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October 16, 2008

Tukwila Planning Commission
City of Tukwila
Department of Community Development
6300 Southcenter Blvd., #100
Tukwila, WA 98188

Re: October 9, 2008 Public Hearing--Comments on Draft Shoreline Master Program Update

Dear Planning Commission Members:

We represent Yellow Transportation, Inc. ("Yellow Transportation"), a subsidiary of YRC Worldwide Inc. which owns and operates a national freight distribution center on the Green/Duwamish River at 12855 48th Avenue South, in the City of Tukwila. This letter supplements our written comments of August 28, 2008 and our testimony of October 9, 2008 before the Planning Commission regarding the Draft Shoreline Master Program prepared by the Tukwila Department of Community Development (the "SMP").

Having been in business in Tukwila for nearly 25 years, Yellow Transportation is most concerned with provisions in the Draft SMP relating to the regulation of existing facilities, more specifically: i) what activities conducted at existing facilities will "trigger" compliance with provisions of the SMP; and ii) to what extent must those activities comply with the SMP regulations. In other words, it is unclear whether the specific activity itself must comport with regulations so to ensure "no net loss of shoreline functions and values," or whether the entire facility must be brought into compliance with the whole of the SMP regulations (including buffer use restrictions and requirements for public access, vegetation protection and landscaping, parking and loading, lighting, and shoreline stabilization).

Further, as the Draft SMP would designate nearly every existing facility adjacent to the river as "nonconforming" structures and uses, our client is concerned with how routine maintenance and repair of these facilities -- and/or the remodeling, replacement or upgrades of these facilities -- will be treated under the SMP. As drafted, the SMP simply references Title 18 of the Tukwila Municipal Code for the regulation of all nonconforming uses and structures. Title 18, however, places conditions on maintenance and repair activities, restricts rebuilding in the event of partial destruction, and many of its provisions are inconsistent with those in the

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SMP. More importantly, nonconforming uses are not favored under Washington law, and long established uses and structures may be legally terminated at some point in the future. This designation may also have a significant adverse effect on property values, and the ability to obtain credit and insurance – especially troubling in this current economic climate. Clearly, nonconforming use designations do not bode well for existing facilities such as Yellow Transportation's.

Please understand that Yellow Transportation shares the concerns of many of the commercial property owners, businesses and citizens who have provided comments in opposition to the current Draft SMP, including legal deficiencies pertaining to: i) public participation; ii) illegal taxation; iii) the implementation of conditions that are disproportionate to project impacts; iv) placing the burden of shoreline restoration and enhancement on private property owners rather than the public at large; and v) unconstitutional takings. Consequently, Yellow Transportation has signed on to the comment letter prepared by the Commercial and Industrial Stakeholders, and presented to the Planning Commission on October 9, which addresses these and other legal deficiencies and concerns.

The following comments, however, focus on the specific applicability criteria, the vague and inadequate language of the SMP regarding these criteria, and the onerous ramifications as they relate to existing business operations. We believe these deficiencies, if not corrected, jeopardize the ability of Yellow Transportation to continue use of its site as a freight distribution center as it has for more than 25 years.

I. APPLICABILITY CRITERIA

The Draft SMP provides that it applies to “all development activity occurring within the Shoreline Jurisdiction.” Draft SMP §1.2(B). “Development” is broadly defined as:

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; construction of bulkheads; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the waters overlying lands subject to the Shoreline Management Act at any stage of water level.

Id at §3. Clearly, under this definition, almost any activity could subject a property owner to SMP regulation. The SMP Development Standards further specify that its provisions apply to the following:

- New construction
- Expansion of existing structures

- Any exterior alteration of a structure where the costs stated on all submitted building permit applications for the structure within any 3 year period equals or exceeds 10% of the building's assessed value.
- Change in building occupancy
- Site modifications, such as, *but not limited to* land alteration, paving, and riverbank modifications

See Draft SMP at §9.1.

These criteria triggering SMP regulation are extremely vague and unnecessarily burdensome. Almost any "exterior alteration" or "site modification" could result in cost prohibitive SMP compliance requirements. In Yellow Transportation's case, the existing facility is nearly 50 years old and will require upgrades and various maintenance and repair activities in the future. As a result, not only is it likely that these triggering activities will take place, but also that the resulting alterations or modifications would exceed the 10% threshold because of the lower assessed value of an older building. Thus, pursuant to the SMP applicability criteria as drafted, "routine" operations at Yellow Transportation's existing facility could jeopardize the existing use of the property.

To illustrate how onerous these regulations could be, simple repaving work in the existing parking and loading areas of the facility – a specific activity triggering compliance – could mean that the very parking and loading uses benefited by the work could no longer continue at their current location. This is because once triggered, the SMP provides for the following:

- Buffer uses are limited to restoration, parks, open spaces, and recreational and water-dependent uses;
- Parking and loading activities must be located on the landward side of shoreline development;
- Vegetation protection and landscaping compliance are required, including invasive species removal, native planting and maintenance, and significant irrigation installation;
- Public access is required; and
- Shoreline stabilization measures may be required.

These requirements (and others) could very well threaten the ability of Yellow Transportation to remain in business at the Tukwila location. We do not believe that this is what the City intended in its SMP update.

Even when exceptions are allowed, as in the case of public access, for example, these exceptions are fraught with unreasonable burdens on the property owner. Although a public access exception is allowed if there are significant health and safety issues or inherent security

requirements (as is the case with freight distribution operations), the burden is on the property owner to demonstrate that there are no reasonable alternatives. Thereafter, findings must be made by the Director in a Type II proceeding (which are appealable), and even if the exception is ultimately approved, the owner must provide alternative access, contribute materials and labor toward other projects, or pay into a shoreline access fund an amount equal to 150% of what it would cost to actually provide access. SMP §11.6.

Other exceptions provide for feasibility determinations, which are not necessarily favorable to an applicant, and not necessarily in the best interest of the City. For example, parking and loading on the waterward side of a property may be permitted if doing so on the landward side is "financially infeasible." SMP §§ 9.3(B); 9.9. According to the SMP, "feasible" means that the action meets all of the following conditions:

1. The action can be accomplished with technologies and methods that have been used in the past in similar circumstances, or studies or tests have demonstrated in similar circumstances that such approaches are currently available and likely to achieve the intended results;
2. The action provides a reasonable likelihood of achieving its intended purpose; and
3. The action does not physically preclude achieving the project's primary intended legal use.

SMP §3. As a result, one would have to prove financial infeasibility irrespective of the fact that parking and loading large trucks on the street (or landward) side of the property would create practical, functional and safety problems, and would significantly diminish the aesthetics of the neighborhood.

Clearly, the applicability criteria of the SMP (as well as permissible exceptions to these criteria) need to be reviewed and revised to provide certainty against such consequences. Rather than simply pointing out the problems with the Draft SMP, we have also considered possible solutions, and present them herein for your consideration.

Proposed Revisions

9.1 Applicability

The following standards apply to:

- New building construction.
- Expansion of existing structures if the footprint of those structures is extended into or within the shoreline jurisdiction and that extension results in increased impacts to the functions and values of the natural shoreline environment.
- Any exterior alteration of a structure where the costs stated on all submitted building permit applications for the structure within any 3 year period equals or

exceeds 10% of the building's assessed value. Exterior alteration does not include routine maintenance or repair of existing facilities.

- Change in building occupancy if that change results in increased impacts to the functions and values of the natural shoreline environment.
- Site modifications, such as, but not limited to land alteration, paving, and riverbank modifications if those modifications result in increased impacts to the functions and values of the natural shoreline environment. In that event, said modifications must comply with the 2008 SMP only to the extent necessary to address the impacts of those specific modifications so to achieve "no net loss" of shoreline functions and values.

Exemptions to SMP regulations could also be included in the text, similar to those provided in the City of Seattle's Shoreline Master Program. Such exemptions would allow existing facilities to continue in operation, and would allow the repair, maintenance and/or upgrade of these facilities as long as such activities do not adversely affect the functions and values of the shoreline environment. Examples of such exemption language is provided for your convenience:

Exemptions. The following developments or activities shall be exempt from compliance with provisions of the SMP:

Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" means those usual acts to prevent a decline, lapse or cessation from a lawfully established state comparable to its original condition, including but not limited to its size, shape, configuration, location, and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to shoreline resources or environment.

Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment.

See e.g. SMC § 23.60.020(C).

II. THE EXTENT TO WHICH THE SMP IS APPLICABLE IF TRIGGERED

Assuming that revisions are made to the SMP applicability criteria (and/or its exemptions) which would clarify when an existing facility would be subject to its terms, an issue would still remain regarding precisely which regulations apply. In other words, if an existing facility proposes an activity that triggers compliance, does that activity require compliance with the SMP only to the extent that it has an adverse effect on the shoreline environment, or would any triggering project require full compliance with the landscaping, lighting, parking and loading, and public access regulations of the SMP? Requiring existing facilities to fully comply with all regulations in the Draft SMP based upon a routine triggering activity would have a devastating effect on existing business operations.

The City has indicated that the guiding principle or “overarching policy objective” of the Draft SMP is to ensure “no net loss” of the functions and values of the shoreline environment. *See e.g.*, 2/25/08 Response Letter to Ecology at 13. In that document, the City also acknowledges its identity as a “regionally significant industrial, manufacturing and commercial center.” *Id.* We believe that shoreline regulation of existing facilities should be reflective of these policies, and to the extent that the SMP is triggered by upgrades or routine maintenance and repair activities at existing facilities, compliance should only be required to mitigate any specific adverse impact to the shoreline environment resulting from that activity.

Proposed Revisions

The exemption language proposed above may be helpful in understanding which specific activities are subject to SMP regulation. To the extent that the repair, maintenance or upgrade of existing facilities may have an adverse impact on the functions and values of the shoreline environment, the Director should be authorized to impose conditions on those activities consistent with the SMP, in order to mitigate any adverse impacts such as provided below:

The Director, when approving an SMP exemption, may impose conditions on an activity if that activity adversely impacts the functions and values of the shoreline environment. Conditions may include, but are not limited to a requirement for submission and implementation of an approved mitigation plan designed to assure that the activity:

- (1) complies with the “no net loss” policy of the SMP to the extent feasible; and
- (2) does not create a risk of damage to other property or to the public health, safety and welfare.

Approval of an SMP shall not eliminate the need for any other permit or approval otherwise required for a project, including but not limited to design review.

III. NONCONFORMING USE DESIGNATIONS

The SMP contemplates designating nearly all existing facilities as “nonconforming,” and requires compliance with Title 18 of the Tukwila Municipal Code. Several provisions of Title 18, however, are inconsistent with the Draft SMP which will lead to further confusion over which regulations apply. For example, while Title 18 allows “ordinary maintenance of a nonconforming structure,” the Draft SMP would prohibit or regulate many of these activities.

Nonconforming use designations would also significantly impair the value and marketability of these properties, and may have an adverse effect on property insurance rates. The result would be an economic hardship for many property owners, and an investment disincentive that would be especially destructive at this point in the nation’s economy. Furthermore, because such structures may not be rebuilt in the event of destruction due to earthquakes, floods or fire, the large number of nonconforming uses and structures created by this SMP could lead to economic blight along the riverfront.

It is particularly troubling that the Department of Ecology suggests that nonconforming uses and structures seeking to expand should seek a shoreline variance permit. *See City Response to DOE, 2/15/08.* Such a policy could be devastating to existing businesses, especially if construed to apply to other SMP provisions and their applicability to existing facilities. Without question, any variance approval is difficult, if not *improbable*, to obtain. Of greater significance, the Department of Ecology has the authority to make the final determination on variance requests.

In order to approve a variance, the SMP requires “extraordinary or unique circumstances” and “unnecessary hardships,” and the burden is on an applicant to demonstrate **all** of the following:

1. That the strict application of the bulk, dimensional, or performance standards set forth in the Master Program preclude or significantly interfere with a reasonable use of the property not otherwise prohibited by the Master Program;
2. That the hardship described above is specifically related to the property and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the Master Program, and not from the owner's own actions or deed restrictions; and that the variance is necessary because of these conditions in order to provide the owner with use rights and privileges permitted to other properties in the vicinity and zone in which the property is situated;
3. That the design of the project will be compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and SMP and will not cause adverse impacts to adjacent properties or the shoreline environment;

4. That the variance will not constitute a grant of special privilege not enjoyed by other properties in the area;
5. That the variance is the minimum necessary to afford relief; and
6. That the public interest will suffer no substantial detrimental effect.

Draft SMP at § 14.4(D); *see also* WAC 173-27-170.

Even if the City determines that an applicant meets these criteria and a variance is warranted, the Department of Ecology may overturn that decision. The Washington Administrative Code provides:

After local government approval of a conditional use or variance permit, local government shall submit the permit to the department for the department's approval, approval with conditions, or denial.

WAC 173-27-200(1). Clearly, Yellow Transportation is concerned with the nonconforming use designations contemplated by the Draft SMP, and with the potential for variance approvals being required in order to maintain its existing operations and its ability to remain competitive in the future.

The SMP should recognize the value of existing commercial facilities, and include a "stand-alone" nonconforming use section within its text to address the necessity of upgrades (including expansion) and the repair and maintenance of these facilities. Common and routine business activities should be exempt from compliance with SMP requirements, without the need for any variance approvals.

Proposed Revisions

To that end, the following revisions to current language in Title 18 of the City Code are included herein for your consideration:

Structures and Uses that Become Nonconforming as a Result of the SMP

Where a lawful structure exists at the effective date of adoption of ~~this title~~ this SMP that could not be built under the terms of ~~this title~~ SMP by reason of restrictions on area, lot coverage, height, ~~yards~~ buffers or other characteristics of the structure, it may be continued so long as the structure remains otherwise lawful subject to the following provisions:

1. No such structure may be enlarged or altered in such a way that ~~increases its degree of nonconformity~~ the impacts to the functions and values of the natural shoreline environment. Ordinary maintenance and repair of and upgrades to a nonconforming structure ~~is~~ are permitted, ~~pursuant to TMC 18.70.060~~, including but not limited to painting, roof repair and replacement, plumbing, wiring, mechanical

equipment repair/replacement, paving and weatherization. These and other alterations, additions or enlargements may be allowed as long as the work done does not extend further into any required yard buffer, or ~~violate any other portion of this title~~ increase the impacts to the functions and values of the natural shoreline environment. Complete plans shall be required of all work contemplated under this section.

2. Should such structure be destroyed by any means ~~to an extent of more than 50% of its replacement cost at time of destruction, in the judgment of the City's Building Official, it shall not be reconstructed except in conformity with provisions of this title, except that in the LDR zone, structures that are nonconforming in regard to yard setbacks or sensitive area buffers, but were in conformance at the time of construction,~~ the structure may be reconstructed to ~~their~~ its original dimensions and location on the lot. In the event that the property is redeveloped as that term is defined in this SMP, such redevelopment must be in conformity with provisions of this SMP.
3. Should such structure be moved for any reason or any distance whatsoever, it shall thereafter conform to the regulations ~~for the zone in which it is located after it is moved,~~ in the SMP as to that new location to ensure no net loss of functions and values of the natural shoreline environment.
4. When a nonconforming structure, or structure and premises in combination, is vacated or abandoned for 24 consecutive months, without reasonable cause and notice to the City, the structure, or structure and premises in combination, shall thereafter be required to be in conformance with the regulations of the ~~zone in which it is located~~ SMP. Upon request of the owner prior to the end of 24 consecutive months, and upon reasonable cause shown, the ~~Director City Council~~ may grant an extension of time of up to 12 months beyond the 24 consecutive months. The Director shall consider special circumstances and economics impacting the sale or lease of said structure and the grant of extension may not be unreasonably withheld.

7. Within the shoreline jurisdiction, In wetlands, watercourses and their buffers, existing structures that do not meet the requirements of the ~~Sensitive Areas Overlay District chapter of this title~~ the SMP may be remodeled, reconstructed or replaced, provided that:
 - a. The new construction does not further intrude into or adversely impact ~~an undeveloped sensitive area or~~ the required buffer;

- b. The new construction does not threaten the public health, safety or welfare; and
- c. The structure otherwise meets the requirements of this ~~chapter~~ SMP.

Repairs and Maintenance

If any building is devoted in whole or in part to any nonconforming use as allowed under the specific shoreline environment, work may be done in any period of twelve consecutive months on ordinary maintenance and repairs, or on repair or replacement of nonbearing walls, fixtures, wiring or plumbing to an extent not exceeding ~~25%~~ 50% of the current replacement value of the building.

Nonconforming Parking Lots

- A. Nothing contained in ~~this SMP the Off-street Parking and Loading Regulations chapter of this title~~ shall be construed to require a change in any aspect of a structure or facility covered thereunder including, without limitation, parking lot layout, loading space requirements and curb-cuts, for any structure or facility which existed on the date of adoption of this ~~title~~ SMP.
- B. If a change of use takes place, or an addition is proposed, which requires an increase in the parking area by an increment less than 100%, the requirements of the SMP Off-street Parking and Loading Regulations chapter of this title shall be complied with for the additional parking area to the minimum extent necessary to mitigate for the impacts to the functions and values of the shoreline environment and ensure no net loss.
- C. If a change of use takes place, or an addition is proposed, which requires an increase in the parking area by an increment greater than 100%, the requirements of the Off-street Parking and Loading Regulations chapter of this title shall be complied with for the entire parking area to the minimum extent necessary to mitigate for the impacts to the functions and values of the shoreline environment and ensure no net loss.

Nonconforming Vegetation Protection and Landscaping

- A. Adoption of the vegetation protection and landscaping regulations contained in this ~~title~~ SMP shall not be construed to require a change in the landscape improvements for any legal landscape area which existed on the date of adoption of this ~~title~~ SMP, unless and until a ~~change of use of~~ the property is redeveloped as that term is defined

herein, or alteration of the existing structure beyond the thresholds provided herein. ~~requiring design review approval is proposed (see TMC Chapter 18.60).~~

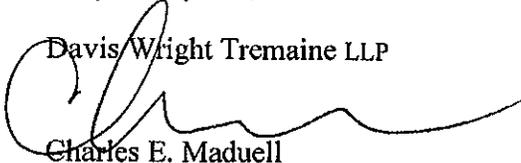
- B. ~~At such time as a change requiring design review approval is proposed for a use or structure~~, the property is redeveloped as that term is defined herein, or the structure is altered beyond the thresholds provided herein, and the associated premises does not comply with the landscape vegetation protection and landscaping requirements of this title SMP, a landscape plan which conforms to the requirements of this title SMP shall be submitted for approval by the Director, ~~along with the design review application.~~

In summary, we respectfully submit that the SMP should recognize the value of the existing commercial and industrial uses along the shorelines, and reflect the stated policies of protecting private property rights and fostering economic vitality in keeping with the City's identity as a regionally significant industrial, manufacturing, and commercial center. The City should revise the SMP applicability criteria and provide specific exemptions for existing facilities so that the regulated community and City staff have a clear understanding of what activities trigger regulation and the extent to which those regulations apply.

Thank you for your considerate attention to these comments. We look forward to working with the City to develop a revised SMP that gives appropriate consideration to owners and operators of existing commercial facilities.

Very truly yours,

Davis Wright Tremaine LLP



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cc: Brad Schroeder, Vice President, Finance & Properties, YRC Worldwide Inc.
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