BEFORE THE HEARING EXAMINER
FOR THE CITY OF BAINBRIDGE ISLAND

In the Matter of the Appeal of	)	No. PLN 51554 ADM
	)	
Central Highlands, Inc.	)	
	)	
Of an Administrative Municipal	)	FINDINGS, CONCLUSIONS, AND
Code Interpretation	)	DECISION

SUMMARY OF DECISION

This appeal addresses whether the City of Bainbridge Island's Director of Planning and Community Development (Director) erred in her interpretation and application of the Bainbridge Island Municipal Code (BIMC) in regard to the potential future development of remaining portions of the Visconsi Master Plan. Because substantial evidence in the record supports the Director's decision, the appeal is **DENIED**.

SUMMARY OF PROCEEDINGS

Hearing Date:
The City of Bainbridge Island Hearing Examiner held an open record appeal hearing on July 23, 2020, using remote technology in light of the ongoing COVD-19 pandemic. The record was left open until July 31, 2020, to allow the parties to submit closing briefs.

Testimony:
The following individuals presented testimony under oath in this matter:

Appellant Witnesses:
David Smith

City Witnesses:
Kelly Tayara, City Senior Planner
Heather Wright, City Planning and Community Development Director

Attorney Hayes Gori represented Central Highlands, Inc. (CHI, or Appellant) at the appeal hearing. Attorney James E. Haney represented the City of Bainbridge Island (City) at the appeal hearing. Attorney Nancy Bainbridge Rogers represented Visconsi Companies, Ltd (Visconsi, or Intervenor)

Exhibits:
The following documents were submitted to the Hearing Examiner for review and admitted as exhibits:

Appellant Exhibits:
A-1. Hearing Examiner Report and Decision, Visconsi Master Plan (No. SPR/CUP 17734), dated March 27, 2014 (same as C-1)
A-2. Master Land Use Application, Administrative Code Interpretation, Central Highlands, Inc., dated September 10, 2019 (same as C-6)
A-3. Memorandum from Kelly Tayara to Heather Wright, Administrative Municipal Code Interpretation, dated January 10, 2020 (decision signed January 11, 2020) (same C-7)
A-4. Notice of Appeal, dated January 23, 2020
A-5. Context Plan Wintergreen Apartments, aerial photo, dated August 23, 2019
A-6. Base Map (Sheet 1/1), dated February 6, 2020
A-7. Floor Area Ratio (FAR) For Residential Development, undated
A-8. Vacant Land Purchase and Sale Agreement, dated May 29, 2019, with attachments

City Exhibits:
C-1. Hearing Examiner Report and Decision, Visconsi Master Plan (No. SPR/CUP 17734), dated March 27, 2014 (same as A-1)
C-2. Hearing Examiner Order on Reconsideration, Visconsi Master Plan (No. SPR/CUP 17734), dated May 5, 2014
C-3. Visconsi Master Plan:
  a. Plan set (Sheets A0.0 – A0.5; Sheets A1.0 – A14.0; Sheets L1 – L11), dated April 25, 2013; Plan set (Sheets C1 - C5), dated April 24, 2013
  b. Plan set (Sheets A15.0 – A17.0) dated June 11, 2013
  c. Plan set (Sheet A0.2), revised September 5, 2013
  d. Plan set (Sheet A1.0), revised September 5, 2013
  e. Plan set (Sheets C1 – C5), revised September 5, 2013
  f. Plan set (Sheets L1 – L5; Sheets L10 – L12), dated September 5, 2013
C-4. Transportation Impact Analysis, Transpo Group, dated April 2013
C-5. Letter from Wenzlau Architects to City Department of Planning and Community Development, Project Description, dated April 15, 2013
C-6. Master Land Use Application, Administrative Code Interpretation, Central Highlands, Inc., dated September 10, 2019 (same as A-2)
C-7. Memorandum from Kelly Tayara to Heather Wright, Administrative Municipal Code Interpretation, dated January 10, 2020 (decision signed January 11, 2020) (same as A-3)
C-8. CD of 2014 Visconsi Proceedings, January 16, 17, 21, and 22
C-9. Aerial photo of Visconsi site, undated

Orders, Motions, & Briefs
- Hearing Examiner's Pre-Hearing Order, dated February 5, 2020

- City's Notice of Appearance (James E. Haney and Emily F. Miner), dated February 7, 2020, with Declaration of Service
- Parties Agreed Motion for Continuance, dated February 20, 2020
- Hearing Examiner's Order on Request for Continuance and Pre-Hearing Order, revised February 20, 2020
- Hearing Examiner's 2nd Order on Request for Continuance and Pre-Hearing Order, revised April 8, 2020
- Motion to Intervene, dated April 23, 2020, with Certificate of Service
- Hearing Examiner's Order on Motion to Intervene and Revised Pre-Hearing Order, dated May 1, 2020
- Hearing Examiner's Order on Request for Continuance, dated May 5, 2020
- Hearing Examiner's Pre-Hearing Order, revised June 16, 2020
- Intervenor's Motion to Limit Issues, dated June 25, 2020, with Certificate of Service
- Appellant's Response to Intervenor's Motion to Limit Issues, dated July 2, 2020
- City's Non-Opposition to Intervenor's Motion to Limit Issues, dated July 2, 2020
- Hearing Examiner's Decision and Order on Motion to Limit Issues, dated July 7, 2020
- Appellant's Brief, dated July 9, 2020
- City's Amended Notice of Appearance (Katherine Hambley), dated July 16, 2020, with Declaration of Service
- Appellant's Witness and Document Lists, dated July 16, 2020
- City's Pre-Hearing Brief, dated July 16, 2020, with Declaration of Service
- City's Witness and Exhibit List, dated July 16, 2020, with Declaration of Service
- Intervenor's Opening Brief, dated July 9, 2020, with Certificate of Service
- Intervenor's Witness and Document Disclosure, dated July 16, 2020, with Certificate of Service
- Appellant's Closing Brief, dated July 31, 2020
- Intervenor's Closing Brief, dated July 31, 2020, with Certificate of Service
- City's Closing Brief, dated July 31, 2020
- Hearing Examiner's Update on Decision, dated August 14, 2020

FINDINGS

Background

1. On March 27, 2014, the former City of Bainbridge Island Hearing Examiner (Stafford L. Smith) approved Visconsi's request for a conditional use permit and site plan review to develop a commercial complex comprised of seven buildings on five parcels totaling 8.16 acres at 10048 High School Road (Visconsi Master Plan). Proposed uses included retail sales and services, restaurants, professional services, and health care facilities. Visconsi did not propose residential uses for the property and the decision did not specifically address use of the property for residential development. The decision included nine State Environmental Policy Act (SEPA) conditions and 40 project conditions (Conditions 10-50). *Exhibit A-1.*

2. Of particular note to the current appeal, Condition 49 of the decision provided:

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

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

   Exhibit A-1, Hearing Examiner Report and Decision, page 58.

3. The decision noted that the appropriate mechanism to seek a revision of imposed conditions was through a request for reconsideration. *Exhibit A-1, Hearing Examiner Report and Decision, page 48.* Visconsi and a citizens group, Islanders for Responsible Development, requested reconsideration of certain conditions, which did not include Condition 49. On May 5, 2014, the Hearing Examiner issued an Order on Reconsideration revising Finding 99 and Conditions 11(b), 23(J), 23(Q), 29, 38, and 47. *Exhibit C-1; Exhibit C-2; Exhibit C-3; Exhibit C-4; Exhibit C-5.*

4. Three of the five lots within the approved Visconsi Master Plan have been developed for commercial and health care facility uses. The two remaining lots, located at 1302 and 1329 Wintergreen Lane, are undeveloped. CHI entered into a contract with Visconsi to purchase the two undeveloped lots, with plans to develop the property with an apartment complex consisting of 100 to 140 multi-family residential units or, alternatively, a condominium complex consisting of 44 detached single-family residential units. *Exhibit A-2; Exhibit A-5; Exhibit A-6; Exhibit A-8; Exhibit C-9; Testimony of David Smith.*

Request for Administrative Code Interpretation

5. On September 10, 2019, CHI filed a request for a code interpretation with the City of Bainbridge Island's Director of Planning and Community Development (Director), Heather Wright. CHI's code interpretation request included 12 statements and asked the Director to respond to each statement by indicating agreement or non-agreement with an explanation. As relevant to this appeal, CHI requested that the Director respond to the following statements:

> 1. With reference to the HE Decision, because the Project was submitted and approved as a single 8+ acre parcel, the Project is entitled to the residential FAR [Floor Area Ratio] available for all 8+ acres of the Visconsi Master Plan regardless of any sales, leases or lot line adjustments within the 8+ acres.
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> . . .
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> 4. With reference to the HE Decision (page 58, para 49), the Project's proposed conversion of building use from commercial to residential requires only City Staff approval, which is predicated upon the visual integrity of the site design and its success in establishing a harmonious relationship among the component structures.
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> 5. With reference to the HE Decision (page 58, para 49.B), an adjustment to the approved site plan (per BIMC 2.16.040.H) in connection with conversion of building use is done only upon the request of the applicant.
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> . . .
>
> 7. With reference to the HE Decision, whether conversion of building use is done by way of City Staff approval or adjustment to the approved site plan, the Planning Commission shall not be involved in any way.

Exhibit A-2.

6. On January 11, 2020, the Director issued her code interpretation in a memorandum entitled "Administrative Municipal Code Interpretation / Visconsi Master Plan PLN 51551 ADM" (Interpretation). The Director notes in her Interpretation that many of the Appellant's requests are "not explicitly framed as a request for an interpretation of the Municipal Code" and, further, appear to ask "whether the proposed development is vested to the existing land use permit approval or if the proposed development requires separate or additional land use review." *Exhibit A-3 at 2.* As relevant to this appeal, the Director responded to CHI's statements by concluding that none of the lots would be entitled to residential floor area ratio (FAR) because residential development was not proposed in the Visconsi Master Plan; that FAR would be calculated based on the individual lots unless all lots involved in the Visconsi Master Plan are aggregated; that the proposed conversion of use from commercial to residential would require site plan

and design review permit approval, including review and recommendations from the Planning Commission; and that the proposal to construct residential units is not a vested development right because residential use was neither proposed nor approved as part of the Visconsi Master Plan. *Exhibit A-3.*

Appeal and Motions

7. On January 23, 2020, CHI timely appealed the Director's Interpretation. CHI's appeal initial challenged each of the City's specific responses in the Interpretation, as well as the City's general assertions that residential use was not approved as part of the Visconsi Master Plan and that construction of residential units is not a vested development right under the Visconsi Master Plan. *Exhibit A-4.*

8. The Appeal was transmitted to the Hearing Examiner and, on February 5, 2020, the Hearing Examiner issued pre-hearing orders, setting a schedule for motions and briefs, and setting the appeal hearing for March 12, 2020. Following the initial pre-hearing orders being issued, the Hearing Examiner granted several requests to continue the hearing and, of note, on May 1, 2020, the Hearing Examiner granted intervenor status to Visconsi. On June 25, 2020, the Hearing Examiner issued revised pre-hearing orders setting the appeal hearing for July 23, 2020, and setting a revised schedule for motions and briefs. *Hearing Examiner's Decision and Order on Motion to Limit Issues (July 7, 2020) at 2.*

9. On June 25, 2020, the Intervenor timely submitted a motion requesting that the issues in the appeal be limited. The Appellant filed a response requesting that the Intervenor's motion be denied. The City filed a response indicating that it did not oppose the Intervenor's motion to limit the appeal issues. On July 7, 2020, the Hearing Examiner issued a decision, on the motion, in which he concurred with the Appellant, to the extent that it was unclear that limiting the appeal issues in question was warranted, especially because neither the Intervenor nor the City had advanced specific argumentation, with legal authority or justification, to do so. *Decision and Order on Motion to Limit Issues, July 7, 2020.*

Pre-Hearing Briefs

10. Attorney Hayes Gori timely submitted a pre-hearing brief on behalf of CHI, in which he withdrew 9 of the 14 appeal issues listed in the notice of appeal. Accordingly, the Appellant's brief presented the following issues as remaining on appeal:
    - Issue 1: Whether the Project is entitled to the residential Floor Area Ratio (FAR) available for all 8-plus acres of the Site Plan regardless of any sales, leases, or lot line adjustments within the 8-plus acres.
    - Issue 4: Whether the Project's proposed conversion of building use from commercial to residential requires only City Staff approval, which is predicated

upon the visual integrity of the site design and its success in establishing a harmonious relationship among the component structures.

- Issue 5: Whether an adjustment to the approved site plan (per BIMC 2.16.040.H) in connection with conversion of building use is done only upon the request of the [property owner or developer, i.e., CHI].
- Issue 7: If conversion of building use is done by way of City Staff approval or adjustment to the approved site plan, whether the Planning Commission shall be involved in any way.
- Issue 14: Whether residential use is approved as part of the Visconsi Master Plan.

Appellant's Brief, pages 3, 6, and 10.

11. The Appellant then provided argumentation about each of these remaining issues. Regarding Issue 14, the Appellant argues that Condition 49.A of the Hearing Examiner's decision approving the Visconsi Master Plan allows a change in use to any permissible use in the underlying zoning district, including residential uses. Regarding Issues 4, 5, and 7, the Appellant argues that Condition 49.B of the Hearing Examiner's decision set forth the exclusive procedure for obtaining a change of use and that such procedure requires only City staff approval. The Appellant therefore argues that Condition 49.B relieves it from the typical code procedure for review of requested adjustments to an approved site plan under BIMC 2.16.040.H, including review and recommendations from the Planning Commission. Finally, regarding Issue 1, the Appellant argues that its proposed residential development project would be entitled to residential FAR totaling 30 percent of the total square footage of the entire 8-plus-acre site because all of the other parcels have been developed as commercial buildings and, thus, all of the residential FAR would be available for the remaining undeveloped parcels. *Appellant's Brief.*

12. Attorneys Katherine Hambley and James E. Haney submitted a pre-hearing brief on behalf of the City. The City argues that a proposed change from a commercial to a residential use would constitute a major adjustment to the approved Visconsi Master Plan, requiring either a new or amended site plan and design review application under BIMC 2.16.040.H.2, and that nothing within Condition 49 of the Hearing Examiner's decision purports to circumvent this code requirement. The City asserts that Condition 49.A would require change of use approval from the City before any building use is converted but does not specify what type of approval from the City would be required. The City contends that Condition 49.B does not describe the process that would be required for obtaining a change of use but, rather, describes only the process for obtaining approval for a change of building design. The City thus argues that a change of use from commercial to residential would be subject to the code requirements for site plan and design review, including review and recommendation by the Planning Commission. Regarding CHI's claim that it would be entitled to the residential FAR available for all 8-plus acres of the Site Plan, the City argues that City code requires FAR to be calculated on a lot-specific basis. Alternatively, the City argues that, even if unused residential FAR

could be transferred to different lots within the Visconsi Master Plan sites, CHI could not unilaterally allocate the FAR to the undeveloped lots in contravention of the development rights of the other lot owners that are not parties to this appeal. *City's Prehearing Brief, dated July 16, 2020.*

13. The Intervenor submitted a pre-hearing brief, in which it generally agrees with the Appellant's claims that Condition 49 would authorize City staff to process an administration decision to change the use on the two lots from commercial to residential and that Condition 49 establishes a unique procedure allowing City staff to approve a change of use without review by the Planning Commission. The Intervenor notes that it does not oppose the Appellant's claim that residential FAR could be aggregated from all lots across the site for use on the two undeveloped lots, but the Intervenor requests that any ruling on this issue not obligate it to obtain and transfer residential FAR to CHI from the developed lots that it no longer owns. *Intervenor's Prehearing Brief, dated July 9, 2020.*

14. The appeal hearing was held on July 23, 2020, as detailed below. As a preliminary matter, all parties agreed to the admission of submitted exhibits and to forgo opening remarks in lieu of closing arguments.

Testimony

Appellant Witness

15. David Smith testified that he is the president of Central Highlands, Inc. (CHI). He provided a detailed history of his work experience as a builder and developer, describing several development projects that he has worked on in the City of Bainbridge Island. Mr. Smith noted that increased City regulations and a more onerous SEPA review process have resulted in a lengthier development review process. Mr. Smith described the two subject lots and surrounding development, noting that the entire site has been built out, apart from the undeveloped lots and some stormwater management features. He stated that he reviewed the audio recording from the Visconsi Mater Plan hearing but that a portion of the audio was missing, which he asserted may have contained discussion about Condition 49. Mr. Smith stated that CHI initially proposed to develop the lots for a multi-family housing complex but that it would prefer to develop the properties with a condominium complex consisting of 44 detached single-family residential units. He noted that the single-family units would be considered affordable housing under City standards. Mr. Smith detailed his understanding of how the municipal code's FAR ratio provisions would apply to development on the subject lots, asserting that the FAR ratio could be allocated to individual lots within a plat and would be calculated based on the entire Visconsi Mater Plan plat, including areas of the three developed lots and all streets and open spaces within the property. He contended that lots within the Visconsi Master Plan property are entitled to both commercial and residential FAR and that the undeveloped lots would be entitled to 100 percent of the residential FAR that would be

available for the entire site because none of the developed lots used residential FAR. Mr. Smith stated that CHI has begun negotiations to purchase an additional 30 percent of bonus FAR from the Islander Mobile Home Park. Mr. Smith noted that several members of the public had expressed concerns at the Visconsi Master Plan hearing that a residential component was not included in the proposal. He stated that he believed the Hearing Examiner presiding over the hearing was sympathetic to concerns regarding the absence of a residential component and that the Hearing Examiner included conditions intended to allow for a change to residential uses. Mr. Smith noted that CHI's proposed residential uses for the lots would have less adverse environmental and traffic impacts than commercial uses. Mr. Smith acknowledged that CHI did not have any ownership interest in the three developed properties in the approved Visconsi Master Plan and that CHI has not entered into any agreement with the other lot owners to purchase unused residential FAR. He noted his belief that City code allows density of individual lots within a single project to be transferred between lots at will. *Testimony of Mr. Smith.*

City Witnesses

16. City Senior Planner Kelly Tayara testified about her education and planning experience, including her experience working as senior planner for the City. She described the procedures for processing an administrative code interpretation, explaining that the requestor is required to submit a formal land use application, that City staff reviews the application and makes a recommendation to the Planning and Community Development Director, and that the Director then issues a final decision on the code interpretation. Ms. Tayara stated that she had drafted the code interpretation ruling pertaining to CHI's request for the Director and that she does not recall whether the Director made any changes to her draft. She stated that, in drafting the interpretation, she had reviewed several materials, including City code provisions, the Hearing Examiner's Visconsi Master Plan decision, the approved site plans, and the Hearing Examiner's decision on reconsideration. Ms. Tayara noted that there was no residential component included within any of the following: the Visconsi Master Plan decision, the approved site plans, the traffic study relied upon in the Visconsi Master Plan decision, or the project narrative for the Visconsi Master Plan. Ms. Tayara acknowledged that residential uses are allowed in the zone in which the lots are located. *Testimony of Ms. Tayara.*

17. City Planning and Community Development Director Heather Wright testified about her education and planning experience. She noted that she and City staff met with CHI to discuss CHI's plans for residential development of the lots and that, after some disagreement as to how CHI could proceed to develop the site, she suggested that CHI apply for a formal administrative code interpretation. Ms. Wright stated that, prior to issuing her code interpretation, she had reviewed documents related to the subject property, including the former Hearing Examiner's decision on the Visconsi Master Plan, the Hearing Examiner's reconsideration order, the project narrative for the Visconsi Master Plan, and the approved site plans. She noted that she understood the Hearing

Examiner's decision to approve only a commercial project, with no residential component. Ms. Wright explained that residential and commercial uses are treated and reviewed differently under the municipal code and the City Comprehensive Plan. She stated that CHI's plan to develop 44 residential structures would not be consistent with the approved Visconsi site plan because only two buildings that were limited to commercial uses had been approved. Ms. Wright stated that the municipal code provides required procedures for adjusting an approved site plan, explaining that a new or amended application would be required for a major adjustment to the site plan. She explained that CHI's planned residential development would constitute a major adjustment to the approved site plan, which would require the same process used for new applications, including public participation and review by the Planning Commission. Ms. Wright stated her opinion that Condition 49 of the Visconsi Master Plan decision addressed only a potential change among different commercial uses for the approved two buildings proposed for the lots and did not address a change to residential use or a change to construct more than two buildings. She stated her opinion that Condition 49.B was intended only to permit some flexibility regarding the exterior design of the proposed buildings. Ms. Wright explained that the municipal code provides each zoning district with a maximum FAR for commercial, residential, and mixed-use development. She stated that these maximum FAR allowances cannot be cumulated to utilize the maximum FAR for each type of development within the same overall site plan and that FAR is calculated only on a lot-by-lot basis. Ms. Wright stated that, even if the developed lots within the Visconsi Master Plan have available residential FAR, the available residential FAR cannot be transferred to the undeveloped lots unless all the lots within the site plan are aggregated. She noted that the Hearing Examiner who issued the Visconsi Master Plan decision would not have had the authority to impose a change of use process contrary to the municipal code. Ms. Wright acknowledged that residential uses are allowed in the zone in which the lots are located. She noted that Condition 49 was not proposed by the City and, instead, was created by the Hearing Examiner. Ms. Wright stated that FAR may be allocated between proposed lots within a subdivision prior to the final plat being recorded, but not between lots within a site plan, because the lots within a site plan already exist, noting that FAR code provisions specifically reference lot area. She stated that City code does not have any specific provisions relating to condominiums and, instead, provides definitions pertaining to single-family and multi-family development. Ms. Wright said that proposed development of multiple detached buildings on a single lot would be processed under City code as multi-family development regardless of whether the Applicant characterizes it as condominium development. *Testimony of Ms. Wright.*

Closing Briefs

18. At the conclusion of the hearing, the Hearing Examiner ruled that the record would be left open until July 31, 2020, to allow the parties to submit closing briefs.

19. CHI submitted a closing brief in which it argues:

- The Hearing Examiner should rule that CHI may develop a condominium complex consisting of 44 detached single-family residential units on the two undeveloped lots without reference to the site plan because the project would be exempt from site plan and design review under City code, would be exempt from subdivision codes, would be exempt from SEPA review, and would be exempt from the City's development moratorium. The only land use review for this proposed condominium development would be associated with building permit approval.
- Condition 49 of the Hearing Examiner's Visconsi Master Plan decision governs all changes of use within the approved site, including a change from commercial to residential, which is an allowed use in the underlying zone.
- Condition 49 provides the exclusive procedure for a change of use and requires only City staff review of the proposed change of use to ensure harmony with the design concepts of the approved site plan. Condition 49 therefore precludes any requirement for a major site plan adjustment.
- Contrary to Ms. Wright's testimony, FAR allocation does not occur at final plat but, rather, occurs at the building permit application stage because a developer does not make a final decision as to building size until the building permit application stage.
- Residential FAR for the entire 8.16 acres of the approved site plan is available for the two subject parcels, subject to an agreement with the other three lot owners to allocate unused residential FAR, which would not require any City oversight or approval.

Appellant's Closing Brief.

20. Visconsi submitted a closing brief in which it argues:

- Condition 49 of the Hearing Examiner's 2014 decision calls for an administrative review process in which City staff makes the final decision on a proposed change of use. The only reason for the Hearing Examiner to include Condition 49 was to provide a separate administrative process for adjustment to the use or design of the approved site plan, and the City is bound by this process because it did not appeal the condition.
- Visconsi agrees with the City that FAR is limited in the underlying zone regardless of use but supports CHI's claim that it can transfer unused FAR from other lots within the Visconsi Site Plan to the two undeveloped lots if it obtains approval from the other property owners.

Intervenor's Closing Brief.

21. The City submitted a closing brief in which it argues:

- The Hearing Examiner's 2014 decision addressed only commercial and retail uses, and CHI has not presented any evidence supporting its assertion that the Hearing Examiner contemplated a change of use to residential when imposing Condition 49.
- Several different types of commercial uses were described in the traffic study prepared for the Visconsi site plan application, in Visconsi's project description for its application, and in the Hearing Examiner's 2014 decision approving the Visconsi site plan. These various commercial uses included medical office/clinic, pharmacy, shopping center, restaurant, bank, and health care facility. Given this context, Condition 49 contemplated only a change in the specific commercial and retail use assigned to each proposed building in the site plan.
- It is unreasonable to interpret Condition 49 as allowing CHI to bypass code requirements.
- CHI does not identify any code provision allowing it to reallocate FAR within the approved Visconsi site plan.
- Although City code allows FAR to be allocated within a subdivision site among the various lots that would be created, there is no code provision allowing the allocated FAR to exceed the maximum allowable FAR for any particular lot or allowing FAR to be allocated after the subdivision receives final plat approval and is recorded.
- Recent code amendments repealed several bonus density options for the subject property's underlying zone, and transfer of FAR between lots in the Visconsi development is no longer allowed. Even assuming that CHI is vested to code provisions in effect prior to these amendments, FAR transfer would only be authorized where critical areas exist on the "sending" property (i.e., the property from which the unused FAR would be transferred) and would be protected through an open space preservation covenant.
- CHI's claim that it may transfer FAR from the Islander Mobile Home Park is not properly before the Hearing Examiner in this appeal.

City's Closing Brief.

CONCLUSIONS

Jurisdiction and Criteria

BIMC Table 2.16.010-1: Summary Table of Land Use Procedures provides that administrative approvals include BIMC interpretations and any other administrative land use decision authorized by this code to be made by the director.

BIMC 2.16.020.D.3 provides:

> Any person may request an interpretation of the zoning code, shoreline master program, or subdivision regulations. The director of planning and community

development may issue interpretations of the zoning code, shoreline master program, or subdivision regulations as needed, and shall post issued interpretations on the city website.

BIMC 2.16.020.R.1 provides the procedure for appealing an administrative review decision, stating in relevant part:

> a. Applicability. All administrative decisions, departmental rulings and interpretations made in accordance with administrative review procedures of BIMC 2.16.030 . . . may be appealed to a hearing examiner. . .
> . . .
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> i. Appeal Hearing. . . . The appeal shall be held at an open record public hearing. Participation in an appeal hearing is limited to the applicant, the applicant's representative, the appellant, the appellant's representative, appropriate city staff and consultants, any witnesses called by each and any nonparty who submitted written comments during the public comment period if the hearing examiner determines that the testimony will be relevant to the issue on appeal and nonrepetitive of the testimony of other witnesses.
> . . .
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> ii. In an appeal of a substantive decision made by the city, the criteria shall be whether (A) the proceedings were materially affected by failure to comply with adopted procedures, or (B) the decision is inconsistent with the BIMC criteria for that type of approval, or (C) the evidence in the record was not adequate to support the decision.
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> . . .
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> k. Upon completion of the appeal hearing, the hearing examiner shall (i) affirm the decision, (ii) reverse the decision, (iii) affirm the decision with conditions, or (iv) remand the decision to the department director for further consideration of identified issues. The decision of the director shall be accorded substantial weight by the hearing examiner. The Hearing Examiner may include conditions as part of a decision granting or grating with conditions an appeal to ensure conformance with BIMC, the city's comprehensive plan and other applicable laws or regulations.
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> l. Timing of Written Decision. The hearing examiner shall issue a written decision on the appeal within 20 working days after completion of the public hearing unless the appellant and the hearing examiner have consented to an extension of time. The written decision shall include (i) the decision of the hearing examiner granting or denying the appeal in whole or in part; (ii) any conditions included as part of the decision on the appeal; (iii) findings of facts upon which the decision, including any conditions, is based and the conclusions of law derived from those

facts; and (iv) a statement of the right of a person with standing to appeal the decision of the hearing examiner in accordance with Chapter 36.70C RCW.

Conclusions Based on Findings

1. **The Hearing Examiner's 2014 Visconsi Master Plan decision did not approve residential uses and does not provide that a change from an approved commercial use to a residential use may circumvent code requirements for a site plan adjustment. Accordingly, substantial evidence in the record supports the Director's interpretation as to Issues 4, 5, 7, and 14.** As an initial matter, CHI requests the Hearing Examiner to rule that it may develop a condominium complex consisting of 44 detached single-family residential units on the two subject lots without reference to the approved Visconsi Site Plan. CHI, however, does not present any legal authority that would support the Hearing Examiner issuing such a ruling in this appeal from an administrative code interpretation. Rather, BIMC 2.16.020.R.1 limits the Hearing Examiner's authority in deciding this appeal to affirming the interpretation decision, reversing the decision, affirming the decision with conditions, or remanding the decision to the director for further consideration of identified issues. CHI neither requested a code interpretation pertaining to this issue nor identified this issue as a subject of this appeal. Accordingly, this issue is not properly before the Hearing Examiner, and the Hearing Examiner declines CHI's invitation to issue an advisory ruling on a potential future land use action. The Hearing Examiner notes, however, that CHI's view that building permits are all that are required for the development of condominiums, be it 1 or 1,000—as opposed to other forms of residential development—would lead to absurd results and, accordingly, is rejected. For one, CHI has misstated the available SEPA exemption related to the construction of single-family residential units. CHI states that SEPA exempts the "construction of four detached single-family residence units on a lot" and that, somehow, this means that a proposal for 44 condominiums would be exempt from SEPA review. WAC 197-11-800(1)(b)(ii) actually states that the "construction or location of four detached single family residential units" are exempt (in certain circumstances) from SEPA review, without reference to the number of lots involved. Even if CHI's circuitous argument about the applicability of the Washington Uniform Common Interest Ownership Act being read in conjunction with the BIMC were accepted, it is still unclear why SEPA review would not be required for the development of 44 residential units (be they detached single-family residences or condominiums). For another (and, perhaps more importantly), as is detailed below, whether condominiums, single-family housing, or apartments are proposed, this would involve a major site plan amendment. Accordingly, additional review by the Planning Commission and Design Review Board would be required because significant changes to the approved Visconsi Master Plan are proposed. The *type* of residential development is immaterial.

CHI contends that the Hearing Examiner's 2014 decision approved residential uses and provided the exclusive procedure for seeking a change of use to residential. CHI does not identify any language within the Hearing Examiner's 2014 decision explicitly approving residential uses. Likely because no such language exists anywhere within the 2014 decision. Instead, CHI relies exclusively on Condition 49 of the site plan approval to support its claim. Before addressing this condition, and to provide an appropriate context for interpreting the scope of the condition, it must be noted that the Visconsi site plan application did not propose any residential uses, and instead proposed only various commercial uses that included retail sales and services, restaurants, professional services, and health care facilities. Additionally, the Hearing Examiner's decision did not explicitly reference residential uses apart from noting public concerns about "the absence of a residential of a residential component in the project's mix of uses." *Exhibit A-1, Hearing Examiner Report and Decision, page 7.* Moreover, the Hearing Examiner's 2014 decision specifically evaluated the commercial impacts of the proposal ("One of the real challenges facing the Visconsi project is to avoid unreasonable commercial impacts on the Stonecress neighborhood to the east"), as well as Comprehensive Plan goals and policies relating to commercial development ("[General Land Use Policy LU 1.4's] use of the word 'center' likely reflects the consistent Plan emphasis on restricting non-residential development to compact areas."). *Exhibit A-1, Hearing Examiner Report and Decision, pages 20 and 34.*

CHI argues that Condition 49.A's reference to "change of use" without qualification supports its claim that the Hearing Examiner's decision contemplated a change of use to residential. Accepting for the sake of argument that Condition 49.A contemplated a change of use to residential, Condition 49.A provides that "[a] change of use approval from City is required before any building use is converted," without specifying how such "approval from [the] City" would be obtained. CHI argues that Condition 49.A should be read in conjunction with Condition 49.B such that a change of use to residential would require only planning staff approval. Condition 49.B, however, refers only to planning staff approval of design elements at the building permitting stage and does not reference a proposed change of use. Accordingly, a more reasonable interpretation is that the "approval from [the] City" for a change of use referenced in the 2014 decision must adhere to the applicable code requirements. Those requirements are found in BIMC 2.16.040.H.2, which provides, "Adjustments other than minor adjustments to an approved site plan and design review require a new or amended application as determined by the director. Major adjustments are those that change the basic design, intensity, density, or *character of the use*." (Emphasis added.) And under BIMC 2.16.040.E.5, the Planning Commission is required to review major site plan and design review applications. This is the interpretation the Director provided. Accordingly, substantial evidence supports the Director's interpretation as related to CHI's appeal issues 4, 5, 7, and 14. *Findings 1 – 21.*

2. **CHI cannot reallocate residential FAR between individual lots within the approved Visconsi site plan.** CHI argues that it may reallocate any unused residential FAR from the developed lots within the approved Visconsi site plan to the two remaining undeveloped lots because the Visconsi project was submitted and approved as a single parcel. CHI does not cite any specific code provision that would explicitly support this argument, and it is belied by the code's definition of floor area ratio, which provides in relevant part, "'Floor area ratio' is a figure that expresses the total floor area as a multiple of *the lot* area. This figure is determined by dividing the floor area of all buildings *on a lot* by the *lot area* prior to removal of lot area for dedication." *BIMC 18.12.050.G.* (Emphasis added.) Director Wright testified at the hearing that this FAR definition supports her interpretation that FAR is calculated on a lot-specific basis rather than site-wide. She further testified that, although City subdivision code provisions allow for the allocation of FAR among proposed lots, such allocation would not apply to lots within a site plan because the lots within a site plan have already been created and recorded. The Hearing Examiner both concurs with the Director and is required to accord substantial weight to her decision. *BIMC 2.16.020.R.1.k.* There was much discussion at the hearing about CHI's potential ability to obtain bonus FAR through the purchase of development rights from property owners within the approved Visconsi site plan. CHI did not request a code interpretation on this issue, however, and it is therefore not properly before the Hearing Examiner. Moreover, the City notes in its closing brief that the code provisions that would have allowed CHI to obtain bonus FAR in this manner are no longer available following recent amendments, and the Hearing Examiner declines to issue any advisory ruling as to whether CHI would be vested to those prior code provisions. Accordingly, substantial evidence supports the Director's interpretation as related to CHI's appeal issue 1. *Findings 1 – 21.*

DECISION

Because substantial evidence supports the City Director of Planning and Community Development's code interpretation, the appeal is **DENIED.**

DECIDED this 21st day of August 2020.

ANDREW M. REEVES
Hearing Examiner
Sound Law Center