

March 27, 2014

**OFFICE OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND, WASHINGTON**

REPORT AND DECISION

Project: Visconsi Master Plan
*Conditional Use Permit and Site Plan Review
SEPA Threshold Determination Appeal*

File number: SPR/CUP 17734

Appellant: Islanders for Responsible Development

*represented by Ryan Vancil, Attorney
266 Ericksen Avenue NE
Bainbridge Island, WA 98110*

Applicant: Visconsi Companies LTD
360 Corporate Circle
Pepper Pike OH 44124-57042420

*represented by Dennis D. Reynolds, Attorney
200 Winslow Way W, #380
Bainbridge Island, WA 98110*

Owners: Deschamps Partnership LP
16213 Agatewood Road NE
Bainbridge Island, WA 98110

Suzanne Kelly
16213 Agatewood Road NE
Bainbridge Island, WA 98110

Location of Subject Property: 10048 High School Road (NE Corner of High School
Road and SR 305)

Zoning and Comprehensive Plan Designations:

Mixed-Use Town Center, High School Road Districts I & II (MUTC HSR-I and HSR-II)

Environmental Review:

A SEPA Mitigated Determination of Non-significance was issued November 22, 2013, and an appeal filed on December 6, 2013.

Request:

Site Plan Review and Conditional Use Permit applications were submitted for approval of a commercial complex comprising seven buildings with a 61,890 square foot combined floor area and 248 parking spaces, on five parcels totaling 8.16 acres. Proposed uses include retail sales and services, restaurants, professional services and health care facilities .

FINDINGS AND CONCLUSIONS

Site and Proposal Characteristics

1. Assessor’s Record Information:

232502-3-026-2002	Suzanne Kelly	0.92 acres
232502-3-027-2001	Deschamps Partnership	1.16 acres,
232502-3-030-2006	Suzanne Kelly	0.49 acres,
232502-3-036-2000	Suzanne Kelly	2.83 acres
232502-3-043-2001	Suzanne Kelly	2.76 acres
Total:	8.16 acres	

1. The property is relatively flat with a knoll towards the center, then gently slopes in all directions. Part of the buffer for a wetland lying off-site to the northeast is on the applicant parcel. The northern half of the property, except for the access road to the Pro Build lumber yard, is mostly covered with second or third-growth evergreen trees with an understory dominated by invasive ivy, scotch broom and holly. The site presently contains an approximately 4,600 square foot commercial building on the corner of High School Road and Highway 305 that will be removed. There is also an older small cabin near High School Road that the applicant is offering to donate to an interested resident or group.

2. A private access road to the Pro Build commercial development currently bisects the property and is proposed to be relocated further east as part of this proposal. Vehicular access to the site will be from High School Road, and non-motorized access will be from improved sidewalks along High School Road and a non-motorized trail to be constructed parallel to Highway SR 305.

3. The applicant site contains HSR-I and HSR-II (High School Road I and II overlay districts) zoning and Comprehensive Plan designations. Surrounding uses and zoning include a commercial business, Pro Build Development (HSR-II) to the north, the Stonecress Multi-family Development (R-

8/UMF) and Woodland Village Subdivision (R-2.9/SUR) to the east, retail commercial (McDonalds, Ace Hardware) across High School Road to the south (HSR-I), and a wooded undeveloped area (HSR-I, R-8/UMF) west across SR 305.

4. The parcel is currently owned by the Kelly/Deschamps family, with the Visconsi Companies holding an option to purchase it once required permits have been secured. Thus tenant commitments have yet to be legally formalized. But it is generally anticipated that the Key Bank facility currently located south of High School Road will relocate to the 3300 square-foot building #1 proposed at the corner of SR 305 and High School Road in the HSR-I zone, and a Bartell's Drugstore will occupy the 14,475 square-foot building #2 to its north that straddles the HSR-I and II zone boundary. The 20,000 two-storey building #5 proposed to be located in the site's northeast corner next to the wetland buffer is being viewed as a future medical office facility, while four other single-storey retail buildings ranging in size between 4800 and 7200 square feet have yet to be publicly identified as to their expected tenancies. All buildings except the bank and the southern half of the pharmacy are proposed for the HSR-II zoned portion of the property.

5. The site circulation design for the proposed Visconsi project that has generated so much controversy has been driven by neighborhood limitations largely of human rather than natural origin. The site's access problems are ultimately the consequence of the Washington Department of Transportation's (WSDOT) policy restricting the creation of further road or driveway cuts to SR 305 in order to maximize flow capacity for vehicles approaching and departing its ferry terminal. This policy historically required the ProBuild lumber yard to obtain access south to High School Road through the applicant's site, thus resulting in the future vehicle and pedestrian conflicts that potentially impact proposed retail development. Access options are further constrained by an offsite wetland near the site's northeast corner, plus existing development for Kitsap Bank and the adjacent narrow Polly's Lane roadway, which together occupy the eastern half of the original High School Road property frontage, provide no suitable opportunities for a commercial second access.

Procedural History

6. An initial pre-application conference was held June 1, 2012, and a public participation meeting on June 18, 2012. On May 20, 2013 the applicant first presented the project concept to the Design Review Board (DRB). Slightly less than a year later, on April 24, 2013, formal applications for the site plan and design review approval and for a conditional use permit (CUP) were submitted. The need for a conditional use permit was triggered by the proposed construction of four retail buildings in the HSR-II zone with footprints exceeding 5000 square feet. On May 22, 2013 the application was deemed complete by the project planner. The application was circulated for agency and departmental comments to, among others, the Health District, Fire Department, Kitsap Transit and the City Development Engineer.

7. A Notice of Application and SEPA comment period was published and mailed on June 7, 2013. After the applicant presented a modified proposal to the Design Review Board on June 17, 2013, a revised Notice of Application/SEPA comment period was issued July 5, 2013. Multiple public comments were received. A SEPA Mitigated Determination of Non-significance containing nine conditions was issued November 22, 2013, and timely appealed by the Islanders for Responsible Development (IRD).

8. A pre-hearing conference was held by the City Hearing Examiner on December 20, 2013, and a pre-hearing order issued on December 29, 2013, for a consolidated public hearing on the applications and SEPA appeal. Although the legal standards for each decision differ, the underlying factual issues substantially overlap and a single consolidated hearing record has been created. The pre-hearing order undertook to clarify the issues within the SEPA appeal and supplied a process for furthering that purpose. A supplement to the pre-hearing order was issued on January 6, 2014. In addition, a motion from the applicant's attorney seeking dismissal of the SEPA appeal was denied by the Examiner pursuant to an order dated January 9, 2014.

9. As specified in the pre-hearing order, the public hearing opened at Bainbridge Island City Hall on the evening of January 16, 2014. Due to the widespread community interest in this proceeding, public testimony was taken at the opening of hearing, followed by testimony on the two applications and finally from the witnesses for the SEPA appeal. Hearing testimony was received on January 16, 17, 20, 21, 22, 26, 27 and 28, 2014. In addition, the record was held open for submission of additional specified documents and for legal briefing from the parties. The final deadline for briefing was February 18, 2014, at which time the record closed.

10. As noted above, a single consolidated hearing record was established for all the applications and SEPA appeal issues. After engaging the public participation process, substantive factual topics will be taken up within related groupings and specific factual determinations made for each. Discussion of the legal consequences of such determinations will be deferred to the Conclusions section, where the differences in the specific standards applicable respectively to the conditional use permit, site plan review and SEPA appeal will be elaborated. Within the Findings issues related to the natural environment have been grouped with drainage questions that are of interest primarily in relation to their potential for imposing effects on the nearby wetland. Most of the impacts of importance from the Visconsi proposal fall within the realm of the human or built environment, including traffic and circulation issues and potential impacts to Stonecress.

Public Participation

11. Bainbridge Island values public participation in its civic decision-making, and the City's land use procedures provide multiple opportunities for such participation to occur. Before a project such as the Visconsi proposal arrives at the Hearing Examiner level, it will have already undergone public informational meetings as well as review by the City's advisory Design Review Board and Planning Commission (PC). These procedures offered occasions for public participation and resulted for the Visconsi applications in both more detailed project studies and important revisions to the proposal.

12. The DRB's first involvement with the project was at a conceptual stage on March 26, 2012. Over the course of more than a year it devoted five meetings to discussion of the Visconsi proposal, voting at its final meeting on June 17, 2013, in favor of a "recommendation of approval with comments." As recorded in its minutes, at its first meeting with Visconsi representatives the DRB encouraged the applicant in its design to "consider the special character of the island" but also noted that the "current context of High School road corridor is lacking in this respect." It also identified the design of the spine road serving ProBuild as "critical to the success of the project" and suggested approaching its development as "a central pedestrian open space as a 'retail destination'."

13. These initial DRB observations were of importance in shaping the conceptual site design. In

the context of planning a medium-scale retail and office development, a driveway used primarily by large and small trucks to access a lumber yard is an anomalous feature. To succeed the site design either needs to tame and embrace this feature or turn away and avoid it. Turning away from the spine road would likely either require creating a much longer loop road design with the bulk of commercial development clustered in a central complex facing inward or, alternatively, two separate commercial pods both facing away from the spine road with minimal structural interconnectivity. In the latter instance, overcoming the resultant sense of separation would probably require installation of a dramatic linkage element such as a pedestrian overpass joining multiple-storey buildings located on either side of the road. While either conceptual alternative could end up trading one set of problems for another, both of these approaches would more explicitly eliminate conflicts between trucks and pedestrians from the site design.

14. With DRB encouragement, Visconsi's design team chose the path of subduing the negative qualities of the ProBuild spine road and converting it from a truck route into a "Main Street" setting. One might wonder whether at the time of this design decision either Visconsi or the DRB fully appreciated the challenges that such a choice might present. The City contracted with the Transpo Group for a rather narrowly defined traffic study that was not published until late April, 2013, which study initially dismissed the importance of truck traffic to and from ProBuild. These potential vehicle and pedestrian conflict issues did not really garner serious attention in the review process until later brought before the Planning Commission by community activists. Thus the split between DRB and the PC over whether to recommend approval for the Visconsi project could ultimately reflect their respective evaluations of (and perhaps knowledge about) the project plan's capacity to deal successfully with traffic and circulation issues that only fully came to light relatively late in the process.

15. Other elements of the DRB review worthy of special mention were its consistent attention to the need for the project to modulate and vary the shapes and surfaces of buildings to create visual interest and its particular attention to visual impacts at the High School Road/SR 305 intersection and along the SR 305 corridor. The property's location and elevated topography serve to minimize impacts to offsite views. To the north is the ProBuild lumber yard, and a wooded wetland lies to the northeast between the site and a single-family neighborhood. Directly east there are potential visual impacts to the adjacent Stonecress residential development, a matter to be discussed later in this report. Retention of a tree buffer along the SR 305 corridor can largely mitigate view impacts to the west. Indeed, probably the most serious project view impacts will occur immediately south across High School Road from the proposed bank and be suffered by customers of the McDonald's drive-in restaurant – a constituency (perhaps the only one) whose cause has yet to be championed.

16. Based on the project checklists the DRB ultimately graded the Visconsi site design as acceptable in all guideline categories. It gave it particularly high marks to the Visconsi design for its modulation of building facades to avoid a massive appearance and limit offsite visual impacts. The DRB specifically agreed with the applicant that "it is better that the corner bank building be low key [pun likely not intended] and smaller in scale," foregoing the creation of a landmark presence. But aware of the limitations of its advisory role, the DRB also expressed concern that the harmoniously integrated building profiles featured in the Visconsi design package might not actually get built, that eventual site retail tenants might express preference for more conventional commercial designs different from those in the Visconsi presentation drawings. Accordingly, the DRB suggested that further design review be incorporated into the construction permit review process.

17. The City's Planning Commission reviewed the Visconsi project proposal at meetings held in October and November, 2013. According to the meeting minutes topics of primary concern were traffic circulation, pedestrian safety, economic impacts, and proposed building size, design and use and their relationship to the City's Design Guidelines. The discussion consensus was that the proposal's impacts could not be adequately mitigated. Based on proposed findings drafted by Commissioner Maradel Gale, the Planning Commission voted unanimously on November 14, 2013, to recommend denial of the Visconsi site plan and conditional use permit applications. But also, in the event its recommendation for project denial was not adopted, the PC proposed four further project conditions relating to utility equipment visibility, wetland mitigation timing, a crosswalk on High School Road and truck traffic use of Polly's Lane.

18. Commissioner Gale's written findings regarding the deficiencies of the Visconsi proposal were accepted by the Planning Commission as the basis for its recommendation of denial. Her analysis acknowledged the challenges presented by the site's location and the existing neighborhood development pattern ("the architect has faced an impossible task") and concluded that the critical problems had not been satisfactorily addressed by either the proponent or City staff. Her main emphasis was on safety issues – conflicts between ProBuild truck traffic and pedestrians both internally on the site and on the surrounding road system, vehicle circulation and movement issues, and sight distance problems. She was particularly sensitive to the questions of how vehicle circulation obstacles onsite, and through the site to and from ProBuild, could push frustrated drivers east onto narrow Stonecress streets that were not designed for expanded levels of non-residential usage and attendant increases in adverse impacts.

19. In addition, Commissioner Gale's analysis discussed the Visconsi proposal at some length in the context of the City's Comprehensive Plan and the Plan's relationship to the conditional use permit review standards. This discussion served to inform much of the public testimony received at the recently completed permit and appeal hearing and anticipated many of the critical legal issues to be reviewed below in the Conclusions section of this report.

20. At each stage of review – DRB, Planning Commission and Hearing Examiner – the Visconsi site design proposal has undergone modification in response to concerns expressed by the advisory groups and the public. The initial April, 2013, design assumed that ProBuild traffic would only comprise a relatively minor pedestrian complication, with the north/south spine road meandering peacefully through a central plaza located along both sides featuring angle parking and four convenient pedestrian crosswalks.

21. The September, 2013, site plan iteration presented to the Planning Commission undertook to respond to emerging ProBuild truck traffic concerns by adding a divider along a now more straightened spine road's east side to create a separate through-lane and a buffer protecting the proposal's three easterly buildings. The plaza area on the west side was reduced and most of its parking spaces converted from angle to parallel configuration, with deleted spaces east of the pharmacy relocated west adjacent to the SR 305 buffer. The September version also featured an enlarged buffer in the site's northeast corner in response to a consensus reclassification of the offsite wetland to Category I; increased tree retention within the western boundary buffer along SR 305; and installation of a full planting screen in the buffer section adjacent to Stonecress residences. Finally, the January, 2014, version recently submitted to the permit hearing record added a multi-modal trail next to the SR 305 corridor, reconfigured the crosswalks east of the pharmacy and added a crosswalk across Polly's Lane

into Stonecress.

22. Large numbers of Bainbridge Island residents participated in the multiple phases of the review process for the Visconsi applications – before the Design Review Board, the Planning Commission and Hearing Examiner. Most expressed opposition to the proposal. Some submitted written comments, others offered oral testimony, and many did both. Many comments were short and concerned mostly with the bottom-line outcome, while others were lengthy, detailed and specifically targeted on particular problems. The more site-specific comments were clustered around topics such as traffic congestion, pedestrian safety and circulation, wetland protection, tree removal and the various potential impacts of commercial development on the nearby Stonecress neighborhood.

23. The broader and more programmatic comments were often anchored by references to different goals and policies within the City's Comprehensive Plan. There may be no other place on the planet where a Comprehensive Plan seems as much a living document as on Bainbridge Island. The conceptual critiques included broad assertions of the project's failure to complement the Island's unique character, the lack of an economic need for another shopping center, the absence of a residential component in the project's mix of uses, a shortage of environmentally friendly sustainable features, claims of atavistic adherence to an outmoded auto-centric commercial paradigm and related accusations of strip mall development practices imposing unwanted urban sprawl. There were frequent references to Kitsap County's earlier approval of the Safeway shopping center located further west on High School Road, a community trauma that was a seminal event in the decision to incorporate the entire island as a city and which remains fresh in the collective memory. Since the Bainbridge Safeway development is ugly even by Safeway standards, the widespread community desire to avoid repeating this experience is understandable.

The Offsite Wetland

24. The character of the Visconsi site and its attendant development constraints have largely been determined by the glacial till layer that underlies the property at depths ranging from two to five feet. Water perched above the till layer has created the wetland offsite to the northeast, and the till's low permeability precludes significant infiltration of runoff generated by the proposed development. Beneath the forest duff layer on the property's east side also lies a thin layer of fill generally identified as the remnant of earlier farming activity. Test holes excavated for the applicant by Aspect Consulting did not encounter significant ground water. The geotechnical evaluation concluded that the onsite till soils would provide suitable materials for building foundations and structural fill.

25. An approximately three-acre depressional wetland within the Woodland Village subdivision lies close enough to the Visconsi property that its regulatory buffer extends onto the site's northeast quadrant. A disagreement over the exact classification of the wetland was resolved on August 5, 2013, when City's wetland planner and a wetland specialist representing the subdivision's homeowners' association jointly investigated the wetland and agreed that it merited a Category I rating requiring a 100 foot buffer plus a 15 foot building setback. Because the understory for the onsite forested portion of the buffer is impacted by invasive plants such as holly and ivy, wetland enhancement will be required in the form of invasives removal and replanting with native vegetation.

26. Although lacking in special characteristics and already subject to impacts from existing nearby residential development and its untreated runoff releases, the wetland was deemed basically healthy

with good plant diversity, snags and large woody debris. Beyond implementation of the enhancement plan, development activities potentially having direct impacts to the onsite wetland buffer include installation of drainage lines connecting to a dispersal trench and clearing within the adjacent building setback. It also appears that a new drainage pipe will be installed to transport offsite flows entering from the ProBuild site and discharge them into the buffer.

27. As described by the preliminary drainage report performed by Browne Wheeler Engineers dated April 24, 2013, the Visconsi project is proposed to be constructed in phases, with the first phase comprising “the construction of the road and the utility mains, mass grading of the entire project, and construction of the buildings and parking lots on lots 1 and 2.” Although there is hope that onsite cuts and fills will balance out overall, no detailed grading plan for the entire site has yet been created. According to the April 17, 2013, Aspect Consulting report, the earthwork anticipated for lot 2 (the pharmacy) near the southwest site corner “appears to range from 3 feet of cut to 4 feet of fill for the general lot.”

28. There was concern expressed at the public hearing, primarily by neighborhood residents Christina Doherty and Chuck Depew, that a proposed project condition tying implementation of the wetland enhancement plan to construction of nearby proposed building 5 might allow early phase construction impacts to go unremedied for an unacceptable length of time and result in buffer degradation. The applicant did not object to rescheduling the mitigation to an earlier point. In view of the plan for initial mass grading of the entire site and uncertainty about when building 5 actually will be constructed, identifying an earlier trigger for replanting the buffer understory appears to be prudent.

Stormwater Management

29. In the current state, stormwater runoff from the Visconsi site is divided among three basins – a southwest basin of about four acres, a northeast basin of about three acres and a northwest basin at about one and a half acres. Both west side basins discharge to the roadside ditch along SR 305, with the northwest basin flows culverted under SR 305 to the Sakai Pond on its west side. Flows from the two western basins rejoin just southwest of the SR 305/High School Road intersection and then travel south toward the Winslow Ravine. There are reports of existing minor erosion in the upper reaches of the Ravine system, and the SEPA appeal suggested the possibility of potential harm to fish habitat. But the record contains no documentation of fish resources in the Winslow Ravine.

30. After site grading, the three basins would remain about the same size but their boundaries would be slightly adjusted. Most notably, the design shifts part of the existing northeast basin that normally would have contained the northern end of the spine road to the northwest basin, compensating for this loss with additional area from lot 7. Each basin will have its own separate detention and treatment system, consisting typically of detention facilities (vaults, tanks or pond), a flow control structure, a StormFilter cartridge water treatment system to remove total suspended solids (TSS), and a discharge pipe to the roadside ditch (western basins) or a dispersion trench (northeast basin). In addition, the access road runoff will receive enhanced water quality treatment by passing it through a rain garden.

31. Most of the hearing testimony focused on the northeast site basin, which discharges to a much larger neighborhood basin that also contains Woodland Village, its Category I wetland, the eastern half of ProBuild and the Stonecress Townhomes. The Visconsi northeast basin appears to comprise about

15% of this total neighborhood basin. Releases from the Visconsi northeast basin stormwater system will pass through the wetland buffer to the wetland, skirt the Stonecress detention pond, continue east into a second wetland located adjacent to Ferncliff Avenue north of its High School Road intersection, then pass under Ferncliff in an 18-inch culvert. From there flows continue east through a third wetland to a drainage swale over another 1200 foot span before turning south and traversing a series of channels, ponds and wetlands to Eagle Harbor.

32. Potential impacts to the Woodland Village wetland from northeast basin flows are to be mitigated by the flow control and water quality treatment requirements and natural filtration through the wetland buffer. The Department of Ecology (DOE) has accepted the Stormfilter cartridge technology as capable of meeting its 80% TSS removal target under specified conditions. Further, Visconsi's design decision to eliminate the entire spine road from the northeast site basin will have the beneficial water quality effect of removing ProBuild truck traffic pollution from flows discharging to the wetland buffer.

33. Before 1990 most municipalities simply authorized direct stormwater discharges to ditches and streams without either detention or treatment. In urban basins these practices resulted in erosion, flooding and the scouring of stream beds – in other words, the total obliteration of any remaining fish habitat. Now computerized continuous flow models that mimic Western Washington's maritime weather, which is characterized less by isolated storm events than by a series of storms over an extended period of time, are employed to calculate the capacities of required stormwater detention facilities. A primary consequence of a series of storms is that later in the storm cycle a new event will encounter soils that are already saturated and a detention pond that is no longer empty. Thus a small event encountered late in the cycle can have impacts more typical of a larger storm. While earlier single-event models assumed an empty pond and unsaturated soils, the continuous flow model takes cumulative storm effects into account in the design of facility capacities. The result has been new detention facility capacities that are many times larger than those required in the 1990s.

34. Continuous flow modeling underpins detention pond capacity and release requirements throughout the Puget Sound area as specified by the minimum standards stated in DOE's 2005 Stormwater Management Manual for Western Washington, which has been adopted (with some modifications) by the City as its regulatory framework. There is also now a 2012 update of the Manual that offers some technical refinements but does not alter the essential analytical approach. Under the 2005 standards Visconsi would be required to release detained stormwater at durations that do not exceed 50% of the 2-year storm.

35. The applicable 2005 release rates are calculated to maintain storm flow durations at the predevelopment level. In so doing they also automatically reduce flow peaks below the levels naturally occurring. Because elevated flow durations and peaks are the primary causes of flooding and erosion within a drainage system downstream, release of development flows at the maximums authorized should not increase downstream damage and may in some instances actually diminish it. This means in most cases that detailed evaluation of the conveyance capacity of distant downstream channels, streams, ponds and wetlands is no longer required. And one further beneficial effect of requiring flow durations to mimic the natural condition is that base flows to wetlands and streams will be better maintained.

36. An issue raised by residents in the immediate vicinity of the Woodland Village wetland was that

increased flows from the Visconsi northeast basin might cause flooding damage while passing through an allegedly malfunctioning stormwater pond complex on the Stonecress site. And Stonecress residents expressed a fear that increased flows from Visconsi would erode an already stressed pond berm, a concern mostly based on an assumption that the eight-inch pipe through the berm designed to by-pass wetland flows is undersized and will flood during major storm events. A resident who lives near the pond in the Hamlet subdivision, Philip O'Hartigan, speculated that Stonecress pond overflow might cause flooding damage to his property. As a remedy Mr. O'Hartigan suggested that northeast basin flows from Visconsi be rerouted west to the SR 305 roadside ditch.

37. One of the cardinal principles of stormwater system design is that post-development drainage basins should generally replicate in size the pre-development condition and effect releases offsite at the pre-development locations. The basic insight is that a substantial reallocation of runoff between drainage basins usually just shifts problems from one place to another. Responding to Mr. O'Hartigan's concerns in a May 28, 2013, letter, Visconsi's engineer Adam Wheeler made this fundamental point in rejecting the suggested westerly reassignment of flows from the northeast basin. In addition, after noting that "our firm provided the drainage designs for the Hamlet and Stonecress communities," Mr. Wheeler went on to make the following observations about the Stonecress pond:

"The drainage system for the Stonecress community was designed to collect water leaving the wetland before it entered the detention pond and route it around the pond and discharge the water to the east. The detention pond was designed to accommodate the runoff from the Stonecress community only. If this is not the case, the City should investigate the issue to determine if the drainage system needs to be repaired or maintained."

38. At this point we have learned two things. First, we know that the Visconsi drainage system is required to be designed so that, when functioning properly, its flow durations will not exceed the pre-existing rate and thus not increase impacts to the downstream conveyance system. Second, from the Stonecress experience we also know that even a well-designed system may not always be built, or may not forever perform, according to plan. So the question becomes whether these facts combine to give rise to any responsibility on the part of Visconsi to fix what may either be an improper routing of flows in the existing downstream system from the Woodland Village wetland through the Stonecress pond or an under-capacity bypass line.

39. Section 2.5.4 of the state Manual containing "Minimum Requirement #4: Preservation of Natural Drainage Systems and Outfalls," states that "[n]atural drainage patterns shall be maintained...to the maximum extent practicable" and the "manner by which runoff is discharged from the project site must not cause a significant adverse impact to...downgradient properties." Since, strictly speaking, natural drainage patterns in an urban area (even a low density one) will have been to a major extent long ago altered, the term probably needs to be understood as mandating the preservation of the drainage patterns in existence immediately before site development.

40. Some context for understanding the terminology quoted above is also supplied by the approval standards stated at BIMC 15.20.060.H, which state that "[d]evelopment projects that discharge stormwater off-site shall submit an off-site analysis report that assesses the potential off-site water quality, erosion, slope stability, and drainage impacts associated with the project and that proposes appropriate mitigation of those impacts" Also, "[p]rojects shall be required to initially submit, with the permit application, a qualitative analysis of each downstream system leaving a site" which should

include as Task 4 a description of “the drainage system, and its existing and predicted problems” and for each potential issue “[w]hether the project is likely to aggravate the problem or create a new one.”

41. In view of the foregoing, one should expect that, over a reasonable time span and after full development, discharges from the northeast basin of the Visconsi site (despite engineering calculations) could at times exceed pre-development rates and volumes, thereby placing additional pressure on an already distressed Stonecress stormwater system which appears now to be receiving flows that either the pond or a bypass pipe were not designed to handle. One also notes that the Stonecress pond receives runoff from Polly's Lane, which roadway will produce a higher runoff pollutant load if it carries future traffic generated by Visconsi commercial development.

42. The Stonecress pond and bypass system lie in the immediate downstream conveyance path for the Visconsi commercial development, so any potential aggravation of an existing malfunction cannot be simply be dismissed as someone else's problem. The intent of the drainage regulations is for new development to responsibly manage its additional contribution to stormwater impacts, including being served by an at least minimally functional conveyance system. For Visconsi to meet this standard would require determining whether flows from the Woodland Village wetland are either exceeding the capacity of the Browne-Wheeler engineered bypass line or otherwise improperly entering the Stonecress pond. If one or both of these conditions are found to exist, corrective measures should be taken, most probably involving installation of a larger flow bypass pipe.

Tree Retention

43. Somewhat more than half of the Visconsi site is currently covered with second or third growth tree stands, beginning on the north end contiguous to ProBuild and the Woodland Village wetland and extending south. Douglas fir appears to be the most numerous species, followed by hemlock and cedar. Deciduous trees consist mainly of bigleaf maple, red alder and madrona. Even though the understory is dominated by invasives, the tree stand overall appears healthy. No unique species or critical habitats have been identified.

44. All trees in the central portion of the site are planned to be removed to accommodate the seven proposed commercial buildings plus nearby driveways and parking areas. Trees slated for retention lie at the site perimeters -- within the western buffer adjacent to SR 305, the wetland buffer in the northeast corner and the eastern buffer separating homes within Stonecress from a site parking lot. No tree removal is proposed within the wetland buffer. The applicant's tree survey designates the 15-foot building setback next to the wetland buffer as an area to be cleared, but the landscape architect thought it possible that some setback trees could also be retained.

45. The Visconsi proposal is falls under the City's interim tree ordinance, now codified within BIMC 18.15.010. The ordinance regulates development on the basis of “tree units,” the award of which increases with tree size. Existing trees are assigned units based on their diameter at breast height (DBH). Thus a tree under 5 inches DBH only receives one tree unit while a tree over 30 inches DBH counts for 8.2 units. Units awarded for replacement trees are discounted compared to those for existing trees. A replacement tree receives one tree unit if will attain a height at maturity of more than 40 feet and only half a unit if it won't. Units for retained trees occurring within a tree stand or grove are also eligible for a 1.2 multiplier bonus.

46. The Visconsi project is subject to an ordinance requirement to provide 40 tree units per acre, or 326.4 tree units for the entire site. According to the applicant's tree retention analysis, the unit value for the trees proposed to be retained onsite is 508.9 tree units, which number increases to 608.4 after application of the tree stand bonus factor. To this number are added 136 tree units for the replacement trees to be planted, for a grand site total 744.4 tree units. This sum is more than twice the 326.4 required by BIMC 18.15.010.

47. While at the hearing many Island residents rued the quantity of tree removal proposed, the accuracy of the applicant's tree survey or the unit totals calculated under the analysis mandated by the ordinance were not credibly challenged. Olaf Ribiero, a plant pathologist and arborist who specializes in tropical vegetation, testified at the hearing on tree issues on behalf of appellant IRD. Like many other residents Dr. Ribiero mostly spoke in general terms about the ecological benefits of trees, how they contribute to health through ozone and particulate removal and carbon dioxide sequestration, and their value in maintaining soil structure and infiltration capacity. Dr. Ribiero's site-specific comments were mostly directed toward the importance of creating an effective tree screen between the Visconsi project and the Stonecress residences to the east.

48. Beneath the somewhat artificial tree ordinance methodology, the raw numbers look something like this. According to the tree survey, there are 1132 trees (of all kinds and sizes) presently on the Visconsi site. Of these 917 are slated for removal and 215 will remain. Plus 313 new replacement trees will be planted, resulting in a total after development of 528 trees, or 46.6% of the number present now. Focusing strictly on the biggest trees, there are currently onsite 30 trees measuring 30 inches DBH or greater, and after development 12 will remain and 18 will have been removed.

Traffic and Circulation

49. The Visconsi traffic issues come in two varieties, level of service (LOS) impacts and questions of safety. They are fundamentally different in character. Safety issues focus on whether a development will contribute to conditions that create an unacceptable risk of personal harm. These issues focus on matters such as conflicts between vehicle and pedestrian uses, vehicle sight and stopping distances, dangerous road conditions and risks to pedestrians. In other words, the emphasis is on tangible real-world situations.

50. Level of service issues, on the other hand, are entirely comprised of social constructs. The focus here is on analyzing how much time a driver will have to wait at an intersection to perform a specified vehicle maneuver and assessing whether such level of delay is acceptable. The determination of what is or is not an acceptable delay is obviously a social decision that can vary from location to location and community to community. In North America communities mostly make these decisions by referencing nationally promulgated standards contained in the Highway Capacity Manual (HCM). Almost all communities have concluded that an LOS F as defined by the HCM is an unacceptable level of intersection delay. But as provided in the Comprehensive Plan and BIMC 15.32.020, Bainbridge Island has adopted a more stringent HCM standard, LOS D, at the SR 305/High School Road intersection. This standard tolerates for signalized intersections an average vehicle delay not to exceed 55 seconds.

51. LOS impacts at the SR 305/High School Road intersection were alleged to be significant by IRD in its SEPA appeal and raised by citizen testimony both at the public hearing and on the Planning

Commission level. The LOS argument was not further pursued by IRD in its closing brief, suggesting either that it has been abandoned or, at the very least, accorded diminished weight. But the sheer quantity of public attention paid to these issues requires that they be understood. There are two basic reasons why the LOS issues ultimately failed to gain traction in this review. First, the contrarian analyses offered were not adequately grounded in HCM methodology. Second, despite a rather narrow and formulaic initial scope of work provided by the City to its transportation engineering firm, Transpo, the LOS cushion at the SR 305/High School Road intersection was found to be sufficiently great that relatively minor assumption modifications were unlikely to alter the ultimate result.

52. Everyone understands that traffic on Bainbridge Island along the SR 305 corridor is subject to some unusual circumstances. First and foremost, high traffic volume pulses of 10 to 15 minutes duration each occur throughout the day when the Seattle ferry come and goes. These pulses become longer during the summer tourist season, especially on weekends. Endemic ferry traffic problems along the SR 305 corridor as it currently exists were acknowledged in 2004 in the introduction to the Comprehensive Plan's Transportation Element: "While the existing configuration of two lanes is adequate during off-peak hours, peak hour traffic coupled with surges from exiting ferry activities have resulted in high levels of congestion at multiple locations."

53. These ferry-induced traffic surges often result in avoidance behaviors, most notably (for our review purposes) that many walk-on commuters who park east of SR 305 in the lot next to the terminal will exit north via Ferncliff Avenue rather than going directly over to SR 305. Then further north they will cut back to SR 305 via High School Road, creating lengthy queues on the east side of the SR 305/High School Road intersection that can back up past the newly planned Visconsi access driveway. Indeed, the hearing record contains multiple reports from area residents of having observed even longer backups, sometimes all the way east to Polly's Lane in Stonecress.

54. An analytical problem arises for project opponents because the factors just described above are deemed anomalies under the HCM methodology, which instead seeks to review what it considers to be more normal patterns. As described in a November 8, 2013, Transpo memo, "summer periods of high volumes are not considered to be representative of typical traffic," and "[t]raffic counts are typically taken mid-week, non-holiday, and not during the school summer break." Plus the late afternoon commuter rush hour period is now almost universally assumed by traffic engineers to provide the optimal peak volume measurement. The essential principle underlying the HCM approach is that it seeks to avoid overbuilding traffic infrastructure in response to exceptional conditions. But this is not to suggest that the City could not decide to adopt regulations deviating from the HCM and tailor its traffic LOS computations to the Island's special circumstances. The essential point is that the City deliberately has chosen not to do so. As stated at BIMC 15.32.020, the City's LOS "[d]escriptions and measuring methodology...are in accordance with" the HCM.

55. Turning from the general framework to specific issues, the Transpo traffic study issued in April, 2013, and relied upon by the City for issuance of a transportation concurrency certificate has been criticized by numerous Island residents, including IRD's consultant Ross Tilghman. These criticisms suggest in various ways that the study underestimates the number of total vehicle trips traveling through the critical SR 305/High School Road intersection, as well as the new vehicle trips that will be generated by construction of the Visconsi development in the project's 2015 horizon year. The estimation of traffic demand at any location will need to consider four major components: baseline traffic volumes, background growth rates, project trip generation and project trip distribution.

56. One issue raised early in the review by Mr. Tilghman and others was that the March 12, 2013, traffic counts that provided the baseline data for the Transpo study were unreliably low as shown by comparing them to a June 19, 2013, count done by IRD. The IRD count, measured between 4 and 5 PM, enumerated a total of 2087 vehicles passing through the SR 305/High School Road intersection, while the earlier Transpo count, done between 4:15 and 5:15 PM, only registered 1870 vehicles. Transpo and the City staff declined to regard the IRD June count as more reliable for the reasons suggested above: it was adjudged atypical based on summer seasonal factors. It is also worth noting that Mr. Tilghman later commissioned a followup traffic count on September 17, 2013 – in other words, after the summer season had ended. The vehicle total generated by this later count was less than one percent greater than the March number. In a September 20, 2013, letter to Ron Peltier of IRD, Mr. Tilghman concluded that “[t]he September count shows that the March volume was not an aberration.”

57. A related assertion that also emphasized exceptional circumstances over routine conditions was that the LOS calculation should not be driven by the figures for the entire PM peak hour but by the highest 15-minute segment within the peak hour. Except in congested urban areas, traffic volumes will generally fluctuate within the PM peak hour, and the relationship between highest quartile and the average for the entire hour is known as the “peak hour factor” (PHF). Where there is no deviation between the quartile and the peak hour average, the PHF equals 1.0. As the deviation increases, the PHF becomes smaller. Being a suburban system subject to ferry traffic surges, Bainbridge Island roads typically will experience PHFs in the lower coefficient range.

58. Mr. Tilghman argued that, being predictably recurrent, the higher ferry surge 15-minute segment of the PM peak hour should have been used as the basis for LOS calculations. He produced a worksheet projecting an intersection LOS E at the SR 305/High School Road intersection during a PM ferry surge peak quartile. Both Scott Lee of Transpo and Janelle Hitch from City staff defended the traffic study's peak hour methodology as actually including the worst ferry surge 15-minute segment but generating a more representative overall picture. Mr Lee pointed out that the reliability of any specific peak quartile assessment on SR 305 will be compromised by the fact that individual movement peaks will vary depending on whether a the ferry included in the quartile is arriving or departing. While the PHF is a concept referenced in the HCM literature, Mr. Tilghman cited no authority for the proposition that the HCM mandates its use for an LOS calculation under the circumstances encountered here.

59. While Mr. Tilghman did not dispute that the SR 305/High School Road intersection in 2015 will function at LOS D when the intersection as a whole is analyzed under standard HCM procedures, he pointed out that individual turning movements now operate at LOS F and will become even worse in the project's horizon year. He argued that these failing individual movements should be viewed as providing the basis for evaluating the project's LOS impacts. The individual movements of major concern are the north and southbound left turns from SR 305 to High School Road. As shown by the Transpo LOS work sheets, the SR 305 northbound left turn currently operates at LOS F with an 88.4 second delay per vehicle and will go to a deeper F at a 134.1 second delay in 2015 when Visconsi project traffic is added to the mix. For the SR 305 southbound left turn movement the comparable figures are 94.4 seconds delay now and 167.4 seconds in 2015 with the project. By comparison, the overall vehicle delay average for the intersection as a whole was calculated by the Transpo study to be 35.7 seconds now and 45.8 seconds in 2015 with the project, both figures falling comfortably within the LOS D range.

60. The HCM is explicit that for signalized intersections the average control delay per vehicle for the intersection as a whole is the correct figure to use in determining the level of service. The reasons for this are easy to discern. Signal timing for each movement is adjusted (“optimized”) to create the best overall operational result for the entire intersection. By giving signal preference to those movements that carry the largest traffic volumes, the average delay per vehicle can be reduced. Since the biggest volumes are encountered in the through-movements, the optimization program will necessarily assign them the lion's share of green-light time, a process which concurrently reduces signal time for low volume movements and forces them to wait longer. In other words, at a signalized intersection such as SR 305/High School Road, individual movement delays (and their resultant LOS descriptors) are purely an artifact of the signal optimization procedure. These delays do not directly reflect project impacts.

61. The SR 305/High School Road intersection work sheet numbers perfectly demonstrate this process. For the SR 305 northbound left turn movement Transpo's optimized delay figures show an 88.4 second wait under current conditions, rising to 104.8 seconds in 2015 without the project, then increasing further to 134.1seconds when project traffic is added. An uninformed interpretation of these figures would lead one to expect that the Visconsi project will be contributing significant numbers of vehicles to the SR 305 northbound left turn delay, resulting in the rather substantial 30-second increase in wait time over the 2015 baseline condition. But is that actually true? How many vehicles headed for the Visconsi site will be in the SR 305 northbound left turn movement? The answer is zero. These northbound vehicles are all turning west on High School Road away from the project site. Does this mean that Visconsi traffic has no impact on individual intersection movement delays? No. It simply means that the correct measure of project traffic impact is the increase in average vehicle delay for the intersection as a whole. Individual movement delays are solely a product of the signal optimization procedure and do not accurately describe project impacts.

62. Another variable in calculating the new vehicle trips that a proposal will generate derives from the recognition that different kinds of businesses and facilities will typically attract different levels of traffic. Here also national data are most often used as the basis for making these volume assumptions, in this case the Trip Generation Manual published by the Institute of Transportation Engineers (ITE), which provides trip ratios either per unit or based on square footage. Trip generation rates can vary significantly according to the type of enterprise. Based on Visconsi's current plans, the PM peak hour trip generation rates employed by the traffic study ranged from a high of 24.31 trips per 1000 square feet for the proposed bank with a drive-through window to a low of 3.57 trips per 1000 square feet for a medical office building. As project critics correctly pointed out, if at a proposed 20,000 square feet of floor area building 5 became a medical clinic rather than medical offices, the trip generation rate for the structure would increase. For this and other reasons, a proposed change of use for building 5 should require additional review. But based on current information and assumptions, the trip generation rates used in the traffic study appear reasonable.

63. Mr Tilghman also criticized the Transpo study on the basis that its estimation of project traffic volumes failed to correctly apply a pass-by trip reduction process. Some trips to a retail facility will be made by drivers who are going to be on the road anyway heading for other destinations and who make a shopping stop en route. Consequently they will not contribute new vehicle trips on the road system as a whole. There are two procedures that deal with the process of adjusting the new trip total to reflect this reality. In our context the conventional method would be to describe vehicles already on High

School Road that stop at the Visconsi retail site as pass-by trips, while vehicles turning off SR 305 to High School Road to access the site would be termed diverted link trips. To make a long story short, due to the site's proximity to SR 305 corridor and its far greater traffic volumes, Transpo opted to aggregate all detoured vehicle movements as pass-by trips, eliminating a separate diverted link adjustment altogether. But the effect of this decision was to overestimate the number of net new trips generated by the Visconsi project, not underestimate them as Mr. Tilghman suggested.

64. Finally, brief mention should be made of two remaining elements of the traffic impact analysis that were not challenged by project opponents but are nonetheless capable of skewing the outcome if improperly done. After the number of new project-generated trips are calculated, they must be allocated to the road network – east, west, north and south. As described by the City's Development Engineer in a memo summarizing the scope of work for the Transpo study, the consultant was commissioned to create a project trip distribution and assignment that would “distribute and assign PM peak hour project traffic onto the surrounding roadway network based on the City's travel demand model, turning movement counts, and local travel patterns adjacent to the site.” The Transpo study itself cited turning movement counts and “observed travel patterns within the project vicinity” as the basis for its trip distribution. Since no further reference has been made anywhere to a City travel demand model, one assumes that it only presently exists as a future task on someone's “to do” list.

65. Transpo's PM peak hour trip distribution chart for the Visconsi project shows 25% of the vehicles distributed north of the site on SR 305, 45% west of SR 305 on High School Road, and 15% each south on SR 305 and east on High School Road. The two 15% distributions are generally consistent with the March 12, 2013, baseline traffic counts done for the traffic study, and a higher north side than south side flow on SR 305 likely reflects the afternoon commuter pattern. But the trip distribution departs from the traffic counts in distributing 45% of project traffic on High School Road west of SR 305 (24% in the traffic count) and 25% north on SR 305 (41% in the count).

66. A consequence of distributing 45% of project traffic on High School Road west of SR 305 is that the predicted level of services for the two Madison Avenue intersections included in the traffic study are not likely to have been understated. But since these intersections are of minimal interest under any scenario, providing a safeguard there should have been deemed a low priority concern. The essential rationale, no doubt, for the 45% westward distribution was that traffic would shuttle between the two neighboring shopping centers. While that may prove to be a reasonable assumption, it would have been helpful if the Transpo report had spelled out just how it reached the 45% figure. If it turns out to be an overestimate, the most likely result would be higher project traffic volumes on SR 305 north of High School Road.

67. A final level of service item of concern is the background growth rate. Performing LOS calculations for the 2015 horizon year requires not only assigning a correct amount of project traffic to affected intersection movements but also adding in background growth from other sources. The Transpo study factored in a 1% annual growth rate above the 2012 baseline figures plus one development project in the City's permitting pipeline, Madrona Townhomes. Since the Madison Avenue/Wyatt Way intersection was a traffic study location, the City Development Engineer was asked at the hearing why the 45-unit Grow Community currently under construction (which can be seen from the Madison/Wyatt intersection) was not included as a pipeline project. A satisfactory explanation was not received, which leads one to wonder if other projects under construction were improperly excluded from the pipeline count. Another imponderable is of course whether the 1% background growth rate

will prove to be an accurate assumption. Since 2008 the national economy has limped along at an anemic growth rate just above the recessionary level, and the traffic study appears to assume an indefinite continuance of this low rate of growth. So if a sudden spurt of affluence is unexpectedly experienced, the traffic study's assumption of a 1% growth rate could prove to be understated.

68. In summary, traffic level of service projections are mostly about predicting human behavior, always a perilous task. Added to this are inevitable uncertainties about economic trends. Thus traffic demand engineering can never be an exact science, and the best studies will be hedged by conservative assumptions. The Transpo study for the Visconsi project followed accepted industry practices and was performed using current modeling technology. Its weakest points appear to be a potentially understated pipeline analysis and background growth rate, plus a lack of clarity as to trip distribution methodology. The City's traffic review regulations adopt national standards and methodologies, which means that they do not accord special weight either to periodic traffic surges generated by ferry traffic or to off-peak or seasonal events.

69. The maximum average vehicle delay permitted in the PM peak hour at the SR 305/High School Road signalized intersection under the applicable LOS D standard is 55 seconds. According to the Transpo study, the existing average vehicle delay at the intersection is currently 35.7 seconds, will go to 36.6 seconds in 2015 without the project, and to 45.8 seconds with the Visconsi development. While there are surely places in the traffic study where the Transpo data assumptions might be questioned, no basis appears in the record for concluding that the corrections potentially indicated could push the average vehicle delay calculation up to, or even near, the 55 second LOS D upper boundary.

70. Unlike the theoretical constructs that dominate the traffic demand analysis, questions about onsite access and circulation, pedestrian safety, and impacts to offsite neighborhoods are experiential and practical. They focus on matters as they exist on the ground. And as nearly everyone who is neither on the Visconsi nor City payrolls has commented, the Transpo study initially failed to adequately identify and address these types of issues. The City neglected to highlight these questions in its traffic study scope of work, and the Transpo engineers sitting in their offices across the water in Redmond had no independent knowledge of them. So an important determination to be made here is – when in the middle of the review process these circulation and safety questions finally received their due, were adequate answers provided? The City's Planning Commission, before whom these issues were first seriously engaged, found the answers to be wanting.

71. At the outset we alluded to the fact that the circulation issues confronting the Visconsi site are created by the pattern of existing development and its attendant constraints. SR 305 adjacent to the west is a state highway mainly oriented toward moving vehicles to and from the state ferry terminal in the most efficient manner possible. To that end WSDOT views unfavorably proposals to add new intersection or driveway cuts to SR 305. So it is unlikely that either Visconsi or its existing neighbor to the north, ProBuild, will ever be permitted to develop a direct access west. Properties immediately to the east are a mixture of residential developments and unbuildable wetlands. Kitsap Bank, which occupies the southeast corner of what at some earlier point was undoubtedly a portion of the current Visconsi parcel, possesses its own separate access driveway system. While the Deschamps interests retained a right for commercial use of Polly's Lane lying between Kitsap Bank and Stonecress, they lacked the foresight to create a right-of-way with sufficient width to both handle commercial traffic volumes and buffer residential development further east.

72. So the access opportunities available to Visconsi consist of about 300 feet of relatively unconstrained frontage along High School Road between the SR 305 intersection and Kitsap Bank plus a legal right of dubious practical value for commercial use of Polly's Lane east of the bank. In addition, as everyone understands, ProBuild must use an easement driveway through the Visconsi site for access to its lumberyard, and the traffic on this driveway contains a significant percentage of both large and small trucks. The large trucks deliver construction inventory in bulk to ProBuild, and smaller trucks are driven by the contractors and home repair enthusiasts who purchase portions of this inventory and cart it away. Since Visconsi's initial "Main Street" site plan concept envisioned customers strolling across the ProBuild access driveway from one shop to another, concerns inevitably arose about potential conflicts between pedestrians and trucks.

73. Visconsi proposes to outlet the ProBuild access further east on High School Road and reconfigure it into a gentle arc. This relocation will have circulation benefits that appear not to have been widely appreciated. An exit further east would allow storage lanes for both right and left turn movements from High School Road to SR 305 to become longer, and the current offset between the ProBuild and Ace Hardware driveways on either side of High School Road can be eliminated. While some project opponents have argued that eliminating the driveway offset will result in turning movements becoming more dangerous, such contention finds no support in the accepted engineering lore. Directly opposing streets and driveways are universally regarded as creating intersection operations that are safer and more efficient than offsets. Finally, the relocated access road will be curved west into High School Road so that 4 or more-axle trucks should be able to make a right-turn exit without having to cross over into the oncoming eastbound lane of traffic (as they often do now). In short, the revised geometry of the access road connection to High School Road should represent a substantial upgrade in maneuverability over the existing situation.

74. Whether or not the Transpo study should have anticipated potential truck and pedestrian conflicts along the spine road, it is beyond dispute that current ProBuild vehicle volumes are not substantial. The traffic counts performed on November 4th and 5th, 2013, both generated totals of less than 700 vehicles per day. The greatest numbers were bunched in the mid-day span between 9 AM and 4 PM, with lower volumes in the PM peak hour. The percentage of trucks in the mix exceeded 50% for both days. A total of 12 double unit truck trips were counted, with 10 occurring on Monday, November 4th. During the eight hours experiencing the heaviest volumes, the average count was 73 vehicles per hour, or an average of one vehicle trip every 50 seconds.

75. Project opponents suggested that ProBuild traffic volumes are likely to be lower when they were counted in November than they will be in the late spring and summer construction season, which seems a reasonable observation. The traffic count data also suggests that Monday is probably a busier than average inventory delivery day. A further basic question would be whether ProBuild traffic can be expected to increase significantly in the future, and whether such increase would create more serious conflicts for Visconsi pedestrians. The early signals appear to be that ProBuild is not unhappy about the prospect of the Visconsi project coming on line next door. It no doubt expects a percentage of Visconsi customers to drift into its yard and spend money. If so, an eventual expansion of ProBuild's general hardware offerings could result. Major lumber purchases are typically neither very elastic as to demand nor do they constitute pass-by phenomena, especially in this location since ProBuild has no nearby lumberyard competition. But hand tools and paintbrushes are a different matter. For our purposes an expansion of the ProBuild hardware business would most likely result in an increase in smaller vehicle traffic into the lumberyard, with much of it consisting of spillover trips from the

Visconsi site. That would mean increased traffic volumes at the north end of the spine road but not necessarily more large truck conflict issues for onsite pedestrians.

76. Perhaps the most comprehensive description of the circulation and conflict issues inhering in the Visconsi site plan is contained in Ross Tilghman's November 12, 2013, letter to the Planning Commission. In his letter Mr. Tilghman identifies location and spacing problems within the crosswalk system proposed for the ProBuild spine road, spots where protective buffering for pedestrians should be added, and flaws in entering driveway configurations, including driveway offsets that exacerbate vehicle and pedestrian conflicts. He also made a case for placing a pedestrian crosswalk across High School Road somewhere within the 1200-foot gap between SR 305 and Ferncliff Avenue, observing that the "Winslow Master Plan envisions a pedestrian crossing network with minimum spacing of 330 feet on streets more than 2,500 average daily vehicles."

77. In general, Visconsi's architect, Charlie Wenzlau, was receptive to altering the site plan proposal to respond to the various criticisms directed at it concerning the function of the spine road. Exhibit 42 presented to the January, 2014, public hearing represented his most recent site plan iteration. Comparing it to earlier versions one observes that a divider has been added on the north side of the spine road to separate through-vehicle traffic to ProBuild from the building 5, 6 and 7 cluster. The divider not only insulates pedestrians from the traffic flow but for the northern crosswalks creates a refuge island midway. Adding the divider meant eliminating a western tier of angle parking spaces. The latest site plan further attempts to remedy conflicts in the vicinity of the driveway adjacent to the north side of the Kitsap Bank property by consolidating the crosswalks earlier depicted at the two east side corners of the building 2 pharmacy into a single crossing at the pharmacy midpoint. This would allow pedestrians to effect a protected crossing of the spine road from building 7 in two short, less conflicted operations, first south to the Kitsap Bank side of the driveway, then west across the access spine road to the pharmacy.

78. Overall, the site plan revision succeeds in improving safety for pedestrians traversing the spine road and creates a more sheltered, pedestrian-friendly environment for the eastern cluster of buildings. West of the spine road buildings 4 and 5 will lose a slight amount of roadside plaza space and adjacent angle parking. For buildings 2, 3 and 4 most parking is now proposed further west next to SR 305. Relocating parking to the west will result in some loss of "Main Street" ambience for the western cluster of buildings. Consolidating the crosswalks serving the pharmacy will reduce conflicts at the driveway located south of building 7. The current site plan retains a slight offset between this driveway and the one between buildings 2 and 3 across the spine road, but conflicts should be minimized by limiting the latter to one-way movements in (west) toward the pharmacy drive-through window.

79. Regarding the revised spine road layout, the biggest problems now appear to exist at its northern end near crosswalk A as shown on the exhibit 42 plan. As presently conceived, this proposed crosswalk cuts through the divider to link the northwest corner of building 5 with the northeast corner of building 4 to its west. Among the unresolved issues remaining in this area are the following: the two-way driveways planned both east and west of the spine road are significantly offset, creating movement conflicts; the northern bulb end of the divider prevents vehicles exiting the angle parking next to buildings 5, 6 and 7 from easily making a U-turn to depart the site via the spine road, encouraging them instead to circle east to exit via Polly's Lane; and on busy days large trucks delivering inventory to ProBuild will occasionally be forced to queue south of crosswalk A next to the divider, creating visibility problems for both pedestrians and other vehicles entering the spine road

from the sides.

80. The logical solution here would seem to be to eliminate crosswalk A and shorten the divider so that it does not extend further north than the northeast corner of building 4. The need for crosswalk A at the outer extremity of the retail area appears to be minimal; certainly, pedestrians heading from the medical building to the pharmacy would find crosswalk B to be more convenient. Reducing the northern extension of the divider (and eliminating the bulb) would increase the U-turn radius and create more maneuverability overall at this driveway intersection, as well as encouraging ProBuild overflow delivery trucks to queue a little further south.

81. Providing two conspicuous and well-protected crosswalks traversing the spine road about 300 feet apart seems to be a better concept than the four crossings originally envisioned. If each crosswalk is elevated 6 inches above grade, constructed out of material that contrasts with the roadway and protected on both sides by speed humps or tables, the crossings and the pedestrians will become more visible, the pedestrians themselves will have a better view of traffic, and the humps or tables (plus appropriate signage) will moderate vehicle speeds. Finally, while early versions of the site plan showed a walkway from the Visconsi site to the ProBuild yard running along the eastern side of the spine road next to the rain garden, later editions appear to have dropped it; this offsite pedestrian connection should be restored. In summary, even with a modest increase in ProBuild activity, the spine access will never serve more than a handful of businesses and is not likely to ever become a busy road. Rather, it will be a low-volume road with a higher than normal percentage of larger vehicles. Creating safe pedestrian facilities in this environment is not an insurmountable hurdle.

82. One of the real challenges facing the Visconsi project is to avoid imposing unreasonable commercial impacts on the Stonecress neighborhood to the east. The most serious aspect of this task results from the risk that, due to access constraints, commercial traffic will spill over into the neighborhood. The key variable in addressing this issue is the function of Polly's Lane on the eastern project boundary. Polly's Lane is a 30-foot two-lane private roadway within a 50-foot shared access easement and currently provides one of two accesses to High School Road for the Stonecress Townhomes development. One Stonecress residence fronts directly onto and obtains sole access from Polly's Lane, while for the 16 homes on narrow Daylily Lane it provides the only vehicle exit route from the neighborhood. Lots within Stonecress are small, and the three residences closest to Polly's Lane are only set back about 25 feet from the pavement edge. At present no properties outside of Stonecress actively utilize Polly's Lane or the other roads within the development for access.

83. So even though Polly's Lane was originally created out of property owned by the Deschamps interests, who have retained its legal ownership as well as a right to use it for commercial purposes, unlimited employment of Polly's Lane for access to and from a new retail shopping center could impose a rude and perhaps devastating intrusion into the lives of many Stonecress residents. And Visconsi itself agrees that this possibility is an outcome to be avoided. The question is, given site access constraints, can commercial traffic impacts to Stonecress be held to an acceptable level?

84. Visconsi's stance going into the public hearing was to preserve Polly's Lane as a back door to the commercial site but to exclude delivery vehicles by imposing lease restrictions on site tenants, provide screening to Stonecress where possible, and blanket the neighborhood with signs discouraging retail customer use. The biggest concern regarding this strategy centers on the possibility that, despite good intentions, congestion encountered at the main spine road entry onto High School Road will impel

customers in large numbers to seek out a backdoor route further east through Stonecress.

85. Transpo's modeling projections notwithstanding, it is clear that during ferry traffic surges vehicles heading west on High School Road now often back up from SR 305 past the proposed new access entry and on occasion even reach Polly's Lane. It is feared that if queues begin to regularly achieve such lengths, more traffic will use Polly's Lane to access the Visconsi site, and perhaps even Stonecress Lane further east. In the worst-case scenario traffic approaching from Ferncliff Avenue to the east might simply develop a habit of cutting through the neighborhood via Stonecress Lane to and from the Visconsi site. This would not only greatly expand the area of the neighborhood exposed to commercial traffic but place at risk children using the playground located close to the northeast bend of Stonecress Lane.

86. One response to this problem discussed at the public hearing was to limit Polly's Lane to one-way out movements and configure the site exit at the Polly's Lane/Stonecress Lane intersection so that traffic from Stonecress Lane could not enter the Visconsi site. Thus Visconsi customers would be able to exit via Polly's Lane and turn either left or right at High School Road, but they could not enter the retail complex from either Polly's or Stonecress Lanes. This would operate to prevent neighborhood cut-through maneuvers entirely. It obviously would also inconvenience Stonecress residents to the extent that their entry into the neighborhood would then become restricted to Stonecress Lane. But most Stonecress residents who commented on this potential solution at the hearing seemed to feel the tradeoff on balance would be advantageous to the neighborhood.

87. Restricting Polly's Lane to outbound traffic would assign a small amount of further traffic to the spine entry road volumes. Using the Transpo study figures, the total PM peak hour volumes turning into and out of the main site entry on High School Road would rise by 16 vehicles if the inbound trips to Polly's Lane were reallocated. According to the study's trip generation numbers, Transpo estimated 429 Visconsi trips would use the site entry in the PM peak hour. Adding to this figure the 16 trips reassigned from Polly's Lane plus 30 trips to ProBuild would bring the total PM peak hour volume at the spine road entry to 475 vehicles. Should this total be a cause for concern?

88. Comparing the Visconsi site to the Safeway shopping center west of SR 305 with its four access driveways to serve about 84,000 square feet of retail floor area, former City Council member Debbie Vann suggested that the number of accesses to Visconsi might be inadequate. But there are two variables that need to be considered in making this comparison. First, a supermarket at 9.48 trips per 1000 square feet has a relatively high vehicle trip generation rate. The approximately 47,000 square-foot Safeway is calculated by itself to generate 446 PM peak hour trips. Second, the efficiency of a parking lot driveway is heavily affected by its relationship to the lot's parking maneuvers. When angle-parked cars are allowed to back into the driveway itself, congestion is usually the consequence of parking maneuvers rather than a function of driveway capacity. While the City has opted to classify the Visconsi spine road as a driveway for regulatory purposes, its width and a minimal amount of proposed roadside parking will enlarge its effective flow capacity and allow it to function more like a street. This fact argues against comparing the Visconsi access to the Safeway driveways. The critical blockage problem here derives from queue formation along High School Road.

89. In this context a further matter to be considered is the sufficiency of lane configurations on High School Road. Viewing the site mapping and aerial photographs, High School Road immediately east of the SR 305 intersection has four lanes extending to the existing ProBuild driveway – consisting of east

and westbound through lanes plus westbound right and left turn lanes. But east of the existing ProBuild driveway the right turn lane begins to taper out. This means that any queue extending past the current ProBuild driveway will contain both through vehicles plus some waiting to make a right turn on SR 305 but as yet unable to access the dedicated right turn lane. This is a queueing problem that can be reduced. If the right turn lane is extended east to the new driveway cut for the Visconsi site, vehicles exiting the spine road will be able to make unimpeded right turns, and other vehicles already on High School Road can more efficiently queue up. This may require dedication of additional right-of-way from the applicant. While further removed from the SR 305 intersection, the proposed new spine road exit still will occupy a constrained location and all reasonable efforts, particularly those that decrease the likelihood that retail traffic will divert to Polly's Lane, need to be pursued to maximize its operational efficiency.

90. The City has adopted strong policies supporting the creation of a pedestrian-friendly environment in its downtown retail area. But it is fair to say that currently not much exists in the High School Road area that qualifies for a friendliness label. There are signalized crosswalks at the SR 305/High School Road intersection that facilitate safe pedestrian crossings, but due to its heavy traffic volumes and multiple travel lanes, a crosswalk at this intersection will never be deemed an appealing amenity. Along High School Road over the 1200 foot stretch between SR 305 and Ferncliff Avenue there are presently no crosswalks. Jaywalking now occurs mid-block at the entry driveway to Ace Hardware and McDonalds, and with Visconsi proposing a second retail destination across the street the temptation to jaywalk could increase. Most project critics have argued that a mid-block crosswalk should be installed, and Visconsi is willing to provide one if the City supports it. But the City's Development Engineer expressed skepticism that pedestrian volumes in the near term would be sufficient to justify a crosswalk.

91. No City-adopted crosswalk siting standards currently exist. As identified by the Development Engineer, factors to be considered in determining need and safety include roadway geometry, speed and volumes, projected pedestrian use, nearby crossings, driver expectancy, lighting and crossing type. Taking a longer range view, WSDOT's 1997 Pedestrian Facilities Guidebook includes as factors consideration of pedestrian/vehicle conflicts, land use patterns and a potential need to identify an optimal crossing location. Before a final approval is conferred, these elements would need to be reviewed by the City in the framework of establishing an acceptable design.

92. It is generally agreed that the section of High School Road directly adjacent to the opposing Ace Hardware and new Visconsi driveways would not be a good crosswalk location because of potential conflicts between pedestrians and turning vehicles and a poor sight distance to the east due to topography. From these standpoints a crosswalk further east at the Polly's Lane intersection would be a safer location. But the concern here is whether a Polly's Lane crossing would actually attract pedestrians owing to the fact that there is now neither a walkway downslope to the northeast corner of the Ace hardware store parking lot nor as yet any development on the commercially zoned property lying immediately to its east.

93. If creating a pedestrian-friendly neighborhood environment in this portion of the High School Road district is an important community goal, this opportunity to establish a mid-block crosswalk at Polly's Lane should be accepted. It is evident that no better location for a mid-block crossing of High School Road exists. While it may prove true that initially the crosswalk will be underutilized, in the longer term the now undeveloped HSR-I property will likely get built and Ace could decide that

providing a pathway from the crosswalk into its lot makes good business sense. At some future date the crosswalk will provide a useful link in an emerging network of public pedestrian amenities.

94. By way of context, City staff seems happy enough at the prospect that Visconsi will construct a multi-use trail segment along the edge of the SR 305 right-of-way where it adjoins the site. In fact construction of this trail has been imposed as a SEPA requirement “[i]n order to be consistent with the adopted codes and Comprehensive Plan policies and to provide non-motorized connections to the proposed development.” It will connect to the crosswalk at the High School Road intersection as well as to the Visconsi project via an easterly spur between buildings 4 and 5, and at some future date this multi-modal segment will likely become a link in the Sound to Olympics regional trail network. But at the moment of its construction this trail facility will have little actual function, with no immediate connections to other major trail segments either north or south. So, like the mid-block crosswalk traversing High School Road under discussion above, the multi-modal trail is to be valued for its future contribution to a non-motorized transportation network being assembled piece by piece as opportunities arise.

Noise

95. The IRD SEPA appeal alleged that the Visconsi project would have unmitigated adverse noise impacts to residential neighborhoods lying east of the site, principally in Stonecress. SEPA Condition No. 7 was imposed by the City in order to protect adjacent properties from noise from site construction and later operational activities, as provided by BIMC Chapter 16.16. Since the City has adopted by reference the applicable state standards, the requirement is that noise produced by the development comply with the maximum environmental noise levels established by WAC 173-60-040(2). Under this Code section, noise generated by commercial properties may not lawfully exceed 57 dBA when measured at the boundary of adjacent residential properties during the daytime and 47 dbA when measured between the hours of 10:00 p.m. and 7:00 a.m.

96. IRD presented the testimony of Dr. Charles Schmid, a fellow of the Acoustical Society of America with a Ph.D. in engineering. Dr. Schmid did not prepare a site noise study nor specify typical noise levels to be expected from sources of concern but rather generally identified several noise generators likely associated with the Visconsi project. These included traffic, HVAC equipment, garbage and recycling operations, and street sweepers. The thrust of Dr. Schmid’s testimony was that a computerized noise study should be performed before Visconsi project approval.

97. In response to Dr. Schmid, Visconsi presented the testimony of Errol Nelson, P.E., an engineer with a specialty in acoustics. At the time of the hearing Mr. Nelson had not yet visited the site, but he presented estimates of existing noise levels deemed representative in view of the location's characteristics. Mr. Nelson testified from his experience that the baseline pre-development noise levels at the project site were likely to be about 58 dBA at the site entry on High School Road and 63 dBA along the western site boundary with SR 305. In Mr. Nelson's view the baseline noise levels along the eastern boundary of the site adjacent to Stonecress were likely to be 50 dBA or less. He also predicted that these baseline levels would likely not be exceeded after noise generated by the completed Visconsi project was factored in, or at most exceeded by a single decibel. Mr. Nelson testified that with today’s technology noise from HVAC systems and other rooftop equipment was easily controlled.

98. As agreed to by the parties, after the hearing Mr. Nelson visited the Visconsi project site and

took actual baseline noise readings to be submitted to the record, the results of which were generally consistent with his earlier testimony and predictions. The measured baseline noise levels were 56 dBA at the site entry on High School Road, 67 dBA along the western boundary of the ProBuild site adjacent to SR 305, and just above 46 dBA at the northern end of Polly's Lane. After considering this additional data, Mr. Nelson concluded that noise levels at the residences along the eastern boundary are currently well below the 57 dBA regulatory maximum and should not rise appreciably after development. He predicted that the project should easily comply with City of Bainbridge Island noise regulations. In addition, as voluntary mitigation Visconsi has agreed to perform followup noise measurements during the first year of full retail operations to assure that acceptable levels are actually being achieved.

99. Traffic noise, which is exempt from direct regulation by the City, is the potential impact source of greatest worry to Stonecress residents. Stonecress is already bounded on its western edge by a commercial property, Kitsap Bank, that has a drive-through lane near its eastern line. If business traffic use of Polly's Lane can be limited, and traffic cutting through the Stonecress neighborhood avoided, traffic noise impacts should not noticeably exceed current levels. Restricting Polly's Lane to one-way outbound traffic should provide the requisite mitigation for all project traffic impacts of concern, including traffic noise. In addition, Visconsi has agreed to a condition excluding project commercial truck traffic from using Polly's Lane, and a 15 mph speed limit can be imposed as well. In combination these measures should operate acceptably to minimize traffic noise impacts to Stonecress.

Light and Glare

100. In support of its contention that the Visconsi Project will have a probable significant adverse impact as the result of light and glare, IRD presented the testimony of Barry Andrews, a resident of the Stonecress neighborhood. Mr. Andrews showed night-time photos of the illuminated Safeway commercial development located west of SR 305 on the south side of High School Road and expressed concern that the light and glare generated by the project would have similar impacts on residents living in Stonecress. SEPA condition 3 provides that to protect adjacent properties from light and glare, all exterior lighting is to be hooded and shielded, all landscape lighting downcast, and lighting within parking lots no higher than 14 feet above grade. In addition, all exterior lighting is generally required to comply with BIMC Chapter 15.34 (now BIMC 18.15.040).

101. Joshua Machen, the City's Planning Manager, testified that compliance with this condition will result in the Visconsi Project being "nothing like" the Safeway development as far as light and glare are concerned. The Safeway development was vested and built under the Kitsap County regulations in effect prior to the 1991 incorporation of Bainbridge Island. Current Bainbridge Island lighting regulations provide significant protection for adjacent properties. The applicable standards are found in BIMC 18.15.040(D), which in addition to limiting heights and requiring shielding, prohibit "light trespass." This means that the indirect light visible at the Visconsi property line can be no more bright or intense than a 60-watt bulb viewed at a distance of 25 feet.

102. Mr. Andrews also expressed concern about the impacts from the headlights of vehicles using parking lots near Stonecress and exiting to Polly's Lane. While the City code exempts headlights from regulation, Visconsi's proposed voluntary mitigations undertake to address this question. The voluntary conditions exclude installation of streetlights on Polly's Lane if the City approves and require posting a "no trucks" sign at the site exit to Polly's Lane plus a board fence and landscaping buffer opposite the

easternmost Visconsi parking lot. This buffer section adjacent to the northern end of Polly's Lane now contains mature trees that will be retained. As for night-time traffic on Polly's Lane itself, the logic of the situation suggests that headlight impacts should not cause a major impact. After 6 PM the proposed medical offices and many retail shops will likely be closed and any general traffic congestion dissipated. Relatively few customers will remain, and those that do will have no obvious incentive to avoid using the main access driveway. Certainly, if the pharmacy remains open late, its customers can be expected to exit directly south to High School Road rather than loop around Kitsap Bank to Polly's Lane.

Aesthetics

103. Aesthetics is an element of the environment to be analyzed during SEPA review, but the term "aesthetics" is not defined as to its regulatory application. The IRD appeal made a general allegation that the Visconsi project would have adverse aesthetic impacts, and this assertion was partially refined in the pre-hearing order to specifically include view impacts from SR 305, High School Road and nearby residential properties. In addition, at the public hearing IRD witness Ron Peltier contended that the realm of aesthetic impacts should be extended to cover a much broader range of issues. Mr. Peltier characterized all of the following as impacts to "aesthetic and scenic values":

- 1) The scale and intensity of the Visconsi project;
- 2) Loss of aesthetic values from tree removal;
- 3) Lack of harmony between the Visconsi project and adjacent uses;
- 4) Failure of the project to create a pedestrian friendly environment;
- 5) Lack of sustainability;
- 6) Failure to preserve the Island's special character; and
- 7) Failure of the project to complement downtown Winslow.

104. The brief submitted by the City Attorney undertook to relate this rather open-ended set of allegations to some sort of workable review framework. Starting with a dictionary definition of "aesthetics" as meaning "of or relating to artistic expression," the brief moved on to consider the aesthetics-related environmental checklist questions specified at WAC 197-11-960. These questions target structural heights and exterior building materials plus the alteration or obstruction of "views in the immediate vicinity." Based on these sources the City's brief argued that under SEPA "aesthetics involves consideration of the negative visual impacts of the proposal" and "cannot and should not go beyond the visual." By comparison, an inclusive definitional statement of the concepts underlying Mr. Peltier's list might be that an aesthetic impact is one that adversely affects a community's pleasurable and healthy sense of harmony.

105. Applying its definition to Mr. Peltier's list, the City's brief rejected intensity, tree removal, disharmonious sprawl, pedestrian orientation, sustainability, and failure to preserve the Island's special character or complement downtown Winslow as allegations not raising aesthetic impact issues under SEPA because they are divorced from visual effects. Employing the City brief's standard, the Examiner

would agree to all the exclusions except for the blanket rejection of tree removal. Tree removal, per se, is not a potential aesthetic impact. But tree removal in the context of a valuable view might be. For example, if someone's prized view is of Mt. Rainier framed by mature conifers, a proposal involving removal of those viewscape trees could result in an aesthetic impact. The City's tree ordinance is not oriented toward preserving trees for view protection, so it cannot be logically cited as providing effective mitigation for the potential view impacts of tree removal.

106. Before proceeding further, it is perhaps important to emphasize the boundaries of this discussion. Some items on Mr. Peltier's list are factors that may be considered apart from SEPA within the site plan and conditional use permit review processes. The question here is limited to whether they also comprise elements of the environment within the meaning of SEPA. In general, the City's analysis that an aesthetic impact under SEPA must have a visual component is persuasive. See, *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 770 (Wash.App. Div. 2) (2006). But the basic principle needs to be fleshed out. A visual impact implies a viewer who will be affected. Something ugly does not create an aesthetic impact if no one sees it. Also, the degree of impact must be assessed. In our Mt. Rainier view example above, the adverse visual impact of tree-cutting might be quite substantial if the viewscape at issue is observed from a dozen homes through the bay windows of their living rooms. On the other hand, the impact will be far less significant if the viewscape can only be observed from a small third-floor bathroom window on the backside of a single residence.

107. Turning to the visual impacts of the Visconsi proposal itself, its site plan depicts a relatively compact development with substantial screening buffers along both its western boundary with SR 305 and its eastern boundary with adjacent residential properties. Visual impacts to the east are blocked by the forested offsite wetland and its buffer located at the site's northeast corner plus the intervening Kitsap Bank occupying the southeast quadrant of the development rectangle. In between, a forested buffer will also be provided to mask the adjacent parking lot and the eastern tier of project buildings. To the north lies the ProBuild lumberyard, and to the south across High School Road are located Ace Hardware and a McDonald's drive-in.

108. The larger buildings are proposed to be clustered at the center of the site away from neighborhood streets and will be screened by other buildings. The most visible structure will be the building 1 bank located near the main SR 305/High School Road intersection. At 3300 square feet it will also be the smallest. The largest footprint belongs to the building 2 pharmacy at 14,475 square feet. It will be set back 200 feet from High School Road and about 150 feet from SR 305, where it will also be screened by a 50-foot vegetated buffer. The 20,000 square-foot two-story building 5 medical center will be tucked away in the site's northeast quadrant, visually buffered on all sides except the north by trees and other buildings; its only offsite visibility will be from the ProBuild yard.

109. It is perhaps possible to fault Mr. Wenzlau's site plan from the perspective of its failure to successfully address, certainly initially, some circulation issues relating to potential vehicle and pedestrian conflicts. But from the standpoint of avoiding adverse offsite visual effects, his design comes about as close to zero-impact as it is possible to get. The only open visual exposure to the project will be from the High School Road frontage, and in this portion of the project the smallest proposed structure will be placed. No other project buildings will have more than minor offsite visibility. No views of consequence will be affected. IRD and its supporters have made generalized allegations of project aesthetic harm but have been unable to identify any unmitigated project visual impacts to substantiate their claims. Mr. Peltier's idealized vision of what the essence of Bainbridge

Island life embraces may be compelling but, in the SEPA context at least, it is not compulsory. Some of the questions he raises will be revisited, however, in the discussion of the regulatory role of the Comprehensive Plan.

Economic Factors

110. The allegation of an “urban blight” environmental impact within the IRD SEPA appeal has been a controversial topic from the beginning. Visconsi's attorney moved to dismiss the issue from the appeal at the pre-hearing level, arguing it was simply a subterfuge for improperly inserting economic competition as a SEPA issue. It is well understood that the effect of economic competition is not in itself a SEPA issue and can only give rise to an environmental impact in the extreme situation where it causes identifiable degradation to the physical environment – hence the common use of the term “urban blight.” In a supplement to the pre-hearing order dated January 6, 2014, the Examiner ruled that as a matter of pleading the blight allegation qualified as an appeal issue and declined to speculate whether IRD later would be capable of producing credible evidence to support it.

111. At the public hearing many residents commented to the effect that the Island has no need for more banks, medical offices or drugstores. Many pointed out that three drugstores already exist and worried that a landmark downtown independent business, Vern's Winslow Drugs, might be driven under by the arrival of another major chain outlet. Similar sentiments were also expressed concerning the economic viability of small independent businesses generally in the downtown retail core. A somewhat contrarian viewpoint was offered by the City's Planning Director who opined that, due to its proximity to the waterfront and the ferry, the downtown Winslow district attracts more of a tourist clientele than would Visconsi further up SR 305 at High School Road.

112. IRD's primary witness on economic impacts was Hilde Chichester, who has a background in marketing. Ms. Chichester researched the availability of empty retail spaces on the Island both through real estate listings and her own investigations. She composed a list of retail and office spaces currently for lease totaling approximately 70,440 square feet. The list contains one large retail and office facility at 34,500 square feet, plus about 33,000 square feet of empty space in the Safeway/Hildebrand area that includes four units in the Safeway Shopping Center. While her presentation was well-organized and informational, Ms. Chichester made no attempt to evaluate the significance of her numbers for the Bainbridge economy overall or for its downtown commercial district, forthrightly admitting that such analysis was beyond her expertise.

113. A number of IRD witnesses commented about the sustainability of the proposal, but it is unclear where in this report a discussion of such a subject properly belongs. The Examiner, somewhat arbitrarily, has opted to include it under the economic heading based on a sense that it refers most fundamentally to the ability of an enterprise to survive over the long term, in the context of both wise resource use and its fitness to serve the needs of the community. As Mr. Peltier has pointed out, in the resource conservation realm BIMC 18.18.020 suggests that “site designs of all developments and redevelopments are encouraged to accommodate solar panels, small wind energy generators, and rain gardens/swales where practical.”

114. While Visconsi seems to have taken awhile to respond to (or even comprehend) the prodding and encouragement it has received from the Island's pervasively green culture, it eventually has managed to climb on board. Its project proposal now proudly incorporates electric car charging

stations, bicycle racks and rain gardens. In addition, during the hearing Visconsi further offered to incorporate into its design “green roofs,” high efficiency windows, recycled products and other sustainability measures as voluntary mitigations.

115. The economic heading might also be an appropriate place to ponder a few factors that could be important to the success of the project but normally escape attention because they bear no direct relationship to regulatory review standards. One factor is the posture of the developer, more particularly, whether it appears to be a solid firm that is going to remain involved with the development over the long term. Some developers specialize in securing options on commercial real estate, obtaining the necessary development permits, then flipping the project to a new owner that will actually build and operate (or resell) the new facilities. In that situation, problems of reliability can arise because the smiling guy at the hearing making all the big promises won't be sticking around long enough to be held accountable.

116. Visconsi does not seem to fall into this category, appearing to be a reasonably stable and financially sound company with a long track record of building and operating shopping centers. One surmises that it expects to be involved over the long term and answerable for its behavior. The company should have the financial strength necessary to deliver on its promises to the community. Ohio-based Visconsi is also in the early stages of expanding into West Coast markets. The potential benefit to Bainbridge from this fact is that the performance of Visconsi's early projects in this part of the world will largely define its regional reputation. From a public relations standpoint, the company should be motivated to avoid having an early project turn into a conspicuous disaster that could reverberate throughout the area. The Examiner is well aware that in the public perception all developers are often tarred with the same uncomplimentary brush. But in reality some are better than others – and on a challenging site such as this one, such differences can prove critical.

117. A second hidden beneficial factor is that the long-time Bainbridge Island property owners, whose option issued to Visconsi will convert to a sale only if the necessary City permits are granted, have been firm in their insistence that the entire eight-acre parcel should be developed as a single project. While this has made review of the Visconsi proposal into a controversial, high-profile public event, a benefit lies in the possibility of creating an integrated site design that deals in some intelligent way with the property's locational constraints.

118. Visconsi's interest in Bainbridge Island seems to have been triggered by its relationship to Key Bank, which requested the developer to find it a new facility site. Absent the Kellys' insistence that the parcel under review be purchased in its entirety, Visconsi likely would have been satisfied to simply secure for the bank a small corner lot at or near the SR 305/High School Road intersection. Pursuing that strategy to its logical conclusion, the eight acres of the site over the years would have been developed piecemeal into separate businesses on a number of smaller parcels, each new site having minimal design continuity with the others and no project being large enough by itself to register on the public review radar. If anyone is unsure how that scenario plays out, just take a look at Kitsap Bank next door and multiply by six.

Stonecress

119. If the Visconsi retail project ends up generating direct and tangible adverse consequences to the surrounding community, the 45-unit Stonecress residential neighborhood to its east would probably

bear the brunt of these impacts. Most of these matters have been explored above under other headings, but it is also useful to revisit them collectively. While many Stonecress residents testified at the public hearing and submitted written comments to the record on particular issues, Barry and Linda Andrews on Daylily Lane within Stonecress undertook to monitor the process as it developed and provided a valuable overview picture. In her capacity as president of the Home Owners Association, Linda Andrews spoke at the opening night hearing, emphasizing traffic and drainage issues. She expressed concern that “commercial center traffic will interfere with our access, particularly during times when traffic backs up on High School Road and shoppers take the Polly's Lane access road in preference to the main entrance to the commercial center,” positing as a worst-case scenario the emergence of Stonecress Lane further east as an additional cut-through route. Regarding runoff, Ms. Andrews described the wetland overflow problems that appear to threaten the stability of the Stonecress stormwater pond berm.

120. Later in the hearing Barry Andrews offered an updated summary of Stonecress concerns that to some degree reflected the neighborhood's response to the discussion that had been taking place over the prior few days. His list of issues included the need for effective privacy and lighting screening on Polly's Lane, night-time light pollution effects generally, traffic and HVAC noise levels, runoff impacts to the Stonecress detention pond, and the need for a pedestrian crosswalk across High School Road. Mr. Andrews supported proposed limitations designed to decrease commercial use of Polly's Lane, at one point stating that “making Polly's Lane one-way would address many of these concerns.”

121. Reviewing these comments, it seems clear that restricting commercial truck traffic usage of Polly's Lane and making both it and the connecting Visconsi parking lot exit one-way outbound are the mechanisms that would offer the greatest mitigation value to Stonecress. In addition to the traffic volumes themselves, many of the other impacts under discussion – noise and lights in particular – would mostly be the secondary effects of increased vehicle use of Polly's Lane. If the commercial vehicle flow can be held to an acceptable level, these secondary effects become far more manageable. Regarding noise, baseline levels have been established and followup measurements will be required once the site is fully operational.

122. A buffer that retains existing mature trees and is augmented by a solid wooden fence will be installed adjacent to the Stonecress homes north of Polly's Lane. It is reasonable to also require that this buffering be created early in the site development process. No one has argued that these measures cannot be effective. As for Mr. Andrews's general concern about night-time light pollution, BMC 18.15.040(D) as noted above limits light leaving the site to an impact equivalent to a 60-watt bulb. Mr. Andrews contended that “what's at issue is not simply whether or not street lights conform to city codes,” but his assertion is not entirely correct. Regulatory mitigations are deemed legally adequate for their intended purposes until someone proves that they in fact are not. No such proof has been offered here. Commercial zoning on the Visconsi site has been in existence since well before Stonecress was built. While Stonecress residents are surely entitled to a permit review outcome that reasonably insulates them from the inevitable arrival of retail development next door, they cannot expect that such review will perpetually guarantee them a wilderness experience.

123. If permits are granted, a crosswalk will be required across High School Road at Polly's Lane as suggested by Stonecress residents as well as numerous others. The Examiner's evaluation is that when the main site access to High School Road is functioning efficiently and unimpaired by congestion, few vehicles exiting the Visconsi site should be motivated go out of their way to use Polly's Lane. So in

addition to restrictions directly limiting the use of Polly's Lane, any decision should also undertake to reduce congestion on High School Road by optimizing vehicle movements at the main site entrance. To that end the right-turn exit lane from the site needs both to be configured to accommodate the large trucks serving ProBuild and extended from the site west to the SR 305 intersection. Finally, as discussed earlier, the outlet from the Woodland Village wetland through Stonecress forms part of the nearby downstream conveyance system for Visconsi runoff flows, and assuring its proper functioning should be a Visconsi responsibility.

CONCLUSIONS

The Review Framework

1. The public hearing and the resultant Hearing Examiner report cover three decisional components – a SEPA threshold determination appeal and applications for a conditional use permit and for site plan review. These procedures have been consolidated into a single review process pursuant to BIMC 2.16.170. The review pecking order stated at BIMC 2.16.170.C places responsibility for conducting the consolidated review on the Hearing Examiner based primarily on having jurisdiction over the conditional use permit element of the process. The procedures stated in BIMC 2.16.040.D also contemplate that a consolidated review might accommodate a prior administrative site plan review decision by the Planning Director. But the parties stipulated at the pre-hearing conference as a more efficient process that the initial site plan review decision also would be deferred to the Hearing Examiner as part of the consolidated review. Thus for both applications the Community Development Department's role is to make a staff recommendation to the Examiner.
2. Prior to arriving at the public hearing stage each application in the consolidated process was subject to its own detailed review procedures. For both applications a review and recommendation from the Design Review Board was required, and for the conditional use permit application the additional step of a Planning Commission review was mandated. So the CUP arrived before the Examiner with three separate recommendations – from the DRB for approval, from the Planning Commission for denial and lastly from the Planning staff for approval. While none of these recommendations carry any formal legal weight under City code, Visconsi has argued that the two project approval recommendations are to be accorded some level of deference.
3. The reasons offered by Visconsi for mandatory deference are not persuasive. First, the appellate cases cited are inapposite; they arise out of situations where a court was reviewing a decision of an administrative agency. Here the agency of concern is the City of Bainbridge Island. The Design Review Board, Planning Commission, Planning and Community Development Department and Hearing Examiner are all sub-parts of COBI, not separate agencies in themselves. For purposes of judicial review the final agency action will be the Hearing Examiner decision. Visconsi's related contention, that code interpretations made by the Planning Director are deemed conclusive by BIMC 18.03.090, also misses the mark. The code interpretations authorized by this section are provided as a service in response to formal public requests for prospective permitting guidance. These interpretations also may be appealed to the Hearing Examiner, who is authorized to overturn them. Nothing in this section suggests that routine staff report analyses or hearing testimony containing code interpretations are entitled to automatic deference.
4. But even though not mandatory, deference may at times be appropriate based on the expertise of

knowledgeable persons operating within the realm of their competence. This is especially true when the standards to be applied rely on value judgments or discretionary elements. On this basis, some deference is surely due the DRB evaluation and recommendation as to overall project compliance with applicable Design Guidelines. This would recognize the expertise of the DRB members, as well the rather discretionary nature of the review process as elaborated in the Guidelines introduction:

Design guidelines are not intended to be like quantitative, fixed zoning standards. They are to be applied with an attitude of flexibility. Each development site and project will have particular characteristics that may suggest that some guidelines be emphasized and others de-emphasized.

5. The Visconsi brief also argues for a categorical preference to be accorded expert testimony over that of neighborhood residents. The City's rules governing hearings supply no process for qualifying individuals as experts. Thus the term "expert" cannot be assigned definitive legal content in this proceeding because the qualifications of the various candidates are never meaningfully tested or determined. All witnesses are subject to evaluation individually based on their actual knowledge and credibility. The outcome of such evaluation often varies with the topic, its complexity and the specific context. For example, the traffic level of service calculations of an engineer conversant with the Highway Capacity Manual and Synchro 8.0 software are inevitably going to carry more weight than the observations of a lay witness familiar with neither. On the other hand, someone who has lived in the project vicinity and observed actual traffic movement patterns for years will know elements of neighborhood history that an out-of-town engineer who has only visited the site a few times has no way to access. There is no one-size-fits-all rule for evaluating administrative hearing testimony. Each witness presents a unique circumstance.

6. Finally, one fundamental principle of general applicability needs to be acknowledged. The High School Road district is an area of the City that is challenged by less than optimal historic development patterns. The temptation therefore exists to try to make proponents of new development bear the entire burden of correcting conditions, including past mistakes, created at various times by the City, Kitsap County, WSDOT and earlier developers. Both the federal and state constitutions, as interpreted by their respective appellate court systems, tell us that this is a temptation to be resisted. New development can only be tasked with mitigating its own impacts, which may include a proportionate share of the cost of addressing larger impacts to which it may contribute. A development proposal cannot be denied on the basis of pre-existing problems that it did not create and indeed may have only limited power to influence.

The Role of the Comprehensive Plan in Permit Review

7. In Washington state the conventional relationship between a comprehensive plan and a zoning code is that the plan provides a general policy matrix upon which the zoning regulations are based. Thus the rule of thumb for development applications is that the code is regulatory but the plan is not. The pristine simplicity and clarity of this arrangement has been compromised, however, by zoning codes that undertake to give concurrent regulatory effect to comprehensive and community plans. This is the situation on Bainbridge Island regarding the decisional criteria governing both conditional uses and site plan review. For issuance of a major conditional use permit BIMC 2.16.110.D(1)(d) requires a finding that the "conditional use is in accord with the comprehensive plan and other applicable adopted community plans, including the nonmotorized transportation plan," while BIMC 2.16.040.E(7) specifies a determination that the "site plan and design is in conformance with the comprehensive plan

and other applicable adopted community plans.”

8. The state's appellate courts recently have undertaken to assess the actual regulatory effect of this type of incorporating reference. The outcomes appear to vary with the specific circumstances. The courts generally agree that such incorporating references are effective on some level:

To the extent a comprehensive plan prohibits a use that the zoning code permits, the use is permitted. *Lakeside Indus. v. Thurston County*, 119 Wash.App. 886, 895, 83 P.3d 433, review denied, 152 Wash.2d 1015, 101 P.3d 107 (2004). But where, as here, the zoning code itself expressly requires that a proposed use comply with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan (citations omitted). *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 770 (Wash.App. Div. 2) (2006).

9. The Division 2 Court of Appeals decided both *Lakeside* and *Cingular* based on its interpretation of the Thurston County comprehensive and sub-area plans and zoning regulations – and in the two cases came to opposite conclusions regarding their regulatory effects. So the *Cingular* opinion goes to great length to harmonize the two different outcomes. Based on *Cingular* and a handful of earlier appellate opinions (and leavened with a drop of common sense), the following general principles applicable to defining the interplay between the Bainbridge Island's zoning regulations and its Comprehensive and Winslow Master Plans can be derived:

- *A comprehensive or community plan provision should not be given regulatory effect if it is primarily intended to operate in the planning context.* Comprehensive plans are a mixture of directives for further future planning and policy statements about specific desirable outcomes that can reasonably be given immediate regulatory effect. Some plans separate these different types of expressions. In the Bainbridge plans they tend to be mixed together. Directives for future planning should not be assigned a present regulatory function.
- *Plan policies should be interpreted within the context that they appear.* Planning is all about linking elements together in a coherent pattern to form a larger picture. It is therefore nonsensical and self-defeating to read plan policies (let alone particular words and phrases) in isolation from related concepts. This is especially true when the purpose of the policy under consideration is to elaborate or explain a larger goal.
- *To have a regulatory effect in evaluating a development proposal a plan policy must be capable of being applied to a factual situation in a way that permits objective discrimination between what is required and what is not.* Generic value statements of a visionary character usually lack the specificity necessary for objective and predictable practical application.
- *To have regulatory effect within a decision-making proceeding the application of a plan policy must be supported by site-specific factual findings.* A permit application cannot be denied based on abstractions unrelated to any unique facts pertaining to the proposal.
- *A plan policy cannot be given regulatory effect if it conflicts with, or operates to nullify,*

a more specific code provision or plan policy. The legal process consistently holds that an action or use listed as specifically permitted is to be deemed a more clearly intended outcome than an implication derived from a general principle.

Plan-based Regulatory Issues Affecting the Visconsi Proposal

10. The employment of comprehensive and community plan policies in the permit review process typically involves treating them as development standards that supplement or clarify zoning code requirements. Opponents of the Visconsi project have undertaken to elevate plan compliance requirements to include the more fundamental inquiry into whether the proposed uses can be permitted at all. On the level of greatest generality, project opponents have proposed that approval of the Visconsi project should be rejected because of its alleged violation of the “Five Overriding Principles that Guide the Plan” stated in the COBI Comprehensive Plan introductory chapter:

- 1. Preserve the special character of the Island which includes forested areas, meadows, farms, marine views, and winding roads bordered by dense vegetation.*
- 2. Protect the water resources of the Island.*
- 3. Foster diversity of the residents of the Island, its most precious resource.*
- 4. The costs and benefits to property owners should be considered in making land use decisions.*
- 5. Development should be based on the principle that the Island's environmental resources are finite and must be maintained at a sustainable level.*

11. Of these Principles 2 and 3 would not appear to be, on their face, directly applicable to the Visconsi proposal under any interpretation, and Principle 4 suggests (if anything) some modest need to take the applicant's interests into consideration. This leaves for discussion Principles 1 and 5. Principle 1 speaks to the “special character of the Island “in the context of “forested areas, meadows, farms, marine views, and winding roads bordered by dense vegetation.” Project opponents focused on the fact that the application property has a large stand of mature trees that will be reduced by site development. The contention put forward is that the tree cutting necessary for retail center development requires project denial because it is not in harmony with the first Plan Overriding Principle. In Principle 5 the opposition emphasis has been placed on the word “sustainable” and its connotations for green development.

12. Taken as a group the “Five Overriding Principles” are intended to inform the future planning process. Though repeated elsewhere in the various topical elements, they are first articulated and explained in the Comprehensive Plan's introduction. Their purpose is identified as guidance, not regulation. None of the five lends itself to creating an intelligible standard for the development review process nor for discriminating application to a factual situation. Not much raw land could ever be commercially developed if applicants were forbidden to cut any trees, an outcome that would negate commercial zoning generally. The basic planning sense of Principle 1 is that the overall rural ambience of the Island is best preserved by concentrating urban development within discrete smaller areas, an objective that is perhaps most clearly expressed at General Land Use Policy LU 1.6. The “Five Overriding Principles that Guide the Plan” are plainly intended to function only as broad directives for future planning, not as development standards to be applied to individual proposals in the permit

review process.

13. A second broadside attack on Visconsi project approval launched by opponents based on Comprehensive Plan language is premised on the potential regulatory application of General Land Use Policy LU 1.4: *"New commercial centers should be considered only after detailed analysis of the economic impact of the new development shows there will be no significant, adverse impact on the existing commercial centers, including Winslow."* The debate here involves whether the Visconsi project constitutes a "new commercial center" that only can be approved after an economic analysis is performed regarding its potential impacts on existing Winslow businesses. Much of the party briefing has focused somewhat inconclusively on the meaning of the word "center," both its use generally and within other parts of the Plan.

14. As the Visconsi brief suggests, a rational interpretation of Policy LU 1.4 necessitates relating it to its Plan context. It is one of nine policies set forth in elaboration of General Land Use Goal 1: *"Ensure a development pattern that is true to the vision for Bainbridge Island by reducing the inappropriate conversion of undeveloped land into sprawling development."* In support of Goal 1, Policy LU 1.1 states that "land use designations" should preserve the predominant Island residential character, "with nonresidential development outside of the Winslow area concentrated in the service centers and at the designated light manufacturing areas." Policies LU 1.2, 1.3 and 1.5 then provide more specific planning guidance regarding Winslow, the Neighborhood Service Centers and the Day and Sportmans Club Road light manufacturing areas respectively. Policies LU 1.4, 1.6, 1.7 and 1.9 lay out the procedures to be followed if the creation of new areas for non-residential uses is to be entertained.

15. Viewed in their entirety, General Land Use Goal 1 and its supporting nine policies are focused almost exclusively on the process of authorizing new non-residential zoning designations. None of the discussion is oriented toward specific development proposals except LU 1.8, and the spotlight there is on appropriate application procedures and not on development standards. In such context it seems unlikely that the intent of Policy LU 1.4 was to impose an economic study as a project development requirement. A reading more consistent with the thrust overall of the Goal 1 discussion is that no new areas should be zoned for commercial uses unless a study demonstrates enough market demand that existing commercial areas will not be harmed. The use of the word "center" likely reflects the consistent Plan emphasis on restricting non-residential development to compact areas. Also, the notion that the High School Road District in its entirety is deemed by the Plan an existing rather than a potential new commercial center is suggested by Winslow Goal 5, which explicitly refers to the area as the "Commercial High School Road District."

16. Moreover, there is a second line of reasoning that compels rejecting the contention that Policy LU 1.4 should be deemed a development requirement. What would be the practical consequences of performing the economic study that project opponents are requesting? If it concluded that no harm would befall downtown Winslow if the Visconsi project were built, the study likely would have no real effect at all. Time and money might have been expended, but the project would go forward as proposed. But if, on the other hand, the economic study concluded that the Bainbridge Island economy can in fact support no further retail development, the practical effect of that determination would be to nullify existing retail zoning on all currently undeveloped parcels on the Island. No doubt this would seem an attractive prospect to project opponents. But one of the few certainties found in the Washington appellate case law dealing with the plan and zoning relationship is that a plan policy cannot validly prohibit a use which the zoning specifically allows. All the proposed Visconsi retail uses

are specifically permitted by code in the High School Road zoning district. The Comprehensive Plan can confer no power to categorically invalidate such a legislative use authorization within an administrative permit review proceeding, either directly or by implication.

17. Winslow Goal 5 within the Comprehensive Plan states that “[t]he Commercial High School Road District is intended to provide for commercial uses that complement downtown Winslow and benefit from automobile access near the highway, while creating a pedestrian-friendly retail area.” Obviously there is a tension between recognizing the suitability of properties adjacent to the SR 305 corridor for automobile-dependent uses and access while at the same time requiring them to maximize pedestrian-friendly development. A balance needs to be established. In numerous ways the Comprehensive and Winslow Master Plans encourage developments on the Island to accommodate and facilitate pedestrian access, movement and safety. But it is also a fact that, among the various Winslow Overlay Districts, High School Road is the sole zoning designation receptive on a regulatory level to automobile-based commercial development. Any attempt to assess within a permitting review the regulatory balance between auto-centric and pedestrian-friendly claims must necessarily take this fact into consideration.

18. The tables provided at BIMC 18.09.020 list the permitted and conditional uses for each City zone. The following are the auto-centric uses allowed to be sited in the High School Road District but prohibited in all five designations that comprise the Winslow Mixed Use Town Center classification: auto repair services, car washes, gasoline service stations, vehicle sales, park and ride lots, small engine repair service, transport and delivery service, and a catch-all category of unlisted non-retail “motor vehicle-related services.” Any realistic imposition of pedestrian-friendly development requirements must necessarily accommodate the fact that the High School Road District is to a substantial degree one of the few zones on the Island that is tolerant of automobile uses. And looking at the range of uses allowed in the district, the Visconsi project with two of seven buildings having accessory drive-up windows is far less auto-centric than many other use configurations arguably permitted under the zoning regulations.

19. As IRD's attorney has noted, there is an apparent regulatory conflict regarding the allowability of drive-through facilities in the High School Road District. Among the uses listed above, it seems indisputable that some, such as an automatic car wash, could not exist other than as a drive-through facility. Plus the purpose statement set forth at BIMC 18.06.040.A specifically provides that for the High School Road zones a “variety of commercial uses are allowed that offer goods and services for the convenience of Island residents and that may have an auto orientation and a drive-through facility.” Yet further along in the chapter devoted to use regulations one encounters the following statement at BIMC 18.09.030.D(8)(d) limiting retail uses: “In the Madison Avenue, Ericksen Avenue, Gateway, High School Road I and II, and central core districts, drive-through businesses are not permitted.”

20. Both the applicant and City staff contend that any resolution of the purported conflict between BIMC 18.09.030.D(8)(d) and the use tables and purpose statement for the High School Road zones must give effect to the overall regulatory scheme and not simply focus on one provision to the total exclusion of all others. An outcome that the Planning staff has embraced is to distinguish between a business based squarely on a drive-in model and a more general retail enterprise that has a secondary or incidental drive-up window component. Since this is a fact-sensitive approach where multiple design interpretations appear possible, deference to Planning staff practice appears to be a defensible option. Certainly the site's location immediately adjacent to the SR 305 intersection supports a flexible

interpretation, as does the fact that for some medical center patients with mobility issues having to park and exit an automobile to pick up a pharmacy prescription could impose a hardship. But for such a compromise to be acceptable, strict limitations on the size and scope of drive-up facilities should be imposed.

21. The High School Road District in the vicinity of the Visconsi project cannot presently be described as a pedestrian-friendly neighborhood. The proposal is conditioned to improve the existing circumstance by upgrading a transit facility along SR 305 adjacent to the site, constructing a section of a regional multi-modal trail in the adjacent SR 305 right-of-way, connecting the multi-modal trail section to the site interior by a pathway, providing walkways and crosswalks linking the site to Stonecress, and pursuant to this review installing a mid-block crosswalk on High School Road. Will these facilities result in an immediate and total transformation of the High School Road neighborhood east of SR 305? Hardly. The full effectiveness of many of these improvements will only be realized later when other players contribute necessary connecting links.

22. Upgrading the pedestrian functionality of the High School Road area must be viewed as a long term community goal. The improvements required of Visconsi will be a reasonable first step in this direction and satisfy Plan pedestrian and circulation policies applicable to development review, including Comprehensive Plan Land Use Element Winslow Goal 5 and Policies W 5.4 and W 5.5; Transportation Element Policy TR 1.3, Goal 3 and Policy TR 3.3, Goal 4 and Policy TR 4.1, and Goal 9 and Policy TR 9.1; Non-Motorized Transportation Policies NM 5.2 and 5.6; and Winslow Master Plan Goals WMP 2-1, 2-2, 6-1, 6-2, 6-8 and 6-10 and Policies WMP 2-2.3, 2-11.1, 6-2.2, 6-2.5, 6-2.8, 6-2.9, 6-8.2 and 6-10-2.

23. In addition, regarding pedestrian circulation through the site interior, a large quantity of review effort has gone into the question of how best to provide safe crossings of the internal spine road used by ProBuild truck traffic. This ProBuild traffic, it must be remembered, is a pre-existing condition, not an impact caused by the proposed Visconsi development. The review discussion has generated multiple adjustments of the site plan layout that will collectively result in safe pedestrian crossings of the spine road, consistent with Comprehensive Plan Policies W 5.4 and TR 1.3.

Site Plan Review

24. BIMC 2.16.040.E contains the standards for approval of a site plan review application:

The director and planning commission shall base their respective recommendations or decisions on site plan and design review applications on the following criteria:

1. The site plan and design is in conformance with applicable code provisions and development standards of the applicable zoning district, unless a standard has been modified as a housing design demonstration project pursuant to BIMC 2.16.020.Q;

2. The locations of the buildings and structures, open spaces, landscaping, pedestrian, bicycle and vehicular circulation systems are adequate, safe, efficient and in conformance with the nonmotorized transportation plan;

3. The Kitsap County health district has determined that the site plan and design meets the

following decision criteria:

- a. The proposal conforms to current standards regarding domestic water supply and sewage disposal; or if the proposal is not to be served by public sewers, then the lot has sufficient area and soil, topographic and drainage characteristics to permit an on-site sewage disposal system.*
- b. If the health district recommends approval of the application with respect to those items in subsection E.3.a of this section, the health district shall so advise the director.*
- c. If the health district recommends disapproval of the application, it shall provide a written explanation to the director.*

4. The city engineer has determined that the site plan and design meets the following decision criteria:

- a. The site plan and design conforms to regulations concerning drainage in Chapters 15.20 and 15.21 BIMC; and*
- b. The site plan and design will not cause an undue burden on the drainage basin or water quality and will not unreasonably interfere with the use and enjoyment of properties downstream; and*
- c. The streets and pedestrian ways as proposed align with and are otherwise coordinated with streets serving adjacent properties; and*
- d. The streets and pedestrian ways as proposed are adequate to accommodate anticipated traffic; and*
- e. If the site will rely on public water or sewer services, there is capacity in the water or sewer system (as applicable) to serve the site, and the applicable service(s) can be made available at the site; and*
- f. The site plan and design conforms to the "City of Bainbridge Island Engineering Design and Development Standards Manual," unless the city engineer has approved a variation to the road standards in that document based on his or her determination that the variation meets the purposes of BIMC Title 18.*

5. The site plan and design is consistent with all applicable design guidelines in BIMC Title 18, unless strict adherence to a guideline has been modified as a housing design demonstration project pursuant to BIMC 2.16.020.Q;

6. No harmful or unhealthful conditions are likely to result from the proposed site plan;

7. The site plan and design is in conformance with the comprehensive plan and other applicable adopted community plans;

8. Any property subject to site plan and design review that contains a critical area or buffer, as

defined in Chapter 16.20 BIMC, conforms to all requirements of that chapter;

9. Any property subject to site plan and design review that is within shoreline jurisdiction, as defined in Chapter 16.12 BIMC, conforms to all requirements of that chapter;

10. If the applicant is providing privately owned open space and is requesting credit against dedications for park and recreation facilities required by BIMC 17.20.020.C, the requirements of BIMC 17.20.020.D have been met;

11. The site plan and design has been prepared consistent with the purpose of the site design review process and open space goals;

12. For applications in the B/I zoning district, the site plan and development proposal include means to integrate and re-use on-site storm water as site amenities.

25. Subsections 3, 4 (e) and (f), 8, 9, 10 and 12 state technical requirements that either are not in serious dispute or are inapplicable to this proposal. No allegations of “harmful or unhealthful conditions” have been made apart from the conventional development impacts more properly addressed elsewhere. BIMC 2.16.040.F provides that “[c]onditions may be imposed to enable the proposal to meet the standards of the decision criteria.”

26. The analysis of “applicable code provisions and development standards” (subsection 1) and “conformance with the comprehensive plan and other applicable adopted community plans” (subsection 7) was combined to a substantial degree in the previous section because the controversy about their interaction is central to this proceeding and affects all its components. As discussed therein, the Visconsi site plan complies with general Comprehensive and Winslow Master Plan goals and policies to the extent that they are applicable to individual project review.

27. The previous section also described and documented the proposal's compliance with Plan goals and policies for pedestrian-friendly development, which has been a primary project review emphasis and an area where the Plan offers specific standards capable of being applied to the development review process. Comprehensive Plan policies also support the imposition of conditions to mitigate project traffic and safety impacts, as follows: reconfiguration of the spine access road and its pedestrian amenities is authorized by Policies W 5.4 and TR 1.3; requiring the construction of a full right-turn lane on High School Road between the site access driveway and SR 305 is authorized by Policies TR 4.1 and TR 4.7 plus Winslow Master Plan Policy WMP 2-2.3; limiting Polly's Lane to one-way out traffic and imposing street lighting restrictions are authorized by Policies TR 1.4, TR 3.1, TR 3.3 and TR 5.2; and requiring a mid-block crosswalk to be installed on High School Road is authorized by Policies W 5.4, TR 1.3 and TR 9.1.

28. As discussed above in the findings, runoff discharged from the Visconsi site's northeast drainage basin will pass through Stonecress after exiting the Woodland Village wetland, plus Visconsi traffic will add to the pollutant load for Polly's Lane runoff entering into the Stonecress stormwater system. As part of the nearby downstream conveyance system for the Visconsi site, project approval necessitates that this conveyance function properly. Placing on Visconsi the responsibility for assuring satisfactory downstream conveyance of flows through Stonecress is authorized by Comprehensive Plan Policies AQ 1.4, SD 1.3 and TR 2.1, section 2.5.4 of DOE's 2005 Stormwater Management Manual for Western

Washington, and BIMC 15.20.060.H.

29. Both Plan Policies W 5.5 and TR 1.5 require a vegetated buffer along the site's SR 305 boundary and Winslow Master Plan Policy WMP 2-2.4 specifies that it should be "full-screen." The IRD brief raises a design issue with respect to this buffer, noting that the site plans depict it terminating nearly 100 feet short of the SR 305/High School Road intersection, creating not coincidentally a commercially desirable roadway exposure for the proposed corner bank building. IRD argues that the SR 305 buffer needs to be extended to the intersection, relying primarily on the code definition for "full-screen." While this definition deals with buffer composition and not length, the specification within the BIMC 18.15.010-5 note that the "buffer will provide as much screening of site activities from Highway 305 as practicable in light of site topography and conditions" discloses the relevant regulatory intent. The major variable here is the need to guarantee safety at a busy intersection. The buffer should be extended toward the intersection as far as feasible consistent with the requirements for safety and efficient circulation, as determined by Staff review.

30. Decision criteria 5 and 11 within BIMC 2.16.040.E require that the Visconsi site plan demonstrate consistency with the site design review process and applicable design guidelines. As noted previously, the City's process before the Design Review Board both relies upon the expertise of the Board members and confers discretion to de-emphasize certain guidelines to achieve an overall design suitable to the site and its constraints. In this regard, the Visconsi site design explicitly eschewed seeking compliance with High School Road guideline 7 encouraging building facades to be located close to the right-of-way and guideline 10 promoting "visually prominent architecture" near the SR 305 intersection. Instead, the site design with DRB approval opted for a layout focused on converting the internal spine road into a "Main Street" environment. Guidelines 7 and 10 were thus not ignored but rather waived by the DRB in favor of alternative concept deemed a better fit for this particular site.

31. Unless the record demonstrates that the DRB has egregiously neglected an adverse impact created by a site design choice, it is not the Hearing Examiner's role to second-guess the design review process. The Planning Commission, of course, came to the conclusion that pedestrian safety along the spine road constituted precisely the kind of deal-breaking issue that demands exceptional intervention – that these adverse pedestrian impact issues simply could not be resolved. While the spine road safety issues are of genuine concern, and they surely generated a need to reconfigure the original site design, the record does not support a conclusion that the obstacles are insurmountable. Large trucks to and from ProBuild will continue to use the spine road, but their numbers are small and unlikely to become much larger. Crossing the spine road will not be like trying to walk across I-5 as it passes through downtown Tacoma. In their zeal project opponents exaggerated the spine road safety problems.

32. The Visconsi design team fully participated in the design review process and amended the site design in response to DRB suggestions and public comments. Within the guideline checklist completed at the end of the design review, the DRB comments were favorable overall and most remaining concerns were oriented toward details. Whether or not one believes the ultimate Visconsi site design has achieved the perfect approach, the evidence supports conclusions that Visconsi submitted in good faith in the DRB process and that the resultant design is feasible overall and duly responsive to the challenges of the site. As such, it meets the requirements of site plan review decision criteria 5 and 11.

33. Decision criteria 2, 3b and 3c mostly relate to the responsiveness of the site design to the

pedestrian and traffic circulation issues that have dominated the discussion presented in the findings above, and whether the proposed facilities and their locations will be suitable to the demands of the project. For the reasons cited previously, and as conditioned to mitigate project impacts, these decision criteria are also met by the Visconsi site plan. In like manner, criterion 4b requires a determination that the site design will not unduly burden the affected drainage basin nor unreasonably interfere with the enjoyment of downstream properties; mandating that Visconsi assure the function of the downstream flow bypass line through Stonecress will satisfy this requirement.

34. Overall, the decision criteria specified in BIMC 2.16.040.E will be met by the Visconsi site plan if it is revised to meet the conditions stated below. The internal spine road features, the alterations to access to and movements on Polly's Lane, the improvements to High School Road and the stormwater conveyance system upgrades required by the conditions below all are necessary to make the application compliant with the site plan review decision criteria.

Conditional Use Permit

35. Various participants this proceeding have raised issues concerning the proper scope of conditional use permit review. Visconsi points out that its project could be built without a conditional use permit if it simply revised its site plan slightly to reduce some building footprints and shift the location of the proposed pharmacy. It argues that review should therefore be limited to evaluating the quantity of impacts that will result from exceeding the development level allowed without a CUP. The Planning staff notes that, as related in the Comprehensive Plan, the stated purpose for requiring a CUP for larger buildings in the High School Road II zone is to protect nearby single-family zoned properties. Since the Stonecress Townhomes project lies within a zoning district designated by the City for multi-family development, staff has taken the position that potential Visconsi impacts to Stonecress need not be considered within the CUP review. Finally, some citizens opposed to the Visconsi proposal have opined that since a CUP approval confers some sort of discretionary "exception" or "variance," the City has the option to deny the project for any reason it likes – or indeed, for no reason at all.

36. A conditional use is not an exception or privilege that the City may grant or deny based on whim or caprice. It is a use permitted in a zone where the City has determined a process of special review and adjustment is required to assure that it will be a proper fit for its location. The normal expectation and practice is that a CUP will be granted subject to appropriate conditions designed mitigate its neighborhood impacts. The City can deny a CUP only if it determines no practical and feasible way exists to condition the proposal to reduce its impacts to an acceptable level. BIMC 2.16.110.A states that "[i]f imposition of conditions will not make a specific proposal compatible the proposal shall be denied." The converse proposition is that if reasonable conditions can in fact make the proposal compatible with other uses in the vicinity, the CUP is to be granted. See BIMC 2.16.110.D(2). As specified by the state Supreme Court, "[a] building or use permit must issue as a matter of right upon compliance with the ordinance." *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960-61 (1998).

37. The Staff's perspective that Visconsi's impacts on the Stonecress neighborhood do not need to be considered within the City's CUP review is derived from a discussion note appended to Comprehensive Plan Policy W 5.3, which provides that within the High School Road District II retail uses between 5,000 and 14,400 square feet require a conditional use permit. The note observes that the High School Road District II "is immediately adjacent to a semi-urban, residential area of 2.9 to 3.5

units per acre and should have less intense uses than the remainder of the High School Road district.” Based on this comment, staff concluded that the intent of the policy was limited to providing CUP protection to single-family neighborhoods.

38. The staff interpretation conflates the rationale for the policy with the policy itself. Neither Policy W 5.3 nor any later regulatory iteration of it limits the CUP analysis to effects on single-family residential zones. The discussion note itself has no independent regulatory status. Thus if a limitation of review to single-family zone impacts were actually to be imposed, the policy itself would need to articulate it, which it does not do. The policy rationale may inform the review process as to concerns of particular importance, but it does not comprise a legal constraint on CUP review. Once the CUP process is invoked, all impacts caused by the proposal within the CUP scope of review are subject to consideration and mitigation.

39. *Hansen v. Chelan County*, 81 Wash.App. 133, (1996), cited by the Visconsi brief, stands for the proposition that a conditional use permit cannot be denied in the absence of evidence the CUP proposal would have greater impacts than uses otherwise permitted outright. The regulatory trigger for CUP review of the Visconsi project was the proposal within the High School Road II portion of the site to construct retail buildings in excess of a 5000 square foot threshold. The argument is that the City's CUP analysis therefore encompasses only the impacts attributable to the parts of the project that lie in the High School Road II zone and then only to the extent that the retail buildings under review will be larger than 5000 square feet.

40. In evaluating this contention, the critical issue to be determined is which elements of the Visconsi proposal qualify for treatment as “permitted outright.” At the point of consolidated project review the answer is that there are as yet no buildings or uses permitted outright. Pursuant to BIMC 2.16.040.B(1)(a), all proposals for new construction of nonresidential buildings are required to obtain site plan review approval before issuance of any construction permits. While the BIMC 2.16.040.E site plan review decision criteria discussed above contain some routine elements, there are also clearly discretionary standards as well, including especially those requiring conformance with the City's design guidelines and comprehensive and community plans. Imposition of this type of approval standard necessitates that a site plan review be classified as a discretionary permit. This means that until site plan review approval is obtained, no commercial uses or structures can be deemed permitted outright. At this stage the CUP review encompasses the entire Visconsi project – all proposed structures and uses in both zones.

41. The following decision criteria for approval of a conditional permit application are stated at BIMC 2.16.110.D:

1. A conditional use may be approved or approved with conditions if:

a. The conditional use is harmonious and compatible in design, character and appearance with the intended character and quality of development in the vicinity of the subject property and with the physical characteristics of the subject property; provided, that in the case of a housing design demonstration project any differences in design, character or appearance that are in furtherance of the purpose and decision criteria of BIMC 2.16.020.Q shall not result in denial of a conditional use permit for the project; and

b. The conditional use will be served by adequate public facilities including roads, water, fire protection, sewage disposal facilities and storm drainage facilities; and

c. The conditional use will not be materially detrimental to uses or property in the vicinity of the subject property; and

d. The conditional use is in accord with the comprehensive plan and other applicable adopted community plans, including the nonmotorized transportation plan; and

e. The conditional use complies with all other provisions of the BIMC, unless a provision has been modified as a housing design demonstration project pursuant to BIMC 2.16.020.Q; and

f. All necessary measures have been taken to eliminate or reduce to the greatest extent possible the impacts that the proposed use may have on the immediate vicinity of the subject property; and

g. Noise levels shall be in compliance with BIMC 16.16.020 and 16.16.040.A; and

h. The vehicular, pedestrian, and bicycle circulation meets all applicable city standards, unless the city engineer has modified the requirements of BIMC 18.15.020.B.4 and B.5, allows alternate driveway and parking area surfaces, and confirmed that those surfaces meet city requirements for handling surface water and pollutants in accordance with Chapters 15.20 and 15.21 BIMC; and

i. The city engineer has determined that the conditional use meets the following decision criteria:

i. The conditional use conforms to regulations concerning drainage in Chapters 15.20 and 15.21 BIMC; and

ii. The conditional use will not cause an undue burden on the drainage basin or water quality and will not unreasonably interfere with the use and enjoyment of properties downstream; and

iii. The streets and pedestrian ways as proposed align with and are otherwise coordinated with streets serving adjacent properties; and

iv. The streets and pedestrian ways as proposed are adequate to accommodate anticipated traffic; and

v. If the conditional use will rely on public water or sewer services, there is capacity in the water or sewer system (as applicable) to serve the conditional use, and the applicable service(s) can be made available at the site; and

vi. The conditional use conforms to the "City of Bainbridge Island Engineering Design and Development Standards Manual," unless the city engineer has approved a

variation to the road standards in that document based on his or her determination that the variation meets the purposes of BIMC Title 17.

j. If a major conditional use is processed as a housing design demonstration project pursuant to BIMC 2.16.020.Q, the above criteria will be considered in conjunction with the purpose, goals, policies, and decision criteria of BIMC 2.16.020.Q.

2. If no reasonable conditions can be imposed that ensure the application meets the decision criteria of this chapter, then the application shall be denied.

42. The criteria stated at BIMC 2.16.110.D(1)(b), (d), (e), (g) and (h) overlap or replicate standards required above for site review approval, and the determinations of compliance stated for BIMC 2.16.040.E in the preceding section are also applicable to the above CUP criteria and are therefore incorporated by reference. No regulatory distinction exists between a conclusion that the proposal is in “conformance” with the Comprehensive Plan and one that it is in “accord” with the Plan. The City Engineer has determined that the Visconsi proposal will meet the infrastructure requirements specified in BIMC 2.16.110.D(1)(i), which requirements have also been reviewed in this proceeding where specific impacts have been alleged and will be augmented, as needed, by additional conditions of mitigation; on that basis, they can be found compliant with all relevant regulatory standards. The conditional use review criteria remaining to be discussed are thus BIMC 2.16.110.D(1)(a), (c) and (f).

43. The requirement that the proposed Visconsi project be “harmonious and compatible in design, character and appearance” imposes a primarily visual standard, particularly with respect to impacts on offsite properties. The evaluation is to be made from two standpoints – that of the “intended character and quality of development in the vicinity” and of the “physical characteristics of the subject property.” The word “intended” indicates that attention should be focused on the nature of the surrounding zoning as well as on existing development patterns, a context that might, for example, diminish the consideration due a neighboring non-conforming use no longer permitted by the zoning.

44. As discussed above in the findings, the offsite visibility of the proposed Visconsi site buildings and parking lots will be relatively minimal. The site's entire boundary along SR 305 will be screened by existing trees to be supplemented with new plantings. Both ProBuild to the north and Kitsap Bank to the southeast have some onsite vegetative screening lying between their commercial facilities and the proposed Visconsi buildings and parking areas. The visual impact to the McDonald's drive-in to the south and the motoring public on High School Road will consist of the view of the proposed single-story 3300 square-foot building 1 bank structure along the frontage just east of SR 305. No one has argued that these visual impacts will be significant or inappropriate, or even greater than the impacts currently generated by the building now at the corner of the site slated for removal.

45. Residentially-zoned properties lie along the Visconsi site's eastern property line, but the northern half of the boundary is occupied by a large wetland and its buffer that will render commercial facilities invisible from houses located east of the wetland. The residences in Stonecross lying north of Stonecross Lane will be screened from from the adjacent Visconsi parking lot by a sight-obscuring vegetated buffer. The narrow width of Polly's Lane precludes placing additional screening there, but most views from that location will be across the Kitsap Bank property, with night-time glare impacts mitigated by lighting restrictions and traffic diversion strategies.

46. To the extent that CUP review is focused specifically on the offsite impacts of buildings larger than 5000 square feet, the site plan responded to this concern by placing the two largest project structures at locations well removed from all offsite views. But IRD has also argued that, from a purely regulatory standpoint, the building 2 pharmacy, proposed at 14,750 square feet in floor area and straddling the line between the High School Road I and II zones, cannot be permitted to exceed 14,400 square feet. This contention is based on language limiting retail uses in the High School Road II zone found in both Comprehensive Plan Policy W 5.3 and Winslow Master Plan Policy WMP 2-11.1 (“retail uses shall be limited to 14,400 sq. ft.”). The regulatory expression of these policies is stated at BIMC 18.09.030.D(8)(b): “In the HSR II district: i. Retail buildings are a permitted (“P”) use up to 5,000 square feet. ii. Retail buildings with a footprint between 5,000 square feet and 14,400 square feet are permitted through a conditional use permit.”

47. The use standards enacted at BIMC 18.09.030.D(8)(b) can be viewed as expanding the scope of retail uses allowed in the High School Road II zone beyond the level initially contemplated by the Comprehensive Plan. The introductory sentence of Policy W 5.3 reads as follows: “The properties designated on the Land Use Map as High School Road District II shall be limited to no more than 14,400 square feet of retail use.” By stating that the “*properties...shall be limited,*” Policy W 5.3 can be read as saying that the totality of retail use should not exceed 14,400 square feet for the entire High School Road II zone. By way of context, the Visconsi project proposes over 24,000 square feet of retail space in High School Road II without counting any part of the pharmacy, and over 30,000 square feet of retail if half the pharmacy is included. And since the High School Road II zone also includes ProBuild which has an existing retail store attached to the lumberyard, presumably the 14,400 square feet district total otherwise available to Visconsi would have to be reduced by ProBuild's current retail space.

48. But BIMC 18.09.030.D(8)(b) clearly shifts the regulatory emphasis from retail uses on properties generally to such uses in “retail buildings” as measured by building footprints. If one were to conclude that a conflict exists between the zoning code use standard and the earlier Comprehensive Plan policy, the use standard would be deemed controlling because it is more specific and later in time. So the current operative regulatory formula for the High School Road II zone is that each building size is addressed individually, and any upper retail limit for either the zone or the site overall is imposed by the Floor Area Ratio (FAR) calculation, not a 14,400 square foot cap.

49. The question of whether an individual building can be permitted to exceed the 14,400 square-foot High School Road II zone upper limit by straddling the district line is a different (and less consequential) issue. The IRD brief offers in support of its position the following language from BIMC 18.06.100.G, which addresses sites that contain more than one zoning designation: “[E]ach portion of the site shall contain only those uses, structures, and density permitted within that zoning designation.” But the brief fails to explain why this phrase should be read as precluding the allocation of floor space between the two zones when a building straddles the district line. An unadorned reference to the term “permitted within that zoning designation” simply begs the ultimate question: is a straddling strategy allowed in the zone?

50. The Examiner's view is that, in the absence of either a more explicit regulatory instruction or an obvious adverse consequence to be avoided, questions of zone-straddling impacts can be adequately assessed within the CUP review framework on an *ad hoc* basis. Placing a building on the district line shared with a less restrictive zone in order to garner more lenient development standard treatment is

usually also going to mean that the impacts of the proposed building are well removed from the more sensitive offsite amenities of critical review concern, which certainly would be the case here with Stonecress and the pharmacy. Allowing the proposed pharmacy to slightly exceed a 14,400 square foot limit by straddling a zone line would appear to entail no adverse impacts.

51. Providing compatibility with the physical characteristics of the Visconsi site itself mostly involved dealing with limitations imposed by existing development patterns and critical areas – resulting in the inability to create a new site access route anywhere but to the south and having to share that access with ProBuild. Vast quantities of review time have been expended in exploring the best ways to deal with this fundamental limitation; as conditioned the resulting approach will reduce traffic impacts and conflicts to a manageable level and adequately protect pedestrian safety. The new spine road configuration will better accommodate large truck movements to and from ProBuild and will constitute an improvement over the current situation. As conditioned, the Visconsi proposal will meet the design, character and appearance compatibility criteria of BIMC 2.16.110.D(1)(a).

52. BIMC 2.16.110.D(1)(c) requires that the proposed conditional use “not be materially detrimental to uses or property in the vicinity of the subject property.” If any compelling basis were to exist in the record sufficient to deny outright the Visconsi conditional use application in its entirety (as opposed to imposing mitigating conditions), it would need to be premised on a conclusion that there is simply no satisfactory way for the project to avoid creating impacts materially detrimental to Stonecress. As elaborated in the findings above, a number of conditions have been identified over the course of the City's review process to deal with various Stonecress issues. Surely the most devastating potential threats to the Stonecress residential neighborhood arise from the risk that unacceptable levels of Visconsi traffic would use Stonecress's narrow streets to circumvent congestion at the site's main access driveway. Visconsi vehicles diverted through Stonecress in significant numbers could cause noise and light pollution and endanger pedestrians and neighborhood children. If they were to reach extreme levels, these impacts could compromise the livability of the neighborhood.

53. Conditions have been devised to discourage inappropriate use of Stonecress streets by Visconsi traffic. Visconsi will require its tenants to prohibit delivery trucks from using Polly's Lane. The site's exit to Polly's Lane and the road itself will be restricted to outbound vehicles, with the exit configured to dissuade site entry from Stonecress Lane. A full right-turn lane with a tapered approach for large trucks exiting the spine road will be constructed along High School Road westbound between the main access and SR 305. The new exit configuration will prevent large trucks from having to cross into adjoining lanes to make right-turns from the spine road and under normal conditions should offer an unimpeded route from the site to SR 305. In addition, the longer dedicated right turn lane should operate to reduce abnormal queue lengths west of the SR 305/High School Road intersection by allowing right-turning vehicles to depart the queue at an earlier point.

54. As described in the findings above, noise and light impacts from within the Visconsi site itself will be regulated and monitored, with a screening buffer installed along the eastern site boundary adjacent to the nearest Stonecress residences. Before stormwater flows from the project can be released offsite to the northeast, the downstream conveyance system through Stonecress will be evaluated and upgraded, as needed, to assure that flows from the wetland do in fact bypass the Stonecress detention pond and that the conveyance system has adequate capacity. Overall, these mitigations will assure that the offsite impacts from the Visconsi project will not be materially detrimental to the Stonecress neighborhood.

55. BIMC 2.16.110.D(1)(f) mandates that all necessary measures be taken “to eliminate or reduce to the greatest extent possible” project impacts on the immediate vicinity. This requirement overlaps the discussion just concluded regarding the mitigation measures to be imposed on the Visconsi project to protect the Stonecress neighborhood. The analysis supports a conclusion that the requirements to be imposed as conditions of project approval include all measures that can realistically be deemed as feasible within the constraints of the site and the neighborhood. As such, they will reduce project impacts to the greatest extent possible and operate to effect overall project compliance with the full range of requirements for conditional use permit approval set forth in the BIMC 2.16.110.D decision criteria. More specifically, the internal spine road features, the alterations to access to and movements on Polly's Lane, the improvements to High School Road and the stormwater conveyance system upgrades required by the conditions below all are necessary to make the application compliant with the conditional use permit decision criteria.

SEPA Threshold Determination Appeal

56. The Mitigated Determination of Nonsignificance (MDNS) issued by the City on November 22, 2013, for the Visconsi proposal was appealed by the Islanders for Responsible Development. The rather generic allegations of adverse environmental impacts contained in the December 6, 2013, IRD SEPA appeal were clarified during the pre-hearing process and, as further specified in the pre-hearing orders, provided the basis for review within this appeal proceeding.

57. An MDNS is a determination by the SEPA responsible official that a proposal will not have a significant adverse environmental impact if certain mitigating conditions are imposed. WAC 197-11-350; see, e.g., *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997). Under BIMC § 16.04.040.A, the SEPA responsible official for the City is the Director of Planning and Community Development.

58. The responsible official's decision to issue an MDNS and not require an Environmental Impact Statement (EIS) is to be accorded substantial weight in any administrative appeal. RCW 43.21C.075(3)(d); WAC 197-11-680(3)(a)(iii); BIMC 16.04.170.E. The substantial weight requirement mandates review of the responsible official's decision under the “clearly erroneous” standard. See, e.g., *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A decision is deemed clearly erroneous only when, although there is evidence to support it, the reviewing body is “left with the definite and firm conviction that a mistake has been committed.” *Norway Hill Preservation & Protection Ass' v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)). Consistent with the foregoing, in a SEPA appeal the appellant carries the burden of proof.

59. The IRD appeal alleged that the Visconsi project would cause unmitigated significant adverse impacts to traffic, which issue was refined in the pre-hearing order to include LOS impacts at the SR305/High School Road intersection and pedestrian safety impacts both on and offsite. The project traffic study concluded that during the proposal's horizon year the SR305/High School Road intersection would operate at a LOS deemed acceptable under the City's regulations and policies, and IRD failed to introduce persuasive evidence to the contrary. Pedestrian safety issues will be addressed by the applicant through the installation of both onsite and offsite crosswalks, supplemented by traffic calming measures along the internal spine road. No evidence was adduced that these measures would be inadequate to mitigate potential pedestrian safety impacts.

60. The IRD appeal further alleged that the Visconsi project would cause unmitigated significant adverse impacts to the environment resulting from the “plan to remove large amounts of trees.” In the pre-hearing order these allegations were identified as involving potential impacts to aesthetics, air quality and increased stormwater runoff. No evidence of view impacts from tree removal was introduced, nor does any seem likely given that substantial tree buffers will be retained on the west side of the site next to SR 305 and on the east next to Stonecress. Air quality issues were only addressed by IRD in terms of the ecological role of trees generally, with nothing offered about impacts from this site specifically. The drainage conditions explicitly require the project to release flows offsite at or below pre-development rates, with or without tree removal, and to assure the functionality of the flow conveyance system immediately downstream. The record demonstrated that Visconsi site tree removal will comply with the City's tree retention requirements. No site-specific unmitigated adverse impacts from tree removal were demonstrated.

61. IRD's allegation of drainage impacts was refined to focus on the possibility that Winslow Ravine downstream from the site contains a fish-bearing habitat. No evidence was introduced in support of this contention. Concerns about wetland mitigation timing will be resolved by requiring the mitigation plan to be executed at an early project stage.

62. No evidence of specific project noise and lighting impacts exceeding the City's regulatory limits was introduced by IRD, nor was any attempt made to establish that these regulatory limits will be incapable of keeping such impacts at a nonsignificant level. A baseline noise study was conducted by the applicant, and followup measurements will be made after the project is occupied. An IRD allegation of adverse impact to the utility infrastructure serving the City was abandoned.

63. IRD allegations of aesthetic harm to views from nearby residential properties, High School Road and SR 305 were not supported by site-specific testimony about visual impacts. The level of perimeter screening required of the project plus the site plan's relationship to surrounding development suggest that specific adverse aesthetic impacts will be minimal or nonexistent.

64. IRD allegations that the Visconsi project will create urban blight were supported by testimony and graphics showing that vacant commercial properties presently exist on Bainbridge Island. No attempt was made to calculate an overall vacancy rate or to demonstrate that such rate should be considered sufficiently elevated to indicate a threat to the community's economic health.

65. Overall, with a few exceptions mostly involving traffic and circulation questions, IRD's evidence in support of its SEPA appeal consisted primarily of statements of general concern that were never quantified in terms of, nor always even concretely related to, the Visconsi proposal and its likely effects. As such, the IRD appeal failed to meet its burden of proof to demonstrate that the Visconsi proposal, as mitigated, would cause probable significant adverse environmental impacts or that the City's MDNS should be deemed clearly erroneous based on the record as a whole. The IRD appeal of the City's SEPA threshold determination issued for the Visconsi proposal thus must be denied.

Project Conditions

66. The conditions attached to this decision are a combination of SEPA mitigation requirements, project conditions recommended by City staff, voluntary mitigations offered by the applicant at the

hearing, and new and modified conditions imposed by the Hearing Examiner determined necessary to make the proposal compliant with site plan review and conditional use permit decisional criteria. While the SEPA conditions remain as promulgated by the City's Responsible Official, the various new conditions mostly have been integrated into the staff conditions format in those places where they expand on matters already under consideration.

67. All the voluntary mitigations have been included as project conditions except Visconsi condition number one, which contemplates a payment from the developer to the Stonecress Home Owners Association. This has been excluded for two reasons. First, the relationship of the payment amount to any actual mitigation costs is unclear, so the City's regulatory connection to the transaction is tenuous. Second, the payment is partly focused on stormwater system issues, which is the subject of a new Examiner-imposed condition. In view of its now increased stormwater mitigation obligation, Visconsi may conclude that its voluntary payment to Stonecress needs to be adjusted. The City has no legitimate role to play in any such negotiation.

68. The Examiner's new conditions and efforts at integrating the Visconsi voluntary mitigations into the overall permit format may inspire the parties to suggest some adjustments regarding procedures, timing and staff responsibilities. The voluntary mitigations contain a number of generic references to "the City of Bainbridge Island's approval" where it is not clear exactly what process is being contemplated. In addition, implementation of a one-way regime for Polly's Lane involves obtaining the agreement of entities that are not formal parties to this proceeding, plus thinking about how to proceed if a key player balks. Condition no. 44 below undertakes to address this circumstance.

69. The new conditions contain details that parties may believe are less than optimal in their consequences and thus in need of revision. The mechanism for seeking such revisions is a request for reconsideration filed before the expiration of the LUPA appeal period. If specific language amendments can be suggested for the conditions at issue, such will likely make the process more efficient. A request for reconsideration will *not* automatically stay the filing deadline for judicial appeals. No such stay will likely be granted unless all parties stipulate to it.

Final Observations

70. An observer cannot avoid being impressed with the depth of dedication and enthusiasm Bainbridge Island residents bring to the public participation process. But there are areas of concern as well. In particular, there is a widespread misconception about what role a comprehensive plan can play in the site-specific development review process. To oversimplify slightly, once the zoning code identifies the uses permitted in a zoning district, the comprehensive plan can be employed to supply certain refinements that operate as development standards for regulating the establishment of such uses. But if the zoning code clearly permits a use, it cannot simply be denied outright based on alleged conflict with comprehensive plan policies.

71. By Bainbridge Island standards, the High School Road zoning districts are relatively tolerant of and friendly toward a broad range of commercial development. So if there really is a popular consensus that the Island already has (for example) more than enough drugstores, the easy and effective way to address this issue is to amend the zoning code permitted use chapter to delete drugstores from the list. But if the code allows a drugstore as a use in a zone, an applicant is entitled to receive a permit based on a successful running of the regulatory maze – regardless of whether it's a popular idea or not.

72. Turning to the Visconsi experience specifically, a long and involved process will not necessarily be a successful one if its key elements are out of sequence. While the Design Review Board and Planning Commission review procedures worked remarkably well overall in ferreting out issues of primary importance, there was one big conceptual glitch. On this highly constrained development parcel access limitations and traffic impacts were obviously going to drive the site design process, but these problems were not fully identified and fleshed out until midway through the review chain. The project's transportation impact analysis didn't appear until the DRB process was already well under way, and even then its initial iteration failed to come to terms with all ramifications of the site access and circulation issues. By the time a clearer picture had emerged, both the applicant and DRB were committed to the "Main Street" concept and didn't want to rethink it. A better process would have produced a complete and adequate traffic study at the very beginning of the review so that it could have informed the conceptual site design discussion before a preferred design option had become entrenched.

73. In closing, a reference to an old query may be in order – whether, in this particular instance, one should regard the development review glass as being half full or half empty. Project opponents may be expected to continue to make the case for half-empty. Here is the case for half-full: the current zoning would support approval of a much more intense and aggressive commercial project than Visconsi is proposing. Except for the small bank on the corner, the project buildings will be nearly invisible from neighboring roads. The largest retail building will be the pharmacy at just under 15,000 square feet – less than one-third of Safeway. Whatever else it may be, this is not a replay of Safeway. In fact if one compares this proposal with what currently exists in the greater High School Road district, the Visconsi project would deserve to be adjudged superior in almost every way to the the jumble of retail and office facilities now gracing the neighborhood. So while it may fall short of some ultimate vision of perfection, the facts on the ground strongly suggest that this project comprises praiseworthy movement in the right direction.

DECISION

The SEPA Threshold Determination appeal of the Islanders for Responsible Development is DENIED, and the Site Plan Review and Conditional Use Permit applications of the Visconsi Companies LTD (file no. SPR/CUP 17734) for commercial development at 10048 High School Road are GRANTED, subject to the following conditions of permit approval:

SEPA Conditions

1. All graded materials removed from the subject property shall be hauled to and deposited at City approved locations (Note: local regulations require that a grade/fill permit is obtained for any grading or filling of 50 cubic yards of material or more if the grading or filling occurs on sites that have not been previously approved for such activities. A SEPA Threshold Determination is required for any fill over 100 cubic yards on sites that have not been previously received a SEPA determination).
2. Contractor is required to stop work and immediately notify the Department of Planning and Community Development and the Washington State Office of Archaeology and Historic Preservation if any historical or archaeological artifacts are uncovered during excavation or construction.

3. To mitigate the possible impact on adjacent properties from light and glare, all exterior lighting shall be hooded and shielded so that the bulb is not visible from adjacent properties. All landscape lighting shall be downcast and lighting within surface parking lots shall be no higher than 14 feet above grade. All exterior lighting shall comply with BIMC Chapter 15.34 (Note: BIMC 15.34 was repealed now BIMC 18.15.040).
4. In order to mitigate the impacts from light, glare, noise and human presence on the off-site wetland, the prescribed wetland buffer understory shall be enhanced by the removal of all invasive species (primarily English Ivy and Holly) and the replanting of native shrubs, plants and trees. A wetland buffer enhancement mitigation plan shall be submitted and approved by the Planning Department prior to construction of building #5 adjacent to the wetland buffer. All invasive species removal and restoration shall occur or an assurance device shall be provided prior to final inspection of building #5.
5. Prior to any clearing or grading on the site, chain-link construction fencing shall be installed and inspected by the City at the edge of the tree's dripline for trees being preserved as part of the development and along the 100 foot wetland buffer. Signs shall be affixed to the fence every 50 feet indicating the protected area.
6. No disturbance of the wetland buffer shall occur, except for buffer enhancement activities and the installation of a utility stormwater dispersal line to return treated stormwater to the wetland. Prior to installation, the applicant shall apply and receive approval of a Special Use Review. Proper buffer restoration/enhancement shall be proposed and implemented as part of the Special Use review.
7. All construction activities shall comply with the construction operating hours limitations contained in BIMC Chapter 16.16. Noise produced by this development must comply with the maximum environmental noise levels established by the Washington Administrative Code 173-60 or its successor.
8. No use in this development shall produce emissions of smoke, dust and/or odors beyond the property boundary that may unreasonably interfere with any other property owners' use and enjoyment of his/her property. In addition, all sources and emission units are required to meet the emission and the ambient air quality standards specified in Chapter 173-400 WAC, and administered by the Puget Sound Air Pollution Control Authority (PSAPCA), and shall apply to all air contaminants listed in that regulation.
9. In order to be consistent with the adopted codes and Comprehensive Plan policies and to provide non-motorized connections to the proposed development, the applicant is required to construct a multi-use trail from the High School Road intersection/crosswalk to the extent of the northern property line of the development. The trail shall be located within the Washington State Department of Transportation (WSDOT) right-of-way and shall meet the minimum standards for a shared-use path contained in the WSDOT Design Manual Chapter 1515 (minimum of 10 feet wide) (Attachment NN). The trail design shall tie into the cross walk at High School Road and shall to the maximum extent feasible be located away from the highway driving lane, but then returning to the highway at the northern extent, allowing users to return to the paved roadside shoulder.

Project Conditions:

10. Except as modified by the conditions below, the site shall be developed in substantial conformance with the site plans and building elevations date stamped received April 25, 2013, as modified by sheet A17 submitted June 11, 2013, revising sheet A3.0; and further modified by the following later revised sheets submitted September 9, 2013 (A0.2, A1.0, L1, L2, L3, L4, L5, L10, L12 and C1-C5) and hearing exhibits 41 and 42 dated January 21, 2014.
11. (a) The full landscape screen ranging in width from 20-30 feet and the 50-foot averaged full landscape screen along Highway SR305, as shown on the submitted plans, shall be planted and maintained between the proposed development and the Stonecress development to the east and the development and Highway SR 305 to the west. All existing trees within the required buffers shall be retained and protected during construction.

(b) A 120 LF 6' high board on board fence starting just north of the Applicant's Development connection to Polly's Lane and running north along the west property line of Stonecress shall be installed adjacent to the 30' buffer to provide additional screening for the Stonecress homes. The fence will be placed on Stonecress's west property line prior to final inspection of the first building in this development.
12. The applicant shall obtain an approved building and/or grading permit from the Department of Planning and Community Development, prior to any construction activities on the site.
13. The demolition of structures that required a permit to construct will require a demolition permit from the City. All debris shall be properly disposed of at approved locations. The applicant's construction contracts shall provide that a minimum of 75% of construction waste will be recycled, composted, reused or diverted from land fill.
14. An approved Boundary Line Adjustment shall be recorded with the Kitsap County Auditor prior to the issuance of any building permits where buildings are proposed over property lines or existing lines preclude meeting lot coverage, FAR or other zoning regulations.
15. Prior to building permit issuance, the applicant shall satisfy the concerns listed in Bainbridge Island Fire Department Memo of May 8, 2013. Specifically the following comments shall be addressed to the Fire Marshal's satisfaction:
 - a. Project shall comply with the applicable provisions of the adopted Fire Code.
 - b. Fire sprinkler and fire alarms as required for new structure(s).
 - c. No Parking Fire Lane signage will be required.
 - d. Proposed hydrant locations and access appear acceptable.
16. Sign permits for each sign shall be required under the City of Bainbridge Island Municipal Code Section 15.08.
17. No signs are permitted to be placed within the 50-foot full screen buffer adjacent to Highway SR305.
18. Signs having internal illumination and standard metal can or plastic panel signs are not allowed, and any new signs shall comply with the Mixed Use Town Center Design Guidelines.
19. After roadway designs required by condition 23 are approved by the City and consistent therewith, the proposed bank building on the corner of High School Road and SR305 shall either be relocated to meet the maximum 10-foot front yard setback from the sidewalk or the existing

sidewalk shall be relocated to provide a planting strip between the side walk and High School Road so that the side walk is within 10 feet of the building. The sidewalk along High School Road shall be a minimum of 8 feet wide. If any portion of the sidewalk is on private property an easement to the City for public access shall be granted.

20. The site and buildings shall meet all accessibility standards of the Building Code.
21. The only drive-through lanes authorized are for the building 1 bank and the building 2 pharmacy. The drive-through window associated with the pharmacy may only be used for delivery of prescription medications from a licensed pharmacist. No building may be served by more than one drive-through lane.
22. No outdoor storage related to retail businesses is permitted.
23. Except as modified herein, all the conditions and recommendations of Engineering Development Review shall be satisfied prior to the issuance of any construction permits (Attachment Z). Civil construction plans for all roads, storm drainage facilities, sanitary sewer and water facilities, and appurtenances shall be prepared by a civil engineer licensed in the state of Washington and shall be submitted to the City for review and approval. No building permits shall be issued and no construction shall be started prior to plan approval by the Development Engineer.

Specifically the following conditions shall apply:.

Stormwater Management:

The following shall be provided with the building permit application or prior to final inspection of the first building as indicated:

- A. The site plan indicates that greater than one acre will be disturbed during construction. To comply with Phase II Department of Ecology requirements, a General Construction Stormwater Permit (NPDES) will be required prior to construction plan approval. The permit is required prior to any clearing, grading or other land-disturbing activities.
- B. A Temporary Erosion and Sediment Control Plan will be needed with the building permit application. The plan shall be prepared by a civil engineer licensed in the state of Washington.
- C. Civil plan design and supporting drainage report for all proposed storm water facilities shall be provided. The design must successfully demonstrate that the project meets the design requirements per BIMC Chapters 15.20 and 15.21. Underground detention tanks for stormwater control and storage shall be used to the maximum extent feasible.
- D. All on-site stormwater facilities shall remain privately owned and maintained. The owner shall be responsible for maintenance of the storm drainage facilities for this development following construction. Annual inspection and maintenance reports shall be provided to the City. A Declaration of Covenant for stormwater system operation and maintenance will be required to be recorded before issuance of occupancy permits. The

approved language for the Declaration of Covenant is found in BIMC Chapter 15.21, Exhibit A.

E. An easement and agreement with WSDOT will be needed for drainage pipes within WSDOT right of way (ROW) and for accepting stormwater runoff from the pipes, respectively.

F. With the prior consent of the Stonecress Home Owners Association, the northeast site basin downstream conveyance system shall be inspected and evaluated between the Woodland Village wetland outlet to Stonecress and Ferncliff Avenue. Adequate flow capacity shall be provided at all locations and existing conveyance structures replaced as needed. No site flows shall be allowed to enter the Stonecress detention pond.

Traffic and Roads:

G. The Certificate of Concurrency issued for this project is valid for the uses described in the traffic impact analysis by the Transpo Group, Inc., dated April 2013 (Attachments L & AA).

H. All internal roadways will be privately owned.

I. Internal roadway plan and sections to be submitted with the initial Building Permit to match the Preliminary Utility Plan, which may be modified to provide consistency with these conditions.

J. For the Primary Access Road (“the spine road”), submit a final design which includes the addition of a planter strip between the Primary Access Road and sidewalk to the east of the drugstore building and proposed relocation of crosswalks by the drugstore as set out in Hearing Exhibit No. 53. As approved by the City Development Engineer, the layout depicted in exhibit 42 shall be modified to eliminate crosswalk A; shorten the divider strip so that its northern tip does not extend north of the northeast corner of building 4 and the bulb is removed; reduce the intersection offset for the driveways north of buildings 4 and 5; and provide a pedestrian walkway along the western edge of the rain garden north to the ProBuild entry. Crosswalks B and D shall be elevated 6 inches above adjacent grade where they cross the spine road, be constructed from materials that contrast with the driving surface, and be flanked on both approaches by speed humps or tables. The spine road will be posted with a 15 mph speed limit, but the speed limit will not be enforced by the City of Bainbridge Island.

K. A safety study and facility design shall be submitted by the applicant for construction of a crosswalk on High School Road at the Polly's Lane intersection. Study and design parameters will be established by the City's Development Engineer.

L. A full right-turn lane shall be constructed by the applicant on High School Road between the spine road exit and SR 305, as approved by the City Development Engineer. This may require the dedication of additional right-of-way and relocation of sidewalks and curbs.

M. A turning radius analysis and design shall be submitted for construction of the right-turn exit from the spine road to High School Road that will allow 5-axle semi-trailer trucks to depart the site westward without crossing out of the right-turn lane on High School Road.

N. The facilities required by subsections K, L and M above shall be installed prior to occupancy of the first site building. The facilities required by subsection J shall be installed before occupancy of the first building located east of the spine road.

O. The applicant is responsible for all regulatory and street names signs in accordance with the Manual on Uniform Traffic Control Devices (MUTCD) and City requirements.

P. Show the location of mailboxes for all buildings within the site plan.

Q. A design for limiting Polly's Lane to one-way southbound traffic use, with left and right turn movements provided to High School Road and a 20 mph speed limit, shall be submitted to the City Development Engineer for approval. The applicant will install "One Way" and "Do Not Enter" signs. The design shall also prohibit placement of street lights along Polly's Lane. The design features listed above will also require Fire Marshal review and approval. A "Local Traffic Only" sign shall be placed on the corner of the intersection of Stonecress Drive and High School Road, and a "No Trucks" sign shall be placed at the Applicant's Development exit to Polly's Lane. The site development exit design shall include features for preventing or discouraging entry from Stonecress Lane. A crosswalk shall be placed just south of Stonecress Drive across Polly's Lane. Once the conceptual approvals required by condition 44 below have been obtained, the facilities required by this condition all shall be installed prior to the connection of the Applicant's Development to Polly's Lane.

Water and Sewer Improvements:

R. On-site water and sanitary sewer main extensions shall be publicly owned and maintained.

S. Consistent with Bainbridge Island Municipal Code Section 13.18.010, the water main shall be extended from High School Road the full length of the property. A gate valve shall be installed on the water main on the northern property line as to not limit future main extensions.

T. Consistent with Bainbridge Island Municipal Code Section 13.18.010, the sewer main shall be extended from High School Road the full length of the property. A manhole shall be installed on the end of the sewer main on the northern property line to facilitate future expansion. The sewer main from the manhole on High School Road shall be placed at minimum slope requirements as listed for 8-inch pipe within the Washington State Department of Ecology, Orange Manual as to not limit future gravity sewer extensions.

U. Water and sewer main extension shall be located in 15-foot wide easements. All mains shall be accessible by maintenance vehicles to the satisfaction of the City Engineer.

V. A water and sewer availability application, binding commitment limited reservation shall be completed for Site Plan Review and a binding commitment unlimited reservation completed prior to building permit issuance.

Permits Required:

X. As stated above, a NPDES permit from the Department of Ecology will be required prior to ground disturbing activities.

Y. A ROW permit will be required prior to any work within the right of way. The ROW permit will be subject to separate conditions and bonding requirements.

24. Parking shall be improved in substantial conformance with the approved site plan. Parking area shall be paved, all stalls shall be striped to their full dimensions and appropriate signage shall be placed at each handicap stall(s). Each parking stall is to meet the dimensional standards of BIMC Table 18.15.020-3 outside of required driving aisles or minimum sidewalk width of five feet.
25. The site shall provide parking spaces and charging stations for at least one electric car per building as well as five (5) parking spaces for motorcycles.
26. No more than 30 percent of the required parking spaces may be designated as compact spaces. All compact spaces shall be property identified as "compact".
27. The primary walkways throughout the development shall meet accessibility requirements and shall be surfaced with nonskid hard surfaces and provide a minimum of five feet of unobstructed width.
28. As shown on the site plan, where pedestrian walkways cross driving aisles, contrasting construction material, such as stamped concrete or pavers shall be used for the cross walk.
29. A minimum of 53 bicycle spaces are required for this development; a proportional number of spaces are to be installed in conjunction with the completion of each building. The racks or wall hangers need to provide the ability to lock wheel and frame of bicycle. At a minimum there should be bicycle racks associated with each building within the development. The site will provide a commuter bike shelter accommodating 8 bicycles prior to the last building receiving a certificate of occupancy.
30. A bus shelter shall be constructed within close proximity of the existing bus stop along Highway SR305. The shelter shall be of similar quality and architectural style as the rest of the Visconsi Master Plan or shall meet the Kitsap Transit standard and shall be constructed prior to final occupancy of any building within the development. Appropriate permits from Washington Department of Transportation shall be obtained prior to construction.
31. Prior to issuance of any building permit, a final landscaping plan shall be submitted and approved for any buildings and landscaping work within that phase.
32. Prior to issuance of any building permit, a final landscaping plan shall be submitted and approved for both the full landscaping screen along the east edge of the property adjacent to the Stonecress

development and the averaged 50-foot full-screen landscaping buffer along Highway SR 305. The SR 305 full-screen buffer shall project south toward the High School Road intersection to the maximum extent feasible consistent with traffic and pedestrian safety, as determined by the City's Development Engineer.

33. All landscaping plans shall be in substantial conformance with the preliminary landscaping plan (Sheet L4) date stamped received September 9, 2013, except that street trees shall be provided along High School Road on 30-foot centers.
34. All landscaping shall be installed per the approved landscaping plans for each phase or a performance assurance device shall be submitted and approved, prior to final inspection of any building. The installation of landscaping shall be verified by the Landscape Professional and the landscaping declaration shall be signed.
35. Prior to the final inspection of the first building within this development the full landscaping screen along the east edge of the property adjacent to the Stonecress development and the 50 averaged foot full screen along Highway SR305 shall be installed or a performance assurance device shall be submitted and approved.
36. Prior to temporary occupancy of any building, a landscaping maintenance assurance device for the required landscaping shall be provided to the City for a period of three years. All landscaping and buffers shall be maintained for the life of the project.
37. In order to define the circulation system and pedestrian separation, raised curbs shall be used to separate landscaping and raised walkways from parking stalls and drive aisles.
38. Exterior trash receptacles/recycling facilities shall be fully screened with solid walls and gates. The screening enclosures shall be architecturally consistent with the adjacent structures. All enclosures serving associated buildings shall be constructed and inspected prior to final inspection of the associated building.
39. At the time of building permit submittal, detailed lighting plans demonstrating compliance with the lighting standards shall be submitted for review and approval by the City
40. All mechanical equipment shall either be located underground, incorporated into landscaping or integrated within the building or roof form of the building. Parapet walls may be used to screen roof top mechanical equipment as long as equipment is completely obscured from view and the parapet does not substantially detract from the building architecture.
41. A minimum of 40 tree units per acre shall be maintained across the Visconsi Master Plan Development either through preservation of existing trees or planting of new trees (326.4 tree units as defined by BIMC Chapter 18.15).
42. The wetland buffer enhancement mitigation plan shall be approved and all invasive species removal and wetland restoration completed prior to occupancy of the first building on the site. This deadline requirement implements (but does not contradict) SEPA condition no. 4.
43. The applicant shall verify compliance with the City's Noise Ordinance by conducting two (2) site visits by a certified noise expert during first year of full project occupancy, taking readings during a Friday P.M. peak traffic hour. If noise readings show the site is not in compliance, the applicant will be required to bring the site into compliance via noise softening measures.

44. In addition to Fire Marshal approval as specified by condition 23(Q) above, conversion of Polly's Lane to a one-way outbound roadway is deemed to require the consent of the Stonecress Home Owners Association (SHOA) and Kitsap Bank. If all consents and approvals necessary for this conversion have not been secured within one year of the date of this decision (which will be considered final for such purposes when all reconsideration procedures and judicial appeals have been concluded), the following procedures shall apply:

A. If SHOA consent has been withheld, this shall constitute implied SHOA acceptance of the impacts of the Visconsi development under Stonecress road conditions as they presently exist, compliance with condition 23(Q) above shall be deleted as a development requirement for the Visconsi project, and construction may proceed under the remaining terms of this approval; provided that, the following requirements of condition 23(Q) shall continue to apply: the 20 mph speed limit and crosswalk for Polly's Lane and the "No Trucks" and "Local Traffic Only" signage.

B. If either Kitsap Bank consent or Fire Marshal approval is withheld, the hearing will be reopened to explore alternative options for limiting site traffic impacts to Stonecress. Due to its limited interest in Polly's Lane, consent by Kitsap Bank may be determined unnecessary, and other access solutions may exist that satisfy the Fire Marshal's concerns.

C. Hearing Examiner jurisdiction over this proceeding is retained for the limited purpose of entertaining alternative access options if required consents to convert Polly's Lane to one-way use and implement the other related requirements of condition 23(Q) cannot be secured. During retention of this jurisdiction any party may request the hearing to be reopened for the purposes specified, which may include requests that conditions be modified because other parties are failing to act in good faith. Condition 23(Q) may be revised and new conditions added pertaining to Polly's Lane access, if required.

D. Hearing Examiner jurisdiction will terminate automatically upon receipt of all necessary consents and approvals as described above, or otherwise upon the Examiner's order.

45. The applicant will establish and staff a 24-hour complaint hot line, to be commenced at a time mutually agreed to with the Planning Director.

46. Prior to issuance of a building permit for any structure, the applicant shall demonstrate that as installed any proposed HVAC units will comply with the City of Bainbridge Island Noise Ordinance.

47. Applicant shall state within an appropriate legal document that any vehicle larger than a single unit – three-axle truck will be prohibited on Polly's Lane and that service and delivery vehicles will be restricted to the hours of 7 a.m. to 9 p.m.

48. Applicant will state within an appropriate legal document its commitment that any tenant shall utilize the latest in Green Building techniques to the extent feasible. Pursuant to such document, the tenant will be encouraged to use proven techniques such as high-efficiency windows, recycled

building products, and occupancy lighting controls in order to reduce energy consumption.

49. A. A change of use approval from City is required before any building use is converted. Conversion of the proposed medical center (building 5) to a retail use is prohibited, and its conversion to a permitted use with an ITE trip generation rate higher than 5.0 trips per 1000 square feet shall require a new conditional use permit.

B. Site plan review approval is predicated upon the visual integrity of the site design and its success in establishing a harmonious relationship among the component structures, as elaborated in the City's Design Guidelines and generally represented in exhibits 28-1 through 28-18. For each building permit application the Planning Staff shall determine whether the proposed development's design is consistent with the design concepts illustrated in exhibits 28-1 through 28-18 and, based on an affirmative determination, may issue the permit. Staff may consult with the Design Review Board in making this determination. If Staff concludes the requisite design harmony and integrity are lacking and a determination of inconsistency is indicated, the application shall be returned to the applicant with suggestions describing the changes necessary to create design consistency. Alternatively, the applicant may request an adjustment to an approved site plan pursuant to BIMC 2.16.040.G.

50. Within 60 days from the Hearing Examiner project approval date, the Applicant will consent to having an interested citizen remove for his or her own re-use the existing green structure located near the current ProBuild entrance on High School Road. The Applicant will not dismantle the structure. After consent is obtained, the interested citizen will have 15 days to remove the structure from the property.

ORDERED March 27, 2014



Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The Hearing Examiner is authorized to make the City of Bainbridge Island's final decisions regarding the Visconsi site plan review and conditional use permit applications and SEPA threshold determination appeal. A party with standing may seek judicial review of these decisions by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.

EXHIBIT LIST

**SEPA MDNS Appeal
and
Permit Application**

**Visconsi Master Plan
Site Plan Design Review and Conditional Use Permit
SPR/CUP 17734**

Staff Contact:
Josh Machen, Planning Manager

Public Hearing: January 16, 17, 21, 22 and 28, 2014
Location: City Hall

Hearing Examiner: Stafford Smith

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
1	Staff Report Attachments: A. Public Participation Meeting Summary and Comment Matrix B. Site Plan and Design Review Application, Submitted April 24, 2013 C. Conditional Use Permit Application, Submitted April 24, 2013 D. Owner/Agent Agreement and Legal Descriptions E. Site Plans and Perspectives A0.0 – A0.5 F. Building Elevation and Perspective Plan A1.0-A17.0 G. Landscape Plans L1-L12 H. Preliminary Civil Plans C1-C5 I. Project Description/Zoning Summary Prepared by Wenzlau Architects J. Planting Plan Supplemental Information Appendix K. Tree Retention Analysis L. Traffic Impact Analysis Prepared by Transpo Group April 2013 M. Wetland Analysis Prepared by Christy Carr N. Wetland Analysis and Rating Form Prepared by Ryan Erickson and Sara Cooke O. Water/Sewer Availability Request P. Utility Report Prepared by Browne Wheeler Engineers, Inc, April 24, 2013 Q. Civil Plan Revision 1 Memo from Browne Wheeler, Sep. 5, 2013 R. Environmental Checklist S. Geotechnical Evaluation, Prepared by Aspect Consulting, April 17, 2013 T. Notice of Application, Published June 7, 2013 U. Revised Notice of Application, Published July 5, 2013 V. Public Comment (1-130) W. Response to Public Comment, Prepared by Wenzlau Architects X. Response to O'Hartigan's Comment Letter, Prepared by Browne Wheeler Inc. Y. Overview of Traffic Report and Response to Comments, Prepared by City's Development Engineer Z. Development Engineer Project Review Memo AA. Certificate of Concurrency BB. Public Works Operations and Maintenance Comments CC. Non-Motorized Transportation Advisory Committee Chair Comments DD. Kitsap Public Health District Comments EE. Bainbridge Island Fire Department Comments FF. Building Division Comments GG. Design Review Board Minutes, March 26, 2012	10/3/2013 (Dated)

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
	HH. Design Review Board Minutes, April 23, 2012 II. Design Review Board Minutes, June 18, 2012, with attached annotated checklists JJ. Design Review Board Minutes, May 20, 2013 KK. Response to DRB Design Comments, prepared by Wenzlau Architects, June 2013 LL. Design Review Board Minutes, June 17, 2013 MM. Design Review Board Guideline Checklist with DRB and Staff Responses NN. WSDOT Design Manual Chapter 1515	
2	Planning Commission Regular Meeting Minutes	10/10/2013 (Dated)
3	Vehicular, Pedestrian and Utilities Easement	10/15/2013 (Received)
4	Memo from Planning Manager to Planning Commission re SEPA Conditions	10/16/2013 (Dated)
5	Planning Commission Regular Meeting Minutes	10/24/2013 (Dated)
6	Planning Commission Special Meeting Minutes	11/14/2013 (Dated)
7	Notice of SEPA Mitigated Determination of Nonsignificance (MDNS)	11/22/2013 (Dated)
8	SEPA MDNS Appeal	12/06/2013 (Received)
9	Notice of Appearance (Dennis D. Reynolds)	12/10/2013 (Received)
10	Motion to Dismiss Claim and for More Definitive Statement as to Allegations (A)-(I) in IRD's Appeal	12/18/2013 (Received)
11	Certification of Distribution and Posting	12/27/2013 (Published)
12	Hearing Examiner Pre-Hearing Order	12/29/2013 (Dated)
13	Letter from Applicant's Attorney Stating Intent to Pursue CUP	12/30/2013 (Dated)

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
14	Petitioner Witness List/Issue Clarification	12/31/2013 (Dated)
15	City Attorney Haney's Emailed Expert Witness List	12/21/2013 (Dated)
16	Applicant's Expert Witness List	12/31/2013 (Dated)
17	City's Response to Appellant's Issue Clarification (Appeal Issue No. 1)	01/02/2014 (Dated)
18	Applicant's Response to Appellant's Issue Clarification (Appeal Issue No. 1)	01/02/2014 (Dated)
19	Hearing Examiner's Supplement to Pre-Hearing Order	01/6/2014 (Dated)
20	Applicant's Motion to Dismiss SEPA Appeal	01/07/2014 (Dated)
21	City of Bainbridge Island's SEPA Appeal Exhibit List	01/07/2014 (Dated)
22	Applicant's Revised Exhibits Disclosure SEPA Appeal	01/07/2014 (Dated)
23	Hearing Examiner's Order Denying Motion to Dismiss	01/08/2014 (Dated)
24	Petitioner Exhibit List/Additional Issue and Witness Clarification	01/08/2014 (Dated)
25	Letter from Applicant's Attorney re Hearing Examiners Order Denying Motion	01/09/2014 (Dated)
26	Project Report Attachments: OO. Planning Commission Findings and Recommendation PP. Planning Commission's Second Motion QQ. Transpo Group Memo Dated November 8, 2013, Supplemental Information RR. Memo from City's Development Engineer regarding Pedestrian Crosswalk Placement on City Streets SS. SEPA Mitigated Determination of Nonsignificance, Dated November 22, 2013 TT. SEPA Appeal by Islanders for Responsible Development	

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
	UU. Memo from Development Engineer regarding Traffic Safety, Dated November 8, 2013	
27	Public Comments (Including Comments Submitted at 1/16/14 Hearing)	10/2013 to 01/2014
28	Applicant Visconsi Exhibits – Volume I	01/17/14 (Received)
29	Applicant Visconsi Exhibits – Volume II	01/17/14 (Received)
30	Thorpe Analysis	01/17/14 (Received)
31	Revised Declaration of Georg Syvertsen (dated January 10, 2014)	01/17/14 (Received)
32	Chichester Submittal <i>(Renumbered and filed as Exhibit 60)</i>	01/22/14 (Received)
33	Stonecress Photos Submitted by B. Andrews <i>(Renumbered and filed as Exhibit 54)</i>	01/22/14 (Received)
34	Resume of Ross Tilghman <i>(Renumbered and filed as Exhibit 44)</i>	01/22/14 (Received)
35	Resume of Olaf Ribeiro <i>(Renumbered and filed as Exhibit 63)</i>	01/27/14 (Received)
36	Planning Commissioners' Bios	01/22/14 (Received)
37	Code Citations	01/22/14 (Received)
38	Drainage Plans	01/22/14 (Received)
39	Cooke Scientific Letter dated January 20, 2014, and Resume	01/22/14 (Received)
40	Woodland Distances Diagram	01/22/14 (Received)
41	Proposed Lot Lines	01/22/14 (Received)

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
42	Pedestrian Circulation	01/22/14 (Received)
43	Stonecress Traffic Calming	01/22/14 (Received)
44	Resume of Ross Tilghman	01/22/14 (Received)
45	Tilghman – Traffic Generation Table	01/22/14 (Received)
46	Tilghman – LOS and Queues	01/22/14 (Received)
47	Tilghman – Queuing and Blocking Report	01/22/14 (Received)
48	Tilghman – HCM Signalized Intersection Capacity Analysis	01/22/14 (Received)
49	Transpogroup Memo	01/22/14 (Received)
50	Second Revised Declaration of Georg Syvertsen	01/20/14 (Dated)
51	Visconsi Comments on Project Report Conditions	01/28/14 (Replaced)
52	Islanders for Responsible Development Conditions Testimony	01/26/14 (Dated)
53	Wenzlau Memo in Response to Traffic Safety Concerns	01/21/14 (Dated)
54	Stonecress Photos Submitted by B. Andrews	01/22/14 (Received)
55	Hand Drawn Diagram of Polly Lane	01/22/14 (Received)
56	Charles Schmid Presentation Regarding Noise Impacts	01/22/14 (Received)
57	Sound Analysis for Penny Creek Retail Center	02/27/06 (Dated)

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58	Port Orchard Wal-Mart Sound Analysis (2005)	01/22/14 (Received)
59	Declaration of Errol Nelson	01/22/14 (Received)
60	Chichester Submittal	01/22/14 (Received)
61	Ron Peltier Aerial Photos	01/27/14 (Received)
62	Ron Peltier Presentation	01/27/14 (Received)
63	Olaf Ribeiro Resume	01/27/14 (Received)
64	Guidelines for Predicting Noise Impacts	01/27/14 (Received)
65	Nelson – Noise Evaluation	01/26/14 (Dated)
66	Aerial Photo Showing Tree Stands	01/28/14 (Received)
67	Diagram of Access Road Design	01/28/14 (Received)
68	Applicant Visconsi's Voluntary Mitigation	01/28/14 (Received)
69	Resume of Bruce MacCoy	01/30/14 (Received)
70	Excerpts From Winslow Master Plan, May 21, 1998	02/03/14 (Received)
71	Visconsi Supplemental Noise Evaluation	02/03/14 (Received) 02/18/14 (Revised)
72	Visconsi Noise Measurement Charts	02/03/14 (Received)

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
73	Legislative History Materials	02/07/14 (Received)
74	Schmid Response to Nelson Noise Evaluation	02/14/14 (Received)
75	Applicant Visconsi's Voluntary Mitigation - Revised	02/18/14 (Received)