other municipal facilities or services;
> (2) Likelihood that a direct impact of a proposed development would require mitigation due to the cumulative effect of such impact when aggregated with the similar impacts of future development in the immediate vicinity of the proposed development;

(Emphasis supplied.) In addition, as discussed in more detail below, the transportation concurrence ordinance, FWRC 19.90.120(2), requires "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 permits would be issued within two years of the date of a development proposal.

SEPA imposes further requirements on the City to consider the cumulative effects of proposals in making its land use decisions, as discussed above. In addition, given the Federal Way code's direction to analyze cumulative effects, the code and SEPA must be read together to assure that the content of the City's environmental review

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adequately addresses cumulative effects. WAC 197-11-060, which specifies the content of environmental review common to all environmental documents under SEPA, states in subsection (2)(a):

> (2) The content of environmental review:
> (a) Depends on each particular proposal, on an agency's existing planning and decision-making processes, and on the time when alternatives and impacts can be most meaningfully evaluated.

(Emphasis supplied.) Because FWRC 19.100.030(2) requires that the decision-maker address aggregate and cumulative impacts of similar future projects, that requirement becomes a basis for environmental review under SEPA.

The Federal Way code in turn, and more explicitly, incorporates SEPA's requirements. FWRC 19.65.050 provides:

> The State Environmental Policy Act applies to some of the decisions that will be made using this chapter. The director shall evaluate each application and, where applicable, comply with the State Environmental Policy Act and with state regulation and city ordinances issued under the authority of the State Environmental Policy Act.

In the case of conflicts between SEPA and the Federal Way code, the City is required to apply the most environmentally protective provision. FWRC 19.05.310, in the City's Zoning and Development code, provides:

> **19.05.310 Conflict of provisions**.
> The standards, procedures and requirements of this title are the minimum necessary to promote the health, safety, and welfare of the residents of the city. The city is free to adopt more rigorous or different standards, procedures and requirements whenever this becomes necessary. 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.

(Emphasis supplied.)

Finally, the Federal Way code provisions requiring a consideration of pending projects are consistent with SEPA policy for early review and disclosure of impacts, articulated in such cases as *Stempel v. Department of Water Resources,* 82 Wash.2d 109, 118, 508 P.2d 166 (1973) and *Loveless v. Yantis,* 82 Wash.2d 754, 765-66, 513 P.2d 1023 (1973):

> Each stage of governmental action may focus on distinct environmental

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> concerns, thus providing for a more narrow evaluation. In this case it will be of benefit to the public and developer that an environmental review can be made on the "design" matters revealed in preliminary plats. Choices exist and crisis decision making and catastrophic environmental damage can be avoid by early deliberation here. Also, give this early stage, the application of SEPA would result in minimizing investment costs if the decision is abandonment or alteration.

(Emphasis supplied). Similarly, in *King County v. Washington State Boundary Review Bd. for King County,* 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) the court stated:

> Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. See *Rodgers,* The Washington Environmental Policy Act, 60 Wash.L.Rev. 33, 54 (1984) (the risk of postponing environmental review is "a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds").

This "dangerous incrementalism" is readily apparent here; as one project is approved, and its impacts recede into background conditions, the argument for the next project will be that its impacts are acceptable because the impacts from the previous project have become the new baseline. This incrementalism is already occurring: IRG's TIA for the Greenline Business Park claims little traffic impact over the background conditions created by the approval of Warehouse A. This is explained by Mr. Tilghman, SWC's transportation expert, in his analysis at pages 3-5 of Exhibit S-5A, AR 6457.

Wetlands provide another example of dangerous incrementalism: the critical areas plan for Warehouse B fails to disclose existing wetlands, because they will be theoretically filled by Warehouse A. See Exhibit F10(d) at page 1 (AR 2736) ("This report assumes that the wetlands proposed to be impacted as part of Building A have been impacted, and thus are no longer present in this existing condition scenario.").

As described above, by November 2017, IRG had filed detailed applications for all three projects described in its Development Plan. These applications included detailed and precise site drawings (see AR 3204 (PDF p.251) for Warehouse B and AR 3221 (PDF p.278) for the Greenline Business Park) and, in addition, SEPA-required

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"Environmental Documents," including analyses on traffic, stormwater and other technical subjects. See AR 3205 (Warehouse B), AR 3224 (PDF p.271) (Greenline Business Park). Moreover, the City told IRG when it filed for the Greenline Business Park that cumulative impacts analysis was required, as well as an historic impact analysis (see Exhibit S-25, page 3, AR 3462). All of the "raw material," in the form of detailed technical analysis for cumulative impacts review and analysis of traffic, stormwater and historic impacts is (and was, at the time of decision on Warehouse A) available for inclusion in a cumulative impacts analysis. [14]

FWRC 19.100.030(2) is clear on its face, needing no interpretation: City staff must identify "direct impacts" before making a decision under FWRC 19.100.010. Indeed, the direct impacts are listed within that section and in FWRC 19.100.030(1), and include many of the concerns long expressed, and at issue, in these proceedings: city streets, water supplies, drainage and storm water detention, and other municipal facilities and services.[15] See e.g. SWC's comment letters on Warehouse B (AR 3281) and on Greenline Business Park (AR 3300). While long a part of the City's code, FWRC 19.100.030(2) is not mentioned in the MDNS or the Land Use Decision.

Cumulative impact review is also required by *Indian Trails Property Owner's Ass'n v. City of Spokane*, 76 Wn.App. 430, 886 P.2d 209 (1994). The Final Decision attempts to distinguish this case at pages 21-23 (AR 7865-67). However, *Indian Trails* is fully applicable to the plans for the three projects proposed by IRG and requires cumulative review.

Indian Trail was a shopping center case; the proposal involves several different uses as described by the court:

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[14] As noted, the City required a historic analysis for the IRG Development Plan as far back as 2017 (see infra at page 8 and AR 3462) but, despite the long lead time, the report is currently still being prepared, thus it was not available either for the decision under review or the hearing. See testimony of Sadlier. TR. 526-564.

[15] As will be discussed below, the City's Guidelines for Traffic Impact Assessment already require assessment of traffic impacts from pending future development. See IRG Rebuttal Exhibit 8, AR 7911.

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> On or about July 17, 1991, the Partnership applied for building permits to reconstruct and expand the shopping center. The existing shopping center contained a 16,500-square-foot grocery store, retail shops, dental clinic and service station. A portion of the site was undeveloped. The Partnership wanted to replace the grocery with a 47,000-square-foot store, construct a 3,820-square-foot building for retail space, relocate the dental clinic and expand and relocate the service station to other parts of the site. The proposed 47,000-square-foot grocery store would contain a pharmacy, floral shop, video rental and delicatessen.

76 Wn.App. at 432.[16] Later, the city issued a "DNS regarding underground fuel tanks to be installed in the reconstructed center." *Id.* at 433. The plans also included a car wash, but that use required a special use permit. Id. at 443. There was no indication that either the underground storage tanks or the car wash were at all dependent on each other or on construction and operation of the other shopping center uses. However, both were a part of the overall development plan for the center.

On SEPA analysis, the city conducted separate review for the fuel storage tanks and the car wash. *Id.* The court ruled that separate reviews for the fuel storage tanks and the car wash were not permitted by SEPA.

Regarding the fuel storage tanks, the court said:

> We note at the onset that the responsible official's initial evaluation of the underground fuel storage tanks separate from other phases of the proposal was in error. Parts of proposals which are "related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." WAC 197-11-060(3)(b). Here, a phased review of the project was clearly inappropriate because it would serve only to avoid discussion of cumulative impacts. WAC 197-11-060(5)(d)(ii). See also WAC 197-11-060(3)(b)

Id. Regarding the car wash, the court said:

> Redevelopment of the shopping district also included plans for a car wash. In B1 zones, a car wash requires a special permit. When addressing neighborhood concerns about the noise impacts from the car wash, the hearing examiner responded "there is no car wash in this application and a special permit must be applied for before a car wash can be built in conjunction with this use". To the extent the hearing examiner was approving separate SEPA review for the car wash, he was in error. WAC 197-11-060(3)(b).

Id.

[16] The contrast between the *Indian Trails* and IRG proposals is remarkable: the *Indian Trails* developer proposed a 47,000 square foot replacement store while IRG's "Development Plan" includes 1,508,000 square feet of new warehouses, parking lots, and other development.

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The court's ruling in *Indian Trail* is dispositive here. As noted above, the proponent there had a development plan which included several shopping center uses, but also included fuel storage tanks and a car wash. Similarly, the IRG Development Plan (Appendix A) has three warehouse proposals. There is no basis for honoring IRG's request for phased or separate review because, as in *Indian Trail*, it would "serve only to avoid discussion of cumulative impacts." In fact, IRG's continuing discussions with the City indicated IRG was indeed phasing its development project and moving projects like pieces on a chess board:

> Please accept this email as our request to swap the current order of review, placing Building A's Process III application in front of Building B. We understand that this will delay receipt of comment for the Building B project; however this should allow Building A to move forward expeditiously.

Email from IRG Consulting Engineer to the City, March 18, 2018 (AR 7313, emphasis supplied).

The requirement for cumulative analysis applied particularly strongly to historic impacts. When the initial Warehouse A application was received, the Washington State Department of Archaeology & Historic Preservation, in an August 23, 2016 letter described at Footnote 5 hereof, wrote that:

> Given the high potential that the subject site and surrounding Weyerhaeuser property is significant for its design, landscape and plan, we recommend that the City consider the impact of the proposal on the character and quality of this location and on Federal Way's heritage as well as its future.

AR 6119. Even IRG recognized, in its October, 2016 checklist for the Greenline Business Park, that at 47 years old, "the Weyerhaeuser Headquarters Building may be eligible for listing in national, state or local preservation registers." Exhibit S-19, page 11, AR 3236.

The substantial value of the Weyerhaeuser property for historic purposes is described in the presentation to the Examiner by the Washington Trust. AR 3139 et seq. This letter set forth the importance of review of cumulative impacts on historic resources because of the "headquarters' deep integration into the surrounding landscape.. . ." AR 3139. Indeed, the Washington State Department of Archaeology &

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Historic Preservation indicates that the headquarters' building "would easily qualify for listing on the National Register of Historic Places (under criteria A & C) as a "groundbreaking design that has been studied by generations of architects, architectural historians, landscape architects and historians." AR 3145. The agency notes that "the boundaries of the listing would need to be defined after further study but most likely includes the full 260 acres as initially developed by Sasaki, Walker and Associates." AR 3146. Background information from Mr. Walker himself was provided to the Examiner, where he said:

> The view sheds were terribly important, so if you see another building, as you look up the valley, or look down the lake, it does real harm to the initial building.

AR 3163. Indeed, the IRG's own Development Plan shows that the five new buildings planned by IRG are significantly larger than the existing historic building on the property, reinforcing the need for the cumulative historic impacts analysis.

Cumulative impacts reviews are an integral and required element of SEPA and land use review in Federal Way; the failure to conduct such analysis warrants reversal of both the SEPA and Land Use Decision.

D. FAILURE TO CONSIDER THE HYLEBOS BASIN PLAN AND FAILURE TO REQUIRE CUMULATIVE ANALYSIS OF DRAINAGE ISSUES.

SWC's appeal also raised important issues about the impact of the large IRG Development Plan on the sensitive Hylebos watershed. Two distinct issues were raised. First was the failure of the City to assess the Development Plan against the criteria of the Executive Proposed Hylebos Creek and Lower Puget Sound Basin Plan ("Hylebos Basin Plan" or "Basin Plan"), which was explicitly adopted by the City (Issue 3.7.5, AR 5391, FWRC 16.25.010(2)(a)). Second was the failure of the City to consider the cumulative drainage impacts of the more than 2,000,000 square feet of impervious surface that is included in the overall Development Plan for the property, as shown on Appendix A.

SWC was not alone in these concerns.

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When the City circulated its draft MDNS, which limited stormwater review to only the Warehouse A project (with a possible later addition of Warehouse B), three governmental agencies immediately responded. The King County DNR explicitly stated that the MDNS did not address how the IRG plans would address impacts to the Hylebos Basin Plan and indicated that all available information be used to assess the downstream impacts in the Hylebos drainage. AR 7617. The Puyallup Tribe of Indians was explicit in its comments as well:

> It continues to [elude] us why the agencies and city are bifurcating these development proposals, other than to circumvent environmental review and analysis of impacts. We strongly disagree with the decisions to review these proposals separately. As we have stated, a sufficient and complete assessment of impact cannot be completed based on available information.

See AR 7622. The Muckleshoot Tribe concurred with the Puyallup Tribe in its comments. AR 7624. As described above, the City completely ignored these concerns.

1. COMPLIANCE WITH THE HYLEBOS BASIN PLAN.

The City did not require IRG to comply with the Hylebos Basin Plan, even though it was adopted by the Council as a regulatory document in FWRC 16.25.010(2)(a) in 1994. In its Warehouse A SEPA application, when asked if the subject property was in a basin plan, IRG responded "No." As a result, IRG's Technical Information Report (or "TIR") fails to describe how its stormwater design meets or exceeds the standards in the adopted Hylebos Basin Plan.

Cumulative impacts are particularly important in the circumstances presented here. The Greenline Business Park alone will create some 1,441,548 square feet of new impervious surface, with a total of 2,108,930 square feet for the three projects. AR 7904. IRG concedes that its current plans for the Greenline Business Park alone include more than 50 acres of impervious surface, requiring the preparation of a Master Drainage Plan under the 2016 Stormwater Design Manual.[17] While IRG hints that it

[17] As indicated in Exhibit S-39, AR 7314, IRG has adopted a scoping for a Master Drainage Plan, however, it is strictly limited to the Greenline Business Park and does not include the runoff for Warehouses A and "B."

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may reduce the size of its Greenline Business Park project to avoid the Master Drainage Plan requirement, the current record does not reflect that change.

> King County DNR wrote to the City during the Draft MDNS comment period:
>
> The County and City both work to improve water quality through implementation of the King County 2016 Surface Water Design Manual (SWDM). As part of the SEPA evaluation, we offer the following specific comments for your consideration.
>
> - To address Special Requirement #1 of the 2016 SWDM, the technical information report (TIR) should explicitly address how the project's stormwater design is meeting or exceeding the standards (recommendations BW-2 and BW-3 on page 3-6) in the Executive Proposed Basin Plan/Hylebos Creek and Lower Puget SoundConditions Report adopted in 1994. See https://your.kingcounty.gov/dnrp/library/1991/kcr773.pdf

AR 7617. Because of the sensitive nature of the Hylebos basin, special treatment is required under the current stormwater manual. Plainly, the addition of this large amount of stormwater requires careful environmental review in a full environmental impact statement.

The Hylebos Basin Plan is "Special Requirement #1" in the Federal Way Addendum to the King County Surface Water Design Manual, set out in FWRC 16.25.010(2)(a):

> (a) *Special Requirement #1 – Other Adopted Area-Specific Requirements.* King County has developed several types of area-specific plans and regulations that contain requirements for drainage design. These regulations include critical drainage areas, master drainage plans, basin plans, lake management plans, and shared facility drainage plans. In some cases, these plans and regulations could overlap with the city of Federal Way's jurisdictional area.
>
> The Hylebos Creek and Lower Puget Sound Basin Plan is the only one of these area-specific regulations that currently affects Federal Way. King County developed this basin plan which recommends specific land uses, regional capital projects, and special drainage requirements for future development within the Hylebos and lower Puget Sound basin.
>
> <u>The drainage requirements of adopted area-specific regulations such as basin plans shall be applied in addition to the drainage requirements of the KCSWDM</u> and Federal Way Addendum unless otherwise specified in the adopted regulation. <u>Where conflicts occur between the two, the drainage requirements of the adopted area-specific regulation shall supersede those in the KCSWDM</u> and Federal Way Addendum.

(Emphasis supplied.) The code specifically provides that the Hylebos Basin Plan "shall

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be applied" by the City when reviewing proposals within the Basin Plan area; these code sections are violated when review ignores them.[18] In addition, the Hylebos Basin Plan has been "adopted by reference" . . . "as a basis for the city's exercise of authority" under SEPA. See FWRC 14.25.070(4)(b)(l).

In his Final Decision at page 16, lines 24-25, the Hearing Examiner agreed with SWC, concluding that:

> The City did not adequately consider the policies and requirements of the Executive Proposed basin Plan for Hylebos Creek and Lower Puget Sound in the application of the stormwater manual.

In response to SWC's motion for reconsideration, the Hearing Examiner clarified his ruling in the Reconsideration Decision:

> Compliance with the *Basin Plan* in the Final Decision was made a condition of approval not because there was an apparent compliance issue, but rather because it didn't appear <u>that the *Basin Plan* had even been considered</u>.

AR 7739, lines 11-13 (emphasis supplied). The Examiner explained further on page 7 at AR 7739, lines 21-23:

> Given this heightened emphasis up on the applicability of the *Basin Plan* it was particularly important that the City establish "*prima facie"* review of that plan. Instead, the City took the position that the *Basin Plan* didn't apply to the stormwater review and had no documentation to evidence that it had considered it.

So far so good; the Examiner agrees with SWC that the City failed to consider the Basin Plan. However, instead of requiring the record be reopened so that the "*prima facie"* compliance with the *Basin Plan* would be subject to public comment and review on the record, the Examiner instead imposed a "condition" on approval at page 42 (AR 7886) of his Final Decision:

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

When SWC argued that this "condition" was an improper delegation of decision making to the applicant, eliminating any opportunity for public comment and appeal, the

[18] Land Use appeal issue 3.7.5 addresses noncompliance with the Basin Plan. AR 6414.

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Examiner backtracked and indicated that City staff would apparently have a role in review of compliance with the Basin Plan. Reconsideration Decision at 7 (AR 7739), line 21. The Examiner concluded that conditions are part of decisions made on a "regular basis" but then said:

> However most of the time those conditions are of minor significance or involve ministerial decision making from which little benefit would be derived from public review and comment.

AR 7734 at lines 5-6. Then the Examiner states:

> For the reasons identified in this reconsideration decision, staff application of the *Basin Plan* will likely not involve any significant decision making and its application in a condition of approval will not involve any improper delegation.

AR 7734 at lines 15-16. No factual analysis accompanies this conclusion.

These conclusions are clear errors of law. To begin with, while termed a "condition," it is clearly a remand for additional review. As noted above, "it was particularly important that the City establish "prima facie" compliance with [the Basin Plan]." But the "condition" referred compliance with the Basin Plan back to the applicant and City staff, who had ignored the plan in the first place, notwithstanding its inclusion in the code since 1999. FWRC 16.25.010(2)(a).

The condition asking the applicant and staff to look at the *Basin Plan* to show "prima facie" compliance is illusory without the opportunity for public comment, review and appeal as provided for in Process III decisions. The result is that SWC has demonstrated clear error, but without any opportunity to determine whether the applicant and City, who fervently opposed consideration of the Basin Plan, will apply the Basin Plan according to its terms.

Oddly, the Examiner has recognized his decision to not provide an opportunity for public review and appeal as a "Potential Error in Delegation of Decision Making." Page 6 of Reconsideration Decision (AR 7738) states that, under the FWRC:

> An appeal coupled with a right to a public hearing attaches by code to appeals of both the Process III decision and the MDNS threshold determination. By delegating assessment of compliance with the *Basin Plan* and traffic impacts to staff review, the Examiner is arguably removing the ability of the public to appeal some potentially significant issues."

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Without further definition, the Examiner states he is "taking a modest risk in imposing conditions." Reconsideration Decision at page 2 (AR 7734) at line 16. What the Examiner means by a "risk" is not clear, though the assumption is potential reversal by a reviewing court.

Indeed, the Examiner indicates that he would prefer remanding for public comment and appeal, but says he lacks the authority to do so:

> Ultimately, a reviewing court could assess how the conditions were applied under RCW 36.70C.120(2)(c) or (3) to determine whether staff did actually engage in decision making that should have been subject to administrative appeal. With or without that additional evidence, RCW 36.70C.140 authorizes a reviewing court to require the favored limited scope remand that the examiner has no authority to impose for this project. In short, resolving the issues of this application with conditions of approval is the most effective and efficient way to address the situation even if it is found to be in error by a reviewing court.

AR 7738, Line 17 (emphasis supplied). Fairly, this is an invitation to the court to order the remand, which the Examiner says he can't do. But the decision is a crabbed interpretation of the Examiner's authority and an error of law.[19]

The Examiner states that he has "no authority to order a remand" at page 6 (AR 7738), line 10. This is based on his interpretation that a remand for further analysis would be considered a prohibited "second hearing on a project application." But a remand for additional review is not a "second hearing," only a continuation of the first. The statute provides that

> 6) Except for the appeal of a determination of significance as provided in RCW 43.21C.075, if a local government elects to provide an appeal of its threshold determinations or project permit decisions, the local government shall provide for no more than one consolidated open record hearing on such appeal. The local government need not provide for any further appeal and may provide an appeal for some but not all project permit decisions. If an appeal is provided after the open record hearing, it shall be a closed record appeal before a single decision-making body or officer;

RCW 36.70B.060. An "open record hearing" is defined in RCW 36.70B.020(3):

> (3) "Open record hearing" means a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of

[19] The Examiner's interpretation of state statute is a question of law that courts review de novo. *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

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> evidence and information, under procedures prescribed by the local government by ordinance or resolution. An open record hearing may be held prior to a local government's decision on a project permit to be known as an "open record predecision hearing." An open record hearing may be held on an appeal, to be known as an "open record appeal hearing," if no open record predecision hearing has been held on the project permit.

The remand ordered by the Examiner would not involve a new hearing. No new parties will need to be included and no new issues would be raised other than resolution of issues already a part of SWC's original MDNS and Land Use Decision appeals. This is not a situation where new hearings would be held contrary to the statute:

> The county, though, did not just hold the hearings sequentially; it held one hearing under one set of rules (a closed record hearing on the SEPA appeal) followed by another hearing under another set of rules (an open record hearing on the CUP). That procedure contradicts the statutory requirement that the SEPA appeal be consolidated and simultaneous with the underlying CUP hearing.

Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wn.2d 737, 749, 317 P.3d 1037 (2014). The remand on the Basin Plan and traffic issues is a continuation of the appeal claims originally made by SWC. The Examiner ignores the obvious: he has, <u>in fact</u>, ordered a remand, which is disguised as a "condition." A condition would be a mandate to include some specific requirement, such as e.g., install a traffic signal, paint a building a certain color, or add parking spaces. Rather, the Examiner has referred the issue of compliance with the *Basin Plan* to the City staff to establish "*prima facie"* compliance with the code.[20] This is a remand plain and simple.

The Examiner has adopted a crabbed interpretation of his authority. He has ordered a remand, but refused to allow public comment and opportunity for a hearing on compliance with the remand. The Examiner has misinterpreted the applicable statutes regarding multiple appeals. His decision to decline to remand is contrary to law and should be reversed and remanded.

---

[20] The applicable rule is where a record "fails to demonstrate" compliance with environmental standards, the proper decision is to vacate the decision: "The lack of a record renders the County's determination clearly erroneous." *Gardner v. Pierce County Bd, of Com'r,* 27 Wn.App. 241, 246, 617 P.2d 743 (1980). See also discussion at page 47 herein.

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2. CUMULATIVE IMPACT ANALYSIS.

The next error made by the Examiner regarding drainage matters is the denial of the SWC's request that:

> Condition 2 of the Final Decision should specify that the cumulative impacts of the Warehouse B and Greenline Business Park should be evaluated in application of the Basin Plan.

Reconsideration Decision at page 8 (AR 7740), lines 1-2. As noted in the Statement of Facts, individual drainage plans have been prepared for all three of the IRG proposals and accordingly the cumulative impacts can be readily ascertained.

As described on page 8, lines 1-8 (AR 7740), the Examiner refuses to require cumulative review of the drainage impacts of the IRG Development Plan, though he recognizes that "the proposal is subject to the cumulative impact analysis required by FWRC 19.100.030(2)." However he refuses to apply that code section because:

> The narrow standards specifically set for drainage review would be rendered meaningless if the broader standard of FWRC 19.100.030(2) were applied. For this reason, the KCSWDM standards and FWRC 19.100.030(2) are found to conflict.

Reconsideration Decision, page 8 (AR 7740) lines 6-8. This is an error of law for three reasons, each obvious from the plain language of the code.

First, as described above, FWRC 19.100.030 specifically applies to the "need for services such as . . . . drainage and stormwater detention facilities. . . ." And it explicitly requires the decision maker to look at the "likelihood" that a proposed development "would require mitigation due to the cumulative effect of such [development] when aggregated with the similar impacts of future development in the immediate vicinity of the proposed development." Indeed the code is explicit on the responsibility of decision makers:

> No official or body shall approve a development unless provision are made to mitigate identified direct impacts that are consequences of such development.

FWRC 19.100.050. Cumulative drainage and stormwater impacts are regulated by the express language of FWRC 19.100.030, which requires cumulative impact analysis.

Second, and also mentioned above, FWRC 19.05.310 explicitly resolves

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questions of "conflict of provisions," precisely the problem raised by the Examiner:

> The standards, procedures and requirements of this title are the minimum necessary to promote the health, safety, and welfare of the residents of the city. The city is free to adopt more rigorous or different standards, procedures and requirements whenever this becomes necessary. 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.

Third, the code section requiring application of the Basin Plan actually resolves the question of conflict between it and other storm water regulations:

> Where conflicts occur between the two, the drainage requirements of the adopted area-specific regulation shall supersede those in the KCSWDM and Federal Way Addendum.

FWRC 16.25.010(2)(a) (emphasis supplied).

The resolution of conflicts under varying provisions of the Federal Way codes is very clear: the most restrictive provision imposing the highest standard prevails.

The Hearing Examiner erred in his interpretation of the code by failing to require cumulative impact analysis of drainage issues.

E. VIOLATION OF COMPREHENSIVE PLAN.

IRG's application for Warehouse A is governed by the Process III procedures under chapter 19.65 of the Federal Way code. FWRC 19.65.100 contains the "Decisional criteria" for Process III applications, including the following:

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

(Emphasis supplied.) The code makes clear that the burden of proof is on the applicant:

> **19.65.080 Burden of proof.**
>
> The applicant has the responsibility of convincing the director that, under the provisions of this chapter, the applicant is entitled to the requested decision.

The Federal Way Comprehensive Plan has a specific designation in its Land Use Element, "Corporate Park," applicable only to the former Weyerhaeuser property.

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This provision reads 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

This designation deals with just the Weyerhaeuser corporate campus. The "Corporate Park" land use designation is followed by Comprehensive Plan Goal LUG8, which specifically provides:

> Create office and corporate park development that is known regionally, nationally, and internationally for its design and function.

The Community Development Director of the City issued his decision on the IRG proposal on February 4, 2019, concluding that the applicant's proposal was consistent with the comprehensive plan. AR 2417 (City Exhibit 6a). SWC appealed the decision and at Paragraph 3.5.11 contended that the proposal for Warehouse A was inconsistent with Federal Way Comprehensive Plan Goal LUG8. AR 6411.

In a prehearing motion, both the City and IRG asked the Hearing Examiner to dismiss SWC's claims that the Warehouse A proposal violated the Federal Way Comprehensive Plan because the claims were not intended to apply to specific development projects. The Hearing Examiner ruled as follows:

> Given that none of the reasons cited by the Applicant/City for dismissal of claim 3.5, the 3.5 subsections and 3.8.4 have merit, the request for dismissal of those claims is dismissed.

Partial Dismissal Ruling at page 7 (AR 7894).

At hearing, the plans of the applicant for Warehouse A were presented, disclosing a rectangular warehouse with tilt-up concrete walls, surrounded by acres of impervious (asphalt) surfaces for parking and unloading tractor-trailer units. AR 152-153. No evidence was provided during the hearing by the applicant that its design and plan would be "known regionally, nationally and internationally for its design and function" as required by LUG8.

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Compliance with LUG8 was addressed by the Hearing Examiner in the Final Decision. Significantly, the Examiner conceded that the design for Warehouse A did not meet the LUG8 standard:

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

Final Decision at 34, lines 7-9 (AR 7878). Notwithstanding this finding, the Examiner concluded LUG8 was met because:

> "Warehouse A will not detract from the regional, national and international status of the headquarters. Ultimately, Warehouse A's contribution to the high status of the headquarters building and its surrounding campus is that Warehouse A is designed to stay out of the way."

Final Decision at 34, lines 15-17 (AR 7878) (emphasis supplied). Importantly, the Hearing Examiner applied the terms of LUG8 only to Warehouse A, not addressing the cumulative impacts of four other new buildings, all but one significantly larger and more visible than Warehouse A. See IRG's Development Plan, Appendix A.

The conclusions reached by the Hearing Examiner are in error for the following reasons.

1. At the outset, LUG8 is specifically, and only, applicable to the Weyerhaeuser Corporate Campus, purchased by IRG in 2016. It is not a general hortatory pronouncement applicable to a broad number of properties in the City. As noted above, LUG8 is applicable to the "Corporate Park" designation, which is limited to the former Weyerhaeuser campus. As the designation states: "The property is a unique site, both in terms of its development capacity and natural features." In keeping with the unique nature of the property, it was natural and appropriate that future development of the property continue with the same high standards of design and function. The Federal Way City Council knew exactly what it was doing when it required that new development must be "known regionally, nationally and internationally for its design and function."

2. LUG8 was included in the revisions to the Federal Way Comprehensive

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Plan adopted in 2015. That comprehensive plan adoption, like others, is appealable to the Growth Management Hearings Board under RCW 36.70A.280(1)(a). Once adopted and not challenged, the property owner cannot later challenge the application of the adopted comp plan.

> The language in the GMA is clear and unequivocal. Comprehensive plans and development regulations, including their amendments, are presumed valid upon adoption. RCW 36.70A.320(1). Should a party wish to challenge adopted plans or regulations, it must petition the growth board for review. RCW 36.70A.280(1).

The Town of Woodway v. Snohomish County, 180 Wn.2d 165, 174, 322 P.3d 1219 (2014). There is no evidence that Weyerhaeuser or IRG ever challenged LUG8 before the Growth Board, the Courts or in any other forum.

3. Similarly, the requirement in FWRC 19.65.100 that an applicant for a Process III application must demonstrate that "it is consistent with the comprehensive plan" was in effect when the comprehensive plan was adopted in 2015. If the property owner thought the special obligation found in the comprehensive plan was too burdensome to meet during permit proceedings, then a challenge could have been filed with the Growth Board on that issue as well. No challenge was filed.

4. It is true that when the most recent Federal Way Comprehensive Plan was adopted in 2015, Weyerhaeuser owned the corporate campus; the property was sold to IRG later. In normal course, a purchaser accepts restrictions on the property when it is purchased:

> If existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes. Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land. Presumably regulations on use are reflected in the price a purchaser pays for a piece of property. This landowner knew when he purchased this lot that it did not satisfy either the minimum lot size or the setback requirements of the MCSMP.

Buechel v. State Dept. of Ecology, 125 Wn.2d 196, 209-10, 884 P.2d 910 (1994). Similarly, an experienced developer, with top-tier legal counsel, would have known that the zoning code placed a high bar for development, requiring its "design" to be known "nationally and internationally." No question this would be a difficult burden for

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a developer in this business of building very large tilt-up concrete warehouses, but presumably the due diligence connected with a $70,000,000 property purchase would have addressed this property-specific restriction. Given the likelihood that the property is eligible for listing on the National Register of Historic places, and that it was a "unique site," it comes as no surprise that extraordinary design standards would be required. IRG is in no position to complain when it purchased the property with its eyes wide open.

5. The Examiner goes on to say that LUG8 was "not designed to guide specific project site development." Final Decision, page 34, AR 7878. This misreads the Land Use Goal. Clearly it was *intended* for project development, not as a guide for adoption of zoning; it refers to "design and function" of a specific structure. The Federal Way Council requires that a Process III applicant meet rigorous and explicit "Decisional Criteria" before an application can be approved:

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

(Emphasis supplied.) Furthermore, zoning for the property was already set, having been in place since 1994 when the Concomitant Zoning Agreement was adopted, so there was no additional zoning to be guided by the Comprehensive Plan. The obligation that new proposals "create office and corporate park development that is known regionally, nationally and internationally for its design and function" obviously applies to individual projects.

6. On page 34 at lines 9-11 (AR 7878), the Examiner says:

> Due process requires some element of reasonableness to be incorporated into zoning standards. Construing the goal above as requiring a warehouse can only be allowed if it is likely to win international awards for its architectural design is not reasonable when the warehouse is otherwise listed as an authorized use by the CZA.

The foregoing presents another clear error of law. First, while "due process" is generically invoked by the Examiner, and he fails to elaborate, he appears to

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anticipate a regulatory taking claim. But such considerations are not relevant here where IRG purchased the Weyerhaeuser property with full knowledge that any new development must be "known regionally, nationally and internationally for its design and function." An owner cannot buy itself into a due process claim of inverse condemnation; generally, such a claim is personal to and actionable only by the property owner at the time of taking. *Gilliam v. City of Centralis*, 14 Wn.2d 523, 530, 128 P.2d 661 (1942). A cause of action for injury does not pass to a subsequent purchaser in part because the price of property is deemed to reflect conditions and circumstances at the time of sale*. Crystal Lotus Enterprizes v. City of Shoreline,* 167 Wn.App. 501, 505, 274 P.3d 104 (2012).

Second, and as addressed above, if the property owner at the time LUG8 was adopted thought the regulation was too restrictive and confiscatory, it could have appealed the provision to the Growth Management Hearings Board. See discussion above. RCW 36.70A.280(1) permits appeals of development regulations and comprehensive plans on the basis that the local government "is not in compliance with the requirements of this chapter." One of the explicit "planning goals" of the GMA is the following:

> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

If IRG (or Weyerhaeuser) thought design criteria were "arbitrary or discriminatory" the Growth Board provided a forum for relief.

Third, the Examiner indicates that the requirement for regional, national and international recognition is "not reasonable where the warehouse is otherwise listed as an authorized use by the CZA." It is not up to the Examiner to second guess the Council to determine what is reasonable or not; as noted, this is the responsibility of the Growth Boards. It is up to the Examiner to enforce the municipal code as written, not as he would prefer.

Nor does application of LUG8 prevent the construction of a warehouse. There

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is no indication in the record that IRG cannot meet the admittedly difficult design parameters established by the code; IRG simply does not want to go to the trouble. The Comprehensive Plan section deals with "design and function," not with use; LUG8 does not prohibit warehouses, it only requires their design and function must be exceptional. In any event, IRG knowingly accepted this burden when they purchased a unique property with unique requirements for design and function. It has simply failed to meet the criteria.

7. Finally, the Examiner makes a clear error of law when he changes the criteria of LUG8. At page 34, lines 13-17, AR 7878, the Final Decision says LUG8 is met because Warehouse A "will not *detract* from the regional, national and international status of the headquarters" (emphasis added) at least partially because it will "stay out of the way." But the operative verb in LUG8 is "create." The Weyerhaeuser corporate campus has existed since 1970 and is a "unique site" with the comprehensive plan and zoning addressing new development, not existing development. "Create" establishes the mandate for <u>new</u> development. The Examiner's legal interpretation would require the deletion of the verb "create" and substitution of the verb "preserve."

In sum, the Examiner erred in his interpretation of LUG8, requiring reversal of his decision approving the IRG proposal.

F. TRAFFIC CONGESTION.

IRG's Development Plan will create unprecedented volumes of traffic, both commercial trucks and other vehicles. IRG Rebuttal Exhibit 4 (AR 7904) admits to weekday traffic volumes of 4,357 vehicles from its Development Plan, with 107 trucks during the AM peak hour (nearly two a minute). This traffic is imposed on a residential neighborhood and a nearby highway system that is heavily congested.[21] See MDNS Comment letters from the King County and State Departments of Transportation. AR

[21] Land Use issues 3.8.1 and 3.8.2 address the inadequacy of local streets and ramps to SR-18. AR 6414.

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7613, 7615.

However, the City emphatically and specifically refused to require that IRG prepare a cumulative traffic impacts analysis for the three Projects in the Development Plan. SWC included Land Use issues 3.8.1 and 3.8.2 (AR 6414) in its appeal to address the inadequacy of local streets and ramps to SR 18. These appeal issues asserted that the City should prepare a comprehensive traffic analysis of the three projects.

Support for such analysis comes not only from SEPA, but three specific provisions of Federal Way code which each explicitly require consideration of cumulative traffic analysis.

1. FWRC 19.100.030(2).

As described above related to consideration of the Hylebos Basin Plan, this code section requires consideration of "cumulative impacts."

> 19.100.030 Determination of direct impact.
> Before any development is given the required approval or is permitted to proceed, the official or body charged with deciding whether such approval should be given shall determine direct impacts, if any, that are a consequence of the proposed development and which require mitigation, considering, but not limited to, the following factors:
> (1) Predevelopment versus postdevelopment need for services such as city streets, sewers, water supplies, drainage and stormwater detention facilities, parks, playgrounds, recreational facilities, schools, police services, fire services and other municipal facilities or services;
> (2) Likelihood that a direct impact of a proposed development would require mitigation due to the cumulative effect of such impact when aggregated with the similar impacts of future development in the immediate vicinity of the proposed development;
> (3) Size, number, condition and proximity of existing facilities to be affected by the proposed development;
> (4) Nature and quantity of capital improvements reasonably necessary to mitigate specific direct impacts identified as a consequence of the proposed development;

(Emphasis supplied.) As seen, "streets" are one of the several services that require the cumulative impact analysis. Plainly, the three IRG projects are within the "immediate vicinity" of one another and are all slated for future development.

2. FWRC 19.90.120(2).

FWRC 19.100.030(2) is not the only section of the Federal Way code to require

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"cumulative impacts" review of transportation impacts. FWRC 19.90.120(2), the City's transportation concurrency ordinance, requires the following:

> (2) For the purposes of this chapter, application for a development permit shall include consideration of the cumulative impacts of all development permit applications for contiguous properties that are owned or under the control of the same owner, when one or more development permits would be issued within two years of the date of issuance of a development permit for such contiguous property.

(Emphasis supplied.) This unambiguous section also requires all development permit applications to consider "cumulative impacts" on contiguous properties owned by the same applicant.

As seen in the Statement of Facts, the three IRG projects fully meet the criteria of FWRC 19.90.120(2): a) they are contiguous properties (see Appendix A), b) all have the "same owner" (IRG), c) there are pending applications for Warehouse A, Warehouse B and the Greenline Business Park, d) all permits would be issued within two years, and e) all are part of the common Development Plan shown in Appendix A.

3. GUIDELINES FOR THE PREPARATION OF TRAFFIC IMPACT ANALYSIS.

In addition to the provisions in its land use code, Federal Way carries forward the obligation for cumulative impact analysis into its guidelines for the preparation of Traffic Impact Analysis ("TIA"). These guidelines, referenced here as "G/TIA," direct the content of a TIA that must be prepared for each substantial project within the City. The G/TIA is found at IRG Rebuttal Exhibit 8, page 3-43 (AR 7911). Two sections of the G/TIA require the preparation of cumulative impact analysis, discussed below.

a. Phased Development.

In Subsection IV, the G/TIA addresses "Development-Related Traffic." Under (B), the TIA must calculate project trip generation, as follows:

> B. Calculate Trip Generation. 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, or if the proposal involved a zone change, the proposed zoning.

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Section IV.B (emphasis supplied). Again, consistent with other provisions of Federal Way regulations, a consideration of the cumulative impacts of development is required for projects built in phases.[22] IRG's own plan at AR 3178 shows the "Woodbridge Development Plan" with Warehouses A and B as well as the Greenline Business Park in three buildings to the north. Emails from the project engineer for all three projects, Eric Labrie, indicate the projects are being pursued in phases, albeit with interchangeable parts, with a March 19, 2018, email request to the City to:

> swap the current order of review, placing Building A's Process III application in front of Building B. We understand that this will delay receipt of comments for the Building B project; however, this should allow building A to move forward expeditiously.

AR 7313. It is clear that IRG is approaching development of its property in phases, with Warehouse A being the first, then moving on to Warehouse B and finally to the three buildings proposed in the Greenline Business Park.

Given the requirements of the G/TIA, these "phases of the development" require review of transportation impacts during the first phase.

Yet, despite the continuous comments from the public, WSDOT, the King County Department of Transportation and others, no cumulative traffic analysis of the three pending projects (all with complete applications) has been prepared.

b. Adjacent Major Development.

In addition to the requirement to include "phased development in a project TIA, the G/TIA contains in Subsection III, the "Forecast of Conditions Without Development," which includes the estimated year of completion of the project, the "Annual Growth Rate" and, under Subsection III.C, the following:

> Add Impact of Adjacent Major Developments Pending and Approved. The City will supply copies of applicable Transportation Impact Analyses and concurrency analyses, if available.

IRG Rebuttal Exhibit 8, page 3-43 (emphasis supplied) (AR 7920). The Greenline Business Park is an "Adjacent Major Development" which was "pending" at the time

[22] See Land Use Appeal issue 3.8.3, AR 6414.

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the Warehouse A/B TIA was filed (March 2018), having been submitted in November, 2017. It was a "major development" because it would have more than 100 peak hour trips (the threshold for "Major New Development" in the G/TIA is 100 or more trips during "any peak hour;" see page 3-41, AR 7918). Significantly, the requirement to "add impact" of these new developments is not based on ownership of the parcels.

The City contends in its brief before the Hearing Examiner at page 15, lines 15-24 (AR 7417), that IRG's TIA took into account "other pipeline development projects" that were pending at the time of application for Warehouse A and claims "the City followed the standards set forth in the TIA Guidelines." However, IRG had filed its application for the Greenline Business Park in November, 2017, and it was "pending" months before the March 6, 2018, TIA for Warehouses A and B, yet it was not included in the TIA.

As seen from the foregoing, the City has adopted special requirements for assuring that TIA take account of not just the projects currently under review, but also other pending or future projects.

In his Reconsideration Decision, the Hearing Examiner substantially agreed with SWC on the need for the "Transportation Error of Fact" identified at pages 3-4, AR 7735; the Examiner concludes that additional cumulative analysis is required, similar to the requirement for application of the Hylebos Basin Plan as identified above. Accordingly, the Examiner required that Condition 1 in the Final decision be modified as follows:

> Condition No. 1 must be revised to require the assessment of cumulative impacts of both AM and PM troff for the Weyerhaeuser Way South, SR18 westbound intersection. This can most efficiently be accomplished by requiring the Warehouse A and B TIA to be supplemented with a SEPA analysis that makes a cumulative impact analysis of the traffic impacts to the Weyerhaeuser Way S/SR18 westbound intersection for Warehouse A and B projects.

AR 7737.

As with the Hylebos Basin Plan discussed above, so far so good: the incorrect and incomplete traffic analysis has been found inadequate and correction is required.

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However, as with the Basin Plan, the Examiner does not reopen or remand for this analysis, but instead simply gives it over to IRG and City staff to address, without provision for public input or potential for appeal in the event of continuing error. Simultaneously, the Examiner admits to "Potential Error in Delegation of Decision Making." AR 7738. As with the discussion on the Basin Plan, the Examiner has made a *de facto* remand to the City and applicant, but without any obligation to consider public input or right to an appeal or an evidentiary hearing, as there was for the original (and erroneous) traffic impact determinations.

Moreover, unlike the more straightforward Basin Plan remand, the revised Condition 1 provides an alternate path for analysis, all subject to the discretion of City staff. Thus, the cumulative traffic analysis can be done in a "SEPA analysis addendum and/or a revision to the Warehouse A and B TIA" at the discretion of staff. Reconsideration Motion at 9, AR 7741, at lines 1-2 (emphasis supplied). PM peak hour "cumulative analysis 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." AR 7741, line 1-4 (emphasis supplied). Moreover, staff will determine whether City or State standards apply. AR 7741, at lines 3-4. All of these choices and analysis are given over to the sole discretion of City staff.

At page 2, line 19 of the Reconsideration Decision (AR 7734), the Examiner indicates:

> Given the poor choices available for resolving the SR 18 and Basin Plan issues, addressing those issues by imposing conditions is the most effective and efficient course. More likely than not, staff review of the conditions will be limited to minor and/or ministerial decision-making the Land Use Petition Act ("LUPA") statutes give the court the opportunity to re-open the administrative record to consider whether the decision-making was exercised in that manner.

AR 7734 at lines 21-22. The Examiner goes on to say that if the staff "does find itself making significant discretionary decisions in application of the conditions, it has some options to address the situation that would subject the decision to administrative appeal." One is that staff might process the condition as a "major amendment" to the

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application or as "an administrative interpretation," both of which "would provide the opportunity for appeal sought by the Applicant . . .". Reconsideration Decision at pages 2-3, AR 7734-35. Tellingly, the Reconsideration Decision leaves the City staff with unfettered discretion in considering these options. Given it was staff that was responsible for the deficiencies in the first place, it is unlikely they would want to subject their next round of decision-making to additional review.

Instead of wishing and theorizing about what staff might do or what a court might do, the Examiner should have resolved the issue by a remand back to the City to reopen the record, collect additional evidence, and revise its decisions, all subject to appropriate public review.

The Examiner certainly has the power to order compliance by staff with its own codes. This is particularly true under SEPA where the Hearing Examiner has authority to determine whether there has been compliance with the procedural requirements of the statute. Indeed, in his Reconsideration Decision, the Examiner freely admits that violation of traffic standards would occur on approval of the project and (supposedly) remedies it by a condition requiring the applicant to "supplement its Warehouse A and B TIA with a SEPA analysis that assesses the cumulative traffic impacts" of the three projects. AR 7733. But Washington caselaw fully supports a remand when deficiencies in SEPA analysis occur:

> Douglass cites no authority, and we find none, that suggests that a hearing examiner may not, after hearing a SEPA appeal, reverse a threshold determination and remand for entry of a different threshold determination.

Lanzce G. Douglass, Inc. v. City of Spokane Valley, 154 Wn.App. 408, 225 P.3d 448 (2010).

So it is here. The Examiner has found errors in the assessment of traffic impacts and in the failure of staff to even consider the Hylebos Basin Plan. These failures could be the basis for outright reversal, or the Examiner could use his authority to remand for further review, which would include opportunity for public comment, appeal and quasi-judicial review.

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The Court should hold that the Examiner has the authority to remand for further proceedings and remand to him to exercise that discretion. In the alternative, as the Examiner has indicated, the court itself has authority to remand and should order remand of the conditions imposed by the Examiner with opportunity for public comment and further on-the-record administrative review following Federal Way Process III standards.

G. THE CITY'S FAILURE TO CONSIDER CUMULATIVE EFFECTS CANNOT BE CURED BY POST HOC RATIONALIZATION.

In the hearing, the City advanced a new argument: that notwithstanding its firm position that it legally could not consider cumulative effects, the City had actually considered cumulative effects after all, on transportation, stormwater runoff, wetlands, and streams. The City's Post Hearing Brief at 57-58 says:

> Under questioning at the appeal hearing, multiple City witnesses stated unequivocally that the substance of this [cumulative effects] analysis had in fact been performed during the regulatory review process for the Warehouse "A" proposal. Testimony to this effect was provided not merely from Director Davis himself, but also from Senior Planner Stacey Welsh and from the City's transportation, stormwater and wetlands/streams experts . . . ."

(Citations omitted). AR 7459-60. This is post hoc rationalization which the Hearing Examiner erred in accepting. See pages 23-25 of his decision, AR 7867-69. This decision is challenged at Paragraph 7.8 of SWC's LUPA petition.

Courts bar consideration of post hoc rationalization, which occurs "where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body." *Independence Mining Company, Inc. v. Babbitt,* 105 F.3d 502, 511 (9th Cir. 1997); see *Securities and Exchange Comm'n v. Chenery Corp.,* 318 U.S. 80 (1943); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971) ("These affidavits were merely 'post hoc' rationalizations . . . which have traditionally been found to be an inadequate basis for review."); *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962) ("The court may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery*

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requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."). This doctrine applies in the State of Washington. See, e.g., *Somer v. Woodhouse,* 28 Wn.App. 262, 272, 623 P.2d 1164, (1981) ("The absence of this statement may render a rule invalid, for agency action cannot be sustained on post hoc rationalizations supplied during judicial review."); *Ellis v. City of Seattle,* 142 Wn.2d 450, 465, 13 P.3d 1065 (2001).

The City provided no evidence it did the cumulative impacts analysis for any of the topics stated, other than for the "modest" shared infrastructure already described. With those minor exceptions, the City's MDNS and Land Use Decision findings explicitly reject the need to consider the effects of Warehouse B and the Business Park when making its decisions on Warehouse A. See Statement of Facts. The City gave two legal justifications for limiting its analysis to the impacts of Warehouse A: First, that the City cannot require Warehouse A to mitigate impacts from Warehouse B or the Business Park; and second, that the developer must agree to combine its projects under a master plan or into a single project to enable a review of cumulative effects. The first of these arguments is discussed below; the second was discussed above. Neither of these arguments is valid. See discussion above re "closely related" proposals; *City of Federal Way v. Town & Country Real Estate, LLC,* 161 Wn.App. 17, 252 P.3d 382 (2011). Nevertheless, the City's decision must stand or fall based on its stated justifications that it legally could not consider cumulative effects.

It was only at the hearing – that is, during review by another body (the Examiner) – that City witnesses claimed they had in fact done cumulative effects analysis. They provided no documentation or other proof to counter the written decision-making record stating otherwise. The Examiner states that this analysis of cumulative impacts was completed under the following:

> The SEPA official, serving as the City's Community Development Director, more likely than not by virtue of his position knew and understood the cumulative impacts review incorporated into his City's development regulations when he issued the MDNS. The multiple references to Warehouse B in supporting documents identified by the responsible official are many times likely

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attributable to those cumulative review standards.

Final Decision at 25 (AR 7869) lines 4-6 (emphasis supplied). This statement indicates that the Community Development Director was actually *thinking* about compliance with FWRC 19.100.030(2)'s cumulative impact standards – part of the City's development regulations – when making the decision, but unaccountably that section of the code is never mentioned in his 28-page, single spaced "Findings for Project Approval." AR 2420. Instead, these "Findings" reject 300 comments on the project application and 66 for the MDNS which specifically asked for "cumulative SEPA review" and a "master plan." See page 2, Paragraph 6 (AR 2421). That a decision maker was "likely" thinking about compliance with standards is insufficient to overcome what was said in writing when the decisions were made, i.e., that the City is prohibited from performing cumulative impact analysis.

SEPA requires that agencies demonstrate "prima facie" compliance with SEPA criteria and "actual consideration" of environmental factors:

> If the governmental body makes a threshold determination of "no significant impact" under SEPA, it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA. *Narrowsview Preserv. Ass'n v. Tacoma*, 84 Wash.2d 416, 422, 526 P.2d 897 (1974); *Eastlake Com. Coun. v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 494, 513 P.2d 36, 76 A.L.R.3d 360 (1973); *Juanita Bay Valley Com. Ass'n v. Kirkland*, supra, 9 Wash.App. at 73, 510 P.2d 1140. Further, Before a court may uphold a determination of "no significant impact," it must be presented with a record sufficient to demonstrate that actual consideration was given to the environmental impact of the proposed action or recommendation.

Lassila v. City of Wenatchee, 89 Wn.2d 804, 814, 576 P.2d 54 (1978). As the Court said later in the decision:

> At minimum SEPA requires a threshold determination for such recommendations and an actual consideration of potential environmental significance. The city commissioners met neither requirement. Finding serious noncompliance with SEPA's mandate, we must vacate the City's amendment of its comprehensive plan.

Id. at 817. Similarly, in *Gardner v. Pierce County Bd. of Com'rs*, 27 Wn.App. 241, 245, 617 P.2d 743 (1980) the court insisted that the agency demonstrate "prima facie" compliance with SEPA:

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> Whether or not property owners in petitioner's position specifically raise a SEPA challenge, the record of a government agency's negative threshold determination must demonstrate that environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the procedural requirements of SEPA. *Sisley v. San Juan County,* 89 Wash.2d 78, 569 P.2d 712 (1977); *Juanita Bay Valley Community Ass'n v. Kirkland,* 9 Wash.App. 59, 510 P.2d 1140 (1973). The SEPA policies of full disclosure and consideration of environmental values require actual consideration of environmental factors before a determination of no environmental significance can be made*. Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash.2d 267, 552 P.2d 674 (1976).

On page 246, the Court went on:

> It is not clear, however, whether any engineering justification can be made for approval of smaller lots. Without a clear record on this point, the County has failed to demonstrate a justification for its negative declarations under SEPA. The lack of a record renders the County's determination clearly erroneous. See Norway Hill Preservation & Protection Ass'n v. King County Council, *supra.*

Gardner v. Pierce County Bd. of Com'rs, 27 Wn.App. 241, 617 P.2d 743 (1980).

The City did not explain why it changed its position to claim that City officials actually conducted cumulative impact analysis when their earlier decision documents said it was not allowed under the law. The claims by City officials and experts that they really had done cumulative effects review are simply post hoc rationalizations without a basis in the record and must be rejected.

IV. RELIEF REQUESTED.

The Hearing Examiner erred in not requiring the cumulative impact analysis of the traffic, drainage and historic impacts of its Development Plan mandated by the SEPA Rules and the Federal Way code. The last minute "conditions" imposed not only fail to resolve deficiencies in City decision making, but allow the City staff unfettered discretion in abandoning requirements for the required cumulative impact analysis, without provision for public comment or additional administrative review guaranteed by city codes. Moreover, the Examiner did not require that the high standards of design imposed by the City Council for new development on the unique former Weyerhaeuser corporate campus be demonstrated by the applicant.

Based on the foregoing, the Court should enter the following relief:

a) reverse the Land Use Decision because the proposal is inconsistent with

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Federal Way Comprehensive Plan Policy LUG8 (the project does not "Create office and corporate park development that is known regionally, nationally, and internationally for its design and function");

b) reverse the Land Use Decision because the City failed to require a cumulative impacts analysis for traffic, drainage and storm water, and historic impacts, as required by SEPA and provisions of Federal Way codes for the three IRG proposals;

c) *or,* in the alternative to (b), remand to the City with directions to conduct the cumulative impacts analysis for both drainage/stormwater and transportation impacts, providing for public comment, reopening the record before the City and allowing for additional quasi-judicial administrative review; and

d) remand to the City to conduct review of the Hylebos Basin Plan, providing for public comment, reopening the record before the City and allowing for additional quasi-judicial administrative review.

Respectfully submitted this 16th day of March, 2020.

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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 SWC Post-Hearing Brief 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 March, 2020.

/s/
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