

Tracey Redd

From: Kristi Beckham <KBeckham@Cairncross.com>
Sent: Monday, December 29, 2014 4:31 PM
To: Nancy Rogers; MDRT User; Andy Williamson; 'olbrechtslaw@gmail.com'
Subject: RE: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 2a of 3)
Attachments: Pages from scan_20141229154717 Reduced File Size Part 2a.pdf

Follow Up Flag: Follow up
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I am resending the attachment to Email 2 of 3 in two parts, 2a and 2b. We received bounce backs because of the file size. Attached is Part 2a.

Thank you.

CH& Kristi Beckham

Legal Assistant

Cairncross & Hempelmann

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From: Nancy Rogers
Sent: Monday, December 29, 2014 4:20 PM
To: 'MDRT User'; 'Andy Williamson'; 'olbrechtslaw@gmail.com'
Cc: Kristi Beckham
Subject: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 2 of 3)

Dear Mr. Examiner and MDRT Team and Mr. Williamson:

Yarrow Bay's reply materials are in three parts: (1) a 22 page memo, (2) the attached full PP1A decision (December 2012), and (3) the Hearing Examiner's Recommendation of Approval for The Villages Development Agreement (September 2011), together with a Department of Ecology Guidance Document (April 2005), and a memo from Transpo (December 2014). Please let me know if you do not receive all parts or have any trouble opening.

We will also be filing the separate reply materials on January 9 after we review the City's response, due Jan 7.

Thank you,

CH& Nancy Bainbridge Rogers

Attorney

Cairncross & Hempelmann

524 Second Ave. | Ste. 500 | Seattle, WA 98104-2323 | [vCard](#) | [Bio](#)



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Tracey Redd

From: Nancy Rogers <NRogers@Cairncross.com>
Sent: Monday, December 29, 2014 4:19 PM
To: MDRT User; Andy Williamson; olbrechtslaw@gmail.com
Cc: Kristi Beckham
Subject: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 1 of 3)
Attachments: scan_20141229154717 Reduced File Size Part 1.pdf

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ATTACHMENT

City of Black Diamond Hearing Examiner Decision,
approving Preliminary Plat 1A (December 2012)

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. 79-81 of 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. Rimbo’s 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. Rimbo's 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); *Wenatchee 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 PPIA. 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 *Nykriem* 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 Impacts¹. 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 from 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, complete 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 cannot² 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.

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 III³ 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 1 of Ex. 133, in its June 13, 2012 memo, Ex. 187, Perteet classified wetland E1 as a Category I wetland with a 110 foot buffer⁴ and classified wetlands S and T as Category III wetland with rating scores that would result in 110 foot buffers⁵. 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.

⁴ Dr. Cooke's Table I, 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 Pertect. 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 Perteeet had determined that the Villages FEIS did not adequately address wetland impacts and that this issue should be 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 Shields, 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 I 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) Pertect⁷ 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

⁷ As noted in Finding of Fact No. III(D)(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