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Honorable City Council
P.O. Box 1967
Olympia, WA 98507-1967

November 9, 2012

Re: City Council Public Hearing 12-0268:
Trillium Property Comprehensive Plan Amendment and Rezone

Dear Honorable City Councilmembers:

DR Horton retains its request that this Council redesignate and rezone the Trillium property to R6-12, assuming the Council still feels the NV zone is not appropriate.[1] Contrary to what appears to be a common perception, a rezone to R6-12 would be a substantial downzone from NV. The density allowed under an R6-12 zoning range is substantially lower than under NV. The type of housing is more limited under R6-12 and commercial development would not be allowed.

Upon review of the public comments submitted to this Council, it seems appropriate to remind the Council of the basic rules that the City must comply with in adopting any regulation, including this rezone. A review of these rules and the specific circumstances of the area make it clear that there is simply no basis to zone the Trillium property to anything lower than R4-8. To the contrary, a designation and zoning in the R6-12 range is fully supported by all the analysis in the record and is appropriate for the Trillium property.

First, the Washington State Constitution requires that City's rezone (a) be aimed at achieving a legitimate public purpose and (b) use means to achieve that purpose that are reasonably necessary and not unduly oppressive on any individual.[2] These are basic due process safeguards to which all property owners are entitled.

Second, a city cannot single out a project or a piece of private property and put up roadblocks to development using either its permitting process or its legislative zoning

[1] DR Horton preserves its submittal of this application under protest to determine the property's zoning in the event the master plan denial is upheld upon completion of judicial review.
[2] *West Main Assoc. v. Bellevue*, 106 Wn.2d 47 (1986).

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powers. Even if there is substantial public pressure or opposition to a project, a city simply cannot rely on that displeasure to block development of private property.[3] It would be equally unlawful for the City to interefere with private development of private land by downzoning the property without a clear evidentiary basis for doing so. The Washington Supreme Court previously found that Seattle acted unlawfully when it downzoned property commonly known as "Parkridge" based on neighborhood pressure and a "desire to gain the favor of a politically active and potentially influential group opposing the Parkridge project."[4] This case was a meaningful lesson to cities across the state that even if public opposition to a project is vociferous, the law will not allow a city to rely on that opposition and downzone property or deny a project. DR Horton respectfully requests this Council to heed this law in making its decision regarding the Trillium redesignation/rezone.

Third, it would be improper for the City to downzone or restrict development on the Trillium site because members of the public wish to use the property as an extension of LBA Park. Such action would be an unconstitutional taking. It would also be a taking were the City to downzone the Trillium property on the basis of providing more passive open space or creating an area for active recreation.

Downzoning the Trillium property would not even accomplish such objectives. Instead, a downzone would result in larger lots that would still be private property and likely fenced from trespassers. Further, as City staff explained and as is addressed in the environmental and staff reports, a lower zone does not equate to more open space or less impervious surface. To the contrary, lower-density zones allow for more impervious surface coverage as well as larger landscaped areas.

Fourth, there is no basis to downzone the property based on the public's stormwater and flooding concerns. The Council has heard a variety of theories regarding stormwater and fears about stormwater impacts from development of the Trillium property. However, no expert review has ever supports these fears. To the contrary, the City's staff has consistently advised the Council that its regulations will appropriately handle stormwater impacts of any development on the Trillium property, whether under NV, R6-12 or R4-8 zoning. There is no reason or evidence that would give this Council cause to doubt its own staff.

Washington Courts have clearly and consistently stated that a rezone cannot be based on project-specific considerations such as traffic, groundwater or stormwater.[5] Addressing any offsite impacts resulting from a future development proposal is why the City adopts development regulations, such as the Stormwater Manual, and the State Environmental Policy Act. The same holds true for considerations such as groundwater, critical areas,

[3] *Westmark v. Burien*, 140 Wn. App. 540 (2007).
[4] *Pleas v. Seattle*, 112 Wn.2d 794 (1989).
[5] *Woods v. Kittitas County*, 130 Wn. App 573 (2006); *Tugwell v. Kittitas County*, 90 Wn. App 1 (1997).

traffic, and schools. These considerations are not appropriate reasons for downzoning the Trillium property.

Trillium is the last large private property in the area that is not developed and does not have an approved development plan. It would simply not be appropriate for the City to spot zone the Trillium property to a lower zone because it is the largest undeveloped property in the area, irrespective of motivation. Further, the City cannot use its zoning powers as a means to address an existing problem. In any event, there is no evidence that downzoning the property would either alleviate flooding or that development under any particular zoning could not address stormwater impacts under the City's adopted stormwater and environmental regulations.

In 2006-2007, the City imposed a moratorium on the Trillium property and broader Chambers Basin area in order to perform a comprehensive analysis of stormwater and flooding concerns. After extensive review, the City lifted the moratorium from the Trillium property and allowed DR Horton to proceed with a master plan development application under the NV zone, unchanged. In doing so, the City recognized that even very dense urban development is appropriate for the Trillium property and can be regulated using the City's stormwater manual and SEPA review. The City later issued a SEPA MDNS for the NV master plan, which was not challenged on the basis of stormwater concerns despite that environmental review concluding that the master planned neighborhood village could proceed. Ultimately, the City did not deny the master plan on the basis of stormwater, but instead because the City did not feel Intercity Transit had provided enough of a commitment to serving the property with a fixed-route bus.[6] As noted above, development under R6-12 zoning would be less dense than that under the NV zone.

Fifth, as the City's staff readily informed the Council when questioned, the City has only ever downzoned other properties that substantially below R4-8 when on-site considerations warranted, such as substantial onsite flooding that would impede development of the property.

In sum, DR Horton maintains that any redesignation and rezone from NV should be to R6-12. To the extent this process has instead compelled the City to find the NV zone is still appropriate for the Trillium property, DR Horton requests instruction on how to move forward with master plan modifications in light of the Council's prior deliberations regarding the master plan.

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[6] *See Ordinance 6762 and underlying Hearing Examiner recommendations and Decision on SEPA Appeal*, incorporated herein as if set forth in full for purposes of the underlying administrative record.

Thank you for the opportunity to provide these comments.

Sincerely,

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