

RESOLUTION NO. 08-522

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
BLACK DIAMOND, KING COUNTY, WASHINGTON,
AUTHORIZING THE MAYOR TO EXECUTE A
PROFESSIONAL SERVICES AGREEMENT WITH OGDEN,
MURPHY, WALLACE PLLC FOR HEARING EXAMINER
SERVICES**

WHEREAS, the City Council approved Ordinance 08-857 on April 3, 2008, creating the position of hearing examiner; and

WHEREAS, thereafter the City of Black Diamond advertised for individuals and firms qualified to serve as the hearing examiner on an as-needed, contractual basis; and

WHEREAS, a panel of City staff reviewed the applications, interviewed applicants and determined Ogden, Murphy, Wallace to be the most qualified for the position; and

WHEREAS, Phil Olbrechts of Ogden Murphy Wallace, who would act as lead examiner for Black Diamond, has served as hearing examiner since 1998; and

WHEREAS, Mr. Olbrechts currently serves as the hearing examiner for Federal Way, Auburn, Jefferson County, Mason County and Port Townsend; and

WHEREAS, the Council supports the Mayor's selection of Ogden, Murphy, Wallace, PLLC, and finds the proposed agreement to be fair and reasonable,

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WAHSINGTON, DOES RESOLVE AS FOLLOWS:

Section 1. The City Council of the City of Black Diamond, Washington, does hereby authorize the Mayor, on behalf of the City, to execute a professional services agreement substantially in the form attached as Exhibit A.

PASSED BY THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, AT A REGULAR MEETING THEREOF, THIS 19TH DAY OF JUNE, 2008.

CITY OF BLACK DIAMOND:



Howard Botts, Mayor

Attest:



Brenda L. Streepy, City Clerk

CITY OF BLACK DIAMOND PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (the or this "Agreement"), for reference purposes only, is dated June 19, 2008, and is entered into by and between

CITY OF BLACK DIAMOND, WASHINGTON ("City")
24301 Roberts Drive
Black Diamond, WA 98010
Contact: Mayor Howard Botts
Phone: 360-886-2560 Fax : 360-886-2592

and

PHIL OLBRECHTS and
Ogden Murphy Wallace, P.L.L.C. ("Consultant")
1601 Fifth Avenue Suite 2100
Seattle, WA 98101-1686

Contact: Phil Olbrechts
Phone: 206-447-7000 Fax: 206-447-0215

Tax ID No.: 91-0344327
City of Black Diamond Business License No.: _____

for professional services for the City of Black Diamond to include:

- (1) To act in the capacity of Hearing Examiner for Black Diamond;
- (2) To hear, and act as authorized by the Black Diamond Municipal Code, hearings related to land use permitting actions, generally once per month or more/less frequently as determined necessary by Black Diamond. As the Hearing Examiner, the Consultant shall receive and examine all admissible evidence regarding cases to be heard; perform on-site inspections of properties; conduct public hearings; and submit written Findings, Conclusions, Recommendations, and Decisions within the time limits and as specified by the Black Diamond Municipal Code;
- (3) To conduct other public hearings not related to land use or code enforcement actions, as provided for in Black Diamond Municipal Code;
- (4) To meet with the Black Diamond City Council, as requested by the Council, to discuss matters pertinent to the conduct and practices of the Hearing Examiner;
- (5) To meet with the Black Diamond staff, or review material provided, and discuss or comment on matters pertinent to the Black Diamond land use permit process, requirements or enforcement, as requested by the Director of the City of Black

Diamond Community Development Department as consistent with the appearance of fairness doctrine, conflicts of interest, professional responsibility and other applicable law; and

- (6) To prepare a citizens' guide to the hearing examiner process for distribution and posting on the City Web site.

TERMS AND CONDITIONS

1. Services by Consultant

1.1 Consultant shall perform the services above described. The services performed by Consultant shall not exceed the services as enumerated nor shall the Consultant be entitled to a greater amount of compensation as that provided in this Agreement without the prior written authorization of the City.

1.2 The City may from time to time require changes or modifications in the professional services rendered. Such changes, including any decrease or increase in the amount of compensation, shall be agreed to by the parties and incorporated in written amendments to this Agreement.

1.3 In order to appropriately accomplish the duties specified in this agreement, it is agreed that the Consultant at his own expense shall do and provide the following: a) office and office equipment; b) an electronic copy in Microsoft Word format and at least two original reports of Findings, Conclusions and Decisions or Recommendations for each hearing by delivering the same to the City of Black Diamond Community Development Department within the time constraints imposed by law; c) any secretarial time required.

1.4 Phil Olbrechts shall be the lead attorney from Consultant to provide Hearing Examiner services and shall be responsible for supervising all others who provide service through the Consultant under this Agreement. In case Phil Olbrechts cannot conduct a hearing due to reasonable cause, he may designate another attorney from the Consultant to conduct the hearing, which designation shall be subject to the approval of the City. Phil Olbrechts may also assign the writing of decisions on an as needed basis to other attorneys from the Consultant. He may also employ the services of other independent contractors to write decisions provided that Consultant shall be fully responsible for the content of the independent contractor's decisions, supervision of the independent contractor, and invoicing.

2. Responsibilities of the City

In order to support the functions of the hearing examiner, the City of Black Diamond shall provide the following:

2.1 Written staff reports to the Hearing Examiner both electronic and hard copies, as well as, maps and such other exhibits as required; shall be responsible for the scheduling of all the hearings for the Hearing Examiner; shall provide notice of hearings and decisions as required by

law; shall make all the required copies of said decisions and correspondence, and mail to all parties of record; shall keep and maintain all official files and records of the hearings; and do all other tasks necessary to administratively process said materials.

2.2 The City shall furnish a hearing room and recording equipment; shall schedule all necessary meetings before the Black Diamond City Council; shall provide an amplification system when necessary; and shall provide a staff person who shall be present at hearings to operate the recording equipment, accept additional exhibits submitted at the hearing, and assist in the orderly conduct of the hearing. The City shall also prepare a formal list of exhibits received prior to the hearing for the final written Hearing Examiner decision or recommendation.

3. Compensation for Services

3.1 The City agrees to pay Consultant on an hourly basis at the following rates: Phil Olbrechts shall be billed at the rate of one hundred forty-five dollars (\$145.00) per hour. Should a substitute be required, and approved by the City, associates with less than five years of experience shall be billed at one hundred thirty-five dollars (\$135.00) per hour. Substitute members and associates with more than five years experience shall be billed at one hundred forty-five dollars (\$145.00) per hour.

3.2 The Consultant shall charge a flat one hour for round trip travel time.

3.3 The City agrees to pay for mileage at the current rate allowed by the Internal Revenue Service and to pay for the direct cost of related administrative expenses, including copy charges. Consultant shall not charge for long distance within Washington State.

3.4 Code enforcement decisions written by a contract decision writer working for the Consultant will be billed at thirty-five dollars (\$35.00) per hour.

3.5 Should Consultant employ the services of independent contractors to write decisions as provided in paragraph 1.4, (1) Consultant shall add on no more than 10% in administrative fees to costs of independent writer plus applicable taxes; and (2) costs of independent writer including the fees and taxes set forth above shall not exceed 75% of the hourly rate of Consultant.

3.6 Transcription of hearing tapes, if requested by the client, will be billed at thirty-five dollars (\$35.00) per hour.

4. Payment

4.1 Consultant shall invoice to Black Diamond on a monthly basis a statement that details charges for each individual case considered. Payment shall be made by the City within 60 days of receipt of invoice.

4.2 Consultant shall keep cost records and accounts pertaining to this Agreement available for inspection by City representatives for three (3) years after final payment unless a longer period is required by a third-party agreement. Consultant shall make copies available to the City on request.

4.3 If the services rendered do not meet the requirements of the Agreement, Consultant will correct or modify the work to comply with the Agreement. The City may withhold payment for such work until the work meets the requirements of the Agreement.

5. Discrimination and Compliance with Laws

5.1 Consultant agrees not to discriminate against any employee or applicant for employment or any other person in the performance of this Agreement because of race, creed, color, national origin, marital status, sex, age, disability, or other circumstance prohibited by federal, state, or local law or ordinance, except for a bona fide occupational qualification.

5.2 Consultant and its subconsultants shall comply with all federal, state, and local laws and ordinances applicable to the work to be done under this Agreement.

5.3 Any violation of this Section 5 shall be a material breach of this Agreement and grounds for immediate cancellation, termination, or suspension of the Agreement by the City, in whole or in part, and may result in Consultant's ineligibility to conduct further work for the City.

6. Suspension and Termination of Agreement

6.1 This agreement may be terminated by either party upon 30 days written notice without cause. The City may immediately remove the Consultant for cause. In the event of termination, all finished or unfinished reports, or other material prepared by Consultant pursuant to this Agreement, shall be submitted to the City. In the event the City terminates this Agreement prior to completion without cause, Consultant may complete such analyses and records as may be necessary to place its files in order. Consultant shall be entitled to compensation for any satisfactory work completed on the Project prior to the date of suspension or termination.

6.2 Any notice from the City to Consultant regarding the suspension of this Agreement shall specify the anticipated period of suspension. Any reimbursement for expenses incurred due to the suspension shall be limited to Consultant's reasonable expenses and shall be subject to verification. Consultant shall resume performance of services under this Agreement without delay when the suspension period ends.

6.3 The Phil Olbrechts shall immediately notify the City of any change in professional status.

7. Standard of Care

7.1 Consultant represents and warrants that it has the requisite training, skill, and experience necessary to provide the services under this Agreement and is appropriately accredited and licensed by all applicable agencies and governmental entities. Services Consultant provides under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing in similar circumstances.

8. Ownership of Work Product

8.1 Ownership of the originals of any decisions, reports, data, studies, surveys, charts, maps, drawings, specifications, figures, photographs, memoranda, and any other documents which are developed, compiled, or produced as a result of this Agreement, whether or not completed, shall be vested in the City and shall be submitted to the City upon termination of this Agreement. Any reuse of these materials by the City for projects or purposes other than those that fall within the scope of this Agreement and the Project to which it relates, without written concurrence by Consultant, will be at the sole risk of the City.

8.2 The City acknowledges Consultant's documents as instruments of professional service. Nevertheless, the documents prepared under this Agreement shall become the property of the City upon completion of the work. The City agrees to hold harmless and indemnify Consultant against all claims made against Consultant for damage or injury, including defense costs, arising out of the City's reuse of such documents beyond the use for which they were originally intended without the written authorization of Consultant.

9. Indemnification/Hold Harmless

9.1 Consultant shall defend, indemnify, and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising directly or indirectly out of or resulting from the acts, errors, or omissions of Consultant or its subconsultants in performance of this Agreement, except for injuries and damages caused by the sole negligence of the City.

10. Insurance

10.1 Consultant shall procure and maintain for the duration of the Agreement, and shall provide proof satisfactory to the City that such insurance is procured and maintained by each of its subconsultants, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by Consultant, its agents, representatives, or employees.

10.2 Consultant shall procure and maintain the following types and amounts of insurance:

a. Automobile Liability insurance covering all owned, non-owned, hired, and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be

endorsed to provide contractual liability coverage. This insurance shall have a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

b. Commercial General Liability insurance shall be written on ISO occurrence form CG 00 01 or a substitute form providing equivalent liability coverage and shall cover liability arising from premises, operations, independent contractors, personal injury, and advertising injury. This insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate.

c. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

d. Professional Liability insurance appropriate to Consultant's profession, with limits no less than \$1,000,000 per claim and \$1,000,000 policy aggregate limit.

10.3 The Automobile Liability, Commercial General Liability, and Professional Liability insurance policies are to contain, or be endorsed to contain, the following provisions:

a. Consultant's insurance coverage shall be primary insurance vis-à-vis the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess over Consultant's insurance and shall not contribute with it.

b. Consultant's insurance shall be endorsed to state that coverage shall not be cancelled, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

10.4 The City shall be named as an additional insured under Consultant's Automobile Liability and Commercial General Liability insurance policies with respect to the work to be performed for the City pursuant to this Agreement.

10.5 Insurance shall be placed with insurers with a current A.M. Best rating of not less than A:VII.

10.6 Declaration pages issued by the insurance carriers for the policies mentioned in this Section 10 showing such insurance to be in force shall be filed with the City not less than ten (10) days following both parties signing this Agreement and before commencement of the work. In addition, the City may request, in writing, a full copy from Consultant of any insurance policy Consultant must procure and maintain pursuant to this Agreement and Consultant must provide such copy to the City within ten (10) days of Consultant's receipt of the City's request. Any policy or required insurance written on a claims-made basis shall provide coverage as to all claims arising out of the services performed under this Agreement and for three (3) years following completion of the services to be performed. It shall be a material breach of this Agreement for Consultant to fail to procure and maintain the insurance required by this Section 10 or to provide the proof of such insurance to the City as provided for in this Agreement.

11. Assigning or Subcontracting

11.1 Consultant shall not assign, transfer, subcontract, or encumber any rights, duties, or interests accruing from this Agreement without the express prior written consent of the City, which consent may be withheld at the sole discretion of the City.

12. Independent Contractor

12.1 Consultant and its subcontractors are, and shall be at all times during the term of this Agreement, independent contractors.

13. Notice

13.1 All notices required by this Agreement shall be considered properly delivered when personally delivered, when received by facsimile, or on the third day following mailing, postage prepaid, certified mail, return receipt requested to:

City: City Administrator
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010
Fax: 360-886-2592

With a copy to: Loren D. Combs
VSI Law Group
3600 Port of Tacoma Rd. Ste. 311
Tacoma, WA 98424
Fax: 253-922-5848

Consultant: Phil Olbrechts
Ogden Murphy Wallace, P.L.L.C.
1601 Fifth Avenue Suite 2100
Seattle, WA 98101-1686
Fax: 206-447-0215

14. Disputes

14.1 Any action for claims arising out of or relating to this Agreement shall be governed by the laws of the State of Washington. Venue shall be in King County Superior Court, Kent, Washington.

15. Attorney Fees

15.1 In any suit or action instituted to enforce any right granted in this Agreement, the substantially prevailing party shall be entitled to recover its costs, disbursements, and reasonable attorney fees from the other party.

16. General Administration and Management on Behalf of the City

16.1 The City Administrator for the City, or his designee, shall review and approve Consultant's invoices to the City under this Agreement and shall have primary responsibility for overseeing and approving work or services to be performed by Consultant.

17. Extent of Agreement/Modification

17.1 The term of this agreement shall begin immediately upon passage and shall continue in full force and effect for one year. After one year, the agreement shall remain in effect on a month-to-month basis until terminated under the provisions of Section 6 above, unless an longer extension of time is agreed upon between both parties. This agreement may be amended at any time after the initial one year term, subject to the mutual agreement of both parties.

17.2 This Agreement, together with any attachments or addenda, represents the entire and integrated Agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement may only be amended, modified, or added to by written instrument properly signed by both parties. The parties acknowledge the general contract rule that a clause in a contract, such as this one, prohibiting oral modifications is itself generally subject to oral modification. However, in order to ensure certainty as to the terms and conditions of this Agreement, the parties waive this general contract rule.

CITY OF BLACK DIAMOND

By:



Howard Botts

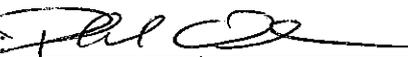
Its: Mayor

Date:

6-20-08

CONSULTANT

By:



Printed Name: Phil Olbrecht

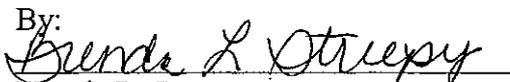
Its: Member (PLC)

Date:

6/25/08

Attest:

By:



Brenda L. Streepy

City Clerk