

November 12, 2020
SWC SEPA Appeal
Attachment 1

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October 23, 2020

Stacey Welsh
Federal Way City Hall
33325 8th Avenue South
Federal Way, Washington 98003

Via Email:
Stacey.Welsh@
cityoffederalway.com

Re: MDNS for Woodbridge Warehouse "B" Development (File No. 17-104237-SE)

Dear Ms. Welsh:

This office represents Save Weyerhaeuser Campus (SWC), a Washington nonprofit corporation organized and existing to protect and preserve the community and natural values of the former Weyerhaeuser Campus and adjacent areas. SWC has been active over the past several years in providing comment on proposals by Industrial Realty Group (IRG) to develop three projects on the former Weyerhaeuser Campus.

On October 9, 2020, the Federal Way SEPA Responsible Official issued a Mitigated Determination of Nonsignificance (MDNS) for the proposed Woodbridge Warehouse "B," a 214,050 square foot general commodity warehouse with 245 parking spaces on a 16.85 acre site (hereinafter Warehouse B). The proponent is Federal Way Campus LLC. The comment period for this proposal ends on October 23, 2020.

This letter constitutes SWC's comments on the Warehouse B proposal. In summary, the MDNS was issued in error for two reasons. First, the City did not adequately consider the impacts of the entirety of the IRG proposals on the former Weyerhaeuser Campus, including Greenline Warehouse "A" (File No. 16-102948-SE) and the Woodbridge (formerly Greenline) Business Park (File No. 17-105491) as well as Warehouse B. These overall proposals clearly would have significant adverse impacts. Secondly, the impacts of Warehouse B alone create a reasonable likelihood of more than a moderate adverse impact on environmental quality. In either case, the currently issued MDNS should be withdrawn and scoping should begin for preparation of a full environmental impact statement.

This comment letter incorporates the comments provided by SWC on the Greenline Business Park proposal by letter dated May 29, 2018, attached hereto (see Attachment A) and incorporated by this reference. In that letter, SWC indicated that the Greenline Business Park and Warehouses A and B should be consolidated for land use and

environmental review.¹ The cumulative impacts of these three projects should be considered.

STANDARDS FOR ISSUANCE OF A THRESHOLD DETERMINATION.

Under the SEPA rules the City must determine whether a proposal “is likely to have a probable significant adverse environmental impact.” WAC 197-11- 330(1)(b). A single significant impact is enough to warrant an EIS, but also “(c) Several marginal impacts when considered together may result in a significant adverse impact” *Id.* at 330(3)(c). Here there are several impacts that must be considered, including impacts on historic resources, as outlined by letters from King County, the State of Washington Department of Archaeology & Historic Preservation (DAHP), the Cultural Landscape Foundation and other agencies and individuals that submitted comments to the City regarding the Weyerhaeuser Campus. SWC has read these letters, agrees with them and incorporates them by reference herein.

PROJECT PROPOSAL.

The application, according to the MDNS, is for a "general commodity warehouse." This use sets a number of environmental parameters, trip generation parameters, standards regarding release of air pollution, the need for limitation of impervious surfaces, etc. to address expected environmental impacts. For reasons stated herein, SWC believes that the MDNS has been issued in error.

IRG has represented, however, in its filings before the U.S. Army Corps of Engineers (USACE) other possible uses for Warehouse B (and Warehouse A). Accordingly, the City’s decision should explicitly provide that the MDNS is issued solely for the "general commodity warehouse" and will become null and void if there is any change in use for the proposal. If the use of the site, or use of the building, changes from the explicit application before the City, the permit and development process, including SEPA, should start over with the new project information.

CUMULATIVE IMPACTS.

As noted in our May 29, 2018 letter and reinforced by Hearing Examiner and court decisions, the environmental impacts of Warehouse A and B and Greenline Business Park projects must be reviewed cumulatively. Comments herein supplement our 2018 letter.

The Greenline Business Park has also been under consideration for several years, in

¹IRG has rebranded its projects on the former Weyerhaeuser site as the “Woodbridge” proposals. Because SWC’s prior communications and City decisions reference the “Greenline” proposal we continue that reference.

parallel with Warehouses A and B. Like Warehouse A, the City has had multiple and detailed documents before it as part of the Greenline Business Park application.

In the Warehouse A MDNS the City contended that Warehouse B and the Greenline Business Park are complex projects that may take additional time for review, thus environmental review under SEPA could not take place at the time of the Warehouse A application. The City's position reflects a fundamental misunderstanding of the law.

Under WAC 197-11-055, two obligations are created for local government. First, under Subsection 1:

The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(Emphasis supplied.) This obligates the local government to assure that SEPA becomes a part of local decision making. Second, under Subsection 2:

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.

(Emphasis supplied.) Under WAC 197-11-310(2):

(2) The responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to the time an agency has developed or is presented with a proposal (WAC 197-11-784). If the lead agency is a GMA county/city, that agency must meet the timing requirements in subsection (6) of this section.

(Emphasis supplied.) WAC 197-11-784 provides that: "A proposal exists at that stage in the development of an action when an agency is presented with an application" Note that with the use of the word "*shall*" in WAC 197-11-310(2) the requirement is mandatory, but the City has not issued a threshold determination for the Greenline Business Park, despite having detailed project plans and environmental reports for more than three years. The City's failure to act violates its obligation to issue a threshold determination "as close in time as possible to the time an agency . . . is presented with a proposal."

The time for the City to issue a threshold determination for the Greenline Business Park project has long since passed. The applicant long ago submitted environmental documents and abundant detail is available for review. SEPA requires review of the cumulative impacts of the Greenline Business Park and Warehouse A along with those of Warehouse B. These impacts are significant, and an environmental impact statement is required. The MDNS should be withdrawn.

TRAFFIC IMPACTS.

The City's decision relies on a traffic study prepared by TENW on March 6, 2018, *IRG Greenline Buildings A and B Federal Way, WA Transportation Impact Study*, TENW Transportation Engineering NorthWest (March 6, 2018). The court has clearly directed the City, however, to consider the traffic impacts of the Greenline Business Park and Warehouse A, along with other traffic impacts, in evaluating the traffic impacts of Warehouse B. Rather than conduct the necessary analysis, however, the City imposes a vague condition, in Mitigation Measure #11, that "cumulative traffic impacts" from Warehouse A, Warehouse B and the Greenline Business Park on the S.R. 18 westbound ramp intersection with Weyerhaeuser Way "shall be evaluated and mitigated" in SEPA documents. SWC believes this and other traffic-related conditions are incomplete and inadequate, for several reasons.

1. The City has in hand, for Warehouse A, an updated traffic study showing a continued loss of service (LOS) failure and a conflicting conclusion of no LOS failure. Both are relevant to and need to be evaluated for Warehouse B, and the differences reconciled in the public record, allowing for meaningful public review and comment.

The LOS failure is documented in the updated Traffic Impact Analysis for Warehouse A, dated March 24, 2020. It concluded that the cumulative impacts of Warehouses A and B and the Greenline Business Park will continue to cause a LOS failure (level E, in violation of WSDOT standards) at the intersection of Weyerhaeuser Way S and SR-18. On April 6, 2020, TENW followed up with an analysis of how the costs of mitigating the increased traffic levels should be allocated among IRG's projects. These costs would be minimal, though, because TENW had recommended shifting IRG's mitigation responsibility to the driving public: it suggested that WSDOT merely re-time the traffic signal to bring impacts below the LOS threshold.

WSDOT, on reviewing the TIA, declined to commit to changing the SR-18 light timing and took issue with TENW's characterization of any such action as mitigation. Swires, Mike & Maan, Sidhu, Memorandum to Ramin Pazooki & Duffy McColloch re Woodbridge Business Park—Updated Traffic Impact Analysis, p. 2, Washington State Department of Transportation (June 18, 2020). WSDOT said it was not requesting any additional mitigation at this time. This leaves the LOS failure—a significant environmental impact—unmitigated. The City should as a result be requiring an EIS for Warehouse A.

For reasons that are not clear in the record, however, on July 22, 2020, TENW submitted a short “SEPA analysis addendum” to the City referring to a new, July 17, 2020 updated TIA for the three projects. In contrast to the March 24 TIA (and the previous TIA presented to the Hearing Examiner), the “addendum” said the new TIA concluded there would be no LOS failure at the SR-18 intersection. Remarkably, it said the delays at the intersection after all three projects are built (47.5 seconds) will be lower than the delays without any of the projects (53.1 seconds, as reported in previous studies).

The new TIA obviously raises questions about its methodology and assumptions. To our knowledge, however, it is not included in the record for Warehouse A or Warehouse B. We do not know whether it was presented to WSDOT for review, nor whether its assumptions are realistic, and whether it otherwise protects the State’s interests.

Consideration of these impacts is required not only by SEPA, but by FWCC 19.90.120(2), which 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...

Instead of disclosing the more current (and conflicting) information, however, and allowing meaningful public review and comment, the City relies on a 2018 transportation impact study that is now more than two and one-half years old for SEPA analysis in an October, 2020 MDNS.

This lack of disclosure is inconsistent with SEPA and denies the public the information needed to make meaningful comments on a project. Mitigation Measure 11 indicates that cumulative traffic analysis could be included in the future, in a SEPA analysis addendum or a revision to the Warehouse A and B TIA. It does not disclose or explain the existence of conflicting and confusing studies covering the same property. The City should withdraw the Warehouse B MDNS for this reason alone until the record is complete and the public has had the chance to evaluate it.

2. Mitigation Measure 8 also discussed traffic volumes and impacts for travel to and from the site, including origins or destinations north of the site. Because of the impact of such traffic on residential and commercial areas north of the site, and continuing congestion concerns at South 320th, including impacts from I-5 off and on ramps, the City should require that the applicant prohibit all trucks using the facility from using Weyerhaeuser Way north of the site and require installation of traffic control measures to enforce that requirement. This would include contract provisions with customers and users of Warehouse B, prohibiting access from the north.

The reports conducted on the campus's historic values, discussed below, find that the curving, tree-lined roads are an important aspect of the environmental and historical value of the campus. Mitigation Measure 8 would allow IRG to eliminate those curving roads with ease, and with little further review of the impacts. The City believes that IRG will balk at the costs of rebuilding these roads, but that is an untested assumption. One can easily envision the opposite outcome: that a wide, straight thoroughfare allowing industrial trucks to run parallel to a crowded I-5 would be well worth the cost for IRG. Without real legal and contractual restrictions, the City is relying on an untested belief as its only mechanism to avoid serious, adverse impacts to the quality of the neighborhoods and the historic nature of the campus. We object strongly to the gamble the City is engaged in, essentially pre-approving a new industrial truck route without even a minimal evaluation of its environmental and other consequences.

3. The cumulative impacts discussed in Mitigation Measure #8 should not be limited to impacts to S.R. 18, but consider all impacted intersections and roadways in the City of Federal Way or other impacted areas.

IMPACTS ON HISTORIC RESOURCES.

The impacts to historic resources of the current proposal, taken individually and cumulatively with Warehouse A and the Greenline Business Park, are significant and require either the preparation of an environmental impact statement or significant mitigation. The City's analysis of these impacts for Warehouse B relies on incomplete and outdated information. The MDNS is not supported and should be withdrawn.

The historical importance of the former Weyerhaeuser corporate campus is exceptional. This is evidenced by IRG's own consultant, Cardno, Inc., in identifying it as a historic district eligible for listing in the National Register of Historic Places. Cardno prepared a Built Environment Survey, a report submitted to the U.S. Army Corps of Engineers (USACE) and the Washington Department of Archaeology and Historic Preservation (DAHP)². According to the Built Environment Survey, p. 6-3:

The former Weyerhaeuser Corporate Headquarters campus is an exceptional example of built heritage that responds to its Northwest context by integrating buildings and landscape into a synergistic whole while using materials, design, and workmanship to reflect the corporate identity projected by the Weyerhaeuser Company at this time in its history. The campus is also an outstanding example of the work of landscape architect Peter Walker (SWA) and architect Edward Charles Bassett (SOM). The former Weyerhaeuser Corporate Headquarters campus is recommended eligible for listing in the NRHP as a historic district . . .;

* * *

² Michelle Sadlier *et al.*, *Built Environment Survey of the Former Weyerhaeuser Corporate Headquarters Campus, Federal Way, Washington*, Cardno, Inc. (July 29, 2020).

The former Weyerhaeuser Corporate Headquarters campus, as defined below, is a historic property so exceptional in historical and design importance that it has achieved significance within the past 50 years.

Unfortunately, the City did not consider the Built Environment Survey in its SEPA analysis on Warehouse B. Instead of referencing that 150+ page report, the SEPA records reference a one-page Memorandum from Cardno to IRG, Built Environment Survey of the Former Weyerhaeuser Corporate Headquarters Campus for Compliance with Section 106 of the NHPA – Comments on SEPA Compliance for Woodbridge Building B, Cardno, July 27, 2020 (Cardno SEPA Memo).

The Cardno SEPA Memo states the consultant's opinion that the impacts of Warehouse B on the campus's historic resources are not significant under SEPA. This reflected a similar opinion Cardno expressed in another report, on the effects of Warehouses A and B under the National Historic Preservation Act.³ Cardno has since revised that second report, to reach the opposite conclusion:

Cardno recommends that the Woodbridge Building A and Woodbridge Building B projects, along with their associated detention pond, will have an adverse effect on the Weyerhaeuser Corporate Headquarters Historic District by diminishing the integrity of the recommended contributing 50-foot buffer east of Weyerhaeuser Road and the driving views the buffer provides.

(Emphasis provided.) Michelle Sadlier et al., *Evaluation of Effects for the Proposed Woodbridge Building A and Woodbridge Building B Projects, Federal Way, Washington*, Cardno, Inc., p. i (September 14, 2020). The City thus acted on incomplete and outdated information in its MDNS decision on Warehouse B.

Even under Cardno's former position, however, the City's conclusions about the effects of Warehouse B on historic values are incorrect. The applicant contends, and the City appears to rely heavily on the idea, that the visual impacts of its industrial warehouses are mitigated by a fifty-foot tree buffer. The tree buffer is inadequate, however, for three reasons.

First, assessing the impacts of Warehouse B alone is not appropriate; the impacts of Warehouse A., at least, should be included as they are adjacent to one another and no construction has begun on Warehouse A.

Second, the site for Warehouse A and Warehouse B is a substantial wooded area that should be included as part of the Historic District or a contributing area thereto. We agree with the Washington Trust for Historic Preservation's position that

³ Michelle Sadlier et al., *Evaluation of Effects for the Proposed Woodbridge Building A and Woodbridge Building B Projects, Federal Way, Washington*, Cardno, Inc. (September 14, 2020).

the entire wooded parcel is a contributing feature of the National Register eligible district, not just the 50-foot buffer and driving views recommended by Cardno. The U.S. Army Corps has not taken a position on this issue, and we expect it will be the subject of well-informed stakeholder debate. We believe the destruction of the interior forest stands for construction of Warehouse B would be a significant adverse environmental impact requiring the preparation of an environmental impact statement or significant mitigation.

And third, the minimal fifty-foot tree buffer is physically inadequate to buffer and protect the campus's historic values, and the City's analysis has not taken into account the expected loss of trees to windthrow and other edge effects.

Buffers must "obscure Warehouse [B] from sight," to quote the standard articulated by the Hearing Examiner⁴, to avoid probable significant adverse impacts to historic resources. It is clear from the visual studies submitted to the City that Warehouse B will be visible from the road, not "out of the way," and will cause adverse impacts. See the photos in Greenline Building B, Visual Impact Analysis, ESM Consulting Engineers (August 10, 2018).

As ESM notes, the buffers around Warehouses A and B are already sparse. In addition, 50' is too narrow to protect against the inevitable loss of trees from windthrow and other edge effects once the site is disturbed. IRG's arborist pointed out the risk of loss of trees in Brian Gilles, *Managed Forest Buffer Management Plan at the Greenline Building B Site*, Gilles Consulting (rev. June 26, 2018). On pages 5-6 he describes this well-known phenomenon in Pacific Northwest forests:

Tree Risk Assessment must be taken seriously on this project and all of the Campus development projects. This is due to the physiology of the trees themselves, their growth in dense stands, the soils, and the large storms that descend upon the region irregularly. When trees grow in a forest such as this, they depend on the trees around them to buffer them from the wind and other storm impacts. This results in a different physically structured tree than the same species of the same age growing in an open setting such as a field, a park, or a pasture.

Trees growing in a dense forest are tall and skinny. They do not have broadly tapered bases or large buttress roots. They do not need them due to the buffering effect of the forest as a whole. Their job is to grow tall and fast to catch sunlight. If they do not keep up with the neighboring trees, they get shaded out and slowly decline and die. Therefore, their internal resources are spent on height growth.

⁴ Findings of Fact 13, Hearing Examiner decision.

This is relevant and important in that, **when dense forest trees are suddenly opened to the wind and storm elements, by clearing of adjacent trees, they are instantly vulnerable to windthrow in severe weather.** This is because, as noted above, they do not have adequate structure in their lower trunks and buttress roots. This can be seen when driving forested lands in the northwest and looking at wind-thrown trees at the edges of recent clear cuts.

Foresters have known this for over 100 years and have a term for it. They call it, “New Edge.” New Edge refers to the trees on the edge of a recent clear-cut. There can be a high percentage of tree failures near the ‘new edge’ created by the clearing/logging of trees in a dense forest due to the growth characteristics noted above. It can take a tree or line of trees along a newly cleared edge many years to develop larger and roots and lower trunks to withstand large storm loads.

Soils and saturated soils also play a huge role in tree risk assessment. The region is known to have areas of hard pan or clay deposits below the surface. Water can build up on top of these impenetrable layers and restrict roots from penetrating deep. This can predispose a tree to fail if it is growing over one of these dense layers and the soil is saturated and a storm overloads the strength of the roots and soil.

The last comment about saturated soils is especially relevant here. The buffers most vulnerable to windthrow are those on the windward side of the buffer (i.e., the down-wind side of new openings). Because Federal Way’s prevailing winds are from the Southwest (especially during storms), the City should expect damage to the buffers between Warehouses A and B and Weyerhaeuser Way S, the very buffers that are most needed to block the driving views from the road. Compounding the problem, IRG’s documents have identified at least three wetlands in the managed forest buffer along Weyerhaeuser Way S. Any trees growing in these wetland soils are even more likely to come down after they lose the stands behind them. This will open even more holes in the buffers, further increasing the visibility of the buildings.

How wide does a buffer need to be to resist windthrow and other damaging edge effects? This was a major issue in Pacific Northwest forests in the late 90s as practices improved to protect water bodies and fish habitat. According to experts, microclimate effects generally extend about “one to three tree heights into forests,” or roughly 100’ to 600’ considering all impacts. Rochelle, James A. et al., *Forest Fragmentation: Wildlife and Management Implications*, p. 117, Brill (1999). On federal forest lands, scientists used 300’ as a conservative buffer to protect streams in the Northwest Forest Plan. Washington’s forest practice rules adopted stream buffers ranging from 100’ (50’ on each side) to over 300’ (both sides) under the 1999 Forests and Fish Agreement. The EIS on Washington’s rules used 75’ as the minimum width for a riparian management

zone (RMZ) for an “acceptable” amount of blowdown, which science suggests will still be 15-20% of the trees. According to the EIS:

Another important aspect considered when evaluating the alternatives was susceptibility to windthrow or blowdown. If an RMZ experiences substantial windthrow, it may not be capable of maintaining desired functions. . . . The RMZs under all alternatives are likely to experience some degree of windthrow in localized areas. Windthrow is a normal occurrence in forests but is known to increase along harvest unit edges after timber harvest opens formerly interior forest trees to more direct wind effects (Harris 1989).

RMZs along streams are subject to similar increases in windthrow. Several studies have attempted to define the relationship between riparian windthrow and various physical and biological features such as topography, valley morphology, aspect, slope, soil wetness, and tree type (Steinblums et al. 1984; Harris 1989). Though these site-specific factors may increase the vulnerability of an RMZ to wind events, no single factor has emerged as being of particular importance on a landscape scale. However, since blowdown is generally greater at the windward edge of a buffer, alternatives with wider RMZs would provide more protection for riparian function.

Pollock and Kennard (1998) reanalyzed several windthrow data sets looking at the relationship between buffer width and the likelihood of windthrow. They reached the conclusion that buffers of less than 75 feet have a higher probability of suffering appreciable mortality from windthrow than forests with wider buffers.

Data for blowdown within buffers from seven studies reported in Grizzel and Wolff (1998) had a mean windthrow level of about 15 percent for 344 sites in western Washington and Oregon with maximum windthrow levels ranging from 17 to 100 percent. Median windthrow levels were usually somewhat lower than the mean because the data are not normally distributed with relatively few sites having extensive blowdown. For example, the mean windthrow level for sites reported by Andrus and Froelich (1986) was 21.5 percent while the median value was 15.5 percent (i.e., half of the sites had less than 15.5 percent windthrow). Windthrow levels in Southeast Alaska were found to average about 9 percent in 66-foot no-harvest RMZs over a 4 to 6 year period following harvest, and most windthrow levels were less than 15 percent (Martin et al. 1998). . . . Susceptibility to blowdown is addressed as appropriate in the effects analysis using a 75-foot buffer width as a general guideline.

U.S. Dept. of Commerce, National Marine Fisheries Service & U.S. Dept. of the Interior, Fish and Wildlife Service, Final Environmental Impact Statement, Chapter 4, p. 4-105.

The City needs to reevaluate its buffer requirements to factor in the predictable loss of

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10-15% of all of the significant trees plus the loss of most or all of the trees on wetland soils. These impacts will be significant, and planting new trees will not be enough to take their place. It will be decades before new trees provide the height, width, and depth of crown provided by the existing forests on the Weyerhaeuser campus.

STORMWATER ANALYSIS.

As described above, the stormwater impacts of applicant's Warehouse A, Warehouse B and Greenline Business Park should be considered together. IRG submitted its environmental checklist on the Greenline Business Park project on October 13, 2016, more than four years ago. That checklist described 1,067,000 square feet of new warehouse facilities and 2,947,175 square feet of new impervious surface. A preliminary stormwater analysis describing runoff from the site has been prepared.

In addition, the City has required a cumulative impact analysis for traffic at the Warehouse B site in Mitigation Measure #11 that includes Warehouse A, Warehouse B and the Greenline Business Park. No logical reason exists as to why cumulative impact analysis for stormwater should not also be prepared, consistent with the City's environmental analysis of cumulative impacts for traffic. The stormwater impacts of the Greenline Business Park combine with those of Warehouse A and Warehouse B south of the Campus and will flow south into the Hylebos Creek system. Given the Greenline Business Park proposal is twice as large as the Warehouse A and Warehouse B proposals together, the combined impact of all three projects to the Hylebos Basin will unquestionably be significant. Further, the Greenline Business Park proposal was initiated with the City more than four years ago, indicating the need to combine its impacts with the Warehouse A and B proposals. See WAC 197-11-784.

CONCLUSION.

The MDNS on Warehouse B has been issued in error. The proposal, individually and cumulatively with other proposals, will have probable significant adverse impacts on the environment. The MDNS should be withdrawn, a determination of significance issued, and scoping initiated for an environmental impact statement.

Sincerely,



J. Richard Aramburu

JRA:cc

cc: Save Weyerhaeuser Campus

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May 29, 2018

City of Federal Way
33325 8th Ave. S.
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Attn: Brian Davis, Director
Department of Community Development
And Jim Harris
Planner

Via Email:
Brian.Davis@cityoffederalway.com
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Re: **Greenline Business Park Application (File #17-105491);
Proposals for Warehouse A (#16-102947-00-UP, 16-102948-00-SE) and
Warehouse B (#17-104236-UP, 17-104237-SE).**

Dear City of Federal Way:

This office represents Save Weyerhaeuser Campus, a Washington nonprofit corporation organized and existing to protect and preserve the community and natural values of the Weyerhaeuser Campus.

On May 14, 2018, the City of Federal Way determined that the application for the Greenline Business Park (GBP) was complete. That proposal, made by Industrial Realty Group of Los Angeles (IRG), includes the construction of three buildings totaling approximately 1,068,000 square feet on a parcel of 146 acres and revisions to an existing parking lot adding 806 parking stalls, which will involve, among other activities, filling wetland and improving existing roads in the vicinity. On May 18, 2018, the City issued a Notice of Master Land Use Application, initiating a fourteen day comment period. The Notice indicates that the proposal will be reviewed under the "Weyerhaeuser Company Pre-Annexation Concomitant and Zoning Agreement" (CA), which places the property in the CP-1 zone created by the CA.

Previously, IRG submitted complete applications for two other construction projects also located in the CP-1, Warehouses A and B. Warehouse A is a 225,950 square foot warehouse building on 13.7 acres with 245 parking stalls; Warehouse B is a 217,300

square foot warehouse building with 244 parking spaces immediately adjacent to Warehouse A. The Warehouse A/B proposals will use a common access road and the same stormwater detention pond. These two projects are owned by the same applicant as for the Greenline Business Park. The City has not issued a threshold determination under SEPA for either of IRG's Warehouse proposals.

In this letter, SWC provides comment on the rules, regulations and standards applicable to the pending permit applications. First, any review of the business park proposal under both current zoning and the State Environmental Policy Act (SEPA) must consider the consolidated and cumulative impacts of all three pending proposals and cannot proceed with separate, individual, fragmented review. Second, the existing rules and regulations, including the CA, cannot be read to vest applications to rules and standards adopted twenty-four years ago. In several specific areas, the City should apply current standards and regulations adopted after Ordinance 94-219 (including the CA and its zoning) was adopted in 1994. These issues will be addressed below.

1. THE CITY MUST CONDUCT COMBINED AND CONSOLIDATED REVIEW OF THE THREE PENDING PROPOSALS.

1.1. SEPA REVIEW. Because of the background of this proposal, the City is required to conduct consolidated land use and environmental review of the pending applications, not segmenting or bifurcating review. This is based on the following.

A. ONE OWNER. The entire 426-acre Weyerhaeuser Campus was purchased in 2016 by IRG, a California developer of warehouses and business parks.

B. THREE CURRENTLY PENDING APPLICATIONS. IRG has filed applications for use of significant portions of the Weyerhaeuser Campus, including the GBPark, Warehouse A and Warehouse B, which have all been deemed complete by the City. These three applications will be referenced herein as the "IRG Applications." Each of the applications is currently pending and no threshold determination has been issued for any of them. Comments on the GBP are due on June 4, 2018.

C. SAME ZONE FOR ALL PARCELS. The IRG Applications are all in the CP-1 zone. That zone is only applicable to the Weyerhaeuser Campus parcels and not to any other properties in the city.

D. UNDER SEPA, THE THREE PENDING APPLICATIONS MUST BE CONSIDERED IN A SINGLE ENVIRONMENTAL DOCUMENT.

The City of Federal Way has adopted by reference most of the Washington State SEPA Rules, WAC Chapter 197-11, into Federal Way's code in FWC 14.05.020.

Included in this adoption is WAC 197-11-060, including Subsection (b). This section provides as follows:

(b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

- (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
- (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

In addition, WAC 197-11-060(c) provides as follows:

(c) (Optional) Agencies may wish to analyze "similar actions" in a single environmental document.

(i) Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography. This section does not require agencies or applicants to analyze similar actions in a single environmental document or require applicants to prepare environmental documents on proposals other than their own.

(ii) When preparing environmental documents on similar actions, agencies may find it useful to define the proposals in one of the following ways: (A) Geographically, which may include actions occurring in the same general location, such as a body of water, region, or metropolitan area; or (B) generically, which may include actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, environmental media, or subject matter.

These provisions were considered in *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn.App. 430, 886 P.2d 209 (1994). There a shopping center redevelopment and expansion were under review, including a large grocery store and other features. However, two parts of the overall proposal were not included in the original environmental checklist and threshold determination, a car wash and large underground storage tanks, and were proposed for later environmental review. On a challenge to this segmented environmental review, the Court of Appeals said as follows:

Cumulative Effects. 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). However, the error was cured when the original MDNS and DNS were withdrawn, and the cumulative effects of the entire project considered before a new MDNS was issued.

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). However, the error was harmless because the responsible official considered the impact of the car wash when making the threshold determination and required mitigation measures for it.

76 Wn.App. at 443.

As noted above, the IRG Applications have a *common owner* (IRG), *common timing* (all have complete pending applications), *common geography* (all on the Weyerhaeuser Campus), *common impacts* and *common zoning* (CP-1, applicable only to this property). The most significant impacts of the combined proposals affect traffic and transportation, with significant impacts to off-site city roads and state highways including I-5 and SR 18. Complete and accurate traffic and transportation analysis should include not only the three current proposals, but an accurate analysis for the future use of the Weyerhaeuser Headquarters building (more than 300,000 square feet), which is currently offered for lease by IRG to a single tenant. Currently, the traffic report for Warehouse A, for example, does not include potential traffic from Warehouse B, the GBP, or the Weyerhaeuser headquarters building. The projects, individually and cumulatively, will also impact downstream water resources, including the Hylebos stream, Milton's East Hylebos Ravine, Fife's Lower Hylebos Nature Park and associated wetlands and habitat. The GBP proposal alone will total 1,441,000 square feet of impervious surface.

Under the applicable regulations and caselaw, it would be error for the City to conduct separate environmental review for IRG's proposals. The City should require IRG to submit an environmental checklist that includes the cumulative impact of all three projects. There appears to be little question that a proposal with more than 2,000,000 square feet of structure and other impervious surfaces will have a significant impact on the environment and accordingly requires an environmental impact statement (EIS).

1.2. LAND USE REVIEW. In addition, the three development proposals are included within the “Corporate Park 1” or “CP-1” zone, which was adopted by the City in Ordinance 94-219 as a part of the annexation of this and other nearby property in 1994. The CP-1 zone only applies to the former Weyerhaeuser Campus. Ordinance 94-219 also reached certain “Conclusions of Law,” beginning at page 4; these Conclusions applied to the entire annexation area, including the property where the three pending proposals are located. Conclusion B states that the property, as a whole, has “unusual environmental features” and that the ordinance is the “means to preserve and protect these natural features,” again referencing the entire annexation area. Conclusion C states that “any development in the corporate headquarters area is low density characterized by large expanses of open space.” The applicant contends that the 1994 CA controls development on the Weyerhaeuser Campus. While that is not entirely correct, as pointed out below, it is apparent that the CA requires that the entire site be considered when development proposals are made. For example, under Paragraph 14.2 of the CA, existing streets had “been constructed to meet capacity needs for on-site development up to an additional 300,000 square feet of Corporate Office Park development;” this provision regarding street capacity is applicable to the entire site.

The CP-1 zone found at Exhibit C to the CA also stresses that the entire site is to be considered together in review and analysis. The CP-1 zone states its Purpose and Objectives, saying that the properties in the zone:

...are characterized by large contiguous sites with landscape, open space amenities, and buildings of superior quality. The property appropriate for such uses is unique, and demands for such uses are rare. Consequently special land use and site regulations are appropriate for such properties.

CP-1 Zone, page C-1. Subsection A states “This property is subject to its own unique standards of review processes as set forth in the Agreement.” *Id.* The same is true of provisions for “Off-Street Parking” found in Exhibit C, in Section XIII at page C-18, that although new development shall require compliance with applicable off-street parking requirements:

the aggregate of all proposed and existing uses on the property may, subject to the approval of the Director, be considered as a whole in establishing the minimum number of vehicles spaces required, . . .

It is wholly inconsistent with the CP-1 zoning, and the background of the CA and Ordinance 94-219, to separately consider individual projects when the City recognizes that the proposals are located on a unique property. This is especially true when IRG, the property owner, has three complete and pending applications to use substantially all of the CP-1 zoned area. Based on the foregoing, it is apparent that since 1994 the City has considered the Weyerhaeuser Campus unique and has adopted unique standards

of review applicable to the entire site. Site development, by a common property owner, must be considered as a consolidated whole for permitting purposes.

2. THE CITY IS REQUIRED TO APPLY CURRENT CODES AND STANDARDS, NOT THOSE IN EFFECT IN 1994.

As noted above, Ordinance 94-219 is now twenty-four years old, but the applicant for the three pending projects claims that the ordinance, and the CA, vest these new proposals to rules, regulations and standards in effect when the ordinance was adopted. The City should reject that proposition and apply current adopted standards.¹

The applicant seeks to apply certain provisions of the CA to its current land use applications. Among others, the applicant asks the City to follow certain criteria in review of its proposals, including the following provisions of the development agreement that are contrary to codes.

1) The agreement “not to require any dedication or conveyance of the Property or any portions thereof for public purposes

Paragraph 12, page 10.

2) Agreement to consider roads adequate for the addition of 300,000 square feet of new Corporate Office Park development that might be located anywhere on the site.

Paragraph 14.2, page 11.

3) Agreement that the property owners “shall be vested for purposes of roadway capacity requirements and any concurrency requirements and Weyerhaeuser shall not be required for pay for any new public streets within the Property area or traffic mitigation fees for these streets in connection with the Additional Development.

Paragraph 14.2, page 11, Paragraph 15, page 13.

4) Agreement that areas of the Property which are “classified as environmentally sensitive” shall comply with the critical areas ordinance in effect in 1994, except for special provisions found at pages C-12 to C-18.

Exhibit C to Ordinance 94-219, Section XII.

Washington law is clear that no city may establish fixed land use and development regulations that cannot be ever modified or changed.

¹ As described above the City should consider IRG’s three pending proposals together as a single application following evaluation of the whole proposal under SEPA.

A) Washington Law Prohibits One Legislative Body from Binding Future Councils.

The effect of the CA as interpreted by the applicant is that no later rules, regulations, legislation or council action can modify the agreement; it is permanent and never capable of modification. This concept is not consistent with Washington law for the following reasons.

Under settled Washington law, a municipality “cannot enter into contracts binding on future boards of commissioners.” *See State ex. rel. Schlarb v. Smith*, 19 Wn.2d 109, 112, 141 P.2d 651 (1943). *See also Miller v. City of Port Angeles*, 38 Wn.App. 904 (1984) where it is recognized that a local government cannot contract away its police power. It is recognized that this rule must be construed in the context of whether the contract involves its legislature function or its administrative/proprietary function. This issue was considered in some detail in AGO 2012, No. 4, which concluded as follows:

If a contract impairs the “core” legislative discretion, eliminating or substantially reducing the discretion future bodies might exercise, the courts are likely to find that the contract has improperly impaired the legislative authority of future commissioners.”

Moreover, the CA permits deviations from the current city standards. For example, at Paragraphs 14.2 and 15, the CA prohibits the city from collecting impact fees for an additional 300,000 square feet of corporate office development, an indulgence not permitted under existing codes. Similarly, Section XII of the CP-1 zoning allowed deviations from even the then-existing sensitive area ordinances, making it inconsistent with those codes. Indeed, Paragraph 4.1 of the CA (page 5) specifically provides that “to the extent Federal Way policies impose development standards conflicting with this Agreement, this Agreement shall control.” Accordingly, the CA, which is claimed to bind all Federal Way councils forever, is *ultra vires*.

It is also important to note that the CA in question is different from contract rezones or other similar legislative actions. These agreements ordinarily set forth what will, or will not, be done on a property as a part of a rezone; in such cases, the work will be completed as a part of the contract rezone. The CA here is not related to any project proposed when it was executed; its sole intention is to limit the authority of the City to take actions in the future and to allow undefined future development.

B) Washington Law Regulating Annexation Zoning Ordinances Does Not Permit Ordinances That Last Forever.

As a city formed under the Optional Municipal Code (OMC), RCW Title 35, Federal Way must comply with the terms of chapter 35.14 when annexing new territory.

In particular, RCW 35A.14.330 allows an OMC city to prepare a zoning regulation to become effective in an area to be annexed. Subsections (1) and (2) define the scope of a potential pre-annexation zoning, while subsection (4) provides as follows:

(4) The time interval following an annexation during which the ordinance or resolution adopting any such proposed regulation, or any part thereof, must remain in effect before it may be amended, supplemented or modified by subsequent ordinance or resolution adopted by the annexing city or town.

As described, this legislation allows an OMC city to establish only a “time interval” during which the pre-annexation zoning regulation “must remain in effect.” Without such a “time interval,” a local legislative authority could amend the interim zoning ordinance at any time, as described above.

RCW 35A.14.330(4) plainly requires zoning have a “time interval” during which the pre-annexation zoning will be binding before it may be amended or modified. Nothing in this statute allows the local government to make permanent pre-annexation zoning, any more than zoning adopted pursuant to the planning and zoning chapter of the OMC, chapter 35A.63, could be made permanent.

The statute is supported by Washington caselaw regarding the permanency of zoning, as discussed in *Bishop v. Town of Houghton*, 69 Wn.2d 786, 792, 420 P.2d 368 (1966):

We have no quarrel with respondents' basic theme to the effect that while zoning implies a degree of permanency, it is not static and zoning authorities cannot blind themselves to changing conditions. Thus, when conditions surrounding or in relation to a zoned area have so clearly changed as to emphatically call for revisions in zoning, the appropriate zoning authorities are under a duty to initiate proceedings and consider the necessity of pertinent modifications of their zoning ordinances. Otherwise, outmoded zoning regulations can become unreasonable, and the zoning authorities' failure to suitably amend or modify their ordinances can become arbitrary, in which event courts can and should grant appropriate relief. 2 *Metzenbaum, Zoning*, 1125 (2d ed. 1955).

Land use regulations cannot be frozen in time nor be immune to new priorities, changed circumstances, scientific study or community needs.

A zoning ordinance that can never be modified is inconsistent with the authority granted to the City of Federal Way and is thus void.

C) The GMA Requires Updating of Development Regulations on a Periodic Basis; The CA Cannot be Immune from the Obligation of Continuing Review.

Federal Way is not only subject to the rules established by the OMC, but also to the Growth Management Act, RCW chapter 36.70A (GMA). One of the obligations imposed by the GMA under RCW 36.70A.130 is for continuing review on a periodic basis. Under this statute each local Comprehensive Plan and the local development regulations:

shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section.

(Emphasis supplied.)² Subsection (1)(c) further states: “(c) The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances. . . .” These sections requiring periodic review were imposed by the legislature after the adoption of Federal Way’s Ordinance 94-219 in 1994. The provisions are to assure that local government regulations remain current with scientific advancements and needs of the community. In addition, when considering amendment of a comprehensive plan or development regulations, the City is obligated to “establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans.” RCW 36.70A.140.

As it relates to critical areas, since the adoption of Ordinance 94-219 by the City, new legislation has modified the content of critical area rules. In 1995, the Legislature adopted RCW 36.70A.172, which requires as follows:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In

² Use of the word “shall” by the legislature has a distinct meaning in Washington jurisprudence:

Moreover, "shall" when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown. *Phil. II v. Gregoire*, 128 Wash.2d 707, 713, 911 P.2d 389 (1996); *State v. Krall*, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994).

Goldmark v. McKenna, 172 Wn.2d 568, 575, 259 P.3d 1095, (2011).

addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

This section mandated that local governments take account of best available information in adopting critical area regulations, including publications such as “Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands.” See <https://fortress.wa.gov/ecy/publications/summarypages/0506008.html>.

As noted above, the applicant seeks to opt out of these provisions by reliance on Ordinance 94-219. However, the City has recently adopted Ordinance 15-797, codified as Chapter 19.145 of the Federal Way Code, which regulates Environmentally Critical Areas (ECA) in the City. The purpose of this ordinance is as follows:

The purpose of this chapter is to protect the environment, human life, and property from harm and degradation. This is to be achieved by precluding or limiting development in areas where development poses serious or special hazards; by preserving and protecting the quality of drinking water; and by preserving important ecological areas such as steep slopes, streams, lakes and wetlands. The public purposes to be achieved by this chapter include protection of water quality, groundwater recharge, stream flow maintenance, stability of slope areas, wildlife and fisheries habitat maintenance, protection of human life and property and maintenance of natural stormwater storage and filter systems.

FWC 19.145.010. FWC 19.145.015 provides as follows: “Except as otherwise established in this chapter, if a proposed development activity requires city approval, this chapter will be implemented and enforced as part of that process.” FWC 19.145.020 clarifies its application: “The provisions of this division apply throughout the city and must be complied with regardless of any other conflicting provisions of this title.” The provisions of this title that do not conflict with the provisions of this division apply to the subject property. Conflicts with the CP-1 zoning are resolved in favor of the adopted critical area ordinances.

Accordingly, the property in the CP-1 zone *must be consistent with the revised ECA ordinance*; no provision of the current code exempts the CP-1 zone from its application or allows a completely out of date code to be applied in the city.

D) The Attempt in the CA to Vest to Future Permit Activity is Inconsistent with Washington Law.

In 1987, the Washington Legislature established the rules for vesting of development applications in RCW 19.27.095 and 58.17.033. In this legislation, either a building permit or a plat would vest when a “fully complete application” was made. As noted in *Snohomish County v. Pollution Control Hearings Board*, 386 P. 3d 1064, 187

Wash. 2d 346, 105 Wash.2d 778, 789, 719 P.2d 531 (2016): “Washington’s vested rights doctrine originated at common law, but is now statutory”, citing *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173 (2014) (emphasis supplied).

The applicant here claims that it is vested to 1994 standards by virtue of the CA, but the terms of Washington law do not allow vesting in advance of the filing of a complete building permit or plat application. There was no complete building permit or plat application filed when the CA was agreed to in 1994. Our courts have held that the statutory vesting doctrine only applies when an applicant files “a completed application for a building permit.” *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn.App. 191, 334 P.3d 1143 (2014). In *Potala*, the Court rejected the proposition that an application for a substantial development permit would vest rights against zoning changes.

In the present case, the applicant claims the Pre-Annexation Zoning Agreement and the CP-1 Zoning in the CA vest it to development regulations in effect at the time, some twenty-four years ago. But, nowhere has the legislature adopted a rule that allows pre-annexation zoning under RCW 35A.14.330 to vest development rights. The rules established in 1987 codified the vested rights doctrine and limited its application to building permits, plats and later (1995) development agreements. Attempts to vest rights based on this pre-annexation zoning are not effective and any review of the current applications should be consistent with existing land use regulations and controls.

3. CONCLUSION.

The applicant’s proposals violate basic standards for review.

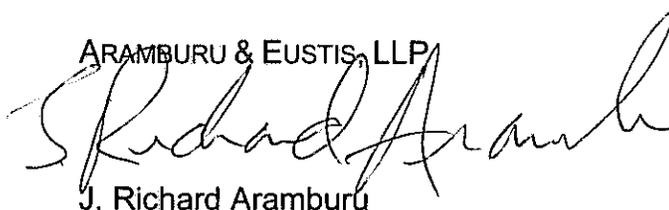
First, with three complete applications on the CP-1 zoned property, Washington law and local ordinances require that project review be consolidated. This applies not only to review for consistency with the city codes, but also SEPA review and analysis. An environmental checklist should be prepared that identifies and reviews the entirety of the three pending applications. This does not present a hardship to the applicant because it has already assembled data for its projects, all that is required is the consolidation of this information.

Second, the city should apply current zoning, environmental and critical area ordinances to the three applications. Consideration of the pending applications under twenty-four year old ordinances is completely inconsistent with Washington law that prohibits ordinances that would bind local governments forever, especially in light of the statutory requirement to continually assure that zoning and environmental regulations are updated to take account of the latest standards and considerations.

Thank you for consideration of SWC's views. Please do not hesitate to contact me if you have any questions.

Sincerely,

ARAMBURU & EUSTIS, LLP

A handwritten signature in black ink, appearing to read "Richard Aramburu". The signature is written in a cursive style with a large, sweeping initial "R".

J. Richard Aramburu

JRA:cc

cc: Save Weyerhaeuser Campus