

AFTER RECORDING MAIL TO:

Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114
Attn: William M. Phillips, Esq.

FIRST AMERICAN TITLE INS

201406180127

Easement Rec Fee: \$ 269.00

06/18/2014 02:34 PM

Walter Washington, Kitsap Co Auditor

Page: 1 of 126



Document Title(s): (or transactions contained herein)

1. **@ Declaration of Easements, Covenants and Restrictions**

Reference Number(s) of Documents assigned or released:

@

Grantor(s): (Last name first, then first name and initials)

1. **@ VWA – Bainbridge Island, LLC**



Grantee(s): (Last name first, then first name and initials)

1. **@**

Abbreviated Legal Description as follows: (i.e. lot/block/plat or section/township/range/quarter/quarter)

@ Ptns Sec 23, 25N, 02E, WM, SW qtr
Lots A & B, SP 3083, AFN 8309070094

Assessor's Property Tax Parcel/Account Number(s):

@ APN: 232502-3-036-2000, 232502-3-026-2002, 232502-3-043-2001,
232502-3-030-2006, 232502-3-027-2001

I AM REQUESTING AN EMERGENCY NONSTANDARD RECORDING FOR AN
ADDITIONAL FEE AS PROVIDED IN RCW 36.18.010. I UNDERSTAND THAT
THE RECORDING PROCESSING REQUIREMENTS MAY COVER UP OR
OTHERWISE OBSCURE SOME PART OF THE TEXT OR THE ORIGINAL DOCUMENT.

Submitted for Kimberly Campbell

EXCISE TAX EXEMPT JUN 18 2014

**DECLARATION OF EASEMENTS, COVENANTS,
CONDITIONS AND RESTRICTIONS**

THIS DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS (the "Declaration") is made and entered into this 16th day of June, 2014, by VWA - BAINBRIDGE ISLAND, LLC, an Ohio limited liability company ("Declarant").

RECITALS

A. Declarant is the owner of that certain real property situated in the City of Bainbridge Island, County of Kitsap, State of Washington, more particularly described in Exhibit "A" attached hereto and made a part hereof (and initially consisting of Lots 1-5 and, if created by Declarant as set forth below, the Storm Water Detention Lot (individually, a "Lot", and collectively the "Lots") as shown on Exhibit "B" attached hereto and made a part hereof (the "Site Plan").

B. Declarant intends to develop the Lots for retail and commercial purposes (the "Project")

C. The Project is subject to the terms and conditions of the Reciprocal Easement Agreement (defined below).

D. In connection with Declarant's intended development of the Project, Declarant intends to develop Lot 1 for use by KeyBank (hereinafter defined) and Lot 2 for use by Walgreen (hereinafter defined).

Declarant desires to impose certain easements upon the Lots, and to establish certain covenants, conditions and restrictions with respect to said Lots, for the mutual and reciprocal benefit and complement of the Lots and the present and future owners and occupants thereof, on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the above premises and of the covenants herein contained, the Declarant does hereby declare that the Lots and all present and future owners and occupants of the Lots shall be and hereby are subject to the terms, covenants, easements, restrictions and conditions hereinafter set forth in this Declaration, so that said Lots shall be maintained, kept, sold and used in full compliance with and subject to this Declaration and, in connection therewith, Declarant covenants and agrees as follows:

AGREEMENTS

1. Definitions. For purposes hereof:

(a) The term "Owner" or "Owners" shall mean the Declarant and any and all successors or assigns of such persons as the owner or owners of fee

simple title to all or any portion of the real property covered hereby, whether by sale, assignment, inheritance, operation of law, trustee's sale, foreclosure, or otherwise, but not including the holder of any lien or encumbrance on such real property.

(b) The term "Lot" or "Lots" shall mean each separately identified parcel of real property now constituting a part of the real property subjected to this Declaration as described on Exhibit "A", that is, initially Lots 1-5, and any future subdivisions thereof. Subject to the foregoing, each Owner shall have the right to unilaterally amend this Declaration reflecting any such subdivision of the Lot owned by such Owner. As of the date of execution of this Declaration, the initial "Lots" are as designated on the Site Plan.

(c) The term "Occupants" shall mean the tenants or occupants of a Lot.

(d) The term "Permittees" shall mean the Occupants of a Lot, and the respective employees, agents, contractors, customers, invitees and licensees of (i) the Owner of such Lot, and/or (ii) such Occupants, including, without limitation, KeyBank, during the continuance of the KeyBank Lease (defined below), and Walgreen, during the continuance of the Walgreen Lease (defined below).

(e) The term "Common Area" shall mean, collectively, all of (i) those portions of Lots 1-5 that are outside of exterior walls of buildings or other structures from time to time located on the Lots and/or within any adjacent areas (such as a right of way) within which improvements are required to be constructed and/or maintained by any governmental authorities in connection with the Project (such as sidewalks and/or the Multi-Purpose Trail [defined below]), and which are either unimproved or are improved, as (without limitation) parking areas, landscaped areas, driveways, roadways, walkways, light standards, curbing, paving, entrances, exits and other similar exterior site improvements, provided, however, that "Common Area" shall not include any drive-through facilities (including without limitation all drives, escape lanes, stacking areas and other components thereof), trash enclosures or loading docks or loading areas on Lots 1-5; (ii) the Driveway (defined below); (iii) the Multi-Purpose Trail (defined below); (iv) the Storm Water Detention Facilities; (v) Polly Lane (defined below); (vi) all Common Utility Facilities (defined below) underneath or adjacent to the Driveway and/or serving any landscaped areas included within any Project Common Area (defined below); and (vii) any wetland mitigation and/or buffer areas, as shown on the Site Plan.

(f) The term "Walgreen" or "Walgreens" shall mean Walgreen Co., an Illinois corporation (or any of its affiliates, subsidiaries, successors or assigns). Walgreen shall be deemed a third party beneficiary to this Declaration.

(g) The term "Walgreen Lease" or "Walgreens Lease" shall mean that Lease of Lot 2 from Declarant as landlord to Walgreen as tenant, and any amendments, extensions or replacements thereof.

(h) The term "Site Plan" shall mean that site plan of the Project attached hereto as Exhibit "B" and by reference made a part hereof. Except as may be otherwise provided in this Declaration, the Site Plan is for identification purposes only.

(i) The term "Driveway" shall mean the driveway in the location within the Project as designated on the Site Plan as "Driveway", and shall include all paving, curbing, adjacent landscaped areas, light standards, Utility Facilities [defined below] serving such driveway (including light standards), Utility Facilities providing storm water drainage from such driveway to the Storm Water Detention Facilities, entrances to adjacent streets, and related improvements.

(j) The term "KeyBank" shall mean KeyBank National Association, a national banking association (or any of its affiliates, subsidiaries, successors or assigns). KeyBank shall be deemed a third party beneficiary to this Declaration.

(k) The term "KeyBank Lease" shall mean that Ground Lease Agreement of Lot 1 from Declarant as landlord to KeyBank as tenant, and any amendments, extensions or replacements thereof.

(l) The term "Operator" shall mean the party designated from time to time by Declarant to maintain and operate the Project Common Areas (defined below) of the Project. The initial Operator shall be Declarant (or an affiliate of Declarant). Declarant shall have the right (with the Approval of the Owners) to designate any other Owner of a Lot as the "Operator", and if, at such time as Declarant no longer owns any real property within the Project, Declarant has not previously designated any other Owner as the "Operator", then prior to conveying the last real property which it owns within the Project Declarant shall designate another Owner as the "Operator".

(m) The term "Approval of the Owners" shall mean the affirmative written vote of those Owners on whose Lots exist in the aggregate more than seventy-five percent (75%) of the allocable shares of Project Common Area Costs (defined below) pursuant to Section 3.5(c) below.

(n) The term "Reciprocal Easement Agreement" shall mean that certain Reciprocal Easement Agreement dated as of June 16, 2014, by and among Declarant Lawrence P. Knudsen and Kaye E. Knudsen, and Catherine Lynn Clayton, Trustee of the Catherine Lynn Clayton Revocable Trust dated January 11, 1993, and recorded June 18, 2014 in Auditor's File No.

20140618D126 of the Kitsap County Recorder's Office, as the same may be amended, extended, or replaced.

(o) The term "Multi-Purpose Trail" shall mean the multi-purpose trail which is located adjacent to the western boundary of Lots 1-3 on the Site Plan and the portion thereof which is contained within Lot 3 as shown on the Site Plan, and shall include all paved walkways, adjacent landscaping, and any light standards or other Utility Facilities serving the same.

(p) The term "Storm Water Detention Facilities" shall mean both (i) the area within Lot 3 designated as the "Storm Water Detention/Water Quality Area" on the Site Plan and (ii) the area within Lot 4 designated as the "Rain Garden Area" on the Site Plan, and shall include all improvements therein and/or which serve such areas (including concrete areas, Utility Facilities within and/or serving such areas (including Common Utility Facilities within the Project Common Area [including the Driveway] and providing storm water drainage to such areas), landscaped areas, any portion of the Multi-Purpose Trail which may be contained within and/or adjacent to such areas, and other improvements within such areas).

(q) The term "Storm Water Detention Lot" shall mean, if elected by Declarant, the separate Lot created by Declarant from a portion of Lot 3 for purposes of creating a separate Lot for that portion of the Storm Water Detention Facilities which are contained within Lot 3, and any future subdivisions thereof.

(r) The term "Common Utility Facilities" shall mean (i) utility systems and facilities from time to time situated on or serving more than one (1) Lot, up to the building wall of any Building, for use or service in common by more than one (1) of the Owners or for the service of the Common Areas located on more than one Lot, and/or (ii) utility systems and facilities from time to time contained within the Common Areas of the Project and which serve more than one (1) Lot, and may include, the following: storm drainage, retention and disposal facilities and sanitary sewer systems, the Storm Water Detention Facilities (and all Utility Facilities serving the same [including Common Utility Facilities within the Project Common Area (including the Driveway) and providing storm water drainage to such areas]), manholes, underground domestic and fire protection water systems, underground natural gas systems, underground electric power cables and systems, underground telephone, television, and other telecommunications cables and systems, irrigation systems for landscaped areas, and all other utility systems and facilities for such common use or service, including, without limitation, those installed under the provisions of this Declaration and as replacements thereto.

(s) The term "Separate Utility Facilities" shall mean any of the following which only serve one (1) Lot and are not for use in common by other Owners: storm drainage facilities and sanitary sewer systems (including, without limitation,

underground storm and sanitary sewer systems), underground domestic and fire protection water systems, underground natural gas systems, underground electric power, underground cables and systems, underground telephone, television, and other telecommunications cables and systems, irrigation systems for landscaped areas, and all other underground utility systems and facilities reasonably necessary for the use or service of any Lot.

(t) The term "Utilities Facilities" shall mean Common Utility Facilities and/or Separate Utilities Facilities, individually and/or together.

(u) The term "Monument Sign" shall refer to the proposed monument sign(s) to be installed and maintained by the Declarant in the location shown on the Site Plan, which may contain multiple sign panels for the benefit of some of the Owners (and/or their Occupants) and/or any other parties, as permitted under Section 2.1(e) below.

(v) The term "Polly Lane" shall mean and refer to that limited access driveway designated as "Polly Lane" on the Site Plan, and shall include all paving, curbing, adjacent landscaped areas, light standards, Utility Facilities serving such driveway, entrances to the remainder of the Project and/or NE High School Road, and related improvements.

(w) The term "Project Common Area" shall mean, collectively, all of (i) the Driveway; (ii) the Storm Water Detention Facilities; (iii) Polly Lane; (iv) the Monument Sign; (v) all Common Utility Facilities, underneath or adjacent to, or serving, all or any of the Driveway (including the Common Utility Facilities providing storm water drainage from the Driveway to the Storm Water Detention Facilities), Polly Lane, the Multi-Purpose Trail, the Monument Sign, and/or any Common Areas of the Project (including without limitation storm water drainage from the Driveway to the Storm Water Detention Facilities); and (vi) those other specified Common Areas on the Site Plan.

(x) The term "Site Plan Requirements" shall mean those requirements (including maintenance and repair obligations) applicable to all or any portion of the Project as set forth in the Report and Decision of the Office of the Hearing Examiner, Bainbridge Island, Washington, dated March 27, 2014 (the "Original Report"), as amended by the Order on Reconsideration dated May 5, 2014 (the "Report Amendment"), as the same may be amended, modified, and/or supplemented by the applicable governmental authorities. Copies of the Original Report and the Amended Report are attached to this Declaration as Exhibit D.

(y) The term "Constant Dollars" shall mean the present value of the dollars to which such phrase refers in this Declaration, which shall be determined by multiplying the dollar amount to be adjusted by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base

Index Number. The "Base Index Number" shall be the level of Index for the month and year during which this Declaration is recorded; the "Current Index Number" shall be the most recent Index published prior to each calendar year during the term of this Declaration; and the "Index" shall be the consumer price index for all urban consumers for the Seattle Metropolitan Area, published by the Bureau of Labor Statistics of the United States Department of Labor (Base Year 1981-84=100) or any successor index thereto. If publication of the Index is discontinued, or if the basis of calculating the Index is materially changed, then Declarant shall determine a substitute Index based upon comparable statistics as computed by an agency of the United States Government or, if none, by a recognized responsible periodical or publication of recognized authority which most closely approximates the result which would have been achieved by using the original Index.

2. Easements.

2.1 Grant of Easements. Subject to any express conditions, limitations or reservations contained herein, Declarant hereby declares, grants, establishes, covenants and agrees that the Lots, and all Owners and Permittees of the Lots, shall be benefited and burdened by the following perpetual easements which are hereby imposed upon the Lots and all present and future Owners and Permittees of the Lots:

(a) (i) A reciprocal, nonexclusive easement for reasonable access, ingress and egress over all paved driveways, roadways and walkways as presently or hereafter constructed and constituting a part of the Common Area of the Lots, including, without limitation, the Driveway and Polly Lane, so as to provide for the passage of motor vehicles and pedestrians between all portions of the Common Area of such Lots intended for such purposes, and to and from all abutting streets or rights of way furnishing access to such Lots; and

(ii) A reciprocal, nonexclusive easement for the installation, operation, use, maintenance, repair and/or replacement of the Multi-Purpose Trail in the location shown on the Site Plan.

(b) A reciprocal, nonexclusive easement for the parking of vehicles in the parking areas constituting part of the Common Area of the Lots, as such parking areas are indicated on the Site Plan and as the same may be modified or removed from time to time by the Owner of the Lot upon which the parking areas are located (the "Parking Easement"). Notwithstanding anything herein to the contrary, to the extent permitted by the Site Plan Requirements and/or applicable law (without variance), and except as hereinafter set forth, the Owner of each Lot (and its Permittees) shall be permitted to sign or otherwise designate up to seventy-five percent (75%) of the parking spaces (rounded down to the lowest number, in the event of fractional spaces) on such Owner's Lot as "short-term" parking spaces or as parking spaces to be used for a limited or specific time

period, and such signs shall be limited to noting the restriction of the time period during which such parking spaces may be used and shall not be used for any other purpose, including without limitation the designation of any name, logo, or other identification of the particular Owner and/or its Permittees of such Lot and/or to otherwise indicate in any manner that any parking spaces within such Lot are for the exclusive use of such Owner and/or its Permittees. The Parking Easement is for parking by the Owners and their respective Permittees in connection only with the businesses operated from time to time at the Lots. In no event shall the Parking Easement be used for delivery vehicle parking, overnight parking, storage or other parking uses that shall constitute an unreasonably prolonged use of the Parking Easement. To the extent permitted by the Site Plan Requirements and applicable law, each Owner (and/or its Occupants) shall have the right to enforce such parking restrictions by towing or other means at the cost and expense of such Owner (and/or of its Occupants).

In addition, so long as the KeyBank Lease is in effect for Lot 1, the Owner and Occupant of Lot 1 shall have a nonexclusive easement for the parking of parking vehicles of employees of KeyBank within those parking spaces contained within Lot 2 and designated as the "Shared Parking Spaces" on the Site Plan in common with the Owner (and the Occupants) of Lot 2, and in no event while such parking rights are in effect shall the Owner of Lot 2 (and/or its Occupants) be permitted to limit the time during which the Shared Parking Spaces are permitted to be used as permitted herein.

(c) A reciprocal, nonexclusive easement for (i) the installation, operation, use, maintenance, repair, and/or replacement of underground storm water Utility Facilities ("Storm Water Utility Facilities") (1) within the Common Area of Lots 3-5 in the locations shown on Exhibit "C"; and (2) within the Driveway; and (ii) with respect to the Driveway and Lots 3-5 only, the right of such Lots to drain such storm water into the Storm Water Detention Facilities to the extent, if at all, Utility Facilities are constructed within the Project to provide storm water drainage from all or any of such Lots into the Storm Water Detention Facilities.

(d) A reciprocal, nonexclusive easement under and across those parts of the Common Area that are not within any permissible building areas shown on the Site Plan, or within any drive-through facilities, trash enclosures, or loading docks or loading areas, for both (i) the sheet drainage of storm surface waters, and (ii) the installation, use, maintenance, repair and replacement of Utility Facilities for the orderly development and operation of the Common Area and each building and other improvements from time to time located within the Lots; provided that (i) the rights granted pursuant to such easements shall at all times be exercised in such a manner as not to interfere materially with the development of or with the normal operation of a Lot and the businesses conducted therein, (ii) once any paving or sub-paving, any sub-surface utility installations, or the initial

construction of building improvements, on a Lot have been completed, the exact location of any Utility Facilities on such Lot for the benefit of another Lot shall be subject to the approval of the Owner(s) of the burdened Lot (and, as to Lot 2 during the continuance of the Walgreen Lease, shall be subject to the approval of Walgreen and, as to Lot 1, during the continuance of the KeyBank Lease, shall be subject to the approval of KeyBank), and (iii) except in an emergency, the right of any Owner to enter upon the Lot of another Owner for the exercise of any right pursuant to such easements shall be conditioned upon providing reasonable prior advance written notice to the other Owner (and to Walgreen, as to any entry upon Lot 2 during the continuance of the Walgreen Lease, and to KeyBank, as to any entry upon Lot 1 during the continuance of the KeyBank Lease) as to the time and manner of entry. All Utility Facilities shall be installed and maintained below the ground level or surface of the Lot, except for such parts thereof that cannot and are not intended to be placed below the surface, such as transformers and control panels, which shall be placed in such location as approved by the Owner of the affected Lot, Walgreen (as to utility installations on Lot 2 during the continuance of the Walgreen Lease) and KeyBank (as to utility installations on Lot 1 during the continuance of the KeyBank Lease). Once the initial construction on Lot 2 has been completed by the Owner of Lot 2 pursuant to the Walgreen Lease, thereafter no additional Utility Facilities affecting Lot 2 shall be installed without the written consent of the Owner of Lot 2 and Walgreen (during the continuance of the Walgreen Lease). No additional Utility Facilities not specifically shown on the Site Plan affecting Lot 1 shall be installed without the written consent of the Owner of Lot 1 and KeyBank (during the continuance of the KeyBank Lease).

(e) Declarant hereby reserves, for the benefit of Lots 2-5 (and/or for the benefit of any other parties to whom Declarant may grant such rights), a perpetual sign easement over Lot 1 to maintain the Monument Sign in the location designated as "Monument Sign" on Lot 1 on the Site Plan, including the right to install, use, maintain, repair, and/or replace the Monument Sign and all Utility Facilities serving the same. The rights reserved to Declarant herein shall include a right of reasonable access over and across Lot 1 for purposes of installing, using, operating, maintaining, repairing and/or replacing the Monument Sign (and/or any Utilities Facilities serving the same) and/or any sign panels located thereon. The rights granted in this Section 2.1(e) shall be subject to all of the same provisions as are set forth in Section 2.1(d) above, and to all other applicable provisions of this Declaration.

Declarant hereby grants to the Owners of Lots 2-5 (and/or for the benefit of any other parties to whom Declarant may grant such rights), a perpetual, nonexclusive easement to install, operate, maintain, repair, and/or to replace sign panels on the Monument Sign, which sign panels shall be of a designated size, and in a position, as determined by Declarant in Declarant's sole discretion. Declarant shall have the right to modify or alter the Monument Sign from time to

time in such manner as Declarant, in its sole discretion, may determine, and/or to grant rights to any other party, (including any party to the Reciprocal Easement Agreement) to maintain a sign panel on the Monument Sign, and the rights granted to the Owners of Lots 2-5 herein (and/or to any other party to whom Declarant may grant such rights as permitted herein) shall be in common with all other rights granted by Declarant herein. Declarant shall have the right to unilaterally execute and record an amendment to this Declaration setting forth the terms and conditions of the grant (or modification) of any such rights. Notwithstanding the foregoing or any other provisions of this Declaration, such sign panels shall be for the use of, and identify, only Occupants of Lots 2-5 and any party entitled to place a panel on the Monument Sign under the Reciprocal Easement Agreement, and in no event shall such rights pertain to any party operating a Bank Operation (as defined in Section 5.2(b) below) in Lots 2-5.

2.2 Indemnification.

(a) Subject to Section 2.2(b) below, the Operator and each Owner (the "Indemnifying Party") shall indemnify and save harmless each other Owner (and its Permittees) and Operator (together, the "Indemnified Parties") from and against any and all liabilities, damages, penalties or judgments, any and all actions, suits, proceedings, claims, demands, assessments, costs and expenses (including reasonable attorneys' fees and costs) incurred in enforcing this indemnity, arising from (i) injury to person or property sustained by anyone in and about any of the Lots subject to this Agreement to the extent resulting from the negligent, intentional or willful acts or omissions of the Indemnifying Party (or its Permittees, which for this purpose shall not include customers) or (ii) a breach of a duty imposed by law or by this Agreement upon the Indemnifying Party. The Indemnifying Party shall, at its own cost and expense, defend any and all suits or actions, just or unjust, which may be brought against the Indemnified Parties or in which the Indemnified Parties may be included with others upon any such above-mentioned matter, claim or claims. For the avoidance of doubt, no Owner (other than Declarant, or the Operator if it also is an Owner), shall be obligated to indemnify any other Owner (or its Permittees) or the Operator for any such matters resulting from the condition of, or any failure to repair or maintain, the Driveway or any other portion of the Project Common Area, unless such Owner (and/or its Occupants) has assumed the obligations to repair and maintain the portion of the Driveway and/or the portion of any other Project Common Area within its Lot as permitted under this Declaration.

(b) Each Owner (for itself and its Permittees) and the Operator hereby waives and releases any and all right of recovery against the other Owner (and/or against its Permittees) and/or the Operator for any and all loss, or damage to any property of such Owner (and/or of its Permittees) and/or the Operator located within or constituting a part of such Owner's Lot, which loss or damage arises from any type of peril which is (or would be) covered by a special

form policy of insurance providing coverage on a one hundred percent (100%) replacement cost basis. Each Owner, and the Operator, shall have its respective property insurance policies issued in such form so as to waive any right of subrogation which otherwise might exist. Notwithstanding the foregoing, so long as the KeyBank Lease is in effect for Lot 1, the waiver provisions of this Section 2.2(b) shall not be applicable to KeyBank, and the indemnity obligations of any Indemnifying Party under Section 2.2(a) above shall remain in full force and effect in favor of KeyBank.

2.3 Access Openings. The opening(s) and access point(s) contemplated between the Lots for use of the Driveway, and/or between any Lots for access between the Lots, are shown on the Site Plan, as contemplated pursuant to Section 2.1(a) above, are hereinafter collectively called the "Access Openings." In addition, at such time as any Lots are subdivided by Declarant, Declarant shall have the right to create additional "Access Openings" and to unilaterally execute and record an amendment to this Declaration setting forth such additional "Access Openings" which shall be subject to the terms and conditions of this Declaration. The Access Openings shall in no event be blocked, closed, altered, changed or removed and shall at all times remain in place as shown on the Site Plan, provided that the Owners of any Lots shall have the right to alter, relocate, change, or close any Access Openings between the respective Lots of such Owners and to unilaterally execute and record an amendment to this Declaration reflecting such change provided that (i) with respect to any change of any Access Opening affecting Lot 1, during the continuance of the KeyBank Lease, the express written consent of KeyBank shall be required, and (ii) with respect to any changes to any Access Opening affecting Lot 2, during the continuance of the Walgreen Lease, the express written consent of Walgreen shall be required. There shall be maintained between the Access Openings a smooth and level grade transition to allow the use of the Driveway, and of Access Openings between Lots, for pedestrian and vehicular ingress and egress as set forth in Section 2.1(a) above. Each Owner shall (or shall cause its Permittees to) keep and maintain, at its sole cost and expense, the portion of the Access Openings located from time to time on its respective Lot in good order, condition and repair.

2.4 Reasonable Use of Easements.

(a) The easements herein above granted shall be used and enjoyed by each Owner and its Permittees in such a manner so as not to unreasonably interfere with, obstruct or delay the conduct and operations of the business of any other Owner or its Permittees at any time conducted on its Lot, including, without limitation, public access to and from, parking for and the use of any drive-through facilities associated with said business, and the receipt or delivery of merchandise in connection therewith. Without limitation, for purposes of this Declaration, once KeyBank shall have commenced its business operations on Lot 1, and so long thereafter as KeyBank is conducting business operations on Lot 1 for purposes of the Bank Operation, the term "unreasonable interference"

shall include any impeding of access to KeyBank's bank branch, parking lot ingress or egress, parking spaces, parking lot circulation or drive-up banking facilities located on Lot 1 during KeyBank's normal business hours of 9:00 AM – 4:00 PM Mondays – Thursdays, 9:00 AM – 6:00 PM Fridays, and 9:00 AM – 1:00 PM Saturdays.

(b) Once the Driveway, Polly Lane, the Storm Water Detention Facilities, Multi-Purpose Trail and Utility Facilities are installed pursuant to the easements granted in Section 2.1 hereof, no permanent building, structures, trees or other improvements inconsistent with the use and enjoyment of such easements (excluding pavement, landscaping and other improvements typically found in common areas of shopping centers) shall be placed over or permitted to encroach upon the Driveway, Polly Lane, Storm Water Detention Facilities, Multi-Purpose Trail, and/or the Utility Facilities. The Owner of the Lot served by any Utility Facilities shall not unreasonably withhold its consent to the reasonable relocation of any portion thereof requested by the Owner of a Lot upon which such Utility Facilities are located, at such requesting Owner's sole cost and expense, so long as water detention and drainage services or utility services, as applicable, to the other Lots are not unreasonably interrupted and the remaining provisions of this Declaration (including those of this Section 2.4) are complied with from time to time. No such relocation affecting Lot 2 or the water detention and drainage services or utility service(s) thereto shall be performed without the consent of Walgreen (during the continuance of the Walgreen Lease). No such relocation affecting Lot 1 or the water detention and drainage services or utility service(s) thereto shall be performed without the consent of KeyBank (during the continuance of the KeyBank Lease).

(c) Once commenced, any construction undertaken in reliance upon an easement granted herein shall be diligently prosecuted to completion, so as to minimize any interference with the business of any other Owner and its Permittees. The right of any Owner to enter upon a Lot of another Owner for the exercise of any right pursuant to the easements set forth in this Declaration, or to prosecute work on such Owner's own Lot if the same materially interferes with utility or drainage easements or easements of ingress, egress or access to or in favor of another Owner's Lot, shall be subject to the notice provisions described in Section 2.1(d) above, and shall be undertaken only in such a manner so as to minimize any interference with the business of the other Owner and its Permittees. In such case, no affirmative monetary obligation shall be imposed upon the other Owner (and/or its Permittees), and the Owner undertaking such work shall with due diligence repair at its sole cost and expense any and all damage caused by such work and restore the affected portion of the Lot upon which such work is performed to a condition which is equal to or better than the condition which existed prior to the commencement of such work. In addition, the Owner undertaking such work shall pay all costs and expenses associated therewith and shall indemnify and hold harmless the other Owner(s) and its

Permittees from all damages, losses, liens or claims attributable to the performance of such work.

(d) No barriers, fences, grade changes or other obstructions shall be erected so as to impede or interfere in any material way with the free flow of vehicular and pedestrian traffic over, across, and/or through the Driveway and/or Polly Lane (or any portions thereof), any Access Opening, and/or between those portions of the Project from time to time devoted to pedestrian access, vehicular roadways or parking area, or so as to in any manner unreasonably restrict or interfere with the use and enjoyment by any of the Owners of the rights and easements created by this Article 2. The preceding sentence shall not prohibit the reasonable designation and relocation of traffic and pedestrian lanes, provided that any such relocation of traffic and/or pedestrian lanes shall remain subject to the remaining terms and conditions of this Declaration. In addition, each Owner may temporarily close or block traffic on its Lot for the time necessary for the purpose of protecting ownership rights and preventing creation of easements to the public and unrelated third parties, and may temporarily fence off portions of its Lot as reasonably required for the purpose of repair, construction and reconstruction.

2.5 Allocation of Rights upon Subdivision. If any Lot is subdivided, all easements and other rights and obligations set forth in this Section 2 shall benefit and be binding upon each subdivided portion of such Lot, provided, however, that the allocation of sign rights on the Monument Sign pursuant to Section 2.1(e) above shall be determined by Declarant in accordance with the terms and conditions of Section 2.1(e) above.

2.6 Project Development. Declarant shall have the right, in connection with its development of the Project, to subdivide, reconfigure, and/or otherwise change the Lots, the location and/or design of any Utilities Facilities, the location and design of any Common Area within the Project, and/or the location, size, and/or configuration of any buildings within the Project in such manner as Declarant in its sole discretion may determine; provided, however, that (a) in no event shall Declarant materially change or reconfigure the Driveway, and (b) in no event shall Declarant modify or change the location or configuration of Lot 1 and/or Lot 2, any Utilities Facilities serving the same, the location, size, or configuration of any building or Common Area within either Lot 1 and/or Lot 2, and/or any portion of the Driveway located adjacent to either Lot 1 and/or Lot 2, without the prior written consent of (i) Walgreen, during the continuance of the Walgreen Lease, with respect to Lot 2, or (ii) KeyBank, during the continuance of the KeyBank Lease, with respect to Lot 1.

3. Maintenance.

3.1 General. Until such time as improvements are constructed on a Lot, the Owner thereof shall maintain the same in a clean and neat condition and shall take such measures as are necessary to control grass, weeds, blowing dust, dirt, litter or debris.

3.2 Buildings and Appurtenances Thereto. Each Owner covenants to keep and maintain, at its sole cost and expense, the building(s) located from time to time on its respective Lot in good order, condition and repair. Except as otherwise provided herein, once constructed, in the event of any damage to or destruction of a building on any Lot, the Owner of such Lot shall, at its sole cost and expense, with due diligence either (a) repair, restore and rebuild such building to its condition prior to such damage or destruction (or with such changes as shall not conflict with this Declaration), or (b) demolish and remove all portions of such damaged or destroyed building then remaining, including the debris resulting therefrom, and otherwise clean and restore the area affected by such casualty to a level, graded condition. Nothing contained in this Section 3.2 shall be deemed to allow an Owner to avoid, or to impose on any Permittees, a more stringent obligation for repair, restoration and rebuilding than may be contained in a lease or other written agreement between an Owner and such Owner's Permittees.

3.3 Common Area. Subject to Sections 3.4 and 3.5 below, each Owner of a Lot covenants at all times during the term hereof to operate, maintain and replace or cause to be operated, maintained and repaired, at its expense all Common Area located on its Lot (provided that so long as the KeyBank Lease is in effect, the Owner of Lot 1 shall not be obligated to maintain the Project Common Area within Lot 1, which maintenance shall remain the responsibility of Declarant or the Operator) in good order, condition and repair. Following the construction of improvements thereon, maintenance, operation and replacement of such Common Area shall include, without limitation, maintaining, repairing and replacing all sidewalks and the surface of the parking and roadway areas, removing all snow, ice, papers, debris and other refuse from and periodically sweeping all parking and road areas to the extent necessary to maintain the same in a clean, safe and orderly condition, maintaining appropriate lighting fixtures for the parking areas and roadways, maintaining marking, directional signs, lines and striping as needed, maintaining landscaping, maintaining signage in good condition and repair, and performing any and all such other duties as are necessary to maintain such Common Area in a clean, safe and orderly condition and/or otherwise required under the Site Plan Requirements.

Once constructed, in the event of any damage to or destruction of all or a portion of the Common Area on any Lot, the Owner of such Lot shall, at its sole cost and expense, with due diligence repair, restore and rebuild such Common Area to its condition prior to such damage or destruction (or with such changes as shall not conflict with this Declaration).

Notwithstanding the foregoing, with respect to any damage or destruction to the Project Common Area within any Lot, the Operator shall perform all restoration of such

damaged Project Common Area (unless any Owner of any Lot [or its Occupants] has agreed to perform such restoration with respect to any Project Common Area within its Lot, in which event such Owner [or its Occupants] shall perform such work in accordance with the requirements of this Declaration), and the Operator shall substantially complete all such required restoration within sixty (60) days after the occurrence of such damage or destruction. All such restoration work shall be performed in a prompt and diligent manner, in a good and workmanlike manner, and in accordance with the terms and conditions of this Declaration. The Operator (and/or the applicable Owner [or its Occupants], as the case may be) shall coordinate the performance of such work with the Owner (and its Permittees) of each Lot to avoid any interference with the performance of any of the work then being performed (or the conduct of any business operations then being conducted) on such Lot.

Subject to the terms and conditions of this Declaration, the Site Plan Requirements, and applicable law, each Owner reserves the right to alter, modify, reconfigure, relocate and/or remove the Common Areas or building areas on its Lot, subject to the following conditions: (i) as to any such changes of the Common Area on Lot 2, during the continuance of the Walgreen Lease, the express written consent of Walgreen shall be required, and as any such changes of the Common Area on Lot 1, during the continuance of the KeyBank Lease, the express written consent of KeyBank shall be required; (ii) the Driveway and Polly Lane, and ingress and egress thereto, the Access Openings, and ingress and egress to and from the Lots and adjacent streets and roads, shall not be so altered, modified, relocated, blocked and/or removed without the express written consent of all Owners; (iii) any Access Openings between any Lots shall not be altered, modified, relocated, blocked and/or removed without the express written consent of all directed affected Owners, Walgreen (during the continuance of the Walgreen Lease, with respect to any Access Opening between Lot 2 and any other Lot) and KeyBank (during the continuance of the KeyBank Lease with respect to any Access Opening between Lot 1 and any other Lot); (iv) the same shall not violate any of the provisions and easements granted in Section 2; and (v) the requirements of Section 3.2 of this Declaration shall be complied with from time to time.

3.4 Utilities. Each Owner shall at all times during the term hereof construct, operate, maintain and replace, or cause to be constructed, operated, maintained and replaced, in good order, condition and repair, at its sole expense, any Separate Utility Facilities exclusively serving the Lot of such Owner and from time to time existing on such Owner's Lot or on the Lot of another Owner pursuant to an easement described herein. Each Owner on whose Lot are located any Common Utility Facilities and which serve the Lot of such Owner shall at all times during the term hereof be jointly and severally responsible for constructing, operating, maintaining and replacing, or causing to be constructed, operated, maintained and replaced, in good order, condition and repair, at its sole expense, such Common Utility Facilities from time to time located on such Owner's Lot. In addition, if any Lot is served by any Common Utility Facilities located on other Lots, then the Owner of the Lot which is served by such Common Utility Facilities located on other Lots shall be jointly and severally responsible, with the

Owner(s) of the other Lot(s) on which the Common Utility Facilities serving the first Owner's Lot are also located, for constructing, operating, maintaining and replacing, or causing to be constructed, operated, maintained and replaced, in good order, condition and repair, at sole expense, such other Common Utility Facilities located on such other Lot(s). In no event shall any Owner be responsible for the operation, maintenance, repair, and/or replacement of any Common Utility Facilities located on its Lot but which do not serve such Lot. Declarant or the Operator shall at all times during the term hereof construct, operate, maintain and replace, or cause to be constructed, operated, maintained and replaced, in good order, condition and repair, all Common Utility Facilities in the Project Common Area (unless any Owner [or its Occupants] has elected to perform such operation, maintenance and/or replacement with respect to those Common Utility Facilities located within its Lot, in which event such Owner [and/or its Occupants] shall perform such operation, maintenance, and/or replacement in accordance with the terms and conditions of this Declaration).

3.5 Maintenance by Operator.

(a) Commencing on the date the first Owner (and/or its Occupants) opens for business in the Project, the Operator shall operate, maintain, repair and replace the Project Common Area in good order, condition and repair. The Operator may hire companies affiliated with it to perform such maintenance and repair obligations, provided the rates charged by such affiliated companies are competitive with those of other companies furnishing similar services in the metropolitan area in which the Project is located. Subject to all of the same conditions, limitations, requirements and protections as are set forth in this Declaration applicable (or with respect) to other entries onto and activities on the Lots, the Operator (and its agents, employees, and contractors) shall have a license to enter upon each Lot to perform its obligations herein.

Notwithstanding the foregoing, any Owner (and/or its Occupants) shall have the right to separately assume and perform all obligations of the Operator herein with respect to that portion of the Project Common Area contained within its Lot, in which event (i) the Operator shall cause such Owner (and/or its Occupants) to, and such Owner (and/or its Occupants) shall, perform all such obligations in accordance with the terms and conditions of this Declaration, and (ii) each other Owner (and its Occupants) shall have the same rights and remedies with respect to any failure to do so as though the same was the direct obligation of the Operator hereunder.

(b) "Project Common Area Costs" shall include, without limitation, all costs and expenses incurred by Operator in the operation, management, maintenance, insurance (including deductible portions up to a maximum of \$50,000), repair, and/or replacement of Project Common Area and/or any Common Areas which Declarant and/or Operator are required to maintain under applicable law and/or the Site Plan Requirements (such as those portions of the Multi-Purpose Trail which may be adjacent to, but not within the boundaries of the Project), including without limitation the cost of

supplies; permits and inspections; security; sign maintenance and replacement for directional, traffic, and similar signs; costs of equipment or rental; maintenance, repair, and/or replacement of landscaping; maintenance, repair, and replacement of curbing, traffic island and similar improvements; costs of insurance; costs of all utilities consumed in the performance of such obligations and/or in the operation, maintenance, repair and replacement of the Project Common Areas and/or such Common Areas; costs of all obligations performed under, and/or sums paid under, the Reciprocal Easement Agreement and/or the Site Plan Requirements with respect to the Project Common Areas and/or such Common Areas; costs of snow and ice removal; sweeping costs; costs of personnel and/or contractors engaged to perform such obligations; maintenance, repair, and/or replacement of all paving; cleaning and removal of refuse and debris (including periodic sweeping); maintenance, repair and replacement of Common Utility Facilities; and an aggregate administrative fee to Operator of five percent (5%) of the foregoing costs.

Notwithstanding the foregoing, with respect to all costs and expenses that are included within "Project Common Area Costs" that are deemed, pursuant to generally accepted accounting principles, to constitute "capital expenditures", then for purposes of calculating "Project Common Area Costs" herein, (i) for the year in which such capital expenditures are incurred, the portion thereof which is equal to or less than Fifty Thousand Dollars (\$50,000) shall be included within "Project Common Area Costs", and (ii) the portion of such capital expenditures which exceeds Fifty Thousand Dollars (\$50,000) shall be amortized over a period equal to the lesser of (1) the useful life of the items to which such capital expenditures pertains, as determined in accordance with generally accepted accounting principles, or (2) ten (10) years, and the portion thereof which exceeds Fifty Thousand Dollars (\$50,000) shall be payable by the Owners in subsequent calendar years based upon an amount equal to the lesser of (1) Fifty Thousand Dollars (\$50,000) in the aggregate or (2) the remaining unamortized portion thereof as set forth herein.

(c) Each Lot shall be responsible for its prorata share of all Project Common Area Costs, which "prorata share" shall be based upon the usable area contained within each Lot as compared to the total usable area contained within all Lots in the Project, as shown on Exhibit "E" attached hereto and made a part hereof. As of the date of this Declaration, the total usable area within the Project is 5.84 acres, and the total usable area within each Lot, and its allocable share of the Project Common Area Costs based upon its total usable area as compared to the total usable area within the Project, as shown on Exhibit "E", is as follows:

Lot	Total Usable Area (In Acres)	Allocable Share
1	.69	11.82%
2	1.40	23.97%
3	1.22	20.89%
4	1.16	19.86%
5	1.37	23.46%
TOTAL:	5.84	100.00%

If any Lot is subdivided, consolidated with another Lot, or otherwise reconfigured or changed, Declarant (and/or the respective Owners of such Lot(s)) shall determine the respective allocation of the original allocable share of such Lot(s) to such subdivided, consolidated, reconfigured, or changed Lot(s) and shall have the right to unilaterally execute and record an amendment to this Declaration reflecting such reallocation. Each Lot shall be obligated to commence contributing to Project Common Area Costs at such time as the Owner (and/or its Occupants) first opens for business in any building contained on such Lot.

Notwithstanding the foregoing, if any Owner (or its Occupants) shall assume any obligations of the Operator to perform all or any of the obligations of the Operator under this Declaration with respect to any portion of the Project Common Area located on the Lot of such Owner, then (i) for purposes of calculating the allocable share of Project Common Area Costs allocable to the remaining Lots, the obligations which such Owner (or its Occupants) assumes shall be excluded from "Project Common Area Costs" to which the remaining Lots are required to contribute, and (ii) the allocable share of Project Common Area Costs previously allocated to the Lot for which such Owner (or its Occupants) elects to perform such obligations shall be excluded in determining the allocable share of all remaining Lots of all remaining Project Common Area Costs. As an example, if an Owner of a Lot elected to maintain and repair the portion of the Driveway contained within its Lot, then for purposes of calculating the "Project Common Area Costs" applicable to the Driveway for the remaining Lots, (i) "Project Common Area Costs" shall not include any costs of maintaining or repairing such portion of the Driveway contained within such Lot, and (ii) the allocable share of such Lot shall be excluded from the denominator in determining the allocable share of the remaining Lots of all Project Common Area Costs applicable to the remaining portions of the Driveway in the Project.

As soon as reasonably practicable after the commencement of each calendar year, Operator shall provide to each Owner an estimated budget for the anticipated Project Common Area Costs for the current calendar year, which shall be subject to adjustment from time to time during such calendar year. Each Owner shall pay to the Operator, in equal monthly payments, in advance, its prorata share of the Project Common Area Costs based upon the amounts set forth in such budget. Within one hundred twenty (120) days after the end of each calendar year, Operator shall provide to each Owner a statement setting forth the actual Project Common Area Costs incurred

during such previous calendar year, and the share of each Owner thereof. If the amount paid by any Owner for such calendar year shall exceeded its prorata share, Operator shall refund such excess amount to such Owner at the time such statement is delivered by Operator to such Owner; if the amount paid by any Owner for such calendar year shall be less than its prorata share, such Owner shall pay the balance of its prorata share to Operator within thirty (30) days after receipt of such statement.

In addition, upon request by any Owner of any Lot, the Operator shall (i) deliver all information required herein (including the estimated budgets, statements, and other information) directly to the Occupants of the Lot owned by such Owner, and (ii) receive all payments of Project Common Area Costs required to be paid by such Lot herein directly from such Occupants, until such time as such Owner may again deliver written notice to the Operator to recommence delivering such information to, and receiving such payments from, such Owner directly. Upon the delivery of any such written notice by any Owner to the Operator pursuant to an agreement between such Owner and such Occupants, the Occupants of the Lot owned by such Owner shall be jointly responsible with such Owner for the performance of all obligations of such Owner under this Section 3.5, and shall have the right to exercise all rights of Owner under this Section 3.5, with respect to the Lot owned by such Owner. Notwithstanding any other provision of this Declaration, so long as the KeyBank Lease is in effect for Lot 1, the Operator shall deliver to KeyBank all of the information described in item (i) above, whether or not KeyBank shall be making direct payments to the Operator as described in this paragraph.

Within two (2) years after receipt of any statement for any calendar year, each Owner (and/or its Occupants) shall have the right to review the books and records of Operator pertaining to all Project Common Area Costs for the calendar year covered by such statement. The party reviewing such books and records shall notify Operator of such proposed review at least twenty (20) days prior to the designated review date. Each Owner shall have the right to review the Project Common Area Costs for any calendar year only once. With respect to any review of Operator's books permitted herein (i) such review shall be conducted no later than sixty (60) days after delivery of the written notice to Operator required herein, (ii) all information with respect to such review shall be maintained on a confidential basis, and (iii) all objections, if any, to Project Common Area Costs shall be delivered to Operator in writing and in reasonably sufficient detail, and must be received by Operator within sixty (60) days after the date on which such party is first permitted to review such books and records, and any such objections not received by Operator within such sixty (60) day period are hereby waived by such party. If Operator shall dispute any objections raised by any party, then Operator and such party shall endeavor in good faith to reconcile such dispute within thirty (30) days after delivery by Operator to such party of Operator's notice disputing any or all such objections, and if Operator and such party are unable to resolve such dispute, then Operator and such party shall jointly select an independent accountant, which accountant shall resolve such dispute within thirty (30) days after its selection,

and such decision shall be binding upon Operator and such party. The fees of such accountant shall be paid equally by Operator and such party.

(d) Notwithstanding anything to the contrary set forth herein:

(i) If any Lots drain storm water from such Lots through Utility Facilities to the Storm Water Detention Facilities, then all Project Common Area Costs with respect to the Storm Water Detention Facilities shall be allocated solely to those Lots (other than Lots 1 and 2) on a prorata basis, based upon the total usable area within each Lot as compared to the aggregate, total usable area in all Lots draining storm water through Utility Facilities to the Storm Water Detention Facilities. Notwithstanding anything to the contrary contained herein, all Lots shall continue to contribute to all Project Common Area Costs with respect to the Common Utilities Facilities providing storm water drainage from any Project Common Area (including the Driveway) to the Storm Water Detention Facilities.

(ii) All Project Common Area Costs with respect to the Monument Sign shall be allocated solely to Lots 2-5, and the "prorata share" for each such Lot shall be a fraction, the numerator of which shall be the area of the sign panel permitted to be maintained by such Lot on the Monument Sign, and the denominator of which shall be the aggregate area of all sign panels maintained by all Lots on the Monument Sign.

4. Construction Requirements.

(a) Every building (including its appurtenant Common Area improvements), now or in the future constructed on any Lot shall be constructed, operated and maintained so that the same is in compliance with the Site Plan Requirements and all other applicable governmental requirements.

(b) Any exterior construction performed on any Lot shall, except in the event of emergency, casualty, or condemnation or as may be required to comply with applicable law, be performed only during the hours of 7:00 a.m. – 8:00 p.m. Nothing contained herein shall be deemed to limit the right of any Owner (or its Permittees) to perform interior construction at any time. In addition, during the performance of such construction on any Lot, the Owner (and/or its Permittees) performing such work shall use reasonable efforts to avoid adversely affecting the respective rights granted to each Owner (and its Permittees) under Section 2 of this Agreement, provided that such Owner (and/or its Permittees) shall have the right to temporarily block access through any access drives contained within the Lot (but excluding the portion of the Driveway contained within such Lot) of such Owner in connection with any work being performed within such driveways (provided that (i) such Owner [and/or its Permittees] shall use reasonable efforts

to minimize the period of such blockage, and (ii) to the extent possible, reasonable access through such driveways [or an alternative access route] shall at all times be provided).

(c) If any mechanic's lien is filed against the Lot of any Owner as a result of services performed and materials furnished for the use of another Owner (and/or its Permittees), the Owner permitting or causing such lien to be so filed shall cause such lien to be discharged within thirty (30) days after written notice thereof, and shall indemnify, defend, and hold the other Owner (and its Permittees) harmless from any liability, loss, damage, costs or expenses arising as a result of such lien.

5. Restrictions.

5.1 General. Each Lot shall be used for lawful purposes in conformance with all restrictions imposed by all applicable governmental laws, ordinances, codes, and regulations, and no use or operation shall be made, conducted or permitted on or with respect to all or any portion of a Lot which is illegal. In addition to the foregoing, throughout the term of this Declaration, it is expressly agreed that neither all nor any portion of a Lot shall be used, directly or indirectly, for purposes of disco, bowling alley, pool hall, billiard parlor, skating rink, roller rink, amusement arcade (meaning a facility with in excess of five (5) video or similar amusement games), a theater of any kind, adult book store, adult theatre, adult amusement facility, any facility primarily selling or displaying pornographic materials or having such displays, auction house, flea market, gymnasium, blood bank, tattoo parlor, funeral home, sleeping quarters or lodging (except for a national or regional hotel chain ["national" or "regional" herein shall mean that such chain has not less than fifty (50) hotels]), the outdoor housing or raising of animals, the long term (i.e., for more than five (5) consecutive days) storage of automobiles, boats or other vehicles, any industrial use (including, without limitation, any manufacturing, smelting, rendering, brewing (except as part of a brew pub or similar establishment), refining, chemical manufacturing or processing, or other manufacturing uses), any mining or mineral exploration or development except by non-surface means, a car wash, a carnival, amusement park or circus, an assembly hall, banquet hall (provided that a banquet hall within a hotel or similar commercial lodging facility permitted herein shall be permitted), auditorium or other place of public assembly, off-track betting establishment, bingo hall, any use involving the use, storage, disposal or handling of hazardous materials or underground storage tanks in violation of applicable environmental laws, statutes and regulations, any use which may adversely affect the water and sewer services supplied to a Lot, a church, temple, synagogue, mosque, or the like, any facility for the sale of paraphernalia for use with illicit drugs, any facility for the sale of marijuana, any cocktail lounge, bar or other establishment primarily selling alcoholic beverages for on-premises consumption (except in connection with or incidental to the operation of a restaurant or any other use not restricted under this Section 5.1), any secondhand store, odd lot, closeout or liquidation store (excluding, however, national chains which may sell secondhand merchandise, including but not

limited to existing chains under the trade names of "Buy Backs", "Pay it Again Sam", etc.), or a massage parlor (provided that the provision of massage services in a clinic, spa or beauty salon and/or the provision of therapeutic massages for health or medical purposes, shall not be prohibited herein).

5.2 Additional Restrictions.

(a) Throughout the term of this Agreement, it is expressly agreed that neither all nor any portion of any Lot, other than Lot 2, shall be used, directly or indirectly, for purposes of the operation of a drug store or a so-called prescription pharmacy or prescription ordering, processing or delivery facility, whether or not a pharmacist is present at such facility, or for any other purpose requiring a qualified pharmacist or other person authorized by law to dispense medicinal drugs, directly or indirectly, for a fee or remuneration of any kind. The foregoing shall not apply to doctors, dentists, veterinarians, or other medical service providers, to the extent any of the foregoing parties write prescriptions for medicine or drugs, provide sample doses of medicinal drugs to their patients during office visits, whether or not any fee or remuneration is received therefor and/or administer medicinal drugs to their patients during office visits whether or not any fee or remuneration is received therefor.

In addition, throughout the term of this Agreement, it is expressly agreed that neither all nor any portion of any Lot, other than Lot 2, shall be used, directly or indirectly, for purposes of (i) the sale of so-called health and/or beauty aids and/or drug sundries (except that this provision shall not prohibit the (1) devotion of the lesser of fifteen percent (15%) of the total square footage of available combined sales or display area or two hundred fifty (250) square feet to the incidental sale of health and beauty aids and/or drug sundries or (2) operation of a beauty salon and/or a national or regionally recognize spa); (ii) the operation of a business in which photofinishing services (including, without limitation, digital photographic processing or printing, or the sale of any other imaging services, processes or goods) or photographic film are offered for sale (except that this provision shall not prohibit the operation of a business that provides in-store or on-line printing and design services, office and business support services, sign or banner production services or shipping or packaging services such as a UPS store or Fed Ex/Kinko's store); (iii) the operation of a business in which greeting cards and/or gift wrap are offered for sale (except that this provision shall not prohibit the devotion of the lesser of fifteen percent (15%) of the total square footage of available combined sales or display area or two hundred fifty (250) square feet to the incidental sale of greeting cards and/or gift wrap); (iv) the operation of a business in which prepackaged food items for off premises consumption are offered for sale (provided however, that ancillary sales of prepackaged food items associated with a restaurant shall not be prohibited, and further provided that the devotion of the lesser of fifteen percent (15%) of the total square footage of available combined sales or display area or two hundred

fifty (250) square feet to the incidental sale of prepackaged food shall not be prohibited by this provision); or (v) the operation of a so-called "Dollar" or similar store which sells and/or advertises the sale of any products then also typically sold in a Walgreens drugstore at a specific price point or below a specific deeply discounted price level (e.g., a "Dollar" or "\$.99" store). In addition, throughout the term of this Agreement, it is expressly agreed that no portion of either Lot 1 or Lot 3 which is immediately adjacent to Lot 2 shall be used for purposes of (i) a national or regional hotel chain as permitted under Section 5.1 above, (ii) a massage parlor as permitted under Section 5.1 above, or (iii) a gymnasium, sport or health club.

(b) Throughout the term of this Declaration, it is expressly agreed that no Lot (nor any portion thereof), other than Lot 1, shall be used, directly or indirectly, for the operation of a bank, credit union, savings and loan association, lending or mortgage brokerage service or other financial institution or business that provides banking, lending or other financial services generally offered by commercial banks and/or operates automatic teller machines ("ATMs") or after-hours deposit devices (each such operation is referred to herein as a "Bank Operation"); provided, however, that this Section 5.2(b) shall not prohibit the operation of ATMs that do not have drive-up access in connection with a business that is not otherwise a Bank Operation.

(c) Subject to Section 5.2(e) below, Declarant shall have the right to amend this Declaration to impose on each of the Lots a reasonable use restriction directly protecting the primary use of any Occupants on any Lot with whom Declarant (or its successor assignee) enters into a lease or purchase agreement prior to the date which is five (5) years after the date of this Declaration. If Declarant shall elect to amend this Declaration as permitted herein, then Declarant shall provide written notice to all Owners of such amendment, together with a copy of the amendment to this Declaration to be recorded by Declarant. From and after the date of recordation of such amendment, all Lots specified in such amendment as being subject to such restriction shall thereafter be subject to such restriction until the earlier to occur of (i) the date on which such restriction terminates in accordance with the terms and conditions of the lease or purchase agreement which contained such restriction or (ii) the date which is ten (10) years after the date of recordation of such amendment to this Declaration reflecting such restriction, and thereafter such Lots no longer shall be subject to such restrictions. In such event, the Owner on whose Lot such pre-existing lease has been executed shall deliver to any requesting Owner of any other Lot a copy of the applicable provisions contained in such previously executed lease reflecting the permitted use of the premises contained within the Lot of such Owner subject to such previously executed lease. In addition, if any Owner shall, at the time of recordation of any such amendment, then be using its Lot for purposes which are otherwise subject to such restriction, then such Owner shall continue to have the right to use its Lot in

the manner used prior to the recordation of such amendment. In no event shall any such restriction in any manner restrict the use of Lot 1 for a Bank Operation, or restrict the use of Lot 2 for any of the purposes described in Section 5.2(a) above.

(d) Declarant (or the applicable Owner, if Declarant no longer owns the applicable Lot) shall have the right to amend this Declaration at such time as any use restriction created by Declarant pursuant to this Section 5.2 shall terminate in accordance with the terms and conditions of the lease or purchase agreement of any Lot in which such use restriction was contained, and from and after the date of recordation of any such amendment by Declarant, such use restriction, as created by Declarant pursuant to this Section 5.2(c), shall terminate and be of no further force or effect.

(e) Notwithstanding anything to the contrary contained in this Section 5.2(c), the existing terms and conditions of the KeyBank Lease and the Walgreen Lease, as of the effective date of this Declaration, shall be controlling in the event of any conflict between the terms and conditions of this Section 5.2(c) and such existing terms and conditions of the KeyBank Lease and/or the Walgreen Lease.

(f) The restrictions set forth in this Section 5.2 may be enforced by Declarant and/or by any Owner and/or any Permittees of the Lot for whose benefit the restriction has been created.

5.3 Drive-Throughs. No facility on any Lot for vehicular drive-up or drive-through, in which the stopping or standing of motor vehicles in line at a location for drop off and/or pickup is intended (as, for example, at a restaurant, car wash, pharmacy or bank), shall be constructed, used or operated in any manner such that motor vehicles in line at such facility stop or stand onto another Lot, or onto the Driveway in a manner so as to impair access to or from another Lot, or otherwise interfere with the normal pattern and flow of pedestrian or vehicular traffic on and across another Lot and/or the Driveway. Nothing contained herein shall be deemed to affect the drive-through serving the building for Walgreen to be initially constructed on Lot 2 by the Owner thereof or the drive-through facilities that may be initially constructed on Lot 1 by KeyBank or the Owner thereof, both of which are hereby expressly approved. In addition, valet parking on any Lot, in which the stopping or standing of motor vehicles at a location for drop off and/or pick up of passengers is intend, shall not be operated in any manner such that motor vehicles shall stop or stand on any other Lot and/or the Driveway so as to interfere with the normal pattern and flow of pedestrian or vehicular traffic on and across the Lots and/or the Driveway.

5.4 Legal Compliance.

(a) Subject to Section 5.4(b) below, each Owner shall cause (i) its Lot (except as may be the responsibility of another Owner(s) as described in items

(ii) and (ii) hereof), (ii) any Separate Utility Facilities exclusively serving the Lot of such Owner and from time to time existing on the Lot of another Owner pursuant to an easement described herein, and (iii) any Common Utility Facilities serving the Lot of such Owner and from time to time located either on the Lot of such Owner and/or on the Lot of another Owner pursuant to an easement described herein, all to comply with the Site Plan Requirements and with all other applicable requirements of law and governmental regulations applicable to such Lot, and in no event shall any such Owner (or its Permittees) violate any of the Site Plan Requirements with respect to its use and/or occupancy of the Lot and/or its use of the Common Areas in the Project.

(b) Notwithstanding anything to the contrary set forth in Section 5.4(a) above, the Operator shall cause all Project Common Area on each Lot to comply with the Site Plan Requirements and with all other applicable requirements of law and governmental regulations applicable to such Project Common Area, provided that any Owner (or its Occupants) shall have the right to assume responsibility for such compliance obligations, and in such event (i) the Operator shall cause such Owner (and/or Occupants) to, and such Owner (and/or Occupants) shall, cause all such compliance obligations to be performed in accordance with the terms and conditions of this Declaration, and (ii) each other Owner (and its Occupants) shall have the same rights and remedies with respect to any failure to do so as though the same was the direct obligation of the Operator hereunder..

6. Insurance.

6.1 Owners. Throughout the term of this Agreement, each Owner shall procure and maintain, or cause to be procured and maintained, general and/or comprehensive public liability and property damage insurance against claims for personal injury (including contractual liability arising under the indemnity contained in Section 2.2 above), death, or property damage occurring in connection with any matter for which such Owner is the Indemnifying Party under Section 2.2(a) above, with single limit coverage of not less than an aggregate of \$3,000,000, and protecting each other Owner (and its Occupants) and the Operator as additional insureds. In addition, any Owner may satisfy this insurance requirement by (i) providing proof of coverage from a general comprehensive policy with coverage of \$2,000,000 and from an umbrella/excess liability policy with \$1,000,000 of coverage, or (ii) providing evidence that any Occupants of such Owner's Lot either (1) maintains such required insurance or (2) have elected to self-insure and/or to carry the insurance required hereunder under master or blanket policies of insurance, provided that in such event such Occupants, shall, together with such notice of its election to self-insure the insurance required herein, deliver evidence that such party has a net worth in excess of One Hundred Million Dollars (\$100,000,000.00).

Notwithstanding anything to the contrary set for herein, in no event shall any Owner (or its Occupants) be required to maintain insurance herein with respect to any matter for which any other Owner or the Operator is the "Indemnifying Party" under Section 2.2 above.

6.2 Operator. Throughout the term of this Agreement, Declarant or the Operator shall procure and maintain, or cause to be procured and maintained:

(a) General and/or comprehensive public liability and property damage insurance against claims for personal injury, death, or property damage occurring within the Project Common Areas, with single limit coverage of not less than an aggregate of \$3,000,000, and naming each other Owner (and its Occupants, including without limitation Walgreens and KeyBank) as additional insureds. The foregoing requirement may be satisfied by providing proof of coverage from a general comprehensive policy with coverage of \$2,000,000 and from an umbrella/excess liability policy with \$1,000,000 of coverage. Evidence of such insurance coverage shall be provided to each such additional insured on an ongoing basis.

(b) "All risk" or "special causes of loss" property insurance insuring all Project Common Area (including the Driveway and the Monument Sign) in an amount equal to the full replacement cost thereof (provided that any Owner [or its Occupants] shall have the right to assume the obligations of the Operator under this Section 6.2(b) and to maintain such required insurance [or to self-insure such insurance requirements, in accordance with the self-insurance requirements of Section 6.1 above] with respect to its Lot).

6.3 Limits in Constant Dollars. The minimum limits of insurance required under this Section 6, and the applicable net worth requirements by which any party may elect to self-insure the insurance otherwise required herein, shall be maintained in Constant Dollars, commencing from and after the date this Declaration is recorded.

7. Taxes and Assessments. Each Owner shall pay all taxes, assessments, or charges of any type levied or made by any governmental body or agency with respect to its Lot.

8. Eminent Domain.

8.1 Restoration by Owner. Subject to Section 8.2 below, in the event the whole or any portion of any Lot shall be taken by right of eminent domain, the entire award for the value of the land and improvements so taken shall be belong to the Owner of such Lot (and/or its mortgagees and/or tenants, as their interests may appear); provided that any Owner of any other Lot which has not been subject to such taking may file a collateral claim with the condemning authority to the extent of any damage suffered by such other Owner (e.g., loss of easement rights under Section 2

above). In the event of any partial taking of any Common Area, the Owner of the Lot on which such Common Area is partially taken shall restore the remaining portions of such Common Area (except for any Separate Utility Facilities or Common Utility Facilities not serving such Owner's Lot) as nearly as possible to the condition existing prior to such taking without contribution from any other Owner, and any portion of any condemnation award necessary therefor shall be held in trust and applied for such purpose.

8.2 Restoration of Project Common Area. Notwithstanding anything to the contrary set forth in Section 8.1 above, in the event the whole or any portion of any Project Common Area shall be taken by right of eminent domain, the portion of the award which is attributable to the land and improvements comprising a portion of the Project Common Area so taken shall belong to the Operator, and in such event the Owner of any Lot which has been subject to such taking shall execute and deliver to the Operator any and all documents required to evidence the assignment of such portion of the award to the Operator (and/or, if required under applicable law, shall pay to the Operator, from the award otherwise receivable by the Owner, that portion of such aggregate award which is attributable to the land and improvements so taken within the Project Common Area). The Operator promptly shall restore the remaining portions of the affected Project Common Area as nearly as possible to the condition existing prior to such taking.

9. Remedies and Enforcement.

9.1 All Legal and Equitable Remedies Available. In the event of a breach or threatened breach by any Owner or its Permittees, or by the Operator, of any of the terms, covenants, restrictions or conditions hereof, the other Owner(s) (or any of such Owners' Occupants) and/or the Operator (with respect to any obligations of the Operator under this Declaration which have been assumed by any Owner [or its Occupants]) shall be entitled forthwith to full and adequate relief by injunction and/or all such other available legal and equitable remedies from the consequences of such breach, including payment of any amounts due and/or specific performance. Walgreen shall have the right, but not the obligation, to enforce this Declaration on behalf of the Owner of Lot 2, and/or to cure a breach or default hereunder by the Owner of Lot 2 or by the Operator, which enforcement or cure shall be accepted by the other Owner(s) as if effected by the Owner of Lot 2. KeyBank shall have the right, but not the obligation, to enforce this Declaration on behalf of the Owner of Lot 1, and/or to cure a breach or default hereunder by the Owner of Lot 1, or by the Operator, which enforcement or cure shall be accepted by the other Owner(s) as if effected by the Owner of Lot 1. Any other Occupants of any Lot shall have the right, but not the obligation, to cure a breach or default hereunder by the Owner of its Lot or by the Operator, which enforcement or cure shall be accepted by the other Owner(s) as if effected by the Owner of such Lot, and/or to enforce this Declaration on behalf of the Owner of its Lot.

9.2 Self-Help. In addition to all other remedies available at law or in equity, upon the failure of a defaulting Owner or by the Operator to cure a breach of this

Declaration within thirty (30) days following written notice thereof by an Owner (or by any other party permitted to enforce this Declaration as set forth in Section 9.1 above) (unless, with respect to any such breach the nature of which cannot reasonably be cured within such 30-day period, the defaulting Owner or Operator commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion), any other Owner (or its Occupants), or the Operator (with respect to any obligations of the Operator which have been assumed by any Owner [or its Occupants] under this Declaration), shall have the right to perform such obligation contained in this Declaration on behalf of such defaulting Owner or the Operator and be reimbursed by such defaulting Owner upon demand for the reasonable costs thereof together with interest at the prime rate charged from time to time by KeyBank National Association (its successors or assigns), plus two percent (2%) (not to exceed the maximum rate of interest allowed by law). Notwithstanding the foregoing, in the event of (i) an emergency, (ii) blockage or material impairment of the easement rights, and/or (iii) the unauthorized parking of vehicles on a Lot, an Owner (or its Occupants) may immediately cure the same and be reimbursed by the defaulting Owner (or the Operator, if the Operator has caused such violation) upon demand for the reasonable cost thereof together with interest at the prime rate, plus two percent (2%), as above described.

9.3 Lien Rights. Any claim for reimbursement, including interest as aforesaid, and all costs and expenses including reasonable attorneys' fees awarded to any Owner (or to its Occupants) in connection with the exercise of its rights set forth in Sections 9.1 and/or 9.2 above) in enforcing any payment in any suit or proceeding under this Declaration shall be assessed against the defaulting Owner or the Operator in favor of the prevailing party and shall constitute a lien (the "Assessment Lien") against the Lot of the defaulting Owner or of the Operator until paid, effective upon the recording of a notice of lien with respect thereto in the Office of the County Recorder of Kitsap County, Washington; provided, however, that any such Assessment Lien shall be subject and subordinate to (i) liens for taxes and other public charges which by applicable law are expressly made superior, (ii) all liens recorded in the Office of the County Recorder of Kitsap County, Washington prior to the date of recordation of said notice of lien, and (iii) the Walgreens Lease, the KeyBank Lease and all other leases entered into, whether or not recorded, prior to the date of recordation of said notice of lien. All liens recorded subsequent to the recordation of the notice of lien described herein shall be junior and subordinate to the Assessment Lien. Upon the timely curing by the defaulting Owner of any default for which a notice of lien was recorded, the party recording same shall record an appropriate release of such notice of lien and Assessment Lien. If the default so cured is on the part of the Operator, the curing Owner (or its Occupant) also may offset the costs of cure against its share of Project Common Area Costs otherwise payable hereunder until such amount shall have been fully satisfied; provided, however, that if the Operator is in good faith disputing either the exercise of such rights by such Owner (or its Occupant) and/or the amount for which any offset is claimed herein, then no such offset against the Project Common Area Costs shall be permitted herein until such dispute is resolved.

9.4 Remedies Cumulative. The remedies specified herein shall be cumulative and in addition to all other remedies permitted at law or in equity.

9.5 No Termination For Breach. Notwithstanding the foregoing to the contrary, no breach hereunder shall entitle any Owner to cancel, rescind, or otherwise terminate this Declaration. No breach hereunder shall defeat or render invalid the lien of any mortgage or deed of trust upon any Lot made in good faith for value, but the easements, covenants, conditions and restrictions hereof shall be binding upon and effective against any Owner of such Lot covered hereby whose title thereto is acquired by foreclosure, trustee's sale, or otherwise.

9.6 Irreparable Harm. In the event of a violation or threat thereof of any of the provisions of Sections 2 and/or 5 of this Declaration, each Owner agrees that such violation or threat thereof shall cause the nondefaulting Owner and/or its Permittees to suffer irreparable harm and such nondefaulting Owner and its Permittees shall have no adequate remedy at law. As a result, in the event of a violation or threat thereof of any of the provisions of Sections 2 and/or 5 of this Declaration, the nondefaulting Owner (or its Occupants), in addition to all remedies available at law or otherwise under this Declaration, shall be entitled to injunctive or other equitable relief to enjoin a violation or threat thereof of Sections 2 and/or 5 of this Declaration.

9.7 No Waiver. No delay or omission of any Owner in the exercise of any right accruing upon any default of any other Owner shall impair any such right or be construed to be a waiver thereof, and every such right may be exercised at any time during the continuance of such default. A waiver by any Owner of a breach or a default of any of the terms and conditions of this Declaration by any other Owner shall not be construed to be a waiver of any subsequent breach or default of the same or any other provision of this Declaration. Except as otherwise specifically provided in this Declaration, no remedy provided in this Declaration shall be exclusive, but each shall be cumulative with all other remedies provided in this Declaration and at law or in equity.

9.8 Cure by Mortgagee. Any mortgagee of any Lot shall have the right, within the time period set forth above, to cure any default of any Owner.

10. Term. The easements, covenants, conditions and restrictions contained in this Declaration shall be effective commencing on the date of recordation of this Declaration in the office of the Kitsap County Recorder and shall remain in full force and effect thereafter in perpetuity, unless this Declaration is modified, amended, canceled or terminated by the written consent of all then record Owners of the Lots in accordance with Section 11.2 hereof.

11. Miscellaneous.

11.1 Attorneys' Fees. In the event a party (including any Owner or its Permittees [to the extent that, pursuant to the terms of this Declaration, such Permittees are permitted to pursue such legal action or proceeding]) institutes any legal action or proceeding for the enforcement of any right or obligation herein contained, the prevailing party after a final adjudication shall be entitled to recover its costs and reasonable attorneys' fees incurred in the preparation and prosecution of such action or proceeding.

11.2 Amendment.

(a) Except as otherwise set forth in this Declaration, and subject to Sections 11.2(b) and 11.2(c) below, Declarant agrees that the provisions of this Declaration may be modified or amended, in whole or in part, or terminated, only by the written consent of all record Owners of all Lots, evidenced by a document that has been fully executed and acknowledged by all such record Owners and recorded in the official records of the County Recorder of Kitsap County, Washington.

(b) No termination of this Declaration, and no modification or amendment of this Declaration which is subject to the consent of the Owner of Lot 1 and/or Lot 2 shall be made nor shall the same be effective unless the same has been expressly consented to in writing by Walgreen (during the continuance of the Walgreen Lease) and by KeyBank (during the continuance of the KeyBank Lease), except as may be otherwise permitted under the terms of the Walgreen Lease and/or KeyBank Lease.

(c) Notwithstanding anything to the contrary set forth in this Section 11.2, each Owner shall have the right to unilaterally execute and record an amendment to this Declaration as expressly permitted under any other provision of this Declaration and/or with respect to matters that concern the Lot(s) owned by such Owner(s) only, and do not affect any other Lot (unless the consent of the Owner of such affected Lot has been granted) and/or the rights provided to any other Lot herein (for example, an amendment by which two (2) Owners agree upon the relocation of any Utility Facilities within their respective Lots, to any reconfiguration of a boundary line between their respective Lots, and/or a reallocation of the Project Common Area Costs between their respective Lots).

11.3 Consents. Wherever in this Declaration the consent or approval of an Owner is required, unless otherwise expressly provided herein, such consent or approval shall not be unreasonably withheld or delayed. Any request for consent or approval shall: (a) be in writing; (b) specify the section hereof which requires that such notice be given or that such consent or approval be obtained; and (c) be accompanied by such background data as is reasonably necessary to make an informed decision thereon. The consent of an Owner or of Walgreen or KeyBank, during the continuance

of their respective Leases, when required herein), to be effective, must be given, denied or conditioned expressly and in writing. During the continuance of the Walgreen Lease, any consent by the Owner of Lot 2, to be effective, shall also require the consent of Walgreen. Any consent of Walgreen may be given, denied or conditioned by Walgreen in Walgreen's reasonable discretion. During the continuance of the KeyBank Lease, any consent by the Owner of Lot 1, to be effective, shall also require the consent of KeyBank. Any consent of KeyBank may be given, denied or conditioned by KeyBank in KeyBank's reasonable discretion.

11.4 No Waiver. No waiver of any default of any obligation by any party hereto shall be implied from any omission by any other party to take any action with respect to such default.

11.5 No Agency. Nothing in this Declaration shall be deemed or construed by any party bound hereby or by any third person to create the relationship of principal and agent or of limited or general partners or of joint venturers or of any other association between the parties.

11.6 Covenants to Run with Land. It is intended that each of the easements, covenants, conditions, restrictions, rights and obligations set forth herein shall run with the land and create equitable servitudes in favor of the real property benefited thereby, shall bind every person and entity having any fee, leasehold or other interest therein and shall inure to the benefit of the respective parties and their successors, assigns, heirs, and personal representatives.

11.7 Grantee's Acceptance. The grantee of any Lot or any portion thereof, by acceptance of a deed conveying title thereto or the execution of a contract for the purchase thereof, whether from an original party or from a subsequent owner of such Lot, shall accept such deed or contract upon and subject to each and all of the easements, covenants, conditions, restrictions and obligations contained herein. By such acceptance, any such grantee shall for such grantee and such grantee's successors, assigns, heirs, and personal representatives, covenant, consent, and agree to and with the other parties, to keep, observe, comply with, and perform the obligations and agreements set forth herein with respect to the property so acquired by such grantee.

11.8 Separability. Each provision of this Declaration and the application thereof to each of the Lots are hereby declared to be independent of and severable from the remainder of this Declaration. If any provision contained herein shall be held to be invalid or to be unenforceable or not to run with the land, such holding shall not affect the validity or enforceability of the remainder of this Declaration. In the event the validity or enforceability of any provision of this Declaration is held to be dependent upon the existence of a specific legal description, the parties agree to promptly cause such legal description to be prepared. Ownership of both Lots by the same person or entity shall

not terminate this Declaration nor in any manner affect or impair the validity or enforceability of this Declaration.

11.9 Time of Essence. Time is of the essence of this Declaration.

11.10 Entire Agreement. This Declaration contains the complete understanding and agreement of the parties hereto with respect to all matters referred to herein, and all prior representations, negotiations, and understandings are superseded hereby.

11.11 Notices. Notices or other communication hereunder shall be in writing and shall be sent certified or registered mail, return receipt requested, or by other national overnight courier company, or personal delivery. Notice shall be deemed given upon receipt or refusal to accept delivery. Each Owner, Walgreen, KeyBank (and any other Long-Term Tenant that has given notice of its existence to the Owners, Walgreen and KeyBank) may change from time to time their respective address for notice hereunder by like notice to the other party, KeyBank and Walgreen. Notice given by any Owner hereunder to be effective shall also simultaneously be delivered to Walgreen (during the continuance of the Walgreen Lease) if such notice is delivered to the Owner of Lot 2, to KeyBank (during the continuance of the KeyBank Lease) if such notice is delivered to the Owner of Lot 1. The notice addresses of Declarant, Walgreen and KeyBank are as follows:

Walgreens
Attention: Corporate and Transactional Law Department,
Real Estate Group
Wilmot Road
MS #1420
Deerfield, IL, 60015
Re: Store # 13968

KeyBank National Association (PID No. 7122)
Attention: Real Estate Asset Manager

By mail to:

Box 94839
Cleveland, Ohio 44101-4839.

by personal delivery
or overnight courier to:

Mail Code: OH-01-10-0605
100 Public Square, Suite 600
Cleveland, Ohio 44113-2207

Declarant: VWA - Bainbridge Island, LLC
c/o Visconsi Companies, Ltd.
30050 Chagrin Boulevard, Suite 360
Pepper Pike, Ohio 44124

With a copy to: Taft Stettinius & Hollister, LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114
Attention: William M. Phillips, Esq.

11.12 Governing Law. The laws of the State in which the Lots are located shall govern the interpretation, validity, performance, and enforcement of this Declaration.

11.13 Estoppel Certificates. Each Owner (or the Operator), within thirty (30) days of its receipt of a written request from the other Owner(s) (or by Walgreen or KeyBank, during the continuance of their respective Leases), shall from time to time provide the requesting party a certificate binding upon such certifying party stating: (a) to such party's knowledge, whether any party to this Declaration is in default or violation of this Declaration and if so identifying such default or violation; (b) that this Declaration is in full force and effect and identifying any amendments to the Declaration as of the date of such certificate; and (c) such other matters as may be reasonably requested with respect to this Declaration.

11.14 Bankruptcy. In the event of any bankruptcy affecting any Owner or Permittee of any Lot, the parties agree that this Declaration shall, to the maximum extent permitted by law, be considered an agreement that runs with the land and that is not rejectable, in whole or in part, by the bankrupt person or entity.

11.15 Mortgage Subordination. Any mortgage or deed of trust affecting any portion of any Lot shall at all times be subject and subordinate to the terms of this Declaration, and any party foreclosing any such mortgage or deed of trust, or acquiring title by deed in lieu of foreclosure or trustee sale, shall acquire title subject to all the terms and conditions of this Declaration.

11.16 Excusable Delays. Whenever performance is required of any party hereunder, such party shall use all due diligence to perform and take all necessary measures in good faith to perform; provided, however, that if completion of performance shall be delayed at any time by reason of acts of God, adverse or inclement weather, war, civil commotion, riots, strikes, picketing or other labor disputes, unavailability of labor or materials, damage to work in progress by reason of fire or other casualty, or any cause beyond the reasonable control of such party, then the time for performance as herein specified shall be appropriately extended by the amount of the delay actually so caused. The provisions of this section shall not operate to excuse any party from the prompt payment of any monies required by this Declaration.

11.17 Mitigation of Damages. In all situations arising out of this Declaration, all parties shall attempt to avoid and mitigate the damages resulting from the conduct of any other party. Each party hereto shall take all reasonable measures to effectuate the provisions of this Declaration.

11.18 Limitation of Liability. In no event shall any Owner (including the officers, directors, shareholders, members, partners, or agents thereof), in its capacity as a "Owner" of any Lot (as opposed to in its capacity as "Operator", or with respect to any obligations of the Operator which such Owner may have elected to assume and perform as described in this Declaration), have any personal liability with respect to any of the terms, covenants, conditions or provisions of this Declaration. In the event of any default by any Owner, any non-defaulting Owner shall look solely to the interest of such defaulting Owner in the defaulting Owner's Lot for the satisfaction of each and every remedy of the non-defaulting Owner, provided that the foregoing shall not limit or prejudice the right of any non-defaulting Owner to pursue equitable relief and/or to recover from another Owner all sums required as a result of such Owner's self-insurance of its insurance obligations under Section 6 above. In addition, such person shall be bound by this Declaration only during the period such person is the fee or leasehold owner of such Lot or portion of the Lot; and, upon conveyance or transfer of the fee or leasehold interest shall be released from liability hereunder, except as to the obligations, liabilities or responsibilities that accrue prior to such conveyance or transfer. Although persons may be released under this paragraph, the easements, covenants and restrictions in this Declaration shall continue to be benefits to and servitudes upon said Lots running with the land.

11.19 Declarant Reservation and Grant of Rights. So long as Declarant (or any of its affiliates) own any property in the Project, all rights permitted to be exercised under this Declaration by the Declarant shall be reserved for the benefit of, and shall be exercisable only by, Declarant. Notwithstanding the foregoing, Declarant shall have the right to grant any or all rights under this Declaration to any Owner (and/or Occupants) of any Lot, and (if Declarant elects to do so in connection therewith, which shall not be a condition to the effectiveness of any such grant) to amend this Declaration to reflect the grant of such rights. Upon any grant of such rights by Declarant, the Owner (and/or Occupants) of such Lot shall have the right to exercise the rights and remedies under this Declaration with respect to the rights granted by Declarant to such Owner (and/or Occupants).

In addition, pursuant to an agreement between the Operator and such Owner and/or Occupants, the Operator shall have the right to delegate all or any of its obligations under this Declaration with respect to any Lot to the Owner and/or Occupants of such Lot, and upon any such delegation, such Owner and/or its Occupants shall be responsible for the performance of all such obligations within its Lot in accordance with the terms and conditions of this Declaration, the Operator shall cause such Owner and/or its Occupants to perform the same, and the Operator and the

other Owners and Occupants shall have the right to enforce all such compliance obligations directly against such Owner and/or its Occupants.

11.20 Approval of the Owners. With respect to the rights reserved to the Declarant under this Declaration, if at any time Declarant no longer owns any Lot, then all such rights on behalf of the Declarant shall be exercised by the Approval of the Owners; provided, however, that in no event shall this Declaration be amended in any manner which would increase the obligations of any Owner, and/or reduce the rights of any Owner, without the prior written consent of such Owner.

11.21 No Dedication to Public; No Implied Easements. Nothing contained herein shall be construed as dedicating for public use any portion of the Lots, except for any Common Area which is required by either the Site Plan Requirements or applicable law to be available for use by the public (such as, but not limited to, the Multi-Purpose Trail). No easements, except those expressly set forth in Section 2, shall be implied by this Declaration; in that regard, and without limiting the foregoing, no easements for signage are granted or implied.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, Declarant has executed this Declaration as of the date first written above.

VWA - BAINBRIDGE ISLAND, LLC,
an Ohio limited liability company

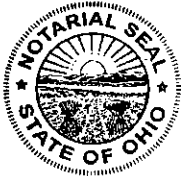
By: Dominic A. Visconti Jr

Its: Manager

STATE OF OHIO)
)
COUNTY OF COUNTY)

BEFORE ME, a Notary Public in and for said County and State, personally appeared Dominic A. Visconti Jr of **VWA – Bainbridge Island, LLC**, an Ohio limited liability company, By: Visconti Holding Company, Ltd., an Ohio limited liability company, its sole member, who acknowledged that he/she did sign the foregoing instrument for and on behalf of said corporation on behalf of said limited liability company, being thereunto duly authorized, and that the same is his/her free act and deed individually and as such officer of such corporation and the free act and deed of said limited liability company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 13th day of June, 2014.



FRANCINE M. LOTARSKI
Notary Public, State of Ohio
My Commission Expires 7/21/2017
Recorded in Geauga County

Francine M. Lotarski
Notary Public

My Commission Expires: 07/21/2017

Exhibit "A"

[Legal Descriptions of Lots 1-5]

[See Attached]

VISCONSI CONSOLIDATED PROPERTY LEGAL DESCRIPTION

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North 88°50'51" West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North 01°15'35" East 30.00 feet to the North right of way of NE High School Road and the True Point of Beginning;
Thence continuing along said East line, North 01°15'35" East 847.93 feet to the South line of the North 443.92 feet of said Northwest quarter of the Southeast quarter of the Southwest quarter;
Thence along said North line, North 88°47'19" West 470.22 feet to the East right of way of State Highway 305;
Thence Southerly along said right of way on a 2964.79 foot radius curve to the right, the center of which bears South 88°58'19" West through a central angle of 06°26'05", an arc distance of 332.97 feet;
Thence continuing Southerly on said right of way on a decreasing offset spiral curve to the right, a resultant spiral chord of South 06°12'12" West 122.09 feet;
Thence continuing on said right of way, South 06°36'24" West 365.71 feet to the said North right of way of NE High School Road;
Thence along said North right of way, South 82°03'16" East 206.62 feet;
Thence continuing along said North right of way, North 01°15'35" East 0.44 feet;
Thence continuing along said North right of way, South 88°50'51" East 85.00 feet;
Thence leaving said North right of way, North 01°15'35" East 264.00 feet;
Thence South 88°50'51" East 200.00 feet;
Thence South 01°15'35" West 270.00 feet to the said North right of way;
Thence along said North right of way, South 88°50'51" East 30.00 feet to the True Point of Beginning.

The above is a consolidated legal description with respect to all Lots contained in the Project, as described in the separate legal descriptions for each Lot attached hereto.

May 1, 2014
Job No. 14-5583

VISCONSI BOUNDARY LINE ADJUSTMENT

LEGAL DESCRIPTIONS

ORIGINAL PARCEL A (The Deschamps Partnership, L.P.)
ASSESSOR'S ACCOUNT NO. 232502-3-036-2000

That portion of the West half of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., in Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section, North 88°50'57" West 659.38 feet;
Thence along the East line of said subdivision, North 01°16'50" East 660.77 feet to the Southeast corner of the North half of the said subdivision and the True Point of Beginning;
Thence continuing North 01°16'50" East 660.77 feet to the Northeast corner of said subdivision;
Thence along the North line of said subdivision, North 88°46'49" West 522.11 feet to the Easterly right of way of State Highway No. 305;
Thence Southerly along said right of way on a curve to the right the center of which bears South 80°19'33" West 2965 feet, an arc distance of 745.59 feet;
Thence leaving said right of way, South 88°48'53" East 273.46 feet;
Thence North 01°16'50" East 81.03 feet;
Thence along the South line of said North half of said subdivision, South 88°48'53" East 200 feet to the True Point of Beginning.

EXCEPT that portion of the Northwest quarter of the Southeast quarter of the Southwest quarter, Section 23, Township 25 North, Range 2 East, W.M., in Kitsap County, described as follows:

(description continued on next page)

Page 2
Visconsi Boundary Line Adjustment
Job No. 14-5583
May 1, 2014

Original Parcel A (continued)

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North 88°50'57" West 659.38 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter;
Thence North 01°16'50" East 1321.54 feet to the Northeast corner of the Northwest quarter of the Southeast quarter of the Southwest quarter and the True Point of Beginning;
Thence North 88°46'49" West 522.11 feet to the Easterly right of way of State Highway No. 305;
Thence along said right of way on a curve to the right, the center of which bears South 80°19'33" West an arc distance of 447.28 feet;
Thence leaving said right of way, South 88°46'49" East 470.49 feet;
Thence North 01°16'50" East 443.92 feet to the True Point of Beginning.

Together with and Subject to easements, restrictions and reservations of record.

ORIGINAL PARCEL B (The Deschamps Partnership LP)
ASSESSOR'S ACCOUNT NO. 232502-3-026-2002

That portion of the Southwest quarter of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., in Kitsap County, Washington, described as follows:

Beginning at the Northeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence South 200 feet;
Thence West 200 feet;
Thence North 200 feet;
Thence East 200 feet to the True Point of Beginning.

Together with and Subject to easements, restrictions and reservations of record.

Page 3
Visconsi Boundary Line Adjustment
Job No. 14-5583
May 1, 2014

ORIGINAL PARCEL C (The Deschamps Partnership, L.P.)
ASSESSOR'S ACCOUNT NO. 232502-3-043-2001

Lot B of Short Plat No. 3083 recorded under Kitsap County Auditor's File No. 8309070094 being a portion of the Southwest quarter of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., in Kitsap County, Washington.

Together with and Subject to easements, restrictions and reservations of record.

ORIGINAL PARCEL D (The Deschamps Partnership, L.P.)
ASSESSOR'S ACCOUNT NO. 232502-3-027-2001

Lot A of Short Plat No. 3083 recorded under Kitsap County Auditor's File No. 8309070094 being a portion of the Southwest quarter of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., in Kitsap County, Washington.

Together with and Subject to easements, restrictions and reservations of record.

Page 4
Visconsi Boundary Line Adjustment
Job No. 14-5583
May 1, 2014

ORIGINAL PARCEL E (The Deschamps Partnership, L.P.)
ASSESSOR'S ACCOUNT NO. 232502-3-030-2006

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of Section 23;
Thence 230 feet West to the Point of Beginning;
Thence North 300 feet;
Thence West 51 feet 11 inches;
Thence Southwest 105 feet 2 inches to a point 85 feet West and 200 feet North of the True Point of Beginning;
Thence South 200 feet;
Thence East 85 feet to the Point of Beginning;

EXCEPT that portion conveyed to State of Washington under Auditor's File No. 589328;

ALSO EXCEPT that portion conveyed to the City of Bainbridge Island for High School Road under Auditor's File No. 9305190187.

RESULTANT PARCEL A

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North $88^{\circ}50'51''$ West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North $01^{\circ}15'35''$ East 877.93 feet to the South line of the North 443.92 feet of said Northwest quarter of the Southeast quarter of the Southwest quarter;
Thence along said South line, North $88^{\circ}47'19''$ West 313.09 feet to the True Point of Beginning;
Thence leaving said South line, Southerly on a 323.50 foot radius curve to the left, the center of which bears South $88^{\circ}54'28''$ East through a central angle of $25^{\circ}39'56''$, an arc distance of 144.91 feet;
Thence South $24^{\circ}34'24''$ East 49.23 feet;
Thence Southerly on a 71.79 foot radius curve to the right, the center of which bears South $65^{\circ}25'36''$ West through a central angle of $09^{\circ}43'33''$, an arc distance of 12.19 feet;
Thence South $14^{\circ}50'51''$ East 81.83 feet;
Thence Southerly on a 126.50 foot radius curve to the right, the center of which bears South $75^{\circ}09'09''$ West through a central angle of $16^{\circ}00'00''$, an arc distance of 35.33 feet;
Thence South $01^{\circ}09'09''$ West 114.11 feet;
Thence Southerly on a 195.50 foot radius curve to the right, the center of which bears North $88^{\circ}50'51''$ West through a central angle of $04^{\circ}10'57''$, an arc distance of 14.27 feet;
Thence North $88^{\circ}50'51''$ West 257.14 feet to the East right of way of State Highway 305;
Thence Northerly on said right of way on a decreasing offset spiral curve to the left, a resultant spiral chord of North $06^{\circ}12'12''$ East 105.52 feet;
Thence continuing Northerly along said right of way on a 2964.79 foot radius curve to the left, the center of which bears North $84^{\circ}35'36''$ West through a central angle of $06^{\circ}26'05''$, an arc distance of 332.97 feet;
Thence leaving said right of way along said South line of the North 443.92 feet, South $88^{\circ}47'19''$ East 157.13 feet to the True Point of Beginning.

Subject to and Together with easements, restrictions, and reservations of record.

RESULTANT PARCEL B

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North 88°50'51" West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North 01°15'35" East 650.67 feet to the True Point of Beginning;
Thence continuing along said East line, North 01°15'35" East 227.26 feet to the South line of the North 443.92 feet of said Northwest quarter of the Southeast quarter of the Southwest quarter;
Thence along said South line, North 88°47'19" West 313.09;
Thence leaving said South line, Southerly on a 323.50 foot radius curve to the left, the center of which bears South 88°54'28" East through a central angle of 25°39'56", an arc distance of 144.91 feet;
Thence South 24°34'24" East 49.23 feet;
Thence Southerly on a 71.79 foot radius curve to the right, the center of which bears South 65°25'36" West through a central angle of 09°43'33", an arc distance of 12.19 feet;
Thence South 14°50'51" East 81.83 feet;
Thence Southerly on a 126.50 foot radius curve to the right, the center of which bears South 75°09'09" West through a central angle of 06°27'56", an arc distance of 14.28 feet;
Thence North 81°37'05" East 42.07 feet;
Thence North 75°09'09" East 195.27 feet to the True Point of Beginning

Subject to and Together with easements, restrictions, and reservations of record.

RESULTANT PARCEL C

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North $88^{\circ}50'51''$ West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North $01^{\circ}15'35''$ East 877.93 feet to the South line of the North 443.92 feet of said Northwest quarter of the Southeast quarter of the Southwest quarter;
Thence along said South line, North $88^{\circ}47'19''$ West 313.09 feet;
Thence leaving said South line, Southerly on a 323.50 foot radius curve to the left, the center of which bears South $88^{\circ}54'28''$ East through a central angle of $25^{\circ}39'56''$, an arc distance of 144.91 feet;
Thence South $24^{\circ}34'24''$ East 49.23 feet;
Thence Southerly on a 71.79 foot radius curve to the right, the center of which bears South $65^{\circ}25'36''$ West through a central angle of $09^{\circ}43'33''$, an arc distance of 12.19 feet;
Thence South $14^{\circ}50'51''$ East 81.83 feet;
Thence Southerly on a 126.50 foot radius curve to the right, the center of which bears South $75^{\circ}09'09''$ West through a central angle of $16^{\circ}00'00''$, an arc distance of 35.33 feet;
Thence South $01^{\circ}09'09''$ West 114.11 feet;
Thence Southerly on a 195.50 foot radius curve to the right, the center of which bears North $88^{\circ}50'51''$ West through a central angle of $04^{\circ}10'57''$, an arc distance of 14.27 feet to the True Point of Beginning;
Thence continuing Southerly on the 195.50 foot radius curve to the right, the center of which bears North $84^{\circ}39'54''$ West through a central angle of $07^{\circ}22'06''$, an arc distance of 25.14 feet;
Thence Southerly on a 199.50 foot radius curve to the left, the center of which bears North $77^{\circ}17'47''$ West through a central angle of $11^{\circ}33'04''$, an arc distance of 40.22 feet;
Thence South $01^{\circ}09'09''$ West 171.25 feet;

(description continued on next page)

Page 8
Viscousi Boundary Line Adjustment
Job No. 14-5583
May 1, 2014

Resultant Parcel C (continued)

Thence Southerly on a 215.50 foot radius curve to the right, the center of which bears North 88°50'51" West through a central angle of 06°26'19", an arc distance of 24.22 feet;
Thence North 88°50'51" West 141.45 feet;
Thence South 01°09'09" West 15.00 feet;
Thence North 88°50'51" West 64.00 feet;
Thence North 01°09'09" East 31.50 feet;
Thence North 88°50'51" West 66.01 feet to the East right of way of State Highway 305;
Thence along said right of way, North 06°36'24" East 228.28 feet;
Thence continuing along said right of way on a decreasing offset spiral curve to the left, a resultant spiral chord of North 06°12'12" East 16.57 feet;
Thence leaving said right of way, South 88°50'51" East 257.14 feet to the True Point of Beginning.

Subject to and Together with easements, restrictions, and reservations of record.

RESULTANT PARCEL D

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;
Thence along the South line of said Section 23, North 88°50'51" West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;
Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North 01°15'35" East 30.00 feet to the North right of way of NE High School Road and the True Point of Beginning;
Thence continuing North 01°15'35" East 620.67 feet;
Thence leaving said East line, South 75°09'09" West 195.27 feet
Thence South 81°37'05" West 42.07 feet;
Thence Southerly on a 126.50 foot radius curve to right, the center of which bears South 81°37'05" West through a central angle of 09°32'04", an arc distance of 21.05 feet;

(description continued on next page)

Page 9

Visconsi Boundary Line Adjustment

Job No. 14-5583

April 30, 2014

Resultant Parcel D (continued)

Thence South 01°09'09" West 114.11 feet;

Thence Southerly on a 195.50 radius curve to the right, the center of which bears North 88°50'51" West through a central angle of 11°33'04", an arc distance of 39.41 feet;

Thence Southerly on a 199.50 foot radius curve to the left, the center of which bears South 77°17'47" East through a central angle of 11°33'04", an arc distance of 40.22 feet;

Thence South 01°09'09" West 171.25 feet;

Thence Southerly on a 215.50 foot radius curve to the right, the center of which bears North 88°50'51" West through a central angle of 06°26'19", an arc distance of 24.22 feet;

Thence South 88°50'51" East 5.92 feet;

Thence North 01°15'35" East 119.69 feet;

Thence South 88°50'51" East 200.00 feet;

Thence South 01°15'35" West 270.00 feet to the said North right of way;

Thence along said North right of way, South 88°50'51" East 30.00 feet to the True Point of Beginning.

Subject to and Together with easements, restrictions, and reservations of record.

RESULTANT PARCEL E

That portion of the Southeast quarter of the Southwest quarter of Section 23, Township 25 North, Range 2 East, W.M., City of Bainbridge Island, Kitsap County, Washington, described as follows:

Beginning at the South quarter corner of said Section 23;

Thence along the South line of said Section 23, North 88°50'51" West 659.40 feet to the Southeast corner of the Southwest quarter of the Southeast quarter of the Southwest quarter of said Section 23;

Thence leaving said South line and along the East line of the West one-half of the Southeast quarter of the Southwest quarter of said Section 23, North 01°15'35" East 877.93 feet to the South line of the North 443.92 feet of said Northwest quarter of the Southeast quarter of the Southwest quarter;

Thence along said South line, North 88°47'19" West 313.09 feet;

Thence leaving said South line, Southerly on a 323.50 foot radius curve to the left, the center of which bears South 88°54'28" East through a central angle of 25°39'56", an arc distance of 144.91 feet;

(description continued on next page)

Page 10
Visconsi Boundary Line Adjustment
Job No. 14-5583
April 30, 2014

Resultant Parcel E (continued)

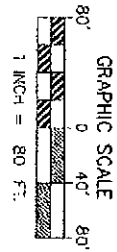
Thence South $24^{\circ}34'24''$ East 49.23 feet;
Thence Southerly on a 71.79 foot radius curve to the right, the center of which bears South $65^{\circ}25'36''$ West through a central angle of $09^{\circ}43'33''$, an arc distance of 12.19 feet;
Thence South $14^{\circ}50'51''$ East 81.83 feet;
Thence Southerly on a 126.50 foot radius curve to the right, the center of which bears South $75^{\circ}09'09''$ West through a central angle of $16^{\circ}00'00''$, an arc distance of 35.33 feet;
Thence South $01^{\circ}09'09''$ West 114.11 feet;
Thence Southerly on a 195.50 foot radius curve to the right, the center of which bears North $88^{\circ}50'51''$ West through a central angle of $11^{\circ}33'04''$, an arc distance of 39.41 feet;
Thence Southerly on a 199.50 foot radius curve to the left, the center of which bears North $77^{\circ}17'47''$ West through a central angle of $11^{\circ}33'04''$, an arc distance of 40.22 feet;
Thence South $01^{\circ}09'09''$ West 171.25 feet;
Thence Southerly on a 215.50 foot radius curve to the left, the center of which bears North $88^{\circ}50'51''$ West through a central angle of $06^{\circ}26'20''$, an arc distance of 24.22 feet;
Thence South $88^{\circ}50'51''$ East 5.92 feet to the True Point of Beginning;
Thence South $01^{\circ}15'35''$ West 144.31 feet to the North right of way of NE High School Road
Thence along said North right of way, North $88^{\circ}50'51''$ West 85.00 feet
Thence continuing along said North right of way, South $01^{\circ}15'35''$ West 0.44 feet;
Thence continuing along said North right of way, North $82^{\circ}03'16''$ West 206.62 feet to the East right of way of State Highway 305;
Thence along said East right of way, North $06^{\circ}36'24''$ East 137.43 feet;
Thence leaving said East right of way, South $88^{\circ}50'51''$ East 66.01 feet
Thence South $01^{\circ}09'09''$ West 31.50 feet;
Thence South $88^{\circ}50'51''$ East 64.00 feet;
Thence North $01^{\circ}09'09''$ East 15.00 feet;
Thence South $88^{\circ}50'51''$ East 147.37 feet to the True Point of Beginning;

Subject to and Together with easements, restrictions, and reservations of record.

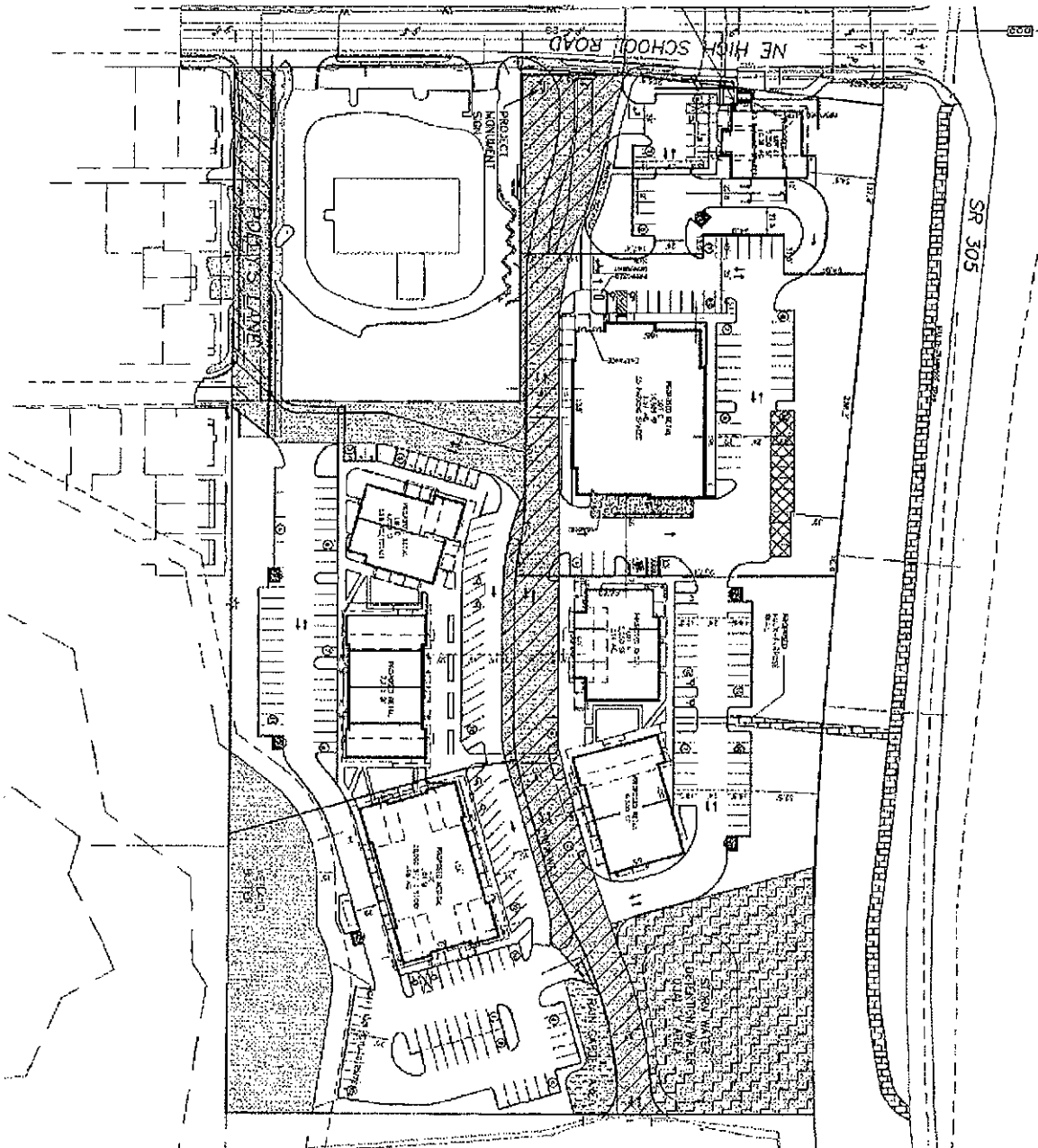
Exhibit "B"

Site Plan

[See Attached]



- DRIVEWAY
- RAIN GARDEN AREA
- PROJECT COMMON AREA
- SHARED PARKING SPACES
- MULTI-PURPOSE TRAIL
- POLY'S LANE
- STORM WATER / DETENTION / WATER AREA



DECLARATION
EXHIBIT B
NEC SR 305 & NE HIGH SCHOOL ROAD
BAINBRIDGE, WA

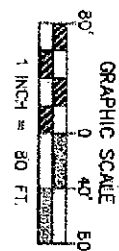
PROJECT NO.: B00-EX-35
DWG NAME: B00-EX-35
DWG SCALE: 1"=80'
DESIGN BY: SJA
CHECKED BY: SJA
DATE EXAMINED: 6/7/2016
REVISION:

SHEET NO.
EX B

EXHIBIT "C"

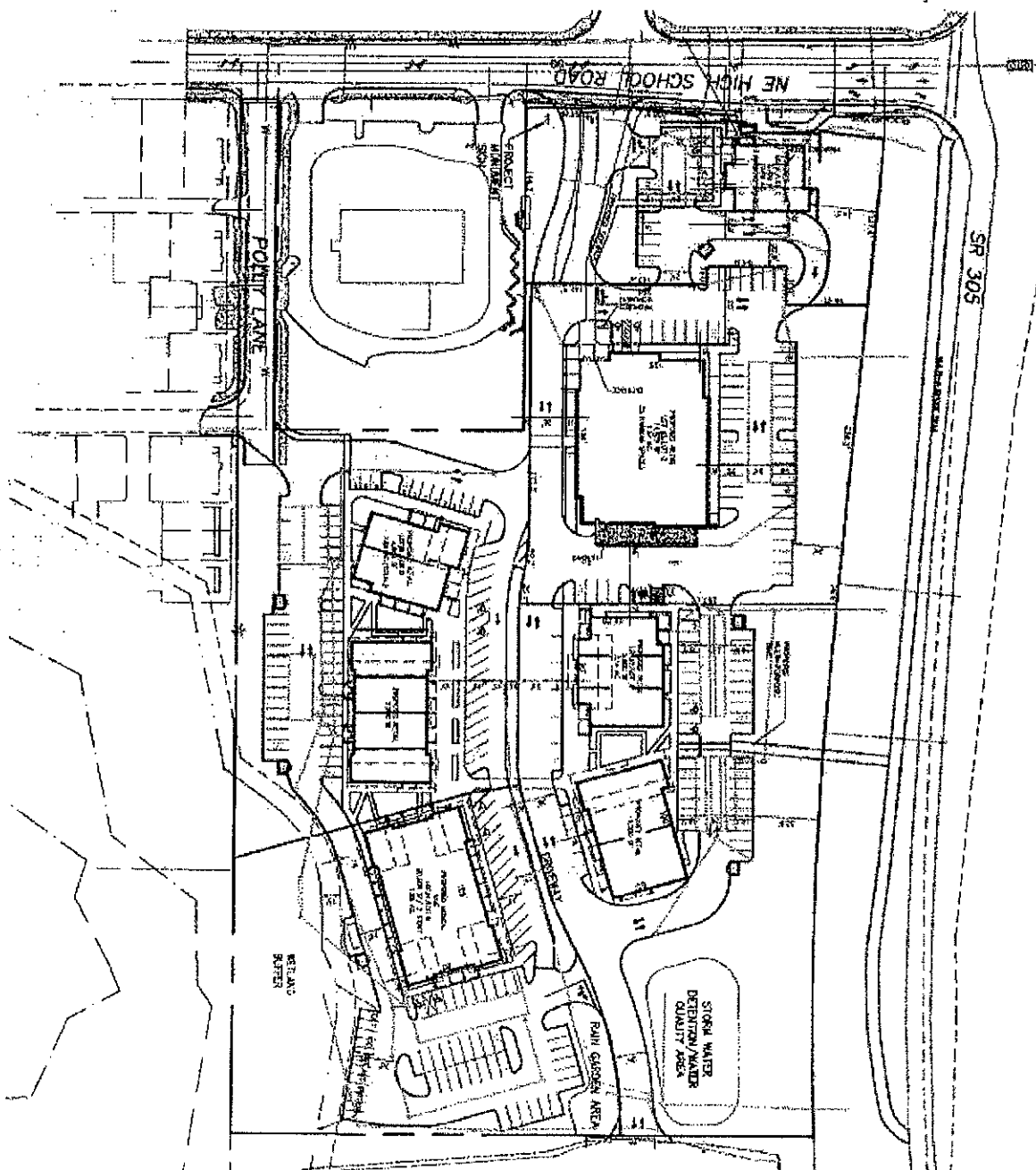
Storm Water Utility Facilities

[See Attached]



LEGEND

— STORM WATER
— UTILITY LINES



DECLARATION
EXHIBIT C
NEC SR 305 & NE HIGH SCHOOL ROAD
BAINBRIDGE, WA

PROJECT NO.: 741
DWG NAME: BAIN EX-3
DWG SCALE: 1"=40'
DRAWN BY: SJA
CHECKED BY: SJA
DATE DRAWN: 6/12/14
REVISION:

SHEET NO.
EXC

EXHIBIT "D"

Original Report and Report Amendment

[See Attached]

March 27, 2014

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

REPORT AND DECISION

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

File number: SPR/CUP 17734

Appellant: Islanders for Responsible Development

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

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

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

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

Suzanne Kelly
16213 Agatewood Road NE
Bainbridge Island, WA 98110

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

VISCONSI REPORT AND DECISION - 1

**Zoning and Comprehensive Plan
Designations:**

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

Environmental Review:

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

Request:

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

FINDINGS AND CONCLUSIONS

Site and Proposal Characteristics

I. Assessor's Record Information:

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

Total: 8.16 acres

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

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

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

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

4. The parcel is currently owned by the Kelly/Deschamps family, with the Visconsi Companies holding an option to purchase it once required permits have been secured. Thus tenant commitments have yet to be legally formalized. But it is generally anticipated that the Key Bank facility currently located south of High School Road will relocate to the 3300 square-foot building #1 proposed at the corner of SR 305 and High School Road in the HSR-I zone, and a Bartell's Drugstore will occupy the 14,475 square-foot building #2 to its north that straddles the HSR-I and II zone boundary. The 20,000 two-storey building #3 proposed to be located in the site's northeast corner next to the wetland buffer is being viewed as a future medical office facility, while four other single-storey retail buildings ranging in size between 4800 and 7200 square feet have yet to be publicly identified as to their expected tenancies. All buildings except the bank and the southern half of the pharmacy are proposed for the HSR-II zoned portion of the property.

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

Procedural History

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

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

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

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

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

Public Participation

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

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

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

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

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

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

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

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

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

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

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

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

into Stonecress.

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

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

The Offsite Wetland

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

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

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

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

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

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

Stormwater Management

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. Some context for understanding the terminology quoted above is also supplied by the approval standards stated at B1MC 15.20.060.H, which state that "[d]evelopment projects that discharge stormwater off-site shall submit an off-site analysis report that assesses the potential off-site water quality, erosion, slope stability, and drainage impacts associated with the project and that proposes appropriate mitigation of those impacts" Also, "[p]rojects shall be required to initially submit, with the permit application, a qualitative analysis of each downstream system leaving a site" which should

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

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

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

Tree Retention

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

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

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

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

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

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

Traffic and Circulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

from the sides.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

93. If creating a pedestrian-friendly neighborhood environment in this portion of the High School Road district is an important community goal, this opportunity to establish a mid-block crosswalk at Polly's Lane should be accepted. It is evident that no better location for a mid-block crossing of High School Road exists. While it may prove true that initially the crosswalk will be underutilized, in the longer term the now undeveloped HSR-1 property will likely get built and Ace could decide that

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

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

Noise

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

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

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

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

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

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

Light and Glare

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

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

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

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

Aesthetics

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

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

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

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

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

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

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

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

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

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

Economic Factors

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

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

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

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

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

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

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

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

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

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

Stonecress

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

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

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

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

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

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

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

CONCLUSIONS

The Review Framework

1. The public hearing and the resultant Hearing Examiner report cover three decisional components – a SEPA threshold determination appeal and applications for a conditional use permit and for site plan review. These procedures have been consolidated into a single review process pursuant to BIMC 2.16.170. The review pecking order stated at BIMC 2.16.170.C places responsibility for conducting the consolidated review on the Hearing Examiner based primarily on having jurisdiction over the conditional use permit element of the process. The procedures stated in BIMC 2.16.040.D also contemplate that a consolidated review might accommodate a prior administrative site plan review decision by the Planning Director. But the parties stipulated at the pre-hearing conference as a more efficient process that the initial site plan review decision also would be deferred to the Hearing Examiner as part of the consolidated review. Thus for both applications the Community Development Department's role is to make a staff recommendation to the Examiner.

2. Prior to arriving at the public hearing stage each application in the consolidated process was subject to its own detailed review procedures. For both applications a review and recommendation from the Design Review Board was required, and for the conditional use permit application the additional step of a Planning Commission review was mandated. So the CUP arrived before the Examiner with three separate recommendations – from the DRB for approval, from the Planning Commission for denial and lastly from the Planning staff for approval. While none of these recommendations carry any formal legal weight under City code, Visconsi has argued that the two project approval recommendations are to be accorded some level of deference.

3. The reasons offered by Visconsi for mandatory deference are not persuasive. First, the appellate cases cited are inapposite; they arise out of situations where a court was reviewing a decision of an administrative agency. Here the agency of concern is the City of Bainbridge Island. The Design Review Board, Planning Commission, Planning and Community Development Department and Hearing Examiner are all sub-parts of COBI, not separate agencies in themselves. For purposes of judicial review the final agency action will be the Hearing Examiner decision. Visconsi's related contention, that code interpretations made by the Planning Director are deemed conclusive by BIMC 18.03.090, also misses the mark. The code interpretations authorized by this section are provided as a service in response to formal public requests for prospective permitting guidance. These interpretations also may be appealed to the Hearing Examiner, who is authorized to overturn them. Nothing in this section suggests that routine staff report analyses or hearing testimony containing code interpretations are entitled to automatic deference.

4. But even though not mandatory, deference may at times be appropriate based on the expertise of

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

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

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

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

The Role of the Comprehensive Plan in Permit Review

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

and other applicable adopted community plans.”

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

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

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

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

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

Plan-based Regulatory Issues Affecting the Visconsi Proposal

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

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

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

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

review process.

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

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

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

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

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

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

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

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

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

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

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

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

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

Site Plan Review

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

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

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

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

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

following decision criteria:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Washington, and BIMC 15.20.060.H.

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

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

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

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

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

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

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

Conditional Use Permit

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

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

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

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

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

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

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

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

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

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

- b. The conditional use will be served by adequate public facilities including roads, water, fire protection, sewage disposal facilities and storm drainage facilities; and*
- c. The conditional use will not be materially detrimental to uses or property in the vicinity of the subject property; and*
- d. The conditional use is in accord with the comprehensive plan and other applicable adopted community plans, including the nonmotorized transportation plan; and*
- e. The conditional use complies with all other provisions of the BIMC, unless a provision has been modified as a housing design demonstration project pursuant to BIMC 2.16.020 Q; and*
- f. All necessary measures have been taken to eliminate or reduce to the greatest extent possible the impacts that the proposed use may have on the immediate vicinity of the subject property; and*
- g. Noise levels shall be in compliance with BIMC 16.16.020 and 16.16.040 A; and*
- h. The vehicular, pedestrian, and bicycle circulation meets all applicable city standards, unless the city engineer has modified the requirements of BIMC 18.15.020 B.4 and B.5, allows alternate driveway and parking area surfaces, and confirmed that those surfaces meet city requirements for handling surface water and pollutants in accordance with Chapters 15.20 and 15.21 BIMC; and*
- i. The city engineer has determined that the conditional use meets the following decision criteria:*
 - i. The conditional use conforms to regulations concerning drainage in Chapters 15.20 and 15.21 BIMC; and*
 - ii. The conditional use will not cause an undue burden on the drainage basin or water quality and will not unreasonably interfere with the use and enjoyment of properties downstream; and*
 - iii. The streets and pedestrian ways as proposed align with and are otherwise coordinated with streets serving adjacent properties; and*
 - iv. The streets and pedestrian ways as proposed are adequate to accommodate anticipated traffic; and*
 - v. If the conditional use will rely on public water or sewer services, there is capacity in the water or sewer system (as applicable) to serve the conditional use, and the applicable service(s) can be made available at the site; and*
 - vi. The conditional use conforms to the "City of Bainbridge Island Engineering Design and Development Standards Manual," unless the city engineer has approved a*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEPA Threshold Determination Appeal

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

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

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

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

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

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

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

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

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

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

Project Conditions

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

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

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

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

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

Final Observations

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

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

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

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

DECISION

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

SEPA Conditions

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

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

Project Conditions:

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

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

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

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

Specifically the following conditions shall apply:

Stormwater Management:

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

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

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

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

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

Traffic and Roads:

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

H. All internal roadways will be privately owned.

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

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

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

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

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

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

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

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

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

Water and Sewer Improvements:

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

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

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

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

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

Permits Required:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED March 27, 2014

/s/ Stafford L. Smith
Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

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

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

VISCONSI REPORT AND DECISION - 58

EXHIBIT LIST

SEPA MDNS Appeal
and
Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
1	Staff Report Attachments: A. Public Participation Meeting Summary and Comment Matrix B. Site Plan and Design Review Application, Submitted April 24, 2013 C. Conditional Use Permit Application, Submitted April 24, 2013 D. Owner/Agent Agreement and Legal Descriptions E. Site Plans and Perspectives A0.0 - A0.5 F. Building Elevation and Perspective Plan A1.0-A17.0 G. Landscape Plans L.1-L.12 H. Preliminary Civil Plans C1-C5 I. Project Description/Zoning Summary Prepared by Wenzlau Architects J. Planting Plan Supplemental Information Appendix K. Tree Retention Analysis L. Traffic Impact Analysis Prepared by Transpo Group April 2013 M. Wetland Analysis Prepared by Christy Carr N. Wetland Analysis and Rating Form Prepared by Ryan Erickson and Sara Cooke O. Water/Sewer Availability Request P. Utility Report Prepared by Browne Wheeler Engineers, Inc, April 24, 2013 Q. Civil Plan Revision 1 Memo from Browne Wheeler, Sep. 5, 2013 R. Environmental Checklist S. Geotechnical Evaluation, Prepared by Aspect Consulting, April 17, 2013 T. Notice of Application, Published June 7, 2013 U. Revised Notice of Application, Published July 5, 2013 V. Public Comment (1-130) W. Response to Public Comment, Prepared by Wenzlau Architects X. Response to O'Hartigan's Comment Letter, Prepared by Browne Wheeler Inc. Y. Overview of Traffic Report and Response to Comments, Prepared by City's Development Engineer Z. Development Engineer Project Review Memo AA. Certificate of Concurrency BB. Public Works Operations and Maintenance Comments CC. Non-Motorized Transportation Advisory Committee Chair Comments DD. Kitsap Public Health District Comments EE. Bainbridge Island Fire Department Comments FF. Building Division Comments GG. Design Review Board Minutes, March 26, 2012	10/3/2013 (Dated)

EXHIBIT LIST

SEPA MDNS Appeal
and
Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

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

EXHIBIT LIST

SEPA MDNS Appeal
and
Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

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

EXHIBIT LIST

SEPA MDNS Appeal
and
Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

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

EXHIBIT LIST

SEPA MDNS Appeal and Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

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

EXHIBIT LIST

SEPA MDNS Appeal and Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
58	Port Orchard Wal-Mart Sound Analysis (2005)	01/22/14 (Received)
59	Declaration of Errol Nelson	01/22/14 (Received)
60	Chichester Submittal	01/22/14 (Received)
61	Ron Peltier Aerial Photos	01/27/14 (Received)
62	Ron Peltier Presentation	01/27/14 (Received)
63	Olaf Ribeiro Resumé	01/27/14 (Received)
64	Guidelines for Predicting Noise Impacts	01/27/14 (Received)
65	Nelson - Noise Evaluation	01/26/14 (Dated)
66	Aerial Photo Showing Tree Stands	01/28/14 (Received)
67	Diagram of Access Road Design	01/28/14 (Received)
68	Applicant Visconsi's Voluntary Mitigation	01/28/14 (Received)
69	Resume of Bruce MacCoy	01/30/14 (Received)
70	Excerpts From Winslow Master Plan, May 21, 1998	02/03/14 (Received)
71	Visconsi Supplemental Noise Evaluation	02/03/14 (Received) 02/18/14 (Revised)
72	Visconsi Noise Measurement Charts	02/03/14 (Received)

EXHIBIT LIST

SEPA MDNS Appeal
and
Permit Application

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

Staff Contact:
Josh Machen, Planning Manager

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

Hearing Examiner: Stafford Smith

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

May 5, 2014

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

ORDER ON RECONSIDERATION

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

File number: SPR/CUP 17734

Appellant: Islanders for Responsible Development

Applicant: Visconsi Companies LTD

Owners: Deschamps Partnership LP and Suzanne Kelly

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

1. The applicant, Visconsi Companies LTD, and the SEPA appellant, Islanders for Responsible Development ("IFRD"), filed timely motions for reconsideration of certain conditions appended to the Hearing Examiner's March 27, 2014, decision approving the Visconsi site plan review and conditional use permits and denying the IFRD SEPA appeal. IFRD has also requested amendment of findings related to noise regulation and the Planning Commission review process. A notice dated April 14, 2014, authorized written comments to be submitted by the parties and the public through April 25, 2014, in response to these motions. Timely comments were received from Stonecress residents Linda and Barry Andrews and Margaret Tchakerian and from the applicant. Comments will be considered to the extent that they relate to the issues identified within the motions; new issues cannot be raised through commenting.

2. Most of the requested changes to the March 27, 2014, decision targeted the project conditions, but two of IFRD's requests were for revisions to language contained in the report's findings. The first seeks modification of language within the findings describing the process pursuant to which the Planning Commission's recommendation for project denial was reached. The gist of IFRD's contention is that the Examiner's discussion overstated the role played by Commissioner Maradel Gale in the process and "marginalizes the rest of the Planning Commission."

3. Finding number 17 states that "[b]ased on proposed findings drafted by Commissioner Maradel

Gale, the Planning Commission voted unanimously on November 14, 2013, to recommend denial of the Visconsi site plan and conditional use permit applications." The opening sentence of finding 18 relates that "Commissioner Gale's written findings regarding the deficiencies of the Visconsi proposal were accepted by the Planning Commission as the basis for its recommendation of denial." This finding and the next one then further discuss the Planning Commission's written recommendation in the context of it being based on Commissioner Gale's analysis. This characterization was deemed appropriate because Commissioner Gale was identified as the principal author of the written recommendation and appeared at the public hearing before the Examiner to both explain and vigorously defend the Planning Commission position. One other Planning Commissioner, Jon Quitslund, also participated in the hearing, but he spoke before Commissioner Gale's appearance and only briefly described the Commission process in general terms.

4. Notwithstanding IFRD's displeasure, the findings stated in the March 27, 2014, decision relating to the Planning Commission process neither were materially inconsistent with the hearing record nor did the matters related therein have any actual effect on the ultimate permitting or appeal decisions. It is uncontested that Commissioner Gale was mainly responsible for drafting the recommendation, the Commission adopted it as presented, and only Commissioner Gale described and explained it at the hearing. The Planning Commission recommendation eventually was rejected by the Hearing Examiner, but that outcome depended in no way on questions of authorship or attribution. Thus in terms of the decisional process, IFRD's request appears to be inconsequential; it adds up to nothing more than a complaint about style and emphasis. In other words, it is an effort at political spin. The request will be denied.

5. The IFRD request for reconsideration of finding number 99 is more substantive. This finding contains language implying that traffic noise generated by vehicles on the private Visconsi site would not be subject to noise control regulations. WAC 173-60-050(4)(a) exempts from regulation noise generated by any vehicles on public highways subject to WAC Chapter 173-62, and the noise exemption for vehicles on private property stated at WAC 173-60-050(4)(f) does not apply if the receiving properties are residential. Visconsi points out that it has volunteered to be subject to noise monitoring and suggests the matter should be deemed moot. But even so, the exemption reference in finding 99 is inaccurate and should be corrected, as requested by IFRD.

6. Regarding IFRD's various requests for amended language within the permit conditions, Visconsi has agreed to the proposed changes involving conditions 11(b) (fence extension), 23(J) and (Q) (speed limits) and 47 (service delivery hours). These requests will be granted as proposed. Condition 23(J) is also the topic of Visconsi's sole reconsideration proposal, which seeks increased flexibility with regard to the design of safety features for crosswalks C and D traversing the internal spine road. No one has objected to this request, and it also will be granted.

7. IFRD has requested modification of condition number 21, which places limitations on the drive-through windows proposed for site buildings 1 and 2. IFRD is concerned that if in the future the currently anticipated uses for these buildings change, the City may fail to make a necessary new determination as to the appropriateness of retaining the drive-through facility. This circumstance is covered by condition number 49(A), which requires the City to review a proposal for a building conversion and issue a change of use approval. Modification of condition 21 is therefore unnecessary, and the IFRD reconsideration request pertaining thereto will be denied.

8. The IFRD request regarding condition number 25 is that the requirement for five motorcycle parking spaces serving the site as a whole be expanded to encompass five spaces for each building or building cluster, which would raise the total to at least 20 and perhaps 35 spaces. IFRD also seeks to add to the condition some sort of design requirement to address the visibility of motorcycles to other "maneuvering vehicles within the parking area." Condition 25 is a voluntary mitigation offered by Visconsi; it was never formally requested by IFRD (see exhibit 52) nor discussed at any length at the hearing. As a result, the record provides an insufficient basis for concluding that five stalls is an inadequate number of motorcycle parking spaces. Further, IFRD's stated rationale for the design component of its request -- that the condition as written poses a "great risk of injury to motorcycles and riders" -- relies on a factual contention that was never elaborated within the hearing testimony. As such, this request must be denied as unsupported by the hearing record.

9. A stronger case exists in support of IFRD's request for modification of condition number 29 to include language linking the commuter bike shelter location to existing bus stops. The exhibit 52 summary of the IFRD project conditions testimony identified a need to provide of "a community bike shelter in order to reduce ferry congestion downtown." Condition 29, which incorporates language from the Visconsi voluntary mitigation proposal, specifies a bike shelter but not its location. Visconsi's objection to the IFRD request is mostly based on speculation about whether WSDOT would in fact permit a bike shelter to be sited within the SR 305 right-of-way. A further unknown is the precise future location of the bus shelter required by condition number 30. Since the logic of a "commuter" bike shelter is that it be convenient to public transportation, in principle the IFRD request is reasonable and should be granted in some form. But the language of the condition needs to be flexible enough to accommodate currently unknown design factors.

10. IFRD contends that condition number 38, which requires that "[e]xterior trash receptacles/recycling facilities shall be fully screened with solid walls and gates," does not go far enough to protect Stonecress residents from site-generated noise and that such facilities therefore should be moved further away from the eastern property line. The IFRD motion mischaracterizes the record in attributing to the Visconsi sound engineer a statement to the effect that the currently proposed location of the facilities "would have a significant negative impact on the adjacent neighborhood." What Mr. Nelson actually suggested was that without sound attenuation some noise from clanging receptacle lids would likely be perceptible offsite. The Visconsi response to the IFRD motion states that the "masonry enclosure for the trash/recycle receptacles will be held a minimum of 30 feet from the Stonecress property line;" condition 38 will be modified to include this information. Also on this subject, Linda and Barry Andrews have proposed in their comment that a requirement for trash receptacle covers be added to condition 38 based on a representation made by Visconsi at a meeting with Stonecress homeowners. But because this meeting took place outside the public hearing framework, any private agreements reached in that forum cannot supply a legal basis for permit conditions unless the parties specifically so stipulated.

11. Controlling truck traffic usage of Polly's Lane on the western boundary of Stonecress is at best a complicated and uncertain task. Ultimately the most effective measures will be those that bar entry from High School Road to Polly's Lane and operate to assure the functionality of the main access spine road so that the motivation to seek out an alternative route will be minimized. While these primary mitigations will be supported by provisions for "no trucks" signage at the Visconsi exit to Polly's Lane (condition 23(Q)) and Visconsi's voluntary mitigation condition for limiting the size of vehicles under its control (condition 47), the effective value of these two secondary conditions will mainly be

informational. No sentry is going to be posted at the site exit to enforce the no truck access signage, and the condition 47 truck size limitation will not apply to non-Visconsi vehicles such as contractors exiting from ProBuild.

12. The IFRD reconsideration motion queries whether conditions 23(Q) and 47 are inconsistent and suggests modifying condition 47 to make it applicable to all commercial delivery vehicles rather than just those larger than a single unit three-axle truck. There are two basic reasons why this suggestion should be rejected. First, as noted above, while the comprehensive "no trucks" signage will convey potentially effective information to the public generally, it is likely to have little actual regulatory consequence and thus does not provide a workable template for narrower conditions of a more mandatory nature. Second, the position taken by IFRD at the hearing as documented in exhibit 52 was that "all large truck traffic" should be prohibited on Polly's Lane. A last minute attempt by IFRD to move the goal posts further back should not be accommodated absent a truly compelling rationale. Condition 47 as written, insofar as these matters lie within Visconsi's control, gives IFRD exactly what it originally requested.

13. IFRD's final reconsideration request, also supported by the email from Barry and Linda Andrews, is that Visconsi be required to pay one-third of the annual costs for maintaining the Stonecress stormwater system based on the fact that 5 of the 15 Stonecress roadway catch basins are located within Polly's Lane, which will inevitably handle some traffic exiting the Visconsi site. But a proposal to allocate the responsibility for stormwater maintenance based on nothing more than a catch basin count suffers from multiple deficiencies. Here are a few. First, the record provides no information on what the overall costs of Stonecress stormwater system maintenance are and what percentage of such costs should reasonably be assigned to catch basin and culvert functions. Second, Visconsi will not add new flow volumes to the Stonecress system but only a marginal increase in pollution to existing flows; no information exists in the record as to actual pollution quantities or the nature of Stonecress runoff pollution treatment facilities (if any) and their maintenance costs. Third, extrapolating from the project traffic study, the percentage of Visconsi traffic using Polly's Lane should constitute about one-third of the total volumes for the road, but the IFRD formula assumes (without offering any justification) that 100 percent of the maintenance costs to the stormwater system attributable to all vehicle use of Polly's Lane should be imposed on Visconsi. Finally, as noted by Visconsi's response, while Polly's Lane may possess one-third of the system's catch basins, it only comprises about 10% of Stonecress's impervious area, thus further undercutting a conclusion that a simple catch basin count supplies a logical mitigation trigger.

14. But even if the proposed IFRD formula were rationally defensible, there is also a consideration of overall fairness that argues persuasively against imposing additional stormwater facility costs on Visconsi. Because Stonecress lies within the nearby downstream conveyance system for the Visconsi northeast drainage basin, condition number 23(F) requires the developer to assure adequate stormwater flow capacity through Stonecress. While the exact nature of the problem remains to be determined, the thrust of the neighborhood hearing testimony was that the Stonecress system downstream from the Woodland Village wetland is *presently* malfunctioning – either wetland flows are not bypassing the pond or the bypass pipe is undersized. Condition 23(F) requires Visconsi to assess and fix this problem, a problem that it obviously did nothing to create. This requirement will confer a significant benefit on Stonecress above and beyond any mandated project impact mitigation effects. This benefit will surely exceed any rationally demonstrable new maintenance costs imposed on Stonecress resulting from a minor additional contribution to runoff pollution loads on Polly's Lane.

ORDER

On reconsideration, the Hearing Examiner's March 27, 2014, decision is modified as follows:

1. The first sentence of finding number 99 on page 24 is revised to read as follows:
"Traffic noise is the potential impact source of greatest worry to Stonecress residents."
2. Condition number 11(b) on page 51 is revised as follows:

(b) A 150 LF 6' high board on board fence starting just north of the Applicant's Development connection to Polly's Lane and running north along the west property line of Stonecress shall be installed adjacent to the 30' buffer to provide additional screening for the Stonecress homes. The fence will be placed on Stonecress's west property line prior to final inspection of the first building in this development.
3. Condition 23(J) on page 53 is revised as follows:

J. For the Primary Access Road ("the spine road"), submit a final design which includes the addition of a planter strip between the Primary Access Road and sidewalk to the east of the drugstore building and proposed relocation of crosswalks by the drugstore as set out in Hearing Exhibit No. 53. As approved by the City Development Engineer, the layout depicted in exhibit 42 shall be modified to eliminate crosswalk A; shorten the divider strip so that its northern tip does not extend north of the northeast corner of building 4 and the bulb is removed; reduce the intersection offset for the driveways north of buildings 4 and 5; and provide a pedestrian walkway along the western edge of the rain garden north to the ProBuild entry. Crosswalks B and D shall be elevated 6 inches above adjacent grade where they cross the spine road, be constructed from materials that contrast with the driving surface, and be flanked on both approaches by speed humps or tables; provided that, in the alternative the applicant with City Development Engineer approval may install stop signs at crosswalks B and D in lieu of an elevated crosswalk flanked by speed humps or tables. The spine road will be posted with a 15 mph speed limit, but the speed limit will not be enforced by the City of Bainbridge Island.
4. Condition 23(Q) on page 54 is revised as follows:

Q. A design for limiting Polly's Lane to one-way southbound traffic use, with left and right turn movements provided to High School Road and a 15 mph speed limit, shall be submitted to the City Development Engineer for approval. The applicant will install "One Way" and "Do Not Enter" signs. The design shall also prohibit placement of street lights along Polly's Lane. The design features listed above will also require Fire Marshal review and approval. A "Local Traffic Only" sign shall be placed on the corner of the intersection of Stonecress Drive and High School Road, and a "No Trucks" sign shall be placed at the Applicant's Development exit to Polly's Lane. The site development exit design shall include features for preventing or discouraging entry from Stonecress Lane. A crosswalk shall be placed just south of Stonecress Drive across

Polly's Lane. Once the conceptual approvals required by condition 44 below have been obtained, the facilities required by this condition all shall be installed prior to the connection of the Applicant's Development to Polly's Lane.

5. Condition 29 on page 54 is revised as follows:

A minimum of 53 bicycle spaces are required for this development; a proportional number of spaces are to be installed in conjunction with the completion of each building. The racks or wall hangers need to provide the ability to lock wheel and frame of bicycle. At a minimum there should be bicycle racks associated with each building within the development. The site will provide a commuter bike shelter accommodating 8 bicycles prior to the last building receiving a certificate of occupancy. The location of the bike shelter is to be determined after the location for the bus shelter required by condition 30 below has been decided and, to the extent reasonably feasible, shall be accessible an existing bus stop, as approved by the Planning Director.

6. Condition 38 on page 56 is revised as follows:

Exterior trash receptacles/recycling facilities shall be fully screened with solid walls and gates and fully contained within a masonry enclosure, the eastern wall of which shall be at least 30 feet from the closest point along the eastern site property line. The screening enclosures shall be architecturally consistent with the adjacent structures. All enclosures serving associated buildings shall be constructed and inspected prior to final inspection of the associated building.

7. Condition 47 on page 57 is revised as follows:

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

ORDERED May 5, 2014.

Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

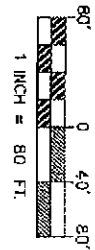
EXHIBIT "E"

Total Usable Area of Lots
(pursuant to Section 3.5)

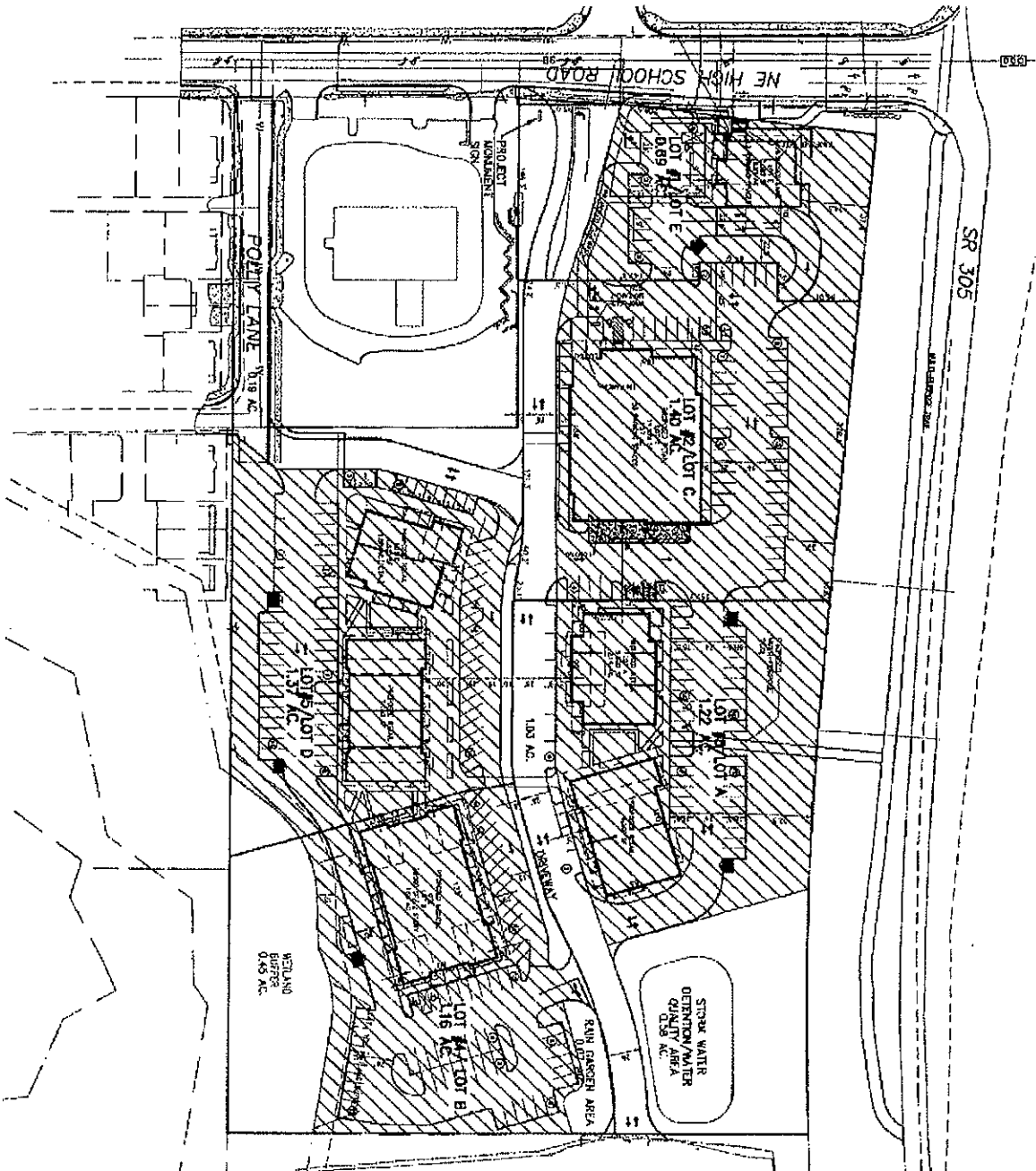
[See Attached]



GRAPHIC SCALE



USABLE AREA	
LOT A:	1.22 AC.
LOT B:	1.16 AC.
LOT C:	1.40 AC.
LOT D:	1.37 AC.
LOT E:	0.89 AC.
TOTAL:	5.84 AC.



DECLARATION
EXHIBIT E

NEC SR 305 & NE HIGH SCHOOL ROAD
BAINBRIDGE, WA

PROJECT No.:
DWG NAME: Bldg. EX-34
DWG SCALE: 1"=80'
DRAWN BY: S.M.
CHECKED BY: S.M.
DATE DRAWN: 6/17/16
REVISION:

SHEET NO.
EX E