

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 69418-9-I

TOWARD RESPONSIBLE DEVELOPMENT,

Appellant,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

REPLY BRIEF OF TOWARD RESPONSIBLE DEVELOPMENT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2013 FEB 19 PM 4:09

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I. RESPONSE TO IRRELEVANT THEMES AND ARGUMENTS

The respondents' briefs are replete with themes and arguments that have no bearing on the issues before the Court. They frequently re-cast our arguments in an apparent effort to avoid the crux of the issues. For instance, the respondents repeatedly attempt to paint our challenge as an attack on earlier decisions to allow urban development of these lands. *See, e.g.*, City Br. at 21; YB Br. at 2 (“destined for development”). But nowhere in these briefs (or in the briefs filed below) has TRD taken the position that Yarrow Bay's lands should not be developed or that the development should not be “urban.”¹

But while a decision to allow urban development of these lands was made long ago, decisions regarding the character of that urban development and an analysis of its impacts were left for later. Not until 2009 did the City, in its new Comprehensive Plan, determine issues regarding the fundamental character of the incipient urban development. At that time, the City adopted numerous Comprehensive Plan policies that confirm that the urban

¹ The City cites a single citizen's complaint about “density” as the foundation for its mischaracterization of TRD's position as being opposed to urban densities. Notably absent from the City's (or Yarrow Bay's) brief is any citation to a TRD brief filed in this Court, in Superior Court, or before the Hearing Examiner in which TRD asserted that “urban densities” were prohibited. To the contrary, even the Council found that the SEPA appellants had identified numerous Plan policies which had at their core protection of Black

development would have to conform to Black Diamond's existing small town character. As the City Council acknowledged:

[S]everal comprehensive plan policies . . . require protection and/or consistency of "community character," "existing character of the historic villages," "natural setting," "rural community," "traditional village community," "small town character," and "existing historical development." *See* Black Diamond Comp. Plan, pp. 2-5, 4-1, 5-7, 5-8, 5-33, 5-38, 5-49, 5-50, 7-49. . . . **All of the policies referenced above reflect a strong preference to retain small town character.**

AR 27258 (City Council's MPD Ord., CL 27.A.v.).

Likewise, the City Code incorporates by reference the policies from *Rural by Design*, which make clear that the development would not proceed in the old-fashioned, suburban sprawl style of clearcutting every tree and leveling every hill, but instead would "fit within the environment rather than on top of it." BDMC 18.98.010 L & 18.98.080 A.10; AR 14081 (*Rural by Design* at 62). Yet Yarrow Bay proposed (and the former City Council approved) a project that is flatly inconsistent with the Comprehensive Plan and related regulations. As the Examiner found, "it is anticipated that the development . . . will be cleared of all vegetation and graded to facilitate the development." AR 24919.

Diamond's small town character. AR 27258.

Yarrow Bay got its share of the bargain: 6,000 units of urban development and a million square feet of big box commercial space. But the community was betrayed. Instead of incremental development that maintains the natural setting and reinforces the City's small town character, the former City Council approved a classic, mega-suburban subdivision development pattern, big box retail, massive clearcutting, clearing, and grading.

Urban development does not need to be of the type proposed by Yarrow Bay. Small towns like Duvall, Fall City, Carnation, Gold Bar, La Conner, Lynden, and, yes, the *existing* Black Diamond have been developed at urban densities, yet maintain a small town character. Simply put, urban densities and small town character are not mutually exclusive.

Just because new development will be at urban densities does not mean that it cannot replicate small town character. As Black Diamond's own Comprehensive Plan states:

Traditional "zoning" concerns, including density and setbacks, must be balanced with the intent of the character designations to encourage development that achieves both the described function and character of the respective area.

Comprehensive Plan at 5-50.

The development community seeks predictability in the implementation of local land use laws. So, too, do local citizens. The

bargain here was to allow urban development of Yarrow Bay lands, but in a manner that respected the small town character and the existing environment. Yarrow Bay has gotten its half of the bargain. The citizens have not.

The respondents note that “community displeasure” is no grounds for reversing a land use decision. Certainly, the ordinances here have generated overwhelming “community displeasure.” Indeed, not only did the only two City Council members who voted for the ordinances and ran for re-election lose their seats in the next election, the slate of three candidates running in opposition to the recently adopted ordinances won election with astounding majorities of 75 percent. But while the community displeasure is overwhelming, that is not the basis for our legal claims – and the respondents know it. Our Opening Brief meticulously reviewed the applicable statutes, plans, and regulations and documented violations of the policies and requirements contained in those documents. Our arguments are based on law and facts, not emotion.

Equally misguided is the respondents’ description of the extensive public participation process that preceded the Hearing Examiner’s and City Council’s decisions. Those recitations were wholly unnecessary. We raised no claim that required notice was not given or hearings were not held.

Rather, our argument is with the *substance* of the City's actions: the failure to prepare an adequate EIS and the adoption of ordinances which violate the City's own plans and regulations.

In yet another similar, irrelevant digression, the respondents frequently refer to the enormity of the record and the hundreds of findings and conclusions adopted by the City Council, as if quantity could make up for a lack of quality. We are well aware of the respondents' tactics to "paper to death" the citizens who sought adherence to the Comprehensive Plan's call for protection of the town's small town character and the environment. It is challenging to parse the record and focus on the dispositive items. We sought to assist the Court with that effort in our Opening Brief and hope we complete that effort in this brief, notwithstanding the respondents' efforts to overwhelm the Court with a voluminous, but largely irrelevant, record.

II. THE EIS IS INADEQUATE

A. The Examiner's Systematic Errors

1. The Examiner employed an improper "averaging approach"

In our Opening Brief (at 22-38), we demonstrated that the Examiner erred in using an unprecedented and improper "averaging approach" to excuse serious deficiencies in the EIS. The City cites two Washington cases

for the proposition that the omission of “vital” information and a failure to discuss “significant” issues can be ignored if other parts of the EIS are adequate. City Br. at 53-54 (discussing *Cathcart Community Council v. Snohomish Cy.*, 96 Wn.2d 201, 634 P.2d 853 (1981) and *OPAL v. Adams Cy.*, 128 Wn.2d 869, 913 P.2d 793 (1996)). But both cases are phased review cases. *Cathcart* excused a less than complete EIS analysis on the basis that a “more detailed EIS” would be prepared later, prior to individual subdivisions. *Id.* at 209-10 (“by waiting, a more specific analysis is possible, and thus informed decision making will be facilitated”). *OPAL* also accepted a less-than-comprehensive EIS because environmental review was “phased.” *OPAL*, 128 Wn.2d at 880 (“[w]e conclude that this proposal presents an appropriate situation for phased review”). We discuss the phased environmental review issue later. The point here is that neither *Cathcart* nor *OPAL* stands for the proposition that clearly deficient portions of an EIS can be excused because *other* portions of the same EIS are adequate, *i.e.*, neither provide support for the Examiner’s “overall” averaging approach.

Simply put, neither respondent in their 200 pages of briefing identified a single Washington State case in which the finder of fact in the administrative proceedings determined that “vital” information was missing

in the EIS and that “significant” impacts had been left unaddressed but nonetheless sustained the EIS using the rationale that the EIS was adequate “overall.” This is an extremely dangerous precedent which would gut SEPA’s call for a reasonably thorough review of the entire sweep of significant environmental issues.

The City and Yarrow Bay also identify a number of federal cases which supposedly justify the Examiner’s “overall” rationale. But in each of those cases, the court looked at the entire EIS to assess whether an error or omission regarding a certain subject was obviated by discussion of that same subject elsewhere in the EIS. In none of the cases cited by the respondents did the court state that an otherwise inadequate analysis of one impact was excused because the EIS addressed other impacts in a satisfactory manner. *See also Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (NEPA “places upon an agency the obligation to consider *every significant aspect* of the environmental impact of a proposed action”) (emphasis supplied; internal quotation omitted).

The error in the Examiner’s “overall” reasoning is plainly set forth in his decision. After first stating that “for the vast majority of impacts,” the

EIS “successfully alerts the reader to the most significant and vital information on environmental impacts,” the Examiner then acknowledged that the SEPA appellants met their burden of proof and established other instances in which significant and vital information was not provided:

The SEPA Appellants established a few instances where the TV FEIS failed to provide this vital information. This vital information was either not disclosed in the main text of the TV FEIS, or the text and appendices both failed to identify and/or adequately assess vital information and probable significant adverse environmental impacts.

AR 24581. The Examiner then excused these deficiencies by referring to the “unfortunate but not fatal” statement in *Mentor v. Kitsap County*, 22 Wn. App. 285, 291, 588 P.2d 1226 (1978). The respondents do, too. But an examination of *Mentor* demonstrates the Examiner’s (and respondents’) analytic flaws in believing they had an analogous situation here.

In *Mentor*, an EIS was prepared for a single hotel in Silverdale. The EIS included two omissions which the Court characterized as “inconsequential.” *Id.* at 291. First, the Court found “inconsequential” a failure of the EIS to mention that the property had an open space designation. The omission was inconsequential because that designation did not prohibit the development. Second, the EIS failed to note that zoning on the parcel recently had been *increased* to allow even more development. *Id.* at 291. In

neither case did the Court determine that the omissions were “significant.” Neither was viewed as “vital” information. Rather, the Court stated: “We find no serious inadequacies in the statements submitted here, . . .” *Id.*

Mentor does not provide that omissions of vital, significant information can be ignored by reference to *other portions* of the EIS such that “overall,” the EIS is deemed adequate. *Mentor’s* characterization of “inconsequential errors” as “unfortunate but not fatal” provides no authority for ignoring multiple failures to include “vital” information about “significant” impacts in an EIS.

The Examiner erred as a matter of law in misreading *Mentor* and believing it justified characterizing the omission of vital information about significant impacts as being “relatively minor.” AR 24581. While we can all agree that “inconsequential” errors are appropriately characterized as “relatively minor” and do not render an EIS inadequate, the Examiner found that this EIS omitted vital information about significant impacts. The respondents’ protestation to the contrary, there simply is no case law support for excusing such errors by reference to an “overall” approach.

The Examiner’s findings that the EIS omitted vital information about significant impacts have not been challenged by the respondents. As such,

they are verities on appeal. Those unchallenged findings compel a conclusion that the EIS was inadequate. *Mentor's* "unfortunate but not fatal" comment about "inconsequential" defects is irrelevant and provides no defense.²

2. The Examiner erred in believing that an adequate mitigation plan excuses an inadequate disclosure of impacts

The Examiner excused inadequate analysis of phosphorous impacts to Lake Sawyer and a variety of traffic impacts on grounds that substantive mitigation requirements were adequate. We have demonstrated that SEPA requires that impacts be identified before the agency assesses whether and to what extent they may be mitigated. *See Op. Br.* at 29-31. The City cites *Hayden v. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980), for the proposition that an EIS need not disclose significant impacts as long as there is a finding that conditions have been imposed to mitigate the (undisclosed and unanalyzed) impacts. *City Br.* at 64, n.95. *Hayden* stands for no such thing.

² Apart from the misguided effort to demonstrate case law support for the Examiner's "overall" approach, the only other rebuttal presented is an effort to mischaracterize the Examiner's findings that "vital" information had been omitted and "significant" impacts left unaddressed. For instance, the City mischaracterizes the Examiner's findings when it asserts that there was only "one isolated flaw in 4,500 pages." *City Br.* at 39. The Examiner found more than "one isolated flaw," as we have documented. *See Op. Br.* at 22-26.

First and foremost, there was no EIS under review in *Hayden*. Rather, a developer proposed to build a Safeway on the outskirts of Port Townsend. Before filing its application for a building permit, Safeway modified its proposal to address community concerns. Based on the application actually submitted, the City determined that the construction of that single store would not have significant impacts warranting preparation of an EIS. *Id.* at 880. Under *those* circumstances, the City's procedure was deemed "eminently sensible." *Id.*

Obviously, the procedures in *Hayden* have nothing to do with the situation here. This case involves the largest development proposal ever in the State of Washington, not the construction of a single grocery store. More to the point, this project was not modified to eliminate significant adverse impacts prior to the filing of the permit application (thus obviating the need for an EIS). Instead, everyone agrees that this massive project has significant adverse environmental impacts. The process and result in *Hayden* do not justify failing to address significant impacts in an EIS. (Yarrow Bay's discussion of the issue is equally non-compelling, focusing on rules that allow the process authorized in *Hayden*. See YB Br. at 27 (citing WAC 197-11-350).)

Having attempted to justify the Examiner's erroneous reasoning on legal grounds, the respondents also seek to rewrite the Examiner's decision, suggesting that he did not really excuse inadequate discussion of impacts on the basis that the mitigation measures were adequate. *See, e.g., id.* and City Br. at 62-63. One example demonstrates the fallacy of that reasoning. As we discussed in more detail in our analysis of the traffic section of the EIS (Op. Br. at 26), one of the flaws of the traffic analysis was its failure to identify individual legs of an intersection which were problematic even though the entire intersection, averaged as a whole, exceeded LOS standards. The Examiner excused the failure to identify individual problematic legs (*e.g.*, a left-turn lane backed up for several signal cycles) on the ground that the City's mitigation ordinance was premised on analyzing the entire intersection. AR 24621 (CL 5). But that reasoning did not address the problem. It just buried it. The flaw with analyzing an intersection *in toto* is that individual legs may be very problematic even though the average for all the movements at the intersection is adequate. In that case, the mitigation ordinance -- which examines the intersection as a whole -- will not require mitigation. That the EIS provides information necessary to apply the mitigation ordinance's "whole intersection" formula does not demonstrate that the EIS adequately

analyzes the significant impacts created by the project, *i.e.*, alerts decision-makers and the public about highly problematic turning movements.³

3. The Examiner erred in characterizing the EIS as a programmatic EIS and judging it by a relaxed standard

The Examiner committed an error of law when he characterized the EIS as a programmatic EIS and judged it by a more relaxed standard as a result. *See Op. Br.* at 31-33. Even though the Examiner clearly relied on his “programmatic” characterization to approve the EIS using a relaxed standard,⁴ Yarrow Bay asserts that characterization has no “bearing on the question of whether the EISs were adequate.” *YB Br.* at 25. This is blatantly inconsistent with the respondents’ repeated requests for this Court to defer to the Examiner’s decision on EIS adequacy. If the Examiner used the wrong standard in judging the EIS, the Examiner’s decision is entitled to no deference. Moreover, the Examiner held the EIS adequate only because he was using the more relaxed standard. *See note 3, supra.* If he had used the

³ Ironically, information about problematic individual turning movements was generated by the EIS authors, but buried deep in computer data-sheets and not generally shared with the public or City Council. For instance, one turning movement at the intersection of SE 288th Street and SR 169 was so delayed it received an LOS of “F” **even after mitigation**. But because other movements at the intersection were better, the overall grade was “E,” a passing grade. AR 16551.

⁴ The Examiner was quite explicit that he was relying on the programmatic characterization to justify upholding multiple sections of the EIS. *See Op. Br.* at 33 (*citing*

correct standard, he would have found the EIS inadequate. *Id.* The Court should so rule.

4. The Examiner's reliance on phased review does not excuse the noncompliance

The Examiner (and perhaps, to an even greater extent, the respondents) seek to justify the EIS flaws by reference to SEPA's allowance for phased review. There are two fundamental flaws with their arguments.

First, this is not a situation in which the omissions in an initial EIS are going to be cured by preparation of another, more detailed EIS prior to subsequent permitting decisions. As this Court is aware from the proceedings in Case No. 69414-6-I, the next step in the permitting process was the City's approval of development agreements. But rather than prepare a new EIS, this same EIS was used for that decision, too. Moreover, the step after the development agreement is the approval of individual subdivisions (plats). The first of those has now been approved by the City (*see* YB Br. at 21, n. 31) and, yet again, no new EIS was prepared for that decision either. The respondents' promise of phased review for this project is no better than their Comprehensive Plan promise that this project would maintain Black

four passages).

Diamond's small town character and mesh with the existing environment rather than scraping it clear. It is one fiction after another.

Second, even if there were a more detailed environmental impact statement to be prepared for later stages, phased review does not allow deferred review of issues ripe for decision at the time of the initial EIS. *See Op. Br.* at 34-35. Here, the City Council's ordinances approve 6,000 new households and a million square feet of commercial space; clearcutting forests and leveling the land; and creating a pattern of new development that is wholly inconsistent with the Comprehensive Plan's call for retaining Black Diamond's small town character. Those decisions are not going to be addressed in subsequent permits that fine tune these large-scale decisions. Now is the time to assess the extent to which a project of this magnitude will impact Lake Sawyer, turn Black Diamond's quiet streets into crowded suburban arterials, and mar the Comprehensive Plan's vision for urban development which maintains small town character. Those macro issues cannot be addressed when individual subdivisions are being analyzed later.

The City asserts that if we are not too early with our call for adequate EIS analysis of these issues, then we are too late. According to the City, because the Comprehensive Plan previously authorized urban development of

this land, there is no need to address now the environmental impacts related to the size of Yarrow Bay's specific project. City Br. at 88. If the respondents could point to an environmental impact statement for the Comprehensive Plan which addressed these issues in adequate detail, then the City might have a point. *See, e.g., West 514, Inc. v. City of Spokane*, 53 Wn. App. 838, 770 P.2d 1065 (1989) (prior EIS incorporated by reference dispenses need for analysis in current EIS). *See also* WAC 197-11-600. In that fictional scenario, when Yarrow Bay applied for the MPD permits, the City could have adopted by reference the EIS prepared for the 2009 Comprehensive Plan and utilized that (fictional) EIS analysis in lieu of developing a new analysis in the EISs for the MPD permits. But this Court must make its decision based on the record before it, not the fiction suggested by the City. There was no EIS prepared for the 2009 Comprehensive Plan. The City cannot rely on that non-existent EIS to excuse the deficiencies in the current one.

Rather than prepare an EIS for the 2009 Comprehensive Plan, the City prepared an Addendum to an EIS prepared in 1996. *See* AR 5024. The Addendum promised "additional detailed environmental impact review of development proposals will occur as specific projects are proposed." AR

5030-31. We are exceedingly frustrated with the City's shell game. In the May 2009 EIS Addendum, the City said more detailed environmental review would be coming later. Now, when that EIS has been prepared and is deficient, the City asserts that it is both too late and too early to do the necessary review. Enough is enough.

B. The EIS Failed to Include an Adequate Response to Critical Comments on the Draft EIS

Yarrow Bay argues that this issue was not adequately raised in the notice of appeal to the Hearing Examiner. YB Br. at 58. But the rule on which Yarrow Bay (and the Examiner) rely states that "no new *substantive* appeal issues may be raised or submitted after the close of the time for filing of the original appeal." BDMC 18.08.210.G (emphasis supplied). The EIS failure to respond to comments is a procedural error to which this rule does not apply. Second, the Examiner recognized that even if the rule applied, the inadequacy of the City's responses to comments could be raised in the context of the adequacy of the EIS discussion of the related substantive issues. *See* AR 24635 (CL 2) ("permitting agency can find itself in a much more difficult position to argue a reasonably thorough discussion if it is given notice of a significant impact through a DEIS comment and still fails to address it"). As such, the Examiner considered the SEPA appellants'

objections to the adequacy of the response to comments related to substantive issues which were raised in the SEPA appeal, such as transportation and water quality.

But when the Examiner addressed the adequacy of the City's response to those comments, he did so in a summary and unpersuasive fashion. *See id.* (FF 3). With the exception of concern about the response to a comment regarding traffic modeling, the Examiner summarily stated that the comments were adequately addressed in the EIS without ever explaining the basis for that finding. *Id.* A review of the comments and the EIS response to those comments reveals just the opposite, as we demonstrated in our Opening Brief (at 38 - 45).

Like the Examiner, the respondents spend little time trying to defend the adequacy of the responses. Avoiding that analysis is understandable. The responses we discuss are wholly lacking in substantive content.

Instead of attacking the merits of our claim, the City argues that TRD did not challenge the Examiner's finding that "nothing in the record" establishes that the responses were inadequate. City Br. at 65. But we cited the specific pages of the Examiner's decision where he addressed this issue and argued that he "failed to discuss [the substance of our challenges] or

explain on what basis he concluded that the responses . . . somehow were adequate.” Op. Br. at 44 (*citing* AR 24634-35). While we did not quote or cite the finding by number, the brief is sufficiently detailed to allow the Court and, obviously, the respondents fair notice of our challenge to the Examiner’s finding regarding the adequacy of the response comments. *See, e.g., State v. Olson*, 126 Wn. 2d 315, 323, 893 P.2d 629 (1995); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582 -83, 915 P.2d 581 (1996).

Yarrow Bay dodges the crux of the issue, too, and argues that the City’s failure to respond to comments from King County and WSDOT should be ignored because those agencies did not appeal and “common sense supports that lack of an appeal by an agency means that the agency has no further objection and neither should TRD.” YB Br. at 60. Yarrow Bay’s speculation that those agencies did not appeal because they were satisfied with the response is just that – speculation. Indeed, while WSDOT did not appeal, it submitted a letter after the FEIS was published lamenting the lack of an adequate response to its comments. AR 3900. Yarrow Bay ignores that issues such as resource limitations and political comity or simply ignorance about an appeal deadline may more readily explain the lack of an appeal. *See* AR 1150-1155.

Notably, Yarrow Bay cites no authority to support its proposition that the failure of an EIS to respond to comments is unreviewable if the author of the comment does not appeal. There is authority to the contrary. *See, e.g., Western Watersheds Project v. Kraayanbrink*, 632 F.3d 472, 492-93 (9th Cir., 2011).

C. The EIS Fails to Adequately Analyze Phosphorous Impacts to Lake Sawyer

1. The EIS was inadequate in its analysis of impacts to Lake Sawyer

Reviewing the respondents' briefs, it may be difficult to remember that this appeal challenges the adequacy of the EIS. The respondents spend most of their time discussing the content of other documents, in particular, King County's Lake Sawyer Management Plan (LSMP, 2000) and DOE's Implementation Plan (2009). Even if the information from these documents had been summarized and set forth in the EIS, the EIS still would have been inadequate (for reasons discussed below). But a lengthy assessment of these *other documents* is not necessary because the issue is whether the EIS was adequate, not these other documents.

The Implementation Plan was not discussed, referenced, or summarized in the EIS or in the technical appendix (AR 17155). It was not attached to either the EIS or the technical appendix.

The LSMP was briefly summarized in the EIS. The entirety of the summary states:

King County completed the Lake Sawyer Management Plan in 2000 and concluded that the lake is currently mesoeutrophic. The Lake Sawyer Management Plan has a goal of maintaining the lake's mesoeutrophic state while accommodating future population growth through 2030.

AR 20760.

Even if the LSMP or Implementation Plan contained information which would meet SEPA's requirements *if contained in the EIS*, that was not the case. None of the Implementation Plan information and virtually none of the LSMP information made its way to the EIS. The respondents (and the Examiner before them) again ask the Court to decide a fictitious case, *i.e.* to pretend that the substance of these documents was included in the EIS. The respondents' lengthy discourse about the content of these documents is irrelevant to assessing the validity of the EIS.

We have attached to this brief as Appendix A the small number of pages from the EIS that address water quality impacts in Lake Sawyer. The

contrast between that “analysis” and the respondents’ discussion of the LSMP and the Implementation Plan is stark. The LSMP and Implementation Plan — and the respondents’ and Examiners’ summary of those documents — are rich with information pertinent to the core issue of protecting Lake Sawyer from excess phosphorous. In contrast, the EIS is superficial and incomplete, providing the public and decision makers with virtually no useful information about the project’s likely phosphorous impacts, the feasibility of mitigation measures, or the different impacts likely to result depending on how much land is cleared and dedicated to development. While the LSMP and Implementation Plan may provide some of that information, the EIS — the document at issue here — provides almost none of it.

We are not asserting that the EIS discussion of water quality impacts had to be as detailed as the analysis in the LSMP and the Implementation Plan. An EIS may summarize important information from other documents. But this Court’s focus must be on the words of the EIS, not the content of these other documents. Likewise, the Examiner should have focused on the words of the EIS, not the content of these other documents. When the words of the EIS are examined, it is painfully obvious that the EIS is deficient. It

did not mention the Implementation Plan and made scant reference to the LSMP.

And the Court need not take our word for it. That was the finding of the Hearing Examiner. It was the Hearing Examiner – not TRD – who stated: “The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer.” AR 24599. It was the Examiner – not TRD – who stated: “Neither The Villages EIS or the Lawson Hills EIS adequately identifies the impacts associated with reaching eutrophication status, *e.g.*, the health hazards, beach closures, harm to endangered fish, and aesthetic blight . . . are not identified.” AR 24600. It was the Examiner – not TRD – who stated: “Given the prominence that Lake Sawyer water quality plays in the Black Diamond community, the significance of phosphorous impacts and the uncertainty in the science backing [the] Implementation Plan, it was unreasonable for the EIS to fail to warn of the specific problems that could arise from phosphorous contamination of Lake Sawyer.” AR 24601.

Those findings of fact are unchallenged by the respondents and must be accepted as verities on appeal. They eliminate the need to parse many of the factual contentions regarding the LSMP and Implementation Plan advanced by the respondents in their briefs. While there may have been

conflicting evidence regarding these issues, the mere presence of evidentiary conflicts does not provide a basis for striking the foregoing findings of fact (even if they had been challenged by the respondents).

Thus, the issue is not whether the EIS was inadequate. The Examiner plainly found that it was. Rather, the issue is whether the justifications the Examiner relied on for excusing the inadequacies are legitimate. Thus, as we did in our Opening Brief, we focus on those justifications and in this brief address the respondents' efforts to support them.

2. The Examiner's excuses for the deficient Lake Sawyer analysis are inadequate
 - a. The Examiner's reference to "inquiry notice" is unjustified

In our Opening Brief, we demonstrated that the Examiner's reference to "inquiry notice" as a basis for rescuing the deficient EIS was anathema to SEPA's requirements for a reasonably full disclosure of adverse impacts – especially adverse impacts which are among the most important of all the impacts discussed in the EIS.

The City makes no attempt to defend this improbable justification. Yarrow Bay asserts that "inquiry notice" is "perfectly acceptable under

SEPA.” YB Br. at 40. Yarrow Bay cites WAC 197-11-402(6) for this remarkable assertion. That regulation states:

The basic features and analysis of the proposal, alternatives, and impacts shall be discussed in the EIS **and shall be generally understood without turning to other documents;** however, an EIS is not required to include **all information conceivably relevant** to a proposal, and may be supplemented by appendices, reports, or other documents in the agency’s record.

(Emphasis supplied.)

This regulation does not support the notion that an EIS analysis found by the Examiner to be inadequate could be excused by referring to other documents that were not even cited in the EIS or attached as appendices. Rather, as we have said, this regulation requires the key information to be included in the body of the EIS. While “all information conceivably relevant” need not be in the EIS, that has never been our claim—and, importantly, was not the basis for the Examiner finding this section of the EIS inadequate. The information he found missing was not simply “conceivably relevant;” it was “vital” (AR 24581) and its omission was “a significant” shortcoming” (AR 24583).

In like vein, Yarrow Bay mischaracterizes our argument when it states: “TRD argues **all information** must be included in an EIS itself . . .”

YB Br. at 40 (emphasis supplied). We have never made that argument. Instead, we have consistently argued that the key information regarding the most important environmental issues must be disclosed in the EIS. The Examiner agreed with us on that and determined that this EIS failed to meet that standard. “The Villages and Lawson Hills FEIS failed to adequately disclose potential phosphorous impacts to Lake Sawyer.” AR 24599.

Yarrow Bay stretches even further in citing WAC 197-11-400(4) which notes that an EIS should be used by agency officials “in conjunction with other relevant materials and considerations to plan actions and make decisions.” This merely reflects that issues other than environmental impacts may be important in agency decision making. Decision makers may need to consider economic and financial impacts, social impacts, and other considerations. WAC 197-11-448(1) (“an environmental impact statement analyzes *environmental* impacts and must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions on a proposal”) (italics in original). The rule even lists a number of examples of these “other relevant considerations and documents,” including: “Methods of financing proposals, economic competition, profits and personal income and wages, and social policy analysis.” WAC 197-11-448(3). In no

way does the reference to “other relevant materials and considerations” excuse the fundamental SEPA requirement to include a reasonably thorough analysis of important environmental issues in the EIS itself. In sum, the respondents have failed to rescue the Examiner’s reliance on inquiry notice as excusing the remand required when he found the EIS “failed to adequately disclose potential phosphorous impacts to Lake Sawyer.” AR 24599.

- b. The Examiner erred in rationalizing that information on the proposal’s contribution to the lake’s phosphorous load “would not have provided anything of significant use to the decision maker”

The Examiner’s other excuse for ignoring his own finding that the EIS water quality analysis was inadequate was that preparation of an adequate analysis “would not have provided anything of significant use to the decision maker.” AR 24606. Not only is this assertion implausible (as we discussed in the Opening Brief at 56-58), it is flatly contradicted by the Examiner himself. The Examiner found that recalibrating the LSMP predictive model would be “relatively simple” and would generate “**useful** and more accurate information.” AR 24606, n.9 (emphasis supplied). So why did the Examiner elsewhere state that such an effort would not have provided anything of significant use to the decision maker? He never addresses the contradiction.

That contradiction – on a key issue -- renders the Examiner’s decision clearly erroneous, precludes a determination that his findings were supported by substantial evidence, and precludes effective judicial review.

While the Examiner never provides a clear explanation for his finding that the information would not “have provided anything of significant use,” he does provide an unclear explanation at the top of AR 24607. There he states:

The price of this additional information is to hold the applicant to a different standard than the watershed standards developed in the LSMP and the Implementation Plan. Along these lines, any proportionate share analysis would be meaningless unless other development and regional watershed implementation measures are held to the same standard.

While the Examiner’s rationale in this passage is difficult to discern, he apparently is suggesting that an updated analysis might propose a different set of mitigation measures than those in the Implementation Plan and that it would be “meaningless” to hold Yarrow Bay to those updated standards when other polluters in the basin were complying with older standards in the Implementation Plan. The Examiner’s apparent logic is befuddling on several counts.

First, the Examiner got ahead of himself in contemplating the mitigation measures that might flow from an adequate analysis of the

project's impacts. The Examiner found that the EIS "fail[s] to adequately disclose potential phosphorous *impacts* to Lake Sawyer." (Emphasis supplied.) Before mitigation measures could be developed, an adequate analysis of those impacts had to be developed. *See supra* at § II.A.2.

Second, even jumping ahead to mitigation measures, the Examiner apparently assumes that an updated analysis would require a more stringent set of mitigation measures, but that those would be "meaningless" if they were not applied to all polluters in the basin. The Examiner does not explain the basis for that judgment either. For one thing, an updated analysis might spur the City (or other agencies) to impose the updated standards basin-wide. Additionally, even if the updated standards were applied only to Yarrow Bay, that would be beneficial to the extent that they limited the amount of phosphorous Yarrow Bay's development was contributing to Lake Sawyer.

Neither of the respondents provides an adequate defense of the Examiner's misguided assertion that an adequate analysis of the project's impacts to Lake Sawyer would be "useless." Yarrow Bay makes a brief reference to this justification (at 38) but does so only in a conclusory manner, asserting that an EIS "need only include information sufficiently beneficial to the decision makers to justify the cost of its inclusion." *Id.* But this does not

account for the Examiner's finding that developing the more accurate information could be derived by "relatively simply refinements." AR 24606 at n.9. Nor does it provide any analysis to support the implication that such information would not be of significant benefit. Beyond that, Yarrow Bay merely quotes the Examiner's decision, without providing any analysis or justification for it. *Id.* at 38. The City's defense of this rationale is equally vacuous, merely quoting the Examiner's decision and stating that it was "reasonable" without any real effort to justify it. City Br. at 56, 69.

In sum, the Examiner's unchallenged findings are that the EIS contained an inadequate analysis of the project's impacts to Lake Sawyer water quality and neither of the justifications the Examiner offered ("inquiry notice" and "additional analysis would not be useful") stand up to scrutiny and, in fact, are barely defended by the respondents. The Court should reject these clearly erroneous rationales which violate basic SEPA principles and give life to the Examiner's multiple, unchallenged findings that the EIS water quality analysis was inadequate.

3. Even if reference to the LSMP and Implementation Plan could be considered in assessing the adequacy of the EIS, those documents fail to provide the analysis required by SEPA

As noted above, the respondents wander far afield in contending that the LSMP and/or Implementation Plan could cure the deficiencies the Examiner found in the EIS analysis of impacts to Lake Sawyer. The key information in those documents (discussed at length by the respondents and by the Examiner before them) was not included, summarized, discussed, or otherwise mentioned in the EIS. Thus, that information cannot fill the holes the Examiner found in the EIS. But even if those documents could, in theory, be considered as a remedy, a brief review of them demonstrates that they would not rescue the deficient EIS anyway.

The respondents' mistake in referencing the LSMP is easily demonstrated by returning to the words of the Examiner himself. It was the Examiner – not TRD – who stated: “Appellants have raised valid questions about the utility of the LSMP and the gap between the modeling results of the LMSP and DOE’s conclusions that development can proceed in the Lake Sawyer watershed without jeopardizing water quality.” AR 24582-83. “If the LSMP was the final word on the issue, the City would be tasked with drafting a new TV FEIS.” AR 24582. These findings were not challenged by

the respondents and, therefore, are verities on appeal. The respondents cannot rescue the EIS by reference to the LSMP.

The respondents (and the Examiner before them) seem to put more weight on the Implementation Plan. But the Examiner never found that the Implementation Plan provided an adequate analysis of the MPDs' water quality impacts either. Rather, he stated that the Mitigation Plan provided "reasonable assurance on the adequacy of **the mitigation measures** incorporated into the MPD proposal." AR 24605 (emphasis supplied). There are three flaws with this finding (and the respondents' reliance on it).

First, as discussed in more detail above, the EIS must do more than discuss mitigation measures. It must first identify the impacts to be mitigated. *See supra* at § II.A.2. Thus, even if the Examiner were correct that the Implementation Plan provided "reasonable assurance" about the "adequacy of the mitigation measures," that would not cure the defect in the EIS failure to analyze *impacts*.

Second, the Examiner himself made findings that were inconsistent with his determination that the Implementation Plan provided "reasonable assurance." Multiple times in his opinion, the Examiner noted that the Implementation Plan lacked analysis or modeling to justify its conclusions:

- “The DOE Implementation Plan provides **no analysis or modeling** to show how DOE determined that its recommended conditions for new development would preserve Lake Sawyer water quality.”
- “There is certainly **a gap of information** in the record that could be of use in assessing the phosphorous impacts of the project.”
- “[The Implementation Plan] provides a framework for corrective actions to address sources of phosphorous pollution in Lake Sawyer and the surrounding watershed. Unlike the LSMP, **it did not include any modeling of future lake conditions.**”
- “Mr. Zisette’s calculations touch upon the most difficult issue of the Lake Sawyer EIS appeals: how could DOE conclude that the Lake Sawyer 715 kg/yr TMDL would be reached when the LSMP model predicted 2255 kg/yr at full build-out? The LSMP **and the Implementation Plan do not provide any explanation.**”

AR 24582, -599, -604 (emphasis supplied).

The Examiner’s decision was clearly erroneous, not based on substantial evidence, and not based on findings which explicate his reasoning when, on the one hand, it concludes that the Implementation Plan provides “reasonable assurance on the adequacy of the mitigation measures” and, on the other hand, makes multiple findings that the Implementation Plan contains no analysis or modeling, contains numerous data gaps, and leaves “the most difficult issue” unanswered. AR 24653.

Third, the Examiner's finding that the Implementation Plan provides "adequate assurance" regarding mitigation measures is inconsistent with his other findings regarding the uncertainty of those mitigation measures. Elsewhere in his opinion, the Examiner found that the contemplated mitigation measures would cost millions of dollars and that most had not been funded:

These mitigation measures include public improvements that cost eight to twelve million dollars to implement. *See* LSMP, p. 6-24 and 6-26. Nothing in the record suggests that these improvements have occurred and, in fact, **the Implementation Plan states generally that most mitigation measures have not been funded.** Implementation Plan, p. 12.

AR 24604 (emphasis supplied).

The Examiner's decision was clearly erroneous, not based on substantial evidence, and not based on adequate findings when, on the one hand, it concludes that there is no funding for most of the mitigation measures and, on the other hand, that the Implementation Plan provides "reasonable assurance" on the adequacy of the mitigation measures.

D. The EIS Fails to Adequately Discuss the Transportation Impacts

1. Safety

The respondents do not contest that the Examiner found that the EIS failed to address safety issues. Instead, they try to support the Examiner's justification for that omission: that there was no evidence that these impacts "could be adequately addressed at this high level review." AR 24620 (CL 2). This "finding" erroneously relies on the programmatic EIS and phased review rationales discussed earlier and should be rejected for those reasons. In addition, the Examiner overlooks the testimony of Mr. Tilghman and others who identified two specific safety issues that could be disclosed and assessed at this time.

One was the safety hazard created by lengthy backups of vehicles at intersections ("queue lengths"). AR 597, 603-09. Mr. Tilghman explained that these unexpected backups create safety hazards (*e.g.*, increased rear end collisions). *Id.* Ironically (and perhaps tellingly), the City actually obtained the information about the probable backups, but the information was not included in the EIS nor was it summarized or even referenced there. It was

buried in technical data sheets.⁵ There was not the slightest hint in the EIS that these backups (queues) would be created or that they would pose safety hazards to the public. Had they been disclosed, the public, other agencies (like WSDOT, with authority over SR 169) and the Council could have assessed measures to reduce or eliminate the backups, including wider roadways and a smaller project (creating less congestion in the first place). These mitigation measures were supposedly being considered by the Council at this time, yet they had not the slightest clue that these mitigations might be necessary to address not just congestion, but safety hazards, too.

Two, TRD presented evidence regarding the safety hazards on the historic and bucolic Green Valley Road. The road currently is heavily used by cyclists, horsemen, pedestrians, farming equipment, and other slow moving vehicles, as the Examiner found. AR 24584. Providing some of the ingress and egress for Yarrow Bay's massive project along this road poses serious safety issues, as the Examiner found. AR 24617-19. There was no reason these impacts could not be disclosed in the EIS. Nor was it appropriate to defer analysis to later. The best mitigation for this impact might be

⁵ See, e.g., AR 16525, -27, -29, -42, -51, -53, -55, -68 (showing queue lengths of 173 to 749 feet).

shifting residential areas or the layout of the project's access points to reduce the amount of traffic likely to head to the Green Valley Road. But the Council approved the basic layout of the development in these MPD ordinances. It will be too late when individual subdivisions are being approved to rearrange the major pieces of the development or re-size it.

Yarrow Bay echoes the Examiner's statement that it is "common knowledge" that safety hazards increase as traffic increases. YB Br. at 45. But the peculiar safety issues implicated by increasing traffic on Green Valley Road are not necessarily "common knowledge" and by failing to identify that impact, the EIS simultaneously failed to disclose significant impacts and neglected the opportunity to mitigate them.

Finally, the respondents' (and Examiner's) reliance on subsequent environmental review to address safety hazards ignores the shell game being played on that score. There was no supplemental EIS prepared for the Development Agreement or for the first subdivisions being approved by the City. *See supra* at 14. The promise of more environmental later of these critical safety issues was another fiction foisted on the Examiner by the respondents.⁶

⁶ In our Opening Brief, we noted that, worse than just omitting any

2. Travel time

The Examiner excused the failure of the EIS to disclose impacts on travel time on the basis that the City Council was familiar with the LOS system for grading individual intersections. That may be, but it is non-responsive to the basic concern. Even if the City Council members understood what the LOS ratings meant for individual intersections, that information did not provide the City Council members (or anyone else) with information about travel time. The issue is not whether the City Council members understood the LOS rating system. The issue is whether SEPA's requirement for a reasonably thorough analysis of the traffic impacts for a project of this magnitude necessitates a disclosure of impacts to travel time.

The respondents try to rescue the Examiner's flawed rationale by citing testimony that EISs commonly use LOS ratings. There are two flaws

discussion of safety issues, the EIS included a misleading statement that there would be no impact from the project to bicyclists and pedestrians. Op. Br. at 62, n.17, 63. The City (at 73) and Yarrow Bay (at 45) argue that the misleading statement only stated that the project would not impact the non-motorized travel "system," and did not suggest that pedestrians and bicyclists would be unaffected. This nuanced reading of the EIS does nothing to demonstrate that the EIS provided an adequate assessment of safety issues for pedestrians, cyclists, and others. Most readers would construe a statement that the project will "not affect the non-motorized system" to mean it would have no impact on pedestrians and cyclists, not just the pavement on which they travel. Even if a discerning reader picked up on the subtlety, the bottom line remains unchanged: the EIS never provides any information to the reader about the safety impacts to pedestrians, cyclists, or anyone else. But if nothing else, at least the respondents' efforts in this regard demonstrate well the linguistic games they are willing to play when "straight talk" in the EIS should be their primary objective. *See* WAC 197-11-425(1) & (2) (EISs shall be "readable," "concise and written in plain language").

with this response. First, what is commonly done for an individual subdivision, hotel or racetrack is not necessarily appropriate for a project that will create a five-fold increase in the population of a small town far removed from most transportation infrastructure and transit. The rule of reason requires that the more substantial the impact, the more detailed the analysis and disclosures must be. *See, e.g., Kiewit Const. Group Inc. v. Clark Cy*, 83 Wn. App. 133, 140, 920 P.2d 1207 (1996) (EIS inadequate; “the level of detail must be commensurate with the importance of the environmental impact”). Everyone agrees that the traffic impacts of a project of this magnitude in a remote, rural corner of King County are one of the project’s biggest issues. Even if projects with lesser impacts are “commonly” analyzed by sole reference to the LOS scale, that hardly provides justification for such a meager analysis for this behemoth.

Second, while the respondents quote Mr. Perlic’s testimony that a travel time analysis is not “common” in an EIS, they omit the remainder of his testimony. Not only did he acknowledge that EISs “occasionally” include a travel time analysis, but he also stated that “it is something you are seeing more and more of.” AR 1982. Given that travel time analyses are being used on projects far smaller than this one, a reasonably thorough disclosure of

traffic impacts of this mega-project would certainly require disclosure of impacts to travel time, not just provide letter grades for individual intersections.

Providing travel time information would not have been difficult. Indeed, buried within the computer model output was the data that allowed Mr. Tilghman at the hearing to calculate that travel times across Black Diamond would more than double. AR 2496. But this important and useful information was not provided to the public or the Council in the EIS. Given the great relevance of this data, its ready availability, and the significance of the traffic issues in general, this information should have been included in the EIS under the rule of reason.

3. Construction traffic impacts

The respondents do not dispute that the EIS totally ignores construction traffic impacts. We addressed in our Opening Brief (at 67-68) the Examiner's rationale that these significant impacts could be addressed later. The respondents provide little new information to support the Examiner's flawed conclusions. Their reliance on phased review is all the more remarkable given that the later phases of environmental review have now occurred and did not involve the preparation of a supplemental EIS.

The City cites testimony that analyzing construction traffic impacts now is not necessary because “typically” solutions can be found later. City Br. at 80. This is directly contrary to SEPA’s requirements that environmental issues be unearthed as early in the process as possible. *See* Op. Br at 16. The City’s argument does not respond to the most basic issues posed by the project: how big are the project’s impacts which cannot be mitigated and should the City be approving so large of a project to be built in such a short time frame? (If the projects are built out on Yarrow Bay’s schedule, Black Diamond’s population would increase more in 10 years than it has in the last 100 years.)

4. No detailed analysis of Alternatives 3 and 4

The City argues that there was no need for the EIS to analyze Alternatives 3 and 4 because the City had previously determined that projects of this size would be allowed on this property (when the 2009 Comprehensive Plan was adopted). As we explained earlier, the City did not prepare an EIS to inform its decision on the 2009 Comprehensive Plan. This EIS is the first time that the City had the opportunity to evaluate the environmental impacts associated with a project of this size on this land to be developed in just the course of 15 years. Simply because the 2009

Comprehensive Plan *authorized* a population increase for the City does not excuse the City from conducting the SEPA-mandated environmental review when the time came for the City to actually adopt an ordinance approving a specific project. If the City had prepared an EIS when it adopted its Comprehensive Plan in 2009, it may have been able to adopt that EIS for purposes of informing its MPD ordinance decisions. But that is not what occurred and, thus, it fell to *this* EIS to provide the requisite analysis.

Second, the City does not deny that this EIS must consider mitigation measures that would eliminate or reduce adverse impacts. *See* WAC 197-11-440(6). The first and preferred form of mitigation is avoidance. WAC 197-11-768. One way to avoid impacts for this project is to approve a smaller project or to require it to be phased over a longer period of time. Indeed, that may be the only kind of mitigation that would have any significant effect on an impact like construction traffic which might otherwise be totally unmitigatable. Thus, even if not framed as “alternatives,” the EIS should have analyzed as a mitigation measure the possibility of downsizing or stretching out Yarrow Bay’s development plans.⁷

⁷ WAC 197-11-440(5)(d) does not justify the EIS failure to analyze alternative project layouts and size. That regulation limits alternatives to those which meet a private developer’s purposes. But the purpose here is to develop a profitable, urban project with a mix of uses. Alternatives 3 and 4 provide two such examples. Yarrow Bay cannot

5. Omissions regarding the true extent of LOS failures

The respondents argue that, under the rule of reason, the EIS need not address “every conceivable impact,” and, therefore, the EIS can be excused for not analyzing intersections for more than one hour of the day and not disclosing failures from specific turning movements at intersections (even when the intersection average as a whole meets LOS standards). The respondents (and the Examiner before them) misapplied the rule of reason.

The rule of reason works in both directions. The degree of analysis is commensurate with the significance of the impact. As the respondents remind us, the rule operates to allow an EIS to address summarily issues of lesser importance. But the reverse is also true. The rule compels more thorough analysis of impacts of greater significance.

Even for larger projects, not all impacts are of the same magnitude. Thus, this project’s impacts on bald eagles, groundwater, and a host of other issues have not been raised in this appeal and were infrequently discussed below. But everyone recognizes that the transportation issues associated with this project are among the weightiest issues to be addressed. Not only is the increase in traffic volume extraordinary, but the project is located in an area

define its purpose so narrowly (*i.e.*, the purpose is to build this specific layout) that it eliminates all reasonable alternatives from consideration.

where there is very little transportation infrastructure: no freeways, very few arterials, and almost no transit. As the City's Comprehensive Plan (at 3-9) states: "because the City is not in immediate proximity to a major employment center, most residents must travel to the western portion of King County or to Pierce County for work." If this were an ordinary (smaller) project slated for development in the middle of the metropolitan area (serviced by arterials and transit), the respondents might have a better argument for limiting the scope of the transportation analysis under the rule of reason. But in this location and with a project so large, the rule of reason requires more. A reasonably thorough disclosure of impacts requires disclosure of more than just the impact at the worst hour of the day. The residents (as well as the City Council) should have been alerted as to how long significant backups would occur at these intersections and whether they would occur in the morning as well as the evening. The respondents' citation to data buried in the technical appendices is no substitute for making these basic disclosures in the body of the EIS.

E. The EIS Did Not Adequately Address Construction Noise Impacts

In our Opening Brief, we argued the EIS discussion of noise impacts was inadequate, *inter alia*, because it failed to include any discussion of the

noise generated by construction truck traffic. Yarrow Bay mischaracterizes our claim, recasting it as an assertion that the EIS had to include a “site-specific analysis of the impacts of truck traffic *on every potentially affected property* along the probable truck haul routes.” YB Br. at 55 (emphasis supplied). There is no such statement in our brief. Analyzing truck traffic noise along the probable haul routes (Op. Br. at 76-77) does not require a lot-by-lot noise analysis. (We mentioned that the noise would impact “everyone” along the haul routes not to suggest that a lot-by-lot analysis was required, but to respond to the Examiner’s misunderstanding that noise would impact only a few people living closest to the construction site.)

Yarrow Bay asserts that “[i]n fact, potential noise impacts from construction activities (including use of dump trucks) are disclosed and discussed in the EIS.” YB Br. at 55 (*citing* AR 20664-67). The cited pages do not support Yarrow Bay’s assertion. Construction noise is discussed in those pages *only* with regard to the impacts of noise generated by on-site equipment impacting properties adjacent to the work site. AR 20664-65. Mitigation from that on-site construction noise is addressed at AR 20665-66. Neither the text nor the table on AR 20665 provides a reasonably useful disclosure of how many people along the probable haul routes will be

impacted; how much noise they will be forced to suffer; and what mitigation – if any – is available.⁸

That is the end of the construction noise discussion. The remainder of the passage addresses “long-term noise disturbance,” *i.e.*, noise generated once the projects have been built and are occupied and commercial establishments open for business. AR 20666-67. The Examiner found that the EIS includes **no** disclosure of construction noise impacts off-site. AR 24583; AR 24611. Yarrow Bay did not appeal that finding and, in any event, has not demonstrated the absence of substantial evidence to support it.

Yarrow Bay continues with the implausible argument that construction noise is “usually determined” to be insignificant because it is temporary (at 56) – heedless that this “temporary” impact will endure in this case for fifteen years or longer. Today’s pre-schoolers will be in college by the time the dump trucks stop rumbling through town.

Yarrow Bay’s standing argument applies only to the on-site noise which impacts neighbors directly adjacent to the property. It has no relevance to the area-wide noise impacts generated by the trucks using haul routes

⁸ This table hardly rises to the level of the map in the case cited by Yarrow Bay (at 56) which alerted those decision makers that three of the alternative routes involved destruction of a historic building.

through the community for the next 15 years. *See also* Answer to Mot. to Dismiss (Nov. 19, 2012).

The City points out that the City Council adopted conditions prohibiting hauling on certain existing streets and residential areas. City Br. at 82. But this is yet another example of putting the mitigation cart before the impact disclosure horse. Neither the cited conditions nor the EIS provides the Council or the public with information to assess the noise impacts on all of the other streets that have not been shielded from the construction trucks. What is the extent of the noise impacts along those roads and how many people will suffer those impacts? The City is still clueless thanks to the uninformative EIS.

West 514, Inc, supra, does not authorize omitting a discussion of significant impacts in an EIS on the basis that the impacts will be subject to monitoring. Rather, *West 514* dealt with impacts that were deemed to be *insignificant*, if the construction complied with the site plan and certain studies. 53 Wn. App. at 849. The monitoring would simply confirm that the project would not have significant adverse effects. *Id.* Just the reverse is true here, where the Examiner acknowledged that the noise impacts from the construction trucks would be significant. How significant (*i.e.*, how noisy

and how many people for how long of a period of time) remains unknown. Monitoring after the project has been approved and is under construction will not do anything to allow the City to modify the MPD ordinance approvals.

F. If the EIS Is Inadequate, Then the MPD Ordinances Are Invalid

Yarrow Bay argues that if the Court finds the EIS inadequate, it should not invalidate the MPD Ordinances. It argues that invalidation of the underlying action is appropriate only when an EIS was required, but not prepared. According to Yarrow Bay, if an EIS has been prepared but it is inadequate, the agency action which relied on the inadequate EIS should be allowed to stand. Yarrow Bay is wrong. Notably, it cites not a single case where an EIS was held inadequate yet the Court allowed the underlying action to stand.

In contrast, multiple cases stand for the opposite result. For instance, in *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P.2d 1148 (1980), Kitsap County prepared an EIS in support of a rezone. The Supreme Court found the EIS inadequate and, therefore, declared the rezone ordinance invalid: “We reverse the Superior Court’s holding that the County’s EIS is adequate and **therefore** declare the rezone ordinance invalid.” *Id.* at 861 (emphasis supplied). *See also Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d

498 (1994) (finding EIS inadequate and reversing approval of underlying conditional use permit). *See also* Op. Br. at 28, n.8 (*citing* numerous federal cases to the same effect).⁹

Yarrow Bay also cites RCW 36.70C.140, but that section of LUPA expressly authorizes a court to “reverse the land use decision under review.” Here, the “land use decisions” under review are the MPD ordinances. Clearly the Court has authority to reverse those approvals based on the City’s illegal action in failing to prepare an adequate EIS.

Moreover, LUPA provides the Court with authority to “make such an order as it finds necessary to preserve the interests of the parties and the public pending further proceedings or action by the local jurisdiction.” *Id.* This, too, provides authority to invalidate the ordinances. If the MPD ordinances are left in place, Yarrow Bay will assert they provide vested rights and compel the City to issue yet additional permits to effectuate the MPD approvals--even though the MPD approvals were based on an inadequate EIS.

⁹ Yarrow Bay spends most of its time attempting to distinguish *Leschi Improvement Council v. Wash. State Highways Comm.*, 84 Wn.2d 271, 525 P.2d 774 (1974) and similar cases on grounds that in those cases the agency had failed to prepare an EIS, as opposed to preparing an inadequate EIS. That is a distinction that makes no difference. SEPA requires preparation of an adequate EIS. Where an adequate EIS is not prepared in advance of the decision, the agency has acted illegally. *Leschi* at 279 (“[w]here an administrative agency fails to have before it, as required, as adequate environmental impact statement when it enters its findings and conclusions, it acts illegally, contrary to the statutory authority of [SEPA]”). Where an agency’s actions are illegal, they should be invalidated.

Clearly, the interests of justice and the public interest do not countenance issuance of additional permits and approvals based on an MPD ordinance which is based on an inadequate EIS.

III. THE MPDs ARE INCONSISTENT WITH COMPREHENSIVE PLAN POLICIES SEEKING PROTECTION OF BLACK DIAMOND'S SMALL TOWN CHARACTER AND PRESERVATION OF ITS NATURAL SETTING

In our Opening Brief, we demonstrated that the applicable development regulations require consistency with the planning and design principles identified in the book *Rural by Design*. Op. Br. at 78 (citing BDMC 18.98.010.L and -.080.A.10). One of the key planning principles in *Rural by Design* is: “Fit within the environment rather than on top of it. New development can be designed to nestle into rather than to intrude upon its natural setting. . . .” AR 0014081 (italics in original, underlying supplied). This principle is repeated as one of the “fundamental principles to retain small town character” in the Comprehensive Plan (at 5-8). See also Appendices I and J to the Opening Brief. Neither respondent questions the applicability of these principles which are expressly adopted by the Code. (The City questions the applicability of *other* Comprehensive Plan provisions. We address that issue later.)

The City Council did not expressly find that the projects complied with these regulatory requirements, but even if it had, such a finding would have to be struck down because it would not be supported by substantial evidence in the record. Such a Council finding also would have been contrary to the Examiner's finding: "[I]t is anticipated that the development areas shown on the Figure 3-1 Land Use Plan [AR 25134] **will be cleared of all vegetation and graded** to facilitate development." AR 24919 (emphasis supplied). Such a development does not "nestle into" the natural environment. It does not "fit within the environment." Rather, it is plopped "on top of" the natural environment and "intrude[s] upon its natural setting."

Because they cannot argue that the 910 acres to be developed will be clearcut and leveled, the respondents seek to shift the focus to other lands that are not slated for development. According to the respondents, the appropriate perspective is to note that the 910 acres slated for clearcutting and leveling are bordered by areas that will not be developed. By taking those adjacent lands into account, the respondents assert that the project "nestles in" to the natural environment.

If the areas to be clearcut and bulldozed were small, we could understand the reference to the surrounding area as perhaps setting the

context for the development. For instance, a clearing for a single home or a small cluster of homes could be said to nestle into a surrounding forest. But here, just on the north end of The Villages main property alone, Yarrow Bay proposes to clear and flatten nearly 500 acres, creating housing for 12,000 people and associated commercial development. That the *surrounding* area is not also being flattened does not transform the 500-acre, pancake flat, clearcut into a project that “nestles into” its environment, instead of “sitting on top of it.”

And that’s just the northern part of The Villages. The entire area to be developed (*i.e.*, flattened and clearcut) is large enough to house a five-fold increase in the town’s population and a million square feet of big box commercial space. The respondents attempt to paint a more idyllic picture, as if the areas to be developed were as small as a small subdivision and a few neighborhood stores, separated from other developed areas by swaths of greenery and wetlands. But that is a fiction. The reality is seen on exhibits like AR 25134, which show that virtually the entire northern part of The Villages is slated for intense development. Hundreds of acres will be bulldozed, clearcut, and developed with high density residential and commercial uses.

Contrast the size of a development that “nestles into” the environment as depicted in *Rural by Design* (Appendix B hereto) with the area proposed for clearing and flattening and intense urban development in Yarrow Bay’s plans (Appendix C hereto). Or contrast the size of the area to be clearcut and flattened in Yarrow Bay’s plans (Exhibit C) with the existing small village-like developments of Morganville and the old Black Diamond town site (also depicted on Appendix C). Rather than avoiding “residential techniques common in other portions of King County,” Comp. Plan at 5-50, Yarrow Bay plans to replicate – on steroids – the pattern of suburban subdivisions seen throughout much of King County.¹⁰

The incongruity between Yarrow Bay’s plans and the ‘retain the natural setting’ principles in *Rural by Design* (and the Comprehensive Plan) is also demonstrated by reference to the stand alone commercial/light industrial area Yarrow Bay seeks to develop.¹¹ This non-contiguous area comprises approximately 160 acres. Like the northern part of The Villages,

¹⁰ The Comprehensive Plan discourages the use of “walled planned residential techniques common in other portions of King County.” Comp. Plan at 5-50. Yarrow Bay’s project is “planned.” The conditions of approval do not prohibit it from being walled.

¹¹ Because each MPD was required to have a substantial commercial (jobs creation) component, a portion of this non-contiguous commercial area was deemed by Yarrow Bay to be part of The Villages and the remainder of this non-contiguous area was deemed to be part of Lawson Hills. The fictions continue.

most of this commercial/industrial area (about 110 acres) is slated for complete leveling and clearcutting. The big box commercial development of this area will look nothing like the small town character exhibited in the historic downtown Black Diamond (home of the famous Black Diamond Bakery).

Yarrow Bay's claim that this mega-commercial development (over a million square feet) fits within the environment and maintains Black Diamond's small town character is yet another fiction. The reality is far different. The commercial/industrial area, like the main residential/commercial areas of The Villages and Lawson Hills would radically transform Black Diamond from something like a small village to something more akin to the Issaquah Highlands (only larger).

Yarrow Bay reviews, at length, six design principles from *Rural by Design*. YB Br. at 65-74. Most of this discussion is irrelevant as it concerns design principles different than the ones upon which we rely. Our focus has been on the first principle discussed by Yarrow Bay (retain the natural setting and development to occur in "villages").

Yarrow Bay also states in this section of its brief that it will not, and is prohibited from, taking down major hillsides to level the site. YB Br. at 66.

But the evidence it cites for this proposition does not support its claim. The cited evidence merely provides that the difference between the amount of cut and the amount of fill cannot be more than 20 percent. That simply means that, for the most part, when the bulldozers cut away the hills, they must use the spoils to fill in the low spots (as opposed to trucking it away). It is likely that Yarrow Bay would have pursued this course of action in any event for economic reasons. But the point here is that the condition does not prohibit flattening the site or “taking down the major hillsides.”

Yarrow Bay also implies that clearcutting is not allowed because Yarrow Bay must comply with the City’s tree preservation ordinance. YB Br. at 67. But the Tree Preservation Ordinance provides no protection. (Not surprisingly, Yarrow Bay does not analyze its requirements.) The protective elements of the ordinance do not apply if 40 percent of the site is left untouched. The wetlands and other critical areas left untouched by Yarrow Bay amount to 40 percent. As a result, the Tree Preservation Ordinance does not protect any of the trees on the 910 acres to be developed, *i.e.*, the 910 acres to be clearcut and leveled. *See* BDMC 19.30.07.E (“when at least 40 percent of the total site area is preserved as non-disturbed open space, critical areas and their associated buffers, or other areas subject to a conservation easement, the

tree replacement requirement shall not apply”).¹² See also AR 24919 (Examiner: “it is anticipated that the development areas . . . will be cleared of all vegetation”).

The City asserts (at 46 – 47) that some of the Plan provisions we cite are not labeled as “policies” and, therefore, are irrelevant. But the Council quoted the Comp Plan provisions cited by TRD’s members below and referred to them as “policies” in the MPD ordinances. See *infra* at 62 n. 16 and 63. The City Attorney’s *post hoc* litigation argument conflicts with the City Council’s characterization and should be rejected. *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (1981) (“agency action cannot be sustained on *post hoc* rationalizations supplied during judicial review”).¹³

¹² The Tree Preservation Ordinance does not prohibit the removal of trees, even trees defined as “significant trees.” Rather, the ordinance requires that a permit be obtained to remove significant trees and requires that developers replace them with new saplings. BDMC 19.30.070.A-C. But as noted in the text, even that tree replacement provision does not apply to Yarrow Bay’s project.

¹³ Demonstrating the correctness of the Council’s characterization, we also note that many of the Plan provisions on which we rely are formally designated as “policies.” See, e.g., Policy LU-17 (Comp Plan at 5-37) (“[n]ew housing should be compatible with the existing development pattern in a small-town atmosphere . . .”); Policy LU-46 (Comp Plan at 5-49) (“retain a sense of place by protecting the community’s important natural features”); Policy LU-59 (Comp Plan at 5-53) (“encourage land uses and development that retain and enhance significant historical resources and sustain historical community character”); Policy T-10 (Comprehensive Plan at 7-49) (“enhance the ‘small town’ character that the City currently possess”); Policy CF-41 (Comp Plan at 8-44) (“discourage significant vegetation clearing”).

Moreover, the City is playing games when it asserts that the only words in the Comprehensive Plan that count are those that are formally identified as “policies.” The zoning code does not limit its incorporation by reference to formally designated policies in the Comprehensive Plan. BDMC 18.98.080.A.1. The Comprehensive Plan contains many policies in addition to those that are formally set forth as such. There is an entire section of the Comprehensive Plan entitled “Principles of Small-Town Character.” The first heading under that section is “Retain the Natural Setting.” Under that heading, the Comprehensive Plan states: “In the Black Diamond area, the natural setting is not just an accent, but is intended to be integrated with the built environment.” Comprehensive Plan at 5-8. The Plan also states: “The City *will apply* several fundamental principles to retain its small town character as follows: Retain the natural setting . . .” *Id.* at 5-7 through 5-8 (emphasis supplied). For the City to now contend that a “fundamental principle” can be ignored because it is not separately identified as a “policy” is yet one more example of the current administration¹⁴ breaking faith with

¹⁴ While there is virtually an entirely new City Council since the MPD ordinances were adopted, the mayor (who directs litigation) has not yet had to stand for re-election subsequent to passage of the MPD ordinances.

the pact the City made with its citizens when the Comprehensive Plan was adopted. The Court should not be a party to such an effort.

The respondents also seek to demonstrate compliance with the Comprehensive Plan's and regulations' small town character protection provision by discussing density issues. We address that in the next section of this brief.

IV. THE CITY COUNCIL FAILED TO ADOPT ADEQUATE FINDINGS OF FACT

A. The Role of Findings in Allowing Effective Judicial Review

“Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court.” *Weyerhaeuser v. Pierce Cy.*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (internal quotation omitted). The purpose of findings is to “ensure that the decision maker has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved and the appellate court may be fully informed as to the bases of his [or her] decision when it is made.” *Id.* (gender neutral words added in original). “The process used by the decision maker should be revealed by findings of fact and conclusions of law.” *Id.* at 36.¹⁵

¹⁵ Yarrow Bay mistakenly cites BDMC 18.08.070.A.3 and 18.98.060.A.6 and RCW 36.70C.130(1)(a) as establishing the standard for assessing the adequacy of findings.

Yarrow Bay quotes *Weyerhaeuser* where the Court found findings deficient because they failed to provide “any guidance as to *how* issues involving disputed evidence were resolved.” City Br. at 75 (emphasis supplied). We agree. Findings are not adequate simply because they are lengthy. *See id.* (citing 164 pages (!) of findings here).

Nor is the issue whether the findings “viewed as a whole,” (*id.* at 76) are adequate. As demonstrated below – and as acknowledged by the City Council – “the most controversial [Plan] policies at issue concern those pertaining to preservation of small town character.” AR 27257 (Conclusion of Law 27.A.i). We have not challenged whether the findings related to water quality, transportation, or other issues reveal the Council’s thinking and factual determinations. But we do challenge the transparency of the findings as they relate to the “most controversial” and fundamental Comprehensive Plan policies, *i.e.*, those related to the preservation of Black Diamond’s small town character. If those findings do not reveal “how” the Council addressed the small town character preservation issue, that omission cannot be defended

The City Code provisions merely restate the case law requirement that findings be entered, but do not address the quality or content of those findings. The statute addresses the standard of review to be used in deciding challenges to the substance of an agency’s decision, not a challenge to whether the findings are sufficiently detailed to allow for judicial review.

on the grounds that other findings dealing with other subjects were “overall” sufficient.

Nor is this an issue controlled by LUPA’s standards for determining whether the underlying action is valid. The issue here is whether the record allows for effective judicial review. LUPA presupposes that an adequate record exists. *Weyerhaeuser* (and the cases cited therein at 35 -36) makes clear that the record must include adequate findings which explain the decision-makers rationale and, thereby, allow for effective judicial review. LUPA does not change that.

B. The Council’s Findings on the Critical Small-Town Character Issue Are Missing

In our Opening Brief, we demonstrated that the City Council’s findings did not adequately address the issue of the project’s consistency with the Comprehensive Plan’s policies for growth consistent with Black Diamond’s small town character. *See Op. Br.* at 85-86. We demonstrated that instead of addressing “small town character,” the Council digressed into an extended discussion of the differences between urban and rural development. Conclusion of Law 27 provides a great summary of arguments against a mandate for “rural development” or “rural density” on this urban site. But the Council seemed oblivious to the fact that small town character

can exist and be protected on either side of the urban/rural divide. By demonstrating that the project was required to be “urban,” the Council missed the real issue: whether this urban project protected small town character or destroyed it.

The City’s Comprehensive Plan recognized the distinction between density and character:

In general, character may be **more important than** the specific uses, activities, and building types. . . . Traditional ‘zoning’ concerns, including density and setbacks, **must be balanced with the intent of the character designations** to encourage development that achieves both the described **function and character** of the respective area.

Comp. Plan at 5-50 (emphasis supplied).

The old Black Diamond town site and Morganville (depicted on Appendix C hereto) have been developed at urban densities. But the **character** of those historic villages is dramatically different from the mega-suburban subdivision and shopping center character that Yarrow Bay seeks to bring to town.

The City Council’s efforts to ignore the distinction between the density issue and the character issue continues in the City’s brief, where the City contends the distinction is “nitpicking.” City Br. at 87. That is the equivalent of arguing that the difference between the character of Carnation

(to name but one “small town” example) and the character of Bellevue, Issaquah, or South Lake Union is a mere “nitpick.” All are urban areas with urban densities, but the small town character of Carnation could hardly be more different than the other suburban and urban areas mentioned. When the City adopted its Comprehensive Plan and promised – repeatedly – that these lands would be developed in a manner that protected Black Diamond’s small town character, that was supposed to mean something. It did to the citizens, but apparently not to the prior City Council or Yarrow Bay.

We referred to Conclusion of Law 27 as the only place in the lengthy document where the City Council even touched on the issue. The City apparently concurs, citing the same conclusion in its response. *See* City Br. at 85. According to the City, in this Conclusion of Law, the Council “explained at length its interpretation of the Plan and the manner in which the MPD Permits are consistent with the Plan.” *Id.* A careful review of that Conclusion of Law demonstrates the fallacy of the City’s reliance on this conclusion to demonstrate that the Council ever addressed the small town character issue in a meaningful way.

Conclusion of Law 27A begins by noting, correctly: “The most controversial policies at issue concern those pertaining to preservation of

small town character.”¹⁶ But that is virtually the last time in the lengthy conclusion that “small town character” is addressed. Instead, the Conclusion immediately digresses and attacks the straw man argument that the MPD had to provide for “rural” development. Subparagraph (i) notes that under the GMA, “urban” areas (including all cities) are not supposed to be developed with rural densities. In subparagraph (ii), the Conclusion reiterates that concept and notes that Black Diamond’s Comprehensive Plan contemplates urban development of the MPD property. In subparagraph (iii), the Conclusion states that, consequently, the MPDs may not be denied “because **their densities** might be construed as damaging ‘rural character.’” (Emphasis supplied.) In none of these paragraphs does the Council address the issue of whether the urban development proposed by Yarrow Bay protects Black Diamond’s small town character (as required by the Comp Plan) or acknowledge that the Comp Plan distinguishes density and character as separate concerns.

In subparagraph (iv), the Conclusion finally returns to the issue of “small town character.” But after citing several of the Comprehensive Plan

¹⁶ We note that the Council here characterizes the Comprehensive Plan provisions at issue as “policies,” despite the Council’s arguments in its brief that the passages at issue are not “policies.” *See* City Br. at 83-85.

policies regarding protection of “small town character,” the Conclusion again fails to address whether Yarrow Bay’s project is consistent with those policies. Instead, the Conclusion yet again reverts to the rural density issue: “This does not mean that the Plan is calling for protection of ‘rural character’ **by limiting density.**” (Emphasis supplied.)

In this passage, the Conclusion also makes reference to principles in *Rural by Design*, but again, only to distinguish those principles from the concept of providing for low, rural densities. “The listed planning and design principles [in *Rural by Design*] are not ‘rural;’ if anything, the reference to ‘compact form’ is a reference to urban rather than rural development.” *Id.*

Finally, in subparagraph (v), the Council acknowledges the arguments advanced below which are also at the crux of this issue here. The Conclusion references the various Plan policies which we cited in our Opening Brief. The Council then acknowledges those policies “require protection and/or consistency of ‘community character,’ ‘existing character of the historic villages,’ ‘natural setting,’ ‘rural community,’ ‘traditional village community,’ ‘small town character,’ and ‘existing historical development.’” (Again, we note that the Council identified these provisions as “Plan **policies**” despite the City’s current litigation position that these passages do

not constitute “policies.”) The Council acknowledges that: “All the policies referenced above reflect a strong preference to retain small town character.”

It is at this point that the Council’s Conclusion should have addressed whether Yarrow Bay’s proposal would protect and/or be consistent with these small town character policies. But the Conclusion does not do that. Instead, it reverts, yet again, to the rural density issue. The very next sentence of the Conclusion states: “None [of these small town character policies] require rural densities or suggest that they supersede the more specific Comprehensive Plan policies and state mandates requiring urban densities within the City.”

This passage demonstrates the crux of the failing of the findings (and conclusions) to address the “retain small town character” core of the Comprehensive Plan. As acknowledged by the Comprehensive Plan itself, urban densities and small town character are not mutually exclusive. The Council mistakenly seemed to believe that because urban densities were authorized by the Plan, there was no need to address whether Yarrow Bay proposal complied with the multitudinous policies calling for protection and consistency with Black Diamond’s existing small town character. The findings (and conclusions) never address that fundamental issue.

In the words of the cases cited above, these findings and conclusions do not allow the Court to confirm that the Council “dealt fully and properly with all the issues” before the matter was decided. The “process used by the decision maker” was not “revealed” by these findings and conclusions. The findings and conclusions did not provide the Court with “any guidance to *how* the issues involving disputed evidence were resolved” – at least as to the fundamental issue of how these projects would be consistent with and protect Black Diamond’s small town character.

It is not for this Court, in the first instance, to determine whether Yarrow Bay’s plans are consistent with and protect Black Diamond’s small town character. That is a determination that should have been made, in the first instance, by the City Council. But the findings and conclusions do not demonstrate that the City Council ever came to grips with that core issue. The findings and conclusions certainly do not provide the Court with a road map as to the Council’s thinking in that regard (other than to suggest that the City Council was distracted by the urban/rural density issue and never came to grips with the small town character issue). Because of the inadequacy of the findings and conclusions, the matter should be remanded so that this fundamental issue may be addressed by the City Council.

V. YARROW BAY HAS NOT MET ITS BURDEN OF PROVING
THAT ITS PROJECTS WILL PROTECT LAKE SAWYER

The respondents note that *in this court*, TRD has the burden of proof. But they ignore that in the proceedings below, the burden was on Yarrow Bay to prove that its projects met Code and Comprehensive Plan requirements. Thus, TRD satisfies its burden on appeal if it demonstrates that the administrative record reflects a failure by Yarrow Bay to prove its projects comply. For instance, if we demonstrate that the evidence that Yarrow Bay submitted to prove that phosphorous from its project would not degrade water quality in Lake Sawyer was rejected by the Examiner, we have satisfied our burden of proof here. We do not have an affirmative obligation at that point to prove that the MPD will pollute Lake Sawyer.

In the EIS water quality issues sections of this and our earlier brief, we demonstrated that Yarrow Bay failed to come forward with evidence the Examiner deemed sufficient to prove that the MPDs would not harm Lake Sawyer. First, the Examiner found that “The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer.” AR 24599. He then turned to the LSMP, but determined that it “makes no assurance that its mitigation measures will prevent the adverse impacts of phosphorous contamination, *despite the clearly erroneous belief of the*

applicant's consultant that it would." AR 24582 (emphasis supplied). Finally, he determined that the DOE Implementation Plan "provides no analysis or modeling to show how DOE determined that its recommended conditions for new development would preserve Lake Sawyer water quality." AR 24582. Thus, the Examiner determined that the evidence submitted by Yarrow Bay (the EIS, the LSMP and the Implementation Plan) failed to demonstrate that the project would protect Lake Sawyer water quality. By pointing to those unchallenged findings, we have satisfied our burden of proof on appeal.

Both respondents take issue with our characterization of Comprehensive Plan Policy NE-6. As noted by Yarrow Bay, Policy NE-5 requires the City to "adopt special protection measures" for a variety of purposes and Policy NE-6 states that one of these purposes is to reduce phosphorous loads discharged to Lake Sawyer:

The protection measures should also evaluate **and include measures to reduce pollutant loads, including phosphorous discharged to Lake Sawyer.**

Comprehensive Plan at 4-25 (emphasis supplied). Yarrow Bay argues that this policy should be construed to mean the City can impose a condition on a permit issued to a hardware store to assure that it "stores its phosphorous

containing fertilizer” in a safe manner, but that this policy does not address the potentially far greater phosphorous pollution that would be released by clearcutting nearly 1,000 acres and the additional discharges that would flow from the developed lands thereafter. Yarrow Bay’s effort to narrow the clear language of Policy NE-6 finds no support in the actual words of that policy.

The City (at 93) also seeks to limit the reach of Policy NE-6 by arguing, implicitly, that the term “protection measures” should be limited to mean “development regulations” and does not include measures incorporated as conditions of permit approval. The City offers no textual or other support for its efforts to limit “protection measures” in that manner. Does the City seriously contend that permit conditions are not “protection measures?” Notably, Yarrow Bay equates both code requirements and permit conditions as protective requirements. YB Br. at 90. The City’s efforts to characterize permit conditions as something other than “protection measures” should be rejected.

Finally, the respondents take issue with our characterization of the monitoring program as too little, too late. Yarrow Bay, in particular, argues that the monitoring will be done “concurrently” with development, not “after-the-fact.” YB Br. at 80-81. But the portions of the record Yarrow Bay cites

support our “after-the-fact” characterization. A large slug of phosphorous is released when the land is initially cleared, more than after the homes are occupied (an issue overlooked by Yarrow Bay). AR 2613, 2619, 2623 - 24. Additional phosphorous will be released as gardens and lawns sprout throughout the development. The monitoring does not *begin* until after the land is cleared (and the initial phosphorous slug is released) and *after* 75 percent of the dwelling units or commercial area tributary to the first stormwater pond are occupied. AR 5190. More development (and phosphorous runoff) continues unabated while monitoring data is collected. **The monitoring continues for seven years.** AR 5190. After seven years, if “the final report” shows higher than anticipated phosphorous concentrations, “the applicant and the City will meet to discuss the best response(s) . . .” AR 5192.

Thus, it is clear that the monitoring is not *initiated* until after the clearing is completed and a substantial amount of the development is ready for occupancy and the monitoring will not be *completed* (the “final report” provided) until seven years later, by which time even more development will have been completed.

Worse, the limitations of the monitoring program are demonstrated by the “adaptive response” set forth in the monitoring program. The following are the list of options identified:

1. Continue monitoring at the first pond.
2. Monitor at another wet pond.
3. Increase enforcement of the conditions limiting sources of phosphorous.

AR 5192. The first two items – more monitoring – obviously would not undo the damage done. The third item assumes that the problem is not with the substance of the conditions, but rather their enforcement. Tellingly, none of the adaptive response options to be “discuss[ed]” include changing any of the conditions of approval, *e.g.*, limiting future development or clearing; installing additional, larger or more effective treatment ponds.

Perhaps recognizing the feeble adaptive response authorized by the conditions of approval, Yarrow Bay says that another option is to treat the lake with alum or hypolimnetic aeration. YB Br. at 81. But these are not conditions of approval attached to the MPD ordinances. AR 5192. Instead, these come from the LSMP. But the LSMP is not binding on Yarrow Bay. It is a program the city may implement. Apparently, Yarrow Bay is content to pollute Lake Sawyer and let the City and its citizens pick up the tab for treating the lake thereafter. Thus, the extremely limited monitoring program

provides further evidence that Yarrow Bay failed to meet its burden of demonstrating compliance with the Comp Plan mandate to protect Lake Sawyer.¹⁷

VI. YARROW BAY DID NOT MEET ITS BURDEN OF PROOF REGARDING TRANSPORTATION ISSUES

In our Opening Brief, we explained that Yarrow Bay failed to meet its burden of proof¹⁸ when it provided analysis of traffic impacts to specific intersections but did not address *any* of the other transportation issues created by this project (*e.g.*, impacts on travel time, safety, duration of impacts at the studied intersections, construction traffic impacts). *See* Op. Br. at 90-91.

Yarrow Bay does not dispute that these issues were not addressed. Instead, it argues that these issues are “irrelevant.” YB Br. at 81. But Yarrow Bay never explains the basis for this conclusion. The Code requires Yarrow Bay to prove that the significant transportation impacts of its project had been appropriately mitigated. BDMC 18.98.080.A.2. As discussed *supra* in the EIS section, there was evidence that these projects would create

¹⁷ Moreover, not only do the conditions of approval not obligate Yarrow Bay (or anyone else) to retroactively treat Lake Sawyer with alum *after* it becomes polluted, but the record demonstrates that there are significant limitations to the amount of water quality rehabilitation that can be accomplished through those means. AR 4377.

¹⁸ The analysis we provided in the preceding section regarding the burden of proof with respect to Lake Sawyer applies equally to the burden of proof issue with respect to

significant impacts to travel time and safety, and that 100,000 construction truck trips would create significant impacts, too. Yarrow Bay cannot simply wave its “not relevant” wand and make these vital issues go away. Yarrow Bay simply failed to meet its obligation to demonstrate that addressing impacts at certain intersections would provide adequate mitigation for all of these other issues.

With regard to the monitoring program, we stated that it was “too late” because if significant impacts are revealed that would necessitate a smaller number of dwelling units or less or different kinds of commercial space (*e.g.*, business parks which generate fewer car trips than malls), the City would be precluded from making those changes because it had already granted the permit to Yarrow Bay. Neither respondent disputes that Yarrow Bay’s rights would vest if these MPD Permits are upheld and, thus, cannot dispute that the monitoring program cannot be used to address what may be the most fundamental transportation flaw of the project, *i.e.*, that they are too large for the rural road system and limited transit facilities that serve this relatively remote area.

We also explained that the monitoring program is “too little” because only congestion at select intersections will be monitored. The monitoring

transportation issues addressed here and noise issues addressed in the next section.

program does not collect data on increased travel time, safety, construction traffic impacts, or any of the other issues blithely deemed “irrelevant” by Yarrow Bay. The respondents have not contended otherwise.

VII. YARROW BAY FAILED TO CARRY ITS BURDEN OF PROOF REGARDING THE PROJECTS’ NOISE IMPACTS

In our Opening Brief, we demonstrated that Yarrow Bay failed to meet its burden of proof that the noise from construction truck traffic would be adequately mitigated. Op. Br. at 94-96. Yarrow Bay’s response is largely irrelevant, noting, for instance, that existing noise levels were measured along a certain road, that a condition requires Yarrow Bay to meet with neighbors whose properties are contiguous with Yarrow Bay’s (but not with neighbors along the haul routes), and that a large number of findings and conditions were entered by the Council (without asserting that any of them are directly responsive to the noise generated by 15 years of trucks hauling their loads through town). YB Br. at 85-87.

The closest Yarrow Bay gets to addressing the substance of this issue is its statement that the Council requires construction haul routes to be designated. *Id.* at 87. But designating haul routes hardly addresses the issue of 15 years of noise generated by the trucks using those haul routes.

That the Council then entered a conclusion that designating haul routes would adequately mitigate the construction noise impacts (*id.* (citing AR 27177)) hardly demonstrates that *Yarrow Bay* met its burden of proof below. The issue here is not whether the Council entered findings. The issue is whether there is evidence to support those findings. *Yarrow Bay* has not cited to any evidence in the record demonstrating that the creation of haul routes will adequately mitigate the significant impacts that the construction trucks will have on residents along those haul routes for fifteen years (as the Examiner found, AR 24583).

The City asserts (at 96) that if, as we suspect, there is not much mitigation that can be provided, then that somehow proves that *Yarrow Bay* met its burden of proving that adequate mitigation had been provided. To the contrary, if there is not much mitigation that can be provided along the haul routes to deal with the noise generated by a project as large as that proposed by *Yarrow Bay*, then the appropriate mitigation may be to downsize the project or require that the project be phased over a longer period of time. But because *Yarrow Bay* did not provide the evidence regarding the amount of noise and the duration of noise that would be suffered by residents along the haul routes, the City Council never addressed that issue. And when the haul

routes are designated later, it will be too late to entertain the possibility of downsizing the project or phasing it over a longer time.

VIII. THE ORDINANCES VIOLATE THE JOB CREATION REQUIREMENTS OF THE MUNICIPAL CODE

A city council has discretion to construe *ambiguous* portions of its comprehensive plan. But that discretion is not authority to re-write unambiguous provisions in the guise of construing them. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 811, 813-15, 828 P.2d 549 (1992). The Black Diamond Comprehensive Plan, not once but twice, expressly sets the job standard as one job per household:

The City's goal is to ensure that land use planning allows the achievement of one local job per household for the year 2025 and beyond.

Comprehensive Plan at 3-10.

The City's **employment target** is to provide one job per household within the City by the year 2025 which would translate to a job's target of approximately 6,534 jobs.

Id. at 3-11 – 3-12 (emphasis supplied).

There is nothing ambiguous about these provisions. The City Council committed an error of law when it found that the Comprehensive Plan's "employment target" was only 0.5 jobs per household by referring to "conservative" "employment projections" (Plan at 3-12), instead of the

explicitly labeled “employment target.” (The Code requires MPDs to address “employment targets,” BDMC 18.98.120.C, not “conservative” “projections,” which is what the City Council referenced.)

Neither the Examiner nor the City Council found that the MPDs meet the jobs creation standard if the standard truly is one job per household. If the Court agrees that the Council twisted its Comprehensive Plan to avoid a Code requirement that the MPDs meet that standard, then the Council’s approval of the MPDs must be reversed.

IX. THE ORDINANCES VIOLATE THE CITY CODE
REQUIREMENT THAT SCHOOL SITES MUST BE A
WALKABLE DISTANCE FROM RESIDENTIAL AREAS

BDMC 18.98.080.A.14 requires school sites to meet the walkable school standard set forth in the Comprehensive Plan. The Comprehensive Plan on this score is ambiguous (because it does not explicitly set forth a “walkable school standard”), but the Council construed its Plan as setting a half-mile walkable distance standard. AR 27268. To this point, we have no quarrel with the Council’s rationale.

The problem is that whereas the Code requires strict adherence to the walkability standard, the Council effectively attempted to amend its Code, requiring compliance with the standard only where “reasonable and

practical.” AR 27317 (CL 98). There is nothing in the Code that authorizes the Council in the midst of a permit process to relax the standard. The Code states that in an MPD, “School sites shall be identified so that all school sites meet the walkable school standard . . .” BDMC 18.98.080.A.14. While the Council had discretion to construe its ambiguous Plan, it did not have discretion to change the word “all” to “some” or to “all, if reasonable and practical.”

As we said at the outset, the predictability the State laws place on implementation of land use regulations works both ways. Yarrow Bay was intimately involved in drafting the MPD Code (and the Comprehensive Plan update). The language of the Code must be implemented as written. If Yarrow Bay has a problem with it, its recourse is to seek an amendment to the Code – not contrive an end run of it in the midst of the permit process.

X. THE COURT SHOULD DENY YARROW BAY’S REQUEST TO DISREGARD TRD CORPORATE FORM

Pursuant to RCW 4.84.370, Yarrow Bay and the City of Black Diamond request attorney’s fees from TRD in case they prevail in this appeal. *See* YB Br. at 98; City Br. at 98–99. TRD does not oppose these requests (if our appeal were to be denied in all respects), but does oppose Yarrow Bay’s additional request that this Court pierce TRD’s corporate veil and hold its

members personally liable for the fees. *See* YB Br. at 98. Yarrow Bay asks this Court to hold TRD members Judith Carrier and Melanie Gauthier liable, as well as Robert and Mary Edelman, TRD’s corporate officers at the time this appeal was filed. *Id.*¹⁹ Yet, Yarrow Bay has failed to show these individuals committed any wrongdoing by forming, joining, or working with TRD. Accordingly, Yarrow Bay’s request to pierce the corporate veil should be denied.

“The doctrine of disregarding the corporate entity or piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege.” *Truckweld Equip. Co., Inc. v. Olsen*, 26 Wn. App. 638, 643, 618 P.2d 1017 (1980). The remedy is appropriate only in “exceptional circumstances,” *id.* at 644, and parties seeking the remedy must meet a strict two-part test established in *Meisel v. M & N Hydraulic Press Company*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982). Under *Meisel*, the movant must first show that the corporate form has been “intentionally used to violate or evade a duty.” *Meisel*, 97 Wn.2d at 409. Second, the movant must show that

¹⁹ Subsequent to the filing of this appeal, Mary Edelman stepped down as an officer of TRD, and is now a member of the Black Diamond City Council. *See* Declaration of Robert Edelman in Support of Appellant’s Special Motion to Strike Pursuant to RCW 4.24.525 (Apr. 19, 2013) filed in support of Appellant’s Motion to Strike and for an Award of Costs, Attorney’s Fees, and Penalties. She is no longer an officer of TRD. *Id.* Robert Edelman remains the director and president of TRD. *Id.*

“disregard [is] ‘necessary and required to prevent unjustified loss to the injured party.’” *Id.* (quoting *Morgan v. Burks*, 93 Wn.2d 580, 587, 611 P.2d 751 (1980)).

Here, Yarrow Bay cannot meet the first prong of the *Meisel* test, under which “the court must find an abuse of the corporate form.” *Id.* In particular, Yarrow Bay argues that TRD’s members and officers somehow abused the corporate form simply by using TRD to pursue this appeal.²⁰ However, there is no evidence that they have acted differently from the members and officers of any other non-profit corporation.

As Mr. Edelman previously explained to this Court, TRD was formed in 2010 to educate its members about local development and to advocate for its members in opposition to projects that threaten their interests. *See* Declaration of Robert Edelman in Support of Appellants’ Answer to Motion

²⁰ *See* Yarrow Bay BR. at 98 (“[B]y using TRD corporation . . . to prosecute their appeal, the Individual Members are intentionally using the corporate form to evade their statutory duty to pay attorney’s fees and costs under RCW 4.84.370.”). Yarrow Bay also appears to argue that TRD’s members and officers abused the corporate form by underfunding TRD. *Id.* at 96. In support, Yarrow Bay cites a single case that held, in the commercial context, that a corporation may be so underfunded as to “manifest[] a fraudulent intent” to harm its creditors. *See id.* at 97 (discussing *Truckweld Equip. Co.*, 26 Wn. App. at 645). Yarrow Bay offers no evidence that TRD’s alleged lack of assets manifests a similarly fraudulent intent. Nor does Yarrow Bay point to any rule of corporate governance requiring a non-profit’s members and officers to commit additional assets to the corporation before pursuing litigation. Absent such a rule, a fraudulent intent may not be inferred. *Truckweld Equip. Co.*, 26 Wn. App. at 645 (refusing to pierce the corporate veil because there is “no rule of law requiring a corporate stockholder to commit additional private funds to an already faltering corporation.”).

to Dismiss (Nov. 16, 2012) at ¶ 2 (herein “Edelman Dec.”). In this way, TRD is but one of a number of grass roots organizations in Black Diamond dedicated to promoting responsible development. *See* Declaration of Judith Carrier in Support of Appellants’ Answer to Motion to Dismiss (Nov. 16, 2012) at ¶ 8 (herein “Carrier Dec.”). Currently, TRD has more than 50 members, all of whom will be injured by Yarrow Bay’s developments. Edelman Dec., ¶ 4.

As the director and president of TRD, Mr. Edelman is responsible for ensuring that TRD acts as an effective advocate for its members. *Id.* at ¶ 6. However, TRD is by no means a one-man-show that serves Mr. Edelman’s private interests, as Yarrow Bay insinuates. *See* Yarrow Bay Br. at 96. Instead, Ms. Carrier has explained that TRD, along with other grass roots organizations in Black Diamond, “are more than the sum of their parts and it takes many people to make them work. Each person contributes in their own way, whether by baking cookies, planning meetings and forming action committees, or by donating time to do research.” Carrier Dec., ¶ 8. For example, members like Ms. Carrier go door-to-door to educate the public about TRD’s mission. *Id.*, ¶ 9. Members like Ms. Gauthier, who has never been a named party to this lawsuit, donate time to promote TRD’s mission.

See Declaration of Melanie Gauthier in Support of Appellants' Answer to Motion to Dismiss at ¶ 3, 4 (Nov. 19, 2012). And Ms. Carrier and Ms. Gauthier have been gracious enough to provide standing declarations for TRD, despite that they have provided little more than moral support to this appeal.

None of these actions by TRD's officers and members "abuse" the corporate form. Instead, these actions reflect the simple fact that people often join organizations like TRD to vindicate their personal and collective interests. *See Nat'l Elec. Contractors Ass'n v. Employment Sec. Dept. of State of Wash.*, 109 Wn. App. 213, 220, 34 P.3d 860 (2001) (observing that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others") (*quoting United Automobile Workers v. Brock*, 477 U.S. 274, 275–76, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986)). Indeed, the Washington Supreme Court has held that forming a non-profit corporation like TRD is often the only practical way for people like Ms. Carrier, Ms. Gauthier, and Mr. and Mrs. Edelman to protect their interests, which is why Washington courts allow entities like TRD to pursue litigation on their members' behalf.

An individual who is one of many harmed by an action may be unable to afford the costs of challenging the action himself.

A class suit may be too cumbersome. *An association or non-profit corporation of persons with a common interest can then be the simplest vehicle for undertaking the task*, and we see no reason to bar injured persons from this method of seeking a remedy.

Save a Valuable Environment (SAVE) v. City of Bothell, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) (emphasis added). In other words, far from being an “abuse” of the corporate form, using entities like TRD to pursue public interest litigation is both appropriate and common-place.

At best, this practice results in the additional benefit of limited liability alongside the primary benefit of providing a simple and expedient way for people to band together to vindicate their collective interests. This additional benefit, however, results from the very nature of incorporation and is insufficient to justify piercing the corporate veil. *Meisel*, 97 Wn.2d at 411 (holding that the mere desire to limit one’s liability for future debts is not an abuse; it is the core purpose of incorporation).²¹

It is likely for these reasons that Yarrow Bay does not cite a single case in which a court pierced the corporate veil of a non-profit corporation for

²¹ Nor is it unforeseeable that a defendant might ultimately not be capable of recouping its costs from a non-profit corporate plaintiff, since the same could be true of any plaintiff. “It is argued that a non-profit corporation without assets may be unable to pay costs assessed against it should it fail in its suit. The same can be said of any individual person, however.” *SAVE*, 89 Wn.2d at 867–68.

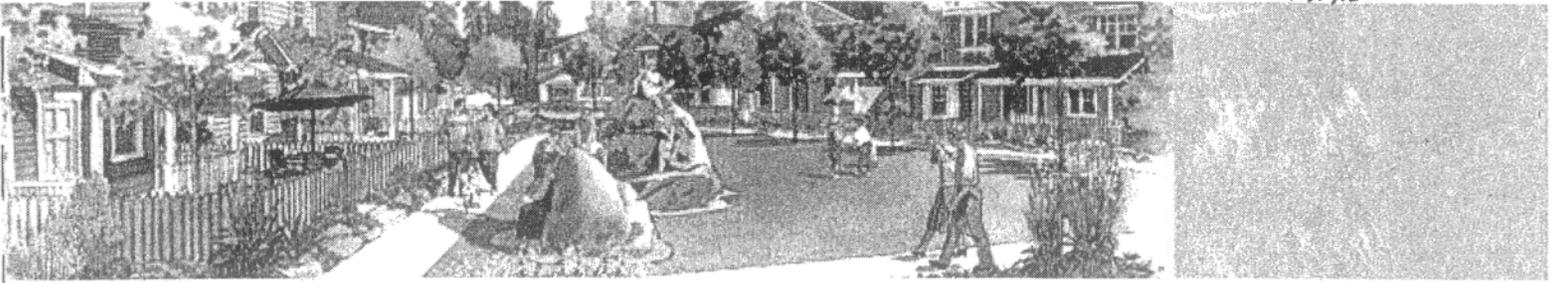
the sole purpose of awarding attorney's fees. The use of a non-profit corporation to pursue public interest litigation, as TRD's members and officers have done, simply is not an abuse of the corporate form. Yarrow Bay fails the first prong of the *Meisel* test and its request should be denied. Further, the request should be stricken and sanctions imposed as outlined in our accompanying motion which we incorporate by reference.

Dated this 19th day of April, 2013.

Respectfully submitted,

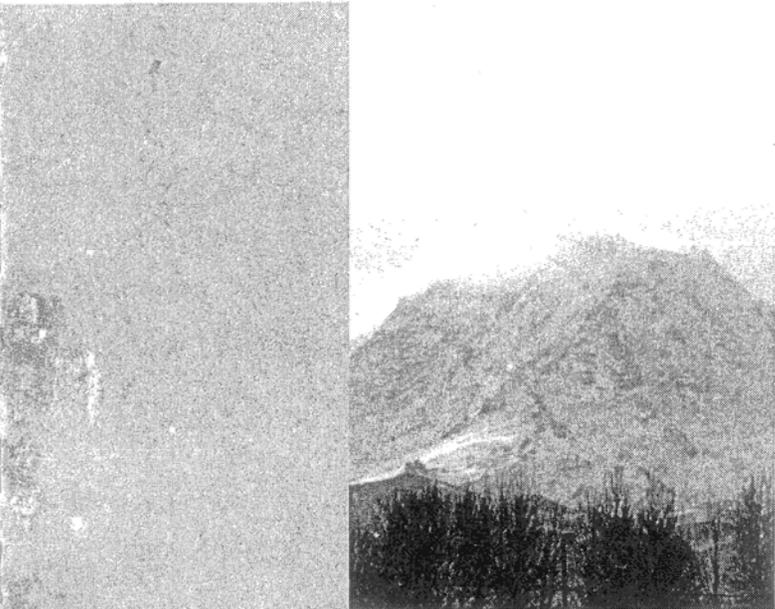
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Development



**The Villages Master
Planned Development
Final Environmental
Impact Statement
City of Black Diamond, Washington**

December 2009



APPENDIX A

Fahrenheit). Removal of shade and decreased evapotranspiration due to reductions in vegetation contribute substantially towards elevated temperatures of roadways, sidewalks, and other surfaces. During a storm event, runoff flowing over heated pavement can absorb this heat, raising the temperatures of the receiving water bodies.

Recent studies have confirmed that conventional stormwater detention ponds can significantly increase the temperature of receiving streams (due to solar heating) if stormwater is discharged directly into them, especially for streams at full capacity or those experiencing back-to-back storms (Kieser 2003). The use of open detention ponds with large surface areas presents the greatest risk of increased temperature, as water within these ponds can also gain heat from solar heating.

A study by A.C. Kindig and Company (see Appendix M) in Sammamish, Washington, showed that in the hottest months, July to September, the natural process of evaporation prevented stormwater discharges from occurring. Based on this study, the potential for high temperature discharges to receiving streams may be lower than in other regions given Western Washington's climate. However, the City or Applicant may want to perform limited temperature analyses post-construction if it is noted that stormwater discharges are occurring during periods of warm weather.

Water Quality

Transitioning from a natural hydrologic cycle to one dominated by urban runoff increases potential for bacterial and chemical pollutants entering water bodies. In natural environments, pollutant levels in stormwater are naturally filtered through vegetation and infiltration into soils. With urbanization, impervious surfaces replace vegetation, disrupting this natural filtration system and increasing bacterial and chemical pollutant concentrations in stormwater runoff.

What is evapotranspiration?

Evapotranspiration is a term that refers to water loss from an area due to the cumulative effects of both evaporation and transpiration by plants. Transpiration is the loss of water by plants as water vapor as part of their natural metabolic processes.

Stormwater detention ponds and discharge temperatures

Studies describing the effect stormwater detention ponds can have on the temperature of receiving water bodies can be found in Appendix M.

The major sources of bacterial contamination are impervious surfaces and residential pets and wildlife that deposit feces on lawns, which is then washed into the stormwater system by storms. Fecal bacteria densities generally increase with greater housing density, increased impervious surfaces, and domestic animal density.

Chemicals of concern include heavy metals such as lead, zinc, and copper, which are largely deposited on road surfaces as a result of vehicle use. Lead is largely in the form of particulates and results from wear of moving vehicle parts. Copper results from wear from brakes, alternators, and radiators and is extremely toxic to aquatic life. Zinc results largely from tire wear. Lesser amounts of zinc originate from brake linings and exhaust emissions, as well as from galvanized metal in structures.

Oil and grease in urban stormwater are largely from automotive spills and leaks, including lubricants, antifreeze, and hydraulic fluids, and can leach out of asphalt road surfaces.

Nutrients of concern in stormwater consist largely of nitrogen and phosphorus and often originate from fertilizers used on lawn and landscaping, and from exterior use of detergents. Nitrogen and phosphorus can also enter waterbodies from erosion during construction and from bed movement in streams. Lake Sawyer currently has a 303(d) listing for phosphorus, and both it and Jones Lake are potential candidates for eutrophication based on increased nutrients resulting from development.

Potential impacts to Black Diamond Lake bear special consideration in the development of all of the alternatives. As a bog with low biological productivity, low nutrient availability, and low pH, it is especially sensitive to changes in hydrology and water quality. Alterations to site hydrology and the introduction of nutrients like phosphorus and nitrogen can disturb the delicate biochemical balance that is unique to sphagnum bogs.

Urban versus "undeveloped" watersheds and phosphorus levels
Studies describing the effect development can have on phosphorus levels in water bodies can be found in Appendix M.

The existing forested land cover in the Main Property and North Property is likely characterized by little or no discharge of pollutants. With regard to phosphorous in particular, grab sample measurements for total phosphorous were taken during storm and baseflow events between December 2006 and April 2007 and measured an average concentration of 0.021 mg/L (Appendix M, Table 2-8). To see what effects development may have on phosphorous concentrations in The Villages study area, this phosphorous measurement in an “undeveloped” state is compared in Exhibit 4-9 to some phosphorous measurements taken in urbanized areas.

The developed areas below were completed prior to Ecology’s 2005 *Stormwater Management Manual*.

Exhibit 4-9

Comparison of Undeveloped Rock Creek Phosphorous Concentrations to Various Urban Watersheds

Watershed	Development Status	Total Phosphorous (mg/L)
Rock Creek	Undeveloped	0.021
Lakemont, Bellevue, WA	Urban	0.14
Lake Garrett, White Center, WA	Urban	0.13
Seattle Urban Watersheds	Urban	0.14–1.62
EPA – Various	Urban	0.3–300

Studies used to generate this exhibit can be found in Appendix M.

Based on the above examples, the increase in phosphorus in urban runoff may be several times greater than that of previously forested conditions. Specific to this site, quantified analysis indicates that total phosphorous discharge concentrations are forecasted to be higher in postdeveloped conditions (Appendix M, Table 3-13). Additionally, these measurements do not include phosphorus bound to sediments which may reenter the water column at a later date; this mechanism is especially pertinent in low oxygen environments such as Black Diamond Lake and Jones Lake. The combined impact of phosphorus in runoff and phosphorus bound to sediments may contribute substantially to the risk of eutrophication of receiving waters.

Alternative 1

Development under Alternative 1 is assumed to occur in conformance with the *Stormwater Management Manual*, and would meet detention and water quality treatment requirements. It would not have a specific requirement for open space or retention of native vegetation and therefore would be less beneficial in maintaining natural hydrologic cycle processes dominated by evaporation, evapotranspiration, and infiltration. The City's SAO would preserve wetlands and streams.

The replacement of native forest with lawn and ornamental vegetation would reduce evaporation, evapotranspiration, and infiltration. With slightly more impervious surface, less water would be available for groundwater recharge.

The development of multiple smaller detention/treatment facilities in Alternative 1 may result in less displacement of flows since there would be multiple points of discharge to surface water. Stream scouring and erosion from greater duration of flows and water quality impacts likely would be similar to Alternative 2.

Alternative 2

Alternative 2 relies heavily on infiltration methodologies for stormwater due to the presence of permeable soils on a large portion of The Villages site. Other Alternative 2 differences from Alternative 1 are:

- Greater areas utilized for commercial development in the North Property and Main Property.
- Higher density residential development.
- Mixed use development.
- Low Impact Development

The preservation of open space under Alternative 2 would tend to preserve the natural hydrologic cycle where portions of the site remain native forest. While all of the alternatives retain approximately 478 acres of native vegetation in the form of sensitive areas and their buffers, Alternative 2 provides an

What is a hydroperiod?

Hydroperiod refers to the length of time that the soil surface in a wetland is covered with water.

additional 29 acres of open space. Some of this open space will likely be forested and may add additional hydrological benefits.

The greatest potential impact Alternative 2 may have on water resources is through its development of the North Property, where the majority of the site would be developed in commercial use with a high proportion of impervious surface. Depending on the type and location of stormwater facilities placed at the North Property, area hydrology could be affected in multiple ways.

- If discharge of stormwater is routed through Wetland B4 on the southerly portion of the North Property without flow control, it would cause a substantial change in the wetland's hydroperiod.
- Conversely, if all stormwater is routed to the northwest corner for infiltration this would greatly diminish recharge to Wetland B4.
- The Applicant is currently proposing to divide the North Property into two stormwater management zones. The northerly zone is proposed to infiltrate stormwater to a detention/infiltration facility located in outwash soils in the northwest corner. In the southerly zone, stormwater would be conveyed to two stormwater facilities there. The wetlands in both zones are proposed to be recharged by rooftop runoff to mimic the existing hydrological inputs to these wetlands. The Applicant's stormwater strategy for the North Property could ameliorate potential impacts to hydrology in this area if implemented properly.

Another potential impact related to the Alternative 2 is the proposal to use a large wet pond for flows in Subbasin 6 that discharge directly to Jones Lake. The potential for higher temperature discharges due to a large wet pond discharging to Jones Lake in the summer months could further degrade this system, which already has high summer water temperatures. Increased water temperatures in Jones Lake could adversely affect the downstream Rock Creek stream/wetland system, and possibly Lake Sawyer, depending on the cumulative effects of

urban runoff from other sources. Monitoring could be performed post-construction in order to better understand this potential impact.

Alternative 3

Since Alternative 3 represents a mitigated version of Alternative 2, it will have impacts to the same areas as Alternative 2. However, these impacts will be proportionally less. Potential impacts to Ravensdale Creek would be less in Alternative 3 given that there will be 36 less acres of commercial/office use. Additionally, overall impacts from new impervious surface would be less for Alternative 3 because it would create 276 acres of impervious surface versus 356 acres in Alternative 2.

Alternative 3 also will include 598 acres of total open space giving more opportunities than the other alternatives for mitigating some of the hydrological changes resulting from development of the project area. Also, the utilization of LID techniques such as reduced road widths, native vegetation in landscaping, and porous pavements give both Alternatives 2 and 3 fewer impacts.

7 What measures may reduce the effects of the proposal on surface water resources?

There are several general strategies available to reduce or mitigate the effects of urbanization on surface water resources:

- Preserving natural hydrologic functions to the extent possible;
- Providing facilities that mimic or enhance natural hydrologic functions of evapotranspiration and infiltration; and
- Providing for stormwater detention and treatment.

All of these strategies can be applied to stormwater management and are often known collectively as Low Impact Development (LID) or are outcomes of using LID best management practices.

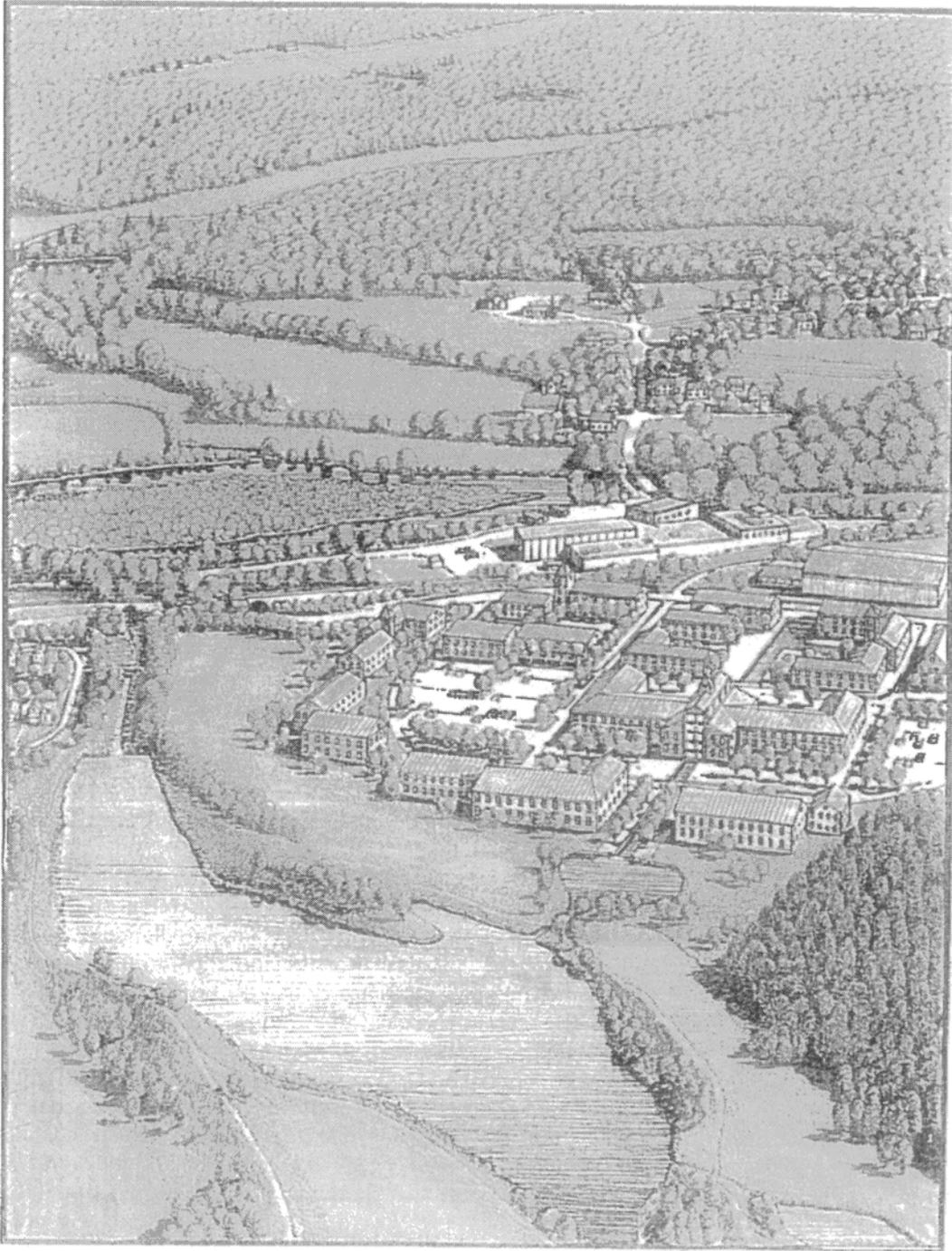


Figure 6-3. Aerial view after creative development.

