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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

OLYMPIA COALITION FOR
ECOSYSTEMS PRESERVATION,

Petitioner,

v.

CITY OF OLYMPIA; WEST BAY
DEVELOPMENT GROUP, LLC; and
HARDEL MUTUAL PLYWOOD
CORPORATION,

Respondents.

NO.

LAND USE PETITION

1. Names and Mailing Addresses of the Petitioners

The names and mailing address of the petitioner is Olympia Coalition for Ecosystem Preservation (OCEP or Oly Ecosystems), c/o Daniel Einstein, 1007 Rogers St. NW, Olympia, WA 98502.

2. Name and Mailing Address of the Petitioners' Attorney

The names and mailing address of the petitioners' attorneys are David A. Bricklin and Alex Sidles, Bricklin & Newman, LLP, 1424 Fourth Avenue, Suite 500, Seattle, WA 98101, telephone 206-264-8600, bricklin@bnd-law.com, sidles@bnd-law.com.

1 3. The Name and Mailing Address of the Local Jurisdiction Whose Land Use Decision is at Issue

2 The name and address of the local jurisdiction whose land use decisions are at issue is City of
3 Olympia, 601 4th Avenue East, Olympia, WA 98506.

4 4. Identification of the Decision-Making Body or Officer

5 This lawsuit challenges Olympia City Council Resolution M-2206 (A Resolution . . .
6 Approving a Development Agreement by and between The City of Olympia and West Bay
7 Development Group, LLC for Development of Certain Real Property), dated March 30, 2021; the
8 Development Agreement by and between The City of Olympia and West Bay Development Group,
9 LLC, dated March 31, 2021; the Order Denying Appellants' Motion for Summary Judgment and
10 Granting Respondents' Motion for Summary judgment issued by the City of Olympia Hearing
11 Examiner on February 17, 2021; and the SEPA threshold determination of non-significance (DNS)
12 for the West Bay Yards Development Agreement, file number 20-2136, signed by SEPA Official and
13 Principal Planner, Nicole Floyd and dated November 10, 2020. Copies of the challenged documents
14 are attached hereto as Exhibit A, B, C, and D respectively.
15

17 5. Respondents and Identification of Each Person to be Made a Party Under RCW
18 36.70C.040(2)(b)-(d)

19 City of Olympia
20 PO Box 1967
21 Olympia, WA 98507

22 West Bay Development Group LLC
23 8512 Canyon Rd. E # 105
24 Puyallup, WA 98371

25 West Bay Development Group, LLC
26 PO Box 1376
Sumner, WA 98390

1 In addition, although Hardel Mutual Plywood Corp. is not identified in any of the decisions by
2 name and address as required by RCW 36.70C.040, Petitioners believe it may be a necessary party
3 under RCW 36.70C.050:

4 Hardel Mutual Plywood Corp.
5 143 Maurin Rd.
6 Chehalis, WA 98532

7 6. Facts Demonstrating That the Petitioners Have Standing to Seek Judicial Review

8 6.1 Oly Ecosystems is a Washington State public interest corporation. Its mission is to
9 protect, preserve, and restore the diverse ecosystems of Olympia, Washington, including freshwater,
10 shorelines, tidal waters, and upland forests. The organization’s mission and area of interest is directly
11 affected by the proposed West Bay Yards project. Oly Ecosystems has been purchasing land and
12 restoring natural forest and riparian environments adjacent to and nearby the West Bay Yards site for
13 several years, including a parcel directly across West Bay Drive from the Hardel property.
14 Development of the Hardel site as proposed directly threatens the Coalition’s ability to accomplish its
15 mission.
16

17 6.2 OCEP’s members are birdwatchers, fishermen, shellfish harvesters, naturalists, hikers,
18 and other outdoor recreational enthusiasts. Its members depend on a healthy marine ecosystem in the
19 waters surrounding Olympia to pursue these activities. Many of OCEP’s members engage in these
20 activities along the shores of Budd Inlet.
21

22 6.3 The West Bay Yards Development Agreement proposes a multi-story, mixed-use
23 residential and commercial project on the shores of Budd Inlet, at a site known informally as the
24 “Hardell Property.”

25 6.4 The West Bay Yards proposal includes the following elements: fill of the tidelands,
26 disturbance of sediment in the submerged lands, clearing and grading on the uplands, impervious

1 surface development on the uplands, the addition of numerous vehicles trips in the area around the
2 Hardell Property, and the construction of expensive, high-end housing along the waterfront. Each of
3 these elements will adversely affect OCEP's members.

4 6.5 The fill of the tidelands will reduce the availability of habitat for shellfish and other
5 benthic organisms. Reduced habitat for benthic organisms will also affect other elements of the
6 environment, including harming bird species that rely on such organisms for food, and fish species
7 including salmonids that rely on such habitat for reproduction. These harms to birds and fish will
8 impair OCEP members' ability to observe birds and fish, and catch fish.

9 6.6 Disturbance of sediment at the Hardell Property will result in the release of pollutants
10 into Budd Inlet, because the Hardell Property has been contaminated from decades of industrial use.
11 A partial cleanup was conducted in or about 2010, but the cleanup was never completed. Sediment in
12 and around the Hardell Property remains heavily contaminated. Release of the Hardell Property
13 contaminants into Budd Inlet will adversely affect every aspect of the local ecosystem, including
14 plants, insects and other arthropods, birds, fish, shellfish, and marine mammals. Harms to these
15 organisms will impair OCEP members' ability to observe and enjoy them (and catch them, in the case
16 of fish and shellfish).

17 6.7 Development of the uplands will adversely affect existing habitat for birds and
18 terrestrial mammals, again with the result that OCEP members will be less able to enjoy these
19 creatures. In addition, new impervious surfaces and increase vehicle traffic will result in increased
20 stormwater runoff and pollutants into Budd Inlet from the Hardell Property, which will cause the same
21 sorts of adverse impacts described above.

22 6.8 The construction of high-end housing (as opposed to affordable housing) will increase
23 housing prices in Olympia, making the City less affordable for OCEP's members and their families.
24
25
26

1 Increased housing prices will also exacerbate the existing homelessness crisis in Olympia, which will
2 result in increased illegal camping in public parks where OCEP members go to conduct their outdoor
3 activities, as well as increased strain on police, fire, and EMS resources that OCEP members depend
4 on.

5
6 6.9 The increase in vehicle trips associated with the project will worsen traffic jams in the
7 surrounding area, where OCEP members often drive.

8 6.10 OCEP submitted comments to this effect on November 24, 2020, but the City did not
9 modify the DNS or the underlying Development Agreement.

10 6.11 The interests of petitioner are among those that the City of Olympia was required to
11 consider. State and local laws incorporate consideration of the adverse impacts to the neighbors of the
12 proposed development as part of the land use decision-making process.

13 6.12 As required by RCW 36.70C.060(2)(c), a judgment in favor of petitioner would
14 substantially eliminate or redress the injuries discussed above because it would require the City to
15 comply with SEPA and the development agreement statute before taking action on West Bay's request
16 for a development agreement.

17
18 6.13 As required by RCW 36.70C.060(2)(d), petitioner exhausted its administrative
19 remedies to the extent required by law.

20
21 7. A Separate and Concise Statement of Each Error Alleged to Have Been Committed and the
22 Facts Upon Which the Petitioners Rely to Sustain the Statements of Error

23 **A. Failure to Prepare an Environmental Impact Statement**

24 7.1 The City violated SEPA by approving the development agreement without first
25 preparing an environmental impact statement. The City erroneously viewed the development
26 agreement as the entire proposal, willfully ignoring the physical development that flows from it.

1 7.2 Contrary to the City’s determination that the impacts of the Development Agreement
2 will be non-significant, the impacts actually will be significant. Therefore, an environmental impact
3 statement should have been prepared. *See* WAC 197-11-360(1); OMC 14.04.020.

4 7.3 The foreseeable, significant, adverse impacts that will result from the Development
5 Agreement include, but are not limited to: increased traffic and foot traffic, increased noise, increased
6 density, increased impacts to soils, overburdening of public transit, overburdening of public parks,
7 decreased views, loss of residential character in the neighborhoods surrounding the affected parcels,
8 increased strain on police resources, incompatibility with existing land use plans, loss of upland,
9 tideland, and submerged land habitat, increased stormwater runoff, and release of toxic and hazardous
10 substances into Budd Inlet.

11 7.4 The Hearing Examiner erred in his conclusion that the City, in its DNS, correctly
12 determined impacts would be nonsignificant. That decision was not based on substantial evidence,
13 and represented a clearly erroneous application of the law to the facts. *See* RCW 36.70C.130(1)(c),
14 (d).

15 **B. Failure to Consider Environmental Impacts at Earliest Reasonable Stage.**

16 7.5 SEPA requires the environmental impacts of a proposal to be analyzed at the earliest
17 possible point in the planning and decision-making process, when the principal features of a proposal
18 and its environmental impacts can be reasonably identified. *See* RCW 43.21C.110; WAC 197-11-
19 055(2); OMC 14.04.020.

20 7.6 Even a non-project action, such as the Development Agreement at issue here, must be
21 accompanied environmental analysis. *See Alpine Lakes Protection Society v. DNR*, 102 Wn. App. 1,
22 16, 979 P.2d 929 (1999).

1 7.7 As part of the threshold determination process, a SEPA checklist must be prepared.
2 *See* RCW 43.21C.460; OMC 14.04.080.D

3 7.8 Using the information in the SEPA checklist, as well as other information at its
4 disposal, the Department must consider an action’s environmental impacts and prepare a threshold
5 determination. *See* WAC 197-11-310; -330; OMC 14.04.020.

6 7.9 Here, the Department impermissibly based its DNS on an absence of information,
7 because the Department deferred consideration of the Development Agreement’s impact to the project
8 stage, instead of analyzing the impacts now, as required.

9 7.10 The Department already possesses substantial, detailed information about the project
10 proposed for the Hardell Property—information sufficient to evaluate the project’s environmental
11 impacts now. However, rather than conduct such an analysis, the Department’s SEPA checklist repeats
12 dozens of variations on the following:
13
14

15 Q: Describe the purpose, type, total area, and approximate quantities and total
16 affected area of any filling, excavation, and grading proposed. Indicate source of fill.

17 A: This is not a project specific proposal. No filling and grading will occur on
18 this site as a result of the development agreement. Future development filling and
19 grading activity will be described and reviewed with project specific SEPA.

20 ...

21 Q: Estimate the amount of fill and dredge material that would be placed in or
22 removed from surface water or wetlands and indicate the area of the site that would
23 be affected. Indicate the source of fill material.

24 A: None, this is a non project action.

25 ...

26 Q: Describe the source of runoff (including storm water) and method of
collection and disposal, if any (include quantities, if known). Where will this water
flow? Will this water flow into other waters? If so, describe.

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A: No runoff will directly result from this non project action.

...

Q: What kind and amount of vegetation will be removed or altered?

A: This is a non-project action, the proposal would not directly alter or remove vegetation. Vegetation removal at the project level must comply with applicable City codes, plans, and standards.

...

Q: Proposed measures to preserve or enhance wildlife, if any:

A: This is a non-project action. Future development must comply with applicable federal, state, and City laws, codes, and standards for protection of fish and wildlife and associated habitat.

...

Q: [Housing] Approximately how many units would be provided, if any? Indicate whether high, middle, or low-income housing.

A: This is a non-project action; no housing units will be provided as a direct result of this proposal.

...

Q: [Asking specifically about nonproject actions] How would the proposal be likely to increase discharge to water; emissions to air; production, storage, or release of toxic or hazardous substances, or production of noise?

A: The proposal will not increase discharges to water, production of noise, emissions to air, or impacts related to toxic or hazardous substances.

Q: Proposed measures to avoid or reduce such increases are:

A: None.

...

Q: [Asking specifically about nonproject actions] How would the proposal be likely to affect land and shoreline use, including whether it would allow or encourage land or shoreline uses incompatible with existing plans?

A: The proposal will not affect land or shoreline use and will not encourage or allow uses incompatible with the City's adopted and existing plans.

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7.11 The above list is meant to be illustrative, not exhaustive. The point is that the SEPA checklist does not actually answer the questions regarding the Development Agreement’s readily foreseeable, environmental impacts. Instead, the checklist simply promises that future review will come. This kind of deferred analysis does not constitute an examination of Development Agreement’s probable impacts.

7.12 In light of the information already known about the project, the Department could have, and was required to, evaluate the probable environmental impacts of the project that the Development Agreement contemplates at the Hardell Property. Instead, the Department failed to conduct any meaningful analysis, despite dozens of questions in the SEPA Checklist seeking information to be used in that analysis.

7.13 The Department conducted no other meaningful environmental analysis than the faulty analysis that appears in the SEPA Checklist.

7.14 The Hearing Examiner erred in his Order on Summary Judgment that the DNS complied with SEPA’s requirement to consider environmental impacts at the earliest stage. That decision was not based on substantial evidence, and committed an erroneous interpretation of law, and a clearly erroneous application of the law to the facts. *See* RCW 36.70C.130(1)(b), (c), (d).

C. The Development Agreement Is Void in the Absence of Lawful SEPA Review.

7.15 A development agreement is only valid if it is “consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW.” RCW 36.70B.170(1).

7.16 The City of Olympia is a local government planning under chapter 36.70A RCW, the Growth Management Act.

1 7.17 The City’s development regulations require environmental review of a development
2 proposal to be completed in compliance with SEPA prior to final action on the proposal. *See* OMC
3 14.04.020 (adopting by reference SEPA regulations, including WAC 197-11-055).

4 7.18 A development agreement is a type of development proposal. *See Cedar River Water*
5 *and Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 783–784, 315 P.3d 1065 (2013) (finding that challenges
6 to development agreements must be raised in accordance with LUPA’s requirements).

7 7.19 Because the City’s environmental review of the development agreement was not
8 lawful under SEPA, the development agreement is not consistent with applicable development
9 regulations.

10 7.20 The City engaged in an unlawful procedure by adopting the development agreement
11 in the absence of lawful SEPA review. *See* RCW 36.70C.130(1)(a).

12 8. Request for Relief

13 Petitioner respectfully requests that the Court issue an order or orders which:

14 8.1 Vacates Olympia City Council Resolution M-2206 (A Resolution . . . Approving a
15 Development Agreement by and between The City of Olympia and West Bay Development Group,
16 LLC for Development of Certain Real Property), dated March 30, 2021; the Development Agreement
17 by and between The City of Olympia and West Bay Development Group, LLC, dated March 31, 2021;
18 the Order Denying Appellants’ Motion for Summary Judgment and Granting Respondents’ Motion
19 for Summary judgment issued by the City of Olympia Hearing Examiner on February 17, 2021; and
20 the SEPA threshold determination of non-significance (DNS) for the West Bay Yards Development
21 Agreement, file number 20-2136, signed by SEPA Official and Principal Planner, Nicole Floyd and
22 dated November 10, 2020;.

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8.2 Directs the City of Olympia to prepare an environmental impact statement before taking any further action on the proposed West Bay development;

8.3 Awards petitioner its reasonable attorney fees and costs; and

8.4 Provides such other relief as is just and equitable under the circumstances.

Dated this 15th day of April, 2021.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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Alex Sidles, WSBA No. 52832
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(206) 264-8600
*Attorneys for Petitioner Olympia Coalition for
Ecosystem Preservation*

EXHIBIT A

RESOLUTION NO. M-2206

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OLYMPIA, WASHINGTON, APPROVING A DEVELOPMENT AGREEMENT BY AND BETWEEN THE CITY OF OLYMPIA AND WEST BAY DEVELOPMENT GROUP, LLC FOR DEVELOPMENT OF CERTAIN REAL PROPERTY.

WHEREAS, RCW 36.70B.170(1) authorizes the execution of a development agreement between a local government and a person or entity having ownership or control of real property within its jurisdiction; and

WHEREAS, a development agreement made pursuant to that authority must set forth the development standards and other provisions that apply to, govern, and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement; and

WHEREAS, the City of Olympia (City) and West Bay Development Group, LLC have negotiated terms and conditions for the development of real property commonly known as West Bay Yards, which consists of property located at 1210 West Bay Drive NW, Olympia, Washington (the Property), which West Bay Development Group, LLC purchased from the Hardel Mutual Plywood Corporation; and

WHEREAS, West Bay Development Group, LLC intends to provide on the Property approximately 478 market-rate rental housing units in five mixed-use buildings and approximately 20,500 square feet of complimentary retail, restaurant, and recreation uses. The project will include public access amenities and shoreline restoration along the property boundary consistent with the recommendations identified in the *City of Olympia West Bay Environmental Restoration Assessment Final Report* (Coast & Harbor Engineering, 2016) for “Reach 5 – Hardel Plywood”, which will provide a public benefit to the Olympia community; and

WHEREAS, on November 10, 2020, the City’s SEPA (State Environmental Policy Act) Responsible Official issued a “determination non-significance” (DNS), documenting her conclusion that entering into the Development Agreement as proposed would probably will not have a significant adverse impact upon the environment (this DNS did not consider the possible environmental impacts of the development project itself, as those possible impacts will be considered at a later stage, after the City receives a development application for the Property); and

WHEREAS, on December 1, 2020, a local organization, Olympia Coalition for Ecosystems Preservation, appealed to the City’s Hearing Examiner the City’s issuance of the SEPA DNS, claiming that the City should have considered the possible environmental impacts of the development project itself, rather than just the possible environmental impacts of entering into the Development Agreement; and

WHEREAS, on February 17, 2021, following a hearing held February 11, 2021 on Olympia Coalition for Ecosystems Preservation’s motion for summary judgment and West Bay Development Group’s cross-motion for summary judgment, the Hearing Examiner issued a decision denying Olympia Coalition for Ecosystems Preservation’s appeal, concluding as a matter of law that the City’s SEPA DNS was adequate because it reflected proper consideration of the possible environmental impacts of entering into the Development Agreement and that the City was not, at this stage, required to consider the impacts of the development itself; and

WHEREAS, pursuant to RCW 36.70B.200, the Olympia City Council held a public hearing on March 23, 2021, and considered testimony from the public and City staff on the proposed Development Agreement; and

WHEREAS, the Development Agreement adopted by this Resolution meets the requirements of RCW Chapter 36.70B and OMC Chapter 18.56 and is consistent with applicable development regulations; and

WHEREAS, the City reserves its authority to impose new or different regulations to the extent required by a serious threat to public health and safety; and

WHEREAS, the Olympia City Council deems it to be in the best interest of the City of Olympia to enter into a Development Agreement with West Bay Development Group, LLC for the development of the mixed-use project providing shoreline restoration and public access amenities;

NOW, THEREFORE, THE OLYMPIA CITY COUNCIL DOES HEREBY RESOLVE as follows:


1. The Olympia City Council hereby approves the Development Agreement between the City of Olympia and West Bay Development Group, LLC for Development of Certain Real Property identified in the Agreement and the terms and conditions contained therein.
2. The City Manager is authorized and directed to execute on behalf of the City of Olympia the Development Agreement between the City of Olympia and West Bay Development Group, LLC for the Development of Certain Real Property, and any other documents necessary to execute said Agreement, and to make any minor modifications as may be required and are consistent with the intent of the Agreement, or to correct any scrivener's errors.

PASSED BY THE OLYMPIA CITY COUNCIL this 30th day of March 2021.



MAYOR

ATTEST:



CITY CLERK

APPROVED AS TO FORM:



DEPUTY CITY ATTORNEY

EXHIBIT B

**DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF OLYMPIA
AND
WEST BAY DEVELOPMENT GROUP, LLC**

THIS DEVELOPMENT AGREEMENT (“Agreement”) is effective as of the date of the last authorizing signature affixed hereto. The parties to this Agreement are the City of Olympia, a Washington municipal corporation (“City”), and West Bay Development Group, LLC, a Washington limited liability company (“Property Owner”) (individually, “Party” and collectively, the “Parties”).

RECITALS

WHEREAS, the Washington State Legislature has authorized the execution of a development agreement between a local government and a person or entity having ownership or control of real property within its jurisdiction pursuant to RCW 36.70B.170(1); and

WHEREAS, a development agreement made pursuant to that authority must set forth the development standards and other provisions that will 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; and

WHEREAS, the Parties recognize development agreements must be consistent with applicable development regulations adopted by a local government planning under Chapter 36.70A RCW; and

WHEREAS, this Agreement relates to the development of a mixed-use project known as West Bay Yards (the “Project”) on the former Hardel Mutual Plywood Brownfield industrial site located at:

1210 West Bay Drive NW
Olympia, Washington 98502

(the “Property” or “Subject Property”).

AGREEMENT

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

GENERAL PROVISIONS

Section 1: The Project. The Project will re-develop the former Brownfield industrial property consisting of approximately seven upland acres (Thurston County Tax Parcel No.

7260-02-00100) in the City of Olympia with mixed-residential and commercial-uses. At full buildout, the Project will consist of approximately 478 market-rate rental housing units in five mixed-use buildings and approximately 20,500 square feet of complimentary retail, restaurant, and recreation uses.

The Project will include significant public access amenities, including a waterfront trail, and will also complete shoreline restoration along the Property boundary consistent with the recommendations identified in the *City of Olympia West Bay Environmental Restoration Assessment Final Report* (Coast & Harbor Engineering, 2016) for “Reach 5 – Hardel Plywood” and the City of Olympia Shoreline Master Program.

The Project is expected to be developed in phases as described in Section 11 of this Agreement. Property Owner will submit required shoreline, land use, and development applications to the City upon execution of this Agreement.

The Project will require review under the State Environmental Policy Act (“SEPA”) (RCW 43.21C) as well as a shoreline substantial development permit, site plan approval, design review, and issuance of construction, engineering, and building permits. The shoreline restoration component of the Project will also require approval and issuance of various federal and state permits.

Section 2: The Property. The Property is legally described in **Exhibit A**, which is attached hereto and incorporated herein by this reference.

Section 3: Definitions. As used in this Agreement, the following terms, phrases, and words have the meanings and must be interpreted as set forth in this Section.

“Adopting Resolution” means the Resolution which approves this Development Agreement, pursuant to RCW 36.70B.200.

“Council” means the duly elected legislative body governing the City of Olympia.

“Director” means the City’s Community Planning and Development Director.

“Effective Date” means the effective date of the Adopting Resolution.

“EDDS” means the Engineering Design and Development Standards adopted by the City of Olympia. *See* OMC 12.02.020.

“Existing Land Use Regulations” means the ordinances adopted by the City Council of Olympia in effect on the Effective Date, including the adopting ordinances that govern the permitted uses of land, the density and intensity of use, and the design, improvement, construction standards, and specifications applicable to the development of the Property, including, but not limited to, the Comprehensive Plan, the City’s Shoreline Master Program, the City’s Official Zoning Map and development standards, determinations made pursuant to SEPA, Concurrency Ordinance, the EDDS, and all other ordinances, codes, rules, and

regulations of the City establishing standards in relation to the development of the Subject Property; and the divisions of land, whether through the subdivision process, the binding site plan process, or otherwise. This does not include any building or fire code that is state-mandated (*see* RCW 19.27.031); any other regulations resulting from superseding state or federal law; impact fees, mitigation fees; or any other fees or charges, except as specifically described or provided for in this Agreement.

“Property Owner” is West Bay Development Group, LLC, the legal owner of the Property as of the Effective Date of this Agreement.

“Project” means the anticipated development of the Property with the West Bay Yards mixed-use development, as further described in Section 11 below and **Exhibits B-F** attached hereto.

Section 4: Exhibits. Exhibits to this Agreement are as follows:

Exhibit A – Legal Description of the Subject Property

Exhibit B – Concept Site Plan – West Bay Yards

Exhibit C – Site Phasing Plan – West Bay Yards

Exhibit D – Building Phasing Plan – West Bay Yards

Exhibit E – Shoreline Conceptual Restoration Plan – West Bay Yards

Exhibit F – Construction Sequence – West Bay Yards

Section 5: Parties to Development Agreement. The Parties to this Agreement are:

“City”
City of Olympia
Post Office Box 1967
Olympia, Washington 98507

“Property Owner”
West Bay Development Group, LLC
Post Office Box 1376
Sumner, Washington 98390

The Parties acknowledge that after the Effective Date the Property or a portion thereof may be sold or otherwise lawfully transferred to another party or parties, and unless otherwise expressly released, successor purchasers or transferees will remain subject to the applicable provisions of this Agreement related to such portion of the Property.

Section 6: Term of Agreement. This Agreement commences upon the effective date of the Adopting Resolution approving this Agreement and continues in force for a period of fifteen (15) years, unless extended or terminated as provided herein. Following the expiration of the

term or any extension thereof, or if sooner terminated, this Agreement has no force and effect, subject however, to post-termination obligations of the Property Owner.

Section 7: Vested Rights of Property Owner; Uses and Standards. During the term of this Agreement, unless sooner terminated in accordance with the terms hereof, in developing the Property consistent with the Project described herein, Property Owner is assured, and the City agrees, that the development rights, obligations, terms, and conditions specified in this Agreement are fully vested in the Property Owner under the Existing Land Use Regulations and may not be changed or modified by the City, except as may be expressly permitted by, and in accordance with, the terms and conditions of this Agreement, including the Exhibits attached hereto, or as expressly consented thereto by the Property Owner.

Section 8: Modifications. Any modifications from the approved permits or the Exhibits attached hereto requested by Property Owner may be approved in accordance with the provisions of the City's code and under the Existing Land Use Regulations and do not require an amendment to this Agreement.

Section 9: Financing of Public Facilities. Property Owner acknowledges and agrees that it shall participate in the funding and/or development of its pro-rata share of the costs of public improvements in accordance with the city code and under the Existing Land Use Regulations.

Section 10: Land Use Development Application Fees. Land use application fees adopted by the City by ordinance as of the Effective Date of this Agreement may be increased by the City, and applicable to permits and approvals for the Property, as long as such fees apply to similar applications and projects in the City.

Section 11: Phasing of Development

11.1 Site Development Phasing. The Property Owner shall construct and develop the Site improvements associated with the Project in two phases as generally depicted and described in **Exhibit C**, subject to approval of all required shoreline, land use, and construction permits. Each phase will meet all applicable code requirements.

11.1.1 Phase 1. Phase 1 consists of construction of:

- frontage improvements on West Bay Drive from the southern Property boundary to north of the Woodard Trail pedestrian crossing;
- completion of a portion of shoreline restoration;
- construction of the waterfront trail;
- installation of public utility infrastructure (water, sewer, stormwater, roads, solid waste facilities) as generally depicted on **Exhibit C** and that will be specifically depicted on City approved construction permits; and
- any other site improvements required for Phase 1 to meet applicable code requirements as a “stand alone” project.

Construction of Phase 1 site improvements is anticipated to take approximately six months after issuance of required approvals and permits. Construction permits for Phase 1 site development may be issued once Property Owner receives all required City, state, and federal environmental and engineering approvals for Phase 1 shoreline restoration.

Completion bonding pursuant to Sections 2.050 and 2.030 of the Engineering Design and Development Standards will be required for the first three listed Site improvements in 11.1.2 prior to issuance of the first building permit for Phase 1. All of this work needs to be completed before a Certificate of Occupancy permit is issued for the last building in Phase 2, or 15 years after approval of this Agreement, whichever comes first.

11.1.2 Phase 2. Phase 2 of site development consists of:

- construction of remaining frontage improvements along West Bay Drive;
- completion of Phase 2 shoreline restoration;
- installation of remaining public utility infrastructure (water, sewer, stormwater, roads, solid waste facilities) as generally depicted on **Exhibit C** and described in Phase 2 narrative on Exhibit C, and that will be specifically depicted on City approved construction permits.; and
- any remaining Site improvements required for Phase 2 to meet applicable code requirements as a “stand alone” project.

Upon completion of Phase 1, the waterfront trail must remain open to the public except during periods of active adjacent site or building construction. Construction of Phase 2 site improvements is anticipated to take approximately six months after issuance of required approvals and permits. Construction permits for Phase 2 site development may be issued once Property Owner receives all required City, state, and federal environmental and engineering approvals for Phase 2 shoreline restoration.

11.2 Building Phasing. The Property Owner shall construct and develop the site in three phases as generally depicted in **Exhibit D** and described below, subject to approval of all required shoreline, land use, and building permits. The Property Owner shall construct each phase within five (5) years from the date the first building permit issued for development of improvements within that phase is issued. It is expected that one or more building and site development phases may overlap. Building permits may be issued once Property Owner receives all required City, state, and federal environmental and engineering approvals for Phase 1 and 2 shoreline restoration described in the preceding Section. Each phase must meet all applicable code requirements.

11.2.1 Phase 1. Phase 1 consists of:

- the construction of the plaza level from south of Building 2 to north of Building 3;

- construction of Buildings 2 and 3; and
- construction of associated required parking and plaza level landscape, hardscape, and pedestrian amenities for Buildings 2 and 3.

11.2.2 Phase 2. Phase 2 consists of:

- the construction of the plaza level north of Building 3;
- construction of Buildings 4 and 5; and
- construction of associated required parking and plaza level landscape, hardscape, and pedestrian amenities for Buildings 4 and 5.

11.2.3 Phase 3. Phase 3 consists of:

- the construction of the plaza level from south of Building 2 to the southern boundary of the Property;
- construction of Building 1; and
- construction of associated required parking and plaza level landscape, hardscape, and pedestrian amenities for Building 1.

11.3 Duration of Phases. The building and site development phasing described in Section 11 of this Agreement must be included within the scope of the shoreline substantial development permit application submitted for the Project in order to set the time requirements for completion of improvements as part of the action on the shoreline substantial development permit as provided for in WAC 173-27-090.

11.4 Impact Fees. Notwithstanding any other provision of this Agreement to the contrary, the Property Owner vests to the City's impact fee schedule and ordinance (OMC Ch. 15) in effect at the time the first building permit is issued for the corresponding building permit phase for the duration of that building phase. Vesting of impact fees under this provision lasts for the duration of the corresponding building phase only.

Section 12: One Time Payment to City of Olympia Home Fund. The Property Owner shall make a one-time payment of \$250,000.00 (Two Hundred Fifty Thousand and No/100 Dollars) to the City of Olympia Home Fund to develop and sustain supportive and affordable housing in the City. This payment shall be made to the City as a condition of issuance of building permits for construction of the first building in Phase 1, and shall be separate from and in addition to any Home Fund levy applicable to the Property.

Section 13: Improvement of Public Lands. The Property Owner shall improve and, if necessary, dedicate to the City rights of way as required in the permits/approvals for each phase of the development, consistent with this Agreement and as set forth in its Exhibits.

Section 14: Default. Subject to extensions of time by mutual consent, in writing, failure or delay by any Party to this Agreement to perform any term or provision of this Agreement constitutes a default. In the event of an alleged default or breach of any terms or conditions of

this Agreement, the Party alleging such default or breach shall give the other Party not less than thirty (30) days' notice, in writing, specifying the nature of the alleged default and the manner in which said default may be cured. During this thirty (30)-day period, the Party charged may not be considered in default for purposes of termination or institution of legal proceedings.

After notice and expiration of the thirty (30)-day period, if such default has not been cured or is not being diligently cured in the manner set forth in the notice, the complaining Party may, at its option, institute legal proceedings pursuant to this Agreement. In addition, the City may decide to file an action to enforce the City's Codes, and to obtain penalties and costs as provided in the Olympia Municipal Code or state law for violations of this Agreement and the Code.

Section 15: Termination. This Agreement expires or terminates as provided below:

15.1 This Agreement automatically expires and is of no further force and effect if the development contemplated in this Agreement and all of the permits or approvals issued by the City for such development are not substantially underway prior to expiration of such permits or approvals. Such expiration requires no City Council action. Nothing in this Agreement extends the expiration date of any permit or approval issued by the City for any development.

15.2 This Agreement expires and is of no further force and effect if the Property Owner does not construct the Project substantially as described in this Agreement, or if the Property Owner submits applications for development of the Property that are inconsistent with this Agreement.

15.3 This Agreement terminates upon the expiration of the term identified in Section 6 or when the Property has been fully developed, whichever first occurs, and all of the Property Owner's obligations in connection therewith are satisfied as determined by the City. Upon termination of this Agreement, the City shall record a notice of such termination in a form satisfactory to the City Attorney that the Agreement has been terminated.

15.4 If not earlier terminated, this Agreement terminates as provided upon the passage of the time periods set forth in Section 6 without City Council action.

Section 16: Effect upon Termination on Property Owner Obligations. Termination of this Agreement as to the Property Owner of the Property or any portion thereof does not affect any of the Property Owner's obligations to comply with the City of Olympia Shoreline Master Program, the Comprehensive Plan, or any applicable zoning codes or subdivision map or other land use entitlements approved with respect to the Property, any other conditions of any other development specified in the Agreement to continue after the termination of this Agreement or obligations to pay assessments, liens, fees, or taxes.

Section 17: Effects of Termination on City. Upon termination of this Agreement as to the Property Owner of the Property, or any portion thereof, the entitlements, conditions of development, limitations on fees, and all other terms and conditions of this Agreement are no longer vested hereby with respect to the Property affected by such termination.

Section 18: Assignment and Assumption. The Property Owner may sell, assign, or transfer this Agreement with all its rights, title, and interests therein to any person, firm, or corporation at any time during the term of this Agreement.

Section 19: Covenants Running with the Land. The conditions and covenants set forth in this Agreement and incorporated herein by the Exhibits, run with the land and the benefits and burdens bind and inure to the benefit of the Parties. The Property Owner, and every purchaser, assignee, or transferee of an interest in the Property, or any portion thereof, is obligated and bound by the terms and conditions of this Agreement, and is the beneficiary thereof and a party thereto, but only with respect to the Property, or such portion thereof, sold, assigned, or transferred to it. Any such purchaser, assignee, or transferee shall observe and fully perform all of the duties and obligations of a Property Owner contained in this Agreement, as such duties and obligations pertain to the portion of the Property sold, assigned, or transferred to it.

Section 20: Amendment to Agreement; Effect of Agreement on Future Actions

20.1 This Agreement may be amended by mutual written consent of all the Parties, provided that any such amendment must follow the process established by law for the adoption of a development agreement.

20.2 Nothing in this Agreement prevents the City Council from making any amendment to its Comprehensive Plan, Zoning Code, Official Zoning Map, or development regulations affecting the Property during the term of this Agreement to the extent required by a serious threat to public health and safety, or as a result of superseding state or federal law.

Section 21: Releases. Property Owner may free itself from further obligations relating to the sold, assigned, or transferred Property, provided that the buyer, assignee, or transferee expressly assumes the obligations under this Agreement as provided herein.

Section 22: Notices. Notices, demands, or correspondence to the City or Property Owner are sufficiently given if sent by pre-paid First-Class U.S. mail to the addresses of the Parties as designated in Section 5. Notice to the City must be to the attention of both the City Manager and the Director of Community Planning and Development. The City is required to give notices to subsequent property owners only if the City is given written notice of their address for such Notice. The Parties may, from time to time, advise the other of new addresses for such Notices, demand, or correspondence.

Section 23: Applicable Law and Attorneys' Fees. This Agreement must be construed and enforced in accordance with the laws of the state of Washington. Venue for any action related to this Agreement is Thurston County Superior Court.

Section 24: Third Party Legal Challenge. In the event any legal action or special proceeding is commenced by any person or entity other than a Party to challenge this Agreement or any provision herein, each Party will bear their own cost of defense and all expenses incurred in the defense of such actions, including but not limited to, attorneys' fees and expenses of litigation, and damages awarded to the prevailing Party or Parties in such litigation.

Section 25: Specific Performance. The Parties specifically agree that damages are not an adequate remedy for breach of this Agreement, and the Parties are entitled to compel specific performance of all material terms of this Agreement by any Party in default hereof.

Section 26: Severability. If any phrase, provision, or Section of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, or if any provision of this Agreement is rendered invalid or unenforceable according to the terms of any statute of the state of Washington that became effective after the effective date of the Resolution adopting this Agreement, and either Party in good faith determines that such provision or provisions are material to its entering into this Agreement, that Party may elect to terminate this Agreement as to all of its obligations remaining unperformed.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the dates set forth below.

I hereby declare under penalty of perjury pursuant to the laws of the State of Washington that I have read the foregoing Development Agreement, I am authorized to execute the same, I know the contents thereof, and I sign the same as my free act and deed.

CITY:

CITY OF OLYMPIA

Date: 03/31/2021

By: Steven J. Burney
Steven J. Burney, City Manager

APPROVED AS TO FORM:

By: Michael M. Young
Michael Young, Deputy City Attorney

**PROPERTY OWNER:
WEST BAY DEVELOPMENT GROUP, LLC**

I hereby declare under penalty of perjury pursuant to the laws of the State of Washington that I have read the foregoing Development Agreement, I am authorized to execute the same, I know the contents thereof, and I sign the same as my free act and deed.

Date: 03/31/2021

By: Ronald Newman
Ronald Newman, Governor

Exhibit A

Legal Description of Property

PARCEL A:

That part of Block 2 of Schneider's Subdivision, as recorded in Volume 6 of Plats, page 77, records of Thurston County, Washington, lying North of the North line of the South 200 feet of Block 369 of Olympia Tide Lands extended West;

EXCEPTING THEREFROM right of way of Burlington Northern Inc.

PARCEL B:

Blocks 366, 367 and 369 of Olympia Tide Lands, records of Thurston County, Washington;

EXCEPTING THEREFROM the South 200 feet;

EXCEPTING THEREFROM right of way of Burlington Northern Inc.

PARCEL C:

Blocks 370 to 380 inclusive of Olympia Tide Lands, records of Thurston County, Washington;

TOGETHER WITH vacated streets attaching thereto by operation of law;

EXCEPTING THEREFROM that part of Lot 5 in said Block 380, lying Westerly of a line described as beginning at a point on the North line of said Block 380, North 84°07'33" East 30.7 feet from its Northwest corner and running thence South 3°23' East 159.01 feet to a point on the South line of said block, North 89°31'12" West 10.65 feet from its Southwest corner on the government meander line of Budd Inlet North 10°40'37" West 951.64 feet from the government meander corner at the Southeast corner of Hurd Donation Claim No. 59, Township 18 North, Range 2 West, W.M.;

EXCEPTING THEREFROM right of way of Burlington Northern Inc.

PARCEL D:

That part of Hurd Donation Claim No. 59, Township 18 North, Range 2 West, W.M., described as follows:

Beginning at the government meander corner at the Southeast corner of said Hurd Claim;

Running thence North 10°40'37" West 750.42 feet along the government meander line of Budd Inlet to the Southeast corner of tract conveyed to Delson Lumber Co., Inc., by deed dated September 7, 1948 and recorded under File No. 440337;

Running thence South 87°40'36" West along the South line of said Delson Lumber Co. tract 130 feet more or less to the Easterly line of West Bay Drive;

Thence Southeasterly along said Easterly line of West Bay Drive to the South line of said Hurd Claim;

Thence East along said South line 105 feet more or less to the POINT OF BEGINNING;

EXCEPTING THEREFROM right of way of Burlington Northern Inc.

PARCEL E:

That part of Hurd Donation Claim No. 59, Township 18 North, Range 2 West, W.M., described as follows:

Beginning at the Southeast corner of tract conveyed to Delson Lumber Co., Inc., by deed dated September 7, 1948 and recorded under File No. 440337, being a point on the government meander line of Budd Inlet, North 10°40'37" West 750.42 feet from the government meander corner at the Southeast corner of said Hurd Claim;

Running thence South 87°40'36" West along the South line of said Delson Lumber Co. tract 101.65 feet to the Easterly line of right of way of Burlington Northern Inc.;

Thence North 9°51'13" West along said Easterly line of right of way 71.93 feet;

Thence North 74°05' East 99.96 feet to said meander line;

Thence South 10°40'37" East along said meander line 95.81 feet to the POINT OF BEGINNING;

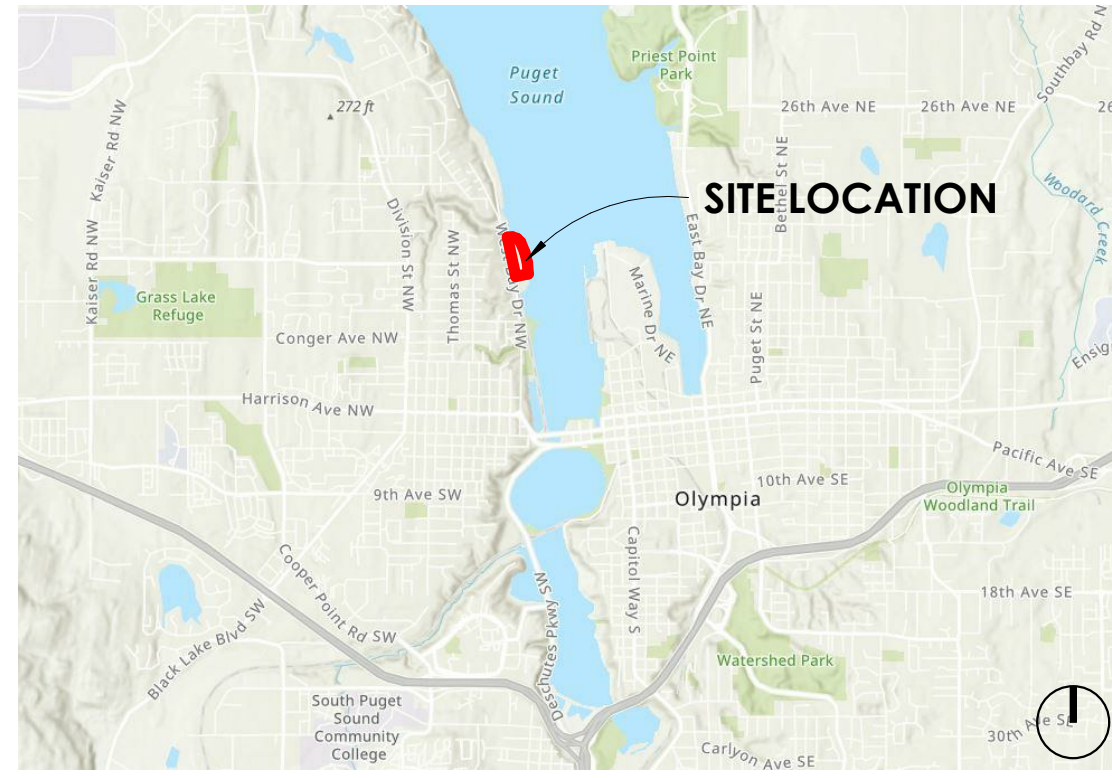
EXCEPTING THEREFROM right of way of Burlington Northern Inc.

In Thurston County, Washington.

Exhibit B

Concept Site Plan – West Bay Yards

VICINITY MAP - SITE LOCATION



SITE INFORMATION

ABBREVIATION LEGAL: SCHNEIDER LOT 1 BLK 2 LESS S 200F TGW PT HURD DLC
 DAF: COM SE COR DLC W 95F N18-14W 2.215 CH; E 20F: N16-53W 140.5 F; W 47.5F; N10-45W 120F; W 130F; N10-45W 60F; E 120F; N10-

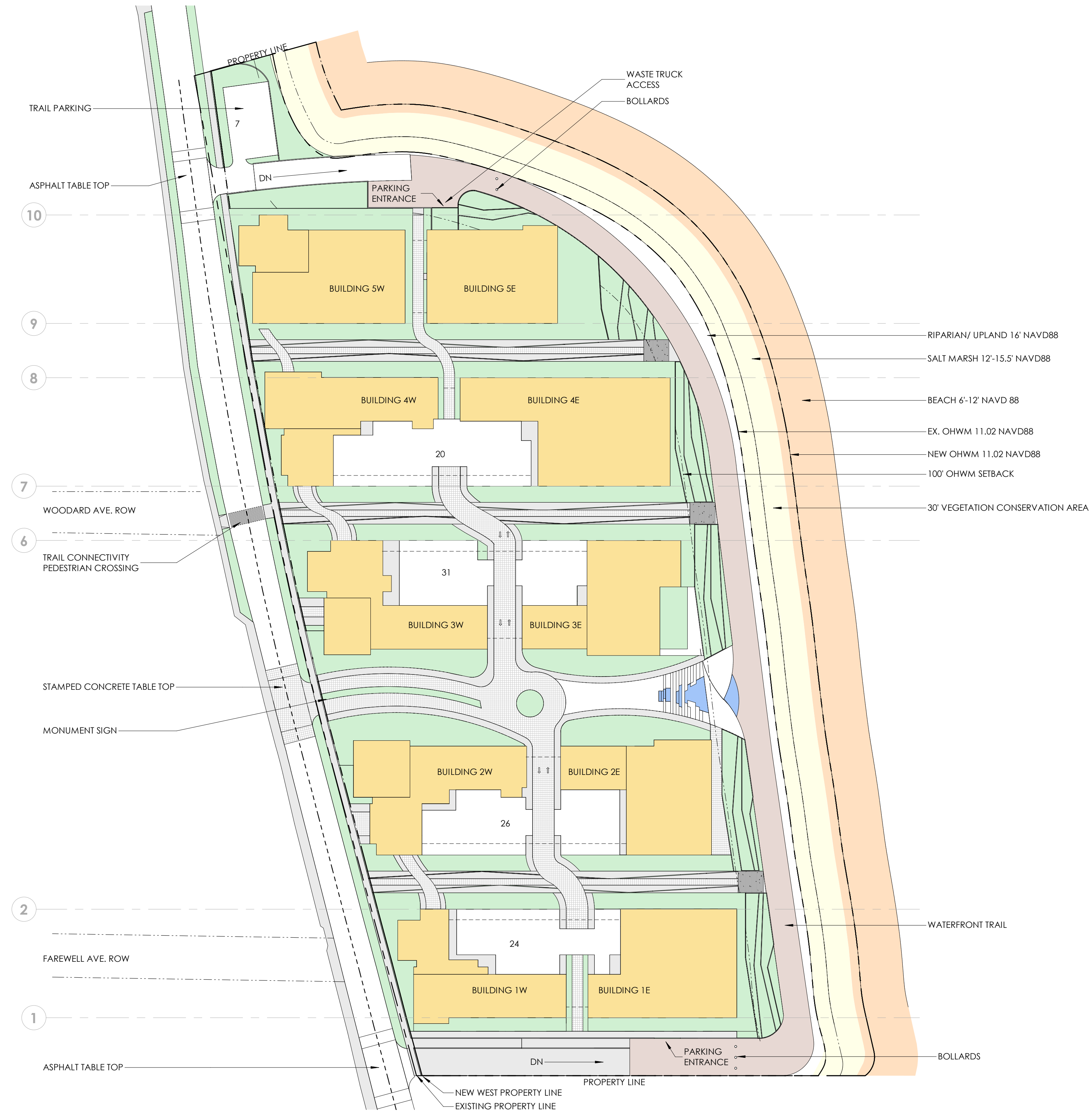
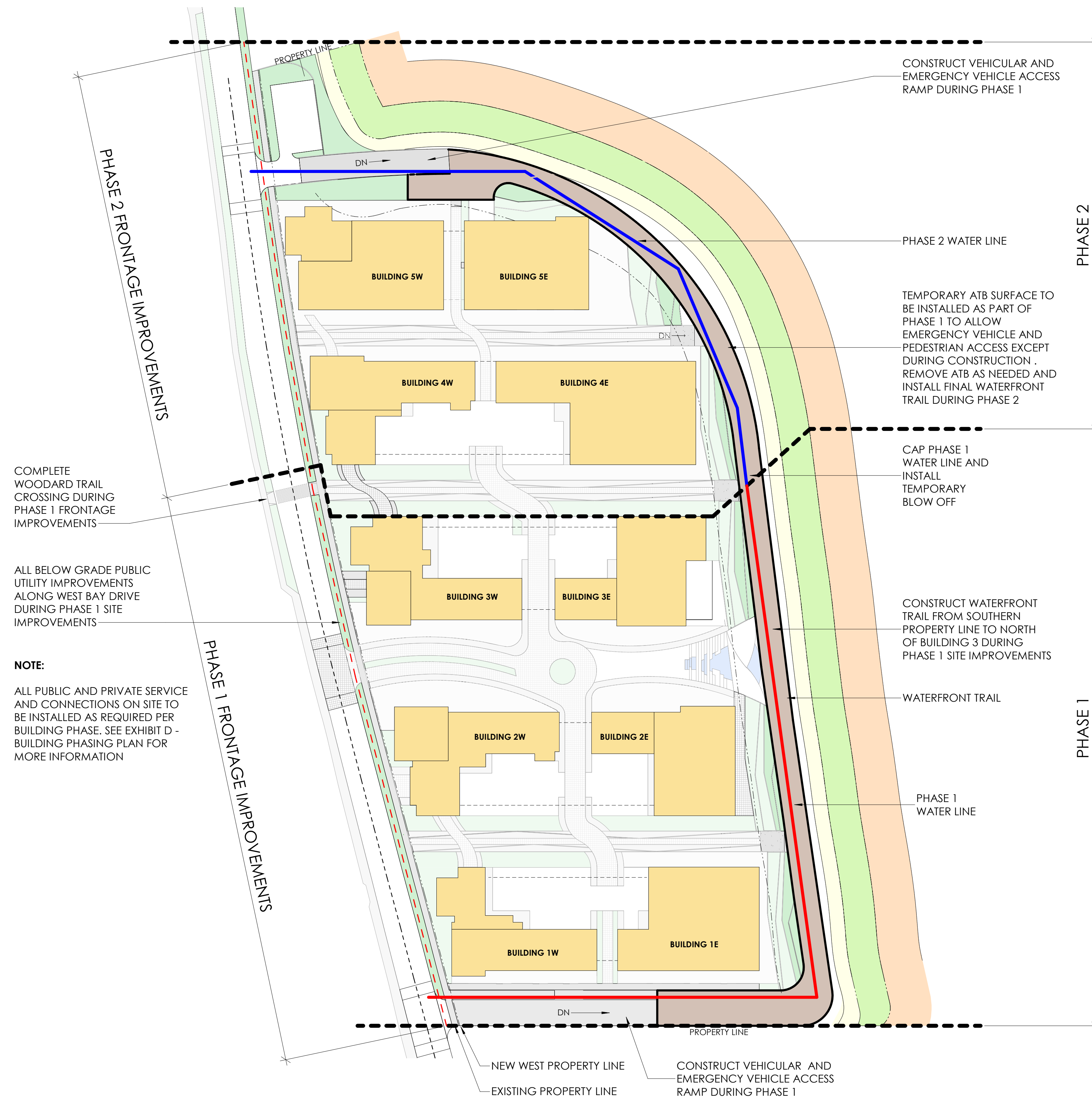


Exhibit C

Site Phasing Plan – West Bay Yards



COMPLETE WOODARD TRAIL CROSSING DURING PHASE 1 FRONTAGE IMPROVEMENTS

ALL BELOW GRADE PUBLIC UTILITY IMPROVEMENTS ALONG WEST BAY DRIVE DURING PHASE 1 SITE IMPROVEMENTS

NOTE:
ALL PUBLIC AND PRIVATE SERVICE AND CONNECTIONS ON SITE TO BE INSTALLED AS REQUIRED PER BUILDING PHASE. SEE EXHIBIT D - BUILDING PHASING PLAN FOR MORE INFORMATION

PHASE 2 NARRATIVE

1. CONSTRUCTION OF REMAINING SHORELINE IMPROVEMENTS ALONG PROJECT BOUNDARY
2. CONSTRUCTION OF REMAINING FRONTAGE IMPROVEMENTS
3. CONSTRUCTION OF REQUIRED PUBLIC UTILITY INFRASTRUCTURE RELATED TO IMPROVEMENTS FOR BUILDINGS 4 (4W AND 4E) AND 5 (5W AND 5E).

SHORELINE PHASING

1. ENVIRONMENTAL PERMITS FOR SHORELINE RESTORATION WILL BE SUBMITTED FOR BOTH PHASE 1 AND PHASE 2 SIMULTANEOUSLY
2. NO CONSTRUCTION WILL OCCUR PRIOR TO APPROVAL OF ENVIRONMENTAL PERMITS FOR SHORELINE RESTORATION
3. SHORELINE RESTORATION WILL OCCUR IN TWO PHASES AS NOTED IN THE SITE PHASING DRAWING ON THIS SHEET
4. UPON APPROVAL OF ENVIRONMENTAL PERMITS FOR SHORELINE RESTORATION CONSTRUCTION OF SITE AND BUILDING IMPROVEMENTS FOR PHASE 1 WILL COMMENCE.
5. UPON COMPLETION OF PHASE 1 SHORELINE RESTORATION AND PHASE 1 SITE AND BUILDING IMPROVEMENTS PHASE 2 SHORELINE RESTORATION AND PHASE 2 SITE AND BUILDING IMPROVEMENTS WILL COMMENCE.

PHASE 1 NARRATIVE

1. CONSTRUCTION OF FRONTAGE IMPROVEMENTS ALONG WEST BAY DRIVE SOUTHERN PROPERTY BOUNDARY TO THE NORTH OF THE WOODARD TRAIL PEDESTRIAN CROSSING.
2. CONSTRUCT BELOW GRADE UTILITY IMPROVEMENTS ALONG WEST BAY DRIVE ALONG THE ENTIRETY OF WESTERN PROPERTY BOUNDARY.
3. CONSTRUCTION OF SHORELINE ENHANCEMENTS FROM SOUTHERN PROPERTY LINE TO NORTHERN EXTENT OF PHASE 1
4. CONSTRUCTION OF WATERFRONT TRAIL ALONG SOUTH, EAST, AND NORTHERN PROPERTY
5. CONSTRUCTION OF WATER LINE TO THE NORTHERN EXTENT OF PHASE 1
6. CONSTRUCTION OF ASSOCIATED PUBLIC UTILITY INFRASTRUCTURE RELATED TO IMPROVEMENTS FOR BUILDINGS 2 (2W AND 2E) AND 3 (3W AND 3E) AND FUTURE CONSTRUCTION OF BUILDING 1 (1W AND 1E).

Exhibit D

Building Phasing Plan – West Bay Yards



PHASE 2 NARRATIVE

1. CONSTRUCTION OF PLAZA LEVEL FROM NORTH OF BUILDING 3 (3W AND 3E)
2. CONSTRUCTION OF BUILDING 4 (4E AND 4W), BUILDING 5 (5E AND 5W)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 4 (4E AND 4W) AND BUILDING 5 (5E AND 5W)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES

PHASE 1 NARRATIVE

1. CONSTRUCTION OF PLAZA LEVEL FROM SOUTH OF BUILDING 2 (2W AND 2E) TO THE NORTH OF BUILDING 3 (3W AND 3E)
2. CONSTRUCTION OF BUILDING 2 (2E AND 2W) AND BUILDING 3 (3E AND 3W)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 2 (2W AND 2E) AND 3 (3W AND 3E)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES
5. CONSTRUCT SOLID WASTE FACILITIES ADJACENT TO NORTHERN VEHICULAR RAMP. INTERNAL SOLID WASTE MANAGEMENT BY OWNER.
6. EMERGENCY VEHICLE ACCESS CONSTRUCTED DURING PHASE 1 AND MAINTAINED THROUGHOUT CONSECUTIVE PHASES

PHASE 3 NARRATIVE

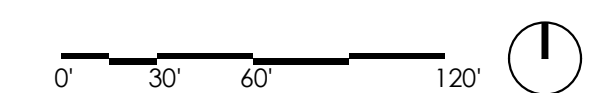
1. CONSTRUCTION OF PLAZA LEVEL FROM SOUTH OF BUILDING 2 (2W AND 2E) TO THE SOUTH PROPERTY LINE
2. CONSTRUCTION OF BUILDING 1 (1W AND 1E)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 1 (1W AND 1E)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES



WEST BAY YARDS
LUXURY WATERFRONT LIVING
OLYMPIA

BUILDING PHASING PLAN

WEST BAY DRIVE | OLYMPIA, WA
SCHEMATIC DESIGN | 10/12/20

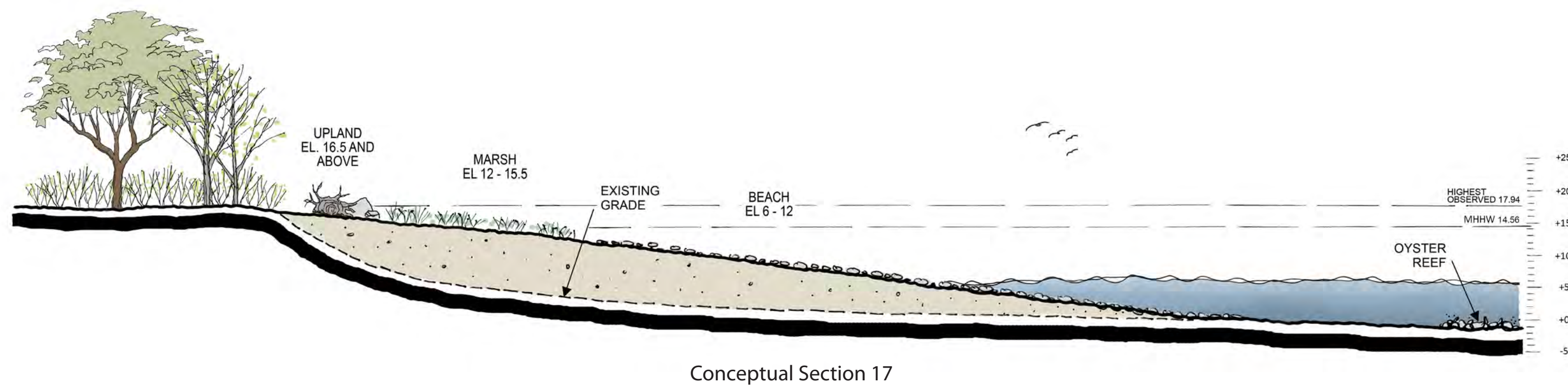


A103.2

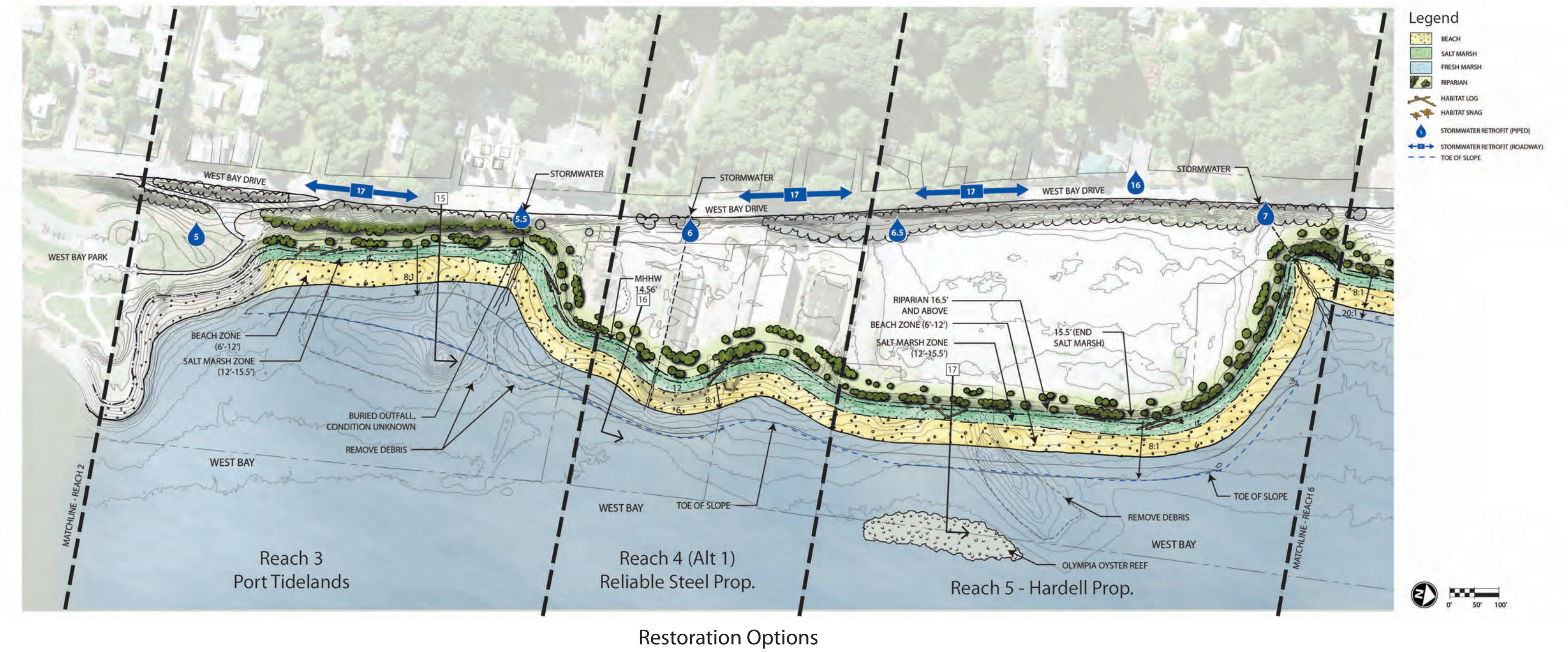


Exhibit E

Shoreline Conceptual Restoration Plan – West Bay Yards



Conceptual Section 17



Restoration Options

Reaches 3, 4, 5

City of Olympia, West Bay Environmental Restoration Assessment
Appendix A: Illustrative Graphic Plans and Sections



WEST BAY YARDS
LUXURY WATERFRONT LIVING
OLYMPIA

CONCEPTUAL RESTORATION

WEST BAY DRIVE | OLYMPIA, WA
SCHEMATIC DESIGN | 09/28/20

A103.3



Exhibit F

Construction Sequence

PHASE 1 →

PHASE 2 →

PHASE 3

SITE IMPROVEMENTS

1. CONSTRUCTION OF FRONTAGE IMPROVEMENTS ALONG WEST BAY DRIVE SOUTHERN PROPERTY BOUNDARY TO THE NORTH OF THE WOODARD TRAIL PEDESTRIAN CROSSING.
2. CONSTRUCT BELOW GRADE UTILITY IMPROVEMENTS ALONG WEST BAY DRIVE ALONG THE ENTIRETY OF WESTERN PROPERTY BOUNDARY.
3. CONSTRUCTION OF SHORELINE ENHANCEMENTS FROM SOUTHERN PROPERTY LINE TO NORTHERN EXTENT OF PHASE 1
4. CONSTRUCTION OF WATERFRONT TRAIL ALONG SOUTH, EAST, AND NORTHERN PROPERTY
5. CONSTRUCTION OF WATER LINE TO THE NORTHERN EXTENT OF PHASE 1
6. CONSTRUCTION OF ASSOCIATED PUBLIC UTILITY INFRASTRUCTURE RELATED TO IMPROVEMENTS FOR BUILDINGS 2 (2W AND 2E) AND 3 (3W AND 3E) AND FUTURE CONSTRUCTION OF BUILDING 1 (1W AND 1E).

BUILDING IMPROVEMENTS

1. CONSTRUCTION OF PLAZA LEVEL FROM SOUTH OF BUILDING 2 (2W AND 2E) TO THE NORTH OF BUILDING 3 (3W AND 3E)
2. CONSTRUCTION OF BUILDING 2 (2E AND 2W) AND BUILDING 3 (3E AND 3W)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 2 (2W AND 2E) AND 3 (3W AND 3E)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES
5. EMERGENCY VEHICLE ACCESS CONSTRUCTED DURING PHASE 1 AND MAINTAINED THROUGHOUT CONSECUTIVE PHASES.

SITE IMPROVEMENTS

1. CONSTRUCTION OF REMAINING SHORELINE IMPROVEMENTS ALONG PROJECT BOUNDARY
2. CONSTRUCTION OF REMAINING FRONTAGE IMPROVEMENTS
3. CONSTRUCTION OF REQUIRED PUBLIC UTILITY INFRASTRUCTURE RELATED TO IMPROVEMENTS FOR BUILDINGS 4 (4W AND 4E) AND 5 (5W AND 5E).

BUILDING IMPROVEMENTS

1. CONSTRUCTION OF PLAZA LEVEL FROM NORTH OF BUILDING 3 (3W AND 3E)
2. CONSTRUCTION OF BUILDING 4 (4E AND 4W), BUILDING 5 (5E AND 5W)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 4 (4E AND 4W) AND BUILDING 5 (5E AND 5W)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES

SITE IMPROVEMENTS

1. COMPLETED IN PREVIOUS PHASES

BUILDING IMPROVEMENTS

1. CONSTRUCTION OF PLAZA LEVEL FROM SOUTH OF BUILDING 2 (2W AND 2E) TO THE SOUTH PROPERTY LINE
2. CONSTRUCTION OF BUILDING 1 (1W AND 1E)
3. CONSTRUCTION OF PARKING LEVEL BELOW BUILDING 1 (1W AND 1E)
4. CONSTRUCTION OF ADJACENT SITE AND PLAZA LANDSCAPING, HARDSCAPING AND PEDESTRIAN AMENITIES



EXHIBIT C

1 BEFORE THE CITY OF OLYMPIA HEARINGS EXAMINER

2 In re the Appeal of:

HEARING NO. 20-3136

3 WEST BAY YARDS DEVELOPMENT
4 AGREEMENT,

ORDER DENYING APPELLANTS'
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT

5 OLYMPIA COALITION FOR
6 ECOSYSTEMS PRESERVATION,

Appellant,

7 vs.

8 CITY OF OLYMPIA COMMUNITY
9 PLANNING AND DEVELOPMENT
10 DEPARTMENT; WEST BAY
11 DEVELOPMENT GROUP, LLC; and
12 HARDEL PLYWOOD CORPORATION,

Respondents.

13 THIS MATTER comes before the Hearing Examiner on Cross-Motions for Summary
14 Judgment. Appellant, Olympia Coalition for Ecosystems Preservation ("Coalition"), moves for
15 summary judgment and asks the Hearing Examiner to: (1) vacate the SEPA DNS and (2) require
16 the City to prepare a EIS; or (3) in the alternative require the City to redo its SEPA Checklist and
17 then issue a new Threshold Determination. Conversely, the Respondents, West Bay
18 Development Group, LLC and Hardel Plywood Corporation ("West Bay"), move for summary
19 judgment and ask the Hearing Examiner to uphold the City's SEPA Determination.

20 Coalition is represented by David Bricklin and Alex Sidles. The City of Olympia
21 appears through its Senior Planner, Tim Smith, and is represented by Jeffery Myers, Special
22 Counsel, and Michael Young, Deputy City Attorney. West Bay is represented by Heather
23 Burgess and Tadeu Velloso.

24 The Hearing Examiner considered the following:

- 25 1. Notice of Appeal;
2. Appellant's Motion for Summary Judgment;

*Order Denying Appellant's
Motion for Summary
Judgment and Granting
Respondents' Motion for
Summary Judgment - 1*

CITY OF OLYMPIA HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
CHEHALIS, WASHINGTON 98532
Phone: 360-748-3386/Fax: 748-3387

1 3. Declaration of L. Brandon Smith in Support of Applicant's Response and Cross-
2 Motion for Summary Judgment;

3 4. Declaration of Heather L. Burgess in Support of Applicant's Response and
4 Cross-Motion for Summary Judgment;

5 5. Applicant's Response and Cross-Motion for Summary Judgment;

6 6. City of Olympia's Response to Motion for Summary Judgment;

7 7. Appellant's Reply in Support of Summary Judgment.

8 All parties are in agreement that the matter is properly decided by summary judgment as
9 there are no material issues of fact.

10 **BACKGROUND**

11 This appeal involves the City's SEPA review of a Development Agreement for the
12 proposed redevelopment of the former Hardel Plywood facility along West Bay of Budd Inlet in
13 the City of Olympia (the "Project Site"). The Project Site continues to be owned by Hardel but is
14 under contract for purchase to West Bay. The Project Site has a well documented history of
15 industrial contamination from its former use. Indeed, the ecology of much of West Bay has been
16 compromised by industrial activities along its shorelines as well as various other activities
17 related to urban development. These problems have led the City to undertake the "City of
18 Olympia West Bay Environmental Restoration Assessment" ("West Bay Restoration Plan" or
19 "Restoration Plan") dated February 26, 2016. It concludes that:

20 "The shorelines and intertidal areas within West Bay have been heavily altered
21 and ample opportunity exists for restoration. Analysis shows that existing
22 ecological and physical processes have been significantly impacted compared to
23 historical conditions. The critical issues include disconnection of riparian forest
24 and freshwater habitats from the Bay, conversion of shallow intertidal mud flats
25 into navigable waters and uplands, loss of sediment and large wood inputs from
bluffs and rivers/creeks, degradation of water quality by physical modification
and untreated stormwater inputs, and degradation of intertidal areas by armoring,
fill placement, and contamination."

1 The Restoration Plan subdivides West Bay into nine "reaches" each having one or more
2 possible alternatives for restoring ecological functions as well as providing recreational
3 opportunities and other improvements. The Project Sites shoreline is referred to as "Reach 5 –
4 Hardel Plywood". The Restoration Plan has a single proposed alternative for its restoration:

5 "One restoration alternative was developed for this reach that essentially
6 maintains the existing uplands and shoreline plan form, but creates fronting
7 intertidal beach and marsh areas primarily through placing beach substrates
8 offshore of the existing revetment. Riparian plantings could be installed above
9 the beach. Sea level rise adaptation could be included in this alternative. Given
10 the relatively deep water depths in this reach, substrate would be placed in the low
intertidal for establishment of an Olympia Oyster reef. Substrate placement may
require permission from WA DNR. Four conceptual stormwater improvement
opportunities that would be supportive of restoration were identified and
investigated in this reach, including treatment along West Bay Drive."

11 The West Bay Restoration Plan has not undergone SEPA review.

12 West Bay wishes to purchase the Project Site from Hardel and redevelop it into a mix of
13 residential and commercial uses known as "West Bay Yards" (the "Project"). The Project
14 envisions approximately 478 market-rate rental housing units in 5 mixed-use buildings along
15 with approximately 20,500 square feet of retail, restaurant and recreation uses. It would also
16 provide public access amenities including a waterfront trail as well as vegetation conservation
17 areas and shoreline restoration consistent with the recommendations found in the West Bay
18 Restoration Plan.

19 The first step in any possible redevelopment of the Project Site is the "West Bay Yards
20 Development Agreement" (the "Development Agreement"), proposed between the City and West
21 Bay. Under Olympia's Municipal Code, a development agreement is the required first step in
22 any development of this nature: "Any development agreement associated with a specific project
23 or development plan shall be heard by the City Council prior to consideration of any related
24 project application." OMC 18.53.040. The City interprets its ordinance as requiring the
25

1 Development Agreement to be in place before development applications are submitted. Thus,
2 this Development Agreement must be in place before West Bay can submit any development
3 applications to the City.

4 Development agreements are authorized by State law. RCW 36.70B.170-.210. Among
5 other things, "a development agreement must set forth the development standards and other
6 provisions that shall apply to and govern and vest the development, use, and mitigation of the
7 development of the real property for the duration specified in the agreement. A development
8 agreement shall be consistent with applicable development regulations adopted by local
9 government planning under Chapter 36.70A RCW." The statute specifically recognizes the right
10 to include mitigation measures, project phasing and vesting periods. RCW 36.70B.170(3)(c)(g)
11 and (i). Again, Olympia not only recognizes the benefit of development agreements but requires
12 that one be in place prior to development application.

13 The proposed Development Agreement approves the conceptual site plan; allows for site
14 development in two phases and building development in three phases; vests the development to
15 existing land use regulations at the time of the Agreement; and also vests impact fees to each
16 construction phase. It allows the development to take place over fifteen years.

17 The Development Agreement expressly recognizes the West Bay Restoration Plan and
18 declares:

19 "The Project will include significant access amenities, including a waterfront trail,
20 *and will also complete shoreline restoration along the property boundary*
21 *consistent with the recommendations identified in the City of Olympia West Bay*
22 *Environmental Restoration Assessment Final Report (Coat and Harbor*
23 *Engineering, 2016) for "Reach 5 – Hardel Plywood" and the City of Olympia*
24 *[Shoreline] Master Program."*

25 The Development Agreement expressly requires that shoreline restoration will be
completed as part of each phase's site development, and the waterfront trail shall be completed as
part of Phase 1.

1 It is worth noting that the Project's proposed residential and commercial uses are
2 permitted uses under the Project Site's current zoning designation of "Urban Waterfront"
3 ("UW"). The proposed uses are also permitted uses under the Project Site's current Shoreline
4 Environmental Designation (SED) of "Urban Intensity" ("UI") under the City's Shoreline Master
5 Program (SMP). The proposed uses are also consistent with the City's current Comprehensive
6 Plan and its Land Use Map. Stated slightly differently, the Development Agreement does not
7 allow for any land use that is not currently allowed under the City's development regulations.

8 The Development Agreement was submitted to the City along with the SEPA Checklist.
9 The Checklist makes clear that the "Proposal" subject to SEPA review is the proposed
10 Development Agreement, not the Project itself. In its review of the SEPA Checklist the City
11 concurs that the "Proposal" is the Development Agreement, not the Project. The City concludes
12 that the Development Agreement, on its own, does not have a probable significant environmental
13 impact and issued a SEPA DNS.

14 Coalition timely appealed the SEPA DNS and then moved for summary judgment. It
15 argues that the "Proposal" subject to SEPA review is the Project, not simply the Development
16 Agreement. Coalition notes that our courts have been insistent upon conducting environmental
17 review at the earliest opportunity and that the details of this Project are already well established –
18 indeed, essentially fixed – that SEPA review of the Development Agreement mandates
19 environmental review of the enter Project.

20 West Bay cross-motined for Summary Judgment. It argues, and the City concurs, that
21 the "Proposal" subject to early environmental review is the Development Agreement, not the
22 Project itself, and that there is nothing about this Development Agreement deserving heightened
23 review.

1 ANALYSIS

2 The resolution of this appeal and the cross-motions requires the answering of two
3 questions: (1) What is the "Proposal" currently subject to environmental review? and (2) Does
4 this "Proposal" have a probable significant, adverse environmental impact?

5 1. What is the "Proposal"?

6 Coalition notes that the principal features of the Project are well defined including the
7 conceptual site plan, phasing plan, restoration plan and construction sequence. Through the
8 Development Agreement, the City binds itself to all of the Project's detail and allows all
9 development to vest to current Development Regulations. As everything about the Project is
10 well known, Coalition does not see how – or why – substantive environmental review can be
11 deferred. To the contrary, Coalition argues that our courts have uniformly insisted upon
12 substantive environmental review at the earliest opportunity which, in this case, is now.

13 The City and West Bay acknowledge our courts' insistence upon early environmental
14 review but argue that this standard applies to the specific "Proposal" being reviewed. In this case
15 the Proposal is the Development Agreement, not the Project, and the mandate of early
16 environmental review applies only to the Development Agreement. The City/West Bay argue
17 that Coalition conflates two separate Proposals (the Development Agreement and the actual
18 Project) into a single Proposal, and that the conflation of the two is improper. The City and West
19 Bay add that the standard for review is the "clearly erroneous" standard, and that the Hearing
20 Examiner must affirm the City's decision "unless he is firmly convinced that a mistake has been
21 committed".

22 There is no question that our courts insist upon substantive environmental review at the
23 earliest opportunity. *King County v. Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024
24 (1993); *Alpine Lakes v. Natural Resources*, 102 Wn. App 1, 979 P.2d 929 (1999); *Lands*
25 *Council v. Parks & Rec. Comm'n*, 176 Wn. App. 787, 309 P.3rd 734 (2013).

1 "[t]he risk of postponing environmental review is a 'dangerous incrementalism
2 where the obligation to decide is postponed successively while project momentum
3 builds.' "It 'may begin a process of government action which can 'snowball' and
4 acquire virtually unstoppable administrative inertia.' "To avoid this,
'decisionmakers need to be apprised of the environmental consequences *before*
the project picks up momentum, not after". *King County* at 664.

5 This judicial insistence is firmly premised on SEPA's administrative regulations
6 including WAC 197-11-055(2):

7 "The lead agency shall prepare its Threshold Determination and Environmental
8 Impact Statement (EIS), if required, at the earliest possible point in the planning
9 and decision making process, when the principal features of a proposal and its
environmental impacts can be reasonably identified."

10 Again, Coalition argues that the "Proposal" is the Project itself and that both court
11 decisions and administrative regulations mandate its early environmental review.

12 But the City and West Bay respond that "Proposal" is defined by administrative
13 regulation. Per WAC 197-11-784:

14 "'Proposal means a proposed action. A proposal includes both actions and
15 regulatory decisions of agencies as well as any actions proposed by applicants. A
16 proposal exists at that stage in the development of an action when an agency is
presented with an application"

17 The only application the City has received is the Development Agreement. Actual
18 development applications have not yet been submitted, and cannot be submitted, until the
19 Development Agreement is approved.

20 I conclude that, pursuant to WAC 197-11-784, the City's decision to regard the
21 "Proposal" subject to SEPA review as the Development Agreement, not the Project, is not clearly
erroneous and should therefore be affirmed.

22 (2) Does this "Proposal" have a probable significant, adverse environmental impact?

23 The determination that the "Proposal" is the Development Agreement, not the Project
24 itself, is merely the starting point for SEPA review. The second question, then, is whether the
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1 Development Agreement has a probable significant adverse environmental impact. This requires
2 a more careful analysis of the Development Agreement in relation to *Alpine Lakes* and *Lands*
3 *Council*. Both make clear that, even if the "Proposal" is a non-project action, it may still have
4 environmental impacts. These impacts may be in the form of an alteration to a site's land use
5 designation (*Lands Council*) or an assurance that future environmental review will be lessened
6 (*Alpine Lakes*).

7 But what determines whether a development agreement or similar non-project action has
8 a substantive environmental impact? The answer appears to be found in *Lands Council*. At page
9 795, the court begins its analysis by framing the question before it: "Was [this non-project
10 action] merely the adoption of a classification that would allow consideration of possible
11 development proposals in the future . . . or was it a final action approving some level of
12 development?" The court's framing of the question provides a dividing line between those non-
13 project actions that do not have environmental impacts (merely the adoption of a classification
14 that would allow consideration of possible development proposals in the future) from those non-
15 project actions that do have environmental impacts (a final action approving some level of
16 development). As applied to this appeal, does the Development Agreement merely allow
17 consideration of possible future development, or does it actually approve some level of
18 development?

19 The answer to this question requires a closer review of the Development Agreement. The
20 Agreement begins by noting that the Project "will complete shoreline restoration along the
21 property boundary consistent with the recommendations identified in the City of Olympia West
22 Bay Environmental Restoration [Plan]", and attaches a copy of the Plan to the Agreement. The
23 Development Agreement then goes on to approve the conceptual site plan; a two-pronged
24 phasing of site development including shoreline restoration in each phase; a three-pronged
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1 phasing of building construction; a vesting of development regulations and a vesting of impact
2 fees to building phases.

3 Coalition argues that the Development Agreement's provisions for vesting and phasing
4 are sufficient enough on their own to warrant fuller environmental review. I respectfully
5 disagree. These provisions of the Development Agreement are expressly authorized by law.
6 RCW 36.70B.170(3). As earlier noted, the Project is a mix of uses that are permitted uses in the
7 site's current zoning designation and its Shoreline Environmental Designation, and are also
8 consistent with the City's Comprehensive Plan and its Land Use Map. The Development
9 Agreement does not allow for anything currently not allowed under the City's Development
10 Regulations. Nonetheless, Coalition argues that more intensive environmental review should
11 occur at this stage to examine possible future changes to development regulations, zoning
12 designations, shoreline designations, and comprehensive plans that might occur over the course
13 of this fifteen-year Development Agreement. But Coalition has not cited to any legal authority
14 for this argument and it is difficult to envision how such review would occur.

15 The more substantive argument raised by Coalition is that the Development Agreement's
16 inclusion of shoreline restoration as envisioned in the West Bay Restoration Plan requires fuller
17 environmental review. Put slightly differently, does the Development Agreement contain an
18 assurance from the City to West Bay that, if it satisfies the shoreline restoration requirements
19 contained in the Restoration Plan, the City will not ask for any additional shoreline restoration?
20 If the Development Agreement serves as such an assurance it has significant environmental
21 consequences requiring closer review in accordance with *Alpine Lakes*.

22 As noted early on, the West Bay Restoration Plan has not undergone SEPA review nor is
23 it adopted by reference in the City's most recent SMP or Comprehensive Plan (both of which
24 have undergone SEPA review). To date the environmental impacts of the Restoration Plan have
25

1 not been analyzed. The fact that the Restoration Plan is a noble and well intended effort to
2 restore the ecology of West Bay does not exempt it from SEPA review. "Even proposals
3 intended to protect or improve the environment may require an EIS. SEPA regulations do not
4 allow Threshold Determinations to be made by balancing the potential "good/bad" effects of a
5 proposal." *Alpine Lakes* at 15. Therefore, if the Development Agreement can be construed as
6 assuring West Bay of no greater shoreline restoration than is found in the Plan, this assurance
7 triggers heightened environmental review.

8 I conclude that the Development Agreement does not contain any such assurance. Both
9 the City and West Bay acknowledge that the Restoration Plan merely serves as a guide, and that
10 the Development Agreement makes no assurance that the City will not demand greater shoreline
11 restoration as part of any development. Therefore, and unlike *Alpine Lakes*, the Development
12 Agreement does not serve to limit future substantive environmental review of the Project's
13 shoreline restoration.

14 In summary, had the Development Agreement not incorporated the West Bay Restoration
15 Plan it would have been far easier to deny Coalition's Motion for Summary Judgment. In that
16 case it would simply have been a matter of concluding that the "Proposal" was the Development
17 Agreement, and that the Development Agreement merely provided for phasing and vesting as
18 expressly allowed by law. The incorporation of the West Bay Restoration Plan into the
19 Development Agreement significantly alters the analysis and requires a determination as to
20 whether it effectively establishes a maximum requirement for shoreline restoration without the
21 benefit of substantive SEPA review, not unlike that found in *Alpine Lakes*. I conclude that the
22 Development Agreement does not establish a maximum requirement for shorelines restoration
23 and that *Alpine Lakes* is therefore not applicable.

24 I therefore make the following:
25

1 **CONCLUSIONS OF LAW**

2 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.

3 2. Any Conclusions of Law contained in the previous Background or Analysis
4 Sections are hereby incorporated herein by reference and adopted by the Hearing Examiner as
5 his Conclusions of Law.

6 3. There are no material issues of fact and the matter may be resolved by summary
7 judgment.

8 4. SEPA Threshold decisions are reviewed under the clearly erroneous standard.
9 The Threshold Determination is "clearly erroneous" only if the Hearing Examiner, when
10 considering the entire administrative record and public policy underlying the statutory standard,
11 is left with the definite and firm conviction that a mistake has been committed.

12 5. On appeal, the City's Threshold Determination is accorded substantial weight.
13 The Hearing Examiner may not substitute his judgment for that of the City but must examine the
14 entire record and all the evidence in light of the public policy contained in the legislation
15 authorizing the decision.

16 6. For purposes of SEPA review, the "Proposal" is the Development Agreement
17 proposed between the City and West Bay.

18 7. Development agreements are authorized by law and are expressly authorized to
19 include mitigation measures, project phasing and vesting. RCW 36.70B.170.

20 8. Development agreements are encouraged as a means of strengthening public
21 planning, encouraging private participation in comprehensive planning, and reducing the
22 economic costs of development. RCW 36.70B.170.

23 9. The City's Development Regulations allow for development agreements and
24 require that they be approved by the City Council prior to consideration of any related project
25 application. RCW 18.53.040.

1 10. To the extent that the Development Agreement between the City and West Bay
2 approves the conceptual site plan, allows for phasing of site development and construction, and
3 assures vesting to Development Regulations, it is merely the adoption of an agreement that
4 allows for consideration of possible development proposals in the future, and does not actually
5 approve some level of development.

6 11. If the incorporation of the West Bay Restoration Plan into the Development
7 Agreement served as an assured maximum requirement of shorelines restoration for the Project,
8 such assurance would require fuller environmental review. *Alpine Lakes*.

9 12. The incorporation of the Restoration Plan into the Development Agreement is not
10 intended to provide such assurance nor do either the City or West Bay interpret it in such a
11 manner. To the contrary, the Development Agreement does not preclude the City from
12 demanding increased shoreline restoration beyond what is proposed in the Restoration Plan. The
13 Restoration Plan is incorporated into the Development Agreement to serve as a guide, not as any
14 assured level of restoration.

15 13. Even with the incorporation of the Restoration Plan into the Development
16 Agreement, it remains the adoption of an agreement that allows consideration of possible
17 development proposals in the future, and is not the final action of the City approving some level
18 of development.

19 **ORDER**

20 Now, therefore, it is hereby:

21 ORDERED, ADJUDGED, AND DECREED that the Appellant's Motion for Summary
22 Judgment is **denied**.

23 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Respondents'
24 Cross-Motion for Summary Judgment is **granted**.

1 DATED this 17 day of February, 2021.



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4 Mark C. Scheibmeir
City of Olympia Hearing Examiner

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EXHIBIT D



STATE ENVIRONMENTAL POLICY ACT
DETERMINATION OF NONSIGNIFICANCE
(SEPA DNS)

West Bay Yards Development Agreement

Community Planning & Development
601 4th Avenue E. – PO Box 1967
Olympia WA 98501-1967
Phone: 360.753.8314
Fax: 360.753.8087
cpdinfo@ci.olympia.wa.us
www.olympiawa.gov

Project Name/Number: West Bay Yards Development Agreement, File No. 20-2136

Description: This non-project action is known as the West Bay Yards Development Agreement. The proposal is an agreement between the City of Olympia and the property owner establishing parameters and a phasing schedule for future development on the property.

Location of Proposal: 1210 West Bay Drive NW

Proponent: Brandon Smith, West Bay Development Group, LLC

Lead Agency: City of Olympia

SEPA Official: Nicole Floyd AICP, Principal Planner
Phone: 360.570.3768
E-Mail: nfloyd@ci.olympia.wa.us

Date of Issue: November 10, 2020

Threshold Determination: The lead agency for this proposal has determined that this action probably will **not** have a significant adverse impact upon the environment. Therefore, an Environmental Impact Statement **is not** required under RCW 43.21C.030(2)(C). The environmental review and SEPA threshold determination of this proposed action are based upon the environmental checklist and the draft code amendments. This information is available to the public on request.

This DNS is issued under Washington Administrative Code 197-11-340. The City of Olympia will not act upon this proposal prior to the appeal deadline.

Comments regarding this Determination of Non-Significance (DNS) should be directed to the SEPA Official at the address above. **COMMENT DEADLINE: 5:00 p.m., TUESDAY, NOVEMBER 24, 2020.**

APPEAL PROCEDURE: Pursuant to RCW 43.21C.075(3) and Olympia Municipal Code 14.04.160(A), this DNS may be appealed by any agency or aggrieved person. Appeals must be filed with the Community Planning and Development Department at the address above within twenty-one (21) calendar days of the date of issue. Any appeal must be accompanied by the administrative appeal fee. **APPEAL DEADLINE: 5:00 p.m., TUESDAY, DECEMBER 1, 2020.**

Issued by:

NICOLE FLOYD, PRINCIPAL PLANNER
SEPA OFFICIAL