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From: Kristi Beckham <KBeckham@Cairncross.com>
Sent: Monday, December 29, 2014 4:44 PM
To: Nancy Rogers; MDRT User; Andy Williamson; 'olbrechtslaw@gmail.com'
Subject: RE: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 2a1 of 3)
Attachments: Pages from Pages from scan_20141229154717 Reduced File Size Part 2a1.pdf

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We received additional bounce backs so I broke each file into four total parts. Attached is Part 2a1.

I'm sorry for the inconvenience.

CH& Kristi Beckham

Legal Assistant

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From: Kristi Beckham
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)

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

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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

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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
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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 PP1A. The difficult task at this stage of review is determining when the Council has made a final decision intended to preclude further review. It is important to note that the *Nykreim* cases only apply to

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

2. Collateral Attack Between SEPA Decisions (Conclusion of Law No. II(B)(2)). Although there is only one case that addresses the preclusive effect of one SEPA decision upon another, that case is as clear as the *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. Rimbo, 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 Morgansville 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