

Hello Heather,

Please forward this memo to the Planning Commission for their consideration before the September 9 meeting. In this memo we address several issues that have been under discussion.

**Departure/variance request to allow all 31 affordable units to be sold to low income households is not necessary.** Thank you for pointing out the verbiage in BIMC 18.12.030.E.1.a that provides: “*Development of the optional affordable housing shall be in accordance with Chapter 18.21 BIMC and Table 18.12.030.*” (emphasis mine)

Chapter 18.21 BIMC, which governs affordable housing constructed pursuant to density bonuses (which is the case with our project) provides as follows: “*Where the code limits benefits to households whose incomes are at or below a specified income, the purpose is to include all categories of income, as defined in Chapter 18.36 BIMC, below the category specified. For example, if the benefit limit is, “to those households whose incomes are at or below low-income,” households who are extremely low income, very low income and low income may benefit.*” See BIMC 18.21.020.H.

Table 18.12.030 provides as follows (yellow highlights are applicable):

**Table 18.12.030: Optional Affordable Housing Bonus Summary Table**

Size of Development	Residential development less than 10,000 sq. ft.	Residential development of 10,000 sq. ft. but less than 60,000 sq. ft.	Residential development more than 60,000 sq. ft.
Affordable Housing FAR Bonus	Must provide 100 percent of bonus square footage for extremely low, very low, or moderate income groups.	Must comply with following ratios: (a) 100 percent of bonus for all moderate; OR (b) 0.2 of bonus for extremely low, very low, or low income groups; 0.5 of bonus for moderate income group; and 0.3 of bonus for middle income group.	Must comply with following ratios: 0.1 of bonus for extremely low, very low or low income groups; 0.6 of bonus for moderate income group; and 0.3 of bonus for middle income group.

Per BIMC 18.12.030.E.1.a, Table 18.12.030 must be read in light of BIMC 18.21.020.H, which means that “moderate income group” and “middle income group” in the table both include all lower income groups. Thus, the code allows us to sell 100% of the affordable units to low income households. No departure or variance from the code is necessary.

**The natural areas and community spaces are consistent with the code.** Per BIMC 17.12.070.E, in all residential subdivisions, “*Any area not designated as a public or private access, buffers, lots or utility tracts shall be designated as either natural area or community space, in accordance with the objectives in either BIMC 17.12.050.A.1 or 17.12.050.B.1.*” This is what we have done.

The natural areas are all inside roadside buffers, and therefore the minimum width is 5 feet (see BIMC 17.12.050.A.5.e and Table 17.12.070-1). The natural areas meet one or more of the following objectives: preserve and protect natural resources and ecological functions; preserve and protect native soils and topography;

preserve and protect scenic views along roads; promote interconnected open space, wildlife corridors, and undeveloped areas; and promote a development pattern consistent with island character. And the natural areas, to the extent feasible, are concentrated in large consolidated areas (with perimeter-to-area ratios that are as low as feasible); connect to adjacent off-site open space areas, designated wildlife corridors and trails, and/or critical areas; and preserve views from off site of the subject property.

There is no minimum width for community space. The community spaces in the project meet one or more of the following objectives: provide a place for residents to gather in shared space; provide common buildings, open space, or gardens; provide space for unstructured recreation; enhance a felt and actual sense of security, identity, and community; and provide a protected, traffic-free environment. And the community spaces adjoin 59 of the 73 lots, and the non-adjacent lots have easy access by way of sidewalks.

As stated in the staff report, our project exceeds what is required by code in terms of natural area and community space:

Natural Area: 15.18% (5% required by code)

Community Space: 13.9% (10% required by code)

This is so because the project is using only about 75% of the allowed density. This allowed us to design the project such that every unit either fronts or backs onto a natural area or community space.

**The project will generate less traffic than commercial development, and it will have less traffic, and lower speeds, than other residential projects on the Island.** The City Engineer finds that, provided recommended conditions are adopted, the site plan conforms to the City of Bainbridge Island Design and Construction Standards and Specifications, and that the streets and pedestrian ways as conditioned are adequate to accommodate anticipated traffic. The traffic study indicates that our project will generate substantially less traffic than commercial development. And within the site, the only traffic will be residents, and Lumbermen's and VM customers. There are multiple traffic controls within the site (3 stop signs the length of our project alone), which serve to keep vehicle speeds under 20mph. This is a much better safety profile than projects that front Madison Avenue and High School Road for example. (NOTE: The overall safety of the project will be greatly enhanced if the courtyard area on the west lot is preserved – see Buffer discussion below.)

**The applicable guidance requires a 25-foot vegetated buffer along SR 305, and a wider buffer would only serve to degrade quality of life for the residents.** At the September 2 meeting the Planning Director and the Chair of the Design Review Board clarified that the DRB's recommendation of a 50-foot vegetated buffer along SR 305 was just that, a recommendation, and not a mandate that had been laid down by the DRB. This is consistent with BIMC 2.16.125.E.5, which provides that the DRB is an advisory body, and that its recommendations are not final decisions. The Planning Commission must determine how much weight to give to the DRB's recommendation of a 50-foot buffer.

With respect to the buffer along SR 305, the guidance we have is the table on page 62 of the Design for Bainbridge Manual (which provides a range of 25 to 50 feet for the width of the buffer), and Table 17.12.070-1 (which provides a minimum building setback of 25 feet to SR 305). In accordance with rules of statutory construction, we have to interpret the two tables in relation to each other and in a way that all provisions are harmonized and given effect. In other words, if there's a way to interpret the two tables such that there's no conflict between them (and therefore no need for one to supersede the other), then that's what we must do. Under these guidelines, the only way to harmonize and give effect to the two tables is to interpret them, collectively, to require a 25-foot vegetated buffer. A buffer wider than 25 feet results in conflict between the two tables in that it overrides Table 17.12.070-1's allowance that the buildings can be within 25 feet of SR 305. In other words, a buffer wider than 25 feet negates the 25-foot setback set forth in Table 17.12.070-1 and effectively rewrites it to the recommended width of the buffer. (NOTE: It's not always possible to harmonize statutory provisions. For

instance, if Table 17.12.070-1 provided for, say, a 10-foot setback, then we would not be able to harmonize the two tables and give effect to both. But that's not the case here. Here, we can harmonize, and we must do so.) Thus, the appropriate recommendation for the vegetated buffer along SR 305 is 25 feet as it harmonizes and gives effect to the two applicable tables. (NOTE: We are proposing a 25-foot vegetated buffer and a 35-foot building setback along SR 305.)

The foregoing interpretation is warranted for other reasons. First, if the DRB's recommendation of a 50-foot buffer were to be adopted, as stated above, it would effectively rewrite Table 17.12.070-1. However, citizen advisory committees do not have the authority to override city code, to legislate. Legislative powers reside exclusively with City Council. Second, developers, as a matter of due process, are entitled to know with certainty which development standards apply to their project. See RCW 58.17.033 (land use applications are to be considered under the ordinances in effect at the time a fully completed application is submitted). We started our design work in the Fall of 2020, and we had a 25 foot buffer along SR 305 from the get-go in reliance on the applicable guidance. The Pre-Application Conference confirmed the validity of the 25-foot buffer in conjunction with Table 17.12.070-1. Then, five months into the land use review, the DRB recommended a 50-foot buffer. Thus, when we submitted our application in February 2021, and when it was deemed complete in April 2021, we still did not have certainty on the buffer – rather, we had unclear and conflicting guidance from City staff and the DRB. This is the opposite of certainty, and it highlights the problems with the interplay between the Design for Bainbridge Manual and BIMC. Third, in the absence of the ability to harmonize the two tables, which fortunately we are able to do here, there is inadequate guidance in the table in the Design for Bainbridge Manual explaining how the DRB should exercise its discretion in terms of selecting the high end of a range versus the low end. This puts the DRB in an untenable position and arguably renders this delegation of authority to the DRB constitutionally infirm.

Not only is a 25-foot vegetated buffer required by the applicable guidance, but also it is the correct thing to do from a design standpoint. Attached are two site plans, both prepared by our engineer. The one in color is the one we are proposing with a 25-foot vegetated buffer and 35-foot building setback from SR 305 on the west lot. The other one shows the west lot with the 50-foot vegetated buffer proposed by the DRB, which results in a 60-foot building setback from SR 305. If you do a side by side comparison of the site plans (specifically the west lots), the destructive effects of the 50-foot buffer are obvious. Among other things, the 50-foot buffer results in the following: loss of 3 affordable units, loss of 5 parking spaces, reduction of the courtyard area in the west lot from approximately 40 feet to 14 feet (eliminating or reducing amenities), and relocation of detention tanks in the buffer along SR 305 because there is nowhere else for storm drainage. These changes would reduce the amount of sunlight in the west lot, result in less vegetation (including trees) in the courtyard area, and force residents (including children) to find other places to gather and play, which could result in more crossings of Wintergreen Lane, thereby reducing overall safety. Also, as set forth in the noise engineer's report, increasing the width of the buffer has only a negligible impact on noise reduction. According to Mr. Dunstan at the September 2 meeting, the rationale for a wider buffer was to heal the land by replanting trees. However, as shown in the attached site plan, the detention tanks have to be moved into the buffer, and no trees can be planted over the tanks, which rules out replanting trees in about half of the added buffer width.

NOTE: We are environmental builders, and thus we are sensitive to the loss of trees on the site (even though not by our hand). As a gesture of good faith, we have put a lot in Fort Ward under contract (about 0.2 of an acre) for \$95,000 with the intent of putting a conservation easement over it to replicate the trees that would have been added in a wider buffer. The property is covered with existing mature trees. If this is of interest to the PC, we can discuss it further at the September 9 meeting.

**The DRB's recommendation is incomplete and inconsistent.** The Planning Commission is required to give weight to the DRB's recommendation. This guidance begs the questions: What is the recommendation? How much weight is to be given to it? As to the first question, the answer is only the video of the June 21 meeting, and the last page of the D for B Worksheet. That's it. This is so because the land use review process is divided into two phases: proposal and application. During the proposal phase the DRB gives the applicant guidance. The applicant then takes that guidance and prepares a land use application. This is exactly what happened here. In

the course of preparing our land use application, we consulted extensively with architect Charlie Wenzlau, who is not only a talented architect with intimate knowledge of the Design for Bainbridge Manual, but who also was the architect for the Visconsi Group in 2013-2014 when the overall site plan was approved, and thus he is intimately familiar with the site and the prior approval. Our application was deemed complete by the City on April 15, 2021, and we had our final meeting with the DRB on June 21, 2021, which was over 3 ½ months since we had last met with the DRB. In those 3 ½+ months we made many design changes (suggested by the DRB and Charlie Wenzlau), and prepared and submitted, with Charlie Wenzlau's assistance, copious application documents, including a Statement of Design Intent and detailed comments in the D for B Worksheet (designated **APPLICANT 06/14/2021**) explaining why the project meets all 23 Design Standards. Thus, when the DRB reviewed the project on June 21, 2021, it was the first time they had seen it during the application phase, and it was considerably different, improved and polished since they'd last seen it. Per the Design for Bainbridge Manual and BIMC, the DRB was charged with reviewing the project and, more specifically, *"The design review board will forward written findings, their determination of the project's consistency with the design guidelines, the design guideline checklist, and their recommendation, including any conditions, to the staff planner."* See BIMC 2.16.125.E.4.b (emphasis added). The DRB failed to follow this guidance in that they did not respond at all to our June 14, 2021 comments in the D for B Worksheet. All of the DRB's comments in the worksheet are from February or March, months before our application was deemed final. Thus, the PC has no written comments specific to our project, as submitted in April 2021, regarding its consistency with the design guidelines. This is the critical information that the PC is supposed to give weight to. But it's non-existent. All we have is the video of the June 21 meeting, which hopefully the PC members have had a chance to watch, or at least the portion from the 2:32 mark to the 2:50 mark, and the last page of the D for B Worksheet. As for the video, what is undisputed is that the DRB was prepping an "Approval with Conditions" very late into the meeting – which means a majority of the DRB was supportive of this recommendation, and which recommendation necessarily means that the project meets all 23 Design Standards – when a discussion of the vegetated buffer along SR 305 ensued. Following this discussion, the recommendation changed to "Denial with Deficiencies" and included the statement "Does not meet the 23 Design Standards listed in the Design for Bainbridge book."

As for the stated deficiencies, we have addressed/remedied them as follows:

23 Design Standards: Our June 14, 2021 comments in the D for B Worksheet are the only comments the PC has as to compliance with the Design Standards with respect to the project we submitted (as opposed to the conceptual and necessarily incomplete materials we submitted during the proposal phase).

50-foot buffer – This is discussed above. It's a legal issue more than a design issue, and as such is not within the DRB's purview, and therefore is not something the PC and other reviewing bodies should give weight to. But even if viewed as a design issue, as discussed above it is not something to be endorsed.

Lack of updated landscaping plan – Remedied

Unit floor plan on landscape plan – Remedied

Screening on north and south sides - Remedied

Articulation on building ends - Remedied

Materials and colors – Remedied (there is a materials/colors palette at City Hall for the PC to view)

Traffic flow – As stated above, the City Engineer approves of the traffic flow, and as the DRB notes it is consistent with the Visconsi approval.

In legal parlance, where, as here, the record from below is not developed enough to allow for deference to the lower body's decision, the reviewing court must necessarily do a *de novo* review. That's the position the PC

largely finds itself in. The video sheds light on the DRB's thinking separate and apart from the buffer issue, there is nothing from the DRB regarding the project's compliance with the Design Standards (other than the circumstantial evidence of the DRB prepping an "Approval with Conditions" during the June 21 meeting), and we have addressed or remedied all of the identified deficiencies.

**Clarification.** – In a local newspaper article and elsewhere, there have been comments to the effect that we are asking for compromises in terms of the review process and the code. Not true. Although the Comp Plan calls for flexible permitting processes for affordable housing projects (and the PC can certainly factor this into its review), we have gone through normal permitting process (and then some), and we believe our project meets code without any "affordable housing discount." And although the Comp Plan calls for financial assistance for affordable housing projects, other than the bonus FAR, we are receiving no financial contributions from the City or otherwise. In this regard, it's important to note that affordable housing projects do not happen without significant financial contributions. For instance, Ferncliff Village was made possible by private donation of the land. Here, with our project, we are contributing over \$400k to HRB and Housing Kitsap to cover their costs and then some, and we are subsidizing the sale of the affordable units to low income buyers (about \$50k per unit for the 28 units that could be sold to moderate and middle income households).