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October 17, 2018

Drew Zaborowski
Avenue 55
600 University Street, Suite 2305
Seattle, WA 98101

**RE: Proposed Development of a Portion of the Former DuPont Works
Cleanup Site**

Dear Mr. Zaborowski,

You requested clarification on whether your proposed development of a distribution/storage warehouse (with a small office component) is an allowable use under the Restrictive Covenant that encumbers a parcel that is within the Former DuPont Works Cleanup Site.

It has been represented to me that the entire proposed project is within “Lot 2 of that Record of Survey recorded under Recording No. 200601275001, Records of Pierce County, Washington” (Lot 2). Lot 2 is encumbered by a Declaration of Restrictive Covenant – Industrial, dated July 24, 2006 and recorded on July 25, 2006 (Industrial RC). The Restrictive Covenant was put into place pursuant to the Consent Decree between Ecology and Weyerhaeuser Company and EI DuPont De Nemours and Company, which is binding on all their successors and assigns (Pierce County Superior Court No. 03-2-10484-7).

The Consent Decree required institutional controls, such as the Industrial RC that encumbers Lot 2, because a cleanup action at the site under the Model Toxics Control Act (MTCA) resulted in residual contaminants in soil and groundwater that exceed MTCA cleanup levels for unrestricted land uses.

The Industrial RC states, among other things:

Section 1: Restrictions on Use of Property. The Property has been remediated to meet the soil cleanup levels specified in MTCA for industrial

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property. The Property may be developed and used only for industrial use as allowed under the City of DuPont zoning regulations and Comprehensive Land Use Plan and under MTCA; provided, however that the Property shall not be developed and used for any of the following: residential uses, schools, daycares, parks, recreational uses, or any other use in which the likelihood of children having sustained access to soils can be reasonably anticipated.

Section 2: Restrictions on Activities. The Owner may maintain and develop the Property consistent with this Restrictive Covenant. Normal construction and maintenance for permitted development is not restricted by this Section. Maintenance of any impervious surfaces is expressly permitted without prior approval so long as appropriate health and safety protocols are followed. For development activities permitted under this Restrictive Covenant, excavated soils must be managed properly and unless put back in place, must be either placed in an area within the boundaries of the Former DuPont Works Site that is zoned for industrial-type uses, or disposed off-site in accordance with applicable regulations. Excavated soils shall be managed to minimize exposure to workers and other adults, including but not limited to the use of best management practices to control dust and surface water runoff; and to prevent exposure to children. Any activity on the Property that could interfere with the continued protection of human health and the environment is prohibited without prior written approval from the Department of Ecology.

Industrial RC, at 2.

Ecology's site manager for this site, Andy Smith, and I met with City of DuPont Community Development Director Jeff Wilson and City Attorney Gordon Karg on October 9, 2018 to discuss this proposed project. According to the DuPont officials, allowable uses under the City's Manufacturing/Research Park (MRP) zoning are comparable to traditional light industrial uses. You have represented that your use is distribution/storage warehouse with a small office component, which both you and the DuPont officials represented are allowable uses under the City of Dupont's MRP zoning.

Pursuant to WAC 173-340-745, "to determine if the property is 'zoned for industrial use,'" the following characteristics shall be considered:

(A) People do not normally live on industrial property. The primary potential exposure is to adult employees of businesses located on the industrial property;

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- (B) Access to industrial property by the general public is generally not allowed. If access is allowed, it is highly limited and controlled due to safety or security considerations;
- (C) Food is not normally grown/raised on industrial property. (However, food processing operations are commonly considered industrial facilities);
- (D) Operations at industrial properties are often (but not always) characterized by use and storage of chemicals, noise, odors and truck traffic;
- (E) The surface of the land at industrial properties is often (but not always) mostly covered by buildings or other structures, paved parking lots, paved access roads and material storage areas—minimizing potential exposure to the soil; and
- (F) Industrial properties may have support facilities consisting of offices, restaurants, and other facilities that are commercial in nature but are primarily devoted to administrative functions necessary for the industrial use and/or are primarily intended to serve the industrial facility employees and not the general public.

Id.

Based on the representations made to me, it is my understanding that people will not live within the proposed project area, access to the proposed project by the general public will be limited and controlled, food will not be grown/raised on the property, the surface of the land at the proposed project area will be mostly covered by buildings or paved areas, and the small office component will be primarily devoted to administrative functions necessary for the proposed distribution/storage warehouse use.

Accordingly, based on the representations made to me and the preceding analysis, the proposed use appears to be an industrial use as allowed under the City of DuPont zoning regulations and Comprehensive Land Use Plan and under MTCA.

You also asked whether the Declaration of Public Trail Easement and Trail Construction Easement associated with the City's Sequalitchew Creek Trail violates the Industrial RC. From the information provided, it is not clear whether the trial easement exists within the area covered by the Industrial RC. However, several Restrictive Covenants were granted associated with the cleanup of the DuPont Site, including an Open Space RC. At our meeting on October 9, 2018, I asked the DuPont officials to establish that the existing trail and easement is consistent with the Open Space RC. If, for example, a GIS-based

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map shows that the trail exists within the Open Space RC area, then there would be no violation of the Open Space RC or the Consent Decree.

I hope this information will be helpful. Please do not hesitate to contact me if you should have additional questions, or wish to discuss any aspect of this matter in greater detail. Please note that this is not a formal opinion of the Attorney General, but expresses my carefully considered legal opinion. My conclusions are based upon the facts summarized herein and current law. If either changes, my analysis or conclusions may change.

Please feel free to contact me with any questions at 360-586-3513 or by email at koalanik@atg.wa.gov.

Sincerely,



KOALANI KAULUKUKUI-BARBEE
Assistant Attorney General
360-586-3513

KKB/MLK

cc (via email only): Andy Smith, Ecology
Jeff Wilson, City of DuPont
Gordon Karg, City of DuPont