

BLACK DIAMOND CITY COUNCIL MINUTES

September 21, 2011 Special Meeting

Black Diamond Elementary School Gymnasium
25314 Baker Street, Black Diamond, Washington

CALL TO ORDER, FLAG SALUTE:

Mayor Olness called the special meeting to order at 6:30 p.m. and lead us all in the Flag Salute.

ROLL CALL:

PRESENT: Councilmembers Hanson, Goodwin, Boston, Saas and Mulvihill.

ABSENT: None

Staff present were: Stacey Borland, Associate Planner; Andy Williamson, Executive Director of Engineering Services and Economic Development; Steve Pilcher, Executive Director of Community Development; Chip Hanson, IS Manager; Bob Sterbank, City Attorney and Brenda L. Martinez, City Clerk.

Mayor Olness welcomed everyone in attendance and opened the closed record hearing on The Villages and Lawson Hills Development Agreements and reminded folks that only items 1 and 2 of the agenda would be addressed tonight.

RULES OF PROCEDURE:

Mayor Olness commented that Council has discussed the proposed rules at the last Council meeting and asked Council if they had any changes or additions they have to the proposed rules. She noted there was Council consensus of 2.5 hours to item #1 on Attachment A and moved on to establishing a schedule for continued sessions.

Councilmember Goodwin addressed comments heard during the last Council meeting and discussed his proposed general schedule which would be to have staff and applicant presentations start on Thursday, September 29, 2011 with party of record statements on October 3, 4, 5, 6, and 8 if necessary to complete the hearing process.

Mayor Olness reminded Council that October 6 is a regular Council meeting.

Councilmember Hanson asked counsel a clarifying question regarding remanding and does the City Council have that authority. **City Attorney Sterbank** responded that in this type of proceeding City code allows the Council to affirm, modify or deny the proposal, but it does not provide the express authority to remand. **Councilmember Hanson** also noted she contacted Jim Dougherty of MRSC and he looked at our Code

and RCW and noted it is stated clearly in the Hearing Examiner's recommendation that his task had been met and to ask him to look at it again or give more time is not something that is done. Councilmember Hanson added she has copies of the email should anyone want one.

Discussion began on the establishment of a proposed schedule.

Mayor Olness polled Council on the proposed schedule and consensus was to have staff and applicant presentations on the 29th of September with party of record statements being October 3, 4, 5, 6, and 8. Mayor Olness also addressed the regular Council meeting on the 6th and reported an option would be to hold a special Council meeting at 6:30 on the 6th followed by the continuation of the development agreement hearings.

Mayor Olness noted the proposed schedule is to begin on September 29 with staff and applicant presentations followed by party of record statements on October 3, 4, 5, 6, and 8 and will have a special City Council meeting on October 6 at 6:30 p.m. followed by the continuation of the development agreements hearings. A majority of the Council agreed with this schedule.

There was council consensus with item #3 on the proposed rules and Mayor Olness moved on to item #4 of the proposed rules and reviewed the bullet points with Council. There was Council consensus for bullet #s 1, 2, 3, and 4 as written.

Councilmember Goodwin proposed for bullet #5 of having parties of record sign up for reserved date and time slots on October 3 and 4 and then first come first serve sign-ups for October 5, 6, and 8. There was Council consensus to this.

Mayor Olness continued on with bullet # 6. **Councilmember Saas** suggested adding or a relevant reason such as vacation to bullet #6. There was Council consensus to add this.

Council consensus for bullet #s 7, 8, 9, 10, 11, 12, and 13.

Mayor Olness moved on and there was Council consensus to item #s 5 and 6. On item #7 **Councilmember Saas** suggested the XX be replaced with one week. After discussion there was Council consensus to replace the XX with three days. There was Council consensus on item #8.

NEW BUSINESS:

Resolution No. 11-766, suspending Council Rules and Procedures regarding Quasi-Judicial Hearings and Closed Record Hearings and establishing new procedures for The Villages and Lawson Hills Development Agreements Closed Record Hearings

A **motion** was made by Councilmember Boston and **seconded** by Councilmember Saas to postpone action on Resolution No. 11-766 until the September 29, 2011 continuation

of the Special Council Meeting in order for staff to prepare a clean version. Motion **passed** with all voting in favor 5-0.

Councilmember Saas asked Counsel to describe the code section he was referring to earlier in the proceedings regarding remanding. **City Attorney Sterbank** responded it was Black Diamond Municipal Code 18.08.070(A)(3) which states "The city council shall decide the application by motion and shall adopt formal findings and conclusions approving, denying, or modifying the proposal".

Councilmember Goodwin commented this does not limit the ability of the Council should they so choose and noted he is not suggesting this - to ask for some guidance while Council is going through the process from the Hearing Examiner. He added he would like some thought given to clarifying whether it would indeed prohibit them.

APPEARANCE OF FAIRNESS INQUIRIES:

City Attorney Sterbank explained he will be asking Council a series of questions to prompt disclosures if there are any. He noted he will ask Council as a body these questions and if there are no's he will move on to the next question and if there are yes's from individual Councilmembers he will explore those further. He added, at the conclusion of the process he would anticipate a time period for objections to be made if there are any from the applicant or parties of record. Following any objections he would ask for an opportunity to recess into executive session to discuss those with Council and provide appropriate advice at which time Council would reconvene to determine what their pleasure was at that point.

City Attorney Sterbank asked the following questions collectively to Council:

1. Do any Councilmembers have any interest in the property that is subject to the Development Agreements? Council collectively responded – **No**
2. Do you stand to gain or lose financially as a result of the outcome of these proceedings? Council collectively responded – **No**
3. Can you hear and consider the application in a fair and unbiased manner? Council collectively responded – **No**
4. Any ex parte contact with parties of record or applicant while this quasi-judicial matter has been pending? **City Attorney Sterbank** commented he heard some yes's from Councilmembers and started the disclosure process with Councilmember Mulvihill.

Councilmember Mulvihill reported she was in contact with a member of the YarrowBay staff regarding Labor Day ads and possible booth applications and it was strictly labor day business; she was able to watch the other hearings before the Hearing Examiner via Skype from her living room;

Councilmember Sass reported all emails that were sent as a blanket to all Councilmembers in regards to any development agreement conversations; phone call from Peter Rimbos last Friday in regards to previous night's Council meeting as it

related specifically to remanding and a summarization of what when on at the Council meeting; attended open record hearing in front of the Hearing Examiner for two or three nights and no one-on-one contact with anyone regarding the Development Agreement. **City Attorney Sterbank** asked about the emails and **Councilmember Saas** responded this was more just a blanket covering any emails that had anything to do with the Development Agreements if there were any – personally nothing. **City Attorney Sterbank** asked if these email were from staff or parties of record. **Councilmember Saas** responded nothing that he could think of.

Councilmember Boston reported he received email from Mr. Irrgang and Mr. Rimbos after the Growth Management Hearings Board ruling wanting him to meet with their Technical Advisory Team to discuss transportation issues and stated he declined those meetings as they were litigants against the City and did not feel it was appropriate; met with Brian Ross after the ruling and commented they did not talk about the Development Agreement, but rather some of the visions of what the projects would entail; letter from attorney David Bricklin that went out to all Councilmembers suggesting the City would benefit from new legal counsel; emails from Ms. Cindy Proctor advising that the school agreement should be re-evaluated; Maple Valley Rotary meeting in June Ryan Kohlmann of YarrowBay gave a presentation to all of rotary and there was no discussion of the Development Agreement.

Councilmember Mulvihill commented that she needed to add to her disclosure Cindy Proctor's email, Peter Rimbos' email, letter from Mr. Bricklin, and rotary meeting.

Councilmember Goodwin reported over the months related to non-development agreement issues for example schools which are not part of the agreement, but a special contract in and of itself; contact with lots of people that are parties of record including YarrowBay on multiple occasions and was diligent to only discuss the MPD Agreements, but not discussing terms, conditions or elements of the Development Agreement; Mr. Bricklin letter; Council meeting last week where Council rules were addressed by a number of people; numerous discussions with staff specific to the Development Agreement.

Councilmember Hanson reported she had all the same contacts as Mr. Boston; Brian Ross meeting to discuss MPDs; Kiwanis meeting where Colin Lund made a presentation regarding the proposed Master Planned Developments; her and Councilmember Mulvihill met with a group of folks at the Bakery and it was MPD related; letter from Bricklin; talked to Cindy Proctor and Vicki Harp over the months and it's been mostly about her Mother's health; email from Cindy Proctor that all Council received. Will provide copies of emails to the City Clerk.

City Attorney Sterbank announced we would now turn to objections from parties of record and noted the City has received today a letter from YarrowBay's Counsel and added the Clerk has copies and will distribute to Councilmembers. He noted YarrowBay's Counsel is here and should Council wish to ask questions or have them address it or speak to it they certainly can. He further added now is the time for the

Mayor to call on parties of record who may have objection to the disclosures that were made tonight.

Mayor Olness ask if any party of record would like to make any comment about the appearance of fairness.

Dave Amber – Lake 12, commented on the phone call Councilmember Saas received after a meeting from Mr. Rimbo. **Councilmember Saas** responded Mr. Rimbo called to summarize the meeting as it related to tonight's rules. **Mr. Amber** asked if all the emails Councilmembers referred to would be given to the City Clerk. **Councilmember Saas** responded everything is public record. **Mr. Amber** commented on Councilmember Boston's statement he was casually discussing the MPDs but not the specifics and thought this amounted to a personal sales pitch. **City Attorney Sterbank** called for point of order as this is an opportunity for individuals to challenge Councilmember's participation not for folks to come up and cross examine them. **Mr. Amber** concluded with these are the objections he has.

Melanie Gauthier – Black Diamond, questioned why the Mayor is not going through the Appearance of Fairness process like the rest of the Council. **City Attorney Sterbank** noted the Mayor is not a member of the Council. **Mayor Olness** stated there will be an ordinance prepared to adopt these agreements and added if there was a tie vote she could not break a tie vote.

City Attorney Sterbank stated to the Mayor as the presiding officer in control of the agenda if there are no further objections and the Council wishes he would suggest recessing into executive session to discuss the objections that have been received to date.

Mayor Olness asked if there were any other challenges.

Cindy Wheeler – Black Diamond, stated she does have a challenge but first asked why YarrowBay was able to submit what she assumes to be challenges in writing and why they are not being shared with the public as their challenges are. **Ms. Wheeler** stated she has a challenge for Kristine Hanson as she recused herself last year during the MPD process because her property is adjacent to the project and she quoted earlier tonight she conferred with MRSC for legal advice and their advice last time was since your property is adjacent to the project it is inappropriate and unfair for you to be a party to this. **Councilmember Hanson** responded that Mr. Saas' property is adjacent to the Lawson Hills project and noted they are all affected by the MPDs and you can say the same for Mr. Goodwin who lives on the lake as he will be affected by it and she added she will not recuse herself this time based on those grounds after talking with MRSC.

Mayor Olness asked if Council was ready to recess into executive session to discuss the objections that have been received to date.

Councilmember Goodwin stated given this document will take some time to go through and we do need to have an executive session regarding potential litigation as a result of

this. He added it would be in our best interest to continue the hearings until the 29th and go immediately into executive session. **City Attorney Sterbank** clarified that the proposed schedule would be to recess into an executive session and then ending the proceedings for this evening at the conclusion of the executive session by making a motion to continue.

EXECUTIVE SESSION:

Mayor Olness recessed the special meeting into executive session at 7:32 p.m. to discuss with legal counsel potential litigation pursuant to RCW 42.30.110(1)(i) which was anticipated to last approximately one hour with no action to follow.

The meeting was called back to order at 8:33 p.m.

ADJOURNMENT:

A **motion** was made by Councilmember Boston and **seconded** by Councilmember Mulvihill to continue the hearings on Monday, September 26 for an executive session at 6:30 p.m. in the Black Diamond Elementary School Gymnasium followed by appearance of fairness.

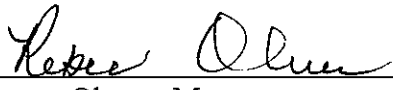
Councilmember Hanson asked YarrowBay to summarize the material the presented to Council so the audience is aware of the contents.

Megan Nelson, Director of Legal Affairs for YarrowBay stated their outside legal counsel Nancy Rogers the author of the document was directed to leave after hearing the Council's announcement before the executive session. Ms. Nelson noted the purpose and intent of writing the letter and submitting it to the City was two-fold: 1) to avoid what YarrowBay felt was potential liability for the City and 2) in avoiding that liability and allow all five Councilmembers to be able to vote and approve the development agreements that are before them. She added YarrowBay felt it was important to bring to the Council's attention some issues of appearance of fairness that they had seen as a result of documents before them. The first issue that has already been raised today which is proximity of three Councilmembers to the projects – Councilmembers Mulvihill, Saas and Hanson. She then cited case law supporting this challenge and asked that those three Councilmembers excuse themselves. The second part is to ex parte documents and contacts that have occurred between September 20, 2010 and today's date. They question with the material reviewed if there is prejudgment on these development agreements and given that concern we felt that Councilmember Saas and Councilmember Goodwin should recuse themselves. On that basis four councilmembers would recuse themselves and then given the rule of necessity all four recused Councilmembers would come back and then vote and be able to approve the development agreements as a whole five member Council. In conclusion she added given the extent of the ex parte communications they felt this was to best approach it this way and to propose a solution that would benefit everyone. **Councilmember Saas** asked why the proximity issue was not raised in the MPD proceedings. **Ms. Nelson** responded she was not employed by

YarrowBay at that time and could not answer directly, but she did believe it was raised on one Councilmember.

Vote: Motion **passed** with all voting in favor (5-0).

ATTEST:



Rebecca Olness, Mayor



Brenda L. Martinez, City Clerk