BEFORE THE HEARING EXAMINER FOR THE CITY OF BLACK DIAMOND

Phil Olbrechts, Hearing Examiner

RE: Villages Preliminary Plat 1A PLN11-0001	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

INTRODUCTION

The Applicant requests approval of a preliminary plat to subdivide 127.3 acres into 413 single family lots and 98 tracts. The preliminary plat is designed to accommodate single family, multi-family, commercial, light industrial and school uses. Consolidated with the plat application is an appeal of a mitigated determination of non-significance issued for the plat under the Washington State Environmental Policy Act, Chapter 43.21C RCW. In newly added SEPA mitigation measures, the Applicant is given a choice of either committing to building pedestrian improvements to Rock Creek Bridge or in the alternative doing a limited scope environmental impact statement on the pedestrian safety impacts created by the proposal as they relate to the bridge. If the Applicant chooses to do the pedestrian improvements, the MDNS is sustained with several added conditions and the preliminary plat is approved with several conditions added to those recommended by staff. SEPA mitigation measures resulting from the SEPA Appeal are listed at p. 79-81of this decision.

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ACRONYMS

CSMA: Comprehensive School Mitigation Agreement

HPA: Hydraulic Permit Approval

MDNS: Mitigated Determination of Non-significance

MDRT: Master Development Review Team

FEIS: Final Environmental Impact Statement

PP1A: Villages Preliminary Plat 1A

QAPP: Quality Assurance Project Plan

SEPA: Washington State Environmental Policy Act, Chapter 43.21C RCW

Villages DA: Villages Development Agreement

Villages MPD: Villages Master Plan Development.

Villages MPD COA: Villages MPD Condition of Approval

Villages MPD COL: Villages MPD Conclusion of Law

Villages MPD FOF: Villages MPD Finding of Fact

ORAL TESTIMONY

A summary of the hearing testimony is attached as Appendix C.

EXHIBITS

Procedural issues pertaining to the conduct of the SEPA appeal portion of the hearing were handled by email between the Examiner and SEPA Appellants prior to the hearing. These emails are listed in Appendix B. The Examiner disclosed the communications at the commencement of the hearing and noted that the email communications were available upon request. No requests were made. At the close of the hearing the Examiner announced that some remaining factual and procedural issues pertaining to the SEPA appeal would be handled through email communications. Only the SEPA appellants, Applicant and City were still present at this time, although the hearing continued to be open to anyone who wished to attend. No one objected to this procedure.

In addition to the emails identified in Appendix B, the following exhibits were admitted during the hearing:

1. The Villages FEIS including all exhibits, December 2009
2. The Villages MPD Phase 1A Preliminary Plat drawings
3. SEPA checklists; Original (2/2/11) and revised (4/25/12); revised checklist supplement (7/3/12)
4. *Results of Subsurface Exploration and Laboratory Testing Stormwater Infiltration Evaluation*, Golder Associates, April 21, 2010.
5. Geotechnical Report*, Golder Associates, October 8, 2010.

6. Geotechnical Report * Stormwater Infiltration Pond*, Golder Associates, January 21, 2011.
7. Drainage Report*, Triad Associates, January 26, 2011; Addendum #1, (6/28/12)
8. Stormwater Monitoring and No Net Phosphorous Implementation Plan*, Exhibit *O* to The Villages MPD Development Agreement.
9. The Villages and Lawson Hills Master Planned Developments Pre-Construction Stormwater Monitoring in Rock Creek and the Establishment of an Interim Baseline Phosphorous Load*, Tetra Tech, July 23, 2012.
10. Maple Valley Transportation Mitigation Agreement*, October 6, 2010, Exhibit *Q* to The Villages MPD Development Agreement.
11. Covington Transportation Mitigation Agreement*, December 14, 2010, Exhibit *R* to The Villages MPD Development Agreement.
12. Comprehensive School Mitigation Agreement*, January 24, 2011.
13. Tree Inventory*, International Forestry Consultants, Inc., January 31, 2011 and by S.A. Newman Firm, March 14, 2011.
14. Short-Term Construction Noise Mitigation Plan*, January 31, 2011.
15. Construction Waste Management Plan*, Exhibit *J* to The Villages MPD Development Agreement.
16. Traffic Impact Study*, Transpo Group, January 2011; update memo May 15, 2012; response memo June 28, 2012.
17. Sensitive Area Study*, Wetland Resources, May 9, 2012; response memo July 17, 2012; second response memo July 30, 2012.
18. Final staff Evaluation of The Villages MPD Phase 1A Preliminary Plat SEPA checklist and MDNS issued for The Villages MPD Phase 1A Preliminary Plat
19. Notice of Extension of SEPA Comment/Appeal Period
20. Preliminary Plat Staff Report and exhibits
21. Photograph of Rock Creek Bridge (appellant ex. 38-3)
22. Pg. 17 of Black Diamond Capital Improvement Plan (appellant ex. 30)
23. Black Diamond Six Year Transportation Plan (appellant ex. 49)
24. 11/1/12 Email from Fisher to Proctor (appellant ex. 34)
25. Photograph of Rock Creek Wetlands(appellant ex. 38)
26. 2/25/10 Letter from Larry Fisher to Steve Pilcher (appellant ex. 35)
27. 9/21/12 Letter from Rob Zisette to Cindy Wheeler (appellant ex 23)
28. 10/19/12 Email from Mark Buscher (appellant ex 78)
29. 6/28/12 letter from Triad to City (appellant ex. 65)
30. 10/1/12 Letter from Steve Pilcher to Mark Buscher (appellant ex. 46)
31. William Shiels Declaration, dated October 31, 2012
32. Scott Brainard Declaration, dated October 29, 2012
33. Sensitive Areas Ordinance Best Available Science report
34. 10/8/12 Perlic email to Williamson
35. 2012-2017 Enumclaw School District Capital Facilities Plan
36. 9/25/12 Memo from Fure to Williamson, (appellant ex. 69)
37. 1/25/11 Letter from Lund to Pilcher and Williamson
38. 1/11/11 Letter from Tetra-Tech to Black Diamond
39. Declaration of James Johnson, dated 10/30/12

40. Fiscal Impact Analysis dated 9/20/12
41. Declaration of Chris Austin, dated October 29, 2012
42. Declaration of Dan McKinney, Jr., dated October 30, 2012
43. Declaration of Darren Peugh, dated October 30, 2012
44. Declaration of Alan Fure, dated October 30, 2012
45. 6/11/12 Letter from Williamson to Lund
46. 9/5/12 Memo from Dan McKinney to Lund
47. Jason Walker CV
48. John Perlic CV
49. 11/2/12 letter from Paulette Norman to Pilcher
50. 1/25/10 Letter from Timothy Lane to Dan Dal Santo
51. Pre-Hearing Order II dated October 15, 2012.
52. Order on Motions for Dismissal dated 10/31/12
53. Order on Motion to Strike Dated 10/31/12
54. Duplicate of Ex. 182 issues
55. 2/17/11 letter from Buscher to Williamson (appellant ex. 41)
56. Dan Ervin CV
57. 8/3/12 letter from Buscher to Williamson (appellant ex.43)
58. 9/13/12 email from Buscher to Williamson
59. P. 418-19; 1443-44; 1568, 1580, 3375 and 3389-90 of FEIS Appeal hearing transcript, AR 584-88, 1068-70, 1087, 1150-51. (SEPA Appellant No. 22)
60. Hearing Examiner Recommendation on Villages Development Agreement
61. 11/02/12 Staff Report errata
62. Villages Aerial Photograph – "Regional Context" shows boundary of City
63. Applicant's "Guide to Preliminary Plat 1A"
64. P. 3-4 of Villages MPD application as revised 12/31/09
65. Use map with lot designation
66. Villages Preliminary Plat 1A Open Space
    a. 11/2/12 letter from Eric to Examiner with attachments (entered as a second Ex. 66)
67. Photo of 40 car queue near Rock Creek Bridge, taken Sept 29 (appellant ex. 38 "Rock Creek Bridge Traffic")
68. Rimbos written testimony
69. 6/11/12 letter from Williamson to Lund (Appellant Ex. 66)
70. 8/15/12 Construction Threshold Evaluation from Dan Ervin (Appellant Ex. 8)
71. 9/12/12 memo from Perlic to Williamson (Appellant Ex. 12)
72. 6/13/12 deviation requests (alley and road)
73. 6/15/11 letter from Lund to Pilcher
74. June 11, 2012 letter from Lund to Pilcher
75. Revised Staff Report narrative submitted April 25, 2012
76. 9/14/12 letter from Brainard to Lund
77. Stormwater Monitoring Requirements; Portion of Ex. O to Villages Development Agreement dated 1/3/2011
78. Design Review Committee Approval letter to Pilcher 2/1/2011
79. 10/4/10 Triad Memo to Seth Boettcher

80. 7/24/12 Water Availability Certificate from Covington Water District
81. 3/16/11 Email from Megan Nelson to Steve Pilcher re owner information
82. MDRT Preliminary Plat 6/11 comments from MDRT and Applicant response
83. 3 Mailing Lists for the MDNS, notice of extension, and notice of combined hearing
84. 10/8/12 Perlic to Williamson (Appellant Ex. 15)
85. Replaced by Ex. 93.
86. 9/11/12 email strings, Pilcher to Boettcher to Rothschild to
87. 9/20/12 email from Rothschild to Pilcher
88. 6/11/2012 Email from Andy Williamson to Mark Buscher (appellant exhibit 40)
89. Chapter 7 Villages Master Plan Application (appellant ex, 42, 50, 73)
90. 8/18/10 Buscher to Boettcher (appellant ex. 44)
91. Applicant proposed conditions of approval
92. Edelman FIA Rebuttal sent by email dated 11/5/12
93. Chapter 3 and Appendix A to NCHRP
94. Undated Memo from Transpo to Lund, "Main Street Intersection Control", SEPA Appellant Ex. 18.
95. Second Declaration of Alan D. Fure, dated 11/8/12.
96. Declaration of Dan Ervin, dated 11/8/12.
97. SEPA Appellant Objection to City of Black Diamond-Dec. of Dan Ervin
98. Objection Applicant Dec. of Alan Fure dated 11/8/12
99. 11/3/12 Watling public comment
100. 11/5/12 Erica Morgan email to Nelson et al
101. 11/2/12 Email from Sperry to Martinez
102. 9/20/12 Letter from Buscher to Pilcher (appellant ex. 45)
103. 10/1/12 Letter from Pilcher to Buscher
104. 10/19/12 email from Buscher to Sperry
105. 10/31/12 email from Walter to Pilcher
106. Pre-Hearing Order I
107. Pre-Hearing Order II
108. City's Opening SEPA Appeal Brief, Witness and Exhibit List dated 10/19/12.
109. Applicants SEPA Appeal Opening Brief dated 10/19/12.
110. Applicant's Disclosure of Witnesses and Exhibits dated 10/19/12.
111. Appellant's Pre-Hearing Brief dated 10/19/12.
112. Appellant's Exhibit List dated 10/19/12.
113. Sarah Cook CV
114. Applicant's Motion to Dismiss and to Strike, dated 10/23/12
115. Appellant SEPA Rebuttal Brief dated 10/26/12.
116. Applicant SEPA Rebuttal Brief dated 10/26/12
117. City SEPA Rebuttal Brief dated 10/26/12.
118. Appellant Response to Motion to Dismiss and Strike, dated 10/30/12.
119. Order on Motion to Strike, dated 10/31/12.
120. Applicant's SEPA Reply Brief, dated 10/31/12
121. City's SEPA Reply Brief, dated 10/31/12
122. Appellant's SEPA reply Brief, dated 10/31/12
123. Order on Dismissal, dated 10/31/12

124. Zisette CV
125. Appellant Relevance Statement on Appellant Ex. 16, 17 and 18 submitted by email dated 11/5/12.
126. Appellant Relevance Statement on Appellant Ex. 44 submitted by email dated 11/5/12.
127. Appellant Relevance Statement on Appellant Ex. 72 submitted by email dated 11/5/12.
128. P. 10, 19 and 20 of Applicant LUPA response brief submitted by email dated 11/5/12.
129. P. 25 of City LUPA Response brief submitted by email dated 11/5/12.
130. Appellant Motion to Reconsider Rock Creek Safety Ruling submitted by email dated 11/5/12.
131. Appellant Response to Applicant Proposed COAs submitted by email dated 11/5/12.
132. Appellant Transportation Rebuttal submitted by email dated 11/5/12.
133. Appellant "final draft" Wetland Rebuttal submitted by email dated 11/5/12.
134. Appellant Wetland Reconsideration Issues submitted by email dated 11/5/12.
135. City Objections to Transportation Rebuttal dated 11/6/12.
136. Ex. A to City's Objections to Transportation Rebuttal submitted by email dated 11/6/12.
137. 11/6/12 email from Applicant objecting to SEPA Appellant Transportation Rebuttal.
138. 11/7/12 email from Edelman responding to Transportation Rebuttal objections.
139. 11/7/12 email from Applicant objecting to SEPA Appellant Ex. 16, 17, 72, 76 and 77.
140. Appellant Response to Objections to Appellant Ex. 72 submitted by email dated 11/7/12.
141. Appellant Response to SEPA Appellant Ex. 16 and 17 submitted by email dated 11/7/12.
142. 11/7/12 email order regarding various procedural issues and denying reconsideration of wetland issues.
143. 11/8/12 Email from Applicant responding to Appellant Motion for Rock Creek Request for Reconsideration.
144. Declaration from Dan Ervin, dated 11/8/12.
145. Applicant's Response to Ex. 27 and 90 and Cook Rebuttal with four attachments, dated 11/8/12.
146. 11/9/12 email order admitting SEPA Appellant Ex. 44 (Ex. 90).
147. 11/9/12 Appellant email replying on motion for reconsideration of Rock Creek.
148. Applicant's Preliminary Plat Rebuttal/Closing, dated 11/9/12.
149. City's Preliminary Plat Rebuttal/Closing, dated 11/9/12.
150. 11/9/12 Email order addressing procedural issues.
151. Appellant Objection to Ervin declaration, submitted by email dated 11/12/12.
152. Appellant Objection to Fure declaration, submitted by email dated 11/12/12.
153. 11/12/12 email from Applicant responding to objection to Fure declaration.
154. 11/12/12 email from Applicant follow-up on SEPA Appellant Ex. 16 and 17.
155. 11/12/12 Order denying admission of SEPA Appellant Ex. 72.
156. Appellant Objections to Applicant PPA Rebuttal/Closing, dated 11/12/12.
157. Appellant Objections to City PPA Rebuttal/Closing, dated 11/12/12.
158. 11/13/12 email order reversing portions of order on dismissal.
159. Appellant Response to Herrera Rebuttal, submitted by email dated 11/13/12.
160. Appellant Reply to Cook Testimony dated 11/13/12.

161. Appellant Proposed COA on Covington Waster District issue, submitted by email dated 11/13/12.
162. 11/13/12 email from City replying to Ervin and PPA closing/rebuttal objections with attachment.
163. 11/13/12 email from Applicant replying to PPA closing/rebuttal objections.
164. 11/14/12 email order clarifying 11/13/12 order.
165. 11/14/12 email from Appellant regarding City PPA closing/rebuttal objections.
166. 11/14/12 email from City regarding City PPA closing/rebuttal objections.
167. Applicant's Objections to Appellant's Rebuttal and Proposed COA, dated 11/14/12.
168. 11/14/12 email order on Applicant's objections to SEPA Appellant traffic rebuttal.
169. 11/14/12 email order on City's objections to SEPA Appellant traffic rebuttal.
170. 11/15/12 email order on Erica Morgan Comments.
171. 11/15/12 email order admitting Fure and Ervin declarations.
172. 11/15/12 email from Appellants regarding SEPA Ex. 17.
173. 11/15/12 email order on objections to Applicant PPA rebuttal/closing.
174. 11/15/12 email order admitting City's PPA rebuttal/closing.
175. 11/15/12 email order on objections to Applicant PPA rebuttal/closing.
176. 11/15/12 email order on objections to City PPA rebuttal/closing.
177. 11/15/12 email from Appellants addressing formerly dismissed issues with five attachments.
178. 11/15/12 email order admitting SEPA Appellant Ex. 16 and 18 and requesting more information on Ex. 17.
179. 11/15/12 email order on objections relating to Herrera Report.
180. 11/15/12 email order on objections to COA on Covington Water District.
181. 11/16/12 email order admitting portions of SEPA Appellant Ex. 17.
182. Email correspondence between SEPA parties, separately identified in Appendix B.
183. 11/19/12 email from Megan Nelson with transcript of Wheeler testimony
184. 11/19/12 email from Cindy Proctor with replies on Rock Creek Bridge and Proposed Traffic COAs
185. 11/20/12 email from Megan Nelson with objections to SEPA Appellants and Declaration of McKinney
186. 11/21/12 email from Robert Edelman regarding Applicant objections
187. 11/21/12 email from Robert Edelman regarding exhibit lists
188. 11/21/12 email from Robert Edelman with attached Appellants Ex. 22.
189. 11/21/12 email from Megan Nelson regarding 11/15/12 submittal
190. 11/21/12 email from Bob Sterbank regarding reconsideration approval
191. 11/26/12 email from Robert Edelman regarding reply to reconsideration responses
192. Applicant's Response to SEPA Appellants' Proposed SEPA Conditions dated 11/16/2012
193. Applicant's Comments regarding the Declaration of Austin Fisher, dated November 29, 2012
194. Applicant's Comments regarding the Declaration of Dan McKinney, dated November 29, 2012

195. Email from Thomas Hanson to Brenda Martinez, Andy Williamson & Steve Pilcher, dated 11-5-12 "Hearing examiner Yarrow Bay plat"; forwarded to the Hearing Examiner by Steve Pilcher in an email dated 11-5-12
196. Email from Cindy Proctor to Steve Pilcher & Stacey Welsh, dated 11-5-12 "TV PPA 1A Plat Comments due 4:00"; forwarded to the Hearing Examiner by Steve Pilcher in an email dated 11-5-12
197. Rimbos Written Preliminary Plat Comments, submitted by email dated 11/5/12.
198. 9/21/12 SEPA Appeal

*Appellant exhibit numbers are provided for reference only.

APPENDICES

Appendix A: Procedural rulings.

Appendix B: Email exhibits.

Appendix C: Summary of testimony.

SEPA APPEAL

I. Introductory Comments and Summary

As mitigated and conditioned by this decision, the threshold determination of the SEPA responsible official is sustained.

As usual, the SEPA Appellants have succeeded in raising several issues that will make the Villages MPD more compatible with their community. The Appellants have once again invested an incredible amount of their time and resources in ensuring that all of the detailed development standards carefully put together by their elected officials are faithfully and effectively administered. Their hard work and professional effort has once again made a major difference in this proceeding.

Despite the good work of the SEPA Appellants, many will no doubt notice that the changes they have effectuated are not as dramatic or comprehensive as what they have accomplished at the master plan and development agreement stages of review. There are many reasons for this. Probably the most significant is that the combined efforts of the Applicant, City and SEPA Appellants have already resulted in the mitigation of most project impacts in earlier stages of review. In a way, the Appellants are a victim of their own success, in that their prior appeals have not left much to be considered at this stage of review. Added to that success element, if the City and/or Applicant were inclined to try to "get away with anything", the Appellants have amply demonstrated that nothing is slipping past the Black Diamond community.

From a more pragmatic standpoint the SEPA Appellants may not have generated as much change as they hoped simply because they have a high burden of proof to establish that change is required. The Appellants have to overcome the substantial weight the Examiner has to give the determinations of the SEPA responsible official in assessing the significance of project impacts. For just about every significant issue, the City and/or Applicant were able to produce an expert witness who was able to testify that an alleged impact was not significant. Against this expert testimony and the substantial weight to be given to it, this meant that the Appellants had to come up with more compelling evidence to the contrary. In the typical "battle of experts" scenario between equally credible expert witnesses, a SEPA appellant will usually lose because of the substantial weight standard. In their appeal to the FEIS adequacy the SEPA Appellants made considerable headway because they had an army of expert witnesses to support all of their claims. The SEPA Appellants did not have that level of support in this appeal. Without that support, the SEPA Appellants were left with a monumental task to overcome the heavy burden of proof against them.

The SEPA Appellants apparently attempted to avoid the costs of expert witnesses by challenging the adequacy of review as opposed to the conclusions made from that review. Unfortunately for them, the courts also place a high burden on anyone challenging adequacy of review. In order to survive an adequacy challenge, the SEPA responsible official only has to make a prima facie showing that he has reviewed environmental factors as required by SEPA. The courts applying this standard have always applied it in a cursory and superficial fashion and have never found the adequacy of review wanting. Given the tremendous amount of study and analysis that has gone into the review of this project, the SEPA Appellants had a very difficult task of establishing inadequate analysis. It is not too surprising that on adequacy of environmental review, the SEPA Appellants only established a failure to make a prima showing on the Rock Creek Bridge pedestrian safety issue.

A common theme that the SEPA Appellants raised throughout their appeal was that environmental review had been deferred by the programmatic EIS to implementing projects such as PP1A. They argued that now is the time to do any deferred review. The Examiner is in full agreement with that viewpoint, and took a very critical look at any project impacts that may have fallen through the cracks between programmatic and project environmental review. Yet even setting aside the burden of proof placed upon the SEPA Appellants, there is nothing that has escaped this decision without adequate scrutiny or regulation. A major factor in this assessment is that project level impacts are thoroughly addressed by project level development standards. The City has adopted reams of stormwater, road, zoning, building and other development standards that apply to this project. Many of these standards are based upon model standards that have gone through decades of refinement from experts throughout the world. Those standards represent the most effective means of mitigating impacts that modern day science and development practices can reasonably apply. To the extent that anything is left for debate, the Applicant and City have undertaken a substantial amount of peer reviewed analysis.

Despite the many obstacles faced by the SEPA Appellants, they were still able to identify a few significant areas that needed improvement. The most significant and confounding SEPA appeal

issue was the pedestrian crossing of Rock Creek Bridge. No one except the SEPA Responsible Official was able to suggest that the bridge was safe for pedestrians. The bridge has virtually no shoulder and no other area for safe pedestrian passage. The bridge will see an increase of 828 PM peak hour trips per weekday upon full build out of the Villages MPD project. If the City Council has seen the need to require sidewalks along quiet residential streets, it seriously calls into question why no such pedestrian facilities are required along the bridge. The bridge serves as a connector between Morganville and the school and commercial areas serving PP1A. No one disputes that PP1A will result in an increase in pedestrian traffic across the bridge. Yet there was no SEPA or other review that included any assessment of how much pedestrian bridge traffic would be generated, whether students would be walking to school over the bridge from Morganville, what increase in accidents is estimated as a result of this added pedestrian traffic, what options there are for addressing pedestrian safety and what those options would cost.

Instead of doing an evaluation over the safety impacts associated with Rock Creek, the City and Applicant simply agree to propose a condition that provides that the Applicant will provide for a pedestrian crossing over Rock Creek if it is found feasible to do so. This condition leaves the very real possibility that the Applicant won't do any pedestrian improvements while probable significant adverse environmental impacts are left unmitigated. This can't happen under SEPA. Either the impacts are mitigated or an EIS is prepared. Unless the Applicant can generate a more creative solution in a reconsideration request, the only option left to the Examiner is to give the Applicant an option. Either (1) commit to doing the pedestrian improvements, or (2) the threshold determination is reversed and the SEPA responsible official is directed to do a limited scope EIS on the pedestrian safety impacts arising from increased pedestrian traffic over the Rock Creek Bridge.

The most blatant failure to address project impacts was the Applicant's "plan" to address project level noise impacts. SEPA conditions required the Applicant to put together a project level noise mitigation plan tailored to PP1A. The Applicant's plan simply duplicated the Villages MPD/SEPA mitigation measures that already applied to PP1A. Somehow this "plan" was approved by the City and allowed to move forward. This "plan" is obviously not what the Council had in mind when requiring further noise mitigation at the project level and more will be required as a condition of moving forward on this project.

Lake Sawyer water quality continues to be an issue in this proposal. In this appeal the Appellants have focused upon the relatively narrow issue of setting an accurate baseline for water quality monitoring. The SEPA Appellants produced some expert testimony on this issue and won the battle of experts. The Appellants' expert wrote that the amount of sampling proposed to establish the baseline was not sufficient. There was some understandable confusion from the Appellants about how much sampling was actually proposed by the Applicant, but the amount of samples that the Appellant's expert determined to be necessary for a reasonably accurate baseline significantly exceeded the sampling program proposed by the Applicant. The Applicant didn't produce any evidence that Appellant's statistical argument was in error or explain how its significantly smaller number of samples could yield accurate results. Even under the substantial weight standard, the Applicant did not prevail on this issue.

A few other SEPA conditions of arguably less significance have been added by this decision as well. After a general overview of generally applicable legal issues, each SEPA appeal issue will be addressed individually below.

II. Generally Applicable Legal Standards

The subsections of this topic address the legal issues that apply to two or more of the SEPA Appeal issues. Legal issues addressed in prior pre-hearing orders have been addressed here again for ease of reference.

A. Standard of Review (**Conclusion of Law No. II(A)**)

The SEPA Appellants request that the Examiner overturn the decision of the SEPA responsible official to issue an MDNS for PP1A. The Appellants request an SEIS and additional SEPA mitigation.

As shall be discussed below, there are only two reasons to overturn an MDNS: (1) there are unmitigated probable significant adverse environmental impacts; or (2) the SEPA responsible official has not undertaken an adequate review of environmental factors as required by SEPA regulations. Each grounds for reversal will be separately addressed below.

1. Probable Significant Adverse Environmental Impacts (**Conclusion of Law No. II(A)(1)**)

The primary relevant inquiry for purposes of assessing whether County staff correctly issued a DNS is whether the project as proposed has a probable significant environmental impact. *See* WAC 197-11-330(1)(b). WAC 197-11-782 defines "probable" as follows:

> 'Probable' means likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.

If such impacts are created, conditions will have to be added to the DNS to reduce impacts so there are no probable significant adverse environmental impacts. In the alternative, an environmental impact statement would be required for the project. In assessing the validity of a threshold determination, the determination made by the City's SEPA responsible official shall be entitled to substantial weight. WAC 197-11-680(3)(a)(viii).

2. Adequate Environmental Review (**Conclusion of Law No. II(A)(2)**)

The second reason an MDNS can be overturned is if the SEPA responsible official did not adequately review environmental impacts in reaching his threshold determination. The SEPA responsible official must make a prima facie showing that he has based his determination upon

information reasonable sufficient to evaluate the impacts of a proposal. Both the City and Applicant have vigorously disputed this conclusion. However, the City/Applicant's position is undermined both by the judicial SEPA standards of review adopted by the courts and how the courts have applied them since the legislature adopted SEPA 1971. As noted by the City, the courts have never actually overturned a decision for inadequate review. These results provide some insight as to how deferential the courts have been in applying the adequacy standard, but do not serve to eliminate the oft-repeated judicial requirement that environmental factors must be adequately considered to support a threshold determination.

As recently as 2010, the courts have ruled that an agency's threshold determination is entitled to judicial deference, but the agency must make a showing that "environmental factors were considered in a manner sufficient to make a prima facie showing with the procedural requirements of SEPA." *Chuckanut Conservancy v. Washington State Dept. of Natural* Resources, 156 Wn. App. 274, 286-287, quoting *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73 (1973). In applying this adequacy standard, on several occasions the courts have examined how thoroughly the responsible official reviewed environmental impacts in addition to assessing whether a proposal has probable significant adverse environmental impacts. See, e.g., *Boehm v. City of Vancouver*, 111 Wn. App. 711 (2002), *Moss v. City of Bellingham*, 109 Wn. App. 6 (2001). In *Moss*, for example, the court recited the *prima facie* rule and then applied it as follows:

> *The record indicates that the project received a great deal of review. The environmental checklist was apparently deemed insufficient, and therefore the SEPA official asked for additional information in the form of an EA. The City gathered extensive comments from agencies and the public, held numerous public meetings, and imposed additional mitigation measures on the project before finally approving it. Notably, although appellants complain generally that the impacts were not adequately analyzed, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS.*

109 Wn. App. at 23-24.

Given this judicial background, it is difficult to see how an assessment of adequacy can simply be ignored, as apparently advocated by the City and Applicant.

In its briefing, the Applicant notes that the prima facie standard requires compliance with SEPA rules and the SEPA rules expressly address adequacy of review. Agreed. WAC 197-11-335 provides that a threshold determination shall be "be based upon information reasonably sufficient to evaluate the environmental impact of a proposal". The standard of review on adequacy, therefore, is that the SEPA responsible official must make a prima facie showing that he has based his determination upon information reasonably sufficient to evaluate the impacts of a proposal.

A somewhat confusing facet of the standard requiring adequate review is WAC 197-11-680(3)(a)(ii). This WAC provision prohibits the appeal of intermediate steps of SEPA and only

allows administrative appeals of threshold determinations and the adequacy of an EIS. SEPA Appellant arguments such as the SEPA checklist is incomplete arguably seeks a ruling on intermediate steps of SEPA review, i.e. the adequacy of the checklist. The judicial standard requiring adequate environmental review was formulated before the adoption of WAC 197-11-680(3)(a)(ii) in 1984, but as demonstrated in the *Moss* case quoted above it was still applied to SEPA threshold appeals well after 1984. The courts have yet to address the arguable conflict between WAC 197-11-680(3)(a)(ii) and the judicial adequacy of SEPA review standard. The ultimate resolution may be that WAC 197-11-680(3)(a)(ii) prohibits administrative agencies from assessing adequacy of review but the courts are still free to do so. Unless and until the issue of whether adequacy of review is germane to an administrative appeal is judicially resolved, the prudent approach is to consider the issue as is done currently with cases such as *Moss*. Doing so will avoid the need for an evidentiary remand should a reviewing court determine that adequacy is something the Examiner should have considered.

Practically speaking, a consideration of the adequacy of review rarely results in a reversal of a threshold determination. In order to meet its burden of proof on adequacy, the SEPA appellant must often present the information the SEPA responsible official should have considered at the SEPA appeal hearing. After the information is presented, the SEPA responsible official is often asked whether they still believe the project has no probable significant adverse environmental impacts. If the responsible official responds that he or she does not see any reason to change the threshold determination, the issue of adequate review becomes moot. This result is allowed because the courts will consider information or mitigation supporting a determination wasn't reviewed or imposed until after issuance of the threshold determination. Again, the *Moss* decision is instructive on the allowance for this type of post hoc rationalization. In *Moss*, the City of Bellingham added SEPA mitigation measures after the SEPA responsible official issued the MDNS. The court sustained the MDNS on the basis of subsequently imposed mitigation measures as follows:

> *Although the DNS was issued prematurely, it is difficult to see how the appellants were prejudiced. The city council imposed many additional mitigation measures on the project before approving it, thereby making it more environmentally friendly than the version in the DNS. Appellants suggest that the DNS misled the city council into believing that all of the impacts were capable of mitigation, but the record indicates that the project received a considerable degree of scrutiny. Furthermore, WAC 197-11-350 requires an EIS where a proposal continues to have a significant adverse environmental impact, even with mitigation measures. While all of the required mitigation measures should have been imposed before the DNS was issued, the appellants still have not shown that the approved project, as it was mitigated, remains above the significance threshold.*

109 Wn. App. at 25.

B. Collateral Attacks. (**Conclusion of Law No. II(B)**)

As previously discussed, the SEPA Appellants have been very concerned about promises for deferred SEPA review that never materialize. This section addresses the opposite concern shared by the Applicant and City – that promises that impacts have been resolved are ignored. Such are the hazards of phased environmental review.

The Applicant and City concerns in this regard are termed in this decision as collateral attacks on previously made decisions. The City Council has taken extraordinary measures to assure that its decisions won't be revisited. Examples abound. Wetland delineations and wildlife corridors in the Villages DA are deemed "complete and final". The mitigation agreement between the Enumclaw School District, City and Applicant has a provision that decrees that the agreement is the final word on school mitigation. As shall be discussed, the law is fairly clear that final land use decisions are binding on subsequent land use applications addressing the same issues. Similarly, it is also fairly clear that environmental review decisions are binding on subsequent environmental review addressing the same issues. What is not so clear is whether land use decisions are binding on SEPA review. There is no case law that directly addresses this issue. However, the courts and the SEPA statutes strongly suggest an independence of decision making between permitting and environmental review that allows SEPA review and mitigation for impacts purportedly already addressed through permitting.

1. Collateral Attack between Land Use Permitting Decisions (**Conclusion of Law No. II(B)(1)**). There is an ample amount of case law on the preclusive effect of one land use permitting decision on another. Collateral attacks between land use permitting decisions is clearly not allowed.

   The determinative case on the preclusive effect of the compliance plans is *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002). *Nykreim* stands for the principle that an improperly issued final land use decision cannot be revoked and a judicial appeal of the decision is barred if a judicial appeal is not filed within 21 days of issuance. The courts have expressly ruled that even illegal decisions must be challenged in a timely manner. *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005). Further, a land use decision time barred from appeal under LUPA's 21-day appeal deadline cannot be collaterally attacked in the appeal of another land use decision. 155 Wn.2d at 410-411 (petitioners could not attack validity of special use permit whose LUPA appeal had expired through appeal of subsequently issued grading permit); *Wenatachee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181 (2000) (petitioner could not collaterally challenge a time barred rezone decision by its LUPA petition challenging a plat approval).

   Under the *Nykreim* decision and its progeny, there is no question that final determinations made by the City Council such as "final and complete" sensitive area delineations cannot be challenged by a subsequent implementing project such as PP1A. The difficult task at this stage of review is determining when the Council has made a final decision intended to preclude further review. It is important to note that the *Nykreim* cases only apply to

final land use decisions and not environmental review. The applicability of the *Nykriem* cases to environmental review is discussed in Section I(B)(3) below. Consequently, *Nykriem* issue preclusion only applies to application of the PP1A preliminary plat criteria and not SEPA review and mitigation.

2. Collateral Attack Between SEPA Decisions (**Conclusion of Law No. II(B)(2)**). Although there is only one case that addresses the preclusive effect of one SEPA decision upon another, that case is as clear as the *Nykreim* decisions that SEPA decisions may not be collaterally attacked in subsequent SEPA review. The one case on the issue is *Glasser v. Seattle*, 139 Wn. App. 728, 738 (2007), which held that "*allowing opponents to use a project EIS to collaterally attack previous programmatic policy decisions would disrupt the finality of the decision and eliminate any benefits of phased review*". *Glasser v. Seattle*, 139 Wn. App. 728, 738 (2007). In this regard methodologies and mitigation found to be adequate in prior environmental review cannot be revisited in this SEPA appeal. By the same token, the prior findings of EIS adequacy must be applied in the context of non-project level review. A finding of adequacy for the review in the Villages MPD FEIS does not translate readily into a finding that more specific project level review is not necessary. Indeed, as repeatedly emphasized by the SEPA Appellants, a significant amount of the Villages MPD FEIS review was expressly based on the premise that environmental review would be done in more detail in subsequent implementing projects such as PP1A. One of the greater challenges of this SEPA Appeal is determining when decisions made in the Villages MPD FEIS were intended to be the final word on a particular impact as opposed to a preliminary analysis to be completed in the review of an implementing development project.

3. Collateral Attack of SEPA on Prior Permitting Decisions (**Conclusion of Law No. II(B)(3)**). The most difficult and probably most significant legal issue of this SEPA Appeal is whether SEPA can be used to add to the requirements of prior land use permitting decisions that were intended to serve as a final resolution of project impacts. There is no court opinion that directly addresses the issue. However, a couple court opinions strongly suggest that SEPA acts independently of the land use permitting process and is not constrained from prior permitting decisions in ensuring that environmental impacts are fully assessed and/or mitigated. It is concluded that prior permitting decisions of the City Council cannot interfere with the responsibility of the SEPA responsible official to ensure that probable significant adverse environmental impacts are adequately assessed or mitigated as required by state statute and implementing SEPA rules (Chapter 197-11 WAC).

   The independence of SEPA review from other decision making has been addressed in at least two court opinions. As discussed in *Victoria Tower Partnership v. Seattle*, 59 Wn. App. 592 (1990), SEPA can be used to impose height limits upon buildings even though the Council has already adopted what it determines to be appropriate height limits through the bulk and dimensional requirements of its zoning code. In a second case, the courts have ruled that even though an impact has been determined non-significant for

purposes of the State Environmental Policy Act ("SEPA"), that same impact can still be used to deny or condition a project under land use permitting criteria. *See Quality Products, Inc. v. Thurston County*, 139 Wn. App. 125 (2007).

Beyond the case law, the independence of SEPA is inherent from the review procedures adopted in the SEPA rules. The SEPA rules authorize a SEPA responsible official, not a legislative body, to review the environmental impacts of a proposal to determine if an environmental impact statement is necessary. The SEPA responsible official is also charged with determining if an environmental impact statement is adequate. Any permitting decision issued with the intent of limiting further environmental review circumvents the independent review process established by the SEPA rules. Such decisions also undermine one of the primary purposes of SEPA, which is to address environmental impacts that have been unwittingly (or not) overlooked or inadequately addressed in the adoption of development standards. The basic purpose of SEPA is to require local government agencies to fully consider a project's total environmental and ecological impacts before taking major actions which significantly impact the quality of the environment. *Sisley v. San Juan County*, 89 Wn.2d 78, 82 (1977). This basic purpose cannot be achieved if legislative enactments are construed as prohibiting environmental review for implementing project applications that haven't even been filed yet.

a. Preclusive Effect of RCW 36.70B.030 on SEPA Decisions (**Conclusion of Law No. II(B)(3)(a)**). Despite the independence of SEPA, the state legislature has tied the hands of SEPA for some limited areas of regulation. One such area concerns fundamental land use choices. As argued in the City's opening briefing, RCW 36.70B.030 operates to preclude SEPA re-evaluation of some fundamental comprehensive plan and development land use choices. Specifically these fundamental choices are density, authorized land uses and levels of service.

   RCW 36.70B.030(2) provides that development regulations that designate type of land use, residential density in urban growth areas and adequacy of public services shall be determinative. In its briefing the City references the first legislative finding for RCW 36.70B.030(2), which is instructive on the scope and intent of RCW 36.70B.030(2) as follows:

> *Given the extensive investment that public agencies and a broad spectrum of the public are making and will continue to make in comprehensive plans and development regulations for their communities, it is essential that project review start from the fundamental land use planning choices made in these plans and regulations. If the applicable regulations or plans identify the type of land use, specify residential density in urban growth areas, and identify and provide for funding of public facilities needed to serve the proposed development and site, these decisions at a minimum*

provide the foundation for further project review unless there is a question of code interpretation. The project review process, ***including the environmental review process under chapter 43.21C RCW*** *and the consideration of consistency, should start from this point and should not reanalyze these land use planning decisions in making a permit decision.*

Emphasis added.

The requirements from RCW 36.70B.030(2) clearly do preclude SEPA reassessment of land uses and densities authorized by zoning codes and also the adequacy of public services for which levels of service have been set by comprehensive plans. However, the restrictions of RCW 36.70B.030 are narrow and do not extend to issues such as protection of environmental resources and traffic safety. This distinction is understandable within the state-wide policies underlying the Growth Management Act (Chapter 36.70A RCW, "GMA"). Density, land use and capital facilities planning are highly integrated from the local to state-wide level under the GMA to ensure that the furtherance of state-wide policies GMA goals of preventing urban sprawl and using infrastructure efficiently. Allowing these fundamental land use choices to be undermined at the permitting level serves to undermine the highly coordinated planning choices made in the adoption of GMA policies and development standards. Protecting critical areas, however, such as wetlands, is not within the fundamental land use choices deemed sacrosanct by RCW 36.70B.030. With good reason – the protection of critical areas is of equal importance under the GMA to its other statewide goals. Protecting environmentally sensitive areas such as wetlands at the project specific level will generally not serve to undermine the coordinated efforts at concentrating urban growth and planning for the funding of capital facilities.

b. Preclusive Effect of RCW 43.21C.240 on SEPA decisions (**Conclusion of Law No. II(B)(3)(b)**). Another potentially applicable statute designed to limit further SEPA review is RCW 43.21C.240. RCW 43.21C.240 prohibits the imposition of SEPA mitigation measures once a city determines that its regulations are sufficient to address all probably significant adverse environmental impacts. It is concluded that this statute has not been exercised by the Black Diamond City Council because no express findings have been made in either the Villages DA or the Villages MPD that the statute has been exercised for the Villages MPD.

More specifically, RCW 43.21C.240 prohibits the imposition of SEPA mitigation and mandates a DNS or MDNS once the "county, city or town" determines that its existing regulations are sufficient to prevent probable significant adverse environmental impacts. This statute's reference to the "county, city or town" authorizes a city council to make determinations that bypass the authority of the

SEPA responsible official to impose conditions as part of a threshold determination.

RCW 43.21C.240 is of relevance to the conditions and requirements imposed by both the Villages MPD and Villages DA because there is some language in those documents that arguably could serve as an implementation of the statute. Some of the findings for some Villages MPD requirements suggest that certain impacts have been adequately mitigated by existing development regulations and/or Villages MPD COAs. As mentioned before, some mitigation measures have language such as the mitigation is to serve as "complete and final" mitigation. The more pertinent provision, however, is Section 4.19 of the Villages DA, which provides in relevant part as follows:

> *The Villages MPD design and mitigation measures described in this Agreement, including the MPD Permit Approval and its Conditions of Approval in Exhibit "C", mitigate any probable significant adverse environmental impact directly identified as a consequence of MPD Permit Approval and this Agreement....Nothing in this section applies to preclude subsequent environmental review of Implementing Projects under the State Environmental Policy Act ("SEPA"), and Implementing Projects are expected to undergo additional SEPA review.*

At first blush, the reference to probable significant adverse environmental impacts would appear to implicate RCW 43.21C.240, because there is no other apparent reason to do so in the development agreement itself. If this was the intent, its applicability is highly ambiguous. The language itself makes it sufficiently clear that it applies to the impacts of the approval of the Villages MPD and Villages DA, but not to the implementing projects of those documents.

Although Section 4.10 clearly only applies to the adoption of the Villages MPD and Villages DA and not to implementing projects, it is significantly more of a challenge to distinguish between the two as intended in 4.10. Taken literally, the provision only applies to the adoption of the Villages MPD and Villages DA. Absent implementing projects, adoption of the Villages MPD and Villages DA had no environmental impacts. The only other logical interpretation is that the provision applies to Villages MPD impacts that operate on a programmatic level as opposed to a project specific level. One could argue that the Council expressly identifies the programmatic level mitigation measures by identifying them as "complete and final" mitigation measures or similar language. Pushing the concept even further, mitigation measures that appear to comprehensively address an impact, such as the Rock Creek safety mitigation measure addressed below, could also qualify.

It is concluded that if RCW 43.21C.240 is to be employed to cut off future SEPA review, it must be clearly identified for that purpose. A legislative determination to prohibit future SEPA review is a highly significant decision given the reliance of citizens upon use of the process to be heard on applications and the strong state legislative policies supporting SEPA. If a legislative body determines that its citizens will no longer have this tool available to them, it should state so clearly by identifying its reliance upon RCW 43.21C.240 and then expressly identifying those impacts that will no longer be subject to any further environmental review. The public is entitled to clear notice when this provision is exercised so that it has the knowledge to timely appeal it and to plan for its effective participation in future project review.

Villages Section 4.1 does not come close to providing the public notice necessary to implement RCW 43.21C.240. The statute isn't even mentioned and no mention is made of the fact that future SEPA review will be curtailed in any way. To the contrary, SEPA review is described as phased in the Villages MPD and Section 4.1 provides that it is not intended to preclude further environmental review for implementing projects. The "complete and final" language and other Villages DA and Villages MPD terms and conditions expressing an intent of finality are completely dissociated from 4.1. It would be entirely reasonable for anyone reading these documents that the finality language adopted by the Council was solely intended to preclude the resurrection of specified issues in permit review, but not in environmental review. Such an interpretation would be consistent with the "gap filling" role of SEPA, as construed in cases such as *Victoria Partnership*, supra. If the Black Diamond City Council had intended Section 4.1 to implement RCW 43.21C.240, it could have easily said so and then listed the environmental impacts that were not to be further considered in SEPA review. This could have been done with minimal effort and provided irrefutable notice to Black Diamond citizens that environmental review of impacts was over for those listed impacts.

III. SEPA Appeal Issues

Each of the Appellants' appeal issues is addressed separately below in the order presented in their appeal statement, Ex. 198.

A. Traffic Safety

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the Appellants noted that the FEIS for the Villages had not specifically addressed traffic safety and that the Examiner's FEIS decision had found traffic safety did not need to be addressed at the programmatic stage but rather at the project level review. The Appellants claim that traffic safety analysis should be performed to evaluate the increase of vehicular traffic accidents, pedestrian

accidents and cyclist accidents at several locations external to the project. The Appellants also requested a review of traffic safety related to increased construction traffic near school zones and on unimproved rural roads. The Appellants were particularly concerned with traffic safety related to pedestrian and vehicular crossings of Rock Creek Bridge and at intersections. The Appellants requested the Applicant perform a Traffic Safety SEIS. No mention was made of any specific probable significant adverse impacts related to traffic safety. However, the Appellants assert that no analysis has been done concerning traffic safety and for this reason it is not possible to determine the exact impacts or necessary mitigation to traffic safety.

2. FEIS Analysis. The FEIS analysis addressed traffic safety in FEIS Transportation Finding of Fact No. 6(a) where it stated, "Significant transportation related issues raised during the SEPA EIS hearing and Villages MPD hearing included...safety issues and impacts to area rural roads." The FEIS went on to state, "The FEIS did not identify safety concerns as a probable significant adverse impact" (FEIS Transportation Finding of Fact No. 14). FEIS Transportation Finding No. 14 went on to summarize the testimony of Mr. Matt Nolan from King County's transportation division who expressed concerns regarding safety on SE Green Valley Road and other rural roads with respect to safety issues and issues related to the physical geometry of the roads, problems with site distances, and curves in the roads. Traffic safety issues were brought into the FEIS discussion by the FEIS SEPA Appellants Carrier and Clifford when they presented WSDOT accident history details from 2001 to 2009. The City's consultant John Perlic testified he would initially have expected the number of accidents to increase as traffic volumes increase, however, the WSDOT accident history proved otherwise (FEIS Hearing Transcript pages 1,541-1,543 as cited in FEIS Transportation Finding of Fact No. 14). Mr. Perlic noted that in his traffic analysis, he found no high incident intersections and that the accidents in the study area were random and not tied to any particular hazards on the roads. Mr. Perlic went on to note that some of the safety impacts will be mitigated by the improvements called for in the FEIS, however, the randomness of the accidents makes it difficult to predict and impose more specific mitigation to decrease that risk. He stated there was no known way to analyze safety impacts except to evaluate the particular configuration of a high accident location.
FEIS Transportation Conclusion of Law No. 2 states, "While the FEIS did not identify safety concerns as a probable significant adverse impact, the Appellants did not present evidence that these issues could be adequately addressed at this higher level of review. It is reasonable to conclude that decision-makers would recognize that vehicle accidents will increase proportionately with increased traffic volumes."

3. Villages MPD Conditions. The Villages MPD approval (Black Diamond Ordinance 10-946, Exhibit A) also presented extensive comment on traffic safety. In Villages MPD FOF 6 Traffic Safety, the Council echoed the Examiner's FEIS findings in stating, "vehicle

accident rates are somewhat random and are not necessarily tied to increases in traffic volume" (Villages MPD FOF 6A). The Council further noted, "there are no high accident intersections" in the study area and that "those accidents that did occur in the study area were random and not tied to any particular, identified hazards on roads." The Council stated, "Some of the safety impacts will be mitigated by the improvements called for in the FEIS, and the randomness of accidents makes it difficult to predict and impose more specific mitigation that would decrease the risk. There is no known way to analyze safety impacts except to evaluate the particular configuration of a high incident location" (Villages MPD FOF 6B). The Villages MPD COA do not specifically address traffic safety and there appears to be no specific mention of traffic safety as a concern in the Villages DA.

4. Traffic Safety Analysis. The Applicant provided an analysis of traffic safety (Ex. 42). This analysis reviewed three-year collision summaries at intersections and along roadway segments in the study area from 2009-2011 and included vehicular, pedestrian and cycling accidents. The Transpo study cites the King County High Accident Location classification as an intersection or road segment that experienced more than nine collisions in a three year period. Though there were a number of accidents, one of them resulting in a fatality and three involving cyclists, no high incident locations were found. The Transpo study also evaluated the number of collisions occurring per million vehicle miles traveled. Transpo concluded, "while the addition of traffic through the study area in the future is likely to result in a similarly proportionate increase in the number of collisions, there are no safety issues identified through the review of collision data" (Ex. 42, page 4). Transpo also notes the project's mitigation includes the redesign of some intersections and road segments. These new infrastructure improvements will be built to today's standards. The Applicant stated they had no objection to updating the traffic safety analysis for the plat at the midpoint traffic evaluation (Ex. 137).

   In the Appellants' Transportation Rebuttal (Ex. 132), the Appellants question the effectiveness of the proposed intersection improvement measures to reduce impacts to future traffic safety. Specifically, they note the Applicant's analysis of traffic safety was retrospective and based on existing traffic levels, which are much lower than future traffic conditions under full buildout. The Appellants question the ability of the present collision rates to be effectively extrapolated to predict future collision rates when the basis of traffic volume will change so drastically. The Appellants contend, "traditional safety analysis consists of employing a multidisciplinary approach to both design and implementation of safety features."

   The Applicant's response to the issue of traffic safety is to cite RCW 43.21C.240 and WAC 197.11.158 with respect to the substantial mitigation addressed by local codes. In

essence, safety concerns are addressed as part of the design of roadways, intersections and pedestrian improvements.

The City's traffic expert, John Perlic, testified during the SEPA Appeal hearing that he had reviewed the Applicant's study and concurred with its findings. Under questioning from the Appellant Mr. Rimbos, Mr. Perlic stated that though traffic accidents were likely to increase proportionate to the increase in background and project traffic, he expected the rate per million vehicles miles traveled to remain constant and he did not foresee the creation of new high incident locations. Mr. Perlic further stated reviewing past trends is the standard methodology for analyzing traffic safety. Without a record of accident histories, it is impossible to predict where safety issues might exist in the future (Tr. 181-190). Other than the Rock Creek Bridge, the Appellant provided no specific instances of safety impacts that would result in probable significant adverse environmental impacts. Nor did the Appellant provide a methodology for predicting future traffic safety impacts beyond the standard methodology applied by the Applicant and reviewed by the City. With the exception of the Rock Creek Bridge, there is nothing in the record to suggest that traffic safety issues will create probable significant adverse environmental impacts.

5. Construction Traffic Safety. Construction traffic safety impacts are addressed below in SEPA Appeal Issues III(C).

6. Rock Creek Bridge. Rock Creek Bridge is located along SR 169 between the area known as Morganville and the Villages Plat. The bridge is nearly a century old and is narrow with limited shoulders that, as shown in Ex. 21, are not wide enough to reasonably accommodate pedestrian traffic. The posted speed limit is 25 mph. The City's traffic expert, Mr. Perlic, stated the width of the shoulders on the bridge was "one to two feet" (*See* 11/2/12 Tr. 214). In their Pre-Hearing Brief, the Appellants argued there will be "direct conflicts between construction traffic and school-related traffic (I.E., pedestrian, bicyclists, and vehicles...the width-confined Rock Creek Bridge")(*See* Ex. 111, Page 8). The Appellants argue, "*Impacts on the bridge were not analyzed and, thus, no mitigation was proposed. There is a known pedestrian safety problem on the existing bridge with existing traffic levels. The traffic levels anticipated from Phase 1A probably will create critical safety issues on the bridge.*" (*See* Ex. 111, Page 9). The City's Responsible Official testified at hearing that students from the development would temporarily attend Black Diamond Elementary School until the new school within the plat was constructed by the Enumclaw School District. He stated that PP1A students would be bussed to Black Diamond Elementary until the PP1A school was constructed, but never addressed whether Morganville children would be bussed or walk to attend the new PP1A school. (*See* 11/3/12 Tr. p. 282).

The Appellants are correct in their assertion that the FEIS did not address potential safety impacts to Rock Creek Bridge. No mention of Rock Creek Bridge or of pedestrian traffic from Morganville was mentioned in the FEIS. The Villages MPD Approval did not include any specific findings of fact with respect to pedestrian crossing of Rock Creek Bridge. However, the Villages MPD conclusions in several places express concern over pedestrian safety on Rock Creek Bridge.

Villages MPD COL 78 and 83 both state that the existing Roberts Drive bridge over Rock Creek is "currently unsafe for pedestrians". Villages MPD COL No. 104 acknowledges that a safe sidewalk link is needed between The Villages and Morganville and that "[t]he area of greatest concern is the narrow bridge over Rock Creek".

In order to address pedestrian safety on Rock Creek Bridge, Villages MPD COA 32 requires,

"Provided a study confirms engineering feasibility and reasonable and customary construction costs, a connecting sidewalk and safe pedestrian connection to the programmed sidewalk in the Morganville area shall be required along Roberts Drive. Construction timing should be specified in the Development Agreement. The City and Applicant shall work in good faith to seek grants and other funding mechanisms to construct the improvement. The Applicant shall otherwise be responsible for construction costs to the extent authorized by law."

The Villages DA Section 11.6 states,

"Pursuant to Condition of Approval No. 32 of the MPD Permit Approval, and provided an expert study, prepared by the City and paid for by the Master Developer, confirms engineering feasibility and that construction costs will be reasonable and customary, the Master Developer shall provide, prior to issuance of the Certificate of Occupancy for the Villages MPDS's 200th Dwelling Unit, a connecting sidewalk and safe pedestrian connection from the frontage improvements along parcel V13 to the northeast corner of the Guidetti Parcel along Roberts Drive. The City and Master Developer shall work in good faith to seek grants and other funding mechanisms to construct this improvement; however, all construction costs not covered by such grants for funding mechanism shall be the responsibility of the Master Developer."

The Applicant has proposed a voluntary condition of approval that modifies the condition recommended by staff (Ex. 20, recommended condition of approval No. 30). This condition of approval would read,

"The Applicant shall comply with the Roberts Drive sidewalk and pedestrian connection in accordance with the requirements of Section 11.6 of TV DA. In addition, the Applicant has voluntarily agreed that, subject to the requirements of Section 11.6 of TV DA, it shall submit a permit application for the sidewalk and pedestrian connection prior to issuance of the Certificate of Occupancy for The Villages Phase 1A Preliminary Plat's 1st Dwelling Unit and such connection shall be substantially complete prior to issuance of the Certificate of Occupancy for The Villages Phase 1A Preliminary Plat's 200th Dwelling Unit."

The Applicant argues that Rock Creek Bridge's lack of a separated pedestrian walking area is a pre-existing deficiency in the City's transportation network for which the Applicant should not be required to pay the entire cost citing *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P .3d 860 (2002). The Applicant argues they are willing to provide the pedestrian connection but only on the condition that the construction costs are "reasonable and customary" and "capable of being accomplished." The Applicant argues the Appellant are providing a collateral attack on previously adopted decisions (Ex. 192).

The Applicants argued the Appellants had not provided any new evidence regarding Rock Creek Bridge that was not considered by the Black Diamond City Council during their review and approval of the Villages MPD Permit and the Villages DA (Ex. 189).

The Appellants' expressed concern about the structural integrity of Rock Creek Bridge to handle the increase in construction, school and general traffic. The City provided a memorandum from Joe Merth, an engineer working for Parametrix, the City's consultant. In this memorandum, Mr. Merth described Rock Creek Bridge as a 1914 structure with a 16 foot clear span and an interior width of 24 feet. Mr. Merth stated the bridge has no signs of major distress but that there were areas of concrete delamination, rock pockets in the abutment walls, exposed reinforcing and spalling. Mr. Merth stated the bridge was fit to carry all Legal Load vehicles (AASHTO 1, 2 and 3 and Type 3, Type 3S2 and Type 33), but that the bridge needed to be monitored at frequent intervals. He went on to state the bridge has a probable remaining service life of 20 years under normal traffic loading. Mr. Merth reviewed several alternative scenarios with respect to repair and renovation with a pedestrian walkway. Mr. Merth concluded, "a minimum rehabilitation of the existing structure should include repair or replacement of the existing barrier, installation of guardrail transitions on both bridge approaches to enhance motorist safety near the bridge, and concrete patching to prevent further degradation of exposed reinforcement." *See* Ex. 193.

In a Declaration, Austin Fisher of Parametrix defined 'normal load conditions' to include traffic expected to be generated by nearby development, including the proposed Villages Phase 1A Preliminary Plat. Mr. Fisher went on to state that Parametrix had

"concluded that all of the bridge repair and replacement alternatives (including the addition of pedestrian access) are feasible from an engineering, permitting and construction perspective. The analysis also includes design sketches and cost estimates for each alternative. The costs for each alternative are reasonable and customary; we identified no extraordinary engineering or design considerations that would adversely affect design, permitting or construction costs or cause them to exceed parameters expected for projects of these types and scale." *See* Ex. 193.

7. Public Transportation. The Appellants argue the Applicant failed to accurately account for the lack of public transportation in their trip generation assignments (Ex. 191). The Appellants stated that the Applicant's use of the ITE Trip Generation Manual was inappropriate in this instance because the Manual uses average trip generation rates from studies conducted in areas with no access to transit and that are dissimilar to Black Diamond. The Applicant stated that use of the ITE *Trip Generation Manual* is standard practice for transportation modeling (Ex. 192) and was used in the *Traffic Impact Study*. The Applicant stated the traffic impact studies have not been shown to contain a 'discount' trip generation based on the assumed provision of public transit. The Applicant further acknowledges that the King County Metro stop mentioned in the SEPA Checklist has been discontinued, but argue that the Appellants have not shown that given the densities associated with the preliminary plat, the stop might not be reinstated (Ex. 192).

8. Probable Significant Adverse Environmental Impacts[1]. With the exception of pedestrian safety on Rock Creek Bridge, and as conditioned, there is nothing in the record to suggest that the proposed transportation infrastructure will create probable significant adverse environmental impacts. Safety impacts to pedestrians on the Rock Creek Bridge are a probable significant adverse environmental impact. As acknowledged by the City Council in Villages MPD COA 78, Rock Creek Bridge represents a current safety hazard. As shown in Ex. 21, the shoulder of Robert's Drive across the bridge is very narrow and pedestrians will likely have to walk on the vehicular lanes of travel to cross the bridge.

[1] It is recognized that in the section of the Appellant's appeal entitled "inadequate analysis" that for the most part they have intended to only address the adequacy of mitigation as opposed to trying to prove any impacts. However, the Appellants have still integrated some assertions of impacts into their adequacy arguments. In order to maximize the consideration of all of the Appellants' arguments, the Examiner is considering impacts in addition to adequacy for every appeal issue raised, even if the issue is labeled as "inadequate mitigation".

Rock Creek Bridge serves as a connector between Morgansville and the school(s) and commercial areas serving PP1A. No one disputes that PP1A will result in an increase in pedestrian traffic across the bridge or that it presents a safety hazard except for testimony from the SEPA responsible official that he rides his bicycle over the bridge and rom John Perlic that pedestrians can safely cross the bridge if they're careful. Yet there was no SEPA or other review that included any assessment of how much pedestrian bridge traffic would be generated, whether students would be walking to school over the bridge, what increase in accidents is estimated as a result of this added pedestrian traffic, how much pedestrian improvements would cost or what options are available for reducing safety risks.

Instead of doing an evaluation over the safety impacts associated with Rock Creek, the City and Applicant simply agree to propose a condition that provides that the Applicant will provide for a pedestrian crossing over Rock Creek if it is found later feasible to do so. The City has provided evidence that providing a pedestrian crossing to the bridge is feasible and reasonable with respect to cost. A condition of approval will require the Applicant to either provide for a safe pedestrian connection to Morganville or prepare an EIS that assesses the pedestrian safety impacts.

9. Adequacy of Review. The Environmental Checklist describes the primary access of the property, the then-existing public transit route and stop, and the proposed new roads and street improvements. The Environmental Checklist also references the *Villages MPD Phase 1A Traffic Impact Study* (Ex. 16) by Transpo. The Applicant provided several supplemental documents in support of the Environmental Checklist including *Villages MPD Preliminary Plat 1A Traffic Impacts to Green Valley Road* (Ex. 46), a *Traffic Monitoring Plan* and responses to comments (Ex. 16, 27 and 94). The City's consultants, Parametrix, prepared the *SE Green Valley Road – Traffic Calming Strategies*. The SEPA Responsible Official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impacts. *See* 11/3/12 Tr. at p. 283-286. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. With the exception of Rock Creek pedestrian safety, the SEPA Responsible Official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of the proposal.

Conclusions of Law

1. Collateral Attack. The Applicant argued in its rebuttal brief to the SEPA Appellants Opening briefing that the Appellants' entire Transportation argument should be stricken or

dismissed based on an impermissible collateral attack. As concluded in Conclusion of Law No.II(B), SEPA review can be used to add mitigation and analysis to previously issued permit conditions even if there is overlap, so long as the SEPA review and mitigation does not conflict with prior SEPA decision making. The Villages FEIS contained no significant assessment of traffic safety and made no recommendations on traffic safety mitigation. As previously noted, COL No. 2 of the Examiner decision on the Villages FEIS adequacy appeal specifically deferred safety analysis by providing that lack of detail in safety analysis at the programmatic level was appropriate for that "higher level of review". Consequently, the traffic safety issues raised by the Appellant are not precluded under considerations of collateral attack as asserted by the Applicant.

2. Threshold Determination Sustained. With the exception of the issue of pedestrian safety at Rock Creek Bridge, there are no grounds for overturning the threshold determination of the responsible official as it applies to traffic safety impacts. As demonstrated in Finding of Fact No. III(A)(9), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of traffic safety impacts. As determined in Finding of Fact No. III(A)(8), with the exception of pedestrian safety at Rock Creek Bridge, there are no probable significant adverse environmental impacts resulting from the traffic safety issues generated by the proposal.

   As determined in Finding of Fact No. III(A)(8), as unmitigated Rock Creek Bridge represents a current safety hazard and a probable significant adverse environmental impact to pedestrian safety. A condition of approval will require the Applicant to either fully mitigate the impacts or prepare a limited scope EIS assessing the pedestrian safety issues.

B. School Traffic Impacts

School Traffic Impacts and Schools generally are discussed below in SEPA Appeal Issues section III(F).

C. Construction Traffic Impacts

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the Appellants noted that the FEIS for the Villages had not specifically addressed construction traffic and that the Examiner's FEIS decision had found construction traffic did not need to be addressed at the programmatic stage but rather at the project level review. The Appellants argued construction traffic will have a direct impact on area roads with particular concern for SE Auburn-Black Diamond Road and SR 169. The Appellants argued construction traffic will impact overall traffic safety, traffic congestion and traffic noise. In their Pre-Hearing Brief,

the Appellants further elaborated in stating there will be direct conflicts between construction traffic and school related traffic, specifically pedestrians, bicyclists and vehicles. The Appellants asserted that a Traffic Control and Construction Plan should have been prepared prior to the MDNS. The Appellants requested the Applicant perform a Construction Traffic SEIS. No mention was made of any specific probable significant adverse impacts related to construction traffic. However, the Appellants assert that no analysis has been done concerning construction traffic and for this reason it is not possible to determine the exact impacts or necessary mitigation related to construction traffic.

The Appellants' expressed concern regarding construction traffic with respect to its composition with the AM Peak Hour. They are specifically concerned about the mix of construction traffic, school traffic and commuter traffic during the morning commute (Ex. 191).

The Applicant argued in its pre-hearing Rebuttal briefing that the City's existing codes require detailed traffic control plan to be submitted and approved by the City engineer prior to the beginning of construction. The City's standards currently impose compliance with both the WSDOT standards and the Federal Manual on Uniform Traffic Control Devices. The Applicant notes that preliminary plat approval does not approve construction. The Applicant will be required to apply for clearing and grading, right of way and building permits. The Applicant further notes that as part of PP1A review, the Applicant has designated haul routes, limited construction timing to avoid the PM Peak Hour, attempted to minimize truck traffic by balancing the cut and fill on site, and by screening top soil on site.

The Applicant also prepared a study by Transpo entitled *Villages Preliminary Plat 1A – Construction Traffic* (*See* staff Report Ex. 44). This report analyzed the impact of construction traffic during the PM Peak Hour. The report found the total daily trips would be 252 trips during the maximum overlap of earthwork and utility construction with vertical construction. The PM Peak Hour Trips would be about 22 trips on a typical weekday. These assumptions are based on the Applicant's voluntary condition requiring a balance of earthwork on the site (Ex. 43).This finding is not entirely surprising given the Applicant will limit the hours of construction such that they end prior to the beginning of the PM Peak Hour. *See* Staff Report Ex. 44. The majority of impact to peak hour traffic will likely occur in the AM Peak Hour. The Transpo study states,

> *"A construction management plan will be developed by Yarrow Bay in coordination with the City to provide for a safe and efficient construction site and minimize the impacts to traffic operations in the area as required by Section 1.17 of the City of Black Diamond Engineering Design and Construction Standards."*

Additionally, a note on the face of the plat will require the Applicant to submit construction traffic control design as part of final engineering plans for review and approval by the City.

Transpo concluded construction activity related to PP1A does not change the proposed transportation mitigation improvements or timing of improvements identified in the Traffic Impact Study and that a detailed construction management plan will be required in accordance with BDMC 3.1.02(2) which will address traffic control procedures and practices consistent with current engineering practices/standards (Ex. 42).

The City's traffic expert, John Perlic, testified that construction traffic rarely results in additional mitigation because the proportion of trips attributable to construction traffic are much lower than development traffic at build out. Mr. Perlic stated the distribution of truck traffic would be similar to that modeled for the overall development. No additional mitigation is needed to deal with construction traffic (11/2/2012 Tr. 174-180).

2. FEIS Analysis. The FEIS analysis did mention construction traffic as a specific issue in FEIS Transportation Finding of Fact No. 19 when it stated,

   "*The FEIS contains no discussion of the traffic impacts posed by construction of the proposed projects. It is clear that the many years of construction arising out of the extensive development proposed by Applicant will result in ongoing construction traffic impacts.*"

   The FEIS Transportation Conclusion of Law No. 14 states,

   "*It is clear that the many years of construction arising out of the extensive development proposed by Applicant will result in ongoing construction traffic impacts. The FEIS did not address the traffic impacts pose by construction of the proposed projects. However, mitigation of such impacts is more appropriately handled at each phase of the project. There is no evidence that addressing these impacts at this stage of environmental review would result in a more effective mitigation. SEPA allows the City to determine the appropriate scope and level of detail of environmental review to coincide with meaningful points in their planning and decision-making processes, and to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready. WAC 197-11-060(5). Construction impacts are such issues not ripe for consideration. The City's Engineering and Construction Standards will require a traffic control plan that will address the specific impacts prior to commencement of construction.*"

3. Villages MPD Permit Approval and Developer Agreement Conditions. Neither the Villages MPD Approval Ordinance 10-946 nor the Villages Developer Agreement addresses construction impacts.

4. King County Construction Traffic Impact. In his testimony, the City's Engineer, John Perlic, referenced a letter from Paulette Norman, the County Road Engineer for King County's Road Services Division (Ex. 49) with respect the construction traffic (See 11/2/2012 Tr. 175-176). Ms. Norman's letter, stated,

"Per King County Code 14.80.030.A, a significant adverse environmental impact occurs when a project sends at least 30 trip-ends in the evaluated peak hour into an analyzed intersection, and, where those 30 trip-ends represent no less than 20% of the projected trip distribution, and, the calculated level-of-service is at or will fall to a calculated "F". Our review of the traffic impact study determined that no King County intersection will fail to meet the minimum King County Level of Service (LOS) standard due to traffic impacts from Phase 1A of The Villages MPD.

The traffic analysis by the Applicant's consultants determined that there are 240 existing peak hour trips on Southeast Green Valley Road. Phase 1A will add 23 new peak hour trips to the road, which is a Scenic Road Heritage Corridor. I agree with the submitted traffic engineering assessment that the additional trips will have minimal impact on this road corridor at this phase. In addition, I generally concur with the PM peak hour trip distribution percentages to King County road network and project trip assignments to the King County intersections."

5. Rock Creek Bridge. As discussed above in SEPA Appeal Issues section IIIA6, the Rock Creek Bridge is located along SR 169 between the area known as Morganville and the Villages Plat. The bridge is nearly a century old and is narrow with limited shoulders. The posted speed limit is 25 mph. The Appellants have expressed concern about the ability of the bridge to withstand the truck traffic that will result from the construction of the projects over the course of the 15-year Villages MPD build out and over the shorter term Plat 1A build out (Ex.191). SEPA Appeal Issues section IIIA6 also details information about a structural integrity study performed on the bridge by the City's consulting engineers, Parametrix. Parametrix found that the bridge is structurally sound, though aged and in need of frequent monitoring. They further found the probable remaining service life of the bridge is 20 years under normal traffic loading. Austin Fisher of Parametrix defined 'normal load conditions' to include traffic expected to be generated by nearby development, including the proposed Villages Phase 1A Preliminary Plat (Ex. 193). Mr. Fisher did not specify whether traffic generated by the nearby development was at build out stage or if it also included anticipated construction traffic. The SEPA Appellants presented no evidence that the bridge was not fit for construction traffic for its remaining 20 year useful life. Given the substantial weight that must be given to the threshold determination of the responsible official, there is insufficient evidence to conclude that Rock Creek Bridge is not fit for construction traffic.

6. Probable Significant Adverse Environmental Impacts. There is nothing in the record to suggest that construction traffic will create probable significant adverse environmental impacts. In their appeal statement the SEPA Appellants assert that the proposal could adversely affect AM Peak Hour traffic and provide a conflict between construction, school and commuter traffic. Appellants also expressed concern about the effect of construction traffic on the Rock Creek Bridge. Beyond the issues identified above, the SEPA Appellants have not identified any adverse impacts associated with construction traffic associated with PP1A. There is nothing in the record to reasonably suggest that the City's engineering and construction standards for construction traffic are insufficient to adequately mitigate the

impacts alleged by the SEPA Appellants. The Applicant will be required to submit a construction management plan for City approval. Substantial weight must be given to the threshold determination of the SEPA responsible official. In this case, the Appellant has provided no evidence of any probable significant adverse environmental impact related to construction traffic.

7. Adequacy of Review. The Environmental Checklist describes the primary access of the property, the then-existing public transit route and stop, and the proposed new roads and street improvements. The Environmental Checklist also references the *Villages MPD Phase 1A Traffic Impact Study* (Ex. 16) by Transpo. The Applicant provided several supplemental documents in support of the Environmental Checklist including *Villages MPD Preliminary Plat 1A Traffic Impacts to Green Valley Road* (Ex. 46), a *Traffic Monitoring Plan* and responses to comments (Ex. 16, 27 and 94). The City's consultants, Parametrix, prepared the *SE Green Valley Road – Traffic Calming Strategies* and a *Rock Creek Bridge Evaluation* (Ex.192). The SEPA Responsible Official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impacts. *See* 11/3/12 Tr. at p. 283-286. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. The SEPA Responsible Official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of the proposal.

Conclusions of Law

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to construction traffic impacts. As demonstrated in Finding of Fact No. III(C)(7), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of traffic safety impacts. As determined in Finding of Fact No. III(C)(6), there are no probable significant adverse environmental impacts resulting from the construction traffic issues generated by the proposal.

D. Traffic Impact Analysis

Findings of Fact:

1. Overview of Appeal Issues. In their Pre-hearing Brief, the Appellants referenced the findings of the Examiner on FEIS adequacy related to transportation impacts with respect to the traffic model used by the City and Applicant as part of the Villages MPD permit process. The Appellants assert the traffic model used in the Villages MPD process is the same model used to evaluate impacts for the Phase 1A Plat application. The Appellants assert this model has multiple flaws and is therefore unsuitable for use in evaluating the impacts and required mitigation for the plat proposal. The Appellants

asserted there were technical flaws in the transportation methodology related to trip distribution, background traffic growth rates, internal trip capture rates, peak hour factors, and the transportation model itself. The Appellants further stated the existing analysis provides for inadequate mitigation to resolve adverse impacts such as excessive queue length, intersection level of service or safety issues associated with Rock Creek Bridge.

A discussion of safety impacts on Rock Creek Bridge is located above in SEPA Appeal Issues section IIIA and IIIC. A discussion of queue length is located below in SEPA Appeal Issue section IIIU. A discussion of intersection level of service is located in SEPA Appeal Issue section IIIV.

2. FEIS Analysis. The FEIS analysis dealt extensively with the issue of traffic impact analysis and specifically with the transportation model, its underlying assumptions and the conclusions derived from the use of this model. FEIS Transportation Findings of Fact No. 5-9, 11-13 and 21 specifically discuss the transportation model as do Conclusions of Law No. 1, 4, and 12-13. FEIS Transportation Conclusion of Law No. 15 stated,

> *"As is evident from the findings above, the EIS traffic analysis is adequate but in several instances there are more accurate methodologies and assumptions available to ensure more complete mitigation. The Examiner will recommend conditions on the MPD that incorporate the better methodologies and assumptions."*

3. Villages MPD COAs. The Villages MPD Approval Ordinance 10-946 included extensive findings of fact related to the transportation model and its underlying assumptions. Council Finding of Fact No. 5 describes the Council's findings with respect to Villages MPD Project Traffic including a specific discussion on the use of the transportation model in Finding of Fact No. 5(K)(i-vi) (Ordinance 10-946, Ex. A, pages 2-8). Council Conclusion of Law No. 23(B) states,

> *"The conditions of approval in Exhibit C require preparation of a revised transportation demand model, and use of that model at specified points in the future to periodically review traffic impacts of the MPDs as they develop and identify additional mitigation as necessary to meet levels of service for successive phases of development. Mitigation may exceed that identified in the FEIS if necessary to meet level of service standards, so long as the adverse impacts are identified in the relevant environmental document (here, the FEIS), and the mitigation is consistent with an environmental policy adopted by the governmental body and referenced in its decision. WAC 197-11-660(1)(a) and (b); see also Quality Rock Products, Inc. v. Thurston County, 139 Wn. App. 125, 140-141 (Div. II 2007). Here, requiring such additional mitigation is consistent with the City's policy set out in BDMC 18.98.020(G), which is adopted by reference as a SEPA policy in BDMC 19.040240(B)(3).* ***Under these conditions,***

the first periodic review will be conducted at the point where building permits have been issued for 850 homes for the Villages and Lawson together; *subsequent periodic review will occur at such future points specified by the City Council.*

As discussed in Finding of Fact 5(L), ***the future periodic reviews utilizing a revised transportation demand model are warranted, because the length of the project build out, and because the existing models are not optimally suited to predict future traffic impacts 15 or more years into the future, particularly given the scale of the two MPD projects and the model's underlying assumptions.*** *Future periodic review will involve re-validation of the transportation demand model by checking the traffic analysis against actual MPD traffic growth."* (Emphasis added.)

The Villages MPD COA included 25 conditions related to transportation. Villages MPD COA 11-14 and 17 related to the creation of a new transportation demand model and its underlying assumptions including to some extent each of the following issues: the current model's transportation network, modeling boundaries, external trip capture, validation, traffic counts, surrounding land uses, peak hour factors including a sensitivity analysis related to their use, the inclusion of funded and unfunded capital improvements from local plans, mode split, transit service plans from local transit providers, the internal trip capture rate and the inclusion of the resultant project impacts and mitigations in the Developer Agreement. Council Villages MPD COA deferred the creation of the new transportation demand model until the point where 850 building permits have been issued for dwelling units in the Villages and Lawson Hills together. The Council's decision eliminated the creation of a new model until after the completion of PP1A.

4. Probable Significant Adverse Environmental Impacts. There is nothing in the record to suggest that the use of the existing transportation model in itself will create probable significant adverse environmental impacts. The Council has determined that the model and its underlying assumptions are adequate and has adopted Villages MPD COA that limit the creation of a new, more project specific model until the issuance of 850 building permits, well after the completion of PP1A. Even if the Examiner's concerns with the traffic modeling in review of the Villages FEIS were still relevant, there is nothing in the record to suggest that the model used for PP1A is inappropriate for the first phase of the project. The Examiner's concerns over the model dealt with its application to the Villages and Lawson Hills MPDs as a whole. The SEPA Appellants have not identified any specific adverse impacts associated with the use of the existing transportation model for PP1A. There is nothing in the record to reasonably suggest that the Applicant's required transportation mitigation measures are insufficient to adequately mitigate transportation impacts. The Examiner must both recognize the Council's required Villages MPD COA and also give substantial give weight to the opinion of the SEPA responsible official that the proposal will not create any probable significant adverse environmental impacts.

5. Adequacy of Review. The Environmental Checklist describes the primary access of the property, the then-existing public transit route and stop, and the proposed new roads and street improvements. The Environmental Checklist also references the *Villages MPD Phase 1A Traffic Impact Study* (Ex. 16) by Transpo. The Applicant also provided several supplemental documents in support of the Environmental Checklist including *Villages MPD Preliminary Plat 1A Traffic Impacts to Green Valley Road* (Ex. 46), a *Traffic Monitoring Plan* and responses to comments (Ex. 16, 27 and 94). The City's consultants, Parametrix, prepared the *SE Green Valley Road – Traffic Calming Strategies*. The SEPA Responsible Official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impacts. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. The SEPA Responsible Official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of the proposal.

Conclusions of Law

1. Collateral Attack. The Applicant argued in its rebuttal brief to the SEPA Appellants Opening briefing that the Appellants' entire Transportation argument should be stricken or dismissed based on an impermissible collateral attack. The transportation issues covered under this SEPA appeal issue (as identified in III(D)(1)) are so stricken.

   The Villages MPD conclusions of law expressly identify the Villages MPD COAs addressing transportation as SEPA mitigation measures. Conclusion of Law No. 28(A) of the MPD Ordinance states that "*[a]ll FEIS mitigation* ***and modifications thereto*** *incorporated into the conditions of this MPD should be considered as imposed pursuant to the City's substantive SEPA authority... as well as pursuant to the MPD criterion...*" (Emphasis added).

   All of the transportation COAs found within the FEIS adequacy determination serve to mitigate transportation impacts that the Examiner determined were not adequately addressed in his decision on the FEIS adequacy appeal. In particular, the conditions regarding the transportation model address the significant concern of the Examiner that the transportation model in use by the City is inadequate in both its initial construction and many of its modeling assumption and may not sufficiently address transportation impacts in the FEIS. Consequently, the transportation COAs pertaining to this SEPA appeal issue (III(D)(1)) are construed to be "modifications" to the mitigation recommended in the FEIS under Villages MPD COL 28(A) and, therefore, were imposed through the City Council's SEPA substantive authority.

   The FEIS extensively addressed the transportation model and its assumptions. The Council chose, in an exercise of SEPA substantive authority, to implement the

Examiner's FEIS conditions but to limit their application until the City had issued 850 building permits. The present PP1A SEPA determination cannot be used to modify the past SEPA determination with respect to the FEIS and Villages MPD. The Appellants arguments regarding the transportation model and the modeling assumptions therein are an impermissible collateral attack on prior policy decisions, namely the MPD Permit Approval Ordinance 10-946.

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to the traffic impact analysis. As demonstrated in Finding of Fact No. III(D)(5), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. No. III(D)(4), there are no probable significant adverse environmental impacts resulting from the traffic impact analysis generated by the proposal.

E. Wastewater Impacts

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that there was insufficient environmental review of the wastewater system proposed for the project. They note that the Villages MPD FEIS did not address wastewater impacts because review of wastewater impacts was deferred to project level review. They also note that the final design of the wastewater system differs from that assessed in the Villages MPD and Villages DA decisions. The appeal statement argues that an SEIS should be prepared "*to evaluate construction impacts, impacts to any stream or wetland crossings, and the potential for overflow and/or odor creation at the pumping/storage site and at the connection to the regional trunk system.*" The record does not contain any other evidence on impacts that may be caused by the wastewater system.

2. Adequacy of Infrastructure. It is determined that the proposed sewer system is adequate to accommodate the wastewater conveyance and treatment demands of the proposal. Wastewater from the proposal will be treated by a regional King County treatment facility, which has sufficient capacity for the proposal. Ex. 55, a letter from the Wastewater Treatment Division of King County, notes that King County treatment facilities currently have capacity for an additional 1,150 ERUs. P. 41 of the Staff Report and the testimony of Dan Ervin, 11/3/12 Tr at p. 11, notes that the proposal will generate demand for 921 ERUs. Ex. 41 exhibits King County concerns over lack of information of future development plans, but these appear to be oriented towards future Black Diamond development that will exceed existing treatment capacity. The conditions of approval require that prior to the issuance of any building permits all off-site sewer facilities necessary to serve the proposal shall be completed. The conditions also require that the Applicant provide estimates of wastewater flows for each application for building and utility permits. It is determined that

the proposed sewer system is adequate to accommodate the wastewater conveyance and treatment demands of the proposal.

3. King County Approval. Pursuant to COA 46 recommended in the staff Report, the Applicants have the choice of either connecting the wastewater conveyance system of the proposal to the City's collection system or connecting it to the regional King County system with King County's approval. A major point of disagreement during the hearing was whether King County approval was required to connect to the City's own collection system. As outlined by King County in Ex. 58, King County Code Section 28.84.050(F) requires King County approval for any sewer system that discharges into the County system. The PP1A sewer system, whether or not it will connect directly to a King County trunk line, will ultimately discharge into the County's system because the County provides the sewage treatment, see p. 3-42 of Villages FEIS. The County's jurisdiction to require approval is based upon the fact that PP1A flows are eventually discharged into King County's sewer system for treatment. There is no evidence to suggest that a need for King County approval would result in any probable significant adverse environmental impacts. In order to prevent any chance that construction work will create unnecessary environmental impacts, a mitigation measure will be added to the MDNS requiring the Applicant to acquire any required King County approvals for discharge and/or connection into King County's sewer system. This clarification will ensure that no substantial work will be done on the project site prior to the institution of an irrevocable commitment to providing adequate wastewater conveyance and treatment.

4. Probable Significant Adverse Environmental Impacts. As conditioned, there is nothing in the record to suggest that the proposed sewer collection and treatment system will create probable significant adverse environmental impacts.

   In their appeal statement the SEPA Appellants assert that the proposal could adversely affect critical areas or create odor. The SEPA Appellants odor concerns appear to be based in part upon a letter from King County, Ex. 57, in which Mark Buscher comments as follows:

   ...the County's preliminary finding is that a connection at the City's preferred location has the potential to limit the ability of the existing Black Diamond (Jones Lake) Pump Station to convey peak wastewater flows and to disrupt the operation of the station. A disruption could lead to overflows at the pump station or in the local sewerage connection lines in the City of Black Diamond...

   It is unclear from Ex. 57 whether the County's concerns regarding Jones Lake would apply to the wastewater volumes generated by PP1A. PP1A will only generate a portion of the total volumes of the Villages at full build out. Dan Ervin, who has been working on the sewer design for the project and is a qualified wastewater engineer, testified that the County's concerns are limited to volumes that exceed the system's capacity for 1,150 ERUs from Black Diamond. The volumes generated by PP1A are within the 1,150 treatment capacity and will not create any problems at the Jones Lake station. See Ervin

testimony 11/3/12 Tr at p. 19-20. The SEPA Appellants have not presented any evidence to the contrary and it is reasonable to conclude that the County's treatment design is sufficient to accommodate flows within its treatment capacity. It is determined that the proposal will not create any odor or overflow at the Jones Lake pump station that would constitute probable significant adverse environmental impacts.

Similar to the Jones Lake pump station issue, the SEPA Appellants present another letter, Ex. 90, expressing odor and clogging concerns over a proposed wastewater storage facility. In an Ex. 96 declaration from Dan Ervin, Mr. Ervin testifies that the storage facility will not need to be constructed for the flows generated by PP1A because the PP1A flows are within the treatment capacity of King County. The SEPA Appellants provide no evidence to the contrary. It is determined that the proposal will not create an odor or clogging problems created by the proposed wastewater storage facility identified in Ex. 90, because the storage facility does not need to be built for the proposal.

Beyond the issues identified above, the SEPA Appellants have not identified any adverse impacts associated with wastewater collection and treatment for PP1A. There is nothing in the record to reasonably suggest that the City's critical area regulations and applicable sewer design standards are insufficient to adequately mitigate sewer impacts. Given that substantial weight must be given to the opinion of the SEPA responsible official that the proposal will not create any probable significant adverse environmental impacts, this is not even a close or debatable factual issue.

5. Adequacy of Review. The environmental checklist, Ex. 3, references sewer analysis from Triad and required sewer approval form King County. As noted by Ms. Nelson at hearing, 11/2/12 Tr. at p. 85-86, the Villages FEIS, adopted for PP1A, contains a significant amount of information on the sewer needs of the proposal and the proposed sewer connection system is consistent with the collection system outlined in the FEIS. King County has asserted the need for more environmental review in Ex. 57 and 90, but as discussed in Finding of Fact No. III(E)(4), those impacts are associated with later Villages development when Villages wastewater volumes exceed King County's treatment capacity. The SEPA responsible official, Steve Pilcher, reviewed all of this information prior to determining that the proposal would not create probable significant adverse environmental impact. See 11/3/12 Tr. at p. 271-72. Mr. Pilcher did not request any additional analysis of sewer impacts because he determined that there was nothing unique about the proposed system that existing regulations would not adequately mitigate. 11/3/12 Tr. at p. 285. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. Id. at 285-86. The SEPA responsible official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of a proposal.

Conclusions of Law

1. Scope of Review. The Applicant argued in its pre-hearing SEPA briefing that sewer impacts are outside the scope of this SEPA appeal because a sewer plant is not part of the proposal. Undoubtedly the sewer system for PP1A up to its connection to the City or King County sewer system is a part of the PP1A proposal. The sewer collection system and treatment plant beyond this connection may not qualify as part of the proposal, but impacts to that part of the treatment and collection system qualify as cumulative impacts subject to the SEPA review of the proposal.

   As recognized in case law presented by the Applicant, "*a cumulative impact analysis need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impacts*". *Boehm v. City of Vancouver,* 111 Wn. App. 711, 720 (2002). *Boehm* involved an appeal of an MDNS, but this didn't stop the court from quoting from a case that applies to EIS adequacy in concluding that

   > *"implicit in [SEPA] is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action. The agency cannot close its eyes to the ultimate probable environmental consequences of its current action."*

   111 Wn. App. At FN6, citing *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344 (1976).

   Even if the sewer system is not considered a part of the proposal, there is no question that the proposed subdivision will result in the construction of major sewer improvements. The City cannot close its eyes to any significant impacts that the sewer proposal will create. More specific environmental review will no doubt be more effective and appropriate when a specific sewer design is presented for approval. However, failure to consider more generalized impacts at this stage of environmental review could limit mitigation options down the line. Now is the time to consider the optimization of the locations for utility lines and other issues that may be frozen out of consideration once the location of interior roads and other design features are set by preliminary plat approval.

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to waste water impacts. As demonstrated in Finding of Fact No. III(E)(5), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. No. III(E)(4), there are no probable significant adverse environmental impacts resulting from the wastewater generated by the proposal.

F. School Traffic Impacts and School Construction.

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the environmental impacts of building schools necessary to serve the project must be evaluated. It was noted that King County is currently considering the adoption of countywide planning policies that would prohibit the siting of schools in rural areas. No mention was made of any specific probable significant adverse impacts from the construction of the schools. In its pre-hearing reply brief on its SEPA Appeal, the SEPA Appellants elaborated that at least in the initial years before school construction is completed that children will have to be bussed to schools 22-24 miles away. In the SEPA Appellants' pre-hearing SEPA rebuttal brief, the SEPA Appellants raise safety concerns about students who may have to walk across Rock Creek Bridge from outside the Villages MPD to go to school within the Villages MPD. No other adverse impacts are identified.

2. Probable Significant Adverse Environmental Impacts. Safety impacts associated with students walking to school over the Rock Creek Bridge is addressed in SEPA Appeal Issues section III(A). The only remaining impacts identified by the SEPA Appellants are traffic impacts and the potential inability to construct schools within rural areas. There is nothing in the record to suggest that school traffic will create probable significant adverse environmental impacts. As discussed in Finding of Fact 10(E) supporting adoption of the Villages MPD ordinance, the FEIS programmatic traffic analysis for the Villages MPD has already taken into account school traffic. As further determined in those findings, a change in school location would not create any significant change in traffic analysis because those impacts affect AM numbers and the traffic analysis is based upon accommodating higher PM peak hour traffic counts. The fact that some students may have to be bussed to Enumclaw does not lead to any reasonable inference that this additional traffic, outside of the PM peak hour, would lead to any significant change in trip estimates and corresponding mitigation needs. The SEPA Appellants have not presented any evidence that would lead one to reasonably conclude that the additional AM traffic generated by school traffic would create any material difference in use of the higher PM trip counts used to assess mitigation needs, let alone enough evidence to override the substantial deference to the SEPA responsible official's determination that the proposal will not create significant adverse environmental impacts attributable to school traffic.

   The fact that the King County Council may prohibit schools from being constructed within rural areas is also of no significance because the Comprehensive School Mitigation Agreement Ex. 12 requires the Applicant to provide sites within the City's urban growth area should the county prohibit construction of schools within rural areas.

3. Adequacy of Review. The environmental checklist, Ex. 3, addresses schools at several locations, noting that the proposal will accommodate two school sites, that school impacts are addressed by the Comprehensive School Mitigation Agreement, Ex. 12. The SEPA responsible official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impact. See 11/3/12 Tr. at p. 271-72. Mr. Pilcher also had the Enumclaw School District Capital Facilities Plan at this disposal, adopted into the City's comprehensive plan. The capital facilities plan

contains level of services standards and projected capital facilities needs with growth projections that include the Villages and Lawson Hills master plans. Finally, Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and still concluded that the proposal would not create any probable significant adverse environmental impacts. Id. at 285-86. The SEPA responsible official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of a proposal.

Conclusions of Law

1. Scope of Review. The Applicant argued in its pre-hearing SEPA briefing that school impacts are outside the scope of this SEPA appeal because a school is not part of the proposal. For the same reasons identified in Conclusion of Law No. III(E)(1) for sewer impacts, school impacts should be addressed as a cumulative impact at a general level because the proposal will clearly result in school construction and increased use of schools.

2. School Agreement. In their prehearing SEPA briefing, the Applicant asserts that the Comprehensive School Mitigation Agreement, Ex. 12, prohibits any further environmental review. Paragraph 3.1 of the Agreement provides that the Agreement constitutes "full, total, compete and sufficient mitigation" for school impacts and further that the City agrees that it will not seek or impose any additional mitigation measures or impact fees. The Applicant cannot circumvent the requirements of SEPA by a contractual arrangement with the City. There are no SEPA statutes that authorize such an arrangement. RCW 43.21C.240 authorizes a City to forego SEPA review upon a determination that its development regulations adequately mitigate environmental impacts, but no such determination has been made in this case. Further, RCW 43.21C.240(2) requires that this determination be made "in the course of project review". It is debatable that the Agreement, which is not a development agreement governed by Chapter 36.70B or any development regulation adopted under Chapter 36.70A RCW, would qualify as a document executed "in the course of project review". Finally, the agreement by its own terms only precludes additional mitigation. It does not preclude assessment of environmental impacts.

3. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to school impacts. As demonstrated in Finding of Fact No. III(F)(3), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of school impacts. As determined in Finding of Fact No. , No. III(F)(2) there are no probable significant adverse environmental impacts resulting from schools generated by the proposal.

G. Noise

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that construction noise impacts have not been adequately assessed in the SEPA threshold determination. The Appellants note that the Examiner had concluded in his decision on the adequacy of the Villages FEIS that "the duration of construction noise impacts is a significant impact that has not been adequately addressed in the EIS." The Appellant asserts that although some mitigation has been adopted, there has been no analysis done on the impacts of the construction noise and for this reason it is not possible to determine whether the mitigation is adequate.

2. FEIS Findings on Noise Impacts. The SEPA Appellants accurately summarize the findings of the Examiner on FEIS adequacy related to noise impacts. As discussed in Conclusion of Law No. 4 on noise impacts in the FEIS decision, the FEIS essentially dismissed construction noise impacts as temporary. The Examiner concluded that construction noise was not temporary, since the scale of the project necessitated a 15 year build out involving 150,000 truck trips. As concluded in Conclusion of Law No. 5 in the FEIS Decision, the TV FEIS did not adequately address noise impacts, but since the appeal was just limited to the impacts on three properties it was determined that the deficiency was limited and did not render the FEIS as a whole inadequate. It was reasoned that mitigation could be adequately addressed in the Villages MPD conditions of approval.

3. Noise Mitigation Measures. The Villages MPD COA of approval include 11 COAs to reduce noise impacts. None require any evaluation of how noise generated by the proposal would affect surrounding residents.

4. Noise Reduction Plan. COA No. 35 of the Villages MPD requires the Applicant to submit a plan for reducing short term construction noise for each implementing development. In response, the Applicant submitted Ex. 39 to the Staff Report. Ex. 39 simply repeats the Villages MPD noise COAs and adds nothing more, except to limit the COAs by providing that they would be followed "whenever feasible".

5. Adequacy of Review. The final environmental checklist references the Villages MPD COAs for noise reduction, which the Council has found adequate to address noise impacts. The checklist went through two iterations at the direction of the SEPA responsible official and the revisions included disclosure of noise impacts. The SEPA responsible official also had the Villages FEIS and Villages DA at his disposal, which also addressed noise impacts. Finally, Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and still concluded that the proposal would not create any probable significant adverse environmental impacts. Id. at 285-86. The SEPA responsible official's conclusions on the noise impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of a proposal.

Conclusions of Law:

1. Collateral SEPA Attack. With one exception, the SEPA Appellants' appeal of noise impacts is a prohibited collateral attack on prior SEPA programmatic policy decisions.

   As concluded in Conclusion of Law No.II(B)(2), SEPA review cannot be used to collaterally attack prior SEPA decisions. As discussed below, the noise COAs imposed by the Villages MPD were imposed under the Council SEPA substantive authority and further mitigation would constitute a collateral challenge to those COAs.
   The conclusions of law expressly identify the Villages MPD COAs addressing noise as SEPA mitigation measures. Conclusion of Law No. 28(A) of the MPD Ordinance states that "*[a]ll FEIS mitigation **and modifications thereto** incorporated into the conditions of this MPD should be considered as imposed pursuant to the City's substantive SEPA authority... as well as pursuant to the MPD criterion...*" (Emphasis added).

   It is concluded that all of the noise mitigation required by the Villages MPD was imposed through the City's SEPA authority. All of the Villages MPD noise COAs that are not already recommended in the FEIS are considered "modifications thereto" as identified in Conclusion of Law No. 28(A) and thus constitute SEPA mitigation measures. All of the noise COAs serve to mitigate noise impacts that the Examiner determined were not adequately addressed in his decision on the FEIS adequacy appeal. In particular, the conditions regarding construction noise address the significant concern of the Examiner that construction noise impacts were not sufficiently addressed in the FEIS. Villages MPD noise conditions were recommended by the Examiner in part to make up for the deficiencies in the FEIS. For these reasons, all of the noise COAs of the Villages MPD are concluded to have been imposed under the substantive SEPA authority of the City Council.

   Since the Noise COAs are determined to be exercises of SEPA substantive authority, it must next be determined whether any requirements for further SEPA review or mitigation imposed by this decision would be inconsistent with the COAs. Most pertinent to this appeal issue, it must be determined whether the City Council intended the noise COAs to serve as complete mitigation of noise impacts, or whether additional analysis and mitigation would be appropriate for implementing project review. In Villages MPD FOF 9(F), the City Council determined that the noise COAs imposed by the Villages MPD approval "will appropriately mitigate the noise impacts of the Villages MPD". Given this finding, it is determined that the noise COAs of the Villages MPD were intended to serve as complete mitigation of Villages MPD noise impacts and that any further requirements for noise evaluation or mitigation would be a prohibited collateral attack on this Council determination.

2. Noise Reduction Plan. As noted in the opening sentence to the preceding Conclusion of Law, the SEPA Appellants' challenge to noise mitigation is a prohibited collateral attack "with one exception". The one exception is the noise mitigation plan submitted by the

Applicant, staff Report Ex. 39. Although the SEPA Appellants cannot challenge or request additional SEPA analysis/mitigation as outlined in the preceding Conclusion of Law, they can assert probable significant adverse environmental impacts if the Applicant fails to comply with previously adopted SEPA mitigation measures. Implicitly, the City Council's determination that its SEPA mitigation measures were sufficient to mitigate probable significant adverse environmental impacts is based upon the understanding that the Applicant would comply with those mitigation measures.

The Applicant has clearly not complied with Villages MPD COA No. 35. COA No. 35 requires the Applicant to prepare a plan for reducing short term construction noise for each implementing development project. As determined in Finding of Fact No. III(G)(4), the Applicant's noise mitigation "plan" simply listed the noise COAs already required for the project. Clearly, this is not what the Council had in mind with Villages MPD COA No. 35. A "plan" that only parrots what is already required by other COAs accomplishes nothing, since those other requirements are already required.

In order to remedy this deficiency an additional mitigation measure will be added to the MDNS requiring that the Applicant provide a detailed noise reduction plan that identifies with specificity how best management practices will be implemented to reduce noise impacts. The noise mitigation plan will be subject to review and input from the Noise Review Committee created by Villages MPD COA No. 45. COA No. 45 already requires the Committee to review and monitor compliance with Villages MPD noise requirements, which should have included the plan required by Villages MPD COA No. 35.

3. Threshold Determination Sustained. With the additional mitigation specified in Conclusion of Law No. III(G)(2) above, there are no grounds for overturning the threshold determination of the responsible official as it applies to noise impacts. As demonstrated in Finding of Fact No. III(G)(5) the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Conclusion of Law No. III(G)(1) above, any mitigation or environmental review required beyond compliance with Villages MPC COA 35 is prohibited as a collateral attack on prior programmatic FEIS policy decisions made by the Council.

H. Public Services

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the SEPA responsible official did not have a finalized fiscal impact analysis (required by Villages DA Section 13.6) available at the time he issued his threshold determination and that the finalized version did not contain an adequate analysis of fiscal issues. Subsequent SEPA briefing by the SEPA Appellants identified what they perceived to be flaws in the fiscal impact analysis.

2. Impact on Public Services. The SEPA Appellants have provided no evidence on fiscal impacts to public services. They only generally assert that the fiscal impacts of the project have not been adequately estimated and that, consequently, it is possible public services may be inadequately funded and that this lack of funding will impair the ability of the City to provide adequate services.

3. Probable Significant Adverse Environmental Impacts. The SEPA Appellants have argued that the fiscal impacts of the project have not been properly estimated, but have provided no information or evidence as to what the fiscal impacts would be or how they would adversely affect the provision of public services. Their primary argument, outlined in their pre-hearing response brief, is that the Applicant's yearly funding contribution required by the Villages MPD Funding Agreement is not off-set by the expenditures funded by that Agreement. There is nothing in the fiscal impact analysis, Ex. 40, to suggest that expenditures funded by the Villages MPD Funding Agreement have not already been factored into the yearly net general fund balance in Table 2 of the fiscal impact analysis. In point of fact this would be expected given the narrative of the fiscal impact analysis, which purports to include all general staffing expenses in the computation of general fund expenses. The only factor supporting the Appellant's position in this regard is that both the City and the Applicant did not contest the Appellant's assertion that expenses covered by the Villages MPD funding agreement are not included in the computation of the yearly net general fund balance.

   The SEPA Appellants also take the position that Table 2 of the fiscal impact analysis shows a "modified cumulative general fund" surplus of $1,653,685 for 2012 and asserts that the City will run a deficit in 2012. The actual general fund balance for 2012 is not in evidence. At any rate, the Appellants have not provided any information or evidence to suggest that the "modified cumulative general fund" of Table 2 is intended to correlate with the actual ending fund balance of the City. It would appear that the "Net Annual General Fund Surplus (Deficit)" in Table 2 is what represents the yearly ending balance of the City, not the "modified cumulative general fund" as asserted by the SEPA Appellants. No ending balance is estimated for 2012 in the "Net Annual General Fund Surplus (Deficit)." Again, the City and the Applicant have surprisingly not addressed the position taken by the Appellants on this issue, so how to interpret Table 2 remains a little unclear.

   More likely than not, it appears that the "Net Annual General Fund Surplus (Deficit)" in Table 2 represents the yearly net general fund balance of the City, after expenses created by the Villages MPD are taken into account. As is readily evident from Table 2, the yearly deficits projected for City's general fund are amply covered by the Applicant's yearly $1,653,685 contribution. The Applicant has even proposed a new condition, Ex. 91, COA No. 6, which is adopted as a condition of PP1A approval, as revised by the City, that requires the Applicant's funding contribution to cover, at a minimum, any annual deficit predicted in the fiscal impact analysis.

Since the Applicant will cover any deficit's projected for the City's general fund, it cannot be concluded that the City's ability to provide adequate public services will be impaired by fiscal impacts. Of course, this conclusion assumes that the fiscal impact analysis uses accurate estimates for the costs of providing public services at appropriate level of service standards. The Appellants do not challenge the fiscal impact analysis on this basis (except as to police level of service, addressed separately) and there is no evidence suggesting that the fiscal impact analysis is inaccurate in this regard. In addition to the foregoing analysis, it is also compelling that the fiscal impact analysis has been subject to independent peer review by the City's financial consultant Randy Young, as outlined in the Applicant's pre-hearing SEPA rebuttal brief.

It is determined that the fiscal impacts of the proposal will not impair the City's ability to provide public services for the following reasons: (1) the fiscal impacts analysis is reasonably accurate given its preparation by a qualified expert subject to peer review by a City qualified expert; (2) the absence of any evidence that fiscal impacts would impair the City's ability to provide public services; (3) the mitigation measure requiring the Applicant to cover general fund deficits; and (4) the substantial weight that must be given to the SEPA responsible official's threshold determination. It is further determined that since the fiscal impacts of the proposal will not impair the City's ability to provide public services, the fiscal impacts of the proposal will not create any probable significant adverse environmental impacts that must be addressed by SEPA.

It is acknowledged that the "modified cumulative general fund" is suspect, given that its starting point is based upon an assumption of a balanced general fund for 2012. If the 2012 general fund will end in a deficit as claimed by the Appellants, the cumulative total is in error from the start. However, the "modified cumulative general fund" has not been used to assess environmental impacts in this decision. The "modified cumulative general fund" is of no consequence in assessing the environmental impacts of the proposal.

4. Use of Draft Fiscal Impact Analysis. The SEPA Appellants assert that the SEPA responsible official only had a draft fiscal impact analysis available to him at the time he issued his threshold determination. As outlined in the pre-hearing SEPA rebuttal brief of the Applicant, Ex. 116, the draft was approved unchanged as the final version of the fiscal impact analysis determined to comply with the requirements of Section 13.6 of the Villages DA.

5. Adequacy of Review. The final environmental checklist references the fiscal impact analysis, which as determined in Finding of Fact No. III(H)(4) above was ultimately approved by the City as compliant with Section 13.6 of the Villages DA. The fiscal impact analysis provided sufficient detail to support the conclusion that the funding impacts of the proposal would not significantly impair the City's ability to provide adequate public services. The SEPA responsible official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the fiscal impacts to the City's ability to provide adequate public services.

Conclusions of Law

1. Fiscal Impacts not an Environmental Impact. The City and Applicant have both argued that fiscal impacts are not an environmental impact subject to review. The City and Applicant are correct on this point. However, fiscal impacts can be so severe that they can create secondary impacts that are environmental. In this case the SEPA Appellants asserted that the fiscal impacts of the proposal would impair the ability of the City to provide adequate public services, which is recognized by the SEPA rules as an environmental impact. The SEPA Appellants were given an opportunity to prove this connection, but ultimately did not do so as determined in the findings of fact above.

   The inapplicability of SEPA to fiscal impacts is well known and well established in the SEPA rules. WAC 197-11-448(2) specifically notes that "socioeconomic" is not a part of the SEPA rules or statutes and is not part of the definition of impacts to be considered in environmental review. No economic impacts of any kind are identified in WAC 197-11-444, which defines the elements of the environment that can be considered when assessing environmental impacts. However, public services and utilities are expressly included in the definition of environment. See WAC 197-11-444(2)(d). Certainly, at least theoretically a project could so severely deplete the coffers of a city that it adversely affects its ability to provide for adequate public services. As noted in Settle's treatise on SEPA case law, given the wide breadth of impacts subject to SEPA review through its definition as environmental, "*it is difficult to imagine many significant effects which might not be characterized as 'environmental'*" despite the restrictions governing review of socioeconomic impacts. Settle, *The Washington State Environmental Policy Act*, Section 14.01[2].

   As determined in the findings of fact, the Applicants have not established that the fiscal impacts of the proposal would impair the ability of the City to provide adequate public services. Without establishing that preliminary connection between fiscal impacts and impacts to public services, the discussion of fiscal impacts cannot[2] be addressed in the context of SEPA review.

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to fiscal and public services impacts. As demonstrated in Finding of Fact No. III(H)(5), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(H)(3), there are no probable significant adverse impacts associated with the proposal.

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[2] In their pre-hearing SEPA reply brief the SEPA Appellants raise a good argument that the fact that fiscal impacts don't qualify as environmental impacts subject to SEPA review only means that the City is not compelled to review the impacts but is not prohibited from doing so. This may or may not be the case, but the issue is moot since it is determined that the financial impacts do not create any significant adverse environmental impacts.

I. Police Service

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the fiscal impact analysis, Ex. 40, does not employ a "comparable city" as required by the Villages DA to assess funding of police services because the "comparable city" is the City of Black Diamond itself. The Appellants also dispute the level of service used to determine funding needs for police services. The fiscal impact analysis used the level of service assigned by the Comprehensive Plan, which designates the police level of service as "proposed".

2. Probable Significant Adverse Impacts. The fiscal impact analysis use of Black Diamond as a comparable city and use of the "proposed" level of police service from the Comprehensive Plan will not result in any probable significant adverse impacts. The SEPA Appellants have not presented any evidence that the methodology of the fiscal impact analysis will in any way result in the provision of inadequate police services. In point of fact, the only evidence on funding impacts is that the use of Black Diamond as a comparable city as opposed to a separate city will result in a greater estimate of police department expenditures, which in turn can serve to increase the Applicant's funding obligation. Cf. Ex. 39 and 40, Villages DA Section 13.6. The City may or may not be bound to use the "proposed" level of police service from the Comprehensive Plan, but the SEPA Appellants have not demonstrated that the proposed level of service is inadequate for the Black Diamond community. In the absence of any other guidance on what is an acceptable police level of service, the "proposed" level of service adopted by the elected representatives of the Black Diamond community in the Comprehensive Plan is by far the most appropriate standard to apply.

3. Adequacy of Review. The final environmental checklist references the fiscal impact analysis, which as determined in Finding of Fact No. III(H)(4) was ultimately approved by the City as compliant with Section 13.6 of the Villages DA. The fiscal impact analysis contains a detailed accounting of fiscal impacts to police services prepared by a qualified expert and subject to review by a City consultant who is also a qualified expert. The SEPA responsible official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the fiscal impacts to the City's ability to provide adequate public services.

Conclusions of Law:

1. Comparable Cities. Section 13.6(e) of the Villages DA clearly contemplates the use of a city other than Black Diamond when using the comparable city methodology for estimating police department expenditures. As determined in the findings of fact, this error does not result in any probable significant adverse environmental impacts so the error is irrelevant for purposes of SEPA review. However, the preliminary plat criteria do require compliance with the Villages DA, which includes Section 13.6(e). The plat

conditions will require use of a separate city for estimating police expenditures. The Applicant will be given the option of continuing to use Black Diamond as the comparable city should its funding obligation be higher using Black Diamond itself. Ultimately the SEPA Appellant's insistence on using a separate city as a comparable city may result in a reduction of Applicant funding to the City, but the Examiner has no choice but to require compliance with Section 13.6(e) since compliance has been raised by the SEPA Appellants.

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to police services. As demonstrated in Finding of Fact No. III(I)(3), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(I)(2), there are no probable significant adverse impacts associated with the proposal.

SEPA Appeal Issues II(C): Wetlands

The SEPA Appellants have filed nine separate appeal issues regarding wetlands. Generally applicable findings and conclusions are listed below and then each separate wetlands issue is assessed more specifically with its own findings and conclusions.

J. General Wetlands Findings of Fact:

1. Wetlands Affected by Proposal. It is uncontested that there are four wetlands affected by the proposal. These wetlands are designated as Wetland E1, located to the southeast of the proposal (see PP8 of staff Report Ex. 2); Wetlands S and D4, both located in the southern portion of the proposal west of the school site (see PP7 of staff Report Ex. 2); and wetland T located to the west of wetland D4 adjoining the southwest of the proposal (see PP4 of staff Report Ex. 2). The proposal is generally located to the north of wetlands S, D4 and T and to the west of Wetland E1.

2. Wetland Classifications. staff have recommended classifications for each of the four wetlands identified in Finding of Fact III(J)(1). Wetland E1 has been classified as a Type II wetland with 225 foot buffers. The remaining wetlands are classified as Type III[3] wetlands with 60 foot buffers. See Ex. 184 and Staff Report Ex. 22.

3. No filling of wetlands is proposed. The proposal will not involve any filling of wetlands. Scott Brainard testified that PP1A will not involve any filling of wetland. 11/2/12 Tr at

[3] The classification of D4 is somewhat ambiguous. In the final wetland review memo, Ex. 22 of the Staff Report, WRI asserts that D4 is a Category IV wetland but "agrees" to a 60 foot buffer, which cannot be required for a Category IV wetland. Given this ambiguous information, it is presumed that the City has classified wetland D4 as a Category III wetland.

p. 37. No filling is evident from any of the evidence in the record and no specific filling is alleged by the SEPA Appellants.

4. Wetland Review Process. Several highly qualified wetland consultants have been involved in the delineation and classification of wetlands for the proposal. The Applicant has used the services of Wetland Resources Inc. ("WRI") to prepare the initial delineations and classifications. Scott Brainard has represented WRI in testimony and evidence presented at hearing. The work of WRI has been subject to third party review by Perteet, Inc., who was hired by the City. Jason Walker has presented testimony and evidence on behalf of Perteet. The Applicant also hired Bill Shiels of Talasera to conduct an additional third party review of the classification of the wetlands. The wetland review process is documented by five letters and memoranda from WRI and Perteet in the administrative record: May 9, 2012 Sensitive Area Study by WRI, Ex. 11 to Staff Report; June 13, 2012 memo from Perteet, Ex. 187; July 17, 2012 letter from WRI, Ex. 186; July 17, 2012 Revised Sensitive Area Study, Ex. 21 of Staff Report; July 25, 2012 Perteet review of revised WRI wetlands review, Ex. 184; July 30, 2012 WRI response to July 25, 2012 Perteet memo, Ex. 22 to Staff Report.

5. MDRT Not Subject to Undue Influence. In Dr. Cooke's written SEPA rebuttal comments, Ex. 133, Dr. Cooke asserts that the City's Major Development Review Team ("MDRT") did not have as much independence and authority as typically associated with the review of major development projects, at least implying that the MDRT lacked independent professional judgment. The evidence does not support this position and it is determined that there is insufficient evidence to establish that the MDRT was subject to any undue or inappropriate influence from the Applicant.

   In their Ex. 145 response to Dr. Cooke's written rebuttal, the Applicants object to this issue on the basis that it exceeds the scope of the appeal and the scope of rebuttal. Those objections are overruled. The independence of the MDRT affects the credibility of their findings. MDRT findings and conclusions are used by the Applicant and City in defending against most of the wetland appeal issues. Consequently, MDRT credibility is relevant to resolving those appeal issues.

   Dr. Cooke states in Ex. 133 that an MDRT is composed of expert consultants with expertise and/or resources that a planning department does not have to review major development projects. She noted that in her experience an MDRT typically reviews the work of a developer and then dictates what changes need to be made. In a subsequent reply statement, Dr. Cooke noted that it is not commonly accepted practice to have the Applicant's wetland consultant "peering over their [City's third party wetland consultant] shoulder and being allowed to contest every one of their decisions". Ex. 160, par. 7. Instead of requiring the Applicant to comply with the decisions of the MDRT team, Dr. Cooke asserts that City staff told the MDRT to work out any differences it had with the Applicant and to come to an agreement. Ex. 133. Dr. Cooke testified that the only time the City gained the upper hand in these negotiations was when a concession would not reduce the development potential of the proposal. Dr. Cooke appears to be arguing that

the MDRT was negotiating wetland mitigation and ratings when it should have been dictating them.

Dr. Cooke presents a substantial amount of evidence in support of her claim that the MDRT lacked sufficient independence and authority to classify the wetlands. In her Ex. 133 SEPA rebuttal, Dr. Cooke presents a chart of the history of the wetland negotiations to show that the MDRT accepted several wetland ratings that were contrary to its initial June 13, 2012 assessment. According to Table 1of Ex. 133, in its June 13, 2012 memo, Ex. 187, Perteet classified wetland E1 as a Category I wetland with a 110 foot buffer[4] and classified wetlands S and T as Category III wetland with rating scores that would result in 110 foot buffers[5]. As shown in Finding of Fact No. III(J)(2), the final categories recommended by the City for these wetlands followed the requests of WRI, which were classifying E1 a Category II wetland and classifying S and T as Category III wetlands with 60 foot buffers. Perteet reversed its 6/13/12 position on the buffer for E1 and expanded it from 110 feet to 225 feet, which is the buffer recommended by the City. The expansion of the buffer was based upon Perteet's determination, unrecognized by WRI, that a stream meandered through the wetland. The documentation in the administrative record does not identify why Perteet agreed to reduce its buffer requirements for wetlands S and T.

In her concerns over the MDRT process, Dr. Cooke also asserts that the categorization of E1 blatantly fails to follow the guidelines of Hruby, 2006, *Wetland Rating for Western Washington*. She notes that E1 should be considered a part of a larger complex that has already been classified as a Category I wetland. WRI, Perteet and Mr. Shields have all concluded that E1 can be classified separately since it is separated from the rest of the complex by a topographic break. Dr. Cooke asserts that the Hruby manual does not allow this type of change in topography to segregate out a wetland except for large contiguous wetlands in valleys. There is no valley associated with E1. It does not appear that City regulations require use of the Hruby 2006 manual, as BDMC 19.10.210(B)(3) requires use of the 2004 *Wetland Rating System for Western Washington*[6]. Nonetheless, the Applicant and City do not address the applicability of the *Hruby* manual or whether segregation is consistent with the guidelines of the *Hruby* manual. Instead, the Applicant asserts that the issue is moot because the 225 foot buffer required for E1 is the same buffer that would be required if it were classified a Category I wetland. As discussed in the Conclusions of Law below, the issue is not moot because the restrictions that apply to Category I wetlands differ from those that apply to Category II wetlands.

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[4] Dr. Cooke's Table 1, Ex. 133, incorrectly states that Perteet assigned a buffer of 225 feet. The June 13, 2012 memo clearly assigned a buffer of 110 feet to E1. It is acknowledged, however, that during review of the Villages DA both Perteet and apparently WRI agreed that E1 was a Category I wetland with a 225 foot buffer since this was proposed for the constraints map initially proposed for the Villages DA.

[5] Perteet expressly stated that the scores required 110 foot buffers in their June 13, 2012 memorandum, Ex. 187.

[6] It is recognized that the City required manual may simply be another edition of the Hruby manual. There is simply no way to confirm that from the record.

Another MDRT concern raised by Dr. Cooke in Ex. 133 is that the MDRT team did not receive information it requested from the Applicant. In Ex. 133, Dr. Cooke noted that Perteet requested wetland delineation data in its June 13, 2012 memo, Ex. 187, but the Applicant simply refused to provide the data on the basis that the Villages DA prohibit the revisiting of the wetland delineations. Perteet backed down on this request in its July 25, 2012 memo, Ex. 184, concluding that "the wetland boundaries submitted with the application are acceptable on the basis of the vested [development] agreement."

There is no compelling evidence that the Applicant exerted any undue influence on the professional judgment of Perteet in its 3rd party review of the wetland categorizations. On Perteet's failure to follow through on its request for delineation data, it was reasonable (though not necessarily correct) for Perteet to conclude that the Villages DA prohibited the consideration of delineation issues as outlined in the Conclusions of Law below. On the issue of segregating E1 from the adjoining core wetland complex, whether or not that was correct is far from clear in the record, but one potential mistake does not lead to the conclusion that the decision was guided by anything other than the rating criteria. Contrary to the assertion made by Dr. Cooke at hearing, the Applicant did agree to changes requested by Perteet that were against its interest. Specifically, the expansion of the E1 buffer from 110 feet to 225 feet resulted in the loss of developable space from Tract 34B, as shown in PP8 of Ex. 2 to the Staff Report. Finally, although not specifically mentioned by Dr. Cooke, the fact that Perteet and the Applicant "agreed" on the classifications does not mean that Perteet would not have required a classification to which the Applicant did not agree.

The one troubling factor on the ratings issue is that Perteet has never explained why it agreed to go from its initial recommendation of 110 foot buffers for Wetlands S and T to 60 foot buffers. Given the extensive documentation between Perteet and WRI, it would appear to be prudent and common practice to provide a good explanation as to why Perteet changed its original assessment. It is also puzzling that Perteet never once explained this change in position during the hearing and the extensive battle of written argument allowed after the hearing. Mr. Brainard has skillfully addressed every other issue that could conceivably undermine his position except for his change in position on the buffers for Wetlands S and T. However, the SEPA Appellants never asked Mr. Brainard about this issue even though he was subject to cross-examination. Although this gaping hole in Perteet's defense is a cause for suspicion, there is nothing else to suggest that Perteet's conclusions were based upon anything other than its impartial application of the rating criteria. Given the substantial weight that is due the threshold determination of the responsible official, who clearly has complete confidence in Perteet's work, no other conclusion can be reached on this issue.

Given Dr. Cooke's substantial expertise, the Examiner must give substantial weight to Dr. Cooke's opinion that unilaterally dictating wetland boundaries as opposed to engaging in a collaborative process with the Applicant is commonly accepted practice. However, such a unilateral approach does not appear to be in the City's interests from both an environmental and a legal stand point. From an environmental standpoint,

Walker, Brainard and Shiels (11/1/12 Tr at 195) all testified that wetland ratings are a subjective process and it is common to have disagreement on scoring. Brainard testified that in Hruby's wetland's ratings class it was common for students to engage in lengthy discussion and collaboration to resolve differences of opinion on wetland rating scores.

The shortcomings of Dr. Cooke's methodology are most evident when applied to Dr. Cooke herself. Dr. Cooke testified that she welcomes peer review of her work and that the added review gives her an added assurance of accuracy. In that situation accuracy would even be better served if Dr. Cooke were given the opportunity to defend her work against an adverse peer review finding. Given her tremendous expertise, it is the unfortunate third party reviewer who would likely be left with the short end of the exchange. Dr. Cooke appears to be opposed to that type of exchange. She would apparently prefer that the third party reviewer's contrary findings be left unchallenged and unmodified, no matter how erroneous, and that the City move forward without the expertise of Dr. Cooke's rebuttal. Such a scenario makes no sense. A wetland rating is clearly a subjective determination and accuracy would be enhanced by a healthy debate between the City and the Applicant.

The benefits of a collaborative approach to wetland determinations are even more significant from a legal standpoint. As previously noted, on-going discussion between the City and Applicant ensures accuracy. Accuracy obviously promotes legal defensibility. It is also in the City's legal interest to seek agreement from the Applicant. In most cases an Applicant cannot legally challenge a development condition or requirement if they have agreed to it. Given the legal advantages of securing the Applicant's agreement on development restrictions, it is always preferable to see if the Applicant will agree to a restriction before resorting to imposing it over the protest of the Applicant.

Ultimately, a discussion and debate between an Applicant and municipality over wetland determinations is preferable to the municipality blindly dictating requirements with no receptivity to feedback. So long as the municipality maintains its impartiality and bases its final decision on what it believes to be consistency with code requirements, there is nothing wrong with seeking input from the Applicant and making modifications to initial positions as error becomes apparent. The change in buffers of wetlands S and T are troubling, but beyond this there is nothing in this administrative record to suggest that the impartiality of Perteet has been compromised in any way by its deliberations with the Applicant.

6. Adequacy of Review. The final environmental checklist references a Sensitive Area study prepared by Scott Brainard as well as several wetland mitigation measures. Ex. 3. Mr. Pilcher was also involved in the preparation of the Villages DA, where after considering argument and evidence on the issue the City Council adopted "final and complete" wetland delineations in Section 8.2.1 of the Agreement. Subsequent to issuance of the checklist, an additional five wetlands reports involving the City's third party reviewer were issued assessing wetland ratings in detail. The Applicant also had

another wetlands consultant, William Shiels, do a third party review of the ratings and Mr. Shiels testified on his findings at the SEPA Appeal hearings. Mr. Shiels based his conclusions on two site visits and Mr. Walker on three site visits. See 11/1/12 at 203 (Shiels) Tr at 119 and 11/2/12 Tr at 119 (Walker). Mr. Pilcher was present during the entire course of the hearing and has examined all six wetland reports as well as the testimony and declarations of Mr. Shiels, Mr. Brainard, Mr. Walker and Dr. Cooke. 11/3/12 Tr at 285-86. In assessing wetland issues Mr. Pilcher relied upon the input of the City's wetland expert, Jim Walker from Perteet. Id. at 274. The Villages FEIS, adopted for the proposal, also contained a discussion of wetlands. Villages FEIS, 4-49 through 4-64. With all this information he still concluded that the proposal would not create any probable significant adverse environmental impacts. Id. The SEPA responsible official's conclusions on the environmental impacts of the wetland delineations are based upon information reasonably sufficient to evaluate those impacts.

K. Wetland Delineations

Findings of Fact:

1. Overview of Appeal Issues. Section 8.2.1 of the Villages DA locks in wetland delineations for twenty years. In their appeal statement, the SEPA Appellants question the accuracy of these delineations and also assert that locking in wetland delineations for twenty years is counter to state and federal law.

2. Probable Significant Adverse Environmental Impacts. The Appellants have not demonstrated that PP1A will create probable significant adverse environmental impacts to wetlands in regards to the delineation set by the Villages DA. The Appellants must demonstrate that the wetland delineations are inadequate to protect the wetlands from PP1A probable significant adverse environmental impacts. The Appellants have not presented any direct evidence to prove this point. The Appellants point out that federal law only allows wetland delineations to stand for a maximum of five years. While that fact serves as circumstantial evidence that the wetland delineations more than five years may be too dated to serve their purpose, that evidence is inapplicable to the proposal at hand because the delineations were made in 2008, less than five years ago. The Appellants also claim that the wetland delineations were not properly verified. The wetland delineations were in fact verified by Parametrix, the City's third party qualified wetlands consultant. More importantly, the wetland delineations were set by the qualified experts of the Applicant and the Appellant has provided no evidence that any of the delineations are in error. It is determined that with or without the substantial weight due the determination of the responsible official that the wetland delineations set for the proposal will not create any significant adverse environmental impacts.

3. Soil Data. During her hearing testimony, Dr. Sarah Cooke, the Appellants' wetlands expert, noted that soil data used for the delineations was not made a part of the public record and was not made available to Perteet for its third party review of the delineations. See 11/1/12 Tr. At 181-82. Dr. Cooke further noted that she needed the soil data to verify the accuracy of the wetland delineations. Scott Brainard, who did the delineations for the Applicant, testified that he did make the soil data available to the City by appending the data to sensitive area reports submitted to the City. See 11/2/12 Tr at p. 26. As noted in email rulings issued by the Examiner, Ex. 182, if the Appellants had requested this information prior to the hearing and was denied on the basis of Public Record Act exemptions, the Examiner did not have the authority to rule on the applicability of those exemptions. If the Appellants were improperly denied access to those records, as discussed in the email rulings the Appellants should have the opportunity to supplement the record on judicial appeal with information pertaining to their evaluation of soil data.

Conclusions of Law:

1. Collateral Attack. The Applicant and the City have both argued that SEPA cannot be used to review the environmental impacts of the wetland delineations set by the Villages DA, because Section 8.2.1 of the Agreement provides that the delineations are to be "final and complete" through the term of the Agreement and that if the boundaries are found to differ during construction from those set by the Agreement that the boundaries of the Agreement shall prevail. It is concluded that the City cannot preclude environmental review through its development agreement.

   As concluded in Conclusion of Law No. II(B)(3), the requirements of the Villages DA cannot preclude SEPA review. The delineations may be "complete and final" as to subsequent implementing permit criteria, but not to the threshold determination made by the SEPA responsible official. Even if Section 8.2.1 has to be construed as prohibiting inconsistent SEPA mitigation measures, SEPA can still be used to require an assessment of environmental impacts, which can still be of significant use in serving as the foundation for other types of mitigation. The environmental impacts of the wetland delineations can and should be considered in the SEPA evaluation of this project.

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to the adequacy of the wetland delineations to protect wetlands from PP1A impacts. As demonstrated in Finding of Fact III(J)(6), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(K)(2), there are no probable significant adverse impacts associated with the proposal.

L. Wetlands T and D4 may not be isolated from Wetland S.

Dismissed by Order on Dismissal, Ex. 123, as moot.

M. Potential Wetland Impacts Haven't Been Sufficiently Analyzed.

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that impacts to wetlands have not been sufficiently assessed. They note that Perteet had determined that the Villages FEIS did not adequately address wetland impacts and that this issue should addressed during implementing project review.

2. Roadway Impact. The only specific impact to wetlands cited by the SEPA Appellants is an encroachment of Ash Ave SE and SE Dogwood St to the building setback line of wetland T. This was also a concern shared by the Muckleshoot Tribe in its SEPA comments on the proposal. Dr. Cooke noted that it's not possible to build a road without equipment getting into areas adjacent to it. 11/1/12 Tr at 179-80. She also noted that vehicles would park along the shoulder in the setback.

   It is determined that construction of the road within the building setback line will not create any probable significant adverse environmental impacts. This finding is based upon the City's development standards, the project design and project conditions. As noted by the Applicant during the hearing, BDMC 19.10.160(D)(4) authorizes roads to be built within building setback lines. See 11/1/12 Tr at 148-49. An MDNS condition and Villages MPD COA 117 require split rail fencing along wetland boundaries. Scott Brainard testified that silt fencing will be required by the City's stormwater regulations to prevent erosion impacts during construction. 11/2/12 Tr at 55. As testified by Bill Shiels, it is possible to build and design a road without encroaching into an adjoining wetland setback. 11/1/12 Tr at 197. As noted in a declaration from Scott Brainard, a sidewalk will separate the Ash and Dogwood streets from the setback line, eliminating the potential for the buffer area to serve as a road shoulder. See Ex. 143, att 1.

3. Classification of E1. The classification of Wetland E1 as a Category II wetland may be erroneous. This improper classification may result in probable significant adverse environmental impacts. A mitigation measure will be added to the MDNS requiring re-evaluation of the classification for Wetland E1.

   The administrative record does not support the classification of wetland E1 as a Category II wetland. As discussed in the general findings of fact, Dr. Cooke references a reputable wetland ratings manual as unambiguously prohibiting the segregation of a wetland from a larger wetland complex unless the wetland is in a valley. The Applicant and City do not dispute this and only counter that the issue is moot because the buffer required for the wetland is the same as a Category 1 wetland. Even with the substantial weight given to the SEPA responsible official, it cannot be determined that the wetland classification is correct. Dr. Cooke is a highly qualified wetland scientist. Her conclusions on this issue are what she claims to be based upon unambiguous guidelines in a reputable ratings

manual. The failure to correctly classify E1 can potentially lead to probable significant adverse environmental impacts because, as concluded in the Conclusions of Law, incorrect classification will result in less protection of the wetland than has been determined necessary in the City's critical areas ordinance. In order to ensure that the impacts of the proposal are still below the MDNS threshold, the MDNS will be revised to require that either (1) Perteet[7] re-evaluate the classification of E1 taking into account the Hruby guideline raised by Dr. Cooke to the extent that guideline is relevant to the ratings manual adopted by City code and revise the classification accordingly; or (2) acquiring agreement from the Applicant to reclassify E1 as a Category I wetland.

4. Sufficiency of Wetland Buffers to Protect Wetlands. It is determined that the wetland buffers required for this project in conjunction with other development standards and conditions are sufficient to protect the wetlands from probable significant adverse environmental impacts generated by the proposal.

   Dr. Cooke testified that DOE studies have concluded that 60 foot wetland buffers are ineffective. 11/1/12 Tr at 176. She said that additional mitigation could still be added to augment the buffers, such as fencing, plantings and monitoring. At the same time, Dr. Cooke agreed that in PP1A there is not a lot of potential for impacts, but this application sets a precedent. 11/1/12 Tr at 169-70. Beyond the road encroachment issue addressed in Finding of Fact No. III(M)(1), groundwater impacts (addressed elsewhere) and her skepticism over the wetland classifications for the project (also addressed elsewhere), Dr. Cooke did not identify any project specific impacts that are not adequately mitigated by the proposed wetland buffers.

   Mr. Walker, Mr. Brainard and Mr. Shiels all testified that the proposal would not result in any probable significant adverse environmental impacts to wetlands. See 11/1/12 Tr at 197 (Sheils); Declaration of Brainard, Ex. 32, par. 4; 11/2/12 Tr at 121 (Walker). As testified by Mr. Brainard, the proposal will not encroach into any wetlands or their buffers and no wetland filling is proposed. 11/2/12 Tr at 121. As noted previously, after hearing all the evidence presented at the hearing, the SEPA responsible official still determined that the proposal would not create any probable significant adverse environmental impacts to wetlands.
   Given the substantial weight that must be accorded to the determinations the SEPA responsible official, it must be determined that the wetland buffers proposed for the project, along with all other wetland mitigation, is sufficient to prevent probable significant adverse environmental impacts to wetlands. The buffers imposed by the City's critical areas ordinance have been legislatively determined by the City Council to be adequate to protect wetlands using best available science as required by the Growth Management Act, Chapter 36.70A RCW. Additional mitigation measures may

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[7] As noted in Finding of Fact No. III(J)(5), the ratings manual cited by Dr. Cooke does not appear to be the ratings manual adopted by City Code. The City must apply the guidelines of the adopted ratings manual. If the segregation guidelines in the Hruby manual are irrelevant to the ratings guidelines of the manual adopted by the City, the classification of E1 should not be changed.

sometimes be necessary for project specific impacts not anticipated in the critical areas ordinance, but in order to justify these mitigation measures and overcome the substantial weight due the responsible official's threshold determination there must be a compelling showing made that a specific impact is not adequately mitigated. No such finding has been made in this SEPA appeal.

Conclusions of Law:

1. E1 Classification Not Moot. In its response to Dr. Cooke written testimony in Ex. 145, the Applicant asserts that the issue should be ruled moot since the wetland for E1 as a Category II wetland are 225 feet, which is the maximum buffer that could be required for a Category I wetland. The issue is not moot. Even though the buffer may not change, Category I wetlands are otherwise more protected than Category II wetlands. As outlined in applicable regulations, the following are more restricted within Category I wetlands and/or buffers than in Category II wetlands and/or buffers: outdoor recreational and educational activities; the harvesting of crops; drilling for utilities; placement of overhead utility lines; placement of trails; placement of roadways; utility facilities; and roadways See BDMC 19.10.220(A) and (B).

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to wetland impacts with the additional mitigation measures imposed by this decision. As demonstrated in Finding of Fact No. III(J)(6), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(M)(2)-(4), there are no probable significant adverse impacts associated with the proposal.

N. Cumulative Wetland Impacts

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that cumulative impacts have not been sufficiently assessed. Dr. Cooke elaborated in her written SEPA rebuttal, Ex. 133, that an adequate evaluation of cumulative impacts should include a consideration of surface water or groundwater conveyance changes resulting from constructing of the development; the impacts of clearing, grading, loss of habitat, changes on hydrologic regime from compaction; and changes to topography and corresponding alterations to surface water flows.

2. Adequacy of Review. The SEPA responsible official has conducted an adequate review of cumulative impacts. The FEIS has already done a limited general cumulative impact analysis, configuring project design to maximize protection of wetlands The SEPA responsible official has also considered impacts to wetlands in general as previously

discussed. Finally, the SEPA responsible official has also considered the arguments and concerns presented by the SEPA Appellants and has still concluded that the proposal will not create any probable significant adverse environmental impacts.

3. Probable Significant Adverse Environmental Impacts. The Appellants have not demonstrated that PP1A will create probable significant adverse environmental impacts to wetlands in regards to cumulative impacts. The Appellants must demonstrate that PP1A will contribute to cumulative impacts that rise to the level of probable significant adverse environmental impacts. The Appellants have limited their appeal to addressing failure to adequately analyze cumulative impacts as opposed to asserting that any exist.

Conclusions of Law:

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to cumulative wetland impacts. As demonstrated in Finding of Fact III(J)(6) and Finding of Fact No. III(N)(2) above, the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(N)(3) above, there are no probable significant adverse impacts associated with the proposal.

O. Groundwater Impacts to Wetlands

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that hydrology inputs to the affected wetlands of the project have not been analyzed and that there should be a discussion of those impacts because wetlands are completely surrounded by development. In their pre-hearing brief, the Appellants assert that development surrounding wetlands can disrupt groundwater flows and, in turn, wetlands, citing *Wetlands and Urbanization, Implications for the Future*, 2001. Azous and Horner [5]; Chapter 8, *The Effects of Watershed Development on Hydrology*, Chapter 14. They also reference Chapter 3.4 in *Wetlands in Washington State, Vol .1 a Synthesis of the Science*.

2. Affected Wetlands Not Surrounded by Development. The Appellants' evidence on groundwater impacts relies upon the testimony of Dr. Cooke that wetlands D4, S, T and W are "surrounded by development". Dr. Cooke referred to studies that have determined that wetlands surrounded by more than 14% development may be adversely affected by changes in groundwater hydrology. 11/1/12 Tr. at p. 138, 161-163. Dr. Cooke has participated in some of these studies. Id. at 138-39. In subsequent rebuttal testimony Dr. Cooke wrote that 3.5% impervious surface is also a threshold. Ex. 133. It is determined that the proposal is not surrounded by development in an amount sufficient to trigger the thresholds of adverse impacts referenced by Dr. Cooke.

Dr. Cooke appears to have been the most knowledgeable and qualified person to speak on the impacts of surrounding development on groundwater inputs to wetlands. However, the evidence supporting Dr. Cooke's conclusions on this issue is not compelling. Dr. Cooke does not provide any precise definition of "surrounding development", except to point to the PP1A maps, Ex. 2, to show that portions of the proposal are proximate to the affected wetlands. If "surrounded by development" was indeed something like all areas within 200 feet of the wetland buffers, then more than 60% of the surrounding area for some of the wetlands (particularly wetland S) could be considered developed.

Scott Brainard provides a more logical definition of "surrounding development", limiting it to development within the drainage basins that feed into the wetlands (hereinafter referred to as "contributing basins"). If the issue at hand is how development affects groundwater that feeds into a wetland, it would appear logical to assess development impacts to those areas from which that groundwater flows. Mr. Brainard also notes that glacial till in the surrounding area is very close to the ground surface; such that the topography of the till dictates the direction of ground and surface water flows. See Ex. 32, p. 3 and 4 of 10/16/12 letter. Mr. Brainard provided a site plan with his 10/16/12 letter that shows the location of the contributing basins. The contributing basins will clearly have very little proposed development within them. As shown on the site plan and later testified by Mr. Brainard, only 0.31% of the contributing basins will be altered by development. Mr. Brainard concluded that this would create a de minimus impact.

Dr. Cooke did not address Mr. Brainard's use of the existing drainage basins until her written comments on November 13, 2012, Ex. 160. In Ex. 160 Dr. Cooke argues that it is not appropriate to use existing drainage boundaries because the proposed grading will change the drainage boundaries. However, Dr. Cooke does not identify any grading that could change the drainage basins that feed the affected wetlands. In point of fact none of the finished contour lines shown in the proposal's grading plans, Ex. 2, encroach into the drainage basins of the affected wetlands or result in any lowering of the lip of the basins except for a nominal area identified on the site plans attached to the first and second declarations of Mr. Brainard. As previously noted, this 0.31% of disturbed area was determined by Mr. Brainard to create de minimus impacts.

Dr. Cooke also asserts in Ex. 160 that a contributing basin is only one of many factors used in modeling wetland hydrology. Dr. Cooke does not identify these other factors or explain how they would affect hydrology within the contributing basins. Since glacial till is located near the ground surface for this proposal, it would appear that water would somehow have to flow uphill in order for the proposed development to change the hydrology of the affected wetlands. Some more detailed explanation from Dr. Cooke was necessary to explain these circumstances. Dr. Cooke's testimony was based upon several studies that she referenced, but there is nothing in the record to suggest that these studies would apply to circumstances where almost no surrounding development will occur in the contributing basins and shallow glacial till is so prevalent that it dictates both groundwater and surface water flows.

The evidence in support of the Applicant's position on groundwater impacts is overwhelming. All of the project specific evidence supports a finding that affected wetlands will not be adversely impacted by changes in groundwater flows. Dr. Cooke has established that as a general proposition surrounding development can adversely affect groundwater hydrology for wetlands. However, there is nothing in the record to suggest that the general studies relied upon by Dr. Cooke would apply to development located primarily outside of contributing basins in areas composed of shallow glacial till. It is not beyond the realm of possibility that adverse impacts could occur, but the SEPA Appellants have not provided any evidence that could reasonably lead to such a determination.

3. Adequacy of Review. The SEPA responsible official has conducted an adequate review of groundwater impacts. In addition to the information outlined in Finding of Fact No. III(J)(6), the SEPA responsible official was also able to consider the substantial amount of information provided by the SEPA Appellants and Mr. Brainard and Mr. Shiels on the issue. The SEPA responsible official's conclusions on groundwater impacts are based upon information reasonably sufficient to evaluate those impacts.

4. Probable Significant Adverse Environmental Impacts. The Appellants have not demonstrated that PP1A will create probable significant adverse environmental impacts to wetlands in regards to groundwater impacts. The Appellants must demonstrate that PP1A will affect groundwater flows to an extent that those altered flows will result in probable significant adverse environmental impacts to wetlands. The Appellants base their arguments on groundwater impacts to the impacts created by surrounding development. For the reasons identified in Finding of Fact No. III(O)(3) above, there in insufficient evidence to overcome the substantial weight that must be given the SEPA responsible officials determination that the proposal will not create any probable significant adverse environmental impacts.

Conclusions of Law:

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to groundwater impacts on wetlands. As demonstrated in Finding of Fact No. III(J)(6) and Finding of Fact No. III(O)(4) above, the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. No. III(O)(5) above, there are no probable significant adverse impacts associated with the proposal.

P. Wetland E1 buffer.

This issue has been dismissed in the Examiner's 10/31/12 Order on Dismissal as moot.

Q. Post-construction hydrologic support of wetlands needs to be verified.

The threshold determination is sustained on this issue for the same reasons it was sustained for wetland groundwater impacts. As testified by Mr. Brainard in Ex. 32, the contact zone on top of the shallow glacial till of the contributing basins "is of uniform thickness and generally follows the surface topography". Mr. Brainard's characterization of the topography in this regard is uncontested and found to be accurate. As a consequence, the contributing basins are the source of all groundwater and surface water that feed wetlands D4, T, S and E1. For the same reasons outlined on wetland groundwater impacts, the SEPA responsible official has engaged in adequate review of post-construction hydrologic support, there will be no probable significant adverse impacts relating to the hydrologic support and the threshold determination should be sustained on this issue.

R. Wetland Delineation methodology outdated.

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the delineation methodology applied to the proposal through the Villages DA is dated because the Army Corps of Engineers supplemented their delineation manual in 2008. The Appellants assert that the Washington State Department of Ecology allowed and preferred the use of the supplement from the time it was adopted on June 28, 2008 until it was required to be used starting March 14, 2011. The federal supplement was not used for the delineations set by 8.2.1 of the Villages DA.

2. Federal Supplement is Circumstantial Evidence. If the federal supplement would result in stricter delineations, this would serve as circumstantial evidence that the delineations applied to this proposal do not adequately protect against probable significant adverse environmental impacts. As determined in Conclusion of Law No. II(B)(3), SEPA can be used as a "gap filler" to address impacts where currently adopted regulations fall short. The federal supplement is required for Army Corps permits and wetlands subject to the City's shoreline master program. See WAC 173-22-035. The supplement is not required for delineation of wetlands not subject to the City's shoreline master program. See BDMC 19.10.210(A)(adopting a 1997 DOE delineation manual). A stricter delineation by itself may suggest that further investigation of impacts is warranted, but it would not be sufficient to show that the proposal would create probable significant adverse environmental impacts to wetlands. In this case there has been no showing made that any stricter delineation would result of applying the Federal supplement or that any difference in delineations would result in probable significant adverse environmental impacts. In point of fact the only evidence on the likelihood of a different delineation is that it's unlikely that the delineation will change. In *Recent Advances in Wetland Delineation-Implications and impact of Regionalization*, by Jacob Berkwitz in Wetlands, Att. E to Ex.

188, the federal delineation supplement was applied to 232 wetlands that had been delineated under the prior federal manual. The wetland boundary did not change in 82% of the cases, with the boundary increasing in 12% (28 sites) of the cases. Consequently, without any other evidence it must be concluded that the delineations will not change as a result of applying the federal delineation supplement.

3. Adequacy of Review. The SEPA responsible official has conducted an adequate review of groundwater impacts. In addition to the information outlined in Finding of Fact No. III(J)(6), the SEPA responsible official was also able to consider the substantial amount of information provided by the SEPA Appellants and Mr. Brainard on this issue. The SEPA responsible official's conclusions on wetland delineation impacts are based upon information reasonably sufficient to evaluate those impacts.

4. Probable Significant Adverse Environmental Impacts. The Appellants have not demonstrated that PP1A will create probable significant adverse environmental impacts to wetlands in regards to wetland delineations. The Appellants must demonstrate that the delineations of PP1A wetlands will inadequately protect against probable significant adverse environmental impacts. The Appellants have provided no evidence that the delineations would provide inadequate protection, other than referring to the federal delineation supplement that could lead to a stricter delineation 12% of the time. This circumstantial evidence is insufficient to establish that the delineations will create probable significant adverse environmental impacts when giving substantial weight to the threshold determination made by the SEPA responsible official.

Conclusions of Law:

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to not applying the federal delineation supplement for wetland delineations. As demonstrated in Finding of Fact No. III(J)(6) and Finding of Fact No. III(R)(4) above, the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wetland impacts. As determined in Finding of Fact No. III(R)(5) above, there are no probable significant adverse impacts associated with the proposal.

S. Differences in Wetland Ratings Between Applicant and City

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the City and Applicant should have resolved differences on wetland ratings prior to making a threshold determination.

2. Wetlands Classified Prior to Issuance of MDNS. As discussed in Conclusion of Law No. II(A)(2)(quoting *Moss v. City of Bellingham*, 109 Wn. App. 6, 25 (2001)), information

used to support a threshold determination can be based upon information submitted after issuance of the threshold determination. Beyond this, however, the SEPA Appellants contention that wetland classifications had not been resolved prior to issuance of the threshold determination is incorrect. WRI sent a letter to Perteet expressing its agreement to all wetland classifications and boundaries on July 30, 2012. See Ex. 22 to Staff Report. The MDNS was issued a month later, on August 31, 2012.

3. Differences in Opinion. The SEPA Appellants find fault with the wetland ratings and buffer determinations because there were some initial differences of opinion between Perteet and WRI. As determined in Finding of Fact No. III(J)(5), the fact that these determinations appear to have been negotiated does not reasonably suggest that Perteet compromised its professional judgment or agreed to determinations that are in conflict with applicable regulations. The differences of opinion are not probative of the accuracy of the final ratings. Indeed, as discussed in Finding of Fact No. III(J)(5), the deliberative process involved in an honest exchange of competing ideas can serve to improve the accuracy of the ratings as opposed to detract from them.

4. No Probable Significant Adverse Environmental Impacts. There are no probable significant adverse environmental impacts resulting from the wetland classifications and ratings recommended by staff. Except for the classification of Wetland E1, which is addressed in another SEPA Appeal issue, the SEPA Appellants have provided no evidence that the ratings and classifications create adverse impacts other than to point out that Perteet changed its initial position on some ratings after deliberating about the proper rating with WRI. As determined in Finding of Fact No. III(J)(5), this deliberative process does not establish any compromised impartiality on behalf of Perteet and so is not probative of adverse impacts.

Conclusions of Law:

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to the allegedly negotiated process employed to set the wetland ratings and classifications recommended by staff. As demonstrated in Finding of Fact No. III(J)(6), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(S)(4) above, there are no probable significant adverse impacts associated with the proposal.

T. Baseline Phosphorous Load for Rock Creek

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the SEPA Appellants assert that the Applicant has undertaken inadequate sampling to establish baseline phosphorous loading for Lake Sawyer. The appeal statement further asserts that an annual

phosphorous goal has not been set as required by SEPA and the Water Quality Committee has not conducted required review.

2. Baseline Monitoring Added to Project Instead of Reduced. Pre-construction baseline sampling has been an understandable source of tremendous confusion for the SEPA Appellants. The SEPA Appellants have contended throughout their briefing that baseline monitoring in the adopted stormwater monitoring program (Ex. O to the Villages DA) has been significantly reduced from baseline monitoring that was proposed in the draft monitoring program initially proposed for the project, Ex. 189. The SEPA Appellants have misconstrued a new and additional baseline monitoring program as a substitute for the draft baseline monitoring requirements. The draft monitoring requirements are in fact still required. The new requirements only add to what was already required in the draft requirements. As a result, contrary to the arguments made by the SEPA Appellants, the final stormwater monitoring program added monitoring requirements to the draft program instead of reducing them.

   As previously noted, the Appellants' confusion on this issue is completely understandable. The new monitoring program added in the final adoption was labeled a "monitoring" program. The pre-existing monitoring requirements were labeled as "baseline monitoring", even though the "baseline monitoring" program is required to be commenced after the initial "monitoring" program. The draft version of the stormwater monitoring plan, Ex. 189, contained a 1/3/11 memo from Triad that summarized the monitoring requirements of the Quality Assurance Project Plan ("QAPP"), another part of Ex. O. The final version of Ex. O failed to include this summary by what the Applicant termed "administrative error", see Ex. 148, Applicant Rebuttal Comments and Closing Remarks, FN. 2, and instead included a memo that summarized the far less stringent requirements of the newly added baseline requirements. Given this confusing use of terminology and the "error" in omitting the 1/3/11 Triad memos, it was reasonable for the SEPA Appellants to believe that baseline monitoring requirements had been significantly reduced.

3. Applicant Has Complied with Newly Added Baseline Monitoring Program. It is uncontested that the Applicant has complied with the newly added baseline monitoring requirements in Ex. O, referenced in Finding of Fact No. 2 above. The new baseline monitoring requires three samples from three locations on Rock Creek taken at three separate times. The Applicant has complied with this requirement. See Ex. 9.

4. Applicant Has Set Annual Phosphorous Goal. The SEPA Appellants assert that the City has not complied with Villages MPD COA 81, which requires the Applicant prior to Villages DA approval to identify the estimated maximum annual volume of total phosphorous that will be discharged from runoff in the Villages MPD. This required information was provided by the Applicant in Ex. 37 and the methodology and estimate was approved by the City's third party reviewer, Tetra Tech, in Ex. 38. Ex. 37 and 38 were prepared in January, 2011 and the Villages DA was approved in December, 2011.

5. Water Quality Committee Has Met. The SEPA Appellants assert that the water quality committee has not been convened as required by Villages MPD COA No. 85. Villages MPD COA No. 85 requires the committee to meet at least once per year. As demonstrated by the letter from Colin Lund to Mayor Olness, Ex. 38, the water quality the committee has met twice. The meeting requirement is satisfied.

6. Adequacy of Sampling and Methodology. In Ex. 27, p. 3, Rob Zisette concludes that the baseline monitoring requirements in the QAPP (those initially required in the draft monitoring plan and adopted into the final plan) were flawed due to inadequate sampling and inaccurate methodology. Mr. Zissette concluded that samples from several hundred storm events were necessary to accurately determine baseline conditions as opposed to the six to eight events recommended in the QAPP.

   The Applicant and City have provided no evidence to counter the sampling and methodology flaws asserted by Mr. Zisette at p. 3 of Ex. 27. The Applicant simply argues that the sampling methodology cannot be challenged because it has been set by the Villages DA. Mr. Zisette is an expert in stormwater management. There is no reason to reasonably conclude that his conclusions on p. 3 of Ex. 27 are in error and there has been no expert testimony provided to counter those conclusions. Given these circumstances, it must be concluded that the methodology used to compute baseline phosphorous conditions of Rock Creek is flawed and will not generate reasonably accurate results.

   It is of no consequence that Mr. Zisette was unaware that the newly adopted "monitoring" requirements differed from the "baseline monitoring" requirements of the draft monitoring plan, as discussed in Finding of Fact No. III(T)(2). As outlined in the conclusions of law below, PP1A triggers the baseline monitoring of the draft plan in addition to the new monitoring plan added upon the adoption of the Villages DA. Further, even though the newly adopted monitoring plan was instituted for the sole purpose of assessing how differences in hydrologic conditions between years has an influence on water quality conditions, there is nothing to suggest that the methodology flaws cited by Mr. Zisette would not similarly cause problems in the results generated for the newly added monitoring regime.

7. Probable Significant Adverse Environmental Impacts. The sampling methodology proposed to set baseline phosphorous conditions is determined to create probable significant adverse environmental impacts. The extensive phosphorous monitoring required for the project has little value if baseline conditions are inaccurate. Inaccurate baseline measurements could result in phosphorous levels that exceed TMDL levels, which as determined in the FEIS would create probable significant adverse environmental impacts.

   The impacts of the monitoring program can be brought back below the SEPA threshold if a reasonably accurate methodology is employed. A condition will be added to the MDNS requiring that the concerns of Mr. Zisette expressed in the first two full paragraphs of p. 3 of Ex. 27 shall be evaluated by the City's MDRT team and that his

methodology be incorporated into setting baseline phosphorous readings. At a minimum, the revised baseline monitoring shall include a significant increase in the amount of sampling to provide for an acceptable error of 0.05 and the use of hydrograph separation, smearing and other techniques to estimate separate loadings for base flows.

Conclusions of Law:

1. Baseline Monitoring Required. The baseline monitoring required in the QAPP has been triggered by this implementing project. The September 19, 2011 letter from Alan Fure in Exhibit O to the Villages DA requires QAPP baseline monitoring "[p]rior to construction of the first implementing project within the Lake Sawyer drainage basin". It is uncontested that PP1A will include two SR 169 improvements within the Lake Sawyer drainage basin. Section 14 of the Villages DA defines an implementing project as a development project that implements the Villages DA and Villages MPD, "including but not limited to Construction Permits and Land Use Permits". Inclusion of the term "construction permits" in the definition establishes that the size of the development is not a significant factor in determining whether development qualifies as an implementing project. If an implementing project was intended to only include large scale development, it would not have referenced construction permits. Further, the SR 169 improvements satisfy, and thus implement, the transportation mitigation requirements of the Villages DA and/or Villages MPD. The plain meaning of the September 19, 2011 letter requires QAPP baseline monitoring prior to construction of the SR 169 improvements.

2. It is recognized that from an environmental protection standpoint, requiring baseline monitoring at this stage of development is not ideal. Deferring baseline monitoring to a later day will allow for baseline monitoring over a more extended period of time (because it would be done with the monitoring already completed), which may provide for more useful results. Since the SR 169 improvements in the Lake Sawyer drainage basin are also relatively minor, inaccurate readings in the newly adopted baseline monitoring (those added to the draft at the Villages DA adoption) caused by the methodology problems identified by Mr. Zisette are unlikely to result in any significant adverse environmental impacts, especially with the phosphorous control conditions adopted by this decision for those improvements. While potentially not providing for any significant environmental benefit, the QAPP monitoring requirements could create significant delays in the Applicant's construction schedule. If requiring QAPP baseline monitoring for this project does become unduly burdensome on the Applicant, the City may be required under constitutional due process requirements to allow for a more flexible interpretation of the timing of QAPP baseline monitoring. It is not immediately clear from the record what impacts this interpretation will have on the Applicant. The Applicant is invited to request reconsideration if it is able to demonstrate from the administrative record that due process mandates a more flexible interpretation.

3. DA Monitoring Requirements Don't Preclude SEPA Review. As determined in Conclusion of Law No. II(B)(3), Villages DA requirements cannot be used to preclude

SEPA review and mitigation unless the requirement is itself and exercise of SEPA substantive authority that was intended to be final mitigation of the impact at hand. There is nothing in the record to suggest that the monitoring requirements were adopted as an exercise of SEPA Authority. The accuracy of the methodology used to set baseline conditions is still subject to SEPA review and can be mitigated accordingly.

4. Threshold Determination Sustained. As additionally mitigated, there are no grounds for overturning the threshold determination of the responsible official as it applies to the allegedly negotiated process employed to set the wetland ratings and classifications recommended by staff. As demonstrated in General Finding of Fact No. 6, in conjunction with all the stormwater information the responsible official has reviewed over the course of the hearing, the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of wastewater impacts. As determined in Finding of Fact No. III(T)(7) above, there are no probable significant adverse impacts associated with the proposal as further mitigated by this decision.

U. Excessive Queue Lengths

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the Appellants noted that the *Traffic Impact Study* and its updates (Ex. 16) show mitigated queue lengths at some intersections which are very long, despite the intersection as a whole functioning at a sufficient level of service (LOS). Additionally, though the whole intersection may have a sufficient LOS, individual legs fall to LOS D. The Appellants argue that while averaging intersection LOS may be common practice, additional mitigation, such as traffic signal timing, should be evaluated when one intersection leg is predicted to have an uncharacteristically long queue length. In their Pre-Hearing Brief, the Appellants note that for the intersections of SE Covington-Sawyer Road/216th Avenue SE and SE Auburn-Black Diamond Road/Main Street, certain intersection legs are predicted to exceed the 95th percentile for volume/capacity and that the queue may be even longer than those shown in the Applicant's *Traffic Impact Study*.

   In the Applicant's Rebuttal Brief (Ex. 116), the Applicant argued that the roadways all have enough capacity to hold the predicted queues without causing gridlock. Dan McKinney of Transpo provided a memorandum to the City entitled Villages Preliminary Plat 1A – Response to September 21, 2012 Transportation Comments (*See* McKinney Declaration Ex. 42). Mr. McKinney stated,

   "Queue lengths ... represent the estimated 95th percentile queues during the weekday PM peak hour Phase 1A buildout. The 95th percentile queue is used to ensure adequate storage length for roadway design and represents the queue length that will only be exceeded approximately 5 percent of the analysis period. Traffic volumes used in the

analysis represent the peak 15 minute period during the peak one hour interval of the afternoon/evening commute period, which typically have the highest volumes throughout the entire day."

Mr. McKinney goes on to state the 507 foot queue, the longest predicted, is located at SE Covington-Sawyer Road/216th Avenue SE, and equates to approximately 20 vehicles. Queues would typically clear the intersection during each cycle of the signal. Mr. McKinney stated, "based on the forecasted queue length and intersection operations, additional mitigation measures are not necessary in the professional opinion of Transpo" (Ex. 42, page 6).

The City's transportation expert, Mr. Perlic, testified that he had reviewed the Applicant's methodology with respect to queue lengths and found it to be the standard methodology used in the profession. Mr. Perlic stated his team had not found any issues with the way the Applicant calculated queue length or the intersection level of service. He stated the calculation of queue lengths is embedded in the level of service calculations which were performed in the intersection analysis that served primarily as the basis for the required mitigation at several intersections. Mr. Perlic stated standard practice is to design intersections to accommodate the 95th percentile of traffic. Mr. Perlic testified that the longest queue length, of 507 feet, though being rather long does not represent a significant adverse environmental impact. This is because the intersection overall still operates at a level of service B with an average vehicle delay of 20 seconds. (*See* 11/02/21012 Tr. 154-161) Mr. Perlic also noted that King County concurred with his analysis in a letter by Paulette Norman of the King County Road Services Division (Ex. 49).

2. FEIS Analysis. The FEIS analysis did mention intersection queue lengths as a specific issue in FEIS Transportation Finding of Fact No. 9 when it stated, in part,

"The FEIS did not include a detailed analysis of potential queue lengths resulting from increased traffic... A queue analyses at the project level will allow consideration of signal timing, actual volumes, intersection design, and will more accurately predict what the specific mitigation needs would be..."

The FEIS Transportation Conclusion of Law No. 11 states,

"It was not necessary for the FEIS to analyze queue lengths. Review of queue lengths is more appropriately done at the project level, rather than the programmatic stage. Such analysis should be done when looking at specific improvements in the construction phase, so that determinations of significant adverse impacts can occur in conjunction with construction, rather than trying to guess what will happen 15 years from now. The FEIS contained a reasonably thorough discussion to inform the City of the environmental impacts of traffic while recognizing that more detailed information on environmental impacts will be available with subsequent project proposals. However, the Hearing Examiner will recommend additional conditions for this topic as part of the MPD."

3. Villages MPD Permit Approval. The Villages MPD FOF 5(K)(vii) addressed queue lengths by deferring their analysis to the project level. The MDP COL and COA did not specifically address queue lengths.

4. Probable Significant Adverse Environmental Impacts. There is nothing in the record to suggest that the queue lengths at intersections as mitigated will create probable significant adverse environmental impacts. In their appeal statement the SEPA Appellants assert that additional mitigation measures, such as traffic signal timing, should have been considered. Beyond the issues identified above, the SEPA Appellants have not identified any adverse impacts associated with intersection queue length as mitigated or with the use of averaged interaction level of service associated with PP1A. The City's consultant concurs that the Applicant's methodology is standard industry practice and that there will be no gridlock. Even during the busiest 15 minutes of the day, most cars should be able to pass through the busiest intersection during the first cycle. Substantial weight must be given to the threshold determination of the SEPA responsible official. In this case, the Appellant has provided no evidence of any probable significant adverse environmental impact related to intersection level of service and associated queue lengths.

5. Adequacy of Review. The Environmental Checklist describes the primary access of the property, the then-existing public transit route and stop, and the proposed new roads and street improvements. The Environmental Checklist also references the *Villages MPD Phase 1A Traffic Impact Study* (Ex. 16) by Transpo. The Applicant provided several supplemental documents in support of the Environmental Checklist including *Villages MPD Preliminary Plat 1A Traffic Impacts to Green Valley Road* (Ex. 46), a *Traffic Monitoring Plan* and responses to comments (Ex. 16, 27 and 94). The City's consultants, Parametrix, prepared the *SE Green Valley Road – Traffic Calming Strategies* and a *Rock Creek Bridge Evaluation* (Ex.192). The SEPA Responsible Official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impacts. *See* 11/3/12 Tr. at p. 283-286. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. The SEPA Responsible Official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of the proposal.

Conclusions of Law

1. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to queue lengths. As demonstrated in Finding of Fact No. III(U)(5), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of queue lengths. As determined in Finding of Fact No. III(U)(4), there are no probable significant adverse environmental impacts resulting from the queue lengths generated by the proposal.

V. Inadequate Intersection Mitigation

Findings of Fact:

1. Overview of Appeal Issues. In their appeal statement, the Appellants argue the Applicant's Traffic Impact Study (Ex. 16) is not credible with respect to the efficacy of proposed intersection mitigation. Specifically, the Appellants question the ability of the proposed mitigation to affect 10-fold reductions in modeled intersection delay after mitigation. In their pre-hearing brief, the Appellants further note that for two critical intersections, SR 169/Roberts Drive and SR 169/SE Black Diamond-Ravensdale Road, the PP1A traffic analysis proposed evaluated mitigations that exceeded those required by the DA. The Appellants further argued that the Applicant's Interim Improvements at these two intersections are simply placeholders.

   In the Applicant's Rebuttal Brief (Ex. 116), the Applicant argued "transportation impacts of PP1A have been thoroughly analyzed and necessary mitigation has been imposed" (*See* Ex. 116, page 10). Dan McKinney of Transpo provided a memorandum to the City entitled Villages Preliminary Plat 1A – Response to September 21, 2012 Transportation Comments (*See* McKinney Declaration Ex. 42). Mr. McKinney stated the large differences in traffic delay for each mitigated intersection is explained by the differences in LOS reporting standards for signalized or roundabouts versus stop-controlled intersections. He stated,

   > *"At intersections controlled by traffic signals or roundabouts, the LOS of the intersection is reported based on the average delay for every vehicle entering the intersection during a specified time period.*
   >
   > *For side-street stop-controlled intersections, LOS is defined in terms of the average vehicle delay of the worst performing approach or movement at the intersection. ... The lower volume of traffic on the side street will experience a high level of delay, which results in the poor level of service for that minor movement."* (*See* Ex. 42, pages 6-7)

   The previously stop controlled intersections would have very high delays on the side streets in an unmitigated condition. After the mitigation of either a signal or a roundabout, the average delay for the entire intersection decreases.

   In a declaration, the City's traffic expert, John Perlic, stated he concurred with both the Applicant's methodology and their conclusion regarding the substantial decrease in intersection delay reported by Transpo (Ex. 135). Mr. Dan Ervin testified the signal improvements proposed for the SR 169/Roberts Drive and SR 169/SE Black Diamond-Ravensdale Road intersections will have a 50-year lifespan. (11/3/2012 Tr. 7).

2. FEIS Analysis. The FEIS analysis discussed individual intersection improvements in a limited way in FEIS Transportation Finding of Fact No. 10 when it stated, in part,

"The FEIS did not address individual turning movement failures at the various "legs' of each intersection. The FEIS concluded that all proposed alternatives would result in increased traffic volumes and delays, some resulting in failing levels of service. The Transportation Technical Report analyzed individual turning movements, but the FEIS itself only addressed failing intersections."

FEIS Transportation Finding of Fact No. 15 also addressed intersections,

"The FEIS addressed levels of service and ***included a reasonable discussion of the impacts resulting from increased traffic volumes and decreased levels of service.*** *The FEIS generally describes mitigation measures in general and in more extensive terms in the body and technical appendices. The Applicant has also proposed a monitoring plan and a mid-point review condition to analyze transportation impacts and ensure the mitigation measures are effective. ... Forty-six intersections were identified for review in the scoping process, an unprecedented number for a non-project FEIS.* ***In accordance with standard practice and the City of Black Diamond code, entire intersections (rather than portions thereof) were studied at PM peak hours, to address the most congested time of day. When the levels of service become unacceptable, mitigation is identified to reduce delays and return to acceptable levels of service.*** *Additional review and potential additional mitigation will be done in conjunction with specific projects."* (Emphasis added.)

The FEIS Transportation Conclusion of Law No. 5 states,

"Analysis of whole intersection failure was sufficient to establish necessary mitigation. The City's LOS standards for intersections applies to the whole intersection....it is standard practice to analyze the entire intersection because mitigation is tied to failure of [the] whole intersection...Analysis of the LOS at intersections contained a reasonably thorough discussion of significant aspects of probable environmental consequences."

3. Villages MPD Permit Approval and Developer Agreement Conditions. The Villages MPD Approval Ordinance 10-946 contained a broad discussion of impacts to intersections and required mitigation in Villages MPD Findings of Fact No. 5(B, C, H, J, and K(v)) and Villages MPD Conclusions of Law No. 23(A) and 30(F). The Villages MPD COA required an extensive list of Applicant improvements to intersections (Villages MPD COA No. 10, 15, 16, 18, 19, 20, and 25). The Villages DA Section 11.5 provides for the timing, construction and funding of off-site regional infrastructure improvements including transportation intersection improvements (TVDA Table 11-5-1 and Exhibits Q and R).

4. Probable Significant Adverse Environmental Impacts. There is nothing in the record to suggest that proposed intersection mitigation will create probable significant adverse environmental impacts. In their appeal statement the SEPA Appellants assert that the proposed mitigation is essentially too good to be true. There is nothing in the record to reasonably suggest that the City's engineering and construction standards for intersection design are insufficient to adequately mitigate traffic impacts. Substantial weight must be

given to the threshold determination of the SEPA responsible official. In this case, the Appellant has provided no evidence of any probable significant adverse environmental impact related to the proposed intersection mitigation.

5. Adequacy of Review. The Environmental Checklist describes the primary access of the property, the then-existing public transit route and stop, and the proposed new roads and street improvements. The Environmental Checklist also references the *Villages MPD Phase 1A Traffic Impact Study* (Ex. 16) by Transpo. The Applicant provided several supplemental documents in support of the Environmental Checklist including *Villages MPD Preliminary Plat 1A Traffic Impacts to Green Valley Road* (Ex. 46), a *Traffic Monitoring Plan* and responses to comments (Ex. 16, 27 and 94). The City's consultants, Parametrix, prepared the *SE Green Valley Road – Traffic Calming Strategies* and a *Rock Creek Bridge Evaluation* (Ex.192). The SEPA Responsible Official, Steve Pilcher, reviewed this information prior to determining that the proposal would not create probable significant adverse environmental impacts. *See* 11/3/12 Tr. at p. 283-286. Mr. Pilcher also considered all of the evidence presented by the SEPA Appellants on alleged impacts during the hearing and concluded that the proposal would not create any probable significant adverse environmental impacts. The SEPA Responsible Official's conclusions on the environmental impacts of the proposal are based upon information reasonably sufficient to evaluate the environmental impact of the proposal.

Conclusions of Law

1. Collateral Attack. The methodology for assessing impacts to intersection was expressly found to be adequate in the Examiner decision approving the adequacy of the FEIS, as outlined in the findings of fact above. Consequently, the methodology used for assessing impacts to intersections cannot be challenged in subsequent SEPA review as outlined in Conclusion of Law No. II(B)(2).

2. Threshold Determination Sustained. There are no grounds for overturning the threshold determination of the responsible official as it applies to intersection mitigation. As demonstrated in Finding of Fact No. III(V)(5), the SEPA responsible official has made a showing that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA in his review of traffic safety impacts. As determined in Finding of Fact No. III(V)(4), there are no probable significant adverse environmental impacts resulting from the intersection mitigation generated by the proposal.

W. SEPA Checklist Deficiency A.9

The SEPA Appellants assert that the Applicant has filed a permit application for development of land that adjoins the proposal to the west. The Appellants have not provided any information on this adjacent permit application beyond the permit number. There is no evidence presented that the adjoining development would create any environmental impacts that would affect the impacts created by the proposal. In the absence of any such information, there is no basis to conclude

that the SEPA responsible official should have investigated the permit application further to amount to prima facie compliance with the procedural requirements of SEPA and there is certainly no basis to conclude that the adjoining permit application would result in the creation of probable significant environmental impacts by PP1A. The alleged failure to include information on the adjoining development is not sufficient to overturn the threshold determination.

X. SEPA Checklist Deficiency A.10

The SEPA Appellants devote a substantial amount of their appeal asserting that required governmental approvals are not identified in the environmental checklist. The failure to identify a required government approval, by itself, is not sufficient to invalidate a threshold determination. The adequacy of a checklist is not grounds for administrative appeal. The SEPA rules clearly provide that the only administrative appeal allowed in the SEPA review process is an appeal of a threshold determination or the adequacy of an FEIS. See WAC 197-11-680(3)(a)(ii). As previously discussed, the only grounds for overturning a SEPA threshold determination are that there are unmitigated probable significant adverse environmental impacts or that the SEPA responsible official failed to establish that he conducted a prima facie review of environmental impacts. As is evident from the permits more specifically addressed below, it is unlikely that failure to disclose a required government approval would ever result in any probable significant adverse environmental impacts or provide any significant amount of information that could support finding that the SEPA responsible official failed to make a prima facie showing of adequately reviewing environmental impacts.

1. King County Stormwater Approval. The SEPA Appellants assert that the SEPA checklist failed to identify King County approval for PP1A discharges to Horseshoe Lake to "actively control the level of the lake to pre-development conditions". Alan Fure, in his declaration admitted as Ex. 44, states that no King County approval is required because the Villages DA 7.4.3.F requires that post-construction stormwater flow volumes into Horseshoe Lake are approximately the same as pre-construction volumes. The SEPA Appellants have not provided any reference to any ordinance or statute that would require King County approval. Further, the SEPA Appellants have provided no evidence that a requirement for a King County approval would result in any probable significant environmental impacts. In the absence of any such information, there is no basis to conclude that the SEPA responsible official should have investigated the permit application further to amount to prima facie compliance with the procedural requirements of SEPA and there is no basis to conclude that the adjoining permit application would result in the creation of probable significant environmental impacts by PP1A. The alleged failure to include information on King County approval, which most likely isn't even required, is not sufficient to overturn the threshold determination.

2. HPA Approval. The SEPA Appellants assert that the checklist fails to address HPA approval for proposed stream crossings (specifically additions to the Rock Creek Bridge and a water main crossing), outfall installations and potential wetland fills. The arguments pertaining to the HPA issue were primarily presented during the testimony of Cindy Proctor. See 11/1/12 Tr at 55-79. In their testimony, the Appellants claim that the

Rock Creek Bridge will be widened based upon its inclusion in the City's six year transportation plan, Ex. 23, and a photograph showing that the bridge is narrow and has no shoulders, Ex. 22. The Appellants also testified that twelve inch water mains will be constructed over the bridge. The Appellants note that City standards require a 15 foot access easement for public water lines, which shows that there isn't room within the existing footprint of the bridge to accommodate a water line. The SEPA Appellants also noted that the Department of Fish and Wildlife rely upon the disclosure of the need for an HPA in SEPA checklists to trigger their review. The SEPA Appellants presented an email from a WDFW official, Ex. 24,that noted an HPA would not be required for water or sewer lines built on the bridge but would be required for the construction of a new trestle to support the utility lines. Ms. Proctor noted that in the Applicant's Motion for Dismissal, the Applicant had asserted that a new trestle may be constructed to support a pedestrian crossing. The SEPA Appellants also argued that it's disingenuous to assert that the Applicant will add pedestrian safety features to the bridge if determined necessary as required by Villages DA 11.6, but at the same time argue that no widening of the bridge is currently proposed.

The City and Applicant responded that the City's six year transportation plan only requires further study of the bridge and also shows the widening of Robert's Road up to but not including the Rock Creek Bridge. Mr. Sterbank also pointed out that the WDFW official who authored Ex. 24 is not an attorney and is not competent to represent WDFW on legal matters. Mr. Sterbank noted that the HPA regulations require an HPA permit only when structures are placed within the bed of a stream or a project otherwise uses the water of a stream or diverts or changes the natural flow of a stream. He also noted that if pedestrian improvements were made via a trestle that the trestle could span the river in such a manner that no portion of it would affect stream flows or be built within the stream bed.

HPA permits are unquestionably an important means of ensuring that impacts to streams are adequately mitigated. However, the failure to identify the requirement of an HPA permit in the environmental checklist from a threshold appeal standpoint is ultimately of little significance. Since an HPA permit is definitely within the realm of possibility for work on Rock Creek Bridge, the environmental checklist should have said that a permit "may be required". Even the Applicant concedes that an HPA permit "may be required" depending on what pedestrian improvements are made to the Rock Creek Bridge. See Fure Declaration, Ex. 44, p. 8 of 11 of 10/30/12 letter. It is acknowledged that the checklist only requires "permits that will be needed for your proposal" (emphasis added), but identifying permits that "may" be needed to this response is consistent with the "worst case" analysis required by WAC 197-11-080(3)(b).

If the checklist had identified that the HPA permit "may be required", this may have made it more likely that WDFW would require an HPA permit and it may also have triggered more SEPA comment from WDFW. However, the record is far from clear that the failure to include this information will result in probable significant adverse environmental impacts. In the uncertain event that the Applicant does work that triggers

an HPA requirement, there is nothing to suggest that the Applicant won't take the initiative to apply for an HPA permit. Indeed, given the monitoring by the SEPA Appellants and other community members, it would be foolish for the Applicant not to apply for a permit if it were required to do so. If a permit is ultimately required and approved it is unlikely that the result would lead to any probable significant adverse impacts given the strict criteria applicable to HPAs and the potential additional SEPA review that may go along with it. In the unlikely event that the Applicant manages to construct improvements without a required HPA permit it becomes a little more likely that probable adverse environmental impacts will result, but the Appellants have not overcome the substantial weight standard to establish this level of impact. Indeed the Appellants have not identified any specific impacts that could result.

In order to remove any doubt as to the marginal impacts of failing to identify the HPA in the SEPA checklist, a new MDNS condition will be imposed requiring the City to revise the checklist to identify that an HPA permit may be required for pedestrian improvements to Rock Creek Bridge. The revised checklist will be sent to WDFW with an invitation for extended comment and an explanation that staff have been granted the authority to impose additional SEPA mitigation in response to any comments provided by WDFW. It should be understood that sole purpose of requiring the revised checklist is to trigger whatever policies WDFW may have for requiring HPA permits and also to trigger comment from WDFW. If the checklist revision is insufficient to provide these triggers, that is WDFWs problem. WDFW has the authority to comment with or without references to HPA permits in environmental checklists and it can and should enforce HPA permitting requirements without their references in checklists as well.

2. Army Corp and DOE Wetland Fill Permits. The SEPA Appellants assert that the proposal may include wetland fill that will trigger permits from the Army Corps of Engineers and DOE. The Applicants emphatically deny that any wetland filling will occur and nothing in the record suggests that filling will occur.

3. Fish and Wildlife Conservation Area Permit Triggers. In their appeal statement, the SEPA Appellants assert that construction work near the fish and wildlife conservation areas will trigger WDFW and Army Corps permitting requirements. The Appellants have not identified what permits would be required or what permitting criteria would be implicated by the Applicant's proposal beyond the HPA issues addressed above. Without this explanation the Examiner can only speculate as to what the SEPA Appellants are alleging and he will only do so for a few limited issues.

   It is determined that the only work that will be within the ordinary high water mark to Rock Creek or within its wetlands is some potential pedestrian crossing improvements as discussed under the HPA improvements above. There is no other Rock Creek Bridge work required of the Applicant. A study for needed improvements is budgeted in the City's six year transportation plan, See Ex. 22 and 23, but the City has no concrete plans beyond this study within the foreseeable future to improve the bridge itself. Linking the

Applicant's proposal to City initiated bridge improvements that may or may not occur, with or without the Applicant's proposal, is too remote and speculative for SEPA review.

As outlined in Mr. Fure's declaration, Ex. 44, p. 8 of 10/30/12 letter, the proposed water main crossing of Rock Creek will occur below the pavement grade of the bridge but above the bottom of the bridge. The SEPA Appellants have not identified any WSDF or Army Corps permitting requirement that would be triggered by this construction activity and none is immediately apparent.

In their appeal statement, the SEPA Appellants assert that the wetland delineations will require WDFW and Army Corps permits. No reason for such permits is apparent from the record. If the SEPA Appellants are asserting that the wetland delineations are so wildly inaccurate that the delineations plus their buffers are not sufficient to prevent filling of areas that would be considered wetlands by the Army Corps, that is difficult to believe. As previously discussed, use of the federal supplement delineation manual instead of the manual used by the City only results in an increased wetland boundary 12% of the time. There is nothing in the record to suggest that the wetland boundaries set by the Villages DA, in conjunction with the buffers assigned to them, would encompass an area that is smaller than that covered by Army Corps wetland delineations.

In their appeal statement the SEPA Appellants assert that the wildlife crossing proposed by the Applicant does not conform to the requirements of the FEIS and that this will trigger WDFW and Army Corps permits. There is no explanation as to why the wildlife crossings would trigger a permit requirement or how the proposed wildlife crossing fails to comply with the FEIS. No relevance to Checklist A.10 is apparent on this issue.

Y. SEPA Checklist Deficiency B.1(a) and B.1(b)

In their appeal statement the SEPA Appellants assert that the checklist description of some isolated 15% slopes are understated and misleading. In their opening brief the SEPA Appellants further elaborate that the checklist fails to identify whether geologically hazardous areas will be avoided. This issue is beyond the scope of the appeal statement pertaining to a description of the slopes of the site. The Applicant is not required to provide information on what it will do to the slopes of the project site in Checklist B.1. The SEPA Appellants have not identified where slopes exceed 15% on the project area or why they consider these slopes to be more than isolated.

Z. SEPA Checklist Deficiency B.4(d)

In their appeal statement the SEPA Appellants assert that the response to the question on proposed landscaping and use of native plants is incomplete because it only references compliance with the City's tree ordinance and some landscaping proposed for parks. In their opening brief the SEPA Appellants elaborate that greenbelt areas need to be addressed as part of a landscaping plan and that the landscaping for stormwater facilities should be identified. The Appellants note that landscaping information should include root protection zones and that

mature stands of trees should be designated for protection. The SEPA Appellants assert that under the construction recommendations of Golder and Associates Inc. (Exhibit C-5, Geotechnical Report, October 10, 2010, p. 26) all trees and vegetation will be grubbed and removed from the site.

The SEPA checklist includes a reasonably thorough discussion of landscaping, noting that landscaping is proposed within open spaces, trails and park areas and that street trees will be required along streets. The loss of trees per se is not a significant environmental impact on its own. The environmentally significant function that trees play in serving as wildlife habitat is already covered by the City's sensitive area regulations. Beyond this, the aesthetic value of trees is environmentally significant to the extent it is protected by the City's tree preservation and landscaping requirements. Except as noted below, the record does not establish any probable significant adverse impacts that are not already adequately mitigated by the City's sensitive area and landscaping requirements. There is also no information to suggest that the SEPA responsible official has not made a prima facie showing of adequate review of landscaping and tree impacts.

The SEPA Appellants make a compelling point regarding advance planning for root protection zones required by Villages MPD COA No. 118. COA No. 118 sets a legislative standard of environmental significant for the protection of significant tree systems. The location of these root protection zones should be determined prior to any site work that unnecessarily limits the optimal locations for these areas. The MDNS will be revised to include a condition requiring that prior to any site work, the tree plan required by Chapter 19.30 BDMC shall delineate the root protection zones for all significant trees retained, relocated or planted under the plan.

AA. SEPA Checklist Deficiency B.5(a)

In their SEPA Appeal Statement the SEPA Appellants identify several species of wildlife that have not been identified in the SEPA checklist.

The FEIS discussion on wildlife, referenced in the checklist, contains a thorough discussion of wildlife species and impacts at the site. Consideration of the FEIS easily satisfies the requirement that the SEPA responsible official establish a prima facie showing of adequate review of environmental impacts. Further, the comprehensive and detailed review in the FEIS of wildlife impacts and associated mitigation measures makes it unlikely that wildlife impacts are open to further SEPA consideration under the collateral attack doctrine of *Glasser v. Seattle*, 139 Wn. App. 728, 738 (2007). Even if further evaluation and/or mitigation is still permitted under *Glasser*, the SEPA Appellants have not expressly claimed that any species protected by local, state or federal regulations have not been identified and/or protected by the FEIS and mitigation adopted pursuant to the FEIS. Unless the SEPA Appellants had established to the contrary, only impacts to protected species would be considered probable significant adverse environmental impacts.

BB. SEPA Checklist Deficiency B.5(c)

The SEPA Appellants assert that the Applicant has inaccurately stated "none known" in response to whether the PP1A site is part of a migration route. The SEPA Appellants note that the project site has been used for elk hunting for years and that elk migration is evidenced by the "beaten-down trails of a large animal, hoof prints, and droppings."

Scott Brainard, wetlands/wildlife expert for the Applicant, contends in his Ex. 32 declaration at p. 7of his 10/16/12 letter that the use of an area by elk for bedding and foraging does not make it a migration route. He notes that the King County Wildlife Habitat Network has identified a wildlife corridor south of the proposal, but none within the proposal. He asserts that no wildlife migration routes have been identified within the boundary of PP1A.

Mr. Brainard limited his comments to major wildlife corridors for large animals such as elk. In their reply on new SEPA evidence, Ex. 191, att. 4, the SEPA Appellants correctly point out that p. 4-75 of the FEIS distinguishes between large wildlife corridors and smaller ones that can connect wetlands and provide for passage of smaller animals such as beaver, river otter, mink and raccoon. The FEIS does not address this more minor category of wildlife corridors, leaving it fair to conclude that type of review is deferred to the implementing projects. There appears to be an opportunity for providing this type of connectivity between wetlands T, D4, S and E1. There are also opportunities to in turn connect these wetlands to the open space located along the western perimeter of the project and possibly even a continuous greenbelt area from the core complex to the western perimeter. As noted by the SEPA Appellants in Ex. 191, att. 4, BDMC 18.98.155(B) requires proposals to be designed to minimize impacts to wildlife habitat and migration corridors.

Since the SEPA Appellants have not provided any evidence on whether Wetlands T, D4, S and E1 can serve as migration corridors, it cannot be concluded under the substantial weight SEPA standard that failure to do so would result in probable significant adverse environmental impacts. However, BDMC 18.98.155(B), which requires minimum impacts to wildlife corridors, is also a requirement that applies to the PP1A application itself. The Applicant has the burden of proof in establishing compliance with that standard. Since the Applicant has provided no evidence on whether or not there is any corridor benefit to connecting the affected wetlands, the PP1A conditions of approval will require an evaluation of the potential for that connectivity. If the evaluation results in any recommended connections that are reasonable and capable of being accomplished, those connections will be made conditions of approval.

CC. SEPA Checklist B.7(b)(2); B.14(g) and B.15

As noted in the SEPA Appeal itself, the issues arising from these checklist items are covered by other parts of the Appeal.

IV. SEPA Mitigation Measures

The following mitigation measures are added to the MDNS as a result of the SEPA Appeal in order to ensure that the proposal does not create probable significant adverse environmental impacts.

1. The Applicant has three options for addressing pedestrian traffic safety over the Rock Creek bridge:

    a. The Applicant shall construct a safe pedestrian connection across Rock Creek for pedestrian linkage to Morganville prior to the issuance of the certificate of occupancy of the 200th dwelling unit for the Villages MPD. In lieu of construction, the City shall have a financial commitment in place to complete the improvements within six years of PP1A approval; or

    b. The City's MDRT team shall prepare a study, at the Applicant's expense, assessing PP1A pedestrian safety impacts over Rock Creek Bridge. The study shall identify any mitigation necessary to eliminate any pedestrian safety hazards that constitute a probable significant adverse environmental impact. Mitigation shall be implemented by the Applicant within time frames necessary to avoid probable significant adverse environmental impacts; or

    c. The threshold determination shall be reversed and a limited scope EIS shall be prepared to assess pedestrian safety on Rock Creek Bridge. In addition to the information required in an EIS, the EIS shall also identify the costs of constructing any recommended improvements and the Applicant's proportionate share of those improvements. Approval of PP1A is contingent upon the Examiner sustaining the SEPA responsible official's threshold determination. If the Applicant chooses reversal of the SEPA responsible official's threshold determination, staff shall determine whether re-application will be necessary for further consideration of PP1A or whether the PP1A application will remain vested and reviewed under a second hearing after completion of the limited scope EIS.

PP1A shall not be deemed approved until the Applicant commits to choices (a) and/or (b). A combination of (a) and (b) may be allowed where the Applicant determines the option it desires after the study required in (b) is completed. Nothing in this condition shall be construed as prohibiting the City or any other party from participating in the funding and/or construction of required Rock Creek Bridge pedestrian improvements.

The Applicant shall submit its choice, in writing, to the City within 17 days from the date of issuance of this decision. The City shall post the Applicant's choice on its website within one business day of receipt.

This condition is designed to supplement and not replace Villages MPD COA No. 32 and Villages DA 11.6. Regardless of the option chosen, the Applicant will have to comply with Villages MPD COA No. 32 and Villages DA 11.6. Of course, if the Applicant chooses the limited scope EIS, the City will still retain substantive SEPA authority to require the Applicant to construct some or all of the improvements identified in Options (a) and (b).

Applicable SEPA Policies: Comp Plan policy LU-27 (encourage walking);T-10 (enhances small town character by maintaining "walkabililty"); T-33 (reduces vehicular traffic); BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare; adequate streets); MPD Design Standard A(5)(community connectivity) and (D)(1)(pedestrian connectivity to services).

2. Prior to final plat approval of the first division, the Applicant shall acquire all required approvals from King County for the connection and/or discharge of all of PP1A wastewater into King County's wastewater collection and treatment system.

Applicable SEPA Policies: Comp Plan policy CF-27; BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare, adequate sanitary waste).

3. The Applicant shall prepare a detailed noise control plan as required by Villages MPD COA 35 that does more than just repeat noise reduction measures already required for the project. The Applicant shall present the plan to the Noise Review Committee created by Villages MPD COA 45 for input. Notice of the Committee meeting shall be mailed to all property owners within 500 feet of PP1A at least ten days in advance. The plan shall be approved by staff prior to the initiation of any on-site construction activities.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); BDMC 17.15.020(A)(8)(compliance with Villages MPD COA 35).

4. As discussed in Finding of Fact No. III(M)(3), the City's MDRT team shall re-evaluate the Class II designation for Wetland E1 on the basis of whether Wetland E1 was properly segregated under the guidelines of the City's adopted and applicable wetland classification manual. The re-evaluation shall be completed prior to conducting any activities within Wetland E1 or its buffers that would be prohibited in a Class I wetland and no later than issuance of the first certificate of occupancy for a PP1A dwelling unit.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); Comprehensive Plan Policy LU-4 (preserve and protect wetlands).

5. Off-site improvements required for PP1A within the Lake Sawyer Drainage basin shall be construed as the "first implementing project" as referenced in the September 19, 2011 memo from Alan Fure in Ex. O to the Villages DA. "Baseline monitoring", as referenced in that Fure memo, shall be completed within the timeframes required by Ex. O.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); BDMC 17.15.020(A)(8)(consistency with Villages MPD COA 35); Comprehensive Goal Plan Goal 10 (protect and enhance water quality), UGA Policy NE 3 (protect surface water quality).

6. The sampling frequencies set by Ex. O of the Villages DA for setting baseline phosphorous levels for Rock Creek shall be increased to the extent necessary to address

the sampling error identified by Robert Zisette in the first two full paragraphs of p. 3 of Ex. 27. An expanded baseline monitoring program in this regard shall be prepared by the MDRT team after consultation with the SEPA Appellants and the Applicant. At a minimum, the revised baseline monitoring shall include a significant increase in the amount of sampling to provide for an acceptable error of 0.05 and the use of hydrograph separation, smearing and other techniques to estimate separate loadings for base flows.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); Comprehensive Goal Plan Goal 10 (protect and enhance water quality), UGA Policy NE 3 (protect surface water quality).

7. SEPA Checklist A.10 shall be revised to provide that an HPA permit "may" be required for pedestrian improvements across Rock Creek Bridge. The checklist shall be sent to WDFW along with an invitation to comment within ten days. The SEPA Responsible Official is authorized to impose additional MDNS mitigation measures as reasonably necessary to address any impacts identified by WDFW. Except for WDFW comment and response, this condition shall not be construed as re-opening the SEPA review process.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); Comprehensive Plan Goal 8 (protect fisheries), Goal 9 (conserve fish and wildlife habitat); UGA Policy NE 5 (maintain natural stream processes), Objective NE-3 (promote preservation of fish and wildlife habitats), Policy NE-10 (avoid disturbance of valuable fish and wildlife habitat).

8. Prior to any clearing or grading within a final plat division, the tree plan required by Chapter 19.30 BDMC shall delineate the root protection zones for all significant trees retained, relocated or planted for the division under the plan.

Applicable SEPA Policies: BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare); BDMC 19.30.010(reduce tree loss, trees important); BDMC 19.30.080(B)(1)(identify root protection zones prior to construction); Villages MPD Design Standard B(3)(protect large stands of trees).

9. Prior to any clearing or grading of Parcels 34B, 27C, 1L or the area between 1L and 27C, the Applicant shall prepare and have approved an analysis by a qualified expert assessing whether any wildlife corridor connections between wetlands S, T, D4 and E1 have any significant environmental benefit and identify any measures to connect those wetlands that are reasonably feasible. The Applicant's analysis shall be subject to peer review by the City's MDRT team. The SEPA Responsible Official shall be responsible for approving the connectivity analysis and is authorized to impose reasonable mitigation measures to the extent necessary to prevent probable significant adverse environmental impacts.

Applicable SEPA Policies: BDMC 17.15.020(A)(9)(connectivity of wildlife corridor); BDMC 17.15.020(A)(3)(public use and interest; public health safety and welfare).

PRELIMINARY PLAT

V. FINDINGS OF FACT

Procedural:

1. Applicant. B.D. Village Partners, LP
10220 NE Points Drive
Suite 310 Kirkland WA 98033

2. Hearing. A prehearing conference with the SEPA Appellants, Applicant and City was held on October 5, 2012. A consolidated hearing on the application and SEPA appeal was commenced on 11/1/12 and was continued through 11/2/12 and 11/3/12. After the close of the hearing on 11/3/12 the record was left open for written comment from all members of the public on the plat through 11/5/12. The record was left open through The Hearing Examiner conducted a hearing on the application at 10:00 AM at the Black Diamond City Council Meeting Chambers on November 3, 2012. The record was left open for until November 21, 2012 for the Applicant, Appellants and City to provide written comment on several issues. The Applicant agreed to extend the deadline for this decision from December 7, 2012 to December 10, 2012

Substantive:

3. Site/Proposal Description. The Applicant has requested preliminary plat approval for a subdivision of 127.3 acres into 413 lots and 98 tracts, consistent with the approved Villages Master Planned Development (MPD) and the Villages MPD Development Agreement. The project will feature 393 residential lots, a 12.5 acre elementary school site (two lots) and 18 lots totaling 14.28 acres for commercial/mixed use. Approximately 22.48 acres of open space will be set aside in parks, trails and landscape tracts. Tract uses include landscaping, natural landscape, parks, sensitive areas and buffers, utilities and access. The project includes off-site street and utility improvements in order to serve the plat and associated site preparation and grading.

4. Characteristics of the Area. The existing site area consists primarily of undeveloped forest land and wetlands. The site is located on the south side of Auburn-Black Diamond Road (Roberts Drive), extending from its intersection with Lake Sawyer Road west to the western city limits and generally ½ mile to the south, within the NW ¼ and the SW ¼ of Section 15, Township 21 North, Range 6 East, Willamette Meridian, King County, WA.

5. Adverse Impacts. There are no significant adverse impacts associated with the proposal that can legally be addressed in permit review. The proposal has been subject to another round of intense SEPA review and scrutiny from the SEPA Appellants. As determined in the decision on the SEPA appeal, as conditioned the proposal has no probable significant adverse environmental impacts. It is recognized that the burden of proof is higher for establishing adverse impacts

under the SEPA appeal than it is under plat review. This has resulted in a finding of some adverse impacts for the plat that were not found for the SEPA appeal. Those impacts have been mitigated through preliminary plat conditions, as discussed in the SEPA appeal decision. In conjunction with SEPA mitigation measures, PP1A has been conditioned to the maximum extent allowed by law as consistent with prior City Council findings of adequate mitigation.
The most significant impacts that cannot be addressed are concerns expressed over the scale of the project, beyond design considerations already incorporated into the project. Erika Morgan, Peter Rimbos, Robert Taeschner, Rich Ostrowski, Kristen Bryant, Karen Watling and Glen Parker all commented that the project is too large and too dense for Black Diamond and that it would ruin their quality of life. The scale and density of the project has been addressed at length in the Villages MPD, FEIS and DA decisions. As outlined in those decisions, the Growth Management Act ("GMA"), Chapter 36.70A RCW, requires urban densities within city limits. RCW 36.70B.030 prohibits a city from re-evaluating those densities once they've been set by local code. In short, once the City Council decided to expand Black Diamond City limits to include the MPD area, it irrevocably committed the City to urban density development, at least so far as the property owner wants to build at urban densities. All that the City can do is ensure that those urban densities are fully mitigated and compatible in design with rural character. Black Diamond has benefitted in that it has had the opportunity to address this urban development in a comprehensive and coordinated fashion via the master plan development process. Of course, the downside is that the development will occur much more quickly than it would occur under multiple separate ownerships.

Concerns were also raised about higher taxes. The Applicant has volunteered a condition that requires it to cover any budget shortfalls estimated in the fiscal impact analysis for the project, Ex. 40. No more can be asked of the Applicant. Further, beyond school levies, there is no indication in the record that the proposal would increase taxes for Black Diamond residents. Indeed one former City Council member testified that approval of PP1A is essential to the financial security of the City.

The Muckleshoot Tribe raised several concerns over environmental impacts in Ex. 105. Most of these concerns were addressed in the SEPA Appeal. The Tribe asserted that the SEPA responsible official had not reviewed sufficient information to assess environmental impacts. As discussed in the SEPA Appeal decision, the standard for adequacy of review sets a low threshold and the SEPA responsible official did in fact consider a large amount of information prepared by several qualified experts in issuing his threshold determination. The Tribe identified concerns over wetland impacts, all of which were raised by the SEPA Appellants and addressed in their Appeal. The Tribe advocated water conservation. Section 7.5 of the Villages DA adopts a water conservation plan. The Tribe asserted that the water needed to serve the project would divert flows from the Green River and adversely affect fish populations in that river. As noted by the Tribe, the issue was addressed in the FEIS responses, where it was stated that the issue had already been studied, and the Tribe has not presented any evidence that would justify further study. In order to provide some basis for a project condition, the Tribe would have to provide some scientific study or well-founded expert opinion that adverse impacts will result from the proposed water use. In the absence of any such evidence, there is no basis to depart from the position taken in the FEIS response. Finally, the Tribe requested stormwater monitoring. Appendix O to the Villages Development Agreement contains a monitoring plan that the City Council has found sufficient for monitoring purposes and the Tribe has not alleged any specific

deficiencies in that plan. The Tribe also advocates enhanced stormwater treatment to reduce dissolved metals. The Applicant asserts in Ex. 148 that it is using enhanced treatment. At any rate, at a minimum the project is subject to the City's stormwater regulations and Villages MPD and DA conditions regarding water quality controls, which serve as a legislative determination of adequacy. The Tribe has not identified anything unique about PP1A that would justify a higher standard. Similarly, the City Council's adopted stormwater controls will address impacts to the widening of Black Diamond and Lake Sawyer Roads and there is nothing to suggest that they are insufficient for that purpose.

David Vournas raised several concerns in Ex. 7(a) and 7(b) to the staff report. His primary issue appears to be that the PP1A includes property that he claims to own. The Examiner does not have jurisdiction to resolve property disputes. Mr. Vournas is also concerned that the Applicant's stormwater infiltration pond would qualify as a wetland with buffers that encroach upon his property and he is requesting that utilities that serve PP1A be designed to connect to his property as well. Mr. Vournas addressed his comments to staff in April 2011 when he noted that he intended to discuss his issues with the Applicant. There is no information in the record as to whether he was able to work out any of his issues with staff or the Applicant. The Applicant cannot be required to design its utilities for the benefit of Mr. Vournas unless necessary to mitigate a project impact. There is also insufficient information in the record to determine whether the infiltration pond would qualify as a wetland. If he hasn't done so already, Mr. Vournas should share his concerns with the Applicant as they are in the best position to accommodate his concerns.

6. Adequacy of Infrastructure and Public Services.

The City has made written findings in their staff Report dated October 12, 2012 on pages 27- 35 that, assuming their recommended conditions of plat approval are imposed on PP1A, appropriate provisions are made by PP1A for the public health, safety and general welfare (through provisions for water, sewer, stormwater, streets, fire, parks/open space, schools and safe walking conditions for students) and therefore, that the public use and interest will be served by PP1A. As conditioned by staff and the Applicant, adequate infrastructure will serve development as follows:

a. Stormwater Drainage and Water Quality:

(1) Overview. With the conditions noted below, PP1A also makes appropriate provision for storm drainage.

Under existing conditions, all stormwater from the plat site infiltrates into outwash soils. The overall flow trend for groundwater in the area of PP1A is to the southwest away from Lake Sawyer. A portion of the site is tributary to Horseshoe Lake; however, groundwater from Horseshoe Lake also ultimately flows to the southwest.

The management of stormwater within PP1A is accomplished entirely through infiltration. Low impact designed rain gardens and a water quality and infiltration pond will be provided for stormwater management. Where necessary, catch basins and underground pipe will be used to transport water to a water quality facility prior to infiltration. In several instances, curb inlets will allow stormwater to flow directly into a rain garden with infiltration occurring in the immediate vicinity. The physical

characteristics of PP1A do not increase the risk of flood or inundation conditions on- or off-site. An adaptive management area for fine tuning infiltration has also been incorporated in street design as shown on PP1A Sheet UA1 (Exhibit 2). In addition to the items noted above, a stormwater overflow route has been incorporated to provide safe transport of stormwater in an unlikely flooding event as shown on PP1A Sheet UA1 (Exhibit 2).

The PP1A Drainage Report prepared by Triad Associates dated January 26, 2011 (City's staff Report, Exhibit 42) and Addendum 1 to the Phase 1A Preliminary Plat Drainage Report dated June 28, 2012 (City's staff Report, Exhibit 43) evaluate the proposal for stormwater facilities, provide the preliminary sizing of the facilities and specify the facilities necessary to meet the standards in the Black Diamond Engineering Design and Construction Standards (Exhibit "E") and Section 7.4.1 of The Villages MPD DA (City's staff Report, Exhibit1).

Sheets RS1-9 (Exhibit 2) propose how storm drainage facilities will be constructed as part of the plat. A temporary infiltration facility that is 40% oversized will be located just to the southeast of the Plat. The Villages MPD COA require this temporary facility to be sized to accommodate all future phases of Villages MPD development and that prior to permitting of any future phases the Applicant shall demonstrate that the facility is operating as intended and has sufficient capacity for the future phase. At full build-out of the Villages MPD, this temporary facility will be removed, and drainage from the Phase 1A Plat formerly discharging to the temporary pond will be routed to a regional detention facility located to the southwest of the Phase 1A Plat, as set forth in Section 7.4 of the Villages DA. If that facility is located outside of the City, the requirements of MPD Permit Condition No. 63 for an agreement with King County regarding ownership and maintenance of the off-site facility will be applied and enforced as part of future permit applications for construction of the regional facility and/or as part of permit applications for discharge of stormwater to it.

The interim stormwater pond and infiltration facility will be designed to provide both an aesthetically pleasing facility and an area for recreation and other outdoor activities. Because a significant portion of the facility will be designed for infiltration and to appropriately manage up to a 100-year storm event, the potential for significant excess area that can be used for recreation a majority of the time is being considered. During the City's final engineering review, the potential for utilizing a significant portion of the infiltration area for recreation will be further analyzed. At a minimum, a meandering trail/ access way has been proposed by the Applicant around the water quality pond and infiltration area as shown on PP1A plat sheets RS8 and RS9 in Exhibit 2.

(2) Rain Gardens. Stormwater runoff from Auburn-Black Diamond Road (Roberts Drive) will be directed to rain gardens within the Auburn-Black Diamond Road right-of-way. Additional rain gardens are proposed along portions of Villages Parkway SE, Willow Avenue SE, SE Fir Street, Madrona Avenue SE, Pine Avenue SE, Maple Avenue SE and Alder Lane SE, draining either within the right-of-way or in adjacent open space. The Applicant anticipates that rain gardens will be used within the parking lots of the plat's mixed use areas. Pervious paving is also proposed in Alleys A, B, C, D, E, F, H, I, J, Q, R, S, T, U, V, W, and X and Tract 931 (Cedar Lane) of PP1A. Finally, reduced

roadway widths are proposed in numerous locations throughout PP1A, including the elimination of parking on one or both sides of the road where rain gardens are proposed within the right-of-ways, at pedestrian crossings, at alley and street intersections, and in areas where parking is not needed on one or both sides of the road. *See* PP1A Sheets RS1-RS9 in Exhibit 2 for extent of LID techniques and locations. In order to ensure that additional rain gardens or other facilities do not further reduce parking, as recommended by staff and concurred by the Applicant, a condition shall be added providing that parking may not be further reduced to accommodate stormwater facilities.

(3) Stormwater Management Zones. The Villages DA identifies several different stormwater management zones, and three of those zones exist within PP1A: Zone 1A and Zone 1B and Zone 1C. The boundaries of each zone are shown on sheet UA1 of Ex. 2.

According to the Staff Report, presumably as required by the project's stormwater plan, stormwater within Zone 1A must be fully infiltrated on-site within the boundaries of the zone. This infiltrated stormwater is used to match predevelopment recharge to Horseshoe Lake. Stormwater from pollution generating surfaces in Zone 1A (roadways, for example) may be infiltrated after enhanced water quality treatment or it can be infiltrated within Zone 1B with basic water quality treatment. Stormwater from non-pollution generating surfaces in Zone 1B may be infiltrated in Zone 1A after basic water quality treatment. It is therefore possible to "trade" stormwater between Zone 1A and Zone 1B to minimize the cost of treatment facilities. In other words, for every gallon of dirty stormwater diverted from Zone 1A into Zone 1B, a companion gallon of clean stormwater can be diverted from Zone 1B to Zone 1A (with basic water quality treatment requirements).

Stormwater within Zone 1B is used to recharge wetlands and is infiltrated to match predevelopment recharge to Horseshoe Lake (provided the recharge requirements have not been met within the Zone 1A boundaries). Any excess stormwater, i.e. stormwater that is not needed to recharge wetlands or Horseshoe Lake, may be discharged to the regional stormwater facility.

Stormwater within Zone 1C is used to recharge wetlands and all excess stormwater is discharged to the regional stormwater facility.

Previous studies have analyzed and estimated the average annual recharge required in Zone 1A to match predevelopment hydrology and minimize impacts to Horseshoe Lake. The boundary of Zone 1A has been selected, based on the land use plan, to provide sufficient recharge to meet Villages DA requirements. It may be possible, however, that changing weather patterns and/or unanticipated development impacts may have an impact on the post-development hydrology of Horseshoe Lake. Because the grading within this project is relatively flat, especially within Zone 1B, the stormwater facilities within Zone 1B could be configured to drain to either Zone 1A or Zone 1C through strategically located valves and piping. Sheet UA1 shows an area of "adaptive management" that will be designed and built with the capability to route clean stormwater from rooftops to either discharge in Zone 1A or Zone 1C. The Applicant is responsible for monitoring and maintaining the water balance within the adaptive management zone until all stormwater facilities within the zone are complete and accepted by the City.

In Ex. 48, Michael Irrgang expressed concern over flooding impacts to Horseshoe Lake. Villages MPD No. 62 requires that the project to match total runoff discharges via surface and subsurface conveyance routes to Horseshoe Lake. According to a declaration of Alan Fure, an expert in stormwater impacts, this should prevent the proposal from creating any flooding impacts to Horseshoe Lake.

(4) Water Quality. PP1A proposes to use a combination of rain gardens, pervious pavement, and an offsite stormwater treatment and infiltration facility to meet the water quality requirements of the 2005 DOE Manual pursuant to Section 7.4.3.B of The Villages MPD Development Agreement. See PP1A Sheets RS1-RS9 in Exhibit 2 for the location of stormwater facilities. PP1A is not tributary to Lake Sawyer or any other phosphorous sensitive water body. Although not tributary to Lake Sawyer, the Applicant has proposed a stormwater facility for PP1A that consists of basic treatment prior to infiltrating stormwater in soils more than one-quarter mile from a fish bearing water body. This proposal is considered by the 2005 DOE Manual to provide an acceptable method of phosphorous treatment. Additionally, pursuant to The Villages MPD COA No. 9, PP1A Homeowners Association(s) conditions, covenants and restrictions (CCRs) will include provisions, to be enforced by the HOA, prohibiting washing of cars in driveways or other paved surfaces, except for commercial car washes, and limiting the use of phosphorous fertilizers in common areas, so as to limit phosphorous loading in stormwater. The CCRs will be reviewed by the MDRT for compliance with Villages MPD COA No. 9 pursuant to Plat Condition #29 proposed in the City's staff Report for PP1A. These CCRs, along with the proposed water quality facilities mentioned above, will provide a reduction in phosphorous in onsite stormwater from PP1A.

The proposal also triggers phosphorous monitoring requirements both because it is the first Villages MPD implementing project and because some off-site improvements will be constructed in the drainage basin to Lake Sawyer. The phosphorous monitoring is addressed in the SEPA Appeal. Mitigation measures addressing phosphorous monitoring should also be considered conditions of approval for PP1A. In order to further protect Lake Sawyer from phosphorous impacts, the Applicant has volunteered a condition requiring that the Lake Sawyer off-site improvements to the "then current, applicable phosphorous treatment standard". This will be made a condition of approval.

The Applicant has coordinated with the Department of Ecology and states it has received an exemption from the state mandated NPDES requirements due to the fact that all of the stormwater from this project will be infiltrated and will not leave the site. A condition of approval requires that, prior to approval for the first clearing or grading permit, the Applicant shall provide written confirmation, from the Department of Ecology, that an NPDES permit is not required for any phase of this Preliminary Plat, including utility installation and building construction. In the alternative, the Applicant may obtain the applicable NPDES Permit, if required.

b. Transportation:

Overview. With the conditions noted below, PP1A also makes appropriate provision for streets, alleys and other public ways. PP1A has accounted for the roadways, alleys, access tracts and easements necessary for safe and viable mobility throughout the project boundary as indicated on PP1A Sheets RS1-RD1 (staff Report Ex. 2). The Villages DA Section 6.3 provides the standards for roadways within the project. The standards apply equally to public and private streets with no distinction made for function or appearance, except that pervious roads may be used for stormwater control and if used, pervious roadways must remain privately owned and maintained. Unless specifically noted otherwise, details of the street design comply with adopted City street standards.

The street network generally consists of a ring or perimeter road that interconnects with an interior gridded street pattern providing auto and pedestrian access to all of the lots and tracts in the project. Some changes will be made to Roberts Drive to accommodate the new development (see staff Report Ex. 37). Those changes must be complete and accepted by the City as detailed in staff Report Ex. 37 regional infrastructure plan. Extensions from the perimeter road to the south and east are anticipated with future phases of development in The Villages.

(1) Deviations. Pursuant to Section 6.2 of The Villages DA, the Applicant requested consideration and approval of three deviations to alley sections: (1) to allow alleys to be constructed within a 20-foot wide tract instead of a 20-foot wide ROW, (2) to allow the use of alternative cross sections instead of relying on the single slope cross section with a curb and gutter on one side, and (3) to allow the drive isle width to be increased from 16-feet wide to 20-feet in isolated locations.

The Applicant has requested that a new element, a stormwater rain garden, be added to the allowable roadway elements. The proposed rain garden is 11.5 feet wide and would displace portions of the landscape strip and on-street parking where applied. Specifically, the Applicant requested consideration and approval of two deviations to road sections: (1) to allow a wider planter strip for the purpose of installing a rain garden within the ROW between the curb and sidewalk and (2) to allow the use of a single slope road cross section as opposed to a crowned road cross section for PP1A.

These alley and road section deviation requests were approved on July 27, 2012 (staff Report Ex. 17 and 18). Conditions of approval will be added to address improvements to Roberts Drive, on-street parking locations, bike lanes on Ash Avenue SE, street trees, and alleys (specifically Alleys I and F).

(2) Proposed Street Network. The Applicant proposes to create two main roads, the Villages Parkway SE (also known as the Villages Community Connector) and Willow Avenue SE/SE Dogwood Street (also known as the Ring Road). Villages Parkway SE is proposed as a two-way, two lane roadway with a center landscape island. Sidewalks on each side of the roadway are separated from the travel lane by landscaping and meander through adjacent landscape tracts. This roadway includes bike lanes on each side. In some locations, where necessary for traffic capacity, additional through lanes and turn lanes are provided. The Villages Parkway SE will be the primary access to PP1A. This segment through PP1A will bisect the center of PP1A and provide a centralized corridor for pedestrians, bikes and vehicles. The road will have a park-like appearance with views

of Mt. Rainier and landscape, park and pedestrian tracts ranging from 25 feet wide to over 100 feet wide lining both sides of the roadway. The road is adjacent to the westerly boundary of a 1.63 acre park and encircles another 1.17 acre park within an elongated roundabout. The road will have a 5-foot meandering walkway on the west side and an 8-foot wide paved trail on the east side.

Willow Avenue SE/SE Dogwood Street will consist of a single lane in each direction with bike lanes, rain gardens, landscaping, sidewalks and on-street parking on both sides. Rain gardens will break up the line of on-street parking. There will be no direct driveway access from this roadway and the design of PP1A provides for several open spaces fronting onto the roadway. The northernmost terminus of Willow Ave SE, in conjunction with the re-alignment of the Lake Sawyer Road/SE Auburn Black Diamond Road intersection, will include a roundabout.

(3) Access Points. In his testimony, Peter Rimbos expressed concern that PP1A violates Villages MPD COA 27 which states that no more than 150 residential units shall be permitted with a single point of access, though up to 300 units may be allowed on an interim basis, provided that a secondary point of access is provided. The Applicant's response in its Closing Remarks (11/9/2012) is that the requirement is not an access capacity requirement, but a circulation and safety requirement. The Applicant states they are not required to provide one access for every 150 units but are instead required to make sure that PP1A has more than one once the 150 unit threshold is met. The Applicant argues the purpose of the requirement is to allow fire and emergency service alternative access routes in the event one access road is blocked. The Applicant states three access points are more than enough to ensure emergency operations work well and that there are multiple circulation routes for emergency access.

(4) Transportation Model. In his testimony, Peter Rimbos discussed his concerns regarding the adequacy of the transportation model and some of its underlying assumptions. This issue was discussed in the SEPA Appeal Decision under SEPA Appeal Issues Section III(D). The Applicant argues any discussion of the transportation model as part of the PP1A is a collateral attack on prior decisions, namely the Villages MPD Permit Approval. However, they do note in their Closing Remarks (11/9/2012) that one of the modeling assumptions Mr. Rimbos is concerned about, Peak Hour Factor, has been updated to include current data at most of the study intersections (see Declaration of Dan McKinney Ex. 42) as part of the PP1A *Traffic Impact Study* (Ex. 16)).

(5) On-Site Intersection Improvements. The Applicant has proposed to construct a single lane roundabout at SE Auburn-Black Diamond Road (Roberts Drive) and Village Parkway SE. This roundabout will eventually serve as the western terminus of the future Pipeline Road extension. The roundabout design provides for future expansion to a dual lane roundabout if warranted by future vehicle volumes. The roundabout will be landscaped and will serve as a gateway for those vehicles traveling from the west as they transition from the County into the City of Black Diamond.

The Applicant has proposed to realign the intersection of Lake Sawyer Road/SE Auburn-Black Diamond Road and construct a single lane roundabout with the goal of improving traffic safety and improve efficiency for vehicular traffic over existing conditions. Like

the roundabout at Villages Parkway SE, this roundabout design has also provided for future expansion to a dual lane roundabout if warranted by future vehicle volumes.

The project proposes to construct a traffic signal at SR 169 and Main Street.

(6) Frontage Improvements. Frontage improvements along SE Auburn-Black Diamond Road (Roberts Drive) will provide over 2,700 lineal feet of sidewalks and 5 foot bike lanes on both sides of the road. The southern side will include landscaped areas ranging from 25 feet wide to over 50 feet in width. A meandering walkway will be provided westerly of the Villages Parkway SE and a more formal sidewalk will be provided easterly of the Parkway. In addition, there will be left and right turn lanes in conjunction with the proposed roundabouts at Villages Parkway SE and Willow Avenue SE, and at the signal controlled intersection of SE Auburn-Black Diamond Road (Roberts Drive) and Village Parkway SE.

(7) On-Street Parking. On-street parking is provided on most streets in accordance with the applicable street standard. Some parking is displaced by rain gardens where those facilities are proposed to meet the stormwater treatment and discharge requirements. Rain garden locations shown might change depending on site soil suitability. The quantity of on-street parking shown in the application is the minimum acceptable amount and supersedes the location and placement of rain gardens or other utility systems. A condition of approval sets the minimum amount of on-street parking and defines the relationship of on-street parking to rain gardens and utility placement.

(8) Bike Lanes. Bike Lanes are generally consistent with the bike lanes shown and required in Section 6.3 and Figure 6.3 of Villages DA. The bike lanes end near the intersection (conversion) of Ash Ave SE and SE Dogwood Street, without an apparent extension of the bike facility to other destinations. A condition of approval requires the bike lane to be extended to Tract 984 to connect to the Cross Community Trail.

(9) Street Trees. Street trees are not required but not adequately demonstrated on the PP1A drawings. The Villages DA allows the trees to be placed in groves where other roadside facilities (such as rain gardens) compromise an even spacing. A condition of approval will require the Applicant to show street trees and to demonstrate that the number of trees required within a single block are placed within that same block, although they may be placed in groves instead of uniformly spaced along the roadway.

(10) Street Lighting. Street lighting is required on all streets consistent with City standards, including spacing, pole height, and fixture type. Street lighting will be reviewed as part of the Utility Permit review.

(11) Alleys. Alley I and Alley F within the application are used for Fire Department access to several properties in PP1A. In order to meet the emergency access requirements, these alleys will be as wide as the travel way of adjacent local streets. It may be possible; therefore, that these alleys may be used by residents as "cut-through" streets. In order to prevent this, and ensure that these alleys function as direct lot access only, a condition of approval will require these alleys to be designed and constructed with traffic calming features to prevent cut-through traffic.

(12) Future Connection and Access Points. PP1A provides four connection points to future implementing projects within The Villages MPD. These include right of way dedication/roadway construction of Pine Avenue SE south, Willow Avenue SE/SE Dogwood Street, as well as three curb radius returns along the south side of Willow Avenue SE/SE Dogwood Street that depict where future roads will connect to PP1A. Except for these four points of access provided along Auburn/Black-Diamond Road, no street stubs to off-site abutting properties are provided in PP1A. Street stubs to future implementing projects within the Villages MPD that include potential connection points to adjacent properties are provided. *See* PP1A Sheets RS6 through RS8 (staff Report Ex. 2).

(13) Off-Site Transportation Infrastructure. Villages MPD FOF 5(B, C, H, J, and K(v)) and Villages MPD COL 23(A) and 30(F) discussed off-site regional infrastructure improvements required by the Applicant. The Villages MPD COA required an extensive list of transportation improvements required by the Applicant for the entire Villages MPD build out (Villages MPD COA No. 10, 15, 16, 18, 19, 20, and 25). The Villages DA Section 11.5 provides for the timing, construction and funding of off-site regional infrastructure improvements including transportation improvements for the entire Villages MPD build out (Villages DA Tables 11-5-1 and 11-5-2 and Ex. Q and R).

A detailed implementation schedule for the PP1A regional infrastructure improvements was approved by the Designated Official in August 2012 (Ex. 37). Villages DA Ex. K incorporated the Phasing Plan from the Villages MPD COA. The Applicant will be constructing all improvements depicted in the table, with the exception of the regional wastewater storage facility which is not required at this time because the number of ERUs contained within the PP1A does not trigger the need for the facility to be built. The number of dwelling units per Ex. K anticipated to be built in Phase 1A is 850; PP1A proposes 782 units.

(14) Rock Creek Bridge. As addressed in Finding of Fact 6(g) below, several citizens including Mr. Edelman, Ms. Wheeler and Mr. Rimbos expressed concern about children walking to school or to the commercial centers of the Villages from Morganville and across the Rock Creek Bridge on SR 169. The record is unclear as to whether children will be walking across this bridge to school. This issue was discussed in the SEPA Appeal Decision under SEPA Appeal Issues Section III(A)(6). The SEPA MDNS found that the pedestrian safety issue at the Rock Creek Bridge represented a probable significant adverse impact. The MDNS mitigation measure require the Applicant to either (1) commit to doing the pedestrian improvements, or (2) the threshold determination is reversed and the SEPA responsible official is directed to do a limited scope EIS on the pedestrian safety impacts arising from increased pedestrian traffic over the Rock Creek Bridge.

(15) Multi-modal connectivity. As shown in Ex. 2 and on PP1A Sheets RS1-9, the proposed sidewalks, bike lanes, trails and roadways are designed to provide an interconnected network of multi-modal motorized and non-motorized transportation routes within and surrounding PP1A.

*c. **Parks and Open Space:***

PP1A makes adequate provision for parks and open space. The proposal incorporates an extensive amount of open space and trails that is readily accessible to all PP1A residents and that also provides a ready connection to surrounding areas. As determined in the Conclusions of Law, PP1A satisfies all legislative standards for open space as well.

(1) General Overview. Approximately 22.84 acres of open space has been provided in PP1A in a variety of ways, including parks, trails, landscape, pedestrian access and sensitive areas and buffers. Public spaces within PP1A include developed parks ranging in size from small common greens to pocket parks to larger community parks, plazas, pedestrian trails, and natural open space. Sheet CV5 of Ex. 2 provides a site plan of the open space and trails of the proposal.

The smallest of the parks, known as common greens, serve as small, intimate open spaces directly in front of homes that do not front a street. These spaces allow for pedestrian access and serve as a collective front yard for children to play in. Common greens can be found throughout PP1A, for example, Tract 958, which can be found on PP1A Sheet PP6 in Ex. 2. Pocket parks, which are parks one half acre or less in size, are intended to serve the informal needs of the immediately adjacent residents and may provide tot-lots, small open areas to play, seating areas, etc. These pocket parks can also be found throughout PP1A, for example, Tract 948, which can be found on PP1A Sheet PP4 in Ex. 2. Neighborhood parks, generally one half to one acre in size, are less frequently found in PP1A. Neighborhood parks meet the social and recreational needs of neighborhoods and include a variety of amenities and activities including tot lots, small playfields, seating areas, pea patches, etc. An example of a Neighborhood Park is Tract 932, which can be found on PP1A Sheet PP4 included in Ex. 2.

The largest of the parks, community parks, are generally one acre or greater in size and are destinations that serve the recreational, social, and civic needs of the community as a whole. Community parks are focal points within the community and include amenities such as larger play fields, tot lots, civic gathering areas, sports courts, etc. The framework of PP1A is built around the community parks located in Tracts 916 and 917. See PP1A Sheets PP1 and PP4 included in Ex. 2 for locations.

There are locations within PP1A that are areas shown as natural open space in the figure on Page 5-7 of the Villages MPD application. The first area is the 100' trail corridor along the western boundary of the plat (Tracts 944 and 946) and the second area is along the south side of Roberts Drive from the western boundary of the plat extending east to Villages Parkway SE (Tract 990). The tract table on PP1A Sheets CV5 and CV6 (Exhibit 2) show Tracts 944 and 946 as open space tracts, with natural landscape (NL) and pedestrian access (PA) uses, and Tract 990 is shown as an open space tract with landscape use (LA). In order to enhance the natural landscape features of PP1A, staff has recommended and this decision adopts a condition that would Tract 990 shall be designated for natural landscape use.

Trail plans meeting City standards will be provided to the City as part of the landscape plans that will be submitted on a division-by-division basis, when the Applicant seeks

final engineering plan review and approval. To further provide guidance on the timing of trail construction, the Applicant has proposed a condition in Ex. 91, to require that trails be constructed or bonded prior to final plat approval. This condition will be adopted into the PP1A conditions of approval to provide a clear standard on timing of trail improvements.

(2) Connectivity of Parks and Open Space. The parks and open space of PP1A are well connected with the proposed housing and other land uses. The open space is linked through a network of sidewalks, trails and pathways. See PP1A Sheets RS1–RS9 (Exhibit 2) for a depiction of the numerous sidewalks, trails and pathways that provide multiple links to adjacent open space. As shown on PP1A Sheet CV5 (Exhibit 2), PP1A is designed with clusters of compact residential lots that are in close proximity to shared open space, rather than suburban-style large lots with little common open space.

(3) Maintenance. The Applicant has also sought to clarify responsibilities by a proposed condition in Ex. 91, Condition 10, making the Villages Master Developer or Homeowner's Association responsible for the maintenance of neighborhood parks, trails and community parks. This condition has been adopted into the PP1A COAs.

(4) Staff and Citizen Concerns. Page 50 of the Staff Report notes that several parks identified on Sheet CV5 are incorrectly identified as Neighborhood Parks and Pocket Parks. The Applicant has proposed a condition, Ex. 91, Condition 14, that has been adopted with some modification to resolve the discrepancy by requiring that the proper terms are substituted, as approved by staff.

In public testimony, Cindy Wheeler Rich Ostrowski expressed concern that one of the planned open space parks is within a roundabout and is identified as a community park. Although this is not usually the most appropriate place for a park facility, the open space area within this roundabout is 51,000 square feet in size and serves as a dramatic visual focal point for the residents of PP1A as they daily commute through their neighborhood. A legitimate concern inherent in these comments is that there are dangers involved in children crossing the roads to get to this park as well as children chasing balls and the like out of the park into traffic. The conditions of approval will require the Applicant to acquire approval from staff for a plan for Tract 917 park use that assures that use of the park will not present a danger to pedestrians or children due to the proximity of the surrounding roads.

d. Water:

There is adequate provision for water. Water service will be provided by the City of Black Diamond. As indicated by Section 7.2.1 of The Villages DA and the water availability letter from the City dated June 11, 2012, Ex. 45, adequate water is available to serve the PP1A. An approximately 98 acre portion of PP1A is currently subject to a water service area dispute with the Covington Water District, but as discussed in the conclusions of law the conditions of approval will ensure that the proposal will be served by adequate water while the dispute runs its course.

In general, the new water system will consist of looped water mains that are located in city-owned rights-of-way and easements and served from an extension of the City's existing 750 pressure zone. The general lay out of the new water system is depicted in Sheets SSWA1-8 of Ex. 2. The pipes are looped for redundancy and reliability and are equipped with strategically located valves and inter-connections so that short-term failures can be isolated and repaired with a minimum of service disruptions. In some portions of the project there are dual water mains as it is anticipated that future phases will need service from higher pressure pipelines (the 850-zone). Therefore, both a low pressure and high pressure pipeline may be constructed side-by-side or one above the other. The Villages MPD COA require that where possible, future 850-zone mains should be interconnected to the 750-zone to improve service to the Phase 1A customers and to prevent stagnation of water in unused pipelines. These mains may be isolated from the 750-zone in the future when buildings are constructed in the 850 zone.

The City can provide needed water to the project through its existing water rights and future connections to a City of Tacoma supply pipeline. The existing water mains are supplied by the City's existing springs near the Green River. Equalizing, fire flow, and standby storage are provided by the 850-zone reservoir and delivered to the 750-zone through existing pressure reducing stations. There is sufficient capacity in the 850 reservoir and in the city-wide supply water distribution system to support the uses shown in this application; namely 921 ERU.

The on-site water distribution system is generally composed of loops of 12-inch diameter pipe proposed to be located within the completed rights-of-way. According to the Staff Report, the water conveyance system as designed is consistent with City standards and requirements. All elevations within the project can be served, including the highest anticipated finished floor elevations within future structures, without booster pump stations. Water mains are sized to provide the required flow rates during maximum fire flow conditions, while meeting the minimum pressure criteria. The conditions of approval require all water mains to be located in public rights of way or within utility easements that provide a minimum of 15' of unobstructed space for access and maintenance.

The Villages MPD Permit Condition #58, and Villages DA Section 7.2.5, set forth water conservation and monitoring requirements. The water conservation plan requirements applicable to water fixtures will be applied during future building permit review and approval; the monitoring requirements will be implemented by the Designated Official, per Section 7.2.5 of Villages DA.

e. Sewer:

Sewer service is available through off-site connections to either the City or King County collection system. Under either connection, sewer will ultimately be discharged into the Metro Treatment Plant in Renton, Washington.

As outlined in FOF(III)(E)(2) of the SEPA appeal decision, the Renton treatment plant has adequate capacity to accommodate PP1A wastewater. PP1A will generate demand

for 921 ERUs and the treatment plant can accommodate 1,150 ERUs from Black Diamond. To assure that concerns about the adequacy of capacity of the existing sewer system are satisfied, the City in its closing preliminary plat comments, Ex. 149, has requested that the Hearing Examiner require an additional condition with preliminary plat approval. The new condition would require the Applicant to conduct a wet season inspection of the existing collection system to determine 'that there are no root intrusions, blockage, breakage, or other deficiency that would render the City's existing sewer system downstream of the proposed point of connection insufficient to convey the sanitary sewer flows anticipated from the PP1A." Given that the PP1A wastewater discharges are close to the 1,150 ERU treatment capacity, the condition is reasonably necessary to ensure that sewer can be adequately treated and will be imposed.

The sewer plan for the proposal is located at SSWA1-8 of Ex. 2. The actual location, pipe sizes and the details of construction will be specified in subsequent Utility Permits and may differ from the schematic configuration shown in this application. The Applicant will construct the lines identified in those plans and then either (1) connect them to the City's collection system at a manhole located near the intersection of Union Drive and Robert's Drive; or (2) connect to the County's collection system to the Black Diamond Trunk Line located on Lake Sawyer Road. The conditions of approval require a connection to the City's collection system unless King County approves a connection to its system.

The Applicant proposes an interim pumping station to be located directly adjacent to PP1A and just north of the interim stormwater pond. The pump station will pump wastewater to the two connection points referenced in the preceding paragraph by force mail. The pump station will serve all of PP1A and portion of future phases of the Villages MPD that drain to this location. It will likely be removed in the future as a permanent wastewater pump station is located further to the south in several years. A recommended condition of approval is for the lift station to be complete and operational before the first building permit (for a building or structure that may generate sewage) is issued. The temporary lift station will pump the collected sewage to the City or County connection points referenced above.

From the City connection point near Union and Robert's Drive, the wastewater would flow by gravity to the City's Morganville Lift Station. From the Morganville Lift Station, the sewage would then be pumped to a gravity line within Morgan Street. From this Morgan Street gravity line, the PP1A effluent would flow by gravity to the Metro Lift Station by Jones Lake. From this Metro Lift Station, the sewage is pumped through a force main back along Morgan Street and Roberts Drive eventually discharging to the Black Diamond Trunk Line in Lake Sawyer Road. Ultimately, under both the City and County connections, the wastewater will enter the Black Diamond Trunk Line. Although the trunk line is called the "Black Diamond Trunk Line", it is important to understand that it is a county facility.

The Black Diamond Trunk Line is a gravity system and flows north and west out of the City of Black Diamond, through Soos Creek Sewer and eventually to a Metro trunk line, which ties into its Renton Treatment Plant.

Extensions to the sewer system, within the project, will be in accordance with Villages DA and adopted codes and standards. In general, the new sewer system will consist of gravity sewer pipes that are installed within public rights-of-way and easements. The pipes direct flow toward the south and generally converge at a point near the regional stormwater pond, where the sewage is collected and discharged to the wet well of the temporary lift station. In the future, the gravity piping system will be extended further to the south through future projects, where sewage will be collected in a future permanent lift station.

It is anticipated that future phases of development may flow through the pipelines constructed as part of PP1A, toward a permanent lift station that is located to the south of PP1A. Therefore, some oversizing of pipelines in the PP1A is anticipated (both in the gravity collection system and in the force main) to accommodate future capacity. Excess sewage capacity, both in gravity pipelines and force mains, can present operational and maintenance impacts as residence times increase or velocities are reduced. A condition of approval requires that for any pipelines that are designed with excess capacity to include provisions to minimize the operational impacts due to the oversizing.

Citizen and Staff Concerns. Ms. Cindy Proctor and Ms. Cindy Wheeler gave oral testimony during the preliminary plat portion of the hearing. Mr. Jack Sperry submitted written testimony for the hearing record. Issues raised or concerns expressed were:

- Lack of adequate system capacity
- Overflow at lift station or blockages in existing system
- No King County approval
- Proposed collection system is conceptual only
- Location of the proposed large storage facility will impact the decision on where the PP1A collection system will discharge

System capacity is adequate as determined in the SEPA appeal. There is no evidence in the record that City and County development standards are inadequate to prevent overflow. As discussed in the SEPA Appeal, King County raised concerns about overflow and blockages in Ex. 90, but these concerns were for wastewater flows that exceed current system capacity. PP1A will not exceed current capacity. Further, Mr. Ervin, a registered professional engineer with expertise in wastewater system design, testified that there are no concerns about environmental impacts from any overflow at the lift station or from blockages in the existing system.

In order to address concerns over required County approvals for the sewer system, County approval will be required prior to final plat approval of the first division of PP1A. In any event, given that PP1A will be discharging within existing treatment capacity, there is no reasonable basis to conclude that County approval will not be forthcoming.

The proposed sewer collection system at pages SSWA1-8 of Ex. 2 is indeed conceptual and as noted in the Conclusions of Law to this decision no more detail is required. Ex. 2 provides sufficient information to evaluate the proposed sewer system and there is nothing in the record to suggest that on-site conditions would require any major alteration

to the final layout of the sewer lines that would necessitate any significant changes in project design.

The location of the proposed large storage facility identified in Ex. 90 does not need to be determined at this time due to any design issues with the PP1A sewer system. As noted in the second declaration of Alan Fure, Ex. 95, the storage facility alternatives can be served by either extending a force main up Lake Sawyer Road or using the existing City collection system.

f. Schools:

The proposal provides adequate provision for school sites. Lots 1L and 2L within PP1A have been provided for dedication to the Enumclaw School District for an elementary school site. PP1A provides a 12.5 acre elementary school site (lots 1L and 2L) pursuant to the Comprehensive School Mitigation Agreement (CSMA) dated January 24, 2011 (recorded under King County recording no. 20110624001156). The site will be of sufficient size to accommodate necessary school buildings, parking and typical sports fields and playgrounds associated with an elementary school use. The elementary school site is located within one-half mile of residential areas within PP1A, consistent with Villages MPD COA No. 98. In addition, Per Section 13.3 of Villages DA, school mitigation is accomplished through the CSMA, which requires payment of a school mitigation fee. The mitigation fee is based on the Enumclaw School District's calculations concerning the expected student generation rate of The Villages MPD and the anticipated cost of new school facilities. Section 3.1 of the CSMA provides that the Agreement "constitutes full, total, complete and sufficient mitigation of the impact of full build out of The Villages MPD on school facilities of the District."

The Enumclaw School District ultimately determines when it will start construction of the elementary school for PP1A. The Applicant, however, will transfer ownership of the elementary school site within PP1A soon after it receives final plat approval for Division 1L, within which the school site is located. The Enumclaw School District has been notified of the PP1A. As of the date of this report, no comments have been received.

Ms. Proctor suggested a condition of approval in which quarterly reports be made to the Enumclaw School District with project infrastructure and timeline updates. She further asserted that the District needed more than 30 days to approve CC&Rs. She requested that the Applicant make a yearly report to the District, that the Applicant advise the District when the 180 day contingency of the CSMA is triggered, that the District be given more than 30 days to review CC&Rs as provided in the CSMA, that the Applicant help fund school levies and that divisional approval of PP1A not be allowed because that would impair the Applicant's obligations to provide for school mitigation. In its written closing comments, Ex. 148, the Applicant stated it had no objection to providing quarterly updates to the school district and that it would make yearly reports to the District if requested by the District.

Ms. Wheeler testified that Enumclaw School district taxpayers are not aware of the impacts to their school system because no public hearings have been held on the issue. If

school levies are not passed within a 12-month period, the school sites are deeded back to the developer.

Mr. Ostrowski testified that there was no adequate school preparation for the plat, and that if the school sites are not in place for this first plat, then the next ones will not be adequate either. According to the school agreement, no schools will be sited outside the UGA; however, two middle schools are sited in that area.

g. Sidewalks to and from School:

All of the streets within PP1A will have sidewalks, along with an extensive trail network as discussed in the open space/park findings of this decision. This network of sidewalks and trails provides for adequate walking conditions to and from school within PP1A. Offsite there are potential problems with children walking to school within PP1A from Morganville. Mr. Edelman and Ms. Wheeler both expressed concerns about this issue during the preliminary plat portion of the hearing. It's unclear from the record whether Morganville residents would go to school in PP1A and whether they would be bussed as opposed to walk. Nonetheless, any impacts to school children are adequately addressed in the SEPA Appeal decision. Under the SEPA conditions, the Applicant will have to construct pedestrian improvements that safely connect Morganville to PP1A if reasonably feasible. If not reasonably feasible, the Applicant will either have to complete a limited scope EIS to assess the issue or complete the improvements anyway. This is the most that can be legally required of the Applicant to address off-site walking conditions for school children.

h. Fire Protection:

There is adequate provision for fire protection and paramedic services. Fire and paramedic services will be provided by the Mountain View Fire and Rescue, also known as King County District No. 44. PP1A is within 1.5 miles travel distance upon built roads of Station 99 located at 25313 Baker Street. In addition, Station 98 is located at 22015 SE 296th Street.

Required fire flows are estimated to range from 2,500 gpm to 3,500 gpm. The Fire Marshall will establish actual requirements during building permit review. Fire hydrants will be provided in rights-of-way. Additional hydrants may be required around some buildings as determined by Fire Department review and approval of building permits. Sprinklers will be provided in buildings according to the requirements of the International Fire Code.

Section 13.4 of the Villages DA comprehensively addresses fire mitigation, including requirements that pertain to the design and construction of a satellite fire station that are triggered by the certificate of occupancy for the 250th dwelling unit for the Villages

MPD. These Villages DA requirements are referenced in the conditions of approval for this decision. On September 20, 2012 the City also adopted fire impact fees, which will take the place of the fire mitigation fees required in Section 13.4.

As indicated in the City's staff Report dated October 12, 2012 on page 34, the Fire Department reviewed the proposed subdivision for adequacy of water supply and access for fire protection and medical aid purposes and provided comments and recommended conditions. Those recommended conditions have been adopted for this decision.

VI. CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner: BDMC 18.08.030 provides that preliminary plat applications are classified as Type 3 applications. BDMC 18.08.060 provides that the Hearing Examiner shall make final decisions on preliminary plat applications after holding an open record hearing. BDMC 19.04.250 requires the Examiner to hear SEPA Appeals and also requires that the appeals be consolidated with the hearing on the underlying permit application.

Substantive:

2. Zoning Designation: MPD, Master Planned Development

3. Review Criteria and Application. BDMC 17.15.020 governs the criteria for preliminary plat approval. Those criteria are quoted in italics below and applied to the proposal under corresponding Conclusions of Law.

BDMC 17.15.020(A)(1): *The proposed subdivision meets all city zoning regulations and is consistent with the city's comprehensive plan maps and policies, and with the Black Diamond design standards and guidelines where applicable;*

BDMC 17.15.020(A)(1)(a): *The proposed subdivision meets all city zoning regulations.*

4. Consistency with Zoning Regulations. Bulk, dimensional and use standards typically associated with "zoning regulations" are set in the MPD zoning district by the required MPD ordinance and development agreement. The Staff Report contains a detailed assessment of compliance with MPD standards as well as the Villages MPD COAs and Villages Development Agreement at p. 29-58. The review and analysis, including any Findings of Fact and Conclusions of Law included therein, are incorporated by this reference as if set forth in full. Zoning requirements are also addressed in Finding of Fact 28 and 29 of the Staff Report, which are also incorporated by this reference as if set forth in full.

Added SEPA condition No. 8 will also be imposed as a PP1A condition in order to comply with BDMC 19.30.080(B)(1), which requires the delineation of tree root protection zones prior to construction.

BDMC 17.15.020(A)(1)(b): *The proposed subdivision is consistent with the City's comprehensive plan maps and policies*

5. Consistency with Comprehensive Plan. The Comprehensive Plan designation of the properties is Low Density Residential, Mixed Use and Master Planned Development Overlay. Regarding the MPD Overlay, the BDCP states, "*Areas with an MPD overlay designation are intended to develop only subsequent to approval of an MPD permit pursuant to Black Diamond Municipal Code." The Villages Phase 1A Preliminary Plat is an implementing project of the approved Villages MPD. It is therefore consistent with the "Master Planned Development Overlay*" Comprehensive Plan map designation. The proposal also implicates other Comprehensive Plan policies. Those policies are identified and applied at pages 9-15 of the staff Report, which are adopted and incorporated by this reference as if set forth in full, including all findings of fact and conclusions of law therein.

6. SEPA/Plat Conditions Implementing Comprehensive Plan Policies. As noted in BDMC 19.04.240, the Comprehensive Plan serves as a part of the City's SEPA policies in addition to a source of regulatory authority for subdivision approval under the criterion quoted above. Consequently, the following SEPA mitigation measures added by the SEPA appeal are imposed both as SEPA mitigation measures via the comprehensive plan SEPA policies and as conditions of the preliminary plat in order to assure compliance with BDMC 17.15.020(A)(1)(b):

a. Added SEPA Mitigation Measure No. 2 (King County Approval of Sewer): Policy CF-27 (ensure adequate sewer available prior to development).
b. Added SEPA Mitigation Measure No. 4 (Verify Wetland E1 Classification). Policy LU-4 (preserve and protect wetlands).
c. Added SEPA Mitigation Measure No. 5 (Rock Creek Baseline Monitoring): Goal 10 (protect and enhance water quality); UGA Policy NE 3 (protect surface water quality).
d. Added SEPA Mitigation Measure No. 7 (HPA in checklist): Goal 8 (protect fisheries); Goal 9 (conserve fish and wildlife habitat); UGA Policy NE 5 (maintain natural stream processes); Objective NE-3 (promote preservation of fish and wildlife habitats); Policy NE-10 (avoid disturbance of valuable fish and wildlife habitat).

BDMC 17.15.020(A)(1)(c): The *proposed subdivision is consistent with the Black Diamond Design Guidelines, where applicable*

7. The City of Black Diamond Design Guidelines consist of the following different sets of guidelines: MPD Framework Design Standards & Guidelines; Residential Uses in the Historic Village Core; Multi-Family Development; Business Park / Industrial Areas; Commercial Zones; and The Historic Town Center. Of these different sets of guidelines, only the MPD Framework Design Standards & Guidelines are applicable to the Phase 1A Preliminary Plat.

The Multi-Family Development and Commercial Zones Design Guidelines, along with Exhibits H and I of Villages DA, will be applied to certain specific Implementing Approvals within the

PP1A, specifically, at the site plan review and building permit stage, after building and site plan details are known.

The proposal is consistent with the MPD Framework Design Standards and Guidelines. The Design Review Committee (DRC) has reviewed project design and has issued a letter stating it is compliant. See Ex. 20. The Staff Report also contains a detailed application of the applicable design standards and has found the project to be consistent with them. The analysis in the Staff Report, at pages 16-26, is adopted and incorporated by this reference as if forth in full, including any findings or conclusions therein.

In order to enhance the ability to protect large stands of trees as required by MPD Design Standard B(3), added SEPA mitigation measure no. 8 will be added to the PP1A conditions of approval in order to require the delineation of root protection zones prior to the removal of any trees.

BDMC 17.15.020(A)(2): *The proposed subdivision results in a net density that is equal to or less than the allowable maximum density established by the zoning regulations, and is greater than or equal to any applicable minimum density requirement;*

8. Compliant Density. The allowable maximum density for MPD properties is set forth in BDMC 18.98.120(F), which allows a density of 18 units per gross acres, with multi-family housing at up to 30 units per gross acre. Sheet CV4 of PP1A (Exhibit 2) contains a section entitled "Land Use Capacity Table" which denotes an overall Phase 1A gross residential parcel density of 10.65 units/acre and an overall Phase 1A net residential parcel density of 12.48 units/acre for the project. PP1A is equal to or less than the allowable maximum density established by BDMC 18.98.120(F).

The applicable minimum density requirement is specified in BDMC Section 18.98.120(E), which is the base density designated in any applicable pre-annexation agreement or development agreement and in the absence of any such agreement, the minimum density designated in the comprehensive plan. The base density specified in the Black Diamond Comprehensive Plan for MPD properties is 4 units per gross acre; the density specified in the Black Diamond Urban Growth Area agreement is 4 units per acre. In addition, the Villages MPD COA #131 (Exhibit C of Villages DA) states that a minimum density of 4 du/per net acre for residential development shall be required for implementing projects, and shall be calculated for each development parcel using the boundaries of that parcel (or the portion thereof to be developed) as shown on the Land Use plan map (Figure 3-1, as updated July 8, 2010).

As shown on Sheet CV4, "Land Use Capacity Table," the PP1A proposes a gross residential density of 10.65 units per acre, and a net density of 12.48 units per acre, which is equal to or greater than the applicable minimum density requirements specified in the BDUGAA, the Comprehensive Plan, and Villages MPD Permit Condition No. 131.

BDMC 17.15.020(A)(3): *The public use and interest is served by the establishment of the subdivision and dedication. In considering this criteria, it shall be determined if appropriate provisions are made for all relevant matters, including, but not limited to, the public health, safety and general welfare, open spaces, storm drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and school grounds;*

9. Adequate Infrastructure. As determined in Finding of Fact No. 6, the subdivision provides for adequate infrastructure as contemplated in the standard quoted above. There are also no probable significant adverse environmental impacts associated with the proposal, as determined by the SEPA responsible official and sustained on administrative appeal in this consolidated proceeding. No other significant adverse impacts are related to the project, as determined in Finding of Fact No. 5. The proposal serves to accommodate urban growth within an urban growth area in furtherance of the goals and policies of the Washington State Growth Management Act and also serves to implement the Villages Master Plan Ordinance and Development Agreement as intended by the City Council that approved those documents. For all these reasons, the proposal makes appropriate provision for public health, safety and welfare and is in the public interest.

In order to provide for adequate sanitary waste, SEPA added condition no. 2 will be added to the PP1A conditions in order to require all necessary King County approvals prior to final plat approval of the first PP1A division for the connection and/or discharge of all PP1A wastewater into the King County sewer system. In order to ensure that PP1A is constructed in the public interest and consistent with public health and welfare, SEPA added mitigation measure no. 3 will be added to the PP1A conditions in order to require that the Applicant prepares a detailed noise mitigation plan as required by Villages MPD No. 35. In order to ensure that wetlands are adequately protected in furtherance of the public interest and public health and welfare, SEPA added mitigation measure no. 4 is added as a PP1A condition of approval in order to require the re-evaluation of the classification of Wetland E1. In order to ensure that water quality is adequately protected in furtherance of the public interest and public health, safety and welfare, SEPA added mitigation measure no. 5 is added to the PP1A conditions of approval. In order to ensure that trees are adequately protected in the public interest and public safety and welfare, SEPA added mitigation measure no. 8 will be added to the PP1A conditions of approval to require delineation of root zones for trees prior to any clearing. In order to ensure that wildlife are protected in the public interest and welfare, SEPA added mitigation measure no. 9 will be added to the PP1A conditions of approval in order to require an assessment of potential wildlife corridors between wetlands.

10. Multiple Access. During his plat comments, Mr. Rimbos asserted that the proposal fails to comply with the access requirements of Villages MPD COA No. 27. As discussed in Finding of Fact 6(a), MPD COA No. 27 prohibits more than 150 residential units to be accessed via a single access point, except that up to 300 units may be permitted on an interim basis provided a secondary access point is eventually constructed. The Applicant is correct in its assertion that it is not required to provide an access point for every 150 units, but is instead only required to provide more than one access point once the 150 unit threshold is met. The PP1A, as proposed, provides adequate access for circulation and emergency vehicles.

11. Covington Water District Service Area Dispute. In Ex. 66 and at hearing, the Covington Water District ("CWD") disputes the adequacy of water provision because it lays claim to 98 acres of the water service area for PP1A. The City maintains it has rights to serve this area. The conditions of approval assures that all uses within PP1A will be served with adequate water in full conformance with all applicable development standards.

As noted by the Applicant's briefing on the issue, the Applicant need only make a threshold showing at the preliminary plat stage that the completed development is able to comply with applicable zoning ordinances and health regulations and that the plat can only be denied on the basis of inconsistency with matters specified by regulation or ordinance if infirmities or conditions exist that would preclude any possibility of plat approval. Knight v. City of Yelm, 173 Wn.2d 325, 343-44 (2011); Topping v. Pierce County Board of Commissioners, 29 Wn. App. 781, 783-85 (1981).

The proposal clearly makes a threshold showing for adequacy of water. The proposal has adequate water availability as determined in Section 7.2.1 of the DA. The preliminary plat COAs require that any waterlines or other water utility facilities constructed prior to resolution of the water service area dispute shall comply with the design and development standards of both the CWD and the City of Black Diamond. The COAs also require a connection plan to be built into the water system plan that allows for the connection to the legally entitled service provider should a court or other decision maker of competent jurisdiction determine that PP1A is served by the incorrect water service provider. These conditions will guarantee adequate water service according to the development and design standards of whichever provider is entitled to serve the disputed area. As conditioned, there are no infirmities or conditions that exist that would preclude any possibility of plat approval. Consequently, denial of the plat is not justified under Knight and there is no need for the examiner to impose more stringent conditions as requested by CWD in Ex. 66.

In its legal argument, Ex. 66, CWD also asserts that the proposal fails to comply with BDMC 17.12.010(B), which requires a plat application to contain "utility plans showing proposed location, sizing and alignment", as well as BDMC 17.12.020(J) and (N), which require preliminary plan documents that have generalized plans of proposed water distribution systems and that show utility connections to adjacent Villages MPD properties. It is doubtful that compliance with application requirements is within the scope of review for compliance with preliminary plat criteria, although the failure to provide required information will certainly be used against an applicant if the information is necessary to ascertain permit criteria. Beyond this, the Applicant has complied with these requirements as outlined in the findings of fact in that its plat drawings do show the general lay out of water lines. The exact connection points to the City or CWD system is not currently known, but the COAs ensure that a connection point will be designated prior to final plat approval. In sum, the utility information required for a preliminary plat application is satisfied to the extent necessary to meet the "threshold" standard for preliminary plat review discussed under the Knight and Topping decisions.

In crafting the COAs addressing the service area dispute, the Examiner has declined to incorporate the COA suggested by the Applicant in its written closing comments, Ex. 148. The COA suggested by the Applicant would preclude final plat approval for the affected service areas until the water service dispute is resolved. This condition could lead to a situation where land is cleared, improvements installed and then no further development occurs for years as protracted litigation over the service area between the City and CWD extend for years. Such partially developed land can serve as a visual blight to the Black Diamond community. PP1A COA 99 enables the full development of the PP1A as the service area dispute continues. Should the Applicant determine it legally cannot connect to the City or CWD prior to resolution of the water

service area dispute it will be in the same position as it would be under its proposed COA, i.e. no final plat approval until the dispute is resolved. .

12. Conceptual Sewer Plans. In his written comments Jack Sperry asserted that the sewer plans submitted by the Applicant could not be conceptual. BDMC 17.12.020(1) only requires "generalized" plans of proposed sewerage systems. The sewer plans in Ex. 2 satisfy this requirement.

13. School Mitigation. Ms. Wheeler, Ms. Proctor and Mr. Ostrowski made several comments and/or requests regarding school mitigation. Villages MPD 98 provides that the CSMA provides for "adequate mitigation of impacts to school facilities" and the CSMA itself provides that it serves as complete mitigation for all school impacts. Villages MPD COA 98 precludes any further mitigation through PP1A as discussed in II(B)(1) of the SEPA appeal decision. Further, many of Ms. Proctor's requests amounted to renegotiating terms of the CSMA, which presumably was found satisfactory to the Enumclaw School District. The District itself would be expected to have a better understanding than Ms. Proctor of what CSMA terms it needs to mitigate school impacts. Nonetheless, in its written PP1A closing, Ex. 148, the Applicant has volunteered to provide quarterly reports to the District as requested by Ms. Proctor and also to meet yearly with the District if requested by the District. The conditions of approval will require that these reports identify when the 180 day contingency period was initiated if this information had not already been transmitted to the District prior to submittal of the report. Further, the conditions will require the Applicant to meet yearly with the District to discuss construction progress as it relates to school impacts, if requested by the District. Finally, a condition of approval will require staff to consider the impacts of dividing final plat approval into divisions and condition the divisions as necessary to ensure that the connectivity of all infrastructure requirements is not adversely affected and that the sequencing will not adversely affect school mitigation. It is not immediately apparent how dividing final plat approval will impair the Applicant's obligations to provide mitigation under the CSMA, but if the SEPA Appellants or the District have any specific concerns they can relay them to staff for their review of any proposed divisions.

BDMC 17.15.020(A)(4): *The physical characteristics of the proposed subdivision site, as conditioned, do not increase the risk of flood or inundation conditions on- or off-site;*

14. Flood Potential. As determined in Finding of Fact No. V(6)(a), the physical characteristics of the PP1A utilizes appropriate storm water facilities designed in accordance with the 2005 SWMWW, and infiltrate stormwater via LID rain gardens and a temporary water quality pond and infiltration facility. As conditioned, the proposal will not increase the risk of flood or inundation, either on-site or off-site (except for storms larger than 100-year event, which are not required to be regulated).

BDMC 17.15.020(A)(5): *Applicable city development standards are met or exceeded;*

15. Consistency with Development Standards. The proposed subdivision has been reviewed by staff for consistency with applicable portions of Title 17 (Divisions of Land), Title 18 (Zoning), and Title 19 (Environment), plus Villages DA and Villages MPD COA. With the

exception of the allowable deviations described in staff Report Findings of Fact #21-24, all other development standards or permit or Villages DA conditions are met or exceeded.

BDMC 17.15.020(A)(6): *All environmental impacts have been addressed consistent with the public health, safety and welfare and city goals and policies;*

16. No Significant Adverse Environmental Impacts. As determined in Finding of Fact No 5, there are no significant adverse impacts associated with the proposal, including significant adverse environmental impacts.

BDMC 17.15.020(A)(7): *Concurrency exists for all utilities and transportation system improvements prior to occupancy of any structures;*

17. The staff report concludes that following completion of the improvements listed in the PP1A application and in accordance with the conditions of approval in the Staff Report, concurrency exists for the City's water, sewer and stormwater systems. There is no evidence to the contrary.

BDMC 17.15.020(A)(8): *If the proposal is in an approved MPD, the proposed subdivision shall be consistent with the approved MPD, the MPD conditions of approval, the MPD design standards, and the MPD development agreement;*

18. Consistency with MPD Requirements. As determined in Conclusion of Law No. 4, the proposal is consistent with the Villages MPD and Villages DA as well as the MPD design standards.

In order to provide for consistency with Villages MPD COA No. 35, SEPA added mitigation measure no. 3 is added as a condition of approval to PP1A to require stormwater baseline phosphorous monitoring be completed prior to construction as required in Appendix O to the Villages DA.

BDMC 17.15.020(A)(9): *There shall be connectivity of motorized and nonmotorized transportation routes, open spaces and wildlife corridors with existing or proposed routes or corridors on adjacent properties;*

19. Connectivity. As determined in Finding of Fact No. V(6)(b)(12) and (14), the proposed trials, sidewalks, bike routes and roadways provides an interconnected, multi-modal network within PP1A and to the surrounding area and also provides for connectivity to adjoining properties.

The connectivity of wildlife corridors for large animals has been fully addressed in the FEIS and no major wildlife corridors are designated for PP1A. However, the FEIS also recognizes a benefit to connecting more minor wildlife corridors between wetlands. Further study of that issue has been required via a new SEPA mitigation measure (added condition no. 9) resulting from the SEPA Appeal of this proposal. This SEPA mitigation measure will be added as a PP1A

condition to implement the criteria quoted above. Implementation of this condition may result in connecting some wetlands located to the south of the proposal.

BDMC 17.15.020(A)(10): *The use of cul-de-sacs and other dead-end streets shall be minimized to the fullest extent possible;*

20. Cul-de-sac. No cul-de-sacs are proposed at full build-out of the PP1A. However, final platting is proposed to occur in phases; the proposed divisions are shown on Sheet CV3 of PP1A (Exhibit 2). Portions of roads within the preliminary plat will be built in conjunction with final plats, necessitating the use of temporary turnarounds (to accommodate emergency access). As divisions within PP1A receive final plat approval, the roads will be extended and connected and the temporary turnarounds will be eliminated.

BDMC 17.15.020(A)(11): *Appropriate provision has been made for the dedication of land to any public body, and provision of public improvements has been made as necessary to serve the subdivision. This shall include appropriate provision for payment of any impact fees imposed in accordance with the provisions of RCW 82.02.050 through 82.02.090, and applicable city codes and regulations. Dedications shall clearly be shown on the final plat;*

21. Dedications. Numerous tracts are proposed for access and utilities; see the Tract Table on Sheet CV6 (Exhibit 2). Sheet CV5 and 6 clearly identify property that is to be publicly owned. Per Section 6.5 of Villages DA, all street right-of-way will be dedicated to, owned and maintained by the City except for private streets which include alleys, auto courts serving less than 20 dwelling units and Main Street (Village Pl. SE). A recommended condition of approval will require all dedications to be shown on the final plats within PP1A.

The subdivision provides a 12.5 acre elementary school site (lots 1L and 2L) pursuant to the CSMA dated January 24, 2011 (recorded under King County recording no. 20110624001156). The CSMA provides for the timing of conveyance of the school site to the Enumclaw School District. Per Section 13.3 of Villages DA, additional school mitigation is accomplished through the CSMA, which includes payment of a school mitigation fee.

Villages DA 13.4 requires the Applicant to pay fire impact fees when adopted by the City Council. As determined in FOF No. V(6)(h), the City adopted fire impact fees in September, 2012. The Applicant will have to pay these fees per the terms of the impact fee ordinance. DA 13.4 further requires the Applicant to design and construct a satellite fire station. This requirement is triggered by the certificate of occupancy for the 250th dwelling unit for the Villages MPD. These DA requirements are referenced in the conditions of approval for this decision.

Section 13.9 of the Villages DA addresses general government facilities mitigation, which includes payment of a general government facilities mitigation fee and/or dedication of land and/or construction of general government facilities. A recommended condition of approval will require payment of the general government facilities mitigation fee pursuant to Section 13.9 of the Villages DA.

Given the above, and subject to the recommended conditions of approval, this code requirement is met.

BDMC 17.15.020(A)(12): *The streetscape and public open space amenities shall be compatible with any adjacent project that has been developed or approved for development as an MPD;*

22. Compatible Streetscape and Open Space. PP1A is the first implementing plat for The Villages MPD. No adjacent properties have been developed as an MPD.

BDMC 17.15.020(A)(13): *The proposed subdivision provides safe walking conditions for students who walk to and from school; and*

23. Safe Walking Conditions for School Children. As determined in Finding of Fact V(6)(g), the proposal provides for safe walking conditions to and from school.

BDMC 17.15.020(A)(14): *The proposed subdivision provides for tree preservation consistent with the provisions of chapter 19.30.*

24. A significant tree report for PP1A was prepared by International Forestry Consultants, Inc. on January 31, 2011 and was submitted with the initial preliminary plat application. Since that report did not address the area of the proposed off-site storm drainage facility, staff requested supplemental information. A second report, prepared by S.A. Newman, dated March 14, 2011, was provided on July 3, 2012. The two reports along with a Significant Tree Inventory Exhibit address all areas of The Villages MPD proposed for disturbance as a result of PP1A (Exhibits 12-14).

Given the size of the preliminary plat site, significant tree coverage densities were determined based upon modeling work, with "ground truthing" being conducted by the two consultants. Summary tables are provided in the reports; they indicate that a large number of significant trees will be removed as a result of site development. Since these figures are based upon modeling (as opposed to a precise inventory), staff finds it is more appropriate to address tree removal and compliance with BDMC 19.30 (Tree Preservation) more specifically as each division of the plat is proposed for actual physical development.

Recommended conditions of approval related to tree removal:

a. Concurrent with submittal of Utility Permits for any final plat, the Applicant shall submit a report with the exact number of significant trees to be removed in that plat and identify mitigation per BDMC 19.30.070 (e.g., planting of replacement trees or payment into the City tree mitigation fund).

b. Trees proposed for replanting shall be native trees per Villages MPD COA 122.

A new SEPA condition imposed as a result of the SEPA Appeal also requires that the tree report identified in the preceding paragraph shall delineate root protection zones.

DECISION

The proposed subdivision is approved if the Applicant commits to constructing Rock Creek Bridge pedestrian improvements as outlined in SEPA mitigation measure No. 1, identified in Section IV(1) of this decision, subject to the following conditions:

1. The Master Developer shall execute the drainage easement for the off-site stormwater pond shown on Sheets RS7-9 (Exhibit 2) prior to final plat approval of any division within PP1A.
2. Pursuant to BDMC 19.10.220.D, wetland buffer boundaries adjacent to land within this plat shall be permanently delineated by split-rail fencing and identification signs, as approved by the City. Fencing shall be installed prior to final plat approval of any plat division adjacent to wetland buffers.
3. The proponent shall submit a wetland buffer vegetation management plan prepared in accordance with BDMC 19.10.230.F for review and approval prior to the issuance of any site development permits for lands adjacent to wetland buffers.
4. Wetlands and all required wetland buffers shall be defined as separate tracts in the final plat (BDMC 19.10.150.B). These tracts shall be as shown on the proposed preliminary plat drawings, except as may be modified pursuant to BDMC 19.10.230 prior to final plat approval.
5. Prior to final plat approval of any division within PP1A, the proponent shall re-channelize the south leg of the intersection of SE 288th St. and 216th Ave. SE to provide a refuge/merge area for westbound left-turning vehicles.
6. Stationary construction equipment shall be located distant from sensitive receiving properties wherever possible. Where this is infeasible, or where noise impacts would still be likely to occur, portable noise barriers shall be placed around the equipment (pumps, compressors, welding machines, etc.), with the opening directed away from sensitive receiving properties.
7. All equipment required to use backup alarms shall utilize ambient-sensing alarms that broadcast a warning sound loud enough to be heard over background noise, but without having to use a preset, maximum volume. Alternatively, use broadband backup alarms instead of typical pure tone alarms.
8. Operators shall be required to lift, rather than drag materials wherever feasible.
9. Electric pumps shall be used whenever pumps are required.
10. The proponent shall establish a noise control "hotline" to allow neighbors affected by noise to contact both the City and the construction contractor to ask questions or to complain about violations of the noise reduction program per Condition of Approval #41 of The Villages MPD permit.
11. The proponent shall provide construction noise attenuation for existing residents adjoining development parcels Villages V10, V13 and V15 as set forth in Villages MPD COA #44 of The Villages MPD permit.
12. Work hours of operation shall be limited to 7:00 a.m. and 7:00 p.m. on weekdays, 9:00 a.m. and 5:00 p.m. on Saturday, and shall be prohibited on Sundays and City holidays, subject to emergency construction and repair needs as set forth in BDMC 8.12.040.C.
13. The Master Developer shall ensure that the short term construction noise mitigation plan for the PP1A is implemented during construction.

14. The Master Developer shall establish the noise control hotline prior to commencement of any development activity on the PP1A site.
15. The Master Developer shall form The Villages MPD Noise Review Committee no later than one week after commencement of any development activity on the Phase 1A site.
16. The Master Developer shall notify the City in writing of the status of their compliance with Section 13.7 (Noise Attenuation) of Villages DA with regard to The Villages development parcels V10, V13 and V15 at the time of submittal of Utility Permits for those development parcels.
17. Prior to issuance of certificates of occupancy for the 726th ERU (equivalent residential unit), the proponent shall construct a single-lane roundabout at the realigned intersection of Lake Sawyer Rd. SE and SE Auburn-Black Diamond Rd. (Roberts Dr.)
18. Prior to issuance of certificates of occupancy for the 327th ERU (equivalent residential unit), the proponent shall install a traffic signal at the intersection of SE Auburn-Black Diamond Rd. (Roberts Dr.) and Village Pl. SE (aka Main St.).
19. Prior to the issuance of certificates of occupancy for the 1,128th ERU (equivalent residential unit), the proponent shall construct a single-lane roundabout at the intersection of SE Auburn-Black Diamond Rd. (Roberts Dr.) and Villages Parkway SE (aka Community Connector "A").
20. The proponent shall model and monitor traffic at the midpoint of occupancy of Phase 1A (596th equivalent residential unit) and determine what additional requirements may be necessary to comply with the transportation concurrency requirements of the Comprehensive Plan.
21. In addition to the applicable owners association, the Master Developer shall also be responsible for maintenance of Tract 901 (Village Pl SE).
22. All road grades shall not exceed 15%.
23. At the time of building permit application, structures will be required to either have required fire flow available or to have a fire sprinkler system installed to allow for a reduction in required fire flow.
24. All alleys shall be posted "No-Parking" with signage according to the International Fire Code; provisions for enforcement of these no parking zones shall be defined and accepted by the Designated Official prior to final plat approval of any plat division in which alleys are provided.
25. If the final design length of Alley A from its intersection with Alley B exceeds 150 feet, an approved Fire Department turnaround shall be provided at its end, per the IFC.
26. All ways-of-travel shall maintain a minimum 20 foot unobstructed driving surface per the IFC. Bike lanes may be a component of this 20 foot width. The fire hydrant and water supply system shall meet IFC Requirements, and shall be installed prior to the beginning of combustible construction materials being placed on site. Construction materials refers to the lumber (framing) packages and not to a job shack.
27. All dedications shall be shown on the final plat.

28. The Applicant shall make provision for a satellite fire station in accordance with the requirements of Section 13.4 of the Villages DA.

29. Prior to final plat approval of any plat division, the Applicant shall submit Covenants, Conditions and Restrictions (CCRs) for such division for review and approval by the Designated Official as defined in The Villages MPD Development Agreement. The Designated Official's review and approval shall be limited to the CCRs compliance with the Conditions of Approval of The Villages MPD Permit (Black Diamond Ord. No. 10-946) and the provisions of The Villages MPD Development Agreement dated December 12, 2011 (Black Diamond Ord. No. 11-970). Provided, if CCRs have already been submitted and approved by the Designated Official that bind a certain plat division, this condition shall be deemed satisfied for purposes of such division.

30. The Applicant shall comply with the Roberts Dr. sidewalk and pedestrian connection in accordance with the requirements of Section 11.6 of the Villages DA. In addition, the Applicant has voluntarily agreed that, subject to the requirements of Section 11.6 of the Villages DA, it shall submit a permit application for the sidewalk and pedestrian connection prior to issuance of the Certificate of Occupancy for The Villages Phase 1A Preliminary Plat's 1st Dwelling Unit and such connection shall be substantially complete prior to issuance of the Certificate of Occupancy for The Villages Phase 1A Preliminary Plat's 200th Dwelling Unit."

31. Tract 990 (as shown on Sheets CV5 and CV6 of Exhibit 2) shall be designated for natural landscape (NL) use.

32. Any division of a final plat requiring TDRs will not be processed or approved until the Master Developer has acquired title to the needed TDRs and they have been assigned by the Master Developer to the applicable division of the final plat.

33. Prior to final plat approval, the Master Developer shall either comply with Villages MPD COA #69 and obtain the Directors' approval, or dedicate more open space as may be necessary to minimum standards.

34. The Master Developer shall comply with Exhibit Q of Villages DA.

35. The Master Developer shall comply with Exhibit R of Villages DA.

36. Prior to final plat approval of the last division of PP1A, the Master Developer shall submit a status report to the Designated Official verifying compliance with Exhibit P of Villages DA.

37. Tracts 908 and 954-956 shall be maintained by the Master Developer (M.D.)/Applicable Owners Association (A.O.A.).

38. All existing water mains within public rights of way shall remain in-service during construction. This condition will be enforced during Utility Permit review and approval.

39. Water connections will be required to both the 750 and the 850 pressure zones in order to meet fireflow requirements and provide proper pressures to future development areas.

40. All water mains shall be located in public rights of way or within utility easements that provide a minimum of 15' of unobstructed width for access and maintenance. This condition will be applied during Utility Permit review and approval.

41. If the Applicant builds off-site improvements to the City's springs water source as a sole-source project, then those improvements shall be completed or bonded prior to the first Final Plat Approval within PP1A. In addition, the improvements shall be in-service and accepted by the City before the first building permit is issued. If the Applicant elects to use the terms of the WSFFA to complete the off-site springs water source improvements, then the Applicant shall notify the City, in writing, of this decision prior to the first Final Plat approval. In addition, a Final Plat within PP1A may not be approved until the City has designed and bid the necessary improvements. Building permits shall not be issued until the improvements are complete and in-service.

42. Where possible, 850 zone mains for service to future areas of the project shall be interconnected to the 750 zone to improve service to the Phase 1A customers and to prevent stagnation of water in unused pipelines. These mains may be isolated from the 750 zone in the future when buildings are constructed in the 850 zone. This condition will be applied during Utility Permit review and approval.

43. If the Coordinated Water Service Area Boundary dispute has not been resolved prior to Final Plat approval of any final plat that includes building lots within the disputed area, then the water system that is designed for service to areas within the disputed boundary for this area shall be designed to be compatible with both the Covington Water District Standards and the City of Black Diamond Standards. The City will be the permitting agency for water system improvements in the disputed area, even if the area is served by the Covington Water District. This condition will be enforced during Utility Permit review.

44. Prior to Final Plat approval of any final plat that includes building lots within the disputed area, a metes and bounds description of the line that is graphically shown on Sheet CV2 and labeled "Coordinated Water Service Area Boundary" in the application will be provided by the Applicant and this description will be used as the actual location of the boundary.

45. If, as part of a final plat within the PP1A, some properties straddle the Coordinated Water Service Area Boundary, and if the disputed area is served by the Covington Water District, service to the properties straddling the line will be from the City's water system.

46. Sanitary sewer shall be discharged to the existing City collection system, unless King County approves direct discharge into the regional King County collection system.

47. All existing sewer mains shall remain in-service during construction of any new sanitary sewer facilities. This condition will be applied during Utility Permit review and approval.

48. Prior to issuing the first building permit for any structure that might discharge sanitary sewer into the utility system, the temporary sanitary sewer lift station shall be complete, operational and accepted by the City. This condition will be applied during building permit review and approval.

49. Prior to issuing the first building permit for any structure that might discharge sanitary sewer into the utility system, the off-site pipelines connecting the temporary lift station to the point of discharge shall be completed and accepted by the City. This condition will be applied during building permit review and approval.

50. Any sewage pipelines (either gravity or force-main) that are designed with excess capacity shall include provisions to minimize potential operational impacts due to the oversizing. This condition will be applied during Utility Permit review and approval.

51. On the face of each plan set for building and Utility permits in PP1A, the DRC (in conjunction with their notification of approval to the City) shall include the following sewage flow information as applicable; the total building square footage included in that application, the number of fixture units, the Average Dry Weather Flow (ADWF), and the Peak Wet Weather Flow (PWWF) associated with the improvements in that application. The information shall be in tabular form.

52. Stormwater from the rooftops in the area labeled "adaptive management" shall be configured, through valves and piping, with the option of discharging into either the Zone 1A infiltration facilities or into the Zone 1C stormwater facility located south of PP1A and designed and managed to meet the target recharge flow rates and volumes to Horseshoe Lake. The Applicant shall be responsible for monitoring and maintaining the water balance within the adaptive management zone until all stormwater facilities within the zone are complete and accepted by the City. The default position will set for Zone 1A. This condition will be enforced during Utility Permits.

53. The stormwater facility located to the south of the PP1A and shown on plat sheets RS7 through RS9 dated 8/23/2012 shall be designed and built at this time to accommodate all future phases of The Villages MPD that may potentially drain to it. This condition will be applied during Utility Permit review and approval.

54. Prior to permitting for any future Villages MPD phase that may discharge to the stormwater facility shown on PP1A sheets RS7 through RS9 dated 8/23/2012, the Applicant shall demonstrate, through on-site real-time monitoring, that the 1 infiltration system located to the south of the Phase 1A Plat is operating as-designed and has sufficient capacity for those future phases. This condition will be applied during preliminary plat, final plat and/or Utility Permit review for Villages MPD phases subsequent to Phase 1A.

55. Prior to approval of the first clearing or grading permit, the Applicant shall provide written confirmation, from the Department of Ecology, that an NPDES permit is not required for any division of PP1A, including utility installation and building construction. Alternatively, the Applicant shall obtain any required NPDES permit. This condition will be applied during grading and/or clearing permit review and approval.

56. Improvements to Roberts Drive, as necessary to provide suitable access to the Project, shall be completed and accepted by the City as detailed in Exhibit 37 regional infrastructure plan. This condition will be applied during subsequent permit review and approval.

57. The on-street parking locations shown in the application shall be considered the minimum acceptable number of parking spaces. To the extent that additional stormwater facilities are required (namely rain gardens), these facilities shall be located outside the right-of-way and shall not displace or eliminate any on-street parking spaces. This condition will be applied during Utility Permit review and approval for rain garden and/or street construction.

58. Extend the bike lanes on Ash Ave SE to Tract 984 (or as necessary) to connect to the Cross Community Trail so that bikes may access the regional trail network. This condition will be applied during Utility Permit review and approval.

59. Street trees may be placed in groves, but shall be counted on a block-by-block basis. In other words, the number of trees required within a single block shall be placed within that same block, although they may be placed in groves instead of uniformly spaced along the roadway. This condition will be applied during Utility Permit review and approval for street construction.

60. Alley I and Alley F shall be designed and constructed with traffic calming features to prevent cut-through traffic, as acceptable to the Designated Official. This condition will be enforced during Utility Permit review and approval for Alley I and F construction.

61. All implementing projects and permits for PP1A shall comply with the terms and conditions set forth in the Traffic Impact Study prepared by Transpo Group dated February 2011, updated on May 15, 2012, and approved by the City on August 30, 2012."

62. All implementing projects and permits for PP1A shall comply with the terms and conditions set forth in the Detailed Implementation Schedule of Phase 1A Regional Infrastructure Improvements dated August 25, 2012 and approved by the City on August 27, 2012.

63. The Master Developer shall implement the following strategies to further reduce PP1A's construction traffic: (1) Adjust PP1A's site grading to achieve an approximate earthwork balance notwithstanding limited import of the following: (i) topsoil of approximately 7,000 CY; and (ii) import approximately 7,000 CY of material for rain garden materials (estimated at 52 rain gardens of average size 11.5' W x 75' L x 4.5'D); (2) Screen PP1A strippings onsite to obtain topsoil for re-use onsite; (3) Rocks obtained through the screening of topsoil on PP1A should be used as fill or crushed for use as base material onsite; (4) Sticks obtained through the screening of topsoil on PP1A should be "chipped" and used for soft surface trails or erosion protection onsite; and (5) Limit deliveries via trucks larger than Single Unit (SU) trucks to before 3:30 p.m. Monday – Friday.

64. All implementing projects and permits for PP1A shall be reasonably consistent, as determined by City staff, with the terms and conditions set forth in the Overall Grading Plan dated June 25, 2012 and the Triad memorandum dated September 28, 2012 re: The Villages PP1A Construction Trips.

65. Prior to any clearing or grading activities within a division of PP1A, clearing limits shall be marked in the field with continuous ribbon, silt fence or orange construction fence where appropriate to clearly indicate clearing limits. Trees within or near clearing limits

to be saved shall be clearly marked. Orange construction fence shall be installed as a tree protection fence outside of drip lines of trees to be saved prior to the start of clearing and grading operations.

66. In order to ensure that The Villages MPD will not have an adverse financial impact upon the City after Phase1A, the Master Developer shall pay to the City an amount for each year that, when combined with the Master Developer's Total Funding Obligation paid for that year pursuant to the Funding Agreement, will be at least equal to the Net Annual General Fund Deficit (if any) shown for that year in Table 2 of The Villages Phase 1A Fiscal Impact Analysis dated September 20, 2012. The Master Developer shall make this payment each year until the earlier of: (1) a new fiscal analysis is prepared pursuant to Section 13.6 of the Villages MPD Development Agreement and approved by the Designated Official, demonstrating that there is further no Net Annual General Fund Deficit; (2) the City and Master Developer mutually agree to amend the Funding Agreement to include the amounts of any payments needed to offset any Net Annual General Fund Deficit for Phase 1A within the Total Funding Obligation required to be paid under the Funding Agreement; or (3) pursuant to Villages MPD COA 156, the Master Developer identifies mechanisms other than interim funding to address projected shortfalls. No implementing permits or building permits shall be issued by the City of Black Diamond for Phase 1A of The Villages MPD if the Master Developer fails to make the payment required herein according to a payment schedule mutually agreed to by the Master Developer and MDRT as part of the Annual Review. All capitalized terms not otherwise defined in this condition shall be as defined in the MPD Funding Agreement (Exhibit "N" of The Villages MPD Development Agreement).

67. The following mechanisms shall be utilized in PP1A where feasible so as to integrate Low Impact Development techniques into The Villages MPD build-out: (1) reduced roadway widths, (2) infiltration wells, (3) rain gardens, (4) bioswales, (5) media filter strips, (6) reduced driveway lengths, (7) pervious asphalt and concrete in alleys, (8) pervious pavers, and (9) install pet waste stations in common areas.

68. Trails within a Division of PP1A shall be constructed or bonded prior to issuance of a certificate of occupancy, final site plan approval or final plat approval (whichever occurs first) for that Division within PP1A.

69. All Neighborhood Parks, trails and Community Parks in PP1A will be owned and maintained by the applicable Owners' Association (OA) or Master Developer pursuant to the provisions of Subsection 5.5.7 of The Villages MPD Development Agreement, except for any owned by a school district.

70. Required open spaces identified with the PP1A sheets will be conserved or conveyed to the City on a division-by-division basis during the final plat process.

71. The westerly boundary of Tract 953 shall be modified prior to final plat submittal and approval for Division 1L to include all portions of the 60-foot buffer of Wetland S as indicated on PP1A Sheet PP7. Such boundary modification shall be exempt from the plat alteration process set forth in BDMC §17.20.090(B) because it is required by a preliminary plat condition of approval.

72. Prior to final plat approval of the Division in which such lot is located and in order to ensure compliance with the first bullet under "Lot Sizes and Front Yard Setbacks (Single Family Detached)" of Chapter 4 of the MPD Project Specific Design Standards and Guidelines (Exhibit "H" of The Villages MPD Development Agreement), which reads "Corner lots side yard setback on the street side shall be at least 5 feet wider than interior lots" (emphasis added), the Master Developer shall either: (i) amend the lot lines of Lots 25I and 25K, as shown on PP1A sheets dated 8/23/2012, to accommodate 5 feet wider side yard setbacks; or (ii) require smaller residential building footprints such that 5 feet wider side yard setbacks can be accommodated on Lots 25I and 25K.

73. Prior to final plat submittal of any Division within PP1A, the park types in Open Space Tract Table on PP1A CV5 shall be amended as follows: (i) Tract 910 is too small to be a Neighborhood Park; (ii) Tract 918 is too small to be a Neighborhood Park; and (iii) Tract 941 is too large to be a Pocket Park per the park type definitions in Section 14 of The Villages MPD Development Agreement. Correct park types shall be substituted as approved and determined necessary by City staff.

74. Prior to final plat submittal of any Division within PP1A, the Master Developer shall correct PP1A Sheet CV3 as follows: (i) Roberts Drive is incorrectly labeled as Richards Drive; and (ii) the Lot Summary table incorrectly gives unit values for Division 1A Lots 1A-10A, Division 1F Lots 1F-3F, Division 1L and Division 1M; these lots are intended for mixed use commercial development and a school site.

75. To the extent that PP1A requires construction of off-site improvements to roads that currently drain to Lake Sawyer, the Applicant will be required to treat the runoff from the improvements and the right-of-way in the immediate vicinity of the improvements to the then current, applicable phosphorous treatment standard. This condition will be applied during the review and approval of any Utility Permits for design and/or construction of any such off-site road improvements.

76. Concurrent with submittal of Utility Permits for any Division of PP1A, the Applicant shall submit a report with the exact number of significant trees to be removed in such Division and identify mitigation per BDMC 19.30.070 (e.g., planting of replacement trees or payment to the City tree mitigation fund). Trees proposed for replanting shall be native trees per The Villages MPD COA 122.

77. Pursuant to Villages MPD COA No. 52, should new water distribution alternatives be desired by the Applicant that are not consistent with the City's Water Comprehensive Plan in effect as of the date of The Villages MPD Permit Approval, the Applicant shall be responsible for the cost of updating the Plan, if needed..

78. The Applicant shall make payment of the general government facilities mitigation fee pursuant to Section 13.9 of the Villages DA.

79. Prior to the approval of the first utility permit for construction of sanitary sewer utilities, the Applicant shall conduct wet season inspection and/or monitoring sufficient to confirm to the City's satisfaction that there no root intrusion, blockage, breakage or other deficiency that would render the City's existing sewer system downstream of the proposed point of connection insufficient to convey the sanitary sewer flows anticipated

from PP1A. If inspection/monitoring identifies any condition indicating there is not sufficient capacity to convey such flows, the Applicant shall provide any improvements the City deems necessary to remedy the deficiency prior to issuance of the first certificate of occupancy for the first division of the Phase 1A plat.

80. The Applicant may seek approval of PP1A final plat by division, as depicted at CV3 of Ex. 2. However, no division shall be approved unless the Applicant demonstrates to the satisfaction of staff that there is no reasonable possibility that piecemeal approval will adversely impact the continuity of required infrastructure and other mitigation. Every approved division should be able to stand on its own in terms of connections to infrastructure networks. staff is authorized to impose mitigation, such as requiring the posting of security devices, to the extent necessary to ensure that the continuity of required improvements is not permanently impaired if remaining un-built divisions are never completed. Final plat approval by division also may not impair any other mitigation requirements, specifically including any required school mitigation.

81. If requested by the Enumclaw School Board, the Applicant shall meet with the Board on a yearly basis to discuss construction activities and activities conducted to mitigate school impacts.

82. Unless waived by the Enumclaw School Board, the Applicant shall prepare a written quarterly report addressed to the Board identifying progress in construction of the Villages MPD as well as any school mitigation required for the MPD. The report shall specifically identify if the 180 day contingency period of the CSMA has been triggered, if this information has not already been provided to the Enumclaw School District by the Applicant.

83. The comparable city used in the fiscal impact analysis, Ex. 40, shall be revised to use a city other than the City of Black Diamond for purposes of estimating police service costs. The Applicant may opt to continue to be subjected to its funding obligation under the current fiscal impact analysis should its funding obligation be more than the funding obligation resulting from the revisions required by this condition. The revisions shall be approved by City staff prior to the issuance of any certificates of occupancy for PP1A.

84. Off-site improvements required for PP1A within the Lake Sawyer Drainage basin shall be construed as the "first implementing project" as referenced in the September 19, 2011 memo from Alan Fure in Ex. O to the Villages Development Agreement. "Baseline monitoring", as referenced in that Fure memo, shall be completed within the timeframes required by Ex. O.

85. Prior to final plat approval of the first division, the Applicant shall acquire all required approvals from King County for the connection and/or discharge of all of PP1A wastewater into King County's wastewater collection and treatment system.

86. The Applicant shall prepare a detailed noise control plan as required by Villages MPD COA 35 that does more than just repeat noise reduction measures already required for the project. The Applicant shall present the plan to the Noise Review Committee created by Villages MPD COA 45 for input. Notice of the Committee meeting shall be mailed to all

property owners within 500 feet of PP1A at least ten days in advance. The plan shall be approved by staff prior to the initiation of any on-site construction activities.

87. As discussed in Finding of Fact No. III(M)(3), the City's MDRT team shall re-evaluate the Class II designation for Wetland E1 on the basis of whether Wetland E1 was properly segregated under the guidelines of the City's adopted and applicable wetland classification manual. The re-evaluation shall be completed prior to conducting any activities within Wetland E1 or its buffers that would be prohibited in a Class I wetland and no later than issuance of the first certificate of occupancy for a PP1A dwelling unit.

88. Prior to any clearing or grading within a final plat division, the tree plan required by Chapter 19.30 BDMC shall delineate the root protection zones for all significant trees retained, relocated or planted for the division under the plan.

89. Prior to any clearing or grading of Parcels 34B, 27C, 1L or the area between 1L and 27C, the Applicant shall prepare and have approved an analysis by a qualified expert assessing whether any wildlife corridor connections between wetlands S, T, D4 and E1 have any significant environmental benefit and identify any measures to connect those wetlands that are reasonably feasible. The Applicant's analysis shall be subject to peer review by the City's MDRT team. The SEPA Responsible Official shall be responsible for approving the connectivity analysis and is authorized to impose reasonable mitigation measures to the extent necessary to prevent probable significant adverse environmental impacts.

90. In the disputed water service area between the City and CWD, see Ex. 66, the Applicant shall be responsible for selecting the appropriate water service provider. If the Applicant chooses to designate a water provider prior to resolution of the water service dispute, the design of the water system will include a plan for connecting to the other service provider should the City and CWD subsequently agree that the Applicant has selected the incorrect water service provider or a court or other tribunal of competent jurisdiction rules that the service provider selected by the Applicant is not entitled to provide service to the disputed area. The alternate connection plan shall ensure that an alternate connection can be achieved with minimal disruption of completed plat improvements, no disruption in water service and no impacts to environmentally sensitive areas. The alternate connection plan shall be subject to the approval of the alternate water service provider, provided that approval is not unreasonably withheld. The alternate connection plan shall be deemed approved if no response is provided the alternate provider within ten working days of receipt. No final plat approval shall be provided for areas that need water service within the disputed water service area until either the Applicant has secured an approved connection plan or the water service area dispute for the area in question has been resolved.

91. Prior to final plat approval of Division 1A, the Applicant shall acquire approval from City staff for a park use and design of Tract 917 that assures that children and other Tract 917 users will not be endangered by the proximity of adjoining roads.

Dated this 10th day of December, 2012.

Phil Olbrechts
Hearing Examiner
City of Black Diamond

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short and procedures strictly construed. Anyone wishing to file a judicial appeal of this decision should consult with an attorney to ensure that all procedural requirements are satisfied.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.