BEFORE THE HEARING EXAMINER FOR THE CITY OF DUPONT

RE: Dupont Downtown Ace and Storage Center **Site Plan and Design Review** **File No. PLNG 2017-007 and PLNG 2017-008**	**FINAL DECISION UPON RECONSIDERATION**

SUMMARY

Pursuant to a reconsideration request of the City of Dupont filed June 30, 2017, Condition No. 10 of the Final Decision of the above-captioned matter is modified as follows (modifications identified in track change):

> 10. The landscape and irrigation plans will be reviewed for compliance with the requirements listed in Attachment Y, specifically 41-43. In addition, the landscaping plans shall increase the total amount of landscaping to conform to the 20% landscaping standard of DMC 25.90.020 unless a lesser amount is authorized by development agreement.

For the reasons outlined below, the Examiner does not agree with the position taken by the City on the use of development agreements to modify applicable development standards. However, it is recognized that the development agreement statutes are very poorly written, which has led some attorneys to reach the arguably reasonable conclusion that cities and counties can modify development standards via development agreements. There are problems in taking this position, but there is no reason for the Final Decision on this permit request to tie the hands of the City Council in its consideration of a development agreement for the proposal. Consequently, Condition 10 is modified as outlined above to enable the Council to waive landscaping standards if it believes a development agreement can be used for that purpose.

In its request for reconsideration, the City raises several arguments for why it believes development agreements can be used to modify development standards. Those arguments are quoted in italics and

addressed in regular text by the examiner.

1. *RCW 36.70B.170(1)[1] specifically allows for development agreements to govern "development standards" of proposed development projects. The term "development standard" as defined in the statute explicitly includes "landscaping". RCW 36.70B.170(3)(d).*

Nothing in any of the development agreement statutes expressly authorizes the modification of development standards. The City apparently equates "governing" development standards with the authority to "modify" development standards, but that is an arguably generous expansion of the common meaning of the term. The "governing" language originates from RCW 36.70B.170(1), which provides that "*[a] development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.*" The "governing" language relates to the express authority granted in development agreements to designate the development standards that vest to a project pursuant to RCW 36.70B.180. Development Agreements typically list the standards that vest to a project. These listed standards do not need to be modified in any way to still "govern" the development as contemplated in RCW 36.70B.180(1).

Consistent with the absence of any language in the development agreement statutes authorizing the modification of development standards is the legislative history of the development agreement statutes and an intent clause to RCW 37.70B.170. The intent clause focuses on the need for certainty in permit review and specifically provides that *"[a]ssurance to a development project applicant that upon governmental approval the project may proceed in accordance with* ***existing policies and regulations****, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development.*" (emphasis added). As noted in the bolded text, the intent is to provide developers with certainty that existing standards will remain in place, not that developers have the option to modify them. There is no mention in the intent clause for the development agreement statutes of a need for more flexibility in permit review or the need for any sort of waiver process. Certainty in development review is accomplished by vesting regulations, which is what is expressly authorized as a development agreement tool in RCW 36.70B.180.

The legislative bill reports are similarly exclusively focused on the vesting aspects of the development agreement statutes. The original house bill report limited its comments to "*Counties and cities planning under all of the requirements of the GMA may enter into development agreements with owners of property that vest certain development standards for a specified development.*" See House Bill Report, p. 5. The Substitute House Bill Report and final House Bill report broadened this language somewhat as follows: *Counties and cities planning under all GMA requirements may enter into development agreements with developers establishing development standards for a development and providing for the developer to be reimbursed over time for financing public facilities.* See Substitute House Bill Report, p. 7. Substitute Final House Bill Report, p. 5-6. Notably, no house or senate bill report mentions any authority to waive development standards. Provisions that ultimately became adopted as RCW 36.70B.170 and .180 were not changed in any material way between the bills addressed under the initial

house bill and the substitute bill reports.

2. *The relevant passage in RCW 36.70B.170(1) relied on in the Final Decision, in its entirety, provides: "A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW."*

3. *Chapter 36.70A RCW is the Growth Management Act (GMA). The only "development regulations" adopted under the GMA are natural resource designations and critical areas ordinances. The City's authority to regulate design standards for commercial developments, like landscaping, does not flow from the GMA nor is it related to the development regulations the City is authorized and required to adopt under the GMA. See generally RCW Chapter 36.70B. There is no finding in the Final Decision that the reduced landscaping footprint is inconsistent with either the City's Critical Areas Ordinances or natural resource designat*ions.

The reason why many, if not most, objective land use attorneys have concluded that development agreements don't authorize modification of development standards is the sentence from RCW 36.70B.170(1) quoted in Paragraph 2 of the City's argument; *"[a] development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW."* The City asserts that the sentence only requires compliance with critical area and natural resource ordinances. This position is problematical on a couple points. First, the sentence doesn't require consistency with chapter 36.70A regulations. It requires consistency with "*development regulations*" that are adopted by "*a local government planning under Chapter 36.70A RCW.*" In short, if the City of Dupont is planning under Chapter 36.70B RCW (which it is), then its development agreements must be consistent with its "*development regulations.*" There is nothing in that sentence that limits the consistency requirement to development regulations adopted pursuant to Chapter 36.70A RCW.

Second, even if the development regulations were limited to those adopted under the Growth Management Act, those standards are not limited to critical area and natural resource regulations. The City of Dupont, as a fully planning jurisdiction under the GMA, is subject to the requirements of RCW 36.70A.040, which requires that fully planning communities adopt comprehensive plans and development regulations that implement those comprehensive plans. Those development regulations include the City's zoning code, the amendments of which are subject to appeal to the Growth Management Hearings Board under RCW 36.70A.280. The landscaping standards of the City of Dupont are a part of its zoning code, adopted under the requirements and appeal procedures of the Growth Management Act. The RCW 36.70A.170 sentence quoted by the City in Paragraph 2 above mandates that any development agreement adopted by the City be consistent with the City's landscaping requirements, including DMC 25.90.020, which requires 20% landscaping.

4. *The above cited portion of the Final Decision concludes that a municipality must adopt an ordinance in order to use a development agreement to alter a design standard. Final Decision, FF. D, Pg. 4. This reads into the statute a requirement that does not exist. Neither RCW 36.70B.170 nor any case law the City is aware of, requires that a city or county adopt any type of ordinance before it may exercise its authority to enter into a development agreement. Indeed, the legislature was clear and unambiguous that no such requirement need be met: "a local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction." RCW 36.70B. 170(1). Furthermore, the legislature went on to specifically provide that "the execution of a development agreement is a proper exercise of county and city police power and contract authority." RCW 36.70B. 170(4).*

In Paragraph 4 above, the City asserts that the Final Decision concludes that an ordinance is necessary to authorize the use of a development agreement to modify development standards. This is correct. The City then argues against this conclusion by asserting that there is no requirement to have an ordinance in place to approve a development agreement. That is not the position taken in the Final Decision. The City Council is free to approve development agreements without a local code provision authorizing this practice. The Final Decision only concludes that if the City Council wants to modify development standards with a development agreement, then it must have an ordinance in place that expressly authorizes the use of development agreements to modify development standards. The adoption of such ordinances is how some jurisdictions have satisfied themselves that they're compliant with the requirement that "*A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW*". A city or county cannot be said to be acting contrary to its code by modifying development standards in its development agreement if it's code authorizes the waivers. A handful of jurisdictions have taken this approach, including the City of Newcastle, NMC 18.45.030(C) and the City of La Center, LCMC 18.60.030.

It should be noted that even if the City did have an ordinance authorizing waiver of development standards, such an ordinance would still be of questionable validity for several reasons that also support the position that development agreements shouldn't be used to modify development standards in the first place. First, RCW 35A.63.110(2) arguably sets the exclusive, or at least minimum, criteria for variance applications. RCW 35A.63.110(2) authorizes the waiver of development standards (i.e. modification) if the specified criteria are met. A development agreement ordinance authorizing waivers of standards without requiring conformance to the variance criteria of RCW 35A.63.110(2) is arguably contrary to RCW 35A.63.110(2). Second, if such an ordinance has no specific waiver standards (even more applicable when there's no ordinance at all), there's a "void for vagueness" issue as outlined in *Issaquah v. Anderson*, 70 Wn. App. 64 (1993)(court concludes that design ordinance imposing vague standards such as "harmonious" and "interesting" design are too vague to be enforceable). Finally, waiving universally applicable development standards for one corporate applicant may violate Article II, Section 28(6) of the Washington State Constitution, which prohibits the enactment of special laws regarding corporate powers or privileges. *See Hale v. Seattle*, 48 Wn. App. 451 (1987).

DECISION

Upon reconsideration, it is determined that Condition No. 10 unnecessarily restricts the authority of the City Council in its review of a development agreement contemplated for the proposal subject to the Final Decision. Given the ambiguity of the development agreement statutes, the City Council may reasonably conclude that it can modify the terms of the City's landscaping standards via a development agreement. This Decision Upon Recommendation identifies the arguments against such a position, to explain the basis of the Final Decision and to give staff what is hopefully some useful information to consider when making its recommendation to the Council on the landscape issue. In order to defer the final decision on whether to modify the 20% landscape requirement of DMC 25.90.020 to the City Council in its review of the applicant's development agreement, Condition No. 10 is modified as follows:

> 10. The landscape and irrigation plans will be reviewed for compliance with the requirements listed in Attachment Y, specifically 41-43. In addition, the landscaping plans shall increase the total amount of landscaping to conform to the 20% landscaping standard of DMC 25.90.020 unless a lesser amount is authorized by development agreement.

Decision issued July 3, 2017.

Phil A. Olbrechts

Hearing Examiner

Appeal Right and Valuation Notices

DMC 25.175.010 provides that this decision, as a Type III decision, is final, subject to appeal to Pierce County Superior Court. Appeals are governed by Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.