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June 30, 2017

*Via Regular Mail and Electronic Correspondence (pcd@bainbridgewa.gov and
hwright@bainbridgewa.gov)*

Planning Commission
280 Madison Avenue North
Bainbridge Island, WA 98110

Re: Permit Number:	PLN50177 SPR
Applicant:	TSENG Properties, LLC PO Box 11765 Bainbridge Island, WA 98110
Project:	Creative Space Site Plan and Design Review

Dear Planning Commission:

This law firm represents Tseng Properties, LLC. In response to the City of Bainbridge Island's Staff Report, dated June 9, 2017, I am enclosing the following:

1. A copy of the June 9, 2017, Staff Report with my client's responses to the issues the City has raised as the bases for its position the application should be denied. My client's responses are in red;
2. For ease of reference, a copy of my April 17, 2017, letter to the City; and
3. Copies of a letter from the City's Planning Director, dated January 5, 2011, and a settlement agreement between the City and the owners of Lot B, which is just south of the property. The owners are also members of Tseng Properties, LLC. Per the letter, the owners expected there to be a "... reset of our working relationship ..."

There has not been a reset of the working relationship between the City and the applicant. The application is for a relatively modest development of 4.55 acres located in the Business/Industrial zone. In fact, only a little more than a quarter of the property will be developed under the proposed plan. The remaining portion of the property will remain undeveloped and in its vegetative state. Moreover, while the property is located in the Business/Industrial zone, the intended use of the property is also relatively modest in that it consists of 10 buildings, a total footprint of approximately 19,200 sq. feet in size to be rented out as commercial space.

Letter to Planning Commission
June 30, 2017
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The City, for reasons unknown to the applicant, has been opposed to working with the applicant to approve the application. In its Staff Report, the City has asserted several issues that it believes the applicant has not adequately addressed. As set forth in the applicant's response on the Staff Report, the issues raised by the City either (1) will be addressed by the applicant, and the approval of the application can be made subject to the applicant addressing the issues; or (2) the issues have been addressed or there is no requirement to address them as set forth in my client's response to the Staff Report.

The only issue that would truly prohibit the applicant from constructing the 10 buildings is the 50' buffer that was imposed after the application had already been submitted and approved by the Design Review Board. However, as set forth in my April 17, 2017, letter, Ordinance No. 2016-1, which enacted the 50' buffer, does not apply to the application. Therefore, we would respectfully request that the Planning Commission recommend to the Director that the application be approved, subject to my client complying with the following:

1. Obtaining the abandonment of the 50' access and utility easement on the southern border of the property;
2. Site-specific analysis of the potential impacts of the storm water on the wetlands;
3. Re-location of the drain fields to comply with Health Ordinance 2008-A-01; and
4. Re-location of the infiltration facilities or the installation of rain gardens.

Sincerely,



Christopher J. Marston

Enclosures
cc: Client

ENCLOSURE

1



Department of Planning and Community Development

Staff Report

Date: June 9, 2017

To: Planning Commission

From: Heather Wright, Senior Planner

Project: Creative Space Site Plan and Design Review

File Number: PLN50177SPR

INTRODUCTION

Applicant: Tseng Properties LLC C/O Dave Christianson
PO Box 11765
Bainbridge Island, WA 98110

Request: A major site plan and design review application to construct 10 buildings to accommodate 18 working spaces (2 per unit) and one caretaker's residence.

Location: Southwest of SR 305, west of Day Rd W, east at entrance to Manzanita Park, east of Manzanita Park/Saddle Club access road, site to the east, SE Quarter of Section 4, Township 25N, Range 02E W.M., situated in the City of Bainbridge Island, WA, having tax parcel #: 042502-4-032-2005.

Environmental Review: This proposal is subject to State Environmental Policy Act (SEPA) review as provided in chapter 197-11 WAC.

As prescribed in BIMC 2.16.040(D)(4)(C), in the case of a major site plan and design review application (reference document A), the Planning Commission shall review the application prior to the final decision by the Director. **The Director shall determine the major issues and specific aspects of the project that the Planning Commission should review, and shall forward this review directive to the Planning Commission.** The Planning Commission shall review the application based on the **Director's review directive, the DRB recommendation, and the decision criteria**, consider the application at a **public**

meeting where public comments will be taken, and forward its recommendation to the Director in accordance with BIMC [2.16.030\(C\)-\(E\)](#).

As proposed, the project is **not** consistent with the applicable sections of the Bainbridge Island Municipal Code. The application is properly before the Planning Commission for a recommendation to the Director for a final decision.

Staff Analysis

II. FINDINGS OF FACT

A. Site Characteristics

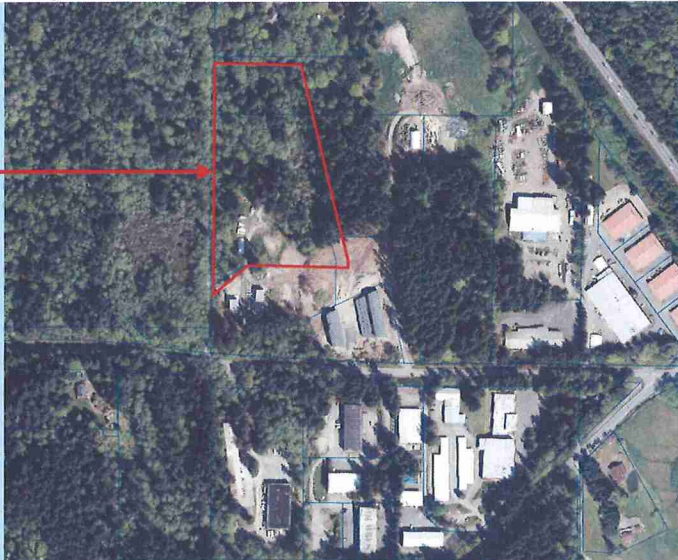
1. ASSESSOR'S RECORD INFORMATION:

- a. Tax Lot Number: 042502-4-032-2005
- b. Owners of record: Tseng Properties, LLC
- c. Site size: 4.55 acres
- d. Land use: Vacant

Vicinity Map



Project Site



- 2. TERRAIN: Gentle to moderate sloping to wetland areas with a knoll in the northeastern portion of the site and a mostly flat development area in the southeastern portion of the site. **The terrain does not slope to the wetlands. In the wetland biologist's report, he indicated that the terrain slopes away from the wetlands.**
- 3. SITE DEVELOPMENT:
The property is undeveloped.
- 4. ACCESS:
Vehicular access to the site is from a private adjoining road known as Manzanita Park/Saddle Club. A drive connects the site from the south, and emergency access is proposed to utilize this existing drive. **There is no private adjoining road. There is a private easement for ingress and egress, but it is not a public right-of-way.**

5. PUBLIC SERVICES:
 - a. Police - Bainbridge Island Police Department.
 - b. Fire - Bainbridge Island Fire District #23.
 - c. Schools - Bainbridge Island School District.
6. SURROUNDING USES:
 - a. North: Undeveloped
 - b. East: Undeveloped
 - c. South: Light Manufacturing
 - d. West: Saddle Club Park
7. SURROUNDING ZONING/COMPREHENSIVE PLAN DESIGNATION
 - a. Subject Parcel: Bainbridge/Industrial
 - b. North: Bainbridge/Industrial
 - c. East: Bainbridge/Industrial
 - d. South: Bainbridge/Industrial
 - e. West: R-0.4
8. SURROUNDING COMPREHENSIVE PLAN DESIGNATION
 - a. Subject Parcel: Bainbridge/Industrial
 - b. North: Bainbridge/Industrial
 - c. East: Bainbridge/Industrial
 - d. South: Bainbridge/Industrial.
 - e. West: OSR-0.4

We believe this is a clerical error, but the above references the zoning as "Bainbridge/Industrial." We believe it was meant to state "Business/Industrial."

B. History

1. On February 17, 2015, the applicant had a pre-application meeting with the City.
2. On March 16, 2015, the applicant had a meeting with the Design Review Board.
3. On March 16, 2015, the applicant held a public participation meeting at City Hall.
4. On October 27, 2015, the Site Plan and Design Review Application was submitted (see reference document 1 -8).
5. On December 11, 2015, the project was noticed with the comment period ending on January 4, 2016.
6. On January 4, 2016, the application was reviewed by the Design Review Board (reference doc 11).
7. On March 1, 2015, the Development Engineer sent correspondence to the applicant (see reference document 10).
8. On March 21, 2016, the City informed the applicant of outstanding landscaping requirements based on the City's Administrative Manual.
9. On April 1, 2016, the City wrote the applicant's agent a letter requesting information and informed the applicant of the increased buffer on the property (see reference document 21).

10. On June 2, 2016, the applicant's agent inquired with the City regarding the possibility of processing the application as a minor site plan review. Heather Wright, the City's Senior Planner, recommended to the applicant's agent that the application be submitted as a minor site plan review.
11. On September 1, 2016, the applicant submitted a revised application reducing the amount of buildings from ten to five (reference doc 14).
12. On September 21, 2016, the City contacted the applicant's agent to let them know there were additional revisions needed to complete the revised application.
13. On September 27, 2016, the City Council imposed a moratorium on two areas zoned Business/Industrial, which included the applicant's property. This moratorium proposed to eliminate artist studio space, and the ability to work on boats. The applicant specifically identified these two uses for its project.
14. On September 28, 2016, the City informed the applicant's agent that the Project Planner was on maternity leave and the project had been reassigned to another City Planner. In early October, 2016, the City informed the applicant that the project had been cancelled. When the applicant informed the City that it had been improperly cancelled, the City reopened the application.
15. On January 17, 2017, the City Project Planner returned from maternity leave.
16. On February 15, 2017, the City met with the owner to discuss outstanding items.
17. On February 21, 2017, the City sent the owner a letter informing them of outstanding items that needed to be addressed for the City to complete its review of the revised application (reference doc 18). There was no revised application. There was the original application for 10-buildings, and there was a separate submission for 5-buildings per Ms. Wright's recommendation.
18. On April 17, 2017, the City was contacted by the applicant's attorney, Christopher Marston (see reference document 15). The letter responded to a request letter sent on February 17, 2017. The letter concluded with a request that the City either approve the Application, deny the Application, in which case it will appeal the decision or agree to proceed with mediation under Bainbridge Island Municipal Code, Section 2.19.
19. Between April 25 and April 26, there was clarifying questions between the City and Mr. Marston. Mr. Marston informed the City that it was not his client's intention to withdraw the request to proceed with the Permit for the 10 buildings. He also stated that the documentation showing only 5 buildings was provided per the City's recommendation and requested a decision on the Permit for approval of the construction of the 10 buildings (reference doc 20).
20. On May 1, 2017 the City responded to Mr. Marston with two options (1) for the City to review the application for 10 buildings and proceed with a recommendation or denial or 2) for the City to proceed with reviewing the revised application for five buildings (reference doc 17). The City refused to proceed to mediation.
21. On May 4, 2017, Mr. Marston responded and requested that the City review the application for ten buildings (reference doc 16).
22. On May 31, 2017, the City contacted Mr. Marston regarding an easement that was not depicted on the site plans to confirm if it existed.

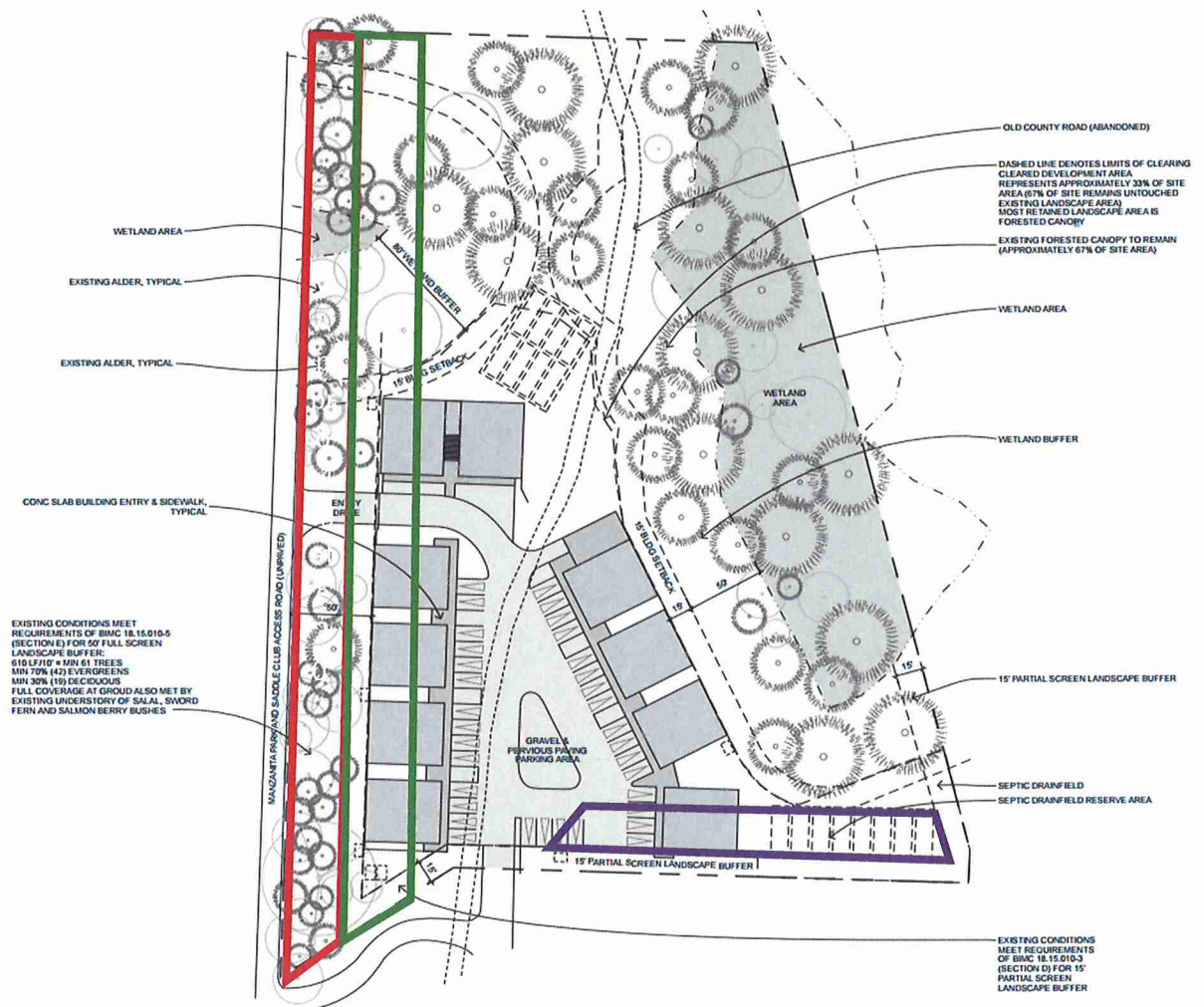
23. On June 1, 2017, Mr. Marston confirmed that the easement existed and that it could be vacated (reference doc 19).

C. Project Description

The proposal is to construct ten buildings, one of which is a caretaker's unit on a vacant property. Each proposed building has a footprint of 1,920 square feet and a floor area of 3,192 square feet. This is not correct. The applicant proposed a possible mezzanine in eight of the buildings, which could increase the total square footage of each building to approximately 2,400 sq. feet. The proposed caretaker's unit in an adjacent building is larger because it is cut into a slope, which provides additional storage space.

The property abuts a private road that is shared with the Saddle Club. The road is accessible with a 60' access easement, 30' of which are on the subject property. Thirty feet east of the road is an easement that has been left in its vegetative state. As part of the project, the intention is to leave this easement in its vegetative state, except to enhance it with a trail for pedestrians and horses. Five of the western most buildings are proposed within the 50' perimeter landscape buffer. The 50' landscape buffer was adopted through Ordinance 2016-1. Previously, it had been 30'. Since the ordinance was adopted on March 22, 2016, which was after this application had been filed with the City and approved by the Design Review Board, the application must be reviewed under the requirements of the 30' landscape buffer. For a more detailed explanation of the applicant's position, please refer to the April 17, 2017, letter submitted by the applicant's counsel to the City. A second 50' access and utility easement exists on the southern border of the property, running east/west. The applicant is proposing to include within that easement area one of the buildings, a landscaping buffer, parking, and drainfields. This easement wasn't included in the applicant's proposed site plans. In researching the site, the City discovered the easement and informed the applicant about the existence of the easement. When so informed by the City, the applicant responded by indicating that they would vacate the easement, without specifying how this would be accomplished (reference doc 19). Certain members of the applicant own and control the company that has the legal rights to the easement. As such, they are in the position to extinguish it. Moreover, approval of the application can be made subject to the extinguishment of the easement.

The property has two wetlands and associated buffers. The site plan does not propose any encroachments into the wetlands and their buffers (reference doc 6). However, stormwater is proposed to discharge to a wetland at the outfall of a replaced culvert proposed to be located opposite the access point along Saddle Club road. The applicant was asked to address the potential impacts on the wetland. This information has not been provided to the City. The applicant's civil engineer, Adam Wheeler, did submit a response to the City's concern, which addressed it. If there are further concerns, approval can be made subject to addressing the concerns.



Approximate 30' easement
 Approximate 50' landscape buffer
 Approximate 50' easement

D. Requested Revisions to the Original Application

On March 1, 2016, the City's Development Engineer (see reference document 10) requested information regarding roadway/traffic and stormwater issues. The City requested that the applicant provide a site-specific analysis of the potential impacts of the stormwater on the wetlands. Also, the applicant was asked to conduct a hydrologic analysis of the discharge leaving the site to a wetland at the outfall of the proposed replacement culvert opposite the access point along Saddle Club road. **To conduct such an analysis will cost the applicant approximately \$10,000. To incur such an expense prior to site plan approval is unnecessary and potentially a waste of financial resources. The applicant is ready and willing to conduct the analysis and will do so on approval of the site plan.**

In addition, pursuant to Kitsap County Board of Health Ordinance 2008-A-01 and the Stormwater Management Manual for Western Washington, the on-site infiltration facilities do not meet the required setbacks from buildings and related to on-site septic (OSS) drainfields and reserves. The applicant was asked to revise the site plan to meet the required facility setbacks. **The reserve drain field can be placed in alternative areas on the site. However, such a revision does not change the overall design of the project. As such, it can simply be made a condition of approval. In addition, approximately two years ago, the City allowed the Island Craft 2.0 Project,**

which is adjacent to applicant's property and zoned Business/Industrial, to locate its septic drain field in the 50' vegetative buffer along Day Road.

Furthermore, the applicant was asked to co-design the placement of on-site stormwater infiltration facilities and rain gardens with the landscape plan. As proposed, these facilities would be in required landscape buffers and would adversely affect the function of the buffers. The infiltration facilities can be placed in alternative areas on the site or it can be complied with by installing rain gardens. However, such a revision does not change the overall design of the project. As such, it can simply be made a condition of approval.

On April 1, 2016, the City (see reference document 21) requested that the applicant submit information that is required by the Administrative Manual to ensure the long-term survivability of trees required for protection in the 50' roadside buffer and within the wetland buffer. The information requested was:

- A development site plan identifying size and species of the trees and tree stands, as defined in BMC 18.15.010.C, heritage trees, or other existing vegetation that are proposed to be retained. **The application included a Landscape Plan with trees depicted. It did not include information on the size and species of the trees, with the exception of the alders that were identified.** The property impacted by the proposed development is very small compared to the overall size of the property. Except for the access to the property, the buffer areas are being left in their natural state. In addition, the plans show how the buildings and parking areas will be developed. As such, there is no need for a revised landscape plan because the existing plan complies with the requirements of BMC 18.15.010.C.
- The International Society of Arboriculture (ISA) valuation for trees where the critical root zone of a tree required to be retained may be impacted by clearing, grading, construction, development, or maintenance. **The Landscape plan did not depict the 30' easement and the 50' buffer. The City is unsure what trees may be impacted by development as trees that would be within the 50' buffer (the 50' past the 30') were not included on the landscape plan.** The drawing inserted above depicts the 30' easement and the 50' buffer. It clearly shows the area impacted by the proposed development.
- An analysis prepared by a certified arborist about long-term health and/or viability for trees that will be on the edge of the developed area, and "post development" tree health for trees requested for removal in roadside or perimeter buffers. This analysis should also address protection during construction (see below). **This information was also not provided with the application.** This is a small project and coordination is the norm on such a project. There is no need for an assessment to be conducted to identify trees that will be retained in the improved areas because, other than in the improved areas, no trees will be removed, except for the trail the applicant had offered to be constructed subject to approval of the application. However, if including the trail in the development will necessitate an analysis by a certified arborist, the applicant will forego developing the trail and leave the area in its vegetative state.

- Protection during construction strategies for trees and vegetation to be retained. **This information was never submitted by the applicant. The project does not entail disturbing the natural vegetation outside the area where the buildings, parking, and road will be constructed. Nevertheless, if the City has additional concerns, approval can be made subject to addressing such concerns.**

In addition to the information and documentation described above that has not been provided by the applicant, the applicant has failed to revise their plans as requested by the City to meet revised landscaping requirements. The landscape chapter of the City's Municipal Code was amended after the application was submitted. As a result, the buffer requirements for this type of development increased to a maximum of 50' and a minimum of 35'. The City requested that the applicant revise their application to provide the 50' buffer. The applicant submitted their revised application on September 1, 2016. The revision incorrectly showed the buffer beginning from the edge of the 30' access easement, rather than the property line, which is the correct point of reference. It is noteworthy that the original plans submitted by the applicant incorrectly calculated the buffer from the property line, rather than from the easement.

Given these buffer issues, the City sought clarification from the applicant regarding whether the applicant was continuing to pursue a design that included ten buildings or a design for five buildings. The applicant's attorney responded on behalf of the applicant and instructed the City to no longer review the application for five buildings and instead review the application that included ten buildings. The applicant was informed by the City it would recommend denial of the ten buildings because the project does not meet the municipal code landscape buffer requirements. **Again, please review the April 17, 2017, letter from the applicant's counsel to the City.**

In the preparation of this staff report, comments were received from the City's surveyor regarding the 30' easement on the property. While reviewing the easement, the surveyor also noted a 50' access and utilities easement on the south side of the subject property. This easement was not depicted on any of the drawings submitted by the applicant. The 50' easement was established in 1991 and was to serve the southern lot and the adjoining lot to the east. The site plan depicts development in this easement area. The City cannot approve the proposed development as depicted because it would impede ingress and egress access to the adjoining property. The project site plan proposes a building, landscaping, a drainfield, and parking within the access easement, which would violate the rights of the easement holder without consent of the current easement holder to abandon this easement. **Again, approval of the application can be made contingent on the applicant obtaining consent from the current easement holder to abandon this easement.**

C. Public Comments

The property abuts a private road that is shared with the Saddle Club. During the public participation meeting (see reference document) and the public comment period, concerns were voiced about the safety of the road, the increased use of the road, and the potential impacts on persons riding horses on and near the road (see reference document 12 & 13). To address these concerns, the applicant offered to create a pedestrian trail on their property and to pave the road.

2. BIMC 2.16, Land Use Review Procedures

- A. BIMC 2.16.040, Site Plan and Design Review Decision Criteria. The Director and the 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. **The project is not in conformance with the 50' perimeter buffer standard in relation to the easement road. As proposed, five of the buildings are proposed within the buffer. In addition, the trees required for protection within the perimeter would not be protected because infiltration trenches are proposed within the buffer. These issues have been addressed above and in the April 17, 2017, letter to the City from the applicant's counsel.**
 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. **The location of the landscaping is not in conformance with the landscaping requirements of the municipal code (see more detailed analysis below). In addition to the perimeter buffer requirement not being met, the Utility Plan submitted by the applicant depicts infiltration trenches within the landscape buffer. Additionally, the Landscape Plan does not include required parking lot landscaping. As stated, the infiltration trenches can be relocated. As to parking lot landscaping, the project is using a fraction of the overall property. Therefore, parking lot landscaping is not necessary because the remainder of the property will remain undeveloped.**
 3. The Kitsap County health district has determined that the site plan and design meet 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. **The Health District issued a recommendation of approval on the project (reference doc 9).**
 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. **The City’s Development Engineer submitted a letter to the applicant dated March 1, 2016, addressing issues related to roadway/traffic and stormwater, more specifically, the impacts of the stormwater on the wetlands. The applicant was asked to conduct a hydrologic analysis of the discharge leaving the site to a wetland at the outfall of a proposed replacement culvert opposite the access point along Saddle Club road. No analysis was submitted. As stated, to conduct such an analysis will cost the applicant approximately \$10,000. The applicant is ready and willing to conduct the analysis and will do so on approval of the site plan.**

In addition, the on-site infiltration facilities fail to meet the required setbacks from buildings and on-site septic (OSS) drainfields and reserves pursuant to Kitsap County Board of Health Ordinance 2008-A-01 and the Stormwater Manual. The City informed the applicant that the facilities need to be revised to meet the required setbacks. The applicant did not submit revisions to address this requirement. **Again, the infiltration facilities can be placed in alternative areas on the site or it can be complied with by installing rain gardens, and the on-site drain fields can also be located in alternative locations on the property. The applicant’s engineer has confirmed that there is sufficient ground to shift the reserve field to another location. As such, meeting these requirements can simply be made a condition of approval.**

Additionally, the placement of on-site stormwater infiltration facilities and rain gardens needs to be coordinated with the landscape plan. These facilities were proposed in required landscape buffers, which doesn’t comply with the City’s regulations for tree preservation in the buffers. Same as above.

Absent the information and documentation described above, the City’s Development Engineer cannot confirm that the site plan meets the development criteria for drainage and water quality. Same as above.

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. **The Design Review Board (DRB) found the project to be consistent with the Light Manufacturing design guidelines. The proposed project is subject to the light manufacturing (Business/Industrial) design guidelines. The application was first reviewed by the Design Review Board (“DRB”) on October 1, 2015, during the pre-application conference phase of review (see reference document 11). The DRB made several suggestions at that first meeting and the applicant responded by making several modifications to the design and providing additional screening along the south side of the property. There is actually no requirement for the applicant to provide**

additional screening along the south side of the property because the Business/Industrial zoning does not have an open space requirement.

The DRB again reviewed the proposal after the applicant had resubmitted a revised Site Plan and Design Review Application. The applicant discussed their desire to consolidate their landscaping in the center of their parking lot rather than complying with the municipal code. **This is incorrect. The applicant simply requests that it remain an open area and has proposed that the open area be a plaza or courtyard with no landscaping.** While sympathetic to this request, the DRB expressed that the parking lot landscaping requirements could not be waived by the DRB. The DRB also noted its concerns that the rain gardens were within the 50' buffer, and that the landscaping buffer was in the 30' easement. The DRB approved the application with the following recommendations: 1) Engineer check infiltration with their landscaping architect to ensure buffer requirements can be met; 2) Landscaping in parking area should meet the code; and 3) If there was any change to the buffer, the applicant would return to the DRB.

6. No harmful or unhealthful conditions are likely to result from the proposed site plan. The proposed site plan does not depict a 50' access and utilities easement on the southern boundary of the property. This easement was recorded as part of a 1991 subdivision and is to serve the abutting properties to the east. As currently designed, proposed building 5, the reserve drainfield area, landscaping, and parking spaces are within the easement area. Construction within an ingress/egress access easement would inhibit access to property it is intended to serve. Based on such a limitation on access and other considerations, what is currently proposed within that easement area would violate the rights of the easement holder. The easement has not been abandoned, and the City would need consent from the current easement holder(s) to abandon this easement. **As stated, the applicant will obtain the necessary approval to have the easement abandoned.**

7. The site plan and design is in conformance with the comprehensive plan and other applicable adopted community plans. **The project is in conformance with the Business/Industrial Goals and the Economic Goals of the Comprehensive Plan.**

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. **The site contains wetlands and buffers and appears to meet the requirements of Chapter 16.20 BIMC , but cannot be confirmed to meet Chapter 15.20 absent of the hydrologic analysis of the discharge leaving the site and entering the wetlands. This analysis may trigger mitigation if it found that the outfall discharge for the site exceeds a key threshold (0.1 cfs increase for 100-year outflow).** **As stated, to conduct such an analysis will cost the applicant approximately \$10,000. The applicant is ready and willing to conduct the analysis and will do so on approval of the site plan.**

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. **The site is not located in the shoreline jurisdiction.**

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. **The applicant is not providing privately owned open space.**

11. The site plan and design has been prepared consistent with the purpose of the site design review process and open space goals. **The purpose of the site plan review process is to establish a comprehensive site plan and design review process that ensures compliance with the adopted plans, policies, and ordinances of the City. The site plan has not been prepared consistent with the landscaping and stormwater requirements of the site design review process (BIMC 2.16.040). This is incorrect. Please refer to the above comments from the applicant.**

12. For applications in the B/I zoning district, the site plan and development proposal include means to integrate and re-use on-site stormwater as site amenities. **The site currently provides infiltration in the front yard and roadside buffer. Underground infiltration chambers are not a site amenity, unlike rain gardens. The applicant's engineer will re-design to provide for rain gardens.**

C. BIMC 18.15 Development Standards and Guidelines

1. BIMC Section 18.15.010, Landscape Requirements by Zone District: **The BI district is subject to the perimeter landscape, roadside buffer and parking lot landscaping requirements.**
2. Perimeter: **B/I to Non-B/I requires a 50' maximum and a 35' minimum full screen perimeter buffer. According to BIMC 18.15.010 and the applicable footnote in the table, the perimeter buffer applies even when a private access road separates a B/I property from non-B/I property. The site plan shows a 50' buffer, but it incorrectly begins at the property line. The correct calculation for the buffer is to establish it from the edge of the 30' easement.**
3. Roadside Buffer. **B/I to Right-of-Way requires a 50' maximum and a 35' minimum full screen road side buffer. The site plan does not show the 50' roadside buffer from the edge of the easement, but rather incorrectly from the edge of the property.**
4. Parking Lot Landscaping: **Parking lot landscaping is also required; since the parking lot is not adjacent to a public right-of-way; one tree for every eight parking stalls is required. One hundred percent of the trees may be deciduous. Deciduous trees shall have a minimum two-inch caliper and evergreen trees a minimum four feet height at the time of planting. Evergreen ground cover and/or shrubs planted and spaces to achieve total coverage within two years. In addition to the trees, landscaping at the end of the parking aisles is also required. The landscape plan does not depict a partial screen buffer and landscaping at the end of the aisles of the parking lot. The requirement of one tree for ever eight parking stalls impedes and interferes with the ability to load and unload vehicles between buildings, which is a common and regular use in the Business/Industrial zone.**
5. Total Site Tree Units Requirements: **These requirements do not apply to development in the Bainbridge/Industrial land use district.**
6. Planting Requirements: **Planting plans must be prepared or approved by a landscape architect licensed by the State of Washington, a Washington certified nursery professional, or a Washington certified landscaper, and such plans must meet the landscaping submittal requirements of the City's administrative manual. The plan was**

not prepared by a landscape architect licensed by the State of Washington, as required by the City's administrative manual. The applicant is confident this issue can be resolved with the City.

III. CONCLUSIONS

As proposed, the project fails to comply with the applicable sections of the Bainbridge Island Municipal Code. The application is properly before the Planning Commission for a recommendation to the Director for a decision. As proposed, the project complies with the sections of the Bainbridge Island Municipal Code. With respect to the sections that the applicant has not complied with, approval can be made subject to compliance with such sections as outlined above.

IV. APPEAL

Appeal of an administrative decision may be appealed to the hearing examiner in accordance with BIMC 2.16.130.

V. Reference Documents:

All reference material may be accessed via the City's Website Online Permit Portal-Smartgov. The following reference materials can be found under the "submittals" and "notes" sections under this file number: [PLN50177 SPR](#)

Submittal:

1. Project application received 10/27/2015
2. Project Narrative received 10/27/2015
3. Design Guideline Checklist received 10/27/2015
4. Environmental SEPA Checklist received 10/27/2015
5. Kitsap Public Health District Documentation received 10/27/2015
6. Wetland Report received 10/27/2015
7. Miscellaneous, grading and utility plan (report) received 10/27/2015
8. Plan set received 10/27/2015 received 10/27/2015

Approval Steps:

9. Health District Review
10. Development Engineer Review

Notes:

11. Design Review Board Minutes 1/4/2016, DRB Minutes 010416
12. 50177 Emailed Comment Letter 5/2/2016 RE Creative Spaces Project PLN50177SPR
13. 50177 Comment Letter, 4/29/2016, Creative Spaces Comment Letter (002)
14. 50177 Complete Revision to Site Plans Received, 9/21/2016, 2016_0811_SPR_lettersize
15. Correspondence from Davies Pearson 04202017, 4/20/2017, 50177 SPR Correspondence 041717
16. May 4 Correspondence from Mr. Marston to the City, 5/4/2017, RE PLN50177SPR
17. May 1, 2017 City Response to Mr. Marston, 5/1/2017 May 1, 2017 City Response to Mr. Marston
18. February 21, 2017 letter of outstanding items needed to be address, 2/21/2017, February 21 2017 creative space – outstanding items
19. May 31 and June 1 2017 correspondence regarding the 50' easement, 5/31/2017, May 31 and June 1 2017 50' easement correspondence with attorney

20. April 25 to 26th correspondence between City and Attorney, 4/25/2017, April 25 and 26 Correspondence
21. April 1, 2016 request for info correction, 4/1/2016, April 1 2016 request for info.corrections

ENCLOSURE

2

Christopher J. Marston
ATTORNEY AT LAW

253-620-1500
cmarston@dpearson.com



April 17, 2017

*Via Regular Mail and Electronic Correspondence (pcd@bainbridgewa.gov and
hwright@bainbridgewa.gov)*

Ms. Heather Wright
City of Bainbridge Island
280 Madison Avenue North
Bainbridge Island, WA 98110

Re:	Permit Number:	PLN50177 SPR
	Applicant:	TSENG Properties, LLC
		PO Box 11765
		Bainbridge Island, WA 98110

Dear Ms. Wright:

This law firm represents Tseng Properties, LLC, and it has requested that I respond to your February 21, 2017, letter regarding the above referenced Permit Number (the "Application").

In regards to the first paragraph of your letter, during the January 4, 2016, meeting with the Design Review Board, the issue of the access easement was addressed. The only concern raised by the Design Review Board was that there be a fifty foot vegetative buffer from the edge of my client's property. My client is in agreement that the thirty-foot portion of the sixty-foot easement that is on my client's property will not be developed or cleared. In addition, the City previously knew about the easement because it went through the same process on Lot B, which is owned by Mr. Christianson, and it had the title report for the property. As such, my client believes the City was fully aware of this easement.

When you contacted my client regarding Ordinance 2016-1 (the "Ordinance"), which changed the buffer to fifty feet, discussions took place between you and my client. You informed my client that it could proceed with the application for five buildings versus ten in order to expedite the approval of those five buildings through the minor site plan review process. Now, however, you have indicated that the Planning Director has opted to have the application proceed through the major site plan review process. In addition, at no time did my client inform the City that it was abandoning its application to construct ten buildings. Instead, per my client's and its architect's discussions with you, the stated intent was to proceed with obtaining approval of the five buildings through the minor site plan review process, which is why new plans were provided to you in September, 2016, per your request. Then, the impact of the Ordinance, if any,

would be addressed separately. Again, this decision was based on your recommendations to my client.

As to the Ordinance, it should not have any impact on the Application with respect to the construction of the ten buildings on the property. The Ordinance was adopted on March 22, 2016, which was after the Application had been filed with the City. Under Washington's Vested Rights Doctrine, the Ordinance should not have been applied by the City to my client's Application.

RCW 19.27.095(1) states that:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of the application, and the zoning or other land use control ordinances in effect on the date of the application.

Here, my client had to apply for the site plan approval before it was allowed by the City to apply for the building permit, so the Vested Rights Doctrine applies to the Application. A complete application is one that is sufficiently complete, complies with existing ordinances and building codes, and is filed during the period the zoning ordinances under which the developer seeks to develop are in effect. *See, Snohomish County, et al. v. Pollution Control Hearings Board, et al.*, 106 Wn.2d 47, 720 P.2d 782 (2016). If a developer complies with these requirements, a project cannot be obstructed by enacting new zoning ordinances or building codes. *Id.*

The Application was sufficiently complete prior to the adoption of the Ordinance to be considered under the former zoning and land use controls, which means the increased 50 foot buffer is inapplicable to the Application. In fact, as you stated, the City had it reviewed by the Design Review Board in January, 2016. The Application must be reviewed under the fifteen foot buffer that was previously in effect.

In addition, there is evidence suggesting that the City, through its officials, specifically its counsel member, Sarah Blossom, improperly spearheaded the adoption of the Ordinance and or the moratorium that was adopted in 2016 to prohibit the approval of my client's Application and restrict its ability to develop its property. Ms. Blossom was or is a member of the Bainbridge Island Saddle Club, which owns property adjoining my client's property, and her family owns commercial NSC property on Bainbridge Island. Ms. Blossom was involved in the strikeout table that was attached to Ordinance No. 2016-31. Notably, certain provisions of the moratorium that impacted my client's property did not impact the commercial property owned by Ms. Blossom's family.

The Ordinance appears to only impact my client's property, which would constitute illegal Spot Zoning. Spot Zoning is improper, and one or two building lots may not be marked

off into a separate district or zone and benefitted by peculiar advantages or subjected to peculiar burdens not applicable to adjoining similar lands. *See, Pierce v. King Cty.*, 62 Wash. 2d 324, 338–39, 382 P.2d 628, 637–38 (1963). Spot Zoning is not usually favorably regarded, because, in too many instances, such practice has been employed in order to aid some one owner or parcel or some one small area, rather than being enacted for the general welfare, safety, health and wellbeing of the entire community. *Id.* Spot Zoning merely for the benefit of one or a few or for the disadvantage of some, still remains censurable because it is not for the *general* welfare. *Id.*

In this case, it appears that the Ordinance was adopted to prohibit or restrict my client's planned development, not for the general welfare of the community. To our knowledge, there are no similarly situated commercial properties on Bainbridge Island that would be impacted in the same manner by the newly enacted fifty foot buffer. As such, it appears that the City engaged in illegal Spot Zoning.

Finally, with respect to the items you requested in your letter, my client's position on them is as follows:

- (1) Shared Private Road. There is a mutual easement benefitting the parties to the private road. We also believe the terms of the existing easement provides for the parties to maintain it. Of course, even if there was no such language, under the law, each of the parties, who benefit from the private road, have an obligation to share in its maintenance. This was not an issue on Lot B, so it is hard to determine why the City now finds that it is an issue with this Application. Moreover, my client has offered to pave the portion it will be using, which would provide the assurance of all-weather surfacing that you are looking for. We believe this issue has been addressed.
- (2) Soil Information. There have been numerous soil logs of the property that my client's civil engineers have, so this is not an outstanding issue. If you do not have copies of these logs, they can be provided.
- (3) Modified Storm Water Report. As indicated previously, my client has had its civil engineers review the property. These engineers have been working and advising property owners on Bainbridge Island for years. They have determined that the storm water is not an issue because the storm water drains away from the wetlands.
- (4) Revised Landscape Plan. The property impacted by my client's proposed development is very small compared to the overall size of the property. Except for the access to the property, my client is leaving the buffer areas in their natural state and has decided not to landscape those areas. In addition, the plans show how the buildings and parking areas will be developed. As such, there is no need for a revised landscape plan.
- (5) LID Site Assessment. This is a small project and coordination is the norm on such a project. There is no need for an assessment to be conducted to

Letter to Ms. Heather Wright
April 17, 2017
Page 4 of 4

- identify trees that will be retained in the work areas because, other than in the buildable areas, no trees will be removed, except for the trail we had offered to be constructed subject to approval of the Application.
- (6) Kitsap Public Health. The health district approved of the septic design, which the City is aware of.
- (7) SEPA Checklist. The SEPA checklist was filed with the City for the ten buildings. Since my client is seeking approval of the Application for all 10 buildings, there is no need to submit a revised SEPA checklist.

At this point, it appears that the City is simply attempting to delay the Application and provide further roadblocks to its approval. My client is requesting that the City either approve the Application, deny the Application, in which case it will appeal the decision, or agree to proceed to mediation under Bainbridge Island Municipal Code, Section 2.19. My client has appreciated your assistance in this matter and will look forward to your continued assistance. It appears that the City, for whatever reason or reasons, does not want to cooperate in approving the Application when the requirements of the Bainbridge Island's Municipal Code have been met by my client.

I will look forward to your written response regarding the City's position within fourteen (14) days from the date of this letter. I also believe this letter is responsive to your February 21, 2017, letter and is being timely submitted prior to April 24, 2017. If I do not hear from you, and the City's position remains the same or it refuses to make a decision as outlined above, my client has instructed me to proceed with legal action against the City and possibly the individual(s) who appear to have been involved in attempting to limit my client's ability to develop its property. I am hopeful this will not be necessary, and the parties can amicably resolve the matter.

Sincerely,



Christopher J. Marston

cc: Client

ENCLOSURE

3



CITY OF BAINBRIDGE ISLAND
Department of Planning and Community Development

January 5, 2011

Therese McGuire
Dave Christianson
Creative Space, LLC
P.O. Box 11765
Bainbridge Island, WA 98110

Dear Ms. McGuire and Mr. Christianson:

In the past few weeks I have come to better understand how the events and communications of the last year or so have appeared from your perspective. Clearly, that long series of events has left you feeling that you have been on the receiving end of a combination of inattention and resistance from city staff. I also understand that there are things we may have done here that have contributed to that conclusion and for that I sincerely apologize.

Every year I see more examples of the failings of human communication and the opportunities for people to unknowingly "talk past" one another. The risks of that certainly increase substantially when complicated and imperfect land use regulations are involved and when the communications involve a variety of staff and a changing cast of attorneys. And once either party starts to doubt the intentions or good faith of the other, the level of interfering static just goes up. I think all of those things have happened here. And, no doubt, we at the City own a good bit of it.

I would also like to think it is still possible to get past that history and pursue our shared objectives in the most expeditious way we can. The reality is that despite the bumpy path this discussion took in 2010, I believe we now have a reasonably clear idea of the project you have in mind and have identified the shortest distance between here and the necessary permits. If you will give us a new chance to work with you, I am very optimistic that the necessary approvals can be obtained fairly expeditiously.

Please consider and let me know, directly or through legal counsel, whether there is a possibility that we can reset our working relationship and move forward with an agreed approach to processing your applications.

Sincerely,

Kathy Cook
Planning Director

SETTLEMENT AGREEMENT

In settlement of its pending land use appeals regarding ADM10006 and BLD16444SFR, Creative Space Management, LLC ("Creative Space"), and the City of Bainbridge Island ("the City") agree as follows:

1. Creative Space's Site Plan as delivered to the Director of Planning and Community Development ("the Director") in August, 2009 shall be processed administratively within ninety (90) days of formal submission of the Site Plan Review Application and payment of the Site Plan Review fee by Creative Space, subject only to the schedule of the Design Review Board for advisory review and BIMC 18.105.010.E.2.b.;
2. Creative Space shall submit its Site Plan (consistent with that Site Plan provided to the Director in August, 2009) for review and pay the fee for said review (hereinafter referred to as "submission of the Application") within thirty (30) days of executing this agreement. The Site Plan shall be approved if it meets all applicable requirements;
3. The City shall: (a) within seven (7) days of the date of executing this agreement issue the building permit for the Caretaker's Unit and (b) concurrently with approval of the necessary boundary line adjustment, lift any and all stop work orders and process and approve the permit for the Temporary Building;
4. Creative Space shall complete the project denominated on the Site Plan within twelve (12) months of Site Plan approval and issuance of the permit for the Caretaker's Unit;
5. The occupancy permit for the Caretaker's Unit shall be promptly issued upon satisfactory completion of its construction and timely inspection.
6. Upon submission by Creative Space of a complete application for a grading and filling permit in support of its proposed road project (Project No. PRJ-0015501) and additional information in support of Case No. VEG15501, the City shall, within thirty (30) days, issue a joint administrative decision with a SEPA threshold determination. The parties recognize that a SEPA threshold determination triggers a period for comment and appeal.

CITY OF BAINBRIDGE ISLAND

Brenda Bauer 1-25-11
Brenda Bauer, Interim City Manager Date

CREATIVE SPACE MANAGEMENT, LLC

Therese A. McGuire 1-25-11
Therese McGuire Date

Dave A. Christianson 1-25-11
Dave Christianson Date