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6 BEFORE THE HEARING EXAMINER FOR THE CITY OF DUPONT

7 Re: DuPont West  
8 Type III Site Plan Review  
9 File No. PLNG2022-031  
10

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND FINAL DECISION  
11

12  
13 **OVERVIEW**

14 Ben Varin has requested site plan approval for a 256,800 square foot (5.9 acre) office/warehouse  
15 building on approximately 19.65-acres of vacant land located at 1700 Center Drive. The application is  
approved subject to conditions.

16 This proposed warehouse was presented with a moderately different design for hearing examiner review  
17 in 2019. That proposal was denied in 2019 for two reasons. First, because the proposal impermissibly  
18 included construction over a historical marker site that identified the location of the first non-native  
19 built building in the Puget Sound Region. Second, because it violated DMC 25.45.030(17). That code  
provision prohibits warehouses from “abutting” a main street. The Applicant has since remedied the  
20 historical marker issue by building around the historical marker area and making it accessible to the  
public. That second “abutting” issue is the Applicant’s primary obstacle to approval for this case.

21 Ultimately, it must be concluded that the proposal meets the DMC 25.45.030(17) “abutting” standard  
22 and must be approved overall. As previously noted, DMC 25.45.030(17) prohibits warehouses from  
23 abutting main streets. As proposed for the 2019 examiner review, the lot accommodating the warehouse  
24 was directly contiguous with Sequalitchew Drive. It was undisputed that Sequalitchew Drive qualified  
25 as a main street. The 2019 Examiner decision found that the warehouse proposed at that time was  
26 “abutting” a main street because its lot was contiguous with a main street, i.e. Sequalitchew Drive. The  
2019 decision assessed multiple interpretations advocated by hearing parties for the “abutting” standard  
and adopted the interpretation that “*if a lot is developed for warehouse use, it must be deemed to abut  
a main road if the lot is contiguous with the main road.*” See 2019 Examiner Decision, PLNG 2018-

008, Conclusion of Law No. 5. The decision also recognized that “*large undeveloped areas that would qualify as vacant land could also qualify as a separate use.*” *Id.*

The Applicant has succeeded in complying with the interpretation adopted by the 2019 decision by separating its proposed warehouse lot with a fifty-foot-wide intervening lot. The proposed warehouse lot will no longer be contiguous with Sequalitchew Drive. Specifically with the dedication of Sequalitchew Drive the lot will be 50 feet wide and several hundred feet long. The intervening lot is located in the Manufacturing and Research zoning district. That district imposes a minimum 25-foot front yard setback and a 15-foot rear yard setback. See DMC 25.45.030(3)(a) and (c). That leaves a building envelope that is only 10 feet wide. It is difficult to conceive of any use that could be limited to ten feet. Even a coffee stand wouldn’t fit given the need to accommodate an access drive. Nonetheless, the creation of the lot was approved by the City as part of a short plat in 2022. When the lot was approved in 2022 it was 135 feet wide. However, upon dedication of Sequalitchew Drive, the lot width will be reduced to 50 feet. Sequalitchew Drive will be constructed and dedicated to the City across the road frontage for the 50 foot lot as part of the mitigation for the warehouse proposal under review.

It is fully acknowledged that separating warehouse use from Sequalitchew Drive by what amounts to an undevelopable lot is likely not what the City Council had in mind when it prohibited warehouse uses from abutting main roads. The problem at this point is that the abutting standard, DMC 25.45.030(17), is too vague to prohibit what the Applicant has proposed. As the State Supreme Court has ruled, an ordinance violates due process if its terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *See, Anderson v. Issaquah*, 70 Wn. App. 64 (1993). If a 50-foot side lot is insufficient to provide the requisite separation, then what width would be sufficient? This literal drawing of lines in the sand is a complete arbitrary exercise.

The staff position advocated in the 2019 decision was that DMC 25.45.030(17) only prohibited warehouse buildings from abutting a main road. That interpretation could easily be found to fail the *Anderson* “persons of common intelligence” standard since warehouse buildings are already prohibited from directly abutting a main road under applicable setback standards. Once an intervening lot or use is introduced, however, there is no such readily available logic to throw out lots because they’re not wide enough in the opinion of some. If a proposed lot is found to merit approval in subdivision review, it is debatable whether its validity as an intervening use can later be questioned under DMC 25.45.030(17).

There is ample reason to be unhappy about the Applicant’s end run on the City’s “abutting” standard with a lot composed of a ten-foot-wide building envelope. However, the City’s zoning is at least partially responsible for the “creative” permitting conduct engaged by warehouse developers. The City’s exceptional beauty and wealth of historical resources is arguably not reflected in its zoning map. Half of that map is covered with some shade of grey that permits warehouse use. Warehouse developers rely upon this ocean of grey for their development plans. It’s generally too late to try to stop warehouse development in areas where the zoning map warrants that as a development right.

1 As always in Dupont, the proposed warehouse development had elicited numerous exceptionally well  
2 prepared and compelling comments from City residents. Those comments are addressed in Finding of  
3 Fact No. 4 and Conclusion of Law No. 3 below. Overall, the response is usually that an impact of  
4 concern has already been addressed by a development standard. The City's detailed development  
standards set acceptable levels of practically all conceivable development impacts, from traffic  
congestion to stormwater flows.

5 The Examiner's hands are further tied in this case because the City's site plan review standards are  
6 narrowly tailored to only require conformance to specific development standards. Unlike site plan  
7 review criteria in other jurisdictions, the City's site plan criteria don't generally require site plan  
8 development to avoid impacting the surrounding community or even to be consistent with the  
9 comprehensive plan. As previously noted, in 2019 City residents were able to identify a couple of those  
10 specific development standards that were not met. The project was denied as a result. In this round the  
residents have had no such luck. Overall that should not come as a surprise. If the zoning map  
authorizes a particular use, the accompanying zoning district standards usually aren't designed to  
prevent that use from occurring.

11 Other than the applicability of the DMC 25.45.030(17) "abutting" standard, the only other reasonably  
12 debatable code compliance issue for the proposal is whether the White Oak of the project site should  
13 have been regulated as a critical area. As discussed in Finding of Fact No. 4K below, the City has  
14 adopted a detailed regulatory program for White Oak under its tree retention standards, Chapter 25.120  
DMC. However, the White Oak could also be subject to additional restrictions under the City's critical  
15 areas ordinance, Chapter 25.105 DMC. White Oak trees and stands that qualify as "priority habitat"  
16 under Washington State Department of Fish and Wildlife (WDFW) guidelines also qualify as Fish and  
17 Wildlife Conservation Areas under the City's critical areas ordinance, Chapter 25.105 DMC. The DMC  
18 is unclear as to whether the detailed standards of the City's tree retention standards for White Oak are  
19 designed to satisfy and/or supplant the critical area standards for Fish and Wildlife Conservation Areas.  
There is no assessment in the record as to whether any of the White Oak at the project site qualify as  
priority habitat and hence Fish and Wildlife Conservation Areas. Finally, there is no assessment of  
whether the White Oak protection measures proposed by the Applicant would satisfy any protection  
measures required for White Oak Fish and Wildlife Conservation Areas.

20 As best as can be ascertained at the point these issues were raised in a post-hearing letter submitted by  
21 WDFW, the City's Chapter 25.120 tree retention standards are intended to replace the Chapter 25.105  
22 critical area regulation of White Oak. Those parties believing to the contrary are authorized to request  
23 reconsideration on that issue. The record can certainly benefit from a more extensive assessment of  
24 White Oak regulatory compliance. However, given the one hearing rule imposed by RCW 36.70B.050,  
25 no new evidence will be allowed as part of a reconsideration request. Any motion for reconsideration  
26 must be based upon the administrative record developed for this proceeding. All reconsideration  
requests must be filed with the City of Dupont Public Services Director, Barbara Kinkaid, ten calendar  
days from the service of this decision.

## TESTIMONY

A computer-generated transcript of the October 15, 2024 hearing has been prepared to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A.

## EXHIBITS

The exhibits listed in the Summary of Record in Section J on pages 39-44 of October 7, 2024 Staff Report are entered into the record. The examiner left the record open until 5 pm October 17, 2024 for the Washington State Department of Fish and Wildlife (WDFW) to comment on the proposal with a right of public response through October 22, 2024 and the Applicant to provide a final response on October 24, 2024. Public response was only authorized as a response to the October 17, 2024 WDFW comments. No public response letters submitted after October 17, 2024 referenced any comments in the WDFW letter. A couple comments addressed the importance of tree retention generally but the comments were not based upon any comments made by WDFW. For these reasons all the public comments, including Nisqually Tribe comments, were untimely and not admitted into the record. Applicant comments prepared by Bill Lynn dated October 24, 2024 is admitted to the extent it addresses the WDFW letter. Mr. Lynn's comments in response to the Nisqually letter, in addition to the attached "Cultural Resources Addendum" memo and an October 22, 2024 letter from Natural Investigations Company in support of the Applicant were all also not admitted into the record since the October 21, 2024 Nisqually letter itself was also not admitted.

### **Hearing Exhibits (J.7):**

#### Public Comments (J.7.1):

- a. Hunter Henderson (10/12/24)
- b. Anneliese Simons (10/13/24)
- c. Heather Carawan (10/13/24)
- d. Esther Day (10/13/24)
- e. Heidi Abarro (10/13/24)
- f. Esther Day (10/14/24)
- g. Jaywa74 (10/14/24)
- h. Kate Walsh (10/14/24)

#### City Staff and Consultants (J.7.2):

- a. October 7, 2024 Staff Report
- b. City Hearing PowerPoint

#### Agency and Tribal Comments (J.8.2):

- 1 a. Washington Department of Fish and Wildlife (10/17/24)<sup>1</sup>

2 Applicant Response (J.8.3):

- 3  
4 a. Applicant Response to WDFW letter from Bill Lynn dated October 24, 2024, excluding  
5 Nisqually response portion of letter

6 **FINDINGS OF FACT**

7 **Procedural:**

8 1. Applicant. The Applicant is Ben Varin of Avenue 55, 601 Union Street, Suite 2930, Seattle,  
9 WA 98101.

10 2. Hearing. A hearing was held on the subject applications on October 15, 2024 at 3:00 pm in a  
11 hybrid meeting digitally via zoom and in person in the City of Dupont City Council Chambers. The  
12 examiner left the record open through October 24, 2024 for post-hearing comment.

13 3. Project and Site Description. The Applicant has requested site plan approval for a 256,800  
14 square foot (5.9 acre) office/warehouse building on approximately 19.65-acres of vacant land located  
15 on the west side of a future extension of Sequelitchew Drive at 1700 Center Drive. Sequelitchew Drive  
16 currently serves as a stub road but will eventually serve as a main access road to the homes located in  
17 Sequelitchew Village to the northeast. The project proposes the extension of Sequelitchew Drive  
18 through dedication and construction of public right-of-way. Access will be taken via two driveways  
19 across the neighboring lot onto Sequelitchew Drive (Ex. J.1.w). Additionally, the proposal includes the  
20 relocation and reconstruction of a portion of the existing Sequelitchew Trail within a revised trail  
21 easement. The proposal will retain the existing Mission Marker as located in the northeastern portion  
22 of the site.

23 The proposal includes grading, paved truck maneuvering, truck and vehicular parking, landscaping,  
24 water and sanitary sewer extensions, franchise utility improvements, and a stormwater collection and  
25 infiltration facility.

26 The project site is relatively flat with some rolling hills and small depressions. The site contains forested  
areas and non-forest brush land. The Sequelitchew Creek Trail passes through the southern portion of  
the parcel. There are no buildings on the site. The parcel is bordered by Sequelitchew Creek on the  
south and west, forested parcels to the north, and a multi-family residential development to the east.

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<sup>1</sup> The letter was submitted 52 minutes after the 5 pm deadline. Given the short amount of time given to WDFW to  
provide its response (which should have been provided well before the hearing), the 52 minute delay is waived and  
the letter still admitted.

1 4. Conformity to Development Standards<sup>2</sup>. The project conforms to applicable development  
2 standards as follows:

3 A. Chapter 25.45 Project Design/Zoning District Standards. The proposal conforms to all  
4 zoning district requirements as governed by Chapter 25.45 for the Manufacturing/Research  
5 Park District (MRP). Basic bulk and dimensional standards such as setbacks and building  
6 heights are met by the proposal as outlined in Section C1 of the staff report. The most  
7 significant Chapter 25.45 compliance issue raised by the proposal is conformance to DMC  
8 25.45.030(17), which prohibits warehouses from abutting main roads. The proposal  
9 conforms to that standard as outlined in the Summary portion of this decision. Conformance  
10 to other Chapter 25.45 standards is addressed below.

11 Walsh, Norris, Novak and Elliott argued the Business Tech Park District prohibits  
12 freestanding warehouse/distribution facilities (Ex. J.7.1.h, J.8.1.a and J.8.1.d). The project  
13 is within the Manufacturing and Research zone (MRP) and is generally subject to the zoning  
14 within DMC Chapter 25.45 Manufacturing/Research Park District. Freestanding  
15 warehousing/distribution is a permitted use in this zone (DMC 25.45.020(1)(a)).

16 The proposal is not subject to any specific set of design standards outside of a small set of  
17 zoning district standards imposed by Chapter 25.45 DMC. DMC 25.45.020(1)(a)(ii)  
18 requires the proposal to be designed for a campus-like setting with architectural detailing.  
19 The proposal is only one building, which doesn't qualify as a "campus". The same applicant  
20 has completed a pre-application meeting for a future project to be located on Lot 3 to the  
21 east. When Lot 3 is developed, it will be required to be designed for a campus-like setting,  
22 meaning a similar building design, landscaping and plant palette as the DuPont West  
23 proposal.

24 DMC 25.45.030.3(5) requires that blank walls greater than 50 feet in length along the front  
25 and side of a building be softened through various architectural and/or landscaping  
26 measures. The blank wall requirements apply to the south and east elevations which face/  
are visible from the public rights of way of Sequalitchew Trail and Sequalitchew Drive. The  
west and north elevations will not be visible to the public and therefore staff takes the  
position that the blank wall requirements do not apply to those elevations. Architectural  
elevation drawings were provided as a part of a previous submittal when two buildings were  
proposed (in addition to the one large building, an additional smaller building was previously  
proposed in the southeast corner of the site). The majority of the southern elevation is not  
visible from Sequalitchew Creek, as demonstrated by the Visual Analysis provided on

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<sup>2</sup> Conformity to development standards is usually assessed via conclusions of law. However, site plan review standards are highly detailed and technical. In the absence of any disagreement over the application or any indication in the record of a code compliance issue, the examiner will rely upon assurances made by staff that standards are met, based upon the staff's exercise of professional judgment. Since these determinations of conformity are based upon staff expertise instead of application of law to fact, the determinations regarding conformance to development standards are treated as findings of fact.

1 August 8, 2023. The proposal does not include any blank walls along the front or south sides  
2 of the building as architectural elements are proposed at intervals of less than 50 feet,  
3 including changes in materials, windows, doors, and loading docks. The proposal is  
4 compliant.

5 DMC 25.45.030(8) requires that all HVAC equipment, pumps, heaters, and other  
6 mechanical equipment shall be fully screened from view from all public rights-of-way.  
7 Staff Analysis and Conclusion: No exterior mechanical equipment is shown on the submitted  
8 plans. Condition No. 12 a requires that building permit applications shall be assessed for  
9 compliance with the provisions for screening mechanical equipment.

10 DMC 25.45.030(9) requires that outdoor storage shall not cover more than 2 percent of the  
11 total site area and shall be screened from the street by a 100 percent sight obscuring fence  
12 or wall. DMC 25.10.150.070 defines outdoor storage as the “*storage of fuel, raw materials,  
13 products, and equipment outside of an enclosed building. Mechanical equipment necessary  
14 for the operation of the building shall be excluded from the definition.*” The outdoor trailer  
15 storage areas do not meet the city’s definition for outdoor storage. There are no outdoor  
16 storage areas shown on the plans. Condition No. 12b requires that building permit  
17 applications shall be assessed for compliance with the provisions for size and screening of  
18 outdoor storage, if provided.

19 DMC 25.45.030(10) requires that trash enclosures conform to Chapter 25.100 DMC.  
20 Condition No. 16 requires that the design requirements for trash enclosures will be reviewed  
21 at the time of site development and building permit application for compliance with DMC  
22 25.100.

23 DMC 25.45.030(12) requires that noise levels shall not exceed the maximum allowed in  
24 Chapter 9.09 DMC for Class B (commercial) environmental designations. The proposal is  
25 found to conform to the City’s noise standards as required by Chapter 9.09 DMC.

26 Noise pollution was a concern for many members of the public (Burch Ex. J.8.1.c, Walsh  
Ex. J.7.1.h, and the testimony of Tortes, Novak and Thayer). The applicant submitted a  
Noise Study prepared by JGL Acoustics (May 2024, Attachment 4.1(mm)) that was peer  
reviewed by Landau (June 2024, Attachment J.6(e)). Landau found that combined with  
JGL’s comment letter dated March 1, 2024 (Attachment J.1(II)) the information adequately  
characterizes potential project-related noise. Noise pollution was a concern for many  
members of the public (Burch Ex. J.8.1.c, Walsh Ex. J.7.1.h, and the testimony of Tortes,  
Novak and Thayer). The predicted project-generated average and maximum noise levels at  
each of 20 receiver locations assessed in the JGL noise study demonstrate that they are all  
within the limits of the noise ordinance (both day and night) for all receivers located off-  
site, except for the portion of the Sequatchew Creek Trail where the average noise (Leq) is  
expected to exceed 47 dBA nighttime limit by 0.3 dBA (Ex. J.1.mm and Ex. J.6.e)). The  
minimal excess noise expected to be experienced by the trail is not a violation of the noise  
ordinance because the sound level is allowed to exceed the specific limit by no more than 5

1 dBA for up to 15 minutes per hour and the predicted duration over 47 dBA at T14 is 5.45  
2 minutes.

3 The Noise Source is Class B. The receiving property EDNA varies depending on adjacent  
4 use. The property is bounded to the north by MRP-zoned vacant land that is under review  
5 for mining (Class B), to the west and south by open space/recreational property  
6 (Sequalitchew Creek and Trail) and to the east by residential property (all Class A). The  
7 maximum allowable noise level on the Class A properties to the east, south, and west is 57  
8 dBA during the day and 47 dBA during the nighttime (10 PM to 7 AM). The noise ordinance  
9 allows the noise level to exceed these limits, but only for limited durations. If the cumulative  
10 duration of the noise does not exceed 15 minutes per hour, the allowable noise level is 5  
11 dBA higher than the continuous (steady) limit. If the cumulative duration of the noise does  
12 not exceed 5 minutes per hour the maximum allowable noise level is 10 dBA higher than  
13 the steady-level limit, and if the cumulative duration of the noise does not exceed 1.5 minutes  
14 per hour the maximum allowable noise level is 15 dBA higher than the steady level limit.  
15 The absolute maximum allowable noise level (even for time periods less than 1 second) is  
16 75 dBA on Class B and 72 dBA during the day and 62 dBA during the night on Class A  
17 receiving property.

18 The potential new sources of noise that will be associated with the proposal include delivery  
19 trucks and automobiles, and mechanical and electrical equipment serving the building  
20 (which are not currently planned). Motor vehicles operating on public streets and highways,  
21 aircraft in flight, and emergency equipment such as backup beepers are exempt from noise  
22 level limitations. Once the vehicles enter private property, they must comply with the noise  
23 limits.

24 The SEPA MDNS (Ex. J.2.d) includes mitigation measures to further reduce project noise  
25 levels to the adjacent trail and apartment building. This includes requiring a recorded and  
26 enforceable agreement between the owner and the City that stipulates that all trucks be  
equipped with air brake release silencers and broadband backup alarms; bay doors be kept  
closed during operations, and follow up noise testing occur within six months of occupancy.  
Staff will review site development and building permit applications for compliance with  
DMC 25.45.020(1)(a)(i), Chapter 9.09 and the SEPA MDNS.

21 B. Chapter 25.75 Commute Trip Reduction. The City's Commute Trip Reduction  
22 requirements, Chapter 25.75 DMC, only apply to employers with 100 or more employees.  
23 The project SEPA checklist identifies that approximately 90-120 persons would be  
24 employed in the completed project. If the final number of employees is greater than 100  
25 persons, then Chapter 25.75 will be applicable. Condition No. 13 requires that final  
26 employee numbers shall be finalized prior to issuance of building permits.

25 C. Chapter 25.80 Cultural Resources. The proposal complies with the City's cultural resource  
26 standards, Chapter 25.80 DMC.



DMC 25.80.030 prohibits construction of any structures, roads or utilities within 50 feet of markers identifying cultural resources as designated by the City Council under DMC 25.80.020. DMC 25.80.040 requires that potential areas of historical or cultural significance be protected during construction.

As to the DMC 25.80.030 marker requirement, the project site has a marker designated by the City Council under 25.80.020(1)(c) designating the former site of the Methodist/Episcopal Mission. This building was the first non-native building constructed in the Pacific Northwest. The proposal as presented for the 2019 hearing examiner review relocated the marker to the adjoining Sequelitchew Trail based upon evidence that the marker location was only approximately accurate. Failure to keep the marker at its designated location was ultimately one of the two reasons the proposal was denied. In the current revised proposal the marker is not being move and no construction is proposed within 50 feet of the marker as required by DMC 25.80.030. The Applicant has also provided parking spaces for the site as well as public access to the marker.

As to conformance to DMC 25.80.040, protective measures are necessary because the project site has a history of occupancy by both Native Americans and European settlers. The site lies within the Sequelitchew Ancestral Village Landscape of Sequelitchew, a nested Traditional Cultural Property (TCP) within the traditional territories of the Nisqually and Puyallup tribes. The property has been documented to be the location of cultural and historic events which occurred on or near the property. There is also evidence of at least one and possibly more culturally modified trees on the project site. As such there are numerous agreements, covenants and studies completed to date for the documentation and protection of cultural resources. The Applicant provided a Cultural Resource Study and Unanticipated Cultural Resource Discover Plan prepared in 2011 by Parus Consulting, a Cultural Resource Addendum prepared by Natural Investigations Company dated October 2022 and a Cultural Resources Addendums prepared by NIC in July 2023 and October 2023 (Ex. J.1.a, e, n and y). Methods used to access the potential impacts to cultural and historic resources included fieldwork consisting of a pedestrian survey and examination of subsurface sediments in a series of 125 shovel probes and 22 geotechnical test pits. The work was monitored by a member of the Nisqually Tribe. The work also included consultation with DAHP and the Nisqually, Puyallup and Squaxin Tribes and research of archaeological surveys, maps and GIS information (Ex. J.1.cc).

To protect potential cultural resources as required by DMC 25.80.040 for potential Native American and Mission artifacts, the SEPA Determination includes mitigation measures for monitoring the site during construction by a professional archaeologist and the Nisqually Tribe, implementation of an Inadvertent Discovery Plan and installation of interpretive signage (Ex. J.2.d). As conditioned by SEPA, the proposal provides for the protective measures required by DMC 25.80.040.

- 1 D. Chapter 25.85 Affordable Housing. Chapter 25.85 DMC, Affordable Housing, is  
2 inapplicable as that chapter only applies to housing projects.
- 3 E. Chapter 25.90 Landscaping. The proposal complies with the City's landscaping standards.  
4 DMC Chapter 25.90 regulates landscaping. DMC 25.90.020(2) requires 20% landscaping.  
5 The provided landscape plans depict a landscaped area of 8.18 acre, or 46.2% of the site.  
(Ex. J.1.mm).
- 6 1. Interior Parking Lot Landscaping. DMC 25.90.030(2) requires that the interior of  
7 surface parking lots with 10 or more stalls be landscaped with at least one tree per  
8 six stalls and that they contain planted landscape islands. At 141 proposed parking  
9 spaces, 24 parking lot trees are required. The applicant proposes 26 parking lot trees  
10 plus one tree per six trailer stalls in the southern perimeter buffer.
- 11 2. Landscape Buffers. Sequalitchew Drive and Sequalitchew Creek Trail are both  
12 adjacent public rights of way that require screening by a landscape buffer.
- 13 i. Sequalitchew Drive Screening: The vehicle and trailer parking area located  
14 east of the building is required to be screened by a moderate buffer from  
15 Sequalitchew Drive. The southern perimeter of the property contains a trailer  
16 storage/parking area, which will not be visible from Sequalitchew Drive. The  
17 proposal provides three-foot-tall, landscaped berms with shrubs and trees  
18 (including pine, cedar, and maple) between the parking stalls and  
19 Sequalitchew Drive, which will effectively screen the parking area.
- 20 ii. Sequalitchew Creek Trail Screening: SEPA mitigation measures provide  
21 landscape screening to reduce the visual impacts to the trail. The southern  
22 perimeter of the property contains a trailer storage/parking area, which will  
23 not be visible from Sequalitchew Creek Trail due to topography and existing  
24 mature vegetation. The development footprint area is on a bench and there is  
25 a vertical drop that ranges between approximately 28 to 45 feet from the  
26 southern perimeter of the trailer storage area to the Sequalitchew Creek Trail.  
See the Visual Analysis (Ex. J.1.v). The trailer storage/parking areas will not  
be visible from the Sequalitchew Creek Trail, however other portions of the  
proposal will be visible from the eastern portion of the relocated trail, such  
as the stormwater pond, parking, circulation and building areas. The  
proposed berm and plantings located south of the stormwater pond will  
screen the pond and parking areas from the trail. As proposed, a portion of  
the relocated trail will not be screened. The SEPA Determination includes a  
mitigation measure to extend the berm and plantings further to the west to  
screen the parking, drive aisle and building from Sequalitchew Creek Trail.
- iii. Trash Receptacle Screening. Per the visual analysis, the trash receptacles will  
not be visible from high-use areas (i.e. Sequalitchew Creek Trail).

1 iv. Irrigation. Irrigation plans are provided and proposed water conservation  
2 techniques are included in compliance with DMC 25.90.040 (Ex. J.1.nn).

3 v. Landscape Maintenance and Monitoring. A condition of approval requires  
4 the Applicant to provide a landscaping maintenance and monitoring bond for  
a period of five years to ensure satisfactory survival

5 F. Chapter 25.95 Parking. As conditioned, the proposed parking conforms to the City's  
6 parking standards, Chapter 25.95 DMC.

7 DMC 25.95.030 requires a minimum of 0.3 and a maximum of 1 parking space per worker  
8 at maximum shift.

9 The project SEPA checklist indicates between 90-120 people will be employed by the  
10 project but does not indicate the number of workers at maximum shift. The Architectural  
11 Site Plan provides that a total of 141 vehicle parking spaces are provided and 43 trailer  
parking spaces. The City does not include the trailer parking spaces in the total code required  
parking calculation.

12 If 90 employees are the number of workers at maximum shift, the code required parking  
13 range is between a minimum of 30 and maximum of 90 parking spaces, which is less than  
14 the proposed 141 spaces. If 120 employees are the number of workers at maximum shift, the  
15 code required parking range is between a minimum of 40 and maximum of 120 parking  
16 spaces, which is still less than the proposed 141 spaces. Condition No. 17 requires that the  
17 applicant shall either revise the plan to reduce the parking, apply for a variance, or  
demonstrate at the time of building permit application that the employee count will be at  
least 141 workers at maximum shift. Each user should be required to provide an employee  
maximum shift count at the time of building permit demonstrating they are within the code  
required parking range. Any removed parking shall be vegetated.

18 DMC 25.95.040 requires that off-street parking be located within a 500-foot walking  
19 distance from an entrance to the building served, and that it not be located in required front  
20 yard or within 5 feet of any property line. The building provides an entrance at the east  
21 elevation (front) in the south corner. Another entrance is located at the south end of the west  
elevation (rear). All standard vehicle parking spaces are located within 500 feet of these  
entrances as required by DMC 25.95.040.

22 G. Chapter 25.105 Critical Areas. As conditioned, the proposed parking conforms to the  
23 City's critical areas standards, Chapter 25.105 DMC. A major issue at hearing was  
24 public and agency concern for natural habitat loss (Burch Ex. J.8.1.c, Barrow Ex.  
25 J.8.1.e, Jaywa74 Ex. J.7.1.g, Walsh Ex. J.7.1.h, Simons Ex. J.7.1.b, Carawan Ex.  
26 J.7.1.c, Day Ex. J.7.1.d and the testimony of Conrad, Arent, Kimmerling, Gnull,  
Novak, and Thayer. The subject property contains the following regulated critical  
areas:

3. Fish and Wildlife Habitat Conservation Areas.

- i. Fish Habitat. As mitigated, no impacts to fish habitat are anticipated. The Sequelitchew Creek is mapped by Washington Department of Fish and Wildlife as containing Priority Habitat fish species: Coho salmon, Cutthroat trout, Resident coastal cutthroat trout, and Summer chum salmon. The development footprint and all grading are located outside of the 100-foot stream buffer, therefore no impacts are anticipated. The SEPA Determination includes mitigation measures for the protection of water quality impacts to Sequelitchew Creek. The measures include the preparation of a Temporary Erosion Control Plan (TESC) and implementation of best management practices to ensure that impacts to the creek during construction are minimized.
- ii. Bat Habitat. The project area is mapped by the Washington Department of Fish and Wildlife as containing Priority Habitat Species for three bat species (all of DuPont is mapped as containing habitat). A Bat Habitat Reconnaissance (Ex. J.1.r) was completed for the proposal by a qualified biologist. The biologist did not observe any bat activity or evidence of roosting bat concentrations and confirmed with WDFW that there are no documented occurrences of any bat priority species on or within the vicinity. Therefore, no protection measures are required.
- iii. Western Gray Squirrel Habitat. Several public comments were received during the SEPA MDNS comment period stating that the subject property is potential habitat for the newly-listed, endangered Western Gray Squirrel. DMC 25.105.050.(2)(e)(i) Performance Standards for Terrestrial Habitats and Species, requires a habitat management plan for any development in or adjacent to areas identified as habitat for endangered, threatened or sensitive species and for breeding or nesting habitat of priority species. The plan shall incorporate mitigation recommendations developed in consideration of Washington Department of Fish and Wildlife habitat recommendations.

WDFW does not map the property as containing habitat for the Western Gray Squirrel in their Priority Habitats and Species mapping, and there is no guidance provided by WDFW for the Western Gray Squirrel at this location. A condition of approval related to Tree Retention (See Finding of Fact 7K), is likely to provide protection for the Western Gray Squirrel if they are in fact on the site (as testified by Erik Renning). This condition requires the Applicant to remove the coniferous trees identified in the WDFW letter (Ex. J.8.2.a) to the extent the City tree preservation plan will allow such removal and in such a manner that preserves Western Gray Squirrel nesting habitat to

the extent possible. The Applicant shall also make commercially reasonable best efforts to incorporate additional oaks into its landscaping plan.

4. Geologically Hazardous Areas. No adverse impacts from geologically hazardous areas are anticipated. Steep slopes are located along the southern and western perimeters. The applicant submitted a Geotechnical Report and four Addendums. Per the Geotechnical Report Addendum 3, prepared by GeoEngineers dated October 20, 2023 (Ex. J.1.y), the property contains both landslide hazard areas and erosion hazard areas and both are recommended to provide a 50-foot buffer from the top of the slope. There is no active landslide hazard area within the property boundaries. The top of the slope and the 50-foot buffer are depicted on the Civil Plans (Ex. J.1.oo). All of the proposed improvements, with the exception of a portion of the new trail segment, are located outside of these geologic hazard areas and their buffers. The relocated Sequelitchew Creek trail will be partially located within the 50-foot landslide hazard area buffer. In compliance with DMC 25.105.050(3)(b)(i)(A)(III), the Applicant has demonstrated through their various site plan iterations and revisions that the present location for the relocated trail is the most feasible. The location also offers the opportunity for adequate screening of the trail from the proposed building and site improvements. The Geotechnical Report Addendum 4 dated March 22, 2024 (Ex. J.1.jj) demonstrates that the geotechnical engineer has evaluated the trail relocation plans in the area of the landslide hazard area buffer and determined that the trail within the buffer poses low risk to slope stability. With the recommendations of the geotechnical engineer, the proposal is in compliance.

Staff has evaluated the project for consistency with the City's critical area regulations and has adopted a series of mitigation measures incorporated into the MDNS to ensure compliance with critical area regulations. A condition of approval will require the Applicant to provide proof of filing a critical area notice with Pierce County within 30 days after approval of site development permit. Staff's findings of consistency with critical area regulations are consistent with the evidence in the administrative record and there is no evidence to the contrary. It is determined that the project is consistent with the City's critical area regulations and therefore the proposal will not significant adversely affect them.

- H. Chapter 25.110 Street Corner Setbacks. Chapter 25.110 DMC imposes height limits on structures and landscaping that can be placed within the sight triangle of street corners. The project area does not include any street corners.
- I. Chapter 25.115 Transportation Concurrency. Chapter 25.115 requires transportation concurrency review for nonexempt development. The applicant requested a Transportation Concurrency Certificate on March 31, 2023 and a Certificate was provided by the City on April 17, 2024 (Attachment J.2(c)).

1 J. Chapter 25.116 Sign Code. The Applicant has not proposed any signs for this stage of  
2 review. Signs are regulated by Chapter 25.116 DMC and sign code compliance shall be  
3 assessed upon the submission of a sign permit application, as required by DMC 25.116.140.  
4 Interpretive signage to be located along Sequalitchew Creek Trail (see Attachment J.2(d)) is  
exempt from sign permit requirements.

5 K. Chapter 25.120 Tree Retention. Tree retention standards are governed by Chapter 25.120  
6 DMC. Tree retention is a significant issue for the project, since hundreds of trees will be  
7 affected by the development. The submitted Tree Retention Plan prepared by WFC dated  
8 March 20, 2024 (Ex. J.1.ii), includes an evaluation of onsite trees. The report states there are  
9 2 cover types on the 19.65-acre property for the purposes of description. Type I is a forested  
area of the site and Type II is non-forest brush land. The arborist found and evaluated a total  
of 669 trees in the project area. Most of the trees were considered to be healthy, long-term  
trees if they were saved.

10 Type I type is a mixed stand of deciduous and conifer trees. It covers 13.55-acres and includes  
11 all the Specimen, Landmark, and Significant trees on the site that are 4 inches and larger in  
12 diameter. There are 669 trees in this type that had their tree location surveyed. The tree  
13 species include Douglas-fir (*Pseudotsuga menziesii*), western hemlock (*Tsuga heterophylla*),  
14 western redcedar (*Thuja plicata*), Oregon white oak (*Quercus garryana*), Pacific yew (*Taxus*  
15 *brevifolia*), Pacific madrone (*Arbutus menziesii*), and bigleaf maple (*Acer macrophyllum*).  
16 Tree size ranges from 4 to over 50 inches DBH. Tree condition ranges from 'Poor' to 'Good',  
17 with most trees described as being in the 'Fair' or 'Good' condition class. Table 1 is a  
summary of trees located on the project site. Understory shrubs include salal (*Gaultheria*  
*shallon*), sword fern (*Polystichum munitum*), trailing blackberry, (*Rubus ursinus*), bracken  
fern (*Pteridium aquilinum*), Indian plum (*Oemleria cerasiformis*), red huckleberry  
(*Vaccinium parvifolium*), western hazelnut (*Corylus cornuta*), grasses, and broadleaved  
weeds.

18 Type II is a 6.10-acre cover type that consists of mostly open, highly disturbed ground with  
19 only small thickets of young Douglas-fir trees. No trees were inventoried or surveyed in this  
20 Type. Other vegetation in this area includes abundant Scotch broom (*Cytisus scoparius*),  
grasses, and broadleaf weeds.

21 There are a total of 75 landmark trees in the project area. Landmark trees include Oregon  
22 white oak, Pacific yew, and Pacific madrone 24 inches DBH and larger, or Douglas-fir,  
23 western redcedar, bigleaf maple, and western hemlock that are 30 inches DBH and larger.  
24 Landmark Oregon White Oak trees are not allowed to be removed without approval from the  
25 City of Dupont under a Type I Tree Removal Permit application. One healthy white oak  
26 Landmark tree (#9) located in the future Sequalitchew Street rights-of-way is proposed to be  
removed. A total of 19 healthy landmark trees can be retained on the site. Fifty-six (56)  
landmark trees will need to be removed because they are either unhealthy or located under  
the footprint of proposed buildings, roads, storm ponds, or parking lots. There are a total of  
six (6) healthy landmark Oregon white oak trees on site (tree numbers 9, 12, 22, 65, 80 and

81). Other than Oregon white oak, there is no requirement to retain these landmark trees under the footprint of the buildings, storm ponds, and parking lots, as long as tree retention is achieved in the street boundaries and abutting a residential district.

In the MRP zone the DMC requires that a minimum of 1.5 trees per acre shall be retained on the 19.65-acre site. Therefore, at least 29 healthy trees will need to be retained. The site plan shows that the new construction will extend to the northern edge of the parcel, leaving open space for tree retention in the southern, southwestern, and western areas. Of the 607 healthy trees, 211 will be retained and 296 will be removed. Planned tree retention exceeds the minimum requirement by 182 trees, so no tree replacement is required beyond that required by the landscape code requirements.

One (1) Oregon white oak to be removed is located within the Sequalitchew Drive right-of-way (tree #9). The tree is located well inside the road right of way and cannot be adjusted to save the tree while providing the required curve radius and design requirements per city road design standards. The removal of landmark Oregon white oak tree #9 is, therefore, permitted as long as it comprises no more than 30 percent of the landmark oak trees to be removed. The report indicates in the table provided that there are a total of six healthy landmark oak trees onsite. Removal of tree #9 represents 16.6% percent of the total, therefore, removal is allowed. No other landmark Oregon white oak trees are proposed to be removed. The proposal includes the removal of one landmark Oregon White Oak which is located in the proposed right-of-way, which is allowed to be removed per DMC 25.120.030(2). The proposal does not require a Type III Tree Modification request.

The Oak Management Map is vague in the boundaries of the oak management mapping units; it appears that the Sequalitchew Creek riparian corridor adjacent to the south of the subject property is within mapping unit MO-13 and some of this unit may extend to the southeastern portion of the property. Some of the area appears to be within the future road right-of-way for Sequalitchew Drive and some appears to be south of the development footprint. The WFC Tree Protection Plan characterizes the type of trees in the vicinity of Unit MO-13 as containing a mix of deciduous and conifer trees including Douglas fir, western hemlock, western red cedar, Pacific yew, Pacific madrone, bigleaf Maple and Oregon white oak. It is not possible to calculate the actual boundaries of the unit and therefore it is not possible to calculate if the 80% requirement will be met. Staff interprets the proposed tree retention that is planned for the southern portion of the property as meeting the intent of DMC 25.120.040, therefore the proposal is compliant.

Tree retention is proposed along the western boundaries of the future Sequalitchew Drive right-of way. The trees within the building footprint, parking lot, and storm retention area are proposed to be removed as allowed.

The tree protection measures, temporary barriers, and drip line radius are provided on the landscape plans. Civil Sheet C-6 depicts grading proposed in the drip line of several non-oak trees the applicant intends to retain adjacent to the proposed trail extension segment. The

1 SEPA Determination includes mitigation measures for tree protection and ongoing  
2 monitoring of the trees that have drip lines that will be impacted during construction, as  
3 outlined in DMC 25.120.030 and as provided in the WFC Tree Protection Plan. These trees  
4 are not otherwise required to be retained; therefore the proposal is compliant with DMC  
5 25.120.030(5).

6 Staff assert the protection measures provided on the landscape plans and the additional  
7 measures required by the SEPA Determination will protect the trees planned for retention as  
8 required by City tree retention standards.

9 WDFW expressed concern over the protection of the Oregon White Oak. They asked that the  
10 City impose the agencies new Best Management Practices for the species while  
11 acknowledging that the current proposal “readily achieves avoidance of impacts”. WDFW  
12 recommends the enhancement of the retained oak canopy in tree retention areas A and B  
13 through removal of adjacent conifers that are crowding Oregon White Oak within the tracts  
14 and invasive vegetation removal from the understory and native understory plantings. They  
15 also recommend replanting oaks that will be removed Finally, WDFW recommends  
16 conducting a site visit to further identify landmark trees that aren’t shown in the available  
17 site plan such as tree #12, a 42” DBH Oregon White Oak to be removed.

18 As noted by the Applicant, the City has adopted its own standards for White Oak protection.  
19 As previously noted, the proposal meets the City’s tree retention standards set by Chapter  
20 25.120 DMC. This is correct, but the White Oak could arguably be subject to additional  
21 regulation as fish and wildlife conservation areas under the City’s critical areas ordinance.  
22 As noted in the WDFW White Oak best management practices, p. 4, some but not all White  
23 Oak trees and tree stands qualify as WDFW priority habitat. DMC 25.105.030 defines fish  
24 and wildlife conservation areas to include WDFW priority habitat.

25 In lieu of the WDFW White Oak management recommendation, the Applicant volunteers the  
26 following condition of approval:

27 *“The Applicant will remove the coniferous trees identified in the WDFW letter to the*  
28 *extent the City tree preservation plan will allow such removal. The Applicant will*  
29 *also make commercially reasonable best efforts to incorporate additional oaks into*  
30 *its landscaping plan.”*

31 The Applicant’s suggested condition has been adopted as a Condition of Approval herein.

32 With adoption of the condition of approval, the proposal is found to sufficiently meet White  
33 Oak protection standards as required by the City’s development standards. The issue is beset  
34 with ambiguities largely caused by the failure of WDFW to submit more timely comment.  
35 The WDFW comments do not identify whether any of the White Oak located at the project  
36 site qualify as priority habitat. If they do not qualify as priority habitat, the oak do not qualify



as Fish and Wildlife Conservation Areas and therefore would not be subject to the City's critical areas ordinance. The DMC is itself unclear as to whether the City's tree retention standards for White Oak are intended to supplant and/or satisfy regulation of the White Oak under the City's critical areas ordinance. Finally, WDFW fails to identify whether and how the mitigation already proposed for the White Oak fails to conform to specifically cited City critical area requirements for Fish and Wildlife Conservation areas.

With a very limited administrative record due to the lateness of the WDFW comment, it must be concluded that the City's tree retention standards are designed to meet the City's critical area requirements for protection of White Oak that qualify as priority habitat. This conclusion is based in part upon the detailed tree retention standards for White Oak that can arguably be viewed as satisfying the general standards for fish and wildlife conservation protection measures. It is also based upon the absence of any mention in the staff report of the White Oak potentially qualifying as a fish and wildlife conservation area. Since the proposal meets the City's Chapter 25.120 DMC tree retention standards for White Oak, the White Oak protection measures proposed by the Applicant as conditioned are found to meet all City White Oak protection requirements.

- L. Chapter 25.125 Wireless Communication Facilities. No wireless communication facilities are proposed, so Chapter 25.125 DMC, Wireless Communication Facilities, does not apply.

## CONCLUSIONS OF LAW

1. Authority. DMC 25.45.040 classifies site plan applications for developments over 15 acres in the manufacturing research park as a Type III review. DMC 25.175.010(2)(b) provides that the hearing examiner shall hold a hearing and issue a final decision for Type III permit applications.

2. Zoning/Comprehensive Plan Designations. The Comprehensive Plan Designation is Manufacturing and Research Park and Industrial Planning Area. The zoning district is Manufacturing/Research Park (MRP).

3. Review Criteria. DMC 25.150.030 states that to obtain site plan approval, all of the development regulations and criteria specified in the district applicable to the property must be satisfied in addition to any general development requirements in Chapters 25.75 through 25.95 and 25.105 through 25.125 DMC. As mitigated and conditioned, the project complies with the site plan approval requirements as demonstrated in Findings of Fact No. 4.

An important consideration to recognize in site plan review is that there are no site plan standards generally requiring compatibility or lack of impacts to neighboring properties such as found in permits such as conditional use and subdivision review. The criteria at issue as listed in DMC 25.150.030 are very specific and don't leave much room for addressing impacts that are not specifically identified in the regulations themselves. In this regard many commentors expressed concerns regarding neighborhood compatibility with respect to nearby residential and recreational/open space uses (Burch

1 Ex. J.8.1.c and testimony of Conrad, Tortes, Gnull, Novak, Pasquale and Brown). Site plan review  
2 criteria give the Examiner no authority to condition or deny the project due to incompatibility unless an  
3 impact is specifically addressed by one of the development standards subject to site plan review.  
4 Compatibility could be relevant for SEPA review, but that review was not appealed so the Examiner  
5 has no authority to consider it. The City issued a SEPA Mitigated Determination of Nonsignificance  
6 (MDNS) on August 29, 2024 (Attachment J.2.d). That MDNS determined that with the mitigation  
7 adopted by the City, the proposal creates no probable significant adverse impacts. That determination  
8 can no longer be addressed in site plan review absent a timely appeal.

9 Similarly, traffic impacts are also outside Examiner authority. Several members of the public expressed  
10 concerns regarding potential traffic impacts (Burch Ex. J.8.1.c, Walsh Ex. J.7.1.h, Simons Ex. J.7.1.b  
11 and the testimony of Pasquale, Gnull, Novak and Tortes). These comments were likely pertinent to  
12 SEPA review, but as previously mentioned the Examiner has no authority to address SEPA issues unless  
13 SEPA review is timely appealed.

14 Compatibility and traffic impacts could arguably be addressed under the City's comprehensive plan  
15 policies. However, unlike some site plan criteria adopted in other jurisdictions, the City's site plan  
16 criteria don't require consistency with the comprehensive plan. *See, e.g.* Monroe Municipal Code  
17 22.58.040E3 and Buckley Municipal Code 19.33.060(1)(a), both requiring site plan consistency with  
18 the comprehensive plan. RCW 36.70A.120 requires a City's activities to be in conformity with its  
19 comprehensive plan. Despite the fact that this state statute has been in place since 1990, no court  
20 opinion has as yet clarified whether this statute gives independent authority to modify or deny a  
21 development proposal based upon inconsistencies with an applicable comprehensive plan. Local  
22 jurisdictions have taken different positions on this issue. Some find that consistency with the  
23 comprehensive plan during permit review is not required by RCW 36.70A.120 because development  
24 regulations have already been adopted to implement the comprehensive plan and assure consistency as  
25 required by RCW 36.70A.120.

26 If a reviewing court should find that consistency with the comprehensive plan is required, then the  
proposal is found to be consistent with the Comprehensive Plan for the reasons identified in Pages 4-  
16 of the staff report. To the extent that comprehensive plan policies require compatibility or mitigated  
traffic impacts, the proposal is found compatible because it complies with Zoning Code design  
standards as outlined in this decision and is found to adequately mitigate traffic impacts because it meets  
level of service standards as determined in the City's concurrency review and demonstrated in the  
Applicant's traffic report, att. J1w, as approved by City staff.

## 21 **DECISION**

22 The Type III Site Plan Review is approved subject to the conditions of approval listed in Section I.  
23 Recommendation on pages 35-39 of the staff report except as amended as follows:

- 24
- 25 a. The Applicant shall remove the coniferous trees identified in the WDFW letter (Ex. J.8.2.a) to  
26 the extent the City tree preservation plan will allow such removal and in such a manner that

preserves Western Gray Squirrel nesting habitat to the extent possible. The Applicant shall also make commercially reasonable best efforts to incorporate additional oaks into its landscaping plan.

- b. The Applicant shall work with the Nisqually Indian Tribe to identify and preserve as feasible any culturally modified trees.

Dated this 12<sup>th</sup> day of November 2024.



Phil A. Olbrechts  
City of Dupont 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.