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APR 20 2009

COMMUNITY DEVELOPMENT

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EXHIBIT 8 DATE 4-20-09
PROJECT NAME
FILE NO
Council Review SMP
Update L06-088

April 20, 2009

Tukwila City Council
City of Tukwila
6200 Southcenter Blvd.
Tukwila, WA 98188

Re: April 20, 2009 Public Hearing--Comments on Shoreline Master Program Update

Dear Tukwila City Council:

We represent the Trustees of the Desimone Trust ("Desimone"), the owner of more than a dozen industrially-zoned parcels and one commercially-zoned parcel that border the Green/Duwamish River in the City of Tukwila and will be subject to the proposed Shoreline Master Program Update ("SMP Update") under consideration by the City Council. We are writing to provide comments on the SMP Update.

Attached as Exhibit A is a map depicting the parcels owned by Desimone that will be subject to the new SMP Update when adopted.¹ Three of the Boeing and Fremont properties have shoreline environmental designations of High Intensity in the SMP Update; the other properties are designated Urban Conservancy. Except for the Barnaby property, which is zoned Tukwila Urban Center, the Desimone properties are zoned Manufacturing Industrial Center/Heavy Industrial. They are also developed and leased for commercial or industrial uses. Several have structures within 100 feet of the ordinary high water mark. As is evident from the aerial photos (in Exhibit B) of three of these properties, the Desimone properties will be substantially affected by the proposed SMP Update.

In prior comment letters of August 28, 2008, October 9, 2008, and January 15, 2009, and in testimony at Planning Commission hearings, Desimone has expressed its concerns about the significant development and financial impacts the proposed SMP Update will have on its properties. While some of these concerns have been addressed in the February 5, 2009 Planning Commission Recommended Draft, a number of substantial concerns remain. They are addressed below by relevant subject matter.

¹ The Duwamish Marina Properties on the list, nos. 6-8, are within a potential annexation area and thus not subject to the SMP Update.

DWT 12746943v1 0089062-000001

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1. River Buffer

Of particular concern to Desimone is the increase in the buffers on its properties from 40 and 50 feet to 100 feet. On many of the properties, the proposed buffer will cut through all or a portion of existing buildings and improvements, and on some of the properties, the buffer will take up all or a substantial portion of the lot area. Consequently, it will cause the current uses and improvements on many of the properties to become nonconforming and make it difficult if not impossible to redevelop the existing properties to a comparable or reasonable use.

The SMP Update does not provide any justification for or relief from this substantial expansion of the buffers on the Desimone properties, which are zoned and developed for commercial and industrial uses. For properties such as these, there is no demonstrable need or basis for imposing a 100-foot buffer where, as here, the existing 40-foot and 50-foot vegetated buffers adequately protect shoreline functions and values. Nor is there even any need or basis for treating these properties differently than residential riverfront properties, for which a 50-foot buffer is imposed by the SMP Update.

A 50-foot buffer is more than sufficient to ensure no net loss of shoreline functions and values and should be the maximum buffer imposed on the Desimone properties. If any wider buffers are imposed, the SMP should at least allow Desimone to obtain a reduction in the buffer upon a showing that the reduction would not adversely affect shoreline functions and values. Such flexibility in buffer width is needed particularly for narrow non-leveed commercially or industrially developed properties like the Barnaby, Airpro, and Secret Garden properties owned by Desimone, which have stable, vegetated buffers of 40 feet or more and very little room to redevelop outside of 100-foot shoreline buffers. Such an approach would be consistent with the SMP goal of ensuring no net loss of shoreline functions and values.

In contrast, the SMP Update as currently recommended by the Planning Commission does not provide any practical relief from the devastating effects that a 100-foot buffer would have on narrow, commercially or industrially zoned and developed riverfront properties such as the Barnaby, Airpro and Secret Garden properties. While the proposed SMP Update contains provisions that would allow the buffer to be reduced by up to 50% if the property owner, among other things, reslopes the bank to 2.5:1, provides a 20-foot setback from the top of the new slope and vegetates both the river bank and the 20-foot setback area in accordance with the vegetation and landscape requirements in the SMP, these provisions are not likely to provide much relief from the 100-foot buffer in the SMP Update since this buffer width was established in the first place to allow enough room to reconfigure the riverbank to achieve the 2.5:1 slope. Thus, if anything, the buffer reduction provisions in the SMP Update underscore the true rationale for the 100-foot buffer, which is to require private property owners to bear the burden and cost of resloping the bank for flood control purposes, not to protect shoreline functions and values as required by the Shoreline Management Act.

The one-size-fits-all 100-foot buffer imposed on the Desimone properties by the SMP Update is neither justifiable nor reasonable, especially for narrow commercially or industrially zoned and developed riverfront properties with existing, fully functioning vegetative buffers and little room to redevelop landward of the buffer. The Desimone properties should either be subject to a maximum buffer of 50 feet or provided with the flexibility to have their buffer reduced to 50 feet if it can be accomplished without adversely affecting shoreline functions and values. To impose the 100-foot buffers in the SMP Update will cause the current use of many of the Desimone properties to be deemed nonconforming, a status that is not favored under Washington law and which can have significant adverse effects on property values, redevelopment potential, and the ability to obtain credit and insurance, among other effects – an especially troubling circumstance in this current economic climate.

2. Height

For the Desimone properties, which are zoned either Manufacturing Industrial Center/Heavy Industrial or Tukwila Urban Center, the height restrictions in Section 9.3 of the SMP Update are substantial and onerous, resulting in a reductions in allowable height from the 125 and 115 feet permitted in these zones, respectively, to 15 feet within the river buffer and 45 feet outside the river buffer. Such dramatic height restrictions are not warranted along these urbanized, industrial portions of the River. The SMP Update should be amended to remove or modify the height restrictions in Section 9.3 for riverfront properties like the Desimone's in these intensive industrial and commercial zones.

3. Vegetation Protection and Landscaping

The SMP Update requires installation and maintenance of substantial, expensive revegetation and landscaping, both within and outside of the river buffer. SMP, §9.10. It does so without any consideration of the need for such requirements based on the impacts of development, or whether such required improvements are roughly proportional or reasonably necessary as a direct result of the project impacts. As a result, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761, 49 P.3d 867 (2002) (“development conditions must be tied to a *specific, identified impact* of a development on the community.”); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show “essential nexus” between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is “roughly

proportional” to the impacts of the proposed development). Further, they purport to impose development conditions to “relieve a preexisting deficiency,” which is clearly unlawful. *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002).

To address these concerns, the City should revise Section 9.10 to ensure that any vegetation protection and landscaping requirements imposed on development are proportional to the impacts of such development, as required by RCW 82.02.020 and state and federal constitutional law.

4. Nonconforming (“Pre-Existing”) Development

Section 14.6 of the SMP Update addresses many of the concerns raised by Desimone in its comment letters and testimony, especially those relating to continuation of nonconforming (“pre-existing”) uses and reconstruction and replacement of nonconforming (“pre-existing”) structures.² One critical concern remains, however: the loss of a property’s nonconforming use status where a pre-existing use of a structure is changed to another use, even if the new use is permitted by the underlying zone. This change of use limitation in Section 14.6(A)(4) is particularly onerous on properties with existing leased commercial/industrial buildings that are nonconforming uses merely by virtue of the fact that the buildings are wholly or partially within the new shoreline buffer in the SMP Update. Under these circumstances, if a building tenant leaves and the landlord cannot find a tenant to continue the exact same commercial or industrial use as the prior tenant’s, then the property loses its nonconforming status and any new use will have to comply with the SMP. In practical terms, this means that the building will have to be left vacant or removed. Such a result would have devastating impacts on several Desimone properties with existing commercial/industrial buildings and improvements that will be located wholly or partially within the new buffers imposed by the SMP Update.

Desimone proposed to the Planning Commission the following revision to Section 14.6(A)(4) to remedy this unreasonable limitation on continuation of a nonconforming use:

If a change of use is proposed to a use determined to be preexisting by application of provisions in this SMP, the proposed new use must be a permitted use in the SMP or in the underlying zoning district in which it is located or a use approved under a Conditional Use or Unclassified Use Permit process. For purposes of implementing this section, a change of use constitutes a change from one Permitted, Conditional or Unclassified Use category to another such use category as listed within the zoning code.

² Although the SMP Update replaces the term “nonconforming” with “pre-existing” in Section 14.6, we will continue to use the term “nonconforming” since the change in terminology is of no legal significance. For all intents and purposes, a “pre-existing” use and structure in Section 14.6 is a “nonconforming” use and structure, as that term is commonly understood.

Desimone requests that the City Council adopt this or a comparable amendment to Section 14.6(A)(4) to allow a change of use from one nonconforming use to another for a structure wholly or partially within the shoreline buffer, so long as the use is permitted by the underlying zoning for the property.

5. Public Access

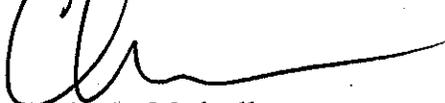
Like the vegetation protection and landscaping requirements, the public access requirements require extensive and expensive public access improvements for relatively minor development or redevelopment. Under Section 11 of the SMP Update, the extent of the public access improvements that must be installed and dedicated do not vary based on the need for such requirements to mitigate the impacts to public access from development, or whether such required improvements are roughly proportional to or reasonably necessary as a direct result of the project impacts. Thus, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020.

To address these concerns, Section 11 should be revised to ensure that any public access requirements imposed on development are reasonably necessary as a direct result of, and roughly proportional to, the impacts of such development on public access, as required by RCW 82.02.020 and federal and state constitutional requirements. *See* cases sited in Section 3, above.

Thank you for your consideration of these comments.

Very truly yours,

Davis Wright Tremaine LLP



Charles E. Maduell

Enclosure

EXHIBIT A

Desimone Trust Properties

Property Tax Acct #

Tenant

- | | |
|--------------------|------------------------------|
| 1. 042304-9083 | Airpro |
| 2. 042304-9169 | Secret Garden Statuary |
| 3. 562420-0990 | Boeing |
| 4. 042304-9011 | |
| 5. 042304-9150 | |
| 6. 000160-0061 | Duwamish Marina |
| 7. 000160-0029 | |
| 8. 000160-0062 | |
| 9. 042304-9187 | Multiple tenants ("Fremont") |
| 10. 042304-9001 | |
| 11. 042304-9073 | |
| 12. 0423049190 | Sabey |
| 13. 0423049186 | |
| 14. 0423049189 | |
| 15. 252304-9007-04 | Barnabys |

EXHIBIT B

**CITY OF
TUKWILA
SHORELINE
MASTER
PROGRAM
UPDATE**

**DESIMONE
TRUST**

**R.W. Thorpe
& Associates, Inc.**
Seattle • Anchorage • Denver

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Project Management

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CLIENT REPRESENTATIVES

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Wealth Management Office
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Seattle, WA 98101

ISSUED		No.	Description	Issued by	Date
1	Existing Conditions	DE	LA	BNY	10/20/08

REVISIONS		No.	Description	Issued by	Date

ROYAL JOB NO. 0809079

SOURCE:
KING COUNTY ASSESSORS MAP
SC 04-24-04 (April 2008)
KING COUNTY MAP
2005 AERIAL IMAGE

SITE PLAN

**SECRET GARDEN
STATUARY**
Tax Parcel #
0423049169

**PROPOSED
REGULATIONS
FIGURE 3.B**

BUFFERS

— 100' - BUFFER

NORTH

GRAPHIC SCALE

0 20' 40' 80'

1" = 50'

