

**MEMORANDUM**  
**For Meeting of December 9, 2008**

TO: Mayor and Councilmembers  
 THROUGH: Steve Worthington  
 FROM: Russ Blount  
 SUBJECT: **Public Hearing** – American Fast Freight/Orbus Investments LLC Agreement

**REPORT IN BRIEF:** Receive public comment on the proposed agreement.

**BACKGROUND:** A public hearing for this project was opened on November 12 and continued on November 25.

American Fast Freight is the developer/tenant for the Orbus property at the east end of 48<sup>th</sup> Street East, east of 70<sup>th</sup> Avenue East. American Fast Freight submitted a grading permit application in August, 2006, for re-route of a portion of the Firwood Ditch and placement of preload in anticipation of site development; the design for that work was done using the 1992 Department of Ecology (DOE) Stormwater Manual, previously adopted by the City of Fife. During SEPA review it was determined that development could not proceed until sanitary sewers were extended to the Orbus site, and development was put on hold pending establishment of a Local Improvement District (LID) or other method to finance a sewer extension. In May, 2008, the City of Fife adopted the 2005 DOE manual. Orbus believes that their 2006 permit applications vest their proposed development to the 1992 DOE Manual standards. The City's position is that Orbus is only vested to the 1992 DOE Manual as it relates to the rechannelization of the Firwood Ditch as it crosses the Orbus Property. Orbus and City staff developed a proposed solution that allows the development to proceed while at the same time providing desired environmental protection for 48<sup>th</sup> Street, thereby providing the City with a pond meeting its new stormwater standards. Capacity in such pond could be used for flows from development of the City's property or from other properties in the area, at the City's discretion.

**ATTACHMENTS:** Draft Resolution 1260, agreement, and exhibits.

**DISCUSSION:** Use of the 2005 DOE manual results in a stormwater pond approximately twice the size of the pond resulting from use of the 1992 manual. The proposed agreement would require Orbus to construct, at its expense a regional stormwater pond on City property with sufficient capacity to meet the 2005 storm water standard for the Orbus property and development of 20 acres in accordance with Single Family Housing zoning, and to construct it in such a way that it will be an amenity to the City property. Additionally, the agreement commits Orbus to construct a sound attenuation berm along the south property line of the Orbus site; such a berm would not be required by the FMC or otherwise. The City could use the available capacity for development of the City property, or sell capacity to other property owners for their use in development of their properties.

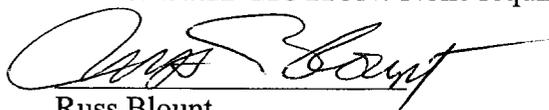
**FISCAL IMPACT:** No cash payment is anticipated to be made; if the city property involved was valued at \$10 per square foot the 3 acre pond site would be worth in excess of \$1,250,000.

**ALTERNATIVE COURSES OF ACTION:**

1. Listen to public comment, and then close the public hearing.
2. Listen to public comment, and then recess the hearing until a future council meeting.

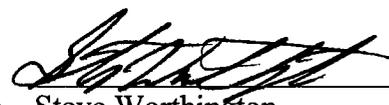
**RECOMMENDATIONS:** Listen to public comment, and then close the public hearing.

**SUGGESTED MOTION:** None required.



Russ Blount  
 Public Works Director

Approved for Agenda



Steve Worthington  
 City Manager

RESOLUTION NO. 1260

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FIFE, PIERCE COUNTY, WASHINGTON APPROVING STORMWATER DETENTION AGREEMENT BETWEEN ORBUS INVESTMENTS, LLC AND CITY OF FIFE

WHEREAS, Orbus Investment, LLC (“Owner”) is the owner of the property described in Exhibit A (the “Property”) to the Storm Water Detention Agreement attached hereto as Attachment 1 (the “Agreement”); and

WHEREAS, in 2006 the Owner submitted a grading permit application for re-route of a portion of the Firwood Ditch and placement of preload in anticipation of development of the Property; and

WHEREAS, in May, 2008 the City adopted the 2005 DOE Manual. One of the effects of adopting the 2005 DOE Manual is that it increased the size of the storm water detention facility that will be required for development; and

WHEREAS, there are numerous small undeveloped properties in the area in which the Orbus Property is located that are zoned for future commercial development. However, due to the small size of these properties, it would be very difficult, if not financially impossible for them to develop under the 2005 DOE Manual stormwater requirement; and

WHEREAS, Orbus believes that the permit applications vest their proposed development to the 1992 DOE Manual standards. The City’s position is that Orbus is only vested to the 1992 DOE Manual as it relates to the rechannelization of the regional stormwater channel the crosses the Orbus Property; and

WHEREAS, Orbus and the City both want to adequately address stormwater issues for future development, resolve their dispute relative to the applicability of the 1992 DOE Manual and the 2005 DOE Manual standards to the Orbus Property, and to find a solution relative to the future stormwater needs of the small properties mentioned above; and

WHEREAS, Orbus and City staff have developed a proposed solution that allows the development to proceed while at the same time providing desired environmental protection and assistance to small lot owners in the area to be able to meet the City’s new stormwater standards; and

WHEREAS, on November 12, 2008 the Council held a Public Hearing on the Storm Water Detention Agreement; and

WHEREAS, the Council has reviewed the Storm Water Detention Agreement and finds that it is in the best interests of the City and its citizens to approve the Agreement; now therefore

BE IT RESOLVED that the City Council hereby approves the Storm Water Detention Agreement with Orbus Investments, LLC attached hereto as Attachment 1 and authorizes the City Manager to execute the Agreement on behalf of the City.

ADOPTED by the City Council at an open public meeting held on the 12<sup>th</sup> day of November, 2008.

---

Barry D. Johnson, Mayor

Attest:

---

Steve Marcotte, City Clerk

**STORM WATER DETENTION AGREEMENT**  
**between**  
**CITY OF FIFE**  
**and**  
**ORBUS INVESTMENTS, LLC**

**1. Date and Parties.**

1.1 This Agreement, for reference purposes, is dated the \_\_\_ day of \_\_\_\_\_, 2008, and is entered into by and between CITY OF FIFE, a Washington municipal corporation, and ORBUS INVESTMENTS, LLC, a Washington Limited Liability Company.

**2. Definitions.**

2.1 When used in this document, unless the context clearly indicates otherwise, the following words, when capitalized, shall be defined as set forth in this paragraph.

2.1.1 "Orbus Property" means the real property owned by Orbus Investments, LLC, located on the 7400 block of 45<sup>th</sup> Street Court East in the City of Fife which property is more particularly described on Exhibit A attached hereto and incorporated herein by this reference.

2.1.2 "Agreement" means this document, entitled Storm Water Detention Agreement.

2.1.3 "Agreement Date" means the date set forth in paragraph 1.1 above.

2.1.4 "City" means the City of Fife.

2.1.5 "City Property" means the real property located between 48<sup>th</sup> St. East and Levee Road in the City of Fife that is owned by the City of Fife and is more particularly described on Exhibit B attached hereto and incorporated herein by this reference.

2.1.6 "Construction Standards" means the City adopted regulations governing construction standards and specifications, such as, but not limited to, the International Building Code, Uniform Plumbing Code, National Electric Code, the Uniform Fire Code, the Uniform Code for the Abatement of Dangerous Buildings, and such other codes adopted by the City, with or without amendment, on the Vesting Date.

2.1.8 "Detention Facility" means the storm water detention facility to be designed and constructed by Orbus on the City Property, as more completely described in

paragraph 4.3 below.

2.1.9 "Development Standards" means the development requirements set forth in this Agreement, the SEPA conditions, and all of the regulations duly adopted by the City, either as a part of the Fife Municipal Code, or adopted therein by reference, and any administrative regulations duly adopted by the City, that relate to the use, alteration or development of real property within the City. (Also see Vested Development Standards, section 2.1.17). Development Standards does not include Construction Standards.

2.1.10 "LID" means City of Fife Local Improvement District 08-02 that was formed in order to provide public sanitary sewer service and other benefits to properties in the same geographic area as the City Property and the Orbus Property.

2.1.11 "Owner" means the fee simple title holder and any others having an ownership interest in the Orbus Property, and its successors and assigns. On the Agreement Date the "Owner" is ORBUS INVESTMENTS, LLC, herein referred to as "Orbus".

2.1.12 "Party" shall mean any of the entities listed in paragraph 1.1. The plural shall mean all of the entities listed in paragraph 1.1.

2.1.13 "Permit Applications" shall mean the following applications filed by Orbus with the City: SEPA Application #SEP06-0016 and Grading Application #GRA06-0017

2.1.14 "SEPA Conditions" means the mitigation conditions attached to the Notice of Final Determination for the Determination of Nonsignificance, dated January 10, 2007.

2.1.15 "Site Plan" is the document showing the proposed building layout for development on the Property in accordance with the Permit Applications, and is attached hereto as Exhibit C, and by this reference incorporated herein.

2.1.16 "Vesting Date" means the date upon which each of applications set forth in paragraph 2.1.13 were submitted.

2.1.17 "Vested Development Standards" shall mean the Development Standards in effect on the Vesting Date.

2.1.18 "1992 DOE Manual" means the 1992 Washington State Department of Ecology Stormwater Design Manual. This manual was adopted by the City of Fife to govern the design and construction of stormwater management systems within the City, and applied to all application for development within the City up to the date of adoption by the City of the 2005 DOE Manual in May, 2008.

2.1.19 "2005 DOE Manual" means the 2005 Washington State Department of Ecology Stormwater Design Manual. This manual was adopted by the City of Fife to govern the design and construction of stormwater management systems within the City, and applies to all applications for development within the City filed after its adoption by the City in May, 2008.

### **3. General Recitals.**

3.1 The City is the entity with land use and regulatory authority over the Orbus Property.

3.2 The City has zoned certain properties in the City for commercial and industrial development. The Orbus Property is one of those properties.

3.3 In May, 2008 the City adopted the 2005 DOE Manual. One of the effects of adopting the 2005 DOE Manual is that it increased the size of the storm water detention facility that will be required for development.

3.4 There are numerous small undeveloped properties in the area in which the Orbus Property and the City Property are located that are zoned for future commercial development. However, due to the small size of these properties, it would be very difficult, if not financially impossible for them to develop under the 2005 DOE Manual stormwater requirements.

3.5 The Permit Applications are vested as of the Vesting Date. Orbus believes that the Permit Applications vest their proposed development to the 1992 DOE Manual standards. The City's position is that Orbus is only vested to the 1992 DOE Manual as it relates to the rechannelization of the regional stormwater channel the crosses the Orbus Property.

3.6 Orbus and the City both want to adequately address stormwater issues for future development, resolve their dispute relative to the applicability of the 1992 DOE Manual and the 2005 DOE Manual standards to the Orbus Property, and to find a solution relative to the future stormwater needs of the small properties mentioned in paragraph 3.4 above.

### **4. Development Standards**

4.1 The Orbus Property shall be developed in accordance with the Vested Development Standards and the Construction Standards in effect on the Agreement Date, except as modified by the Agreement or by the City Council in accordance with the provisions of paragraph 13. The provisions of the Agreement, the Development Standards and the Construction Standards shall be read in a manner so that, if at all possible, they are consistent and complementary. However, in case there is a conflict between the provisions of this Agreement, and any other Development Standard, the controlling document shall be in the following order of priority, with the 1st document listed being the highest and the last document

listed the lowest: 1) the Agreement Text; 2) the Agreement Exhibits; 3) the MDNS conditions and 4) any other Vested Development Standard. Provided, however, if a complete set of construction drawings for the proposed 110,000 square foot industrial building on the Orbus Property are not submitted within 90 days of the Agreement Date, then the vesting date for such improvements shall be the date a complete application is submitted.

4.2 Sound Berm. Orbus shall construct an earthen sound berm the entire length of the south side of the Orbus Property. The berm shall be six feet high with a three to one slope, and shall be planted with native vegetation that does not require permanent irrigation. Temporary irrigation shall be provided after planting to insure survival of the plants. The plantings and the temporary irrigation standards shall comply with the Vested Development Standards.

4.3. Storm Water Detention Facility. Orbus shall design and construct the Detention Facility. The Detention Facility will be constructed of sufficient size to receive storm water by gravity flow and to provide compensatory storage, if needed, from the real property shown on Exhibit D attached hereto and incorporated herein by this reference. The Detention Facility will be designed in accordance with the 2005 Department of Ecology Storm Water Design Manual. The Detention Facility will be designed, constructed, including planting, in such a way that it will look like a natural pond. Examples of such design and planting types are the storm water facilities described in Exhibit E. To the extent the City desires to construct park like amenities such as paths, benches, and lighting in conjunction with the Detention Facility, the City shall be responsible for those costs.

4.4 Orbus Use of Detention Facility. Orbus shall only be required to detain as much stormwater on the Orbus Property as would have been required by the 1992 DOE Manual, and the difference between that amount and the amount required to be detained by the 2005 DOE Manual shall be provided by the Detention Facility so that the total combined flow from the Detention Facility and the pond on the Orbus property will not exceed the total permitted using the 2005 manual for the properties served by the Detention Facility and the Orbus property, but no diversion of water from the ORBUS Property to the Detention Facility shall be required. Orbus shall also be entitled to utilize the Detention Facility to accommodate two acres of compensatory flood storage that would otherwise be required to be accommodated on the Orbus Property.

## **5. LID ASSISTANCE AND PARTICIPATION.**

5.1 Orbus signed the petition to form LID 08-02, authorizing the Orbus Property to be included in the LID. Orbus assisted the City in obtaining the necessary signatures to form LID 08-02.

**6. Transportation Impact Fees.**

6.1 To the extent allowed by FMC 20.10.100, the City shall allow Orbus to offset against its transportation impact fees (formally "mitigation") amounts spent by Orbus on the following street improvements: a) Dedicate property and extend 45<sup>th</sup> Street approximately six hundred feet to the east within the Orbus Property, including curb, gutter, sidewalk, planting strip, and sewer; b) construct sidewalk and lighting from 70<sup>th</sup> to end of 45<sup>th</sup> Street; and c) construct right hand turn lane from 45<sup>th</sup> to 70<sup>th</sup>. The current impact (mitigation) fee is currently estimated as \$338,933. Prior to the issuance of a building permit for construction on the Orbus Property the Owner shall pay to the City the Traffic Impact fee, if any, still remaining after the appropriate credit. In the event the amount of the credit is greater than the impact fee due, Orbus shall be allowed to apply the excess credit against transportation impact fees required for future development on the Orbus Property.

**7. Default: Notice: Rights on Default**

7.1 No party shall be in default under this Agreement unless it has failed to perform following written notice of default from the other party. Notice of default shall allow for a thirty (30) day period of cure for the non-defaulting party. Each notice of default shall specify the nature of the alleged fault and the manner in which the default may be cured satisfactorily. A party not in default under this Agreement shall have all rights and remedies provided by law or equity, including without limitation: issuance of a stop work order, injunction, damages, action for specific performance, or to require action consistent with this Agreement. Nothing herein will operate to prevent the City from taking legal action regarding noncompliance that threatens public health, safety or welfare prior to the expiration of the thirty (30) day cure period following notice of default. No such action or proceeding will operate to automatically terminate this Agreement, nor shall it release either party from any promise or obligation herein nor shall it release either party from any liability or obligation with respect to any breach of this Agreement occurring prior to the commencement of any legal action by the City.

**8. Notices**

8.1 All notices required by this Agreement shall be deemed delivered to the respective party on the date that is it personally delivered to the address(es) set forth below, or on the date that it is successfully sent by facsimile transmission to the facsimile number(s) set forth below:

City: Steve Worthington  
City Manager

5213 23<sup>rd</sup> St. East  
Fife, WA 98424  
Facsimile: 253-922-5255

With a copy to: Loren D. Combs  
City Attorney  
3600 Port of Tacoma Road, Suite 311  
Tacoma, WA 98424  
Facsimile: 253-922-5848

Owner: ORBUS INVESTMENTS, LLC  
450 Shattuck Avenue S., Suite 401  
Renton, WA 98057  
Facsimile:

With a copy to: Don Marcy  
Cairncross & Hempelmann, P.S.  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Facsimile: 206-587-2308

**9. Assignment: Covenant to Run With the Land.**

9.1 The rights, obligations, conditions and interests under this Agreement shall run with the land and shall inure to the benefit of and be binding upon the Owner and his successors and assigns. The Owner shall have the right to convey, assign, apportion or otherwise transfer any and all of its rights, obligations, conditions, and interests under this Agreement. Within three (3) days of the effective date of Owner's conveyance, assignment, apportionment, or other transfer of its rights under this Agreement, the Owner must provide notice to the City of the same. Owner must also, within this three (3) day period, provide the City with a copy of the legal documents that indicate the conveyance, assignment, apportionment or other transfer. From and after the effective date of such conveyance, assignment, apportionment or other transfer, any reference to Owner in this Agreement, as it relates to the portions of the Orbus Property in which he no longer has an ownership interest, shall be deemed to be a reference to the conveyee, assignee, apportionee or transferee and will release Owner from legal action under this Agreement that arises after the effective date of such conveyance, assignment, apportionment, or other transfer to the extent the legal action relates to the portion of the Orbus Property in which he no longer has an ownership interest. Provided, however, this Agreement creates no in personam right, responsibility or obligation, except to the extent the person has an ownership interest in the Orbus Property.

9.2 A successor or proposed successor to a legal lot within the Orbus Property, but not the entire Property, may request that the City remove all or a portion of the burden of this

Agreement from the lot it is acquiring. The City agrees to consider such a request in good faith. If Owner demonstrates that City has sufficient assurances that the obligations of the Owner sets forth in the Agreement will be fulfilled, and compliance with the Agreement terms will be met for the remainder of the Agreement term even if the Agreement, in whole or in part, is removed as an encumbrance on the lot of the proposed successor, then the City shall execute a release of the burdens of this Agreement for which adequate assurances have been provided, to such proposed successor sufficient to clear this Agreement from the title records for the lot to be acquired, and the release will be recorded in the Pierce County records.

**10. No Third Party Beneficiaries.**

10.1 This Agreement is made and entered into for the sole protection and benefit of the parties hereto and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

**11. Interpretation.**

11.1 This Agreement has been reviewed and revised by legal counsel for both parties, and no presumption or rule construing ambiguity against the drafter of the document shall apply to the interpretation or enforcement of this Agreement.

**12. Entire Agreement**

12.1 This Agreement constitutes the entire agreement of the parties and incorporates all prior discussions and agreements. The Parties participated in the negotiation and drafting of this Agreement. If a dispute should arise with regards to the meaning or interpretation of any Agreement provision there shall be no presumption of draftsmanship as to the Agreement provision.

**13. City's Reservation of Rights.**

13.1 This Agreement shall be construed to exclude from its scope, and to reserve to the City, the police power authority which is prohibited by law from being subject to a mutual agreement with consideration.

13.2 This Agreement shall not limit the City's authority to exercise its power of eminent domain.

**14. Severability.**

14.1 If any provisions of this Agreement are determined to be unenforceable or invalid pursuant to a final decree or judgment by a court of law with jurisdiction, then the remainder of this Agreement not decreed or adjudged unenforceable or invalid shall remain unaffected and in

full force and effect.

**15. Changes; Agreement to be Recorded.**

15.1 This Agreement may be modified, including termination of the Agreement or any part thereof, at any time, but only by the Parties by written agreement. Provided, however, the consent of Parties owning portions of the Property not affected by such amendment shall not be required. This Agreement or a memorandum thereof shall be recorded against the Property as a covenant running with the land which touches and concerns the Property and shall be binding upon the City and Owner, their heirs, successors and assigns and all future owners of the Property. Owners shall be responsible for the costs of recording this Agreement, and any subsequent amendments thereto.

**16. Jurisdiction, Venue and Governing Law.**

16.1 This Agreement has been and shall be construed as having been made and delivered within the State of Washington and it is agreed by each party that this Agreement shall be governed by the laws of the State of Washington both as to interpretation and performance. Any action at law, suit in equity or judicial proceeding for the enforcement of this Agreement or any provisions thereof shall be instituted and maintained only in any of the courts of competent jurisdiction in Pierce County, Washington.

**17. Estoppel Certificate.**

17.1 Owner may, at any time, and from time to time, deliver written notice to the City requesting the City to certify in writing that, to the knowledge of the City (i) this Agreement is in full force and effect and a binding obligation of the Parties; (ii) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments; and (iii) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, to describe therein the nature and amount of any such defaults. The City shall execute and, upon payment of the City's costs associated with researching and preparing the certificate, return such certificate within thirty (30) days following the receipt thereof. The City shall not have any liability to the requesting Party, the Owner, or to any third party for inaccurate information if it provides the estoppel certificate in good faith.

**18. Authority to Execute.**

18.1 The City was authorized to execute this Agreement pursuant to the authority granted to the City Manager by the adoption of City of Fife Resolution \_\_\_\_\_.

18.2 Orbus is authorized to execute this Agreement pursuant to its business documents or appropriate resolution. Proof of Orbus' signatory authority shall be provided to the City, and

remain on file with the City as a public record.

**19. Covenant Running with the Land.**

19.1 The obligation and/or liability of Owner relating in any way to this Agreement and the Property is binding only on Owner's assets, and specifically limited to the Property, and shall not be personally binding upon, nor shall any resort be had to, the private properties or assets of any of the trustees, partners, members, officers, directors, shareholders or beneficiaries of Owner.

CITY OF FIFE:

ORBUS INVESTMENTS, LLC

By: \_\_\_\_\_  
Steve Worthington  
City Manager

By: \_\_\_\_\_  
\_\_\_\_\_  
Its: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_  
Steve Marcotte, City Clerk

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Loren D. Combs  
City Attorney

STATE OF WASHINGTON            )  
  ) ss.  
COUNTY OF PIERCE            )

I certify that I know or have satisfactory evidence that Steve Worthington is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath

**STORM WATER DETENTION AGREEMENT**

City \_\_\_\_\_ Owner \_\_\_\_\_



EXHIBIT A  
LEGAL DESCRIPTION

BEGINNING AT THE CENTER OF THE NORTHEAST QUARTER OF SECTION 7  
TOWNSHIP 20 NORTH RANGE 4 EAST OF THE WILLAMETTE MERIDIAN;  
THENCE NORTH 30 FEET;  
THENCE WEST 812 FEET TO THE TRUE POINT OF BEGINNING;  
THENCE NORTH 300 FEET;  
THENCE WEST 151 FEET;  
THENCE SOUTH 300 FEET  
THENCE EAST 151 FEET TO THE PLACE OF BEGINNING;  
EXCEPT EASEMENT ON SOUTH BOUNDARY FOR COUNTY ROAD;  
  
SITUATE IN THE CITY OF FIFE, COUNTY OF PIERCE, STATE OF WASHINGTON.

# Exhibit B

## Legal Description

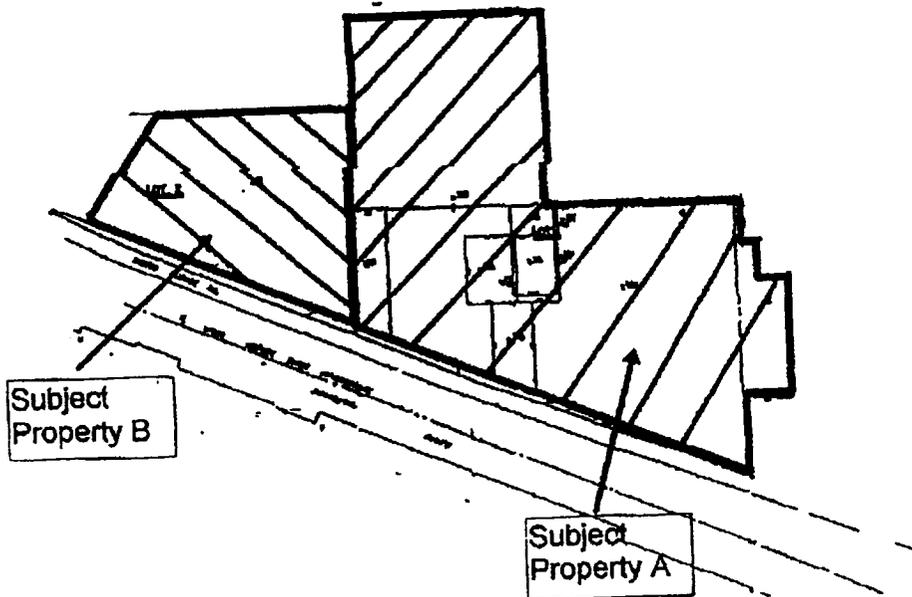
### Subject Property A:

Pierce County Tax Parcels	Acres
420201117	1.61
420202072	1.1
420202073	.33
420202074	.01
420202075	.63
420202700	13.68
420202701	.01
420202702	.88
420202703	.15
420202704	1.03
420202705	12.47
(Total)	31.9

### Subject Property B:

420202071	9.26
-----------	------

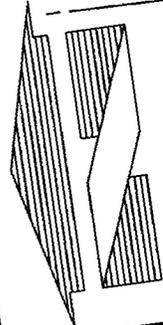
**Approx 41.16 Acres**



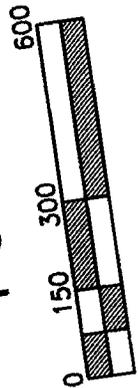
# EXHIBIT C

VICINITY MAP

48TH STREET



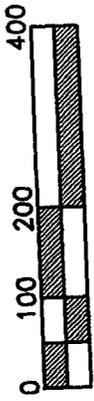
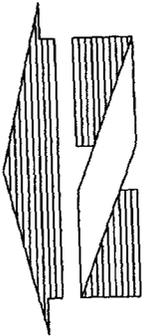
1"=300'



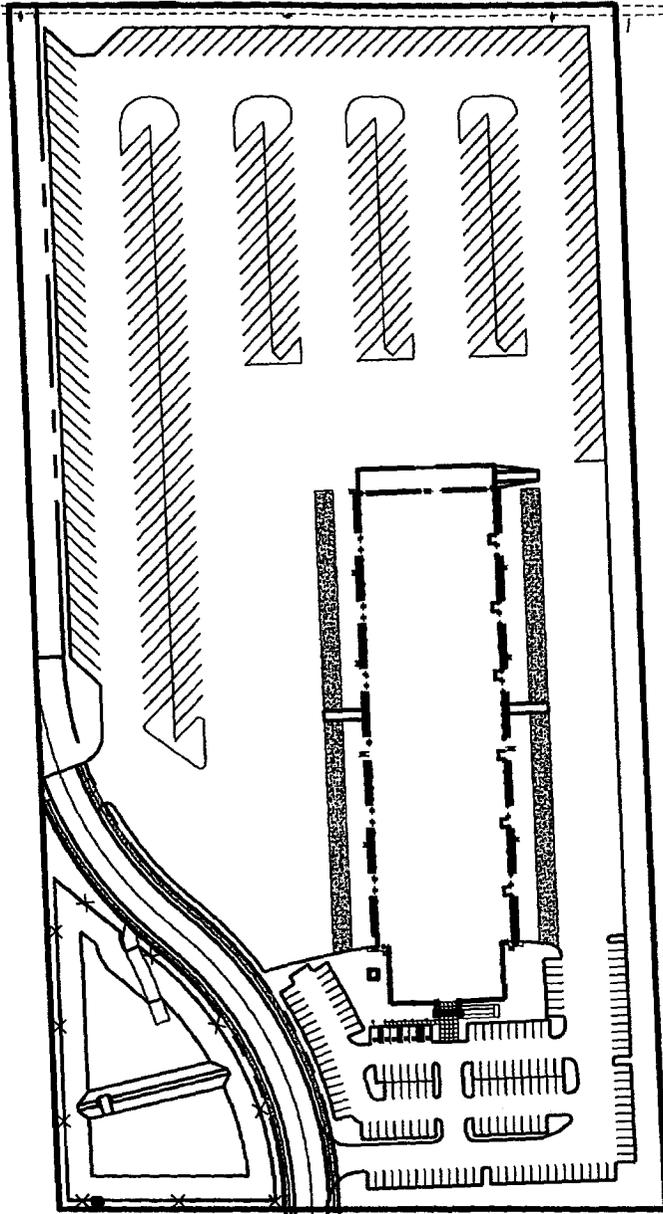
PROPOSED STORM  
DRAINAGE  
FACILITY/AMENITY

PUYALLUP RIVER

# AMERICAN FAST FREIGHT SITE



1"=200'



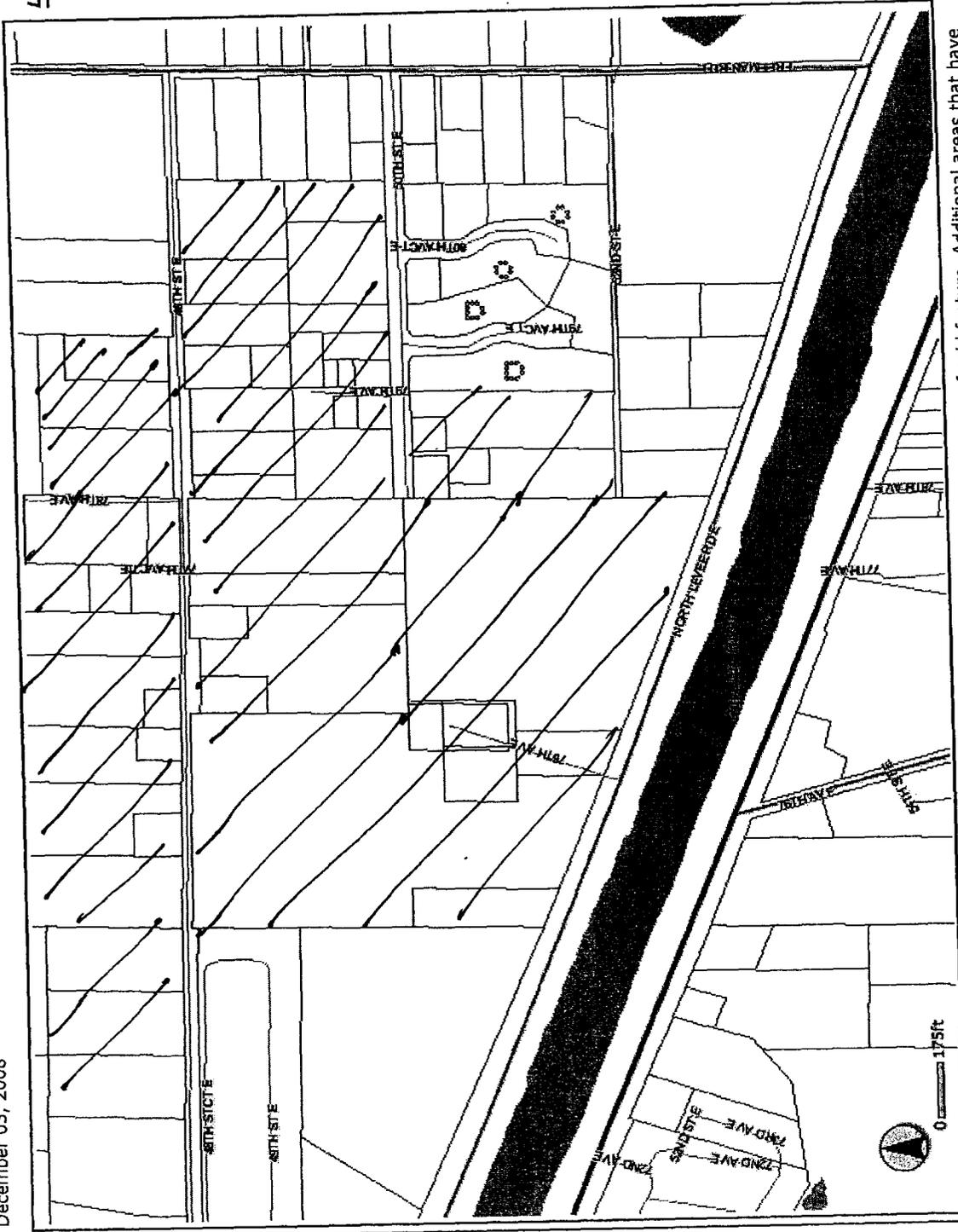
45TH ST E.

Legend

# EXHIBIT D

The Fife City Council reserves the right to select up to 20 acres from hatched area

nuil  
December 03, 2008



Disclaimer: The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. The County assumes no liability for variations ascertained by actual survey. **ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'**. The County makes no warranty of fitness for a particular purpose.



