May 27, 2014

City Council Members
City of Puyallup
333 S. Meridian
Puyallup, WA 98371

RE: Proposed Adoption of ML Overlay

Dear Council Members,

We are writing on behalf of Schnitzer West, prospective purchaser of the Van Lierop Property ("Property") pursuant to a Purchase and Sale Agreement ("Purchase Agreement"), related to the proposed adoption of a new overlay zone ("Proposed ML Overlay") that would apply to three Limited Manufacturing-zoned parcels owned by Neil and Lore Van Lierop on the north side of East Pioneer Way.

The Proposed ML Overlay is scheduled for a second reading (and probable adoption) tonight at a Special Council Meeting at which the public comment is not permitted. Accordingly, Schnitzer is submitting this letter for the Council's consideration before the meeting and requests that it be included in the City's official record for this matter.[1]

The Proposed ML Overlay is a discriminatory, site-specific rezone that is the latest in a pattern of actions by certain members of the City Council to interfere with the Schnitzer/Van Lierop Purchase Agreement. The purpose of this letter is to put the City Council on notice that if it adopts the Proposed ML Overlay, it will do so in knowing violation of the law. As the Council knows, actions taken in knowing violation of the law give rise to a claim for damages and attorney's fees under Chapter 64.40 RCW.

A brief review of background facts is warranted. In 2013, Schnitzer proposed a Comprehensive Plan amendment and rezone to redesignate two parcels of the Property from Business/Industrial Park ("B/IP") to Light Manufacturing Warehouse ("LM/W"), and to rezone those parcels from Business Park ("MP") to Limited Manufacturing ("ML").[2] The Council ultimately approved that request, but the legislative record reveals at least one Councilmember's intent to thwart industrial development on the Property and acquire it for use as a park.

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[1] We also request that the City include the Council meeting videos and Planning Commission audiotapes cited in the attached Exhibit A. These meeting videos and audiotapes are directly relevant to the Council's consideration of the Proposed ML Overlay.

[2] The Comprehensive Plan application is attached as Exhibit B, and the adopting ordinance is attached as Exhibit C.

In early 2014, Schnitzer submitted a short plat application for a warehouse project that was fully consistent with the new ML zoning.[3] Also in early 2014, two new Council members were seated on the City Council, and the newly comprised Council immediately proposed an "emergency" moratorium preventing the acceptance or processing of any and all land use or building applications or plans on thirteen parcels in the Shaw-East Pioneer area, which included the Property.[4] We informed the Council at that time that the moratorium was adopted in violation of state law, without required Planning Commission or State Environmental Policy Act ("SEPA") review, but the Council acted in disregard of our letter and the law.[5]

The stated purpose of the moratorium was to allow time for the City to consider whether to extend the original "Shaw-East Pioneer Overlay Zone," which was created in 2009 ("Original SPO Overlay"), to thirteen parcels in the Shaw-Pioneer area, which included the Property. Although the Original SPO Overlay applied only to commercially-zoned properties, the Council elected to include the ML-zoned Property in the moratorium that was under contract with Schnitzer. Indeed, Councilmember Vermillion observed at the January 7, 2014 Council meeting that the moratorium could be viewed as "personal retribution against Schnitzer"—the only entity with a viable development proposal in the Shaw-Pioneer area. Furthermore, Councilmember Door described the urgency as follows: "do it now before the [Schnitzer] sale closes." There can be no dispute that the moratorium was a retaliatory action adopted in direct response to Schnitzer's development proposal.

Over the past several months, the Council and Planning Commission have considered whether to extend the Original SPO Overlay, or a new overlay with minor amendments, to the thirteen parcels north of East Pioneer. In April 2014, the Planning Commission issued a recommendation not to extend the Original SPO Overlay, or any variation thereof, to any of the parcels.

However, on May 6, the City Council introduced a new concept that had not previously been considered by the Planning Commission or revealed to the public— a new SPO overlay with substantive development restrictions that would be applied solely to the 3 ML-zoned parcels owned by the Van Lierops and under contract with Schnitzer; it would not be applied to the commercially-zoned parcels directly north of Pioneer.[6] So unlike the Original SPO Overlay, which imposed design standards on commercially-zoned parcels, the Proposed ML Overlay would apply significant development restrictions (such as a 125,000 sq. ft. building size limitation) to three industrially-zoned parcels held under common ownership.

The effect of this new, site-specific, discriminatory Proposed ML Overlay ordinance is to "undo" the policy decision made by the previous Council when it adopted the Comprehensive Plan and rezone in 2013. As Council well knows, these new regulations would render an industrial warehouse

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[3] The short plat application is attached as Exhibit D. The City letter deeming the short plat application complete for vesting purposes is attached as Exhibit E.

[4] A copy of the moratorium ordinance is attached as Exhibit F.

[5] A copy of the January 13, 2014 letter from McCullough Hill Leary to the City Council is attached as Exhibit G.

[6] Notably, Council discussions at the May 6 meeting referred to a draft ordinance that was prepared without Planning Commission review that was never made available for public comment.

development on the Property infeasible.[7] If Schnitzer were to lose its vested rights through action by the City, it is highly unlikely that the Van Lierops could identify another buyer for industrially-zoned property that does not permit an economically-feasible industrial project.

In sum, the actions of the Council over the last several months reveal a concerted scheme to interfere with the Schnitzer/Van Lierop Purchase Agreement and prohibit industrial development on the Property. If the Council adopts the Proposed ML Overlay—a discriminatory, site-specific action designed to prohibit Schniter's development project—it will do so in knowing violation of the law and subject the City to damages under Chapter 64.40 RCW.

Outlined below are some of the legal defects associated with the City process and the Proposed ML Overlay. This list is not exhaustive.

1. Planning Commission and SEPA Violations

Under the Puyallup City Code, the Planning Commission "shall" review and make recommendations on proposed amendments to city regulations concerning land use and development. PMC 2.28.070(3). PMC 20.91.020 provides:

> **Planning Commission Recommendation Required.** Before the city council may grant, modify or deny any application for amendment [to the City's zoning code], it must first receive and consider a recommendation on such application from the planning commission. Before the planning commission acts to make a recommendation on such application it shall conduct a duly noticed public hearing pursuant to Chapter 20.12 PMC.

The Planning Commission did consider whether to extend the Original SPO Overlay to the thirteen parcels on the north side of East Pioneer Way, but it did not consider a targeted, site-specific ML overlay with standards so stringent that viable industrial development could not occur. Council members introduced the Proposed ML Overlay concept on May 6—after the Planning Commission had completed its review. City Council must forward the Proposed ML Overlay to Planning Commission for review as required by PMC 20.91.020 and PMC 20.91.025.

Similarly, the City's SEPA Addendum for the Proposed ML Overlay concludes that no significant impacts would result from the proposed overlay options in comparison to the development permitted under current zoning. However, the SEPA Addendum did not analyze the impacts of creating a new, site-specific ML overlay that would significantly restrict building size and effectively preclude industrial development. The City must assess the probable impacts of this action under SEPA (and in its GMA-required buildable lands analysis). RCW 43.21C.034.

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[7] Schnitzer's short plat application proposed an approximately 470,000 sq. ft. building, which responds to the infrastructure challenges in the area (the City has no plan to extend necessary infrastructure to this area, despite the fact that it is inside the City's Urban Growth Area) and the market demand for larger industrial buildings.

2. Appearance of Fairness Doctrine/Bias/Due Process Violations

Quasi-judicial actions are defined by state statute to be: "...those actions of the legislative body . . . which determine the legal rights, duties, or privileges of specific parties. . ." RCW 42.36.010. Here, the Council is seeking to apply new, targeted regulations to three parcels of property owned by one property owner. This is a quasi-judicial action. *See Spokane County v. Eastern Washington Growth Management Hearings Board et. al.*, 176 Wn. App. 555 (2013); *see also RCW 42.36.060.*

Accordingly, the appearance fairness of doctrine applies here. *See* Chapter 42.36 RCW. The appearance of fairness doctrine is a rule of law requiring government decision-makers to conduct proceedings in a way that is fair and unbiased. In a quasi-judicial matter, local governments must disqualify decision-makers from quasi-judicial hearings who have prejudged the issues, who have a bias in favor of one side in the proceeding, who have a conflict of interest, or who cannot otherwise be impartial. "Ex parte" communications between a decision-maker and a proponent or opponent of the matter being decided are prohibited. RCW 42.36.060.

In this case, the evidence shows—through adoption of a development moratorium on the eve of Schnitzer's short plat application and Councilmember Vermillion's observation that the moratorium as adopted as "personal retribution against Schnitzer"—clear evidence of bias. However, no attempt was made to assess and disclose potential bias on the record, and no attempt was made to assess the extent and nature of ex parte contacts. This is a violation of the appearance of fairness doctrine, which would require invalidation of the Proposed ML Overlay (if adopted). *See Alger v. City of Mukilteo*, 107 Wn. 2d 541, 730 P.2d 1333 (1987).

Finally, a quasi-judicial action requires specific procedures that were not followed here, which gives rise to due process claims.

3. Comprehensive Plan Inconsistency

Proposed zoning amendments must be consistent with the City's GMA Comprehensive Plan. *See* PMC 20.91.010 ("any action amending the City zoning code "shall be principally based upon the consistency of such amendment with the goals, objectives and policies of the comprehensive plan").

The City's Comprehensive Plan notes that the City "has lagged behind many other Puget Sound communities in the development of industrial, warehousing and business park uses," which has resulted in limited employment opportunities and no industrial tax base. Comprehensive Plan, page 24, Section III. Accordingly, the Comprehensive Plan lists several goals intended to encourage industrial development, including requirements for appropriate siting of industrial lands, adoption of appropriate performance standards, and implementation of architectural design and landscaping measures. These standards are intended to strengthen the City's industrial base. In contrast, the Proposed ML Overlay is designed to make industrial development less feasible on three specific ML-zoned properties, in clear contravention of the City's Comprehensive Plan.

4. Internal Development Regulation Inconsistency

The Proposed ML Overlay is also inconsistent with other provisions of the City Code. As noted, the Original SPO Overlay applied (and still applies) only to commercial zones. *See* PMC 20.46.005 ("the SPO zoning shall apply only to specific parcels zoned business commercial and general commercial on the south side of East Pioneer in the vicinity of Shaw Road, as well as specific parcels zoned general commercial on the north side of East Pioneer in the vicinity of Shaw Road"). Creation of a new Proposed ML Overlay (that purports to be an extension of the Original SPO Overlay) is inconsistent with the PMC 20.46.005 and the City's ML regulations, which are designed to encourage high-quality industrial development.

5. Other Procedural Violations

The decision not to allow public comment at a special meeting set to consider adoption of a new, site-specific zoning ordinance that was introduced for the first time on May 20 is an extraordinary action that violates participation requirements. RCW 36.70A.020(11); RCW 36.70A.140; RCW 36.70A.035; WAC 365-196-600.[8]

Finally, on May 16, 2014, we submitted a Public Records Act ("PRA") request to the City for documents related to the Schnitzer short plat application and proposed overlay zone since February 1, 2014 (documents produced over a 3 ½ month time period).[9] The City responded that it could not produce the requested documents until November. A six-month response time is unreasonable and gives rise to a claim under RCW 42.56.550. The City's eventual response to the PRA request may reveal additional violations of state law, including potential violations of the Open Public Meeting Act ("OPMA"), Chapter 42.30 RCW.[10]

Schnitzer has attempted to work in good faith with the City to bring a high quality industrial development and needed infrastructure to the Shaw-Pioneer area. However, it will aggressively challenge any attempts to interfere with its investment-backed expectations and Purchase Agreement with the Van Lierops.

Sincerely,

John C. McCullough

cc: Schnitzer West

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[8] We have reviewed Council agendas over the last several years and have not identified one instance in which the Council prohibited public comment under similar circumstances.

[9] The PRA request is attached as Exhibit H. The City's response is attached as Exhibit I.

[10] An email from John Palmer to undisclosed City officials/staff members dated April 18, 2014 is attached as Exhibit J.