

TO: City Council
FROM: Karen Kirkpatrick
DATE: October 3, 2023
SUBJECT: Common Interest and Confidentiality Agreement with Port of Olympia

1) Recommended Action:

Approve and authorize the Mayor to sign the Common Interest and Confidentiality Agreement with the Port of Olympia.

2) Background:

The Port of Olympia is a public port district and the City of Tumwater is a Washington municipal corporation. The Port owns the Olympia Regional Airport as well as other property in the City of Tumwater. In November 2016, the City and Port have entered into an Interlocal Agreement under RCW 39.34 to jointly develop the Bush Prairie Habitat Conservation Plan in order to provide programmatic incidental take coverage under the Endangered Species Act and allow for future development on property within the Parties' respective jurisdictions and/or direct ownership. The Port and the City (although separate and distinct entities) share longstanding and continuous interests in jointly acting on matters of mutual concern, and they have a common interest in communicating and collaborating on the matters covered in the proposed Common Interest and Confidentiality Agreement (attachment "A").

3) Policy Support:

Strategic Priority: be a leader in environmental sustainability and complete and implement the Habitat Conservation Plan.

4) Alternatives:

Not authorize the signing of the Common Interest/Joint Defense Agreement.

5) Fiscal Notes:

N/A

6) Attachments:

A. Common Interest and Confidentiality Agreement

COMMON INTEREST AND CONFIDENTIALITY AGREEMENT

THIS COMMON INTEREST AND CONFIDENTIALITY AGREEMENT (the “Agreement”) is effective as of the ___ day of _____, 2023 (the “Effective Date”).

1. Parties. The parties to this Agreement are the Port of Olympia (the “Port”) and the City of Tumwater (the “City”), (individually a “Party” and collectively the “Parties”).

2. Covered Matters. This Agreement relates to communications between the Parties and their agents, including their attorneys, regarding matters including but not limited to the Parties negotiation and development of a habitat conservation plan for the Olympia Airport and surrounding areas in the jurisdiction of the City of Tumwater (commonly known as the “Bush Prairie Habitat Conservation Plan”); associated application for an incidental take permit under the Endangered Species Act; regulation or oversight by state and federal agencies, including the United States Fish and Wildlife Service; compliance with any federal, state, or local legal obligations; and other matters as they may arise or be added to this list (all together the “Covered Matters”).

3. Mutual Interest. The Port is a public port district and the City is a Washington municipal corporation. The Port owns the Olympia Regional Airport as well as other property in the City of Tumwater. City and the Port have entered into an Interlocal Agreement under RCW 39.34 to jointly develop the Bush Prairie Habitat Conservation Plan in order to provide programmatic incidental take coverage under the Endangered Species Act and allow for future development on property within the Parties’ respective jurisdictions and/or direct ownership.

Although each of the Parties remains a separate and distinct legal entity, they share longstanding and continuing interests in jointly acting on matters of mutual concern. The Parties therefore agree that they have a common interest in communicating and collaborating on the Covered Matters. The Parties further agree that it is in their mutual best interest to cooperate to the extent permitted by law and develop and share certain information while retaining the attorney-client privilege, work-product protection, joint-defense and common interest privilege, and any other applicable privileges that might arise in the context of the Covered Matters.

The Parties wish to work together and have their attorneys and other agents work together in advancing their common interests in the Covered Matters. In doing so, and in order to maintain privileges, protections, and confidentiality to the full extent allowed by the law, the Parties and their agents shall follow the procedures set forth in this Agreement regarding “Received Protected Material,” as that term is defined below, that has been produced or disclosed in furtherance of this Agreement and their joint pursuit of the Covered Matters.

a. Protected Material

In the course of pursuing the Covered Matters, each Party will identify and create information and documents that are protected by the attorney-client privilege, work-product doctrine, or other applicable privileges, with such information and documents including but not limited to factual analyses; mental impressions; legal memoranda; reports of witness interviews;

draft briefs, declarations, and pleadings; billing information; consultant and expert correspondence; information and reports; and other items in oral, written, or electronic form (collectively “Protected Material”). The Parties agree that no protection or privilege will be waived or destroyed through disclosure between or among the Parties and their counsel.

b. Sharing of Protected Material

Through this Agreement, the Parties confirm that it is in their mutual best interest to cooperate and share certain Protected Material as a means of pursuing the Covered Matters. To further this Agreement, the Parties have exchanged and intend to continue exchanging such Protected Material between and among themselves. All Protected Material shared between or among the Parties (“Received Protected Material”) shall retain all protection to which it was entitled had it not been so shared.

Nothing in this Agreement requires any Party to provide information or documents in its possession to any other party and nothing in this Agreement prevents any Party from obtaining, developing, or using its own information or documents in pursuit of the Covered Matters.

c. Persons Included in Protections

Each of the Parties agrees to maintain confidentiality of all Received Protected Material exchanged between and among them. Received Protected Material shall not be disclosed to any persons other than (i) the Parties; (ii) attorneys for the Parties and staff of those attorneys’ law firms that are assisting those attorneys with the Covered Matters; (iii) consultants and technical experts and their staff engaged by the Parties in connection with the Covered Matters. Any Party wishing to disclose Received Protected Material to any consultant or expert shall first require that consultant or expert to agree to be bound by this Agreement in writing, either through a confidentiality provision in the consultant’s or expert’s engagement letter or by signing **Exhibit A**, attached hereto.

Received Protected Material provided to any person listed in this Section (3)(c) shall be used only for purposes of the Covered Matters unless the sending Party or Parties consents in writing. Received Protected Material shall not be shared with any person other than those listed in this Section (3)(c) or as agreed in writing.

Except as might be required by court order or permitted by further written agreement by all Parties, no Party may disclose Received Protected Material provided by another Party to any person or entity other than a Party to this Agreement. The Parties agree that they shall use Received Protected Material solely in connection with the Covered Matters and for no other purpose.

4. Third-Party Requests for Protected Material. If a Party receives a request, including a subpoena or request for public records under chapter 42.56 RCW, for production of Received Protected Material, that Party will promptly notify each other Party. At the reasonable request of any Party, each other Party shall cooperate to oppose any request for such Received Protected Material or limit the scope of any disclosure to the extent permitted by law. This

cooperation requirement shall not prevent any Party from complying with a third-party's request when the producing Party believes in good faith that disclosure is warranted; provided that, the other Parties receive reasonable notice before such production. This Agreement shall not prohibit disclosure of information or documents that a Party has prepared or obtained on its own initiative where that information or document contains no Received Protected Material obtained directly or indirectly from another Party.

5. No Agency Relationship. This Agreement shall not create any agency or similar relationship between or among the Parties. No Party shall have the authority to waive any applicable privilege or doctrine on behalf of any other Party, nor shall any waiver of applicable privilege or doctrine based on conduct of one Party be construed to apply to any other Party.

6. Maintenance of Privileges. The Received Protected Material exchanged by the Parties is protected from disclosure to third parties as a result of the attorney-client privilege, work-product doctrine, and other privileges and protections. Through this Agreement, the Parties confirm that in pursuing their common interests regarding the Covered Matters they do not, by sharing Received Protected Material, intend to waive any applicable protection. The Parties intend to preserve all applicable privileges and protections to the maximum extent permitted by law.

7. Adverse Positions. The Parties recognize that they might take positions that are inconsistent with or even adverse to each other in the Covered Matters or other legal proceedings. If the Parties advance inconsistent or adverse positions, they will nonetheless be bound by the provisions of this Agreement. The Parties shall not use Received Protected Material or other material obtained under this Agreement in actions against each other. The Parties may obtain those materials through normal discovery procedures or other sources independent of this Agreement, to afford an opportunity for appropriate privileges and protections to be asserted.

8. Withdrawal. This Agreement shall continue in force until a revised agreement is fully executed or the habitat conservation plan and incidental take permit are approved by the United States Fish and Wildlife Service. Any Party may withdraw from this Agreement only after submitting written notice to all other Parties. The withdrawing Party shall continue to be bound by this Agreement with regard to any Received Protected Material received, obtained, or learned at any time and this Agreement shall continue to govern the use and disclosure of Received Protected Material shared with or disclosed to the withdrawing Party. Upon withdrawal, the withdrawing Party shall prospectively cease to have any entitlement to receive Received Protected Material. Subsequent to the withdrawal, the withdrawing Party shall return to the sender all copies of Received Protected Material it received and delete any electronic copies in its possession.

A Party shall not be deemed to have withdrawn from this Agreement by virtue of any action other than as set out under this Section 8. If any counsel or other agent for a Party ceases that counsel or agency relationship, the obligations set out in this Agreement shall continue to apply to the former counsel or agent.

9. Return of Received Protected Material. Any Received Protected Material shall be returned promptly upon written request of the sending Party or its agent.

10. Enforcement. This Agreement may be enforced through any applicable cause of action in legal law or equity. Entry into this Agreement shall not affect the rights of any Party with respect to any other Party.

11. Injunctive Relief. The Parties agree that unauthorized disclosure of any Received Protected Material may cause the Parties to suffer irreparable harm for which there is no adequate legal remedy. The Parties acknowledge that immediate injunctive relief is an appropriate and necessary remedy for violations of this Agreement that involve potential or actual unauthorized disclosure of Received Protected Material. Nothing in this Section 11 limits a Party from seeking additional remedies.

12. Separate and Independent Representation. Nothing in this Agreement shall be construed to affect the separate and independent representation of each Party by its counsel. Neither the entry into this Agreement nor the receipt or use of Received Protected Material shall be deemed to create an attorney-client relationship between one Party and counsel for another Party. Nothing in this Agreement shall be construed to affect the separate and independent representation of the Parties by their respective counsel. Each Party waives any claim it might have for disqualification of counsel for any other Party related to the Covered Matters based on access to Received Protected Material.

13. Independent Analysis. The Parties recognize their right and obligation to pursue independent analysis to protect their own best interests regarding the Covered Matters. Any Party that undertakes independent analysis may freely use information or documents obtained pursuant to those efforts in any manner that Party desires, including through disclosure to third parties, without the consent of any other Party to this Agreement. Similarly, this Agreement does not limit the use by any Party of information, documents, or materials obtained outside the scope of this Agreement or the use of any information, documents, or materials that are not Received Protected Material.

14. Effective Date. This Agreement incorporates the prior intent and practice of the Parties and is effective as of the Effective Date, even if one or more Party has not signed this Agreement by that date. This Agreement shall apply to all Received Protected Material, including any Received Protected Material exchange between or among the Parties before the Effective Date. By entering into this Agreement, the Parties confirm their understanding that any Received Protected Material previously exchanged by them is protected by and subject to the terms of this Agreement.

15. Additional Agreements. Nothing in this agreement shall prevent the Parties from entering into additional common interest and confidentiality agreements when the Parties determine that circumstances warrant an additional or supplemental agreement. Further, no additional or subsequent common interest and confidentiality agreement entered into by the Parties shall undermine the effect of this Agreement.

16. Counterparts. This Agreement may be executed in counterparts. Additional Parties and their counsel may separately subscribe to and be bound by the terms of this Agreement by signature of those additional Parties and the original Parties.

CITY OF TUMWATER

PORT OF OLYMPIA

By: _____

By: _____

Printed name: DEBBIE SULLIVAN

Printed name: ROBERT (RUDY) RUDOLPH

Its: MAYOR

Its: PORT OPERATIONS DIRECTOR

Dated: _____

Dated: _____

ATTEST:

APPROVED AS TO FORM:

Melody Valiant, City Clerk

Richard L Hughes, General Counsel
Law Office of Richard L. Hughes, PLLC

APPROVED AS TO FORM:

Karen Kirkpatrick, City Attorney

EXHIBIT A

The undersigned, _____, hereby acknowledges receipt of a copy of the Common Interest and Confidentiality Agreement (the “Agreement”).

The undersigned confirms having read the Agreement and agrees to be bound by all provisions thereof.

The undersigned agrees that all co-workers, employees, assistants, or other similar personnel having access to Protected Material shall be shown a copy of this Agreement and shall be specifically instructed that they are bound by its terms.

Signed and agreed to on this _____ day of _____, 2023.

By: _____
Printed name: _____