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BEFORE THE HEARING EXAMINER FOR
THE CITY OF BLACK DIAMOND

Development Agreements		
Lawson Hills PLN10-0021; PLN11-0014		Addendum to Recommendation
Documents		

The Examiner’s recommendation stated that an addendum would be provided to complete the response to two issues of concern. Those concerns are addressed below. Also, as clarification to the DA recommendation, any factual determinations in Section VII of the Recommendation or below that support the conclusion that the provisions identified in Section VIII are required to be revised in order to implement the master plan development approvals and/or comply with applicable law shall be construed as findings of fact, as well as any factual determinations in Section VII or below that support the conclusion that revisions are not required to implement the master plan development approvals and/or comply with applicable law

A. Recommendation Page 55, Line 16

9. Buffer width not consistent with protocols. Dr. Sarah Cooke, in verbal testimony, noted wetlands ratings and buffer widths on the constraints map are not consistent with Black Diamond’s sensitive areas maps as required by DA 8.2.1. As an example, she noted the large wetlands system running from Jones Lake to Black Diamond Lake. Black Diamond code would require a 250 foot buffer for this wetland system, but the Development Agreements only assign a 60 or 110 foot buffer.

In Exhibit 143, Erika Morgan notes that marker indicating the “setback” (buffer) along the east side of Black Diamond Lake is three feet into a logging road near the edge of a cliff leading down to the lake, and indicates that there should be a setback from the cliff, even if there weren’t a lake below. She also argues that the setback should be measured horizontally from the edge of the lake as from a view from above rather than an on-the-ground measurement up the face of the cliff. Ms. Morgan estimates this “cliff” as an “80 degree slope that raises (sic) at least 110 feet”. Ms. Morgan is further concerned that the buffer described on the constraint map includes only impassible peat bog

1 wetlands without consideration for the solid footing large wildlife would need to be able to pass
2 through the area.

3 *YB response: YB responded first by objecting to the inclusion of the Exhibit by Dr. Cooke (verbal*
4 *testimony and Ex. 150), by noting the FEISs were deemed adequate by the Hearing Examiner and*
5 *adopted by the City for the Development Agreements (Ex. 209, page 35). YB went on to note the*
6 *DAs are binding only to the City and YB and not the US Army Corps of Engineers (Corps) or the*
7 *Washington Department of Ecology (DOE). They stated State and Federal agencies may change*
8 *the approved delineation methodologies over time and, should YB choose to propose fill or*
9 *development activities in the wetlands, those activities would require a permit or approval from the*
10 *Corps or DOE. Either agency could require a current delineation of the wetlands using a then-*
11 *current methodology.*

12 *YB submitted a letter by their wetlands expert, Scott Brainard (Ex. 210) in response to Dr. Cooke.*
13 *Dr. Brainard noted the DA 8.1 specify all development within the MPD will be subject to the City's*
14 *Sensitive Areas Ordinance. He further noted BDMC 19.10 does not require wetland boundaries to*
15 *be reviewed and/or approved by the Corps or DOE. He mentioned the Corp will be notified of*
16 *preconstruction activity for implementing projects. He also stated, "It is fully anticipated that, as*
17 *part of any Federal and State review process, additional technical reports and/or documents will be*
18 *required. This review and/or any additional documents required by the Corps or DOE have no*
19 *relationship to the City's Sensitive Areas Ordinance or the Development Agreement Process," (Ex.*
20 *210, page 2). Mr. Brainard stated he felt BDMC 19.10 effectively and adequately protects*
21 *wetlands.*

22 *Examiner Response: One very important point to keep in mind when reviewing the proposed*
23 *wetland boundaries is that they will no longer be subject to change once approved by the City*
24 *Council. As noted in V COA 155 and DA 8.2.1, once those boundaries are set they cannot be*
25 *moved if field conditions show an alternative location is more appropriate. The fact that*
26 *implementing projects must comply with the Sensitive Areas Ordinance ("SAO") does not alter the*
27 *fact that wetland boundaries set in the DAs cannot be revisited during that review. Since the*
28 *wetland buffers set in the DAs will be applied during implementing project review, the Council must*
29 *be satisfied that the precision of those boundaries will satisfy the requirements of the SAO at*
30 *implementing project review. This places the Council in the somewhat unusual position of having*
31 *to address specific project wetland impacts during the more generalized level of DA review. All*
32 *statements by concerned citizens that the proposed boundaries do not comply with the SAO must be*
33 *carefully considered.*

34 *As to the concerns of Erika Morgan, wetlands buffers are measured from the wetland boundary as*
35 *surveyed in the field and must extend to include the buffers for any adjacent critical areas such as*
36 *landslide hazard/erosion areas (BDMC 19.10.230.(E)), which could include the cliff mentioned by*
37 *Ms Morgan if it qualifies as a landslide/erosion hazard area. Further, buffers may not extend*
38 *across any human features such as "improved" roads, unless restoration of buffer function is*
39 *reasonably anticipated. Id. It doesn't appear that the logging road cited by Ms. Morgan would*

1 qualify as “improved”, but clarification is necessary on this issue. All of these factors potentially
2 should have been considered in the setting of the proposed “permanent” wetland boundaries
3 proposed in the constraint maps if all of the assertions made by Ms. Morgan are correct.

4 As to Dr. Cooke’s testimony on the 250 foot buffer she believes is required for Black Diamond Lake
5 wetlands, the basis of her opinion and what buffer is depicted in the constraints map is unclear. In
6 Black Diamond, wetland buffers range from 40 feet to 225 feet (BDMC 19.10.230) with the
7 possibility for an increased buffer width in the instance where a large buffer is needed to protect
8 other sensitive areas or where the buffer or adjacent upland has a slope greater than fifteen percent
(BDMC 19.10.230(G)). In general, wider wetland buffers correspond to core wetland complexes
(BDMC 19.10.230(B)), headwaters wetland buffers (BDMC 19.10.230(C) and those with high levels
9 of habitat function and/or high water quality function (BDMC 19.10.230(D).

10 For the reasons stated above it is recommended that staff provide information to the Council, from
11 evidence in the record, that addresses the alleged discrepancies cited by Dr. Cooke and Ms.
12 Morgan. The presentation of the full scale constraint maps be sufficient to address many of these
13 issues. The Council should not agree to any permanent wetland boundaries if they cannot be
14 reconciled with project level discrepancies such as those allegedly identified by Dr. Cooke and Ms.
15 Morgan.

16 **B. Recommendation Page 88-89, line 25**

17 3. Project phasing. Peter Rimbo testified that, “Because some monitoring commitments in the DAs
18 exist within a timeframe based on phases, all phases would need to be defined as consecutive in
19 order for a timeline to be developed,” (Ex. 117, p. 23). He further stated, “If a change is enforced by
20 the City that does not allow concurrent phasing, then the inter-phase monitoring proposed in the
21 DAs makes sense. Otherwise, they do not,” Id. Mr. Rimbo reiterated this point with respect to
22 transportation concurrency in Ex. 118, p. 22 and cited BDMC 18.98.080(A)(4). This statute
23 pertains to a phasing plan and timeline for construction of improvements and the setting aside of
24 open space such that:

25 a. Prior to or concurrent with final plat approval or the occupancy of any
26 residential or commercial structure, whichever occurs first, the improvements have been constructed
and accepted and the lands dedicated that are necessary to have concurrency at full build-out of that
project for all utilities, parks, trails, recreational amenities, open space, stormwater and
transportation improvements to serve the project, and to provide for connectivity of the roads, trails
and other open space systems to other adjacent developed projects within the MPD and to the MPD
boundaries; provided that, the city may allow the posting of financial surety for all required
improvements except roads and utility improvements if determined to not be in conflict with the
public interest; and

1 b. At full build-out of the MPD, all required improvements and open space
2 dedications have been completed, and adequate assurances have been provided for the maintenance
3 of the same. The phasing plan shall assure that the required MPD objectives for employment, fiscal
4 impacts, and connectivity of streets, trails, and open space corridors are met in each phase, even if
5 the construction of improvements in subsequent phases is necessary to do so.

6
7 Mr. Rimbos stated the Development Agreements do not describe the enforcement mechanisms for
8 the provisions in the statute.

9
10 *YB Response: YB responded to Mr. Rimbos' concern by noting the MPD Phasing Plan, Exhibit K,
11 was approved in V COA 3 (Ex. 208). They noted the approved Phasing Plan allows phases to
12 proceed concurrently (Ex. 208, p. 4 and Ex. 209, p. 22). YB concurred allowable changes to the
13 phasing plan will affect the timing of infrastructure for each phase. They stated the real issue,
14 ensuring infrastructure necessary to serve the development is in place when needed, is
15 accomplished because of the implementation schedules required by V COA 29 and 164. They
16 further noted the findings required by DA 11.7 for implementing projects further support the goal of
17 infrastructure timing.*

18
19 *Examiner Response: With one significant exception, the requirements of DA 11.7 and V COA 29
20 and 164 provide a mechanism for assuring project level concurrency. The provisions of DA 11.7 in
21 particular would prevent a project from proceeding without having all facilities identified in BDMC
22 18.98.080(A)(4) available for development. This should prevent any timing problems expressed by
23 Mr. Rimbos, since implementing projects simply couldn't be approved without a finding of
24 concurrency. Although BDMC 18.98.080(A)(4) or the facilities to which it applies are not expressly
25 mentioned in DA 11.7, the requirements of BDMC 18.98.080(A)(4) would be the first place a court
26 would look in interpreting DA 11.7.*

*The one exception is traffic concurrency. As discussed in the Examiner's Response to concerns
over the traffic monitoring plans for the DAs, DA Ex F, the traffic monitoring plans set up detailed
timing requirements for infrastructure improvements that are not linked to implementing project
level concurrency assessments. Nothing in the monitoring plans suggests that the timing of the
construction of traffic infrastructure will be superseded by the concurrency findings required by DA
11.1. Further, the phasing plan adopted by V COA 3 states that the timing of traffic infrastructure
is set by the traffic monitoring plans, with no mention of a superseding concurrency provision such
as DA 11.1. Given the difference in specificity between the general requirements of DA 11.1 on the
one hand and the detailed timing provisions in the traffic monitoring and phasing plans on the
other, DA 11.1 is vulnerable to an interpretation that the timing established in the traffic
monitoring plan satisfies the timing requirements of DA 11.1, even though they may not meet the
timing requirements of GMA traffic concurrency adopted into the City's comprehensive plan and
contemplated by BDMC 18.98.080(A)(4). As discussed in the assessment of the traffic monitoring*

1 *plan, it is recommended that the monitoring plan be amended to make it clear that GMA traffic*
2 *concurrency review shall be conducted at project implementation and that concurrency review shall*
3 *supersede any conflicting timing identified in the monitoring plan.*

4 DATED this 20th day of September, 2011.

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6 Phil A. Olbrechts
7 Hearing Examiner for Black Diamond
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