



CITY OF BLACK DIAMOND

October 14, 2011

**STAFF RESPONSE TO
WRITTEN PUBLIC COMMENTS RECEIVED RE:
DEVELOPMENT AGREEMENTS FOR
THE VILLAGES MASTER PLANNED DEVELOPMENT
FILE NOs.: PLN10-0020/11-0013
LAWSON HILLS MASTER PLANNED DEVELOPMENT
FILE NOs.: PLN10-0021/11-0014**

I. INTRODUCTION

This memorandum has been prepared per the City Council's adopted Rules of Procedures for the Closed Record Hearings, in which staff and the applicant are provided the opportunity to respond to written comments submitted by members of the public prior to midnight, Saturday October 8, 2011.

II. GENERAL COMMENTS

In the written comments, it was apparent that many individuals remain dissatisfied with the manner in which environmental impacts were addressed in the two Environmental Impact Statements (EISes) prepared for the MPDs and also in the perceived inadequacy of the MPD conditions of approval. As Council knows, last year, the Hearing Examiner ruled that the EISes met the legal standard of adequacy. He recommended conditions of approval to address specific environmental areas of concern which the Council subsequently modified and adopted. It is staff's position that the overall environmental

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impacts of the projects have been adequately addressed at this time. More site-specific impacts can and will be addressed through the SEPA process as Implementing Projects are considered.

In September 2010, the Council unanimously adopted Ordinances 10-946 & 10-947, conditionally approving the two MPDs. The two ordinances were not invalidated by the Central Puget Sound Growth Management Hearings Board nor have they been altered by any subsequent action by the Council. Staff thus used the conditions of approval as the foundation of its negotiations of the Development Agreements with the applicant. In essence, many written comments are advocating additional, modified or supplemental Conditions of Approval (COA) to the MPDs, which cannot be done at this time.

It is important to recognize that the Development Agreements in themselves do not authorize any development of any portion of the MPD properties (See BDMC 18.98.090). Future Implementing Projects (such as subdivisions) must be reviewed and approved before any development can occur. Those processes will include additional environmental review through the SEPA process and opportunities for public comment per BDMC 18.08. Many of the written comments raise issues that are more appropriately addressed at those later stages.

III. FUNDING AGREEMENT

Several individuals raised concerns about various aspects of the proposed Funding Agreement, which is included as Exhibit "N" to the Development Agreement. The existing Staff and Facilities Funding Agreement will expire in June 2012; Exhibit "N" is proposed as its replacement.

The Funding Agreement proposes the establishment of a Major Development Review Team (MDRT) whose primary focus will be administering the Development Agreements and reviewing all Implementing Projects proposed within the MPDs. A core team of City staff will be augmented by consultants as necessary, depending upon the amount and nature of anticipated Implementing Projects. In other words, growth will be paying for growth. Due to the small size of City staff, individuals assigned to the MDRT will also have other work duties not related to the MPDs. The Funding Agreement provides that if the City receives other sources of revenues for those activities (i.e., other subdivisions occurring outside the MPDs), the Master Developer will not be required to pay for the staff time spent on those projects. Were this provision not included, the City would essentially be paid twice for that time: by both the Master Developer and the subdivision applicant.

A key concept of the MDRT is to retain a core group of staff that is familiar with the MPDs and Development Agreements. This is ensured by providing funding for these positions, rather than relying upon land use application fees, which will fluctuate. Also, note that building permit, utility connection fees, etc. will still be collected.

IV. CONSTRAINTS MAP

Several written comments expressed concern regarding the accuracy of the constraints maps and whether they should be accepted at this time. COA #155 (The Villages) and COA #159 (Lawson Hills) require that the boundaries of wetlands, etc. be fixed. It is not required that the category of the wetlands be included on the maps or that the corresponding buffers also be noted. Since additional studies will be required to be submitted with Implementing Project applications, staff recommends that only the Constraint Maps wetland boundaries be accepted.

V. TRANSPORTATION

Traffic impacts were a major concern expressed during the closed record hearings and in several of the written statements (including those of King County). Staff reminds Council that the MPD Conditions of Approval require monitoring of traffic as the projects develop and provide for the potential of new mitigation measures being implemented, based upon results of that monitoring (TV COA 17f, LH COA 16e). In other words, traffic mitigation will be an iterative process throughout the duration of the build-out period. Future councils will have the ability to establish the timing of the periodic reviews (see TV COA 17a, LH COA 16a).

VI. CONCLUSION

Staff and the applicant spent months in negotiating and crafting the Development Agreements. We are proud of and stand behind the Agreements presented for your consideration. As noted at the outset of the closed record hearing, we concur with the applicant in making the changes as recommended by the Hearing Examiner and as drafted in the submittal presented by Yarrow Bay (Exhibit 7).

Staff looks forward to assisting the Council in its deliberations over the upcoming weeks.



MEMORANDUM

To: The City Council for the City of Black Diamond
From: Megan Nelson, Director of Legal Affairs, YarrowBay Holdings
CC: Nancy Bainbridge Rogers, Counsel for YarrowBay Holdings
Re: YarrowBay's Response to Party of Record Arguments
Date: October 14, 2011

I. INTRODUCTION AND BACKGROUND

A. Format of this Response.

Pursuant to the Procedural Rules set by the Black Diamond City Council in Amended Exhibit A of Resolution No. 11-766, YarrowBay has 10 pages, double-spaced, to respond to each written statement from Parties of Record. We have combined our responses into one memo for ease of reference, and organized them in alphabetical order in Section II of this Memorandum.

For purposes of clarity, YarrowBay refers to all exhibits submitted during the City Council's closed record portion of these Development Agreement hearings as C-#. Exhibits submitted during the Hearing Examiner's open record portion of the proceedings, however, are merely referred to by their number. Moreover, in an attempt to avoid repetition, if an issue is raised by several different parties, YarrowBay may only respond once throughout this document and/or provide a cross-reference. As such, it should not be assumed that just because a specific issue was not addressed in response to one party of record that the issue was not addressed at all within this document. Last, Carol Benson (Exhibit C-19), Valerie and Shane Brazier (Exhibit C-

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36), Bruce Earley (Exhibit C-15), and Carl Lynn Harp (Exhibit C-29) were intentionally omitted because their arguments were wholly addressed in responses to other parties of record. The remainder of this Introduction addresses issues that were raised many times by many parties of record.

B. The Hearing Examiner Addressed All Significant Concerns in his Recommendation.

The Hearing Examiner, by his own admission, addressed “all significant concerns of the public.”¹ Several parties of record noted during their oral and written presentations to the City Council that the Hearing Examiner did not specifically address a certain issue (e.g., building permit surcharge or CFDs) because he didn’t have enough time. Contrary to this conclusion, however, the Hearing Examiner may have decided these issues were not relevant to his Recommendation on the Development Agreements; and/or were in fact addressed more generally in his mixed findings of fact and conclusions of law. There is nothing in the Recommendation to suggest that the Hearing Examiner did not consider such issues and such arguments are undermined by the Examiner’s statement that “priority in this recommendation was to ensure that all significant concerns of the public were addressed and that the development agreements implement the master plan conditions of approval. That priority was met.”² (Emphasis added).

C. The Hearing Examiner Had Adequate Time to Render his Recommendation.

The Hearing Examiner had 17 business days to render his Recommendation on the Development Agreements with the evidence on every single issue except wetlands, and 12 business days from the close of the record on wetlands. Collectively, as stated by City Staff

¹Recommendation at pg. 4.

²Recommendation at pg. 4.

during its closing presentation on Monday, October 10, 2011, the Hearing Examiner and his staff spent 800 hours preparing his Recommendation dated September 14, 2011.

1. The schedule as set by the Examiner's Rules of Procedure.

The Hearing Examiner's rules of procedure for the Development Agreement hearings allowed written testimony to be submitted for two full weeks following the close of oral testimony, provided one week for written rebuttals, and then two business days for written replies. The Examiner's recommendation was then due 10 business days following the submittal of the replies. Because oral testimony closed on July 21, 2011, the schedule was as follows:

Written Testimony due:	Thurs 8/4
Responses due:	Fri 8/12 (assuming posting of written testimony by 8/5)
Replies due:	Wed 8/17 (assuming posting of Responses on 8/15)
Recommendation due:	Wed 8/31 (10 business days later)

2. The schedule proposed by the Examiner on August 9.

On August 9, 2011, the Examiner sent the following email that was posted on the City's website:

From: Phil Olbrechts [olbrechtslaw@gmail.com]
Sent: Tuesday, August 09, 2011 11:09 PM
To: 'Brenda Martinez'
Cc: Nancy Rogers; 'Steve Pilcher'
Subject: Response Deadline on Villages/Lawson Hills Written Comments
Brenda,

Please post the following email ASAP:

It appears that the written testimony exceeds 1,700 pages. This number excludes the prehearing motions and the development agreements and their exhibits. Under the current briefing schedule the Applicant will have to respond to these documents in one week's time. The Applicant is tasked with responding to the majority of these 1700+ pages in that one week period. I will probably be seeking additional time beyond the required ten days to issue my decision. In order to do so, for liability reasons, I will need the authorization of the Applicant. I propose that the response period be extended for an additional week, the reply period be extended to a total of four business days and that I have fifteen business days from the deadline of the reply documents to issue my decision. For all hearing participants, please email any objections to this proposal to

Steve Pilcher, cc'd above, by 10:00 am on Thursday, 8/11/11. I will need the express authorization of the Applicant to proceed with this proposal.

Had Yarrow Bay agreed to the Examiner's proposal, the schedule for submittals and timeframe for the Examiner to act would have been as follows:

Written Testimony due:	Thurs 8/4
Responses due:	Fri 8/19 (assuming posting of written testimony by 8/5)
Replies due:	Thurs 8/25 (assuming posting of Responses on 8/19)
Recommendation due:	Fri 9/16 (15 business days later)

3. The Examiner's actual schedule, due to separate requests for more time.

Due to various parties' requests for more time which the Examiner granted, the actual schedule ended up as follows:

Written Testimony due:	Thurs 8/4
Responses due:	Fri 8/12
Replies due:	Fri 8/19
S. Cooke Response:	Mon 8/22
YB Reply to S. Cooke:	Fri 8/26
End of Procedural Arguments	
Re Motion to Strike:	Tues 8/30, 8 a.m.
Recommendation due:	Wed 9/14

Thus, the Hearing Examiner actually had 17 business days (rather than the 15 days he requested) from the date of the submittal of all reply materials, other than the limited response and reply regarding wetland issues. As to the limited issue of wetlands, the Hearing Examiner had 12 business days to complete his recommendation. The procedural issues, which were the final matters that closed the record and started the 10 business day period running, were to be separately ruled on, and not included in the Examiner's Recommendation.³

³It is standard operating procedure – even expressly called out in the Growth Management Act at RCW 36.70A.470 – for planning directors and hearing examiners and even city councils to suggest improvements that might be made to codes in the future when a process or standard does not work as well as expected during specific project review. While municipalities cannot change their procedural rules in the middle of

D. Remand.

Throughout both their oral statements and written presentations, parties of record requested that the City Council remand the Development Agreements to the Hearing Examiner to give him more time. It is important to note that the Hearing Examiner did not request a remand for more time, had more than 10 business days to draft his Recommendation, and in fact stated in his Recommendation that the “priority in this recommendation was to ensure that all significant concerns of the public were addressed and that the development agreements implement the master plan conditions of approval. That priority was met.”⁴ (Emphasis added).

Furthermore, under BDMC 18.08.070, and as affirmed by the City Attorney, the City Council lacks the authority to remand a Type 4 quasi-judicial decision to the Hearing Examiner. BDMC 18.08.070(3) provides: “The city council will decide the application by motion and will adopt formal findings and conclusions approving, denying, or modifying the proposal.” Remand authority is specifically excluded. Without such authority, the City Council must move forward and take action on the pending Development Agreements.

E. City Council Discretion.

Pursuant to BDMC 18.98.090, the City Council’s discretion with regard to matters that can be compelled to be addressed in the Development Agreements for The Villages and Lawson Hills is limited to the incorporation of the MPD Permit Conditions of Approval. Other matters are subject to negotiation.

the game, jurisdictions can suggest changes for the future, and that is what the Hearing Examiner was doing in his Recommendation.

⁴ Recommendation at pg. 4.

II. RESPONSES TO PARTY OF RECORD STATEMENTS

Dave Ambur (oral argument)

Infrastructure Financing.

As previously described on page 22 of Exhibit 209 in response to Mr. Ambur's testimony before the Hearing Examiner, YarrowBay is financing and constructing the infrastructure improvements that serve the MPDs as well as other uses outside the project sites. Per Sections 11.3(B) and 11.4(B) of the Development Agreements, the Master Developer shall construct and fund the on-site and off-site regional facilities identified in Tables 11-3-1, 11-3-2, 11-3-3, 11-3-4, 11-4-1, and 11-4-1. Regional facilities are defined in Section 14 of the Development Agreements as "an on- or off-site street or utility facility that serves land uses located within and outside the Project Site, regardless of the location of the street or utility facility." Thus, infrastructure improvements outside the development areas and that serve more than just the MPDs are addressed in the Development Agreements. Moreover, the Master Developer is financing these necessary infrastructure improvements for "small-scale infill-type development". See, e.g., pages 91 and 96 of The Villages Development Agreement. This type of development is referred to in the Development Agreements as "Exempt Properties" that will never have to pay their proportionate share of costs for regional infrastructure facilities. "Exempt Properties" are specifically defined to include "single lot land use applications", i.e., an application like that described in Mr. Ambur's testimony to the City Council. As such, there is no reason or basis for the City Council to revise the Development Agreements to address this issue.

Gil Bortleson (oral argument, Exhibit C-13, and Exhibit C-35)

Sensitive Area Buffers.

See YarrowBay’s response to Kristen Bryant.

Wildlife Corridor, FWHCA, and Wildlife and Habitat Preservation Plan.

In both his oral argument and Exhibits C-13 and C-35, Mr. Bortleson asserts that the wildlife corridors are insufficient, and that a Wildlife and Habitat Preservation Plan should be included in the DA. *See* YarrowBay’s response to the Examiner’s Recommended Implementing Condition “J” at page 16 of Exhibit C-7.

Open Space.

See YarrowBay’s response to Kristen Bryant.

Winter Earth Moving Activities.

On page 10 of Exhibit C-35, Mr. Bortleson requests that the Development Agreements be revised to disallow major earth moving and grading in the winter. Contrary to this assertion, however, the MPD COAs at 104 (Villages & Lawson Hills) authorize moving and grading during the wet season as allowed by the City’s Engineering Design and Construction Standards 2.2.05. The Examiner confirmed this conclusion on page 58 of his Recommendation:

The term “wet season” appears in COA 104, however the COA specifically references Engineering Design and Construction Standards 2.2.05. That section states that work between October 1 and March 31 requires a winterization plan approved by the City Engineer. As such, the dates of the “wet season” are established and cannot be changed. However, Engineering Design and Construction Standards 2.2.05 also states that the City Engineer cannot approve work in those dates where erosion risks are “significant.” Therefore, if actual ground conditions at a given time indicate that significant erosion could occur, the

City Engineer cannot not allow grading. Consequently, it appears that the commentator's concerns are addressed, but the Council can request YB to voluntarily agree to additional mitigation if it finds a need to do so.

As such, there is no need to add further conditions to the Development Agreements. Mitigation is adequately addressed by the City's Engineering Design and Construction Standards. Moreover, YarrowBay is not willing to voluntarily agree to additional mitigation at this time.

Overall Grading Plan.

MPD Condition of Approval No. 110 (Villages & Lawson Hills) requires an overall grading plan prior to the approval of the first implementing project. In his Exhibit C-35, Mr. Bortleson requests that a strict erosion plan be outlined in the Development Agreements. This request, however, was already rejected by the Hearing Examiner on page 56 of his Recommendation: "None of the COAs identified above require that they be implemented into the DAs. The Council would need to acquire voluntary approval from YB to include them." As such, there is no reason or basis to include the overall grading plan requested by Mr. Bortleson in the Development Agreements. YarrowBay will comply with MPD Condition of Approval No. 110 prior to the approval of the MPDs' first Implementing Project.

Wetland Preservation Plan & Sensitive Area Protection.

In his Exhibit C-35, Mr. Bortleson echoes the request made by Dr. Sarah Cooke in Exhibit 56 for a Wetland Preservation Plan detailing construction mitigation via fencing and other protective methods and also separately requests greater measures than silt fencing for slopes and streams for sensitive area protection. First, there is no need to include these measures specifically within the Development Agreements because MPD Implementing Projects must be

consistent with the City Engineering Design and Construction Standards Sections 2.2.02.6, 2.3.01.2, and 2.6.2, which require “appropriate fencing and erosion controls” for any projects in the vicinity of sensitive areas. Moreover, the Hearing Examiner already rejected both of these requests on page 57 of his Recommendation:

FOF 13 states that application of the City’s SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals. Regarding Ex. 150, Dr. Cooke’s argument is based on the idea that the EISs and the MPD COAs are inadequate to address wetland impacts, including those from erosion and siltation. The adequacy of the EIS and COAs cannot be challenged in this proceeding, but her comments are relevant to the extent that the Council may wish to pursue voluntary agreement from YB for additional DA conditions. All of the issues addressed by the commentators above are already regulated by City development standards that have been presumably that have been found by the Council to be adequate and have been presumably applied to development projects throughout the City.

As such, there is no reason or basis to require a Wetland Preservation Plan or greater measures for sensitive area protection in the Development Agreements. The SAO and other City code provisions already provide adequate sensitive area protection.

Tree Inventories.

In his Exhibit C-35, Mr. Bortleson alleges that MPD Conditions of Approval 120 (Villages) and 123 (Lawson Hills) are not addressed in the Development Agreements. These conditions require a tree inventory prior to the development of any MPD Implementing Projects. No action, however, is required in the Development Agreements. The COAs are self-enforcing and compliance is specifically required by Section 15.1. *See* Examiner’s Recommended Implementing Condition “R” at page 31 of Exhibit C-7. As such, there is no reason or basis to revise the Development Agreements on the basis of this allegation.

Visual, Aesthetic, and Buffer Plan.

On pages 19-20 of Exhibit C-35, Mr. Bortleson requests that the City Council require a Visual, Aesthetic and Buffer Plan in the Development Agreements. Mr. Bortleson previously presented this same request to the Hearing Examiner, who concluded on page 109 of his Recommendation:

The visual and aesthetic impacts of the MPDs were addressed by the EISs, which found that no mitigation was required as no significant impacts would occur (V EIS pp. 3-65 through 3-67; LH EIS pp. 3-61 through 3-64). Mr. Bortleson has provided no new information beyond that considered by the EISs and the City during the consideration of the MPDs. Of additional consideration is the fact that the MPDs and DAs incorporate many of the features called for by Mr. Bortleson, including buffers and setbacks. The City's tree preservation ordinance requires the retention of trees. BDMC requirements for buffers between non-compatible land uses (BDMC 18.72.030) would apply to the MPDs.

Given the Examiner's finding, there is no reason or basis to the requirement for such a plan in the Development Agreements.

Kristen Bryant (oral argument and Exhibit C-22)

Sensitive Area Delineations.

In both her oral statement to the City Council and written materials (Exhibit C-22), Ms. Bryant alleges that the work required to designate wetlands within the MPDs is not yet finished. This allegation, however, is contrary to facts in the record. In fact, all wetlands within the MPDs were categorized utilizing the very specific protocols established in the *Washington State Wetland Rating System for Western Washington, revised August 2004* (Rating System) as required by BMC 19.10.210 of the City's SAO. As part of this protocol, where wetlands extended outside of the MPD project boundaries, the entire wetland unit was rated, as required in the Rating System. In situations where permission was not granted to access off-site wetland boundaries, offsite portions were evaluated utilizing visual observations from adjacent properties, aerial photographs, NWI mapping, soil surveys, etc. to gain an accurate representation of offsite conditions for rating purposes. Wetland Rating Forms were submitted to the City of Black Diamond as part of the MPD process and were reviewed for accuracy by City Staff and Parametrix biologists, the City's third party review consultant. In instances where inconsistencies and/or inaccuracies were identified, WRI worked with Parametrix to resolve any and all concerns. *See* Letter from Scott Brainard of Wetland Resources, Inc., Attachment 1 to Exhibit 139.

Sensitive Area Buffers.

In both her oral statement to the City Council and written materials (Exhibit C-22), Ms. Bryant alleges that the buffer widths shown on the Constraint Maps contained within Exhibit

“G” of the Development Agreements are inconsistent with the City’s Sensitive Areas Ordinance (BDMC Ch. 19.10). Moreover, on page 6 of C-22, Ms. Bryant alleges that the “wrong development intensity” is used to determine wetland buffer widths. These comments of Ms. Bryant go to the accuracy of the wetland buffers previously shown on the Constraint Maps presented to the Hearing Examiner as Exhibit “G” to the Development Agreements. In the City’s and YarrowBay’s opening presentation to the City Council, both parties agreed to remove the mapped buffers and provide updated Constraint Maps to the City Council. These updated maps were provided as part of Exhibit C-7 along with a written explanation on page 18. As Implementing Projects are proposed across each MPD Project Site, the buffer for each wetland will be set using the buffer widths contained in the City’s SAO for the listed wetland type. While YarrowBay believes those buffers were properly identified on the original Constraints Map, this process will provide the City the opportunity to double-check that the buffer widths comply with the SAO. Given the submittal of updated Constraint Maps without buffers, Ms. Byrant’s buffer-related concerns have been resolved.

Wetland Categorization.

In both her oral and written statement (Exhibit C-22) to the City Council, Ms. Bryant generally alleges that Development Agreements’ Constraint Maps incorrectly identify certain wetlands within the MPDs as isolated when they should in fact be connected therefore resulting in higher wetland ratings and larger buffer widths. Her allegations are based on two exhibits (150 and 270) prepared by Dr. Sarah Cooke. Scott Brainard of Wetland Resources, Inc. addresses this disagreement in Attachment 1 of Exhibit 139:

Core wetlands are designated in BDMC 19.10.210(B)(1), which states:

Core Wetland and Stream Complex. The wetland complex associated with Rock Creek, Jones Creek, Black Diamond Lake, Black Diamond Creek, and Ravensdale Creek are designated as the Core Stream and Wetland Complex. The *general* boundaries of the area affected are designated within the Best Available Science Document, Technical Appendix B, provided that the dimension of the area shall be defined by the *field verified wetland boundaries* and the buffer defined in Section 19.10.230.

Emphasis added. Per this BDMC provision, the core wetland boundaries and associated buffers identified in the Best Available Science Document (including Figure 1-1) are general and shall be further refined by field verified surveys. These field verified surveys have been done and are reflected in the Constraint Maps included within Exhibit G of both Development Agreements. WRI has determined, and City of Black Diamond staff and their third party reviewer have agreed, that the buffers depicted west of the Black Diamond Lake System (Wetland F and wetlands further west) in the Constraint Maps are appropriate for the following reasons:

- Wetland F⁵ and all the wetlands west within the area designated as the Core are not associated with Black Diamond Lake or Black Diamond Lake Creek. They are separated by approximately 100 feet of non-wetland.
- Hydrology from Wetland F flows northwest and away from the Black Diamond Lake and Black Diamond Creek System.
- Wetland F and all wetlands west are in a completely different sub-basin from Black Diamond Lake and Black Diamond Lake Creek
- The depicted buffers provide a sufficient wildlife corridor (minimum 300' combined wetland and buffer) as referenced in the BAS document Section 5.3 and as recommended by the King County Wildlife Network.
- Buffers were extended west to the UGA boundary in order to provide a more usable and effective wildlife corridor.

Based on the testimony provided by Sarah Cooke on July 21, 2011, and the documents submitted and reviewed over the course of these projects, it is my professional opinion that Exhibits G for both The Villages and Lawson Hills accurately depict the wetland boundaries, DOE ratings and buffers as delineated

⁵ This is a reference to Wetland F of The Villages MPD.

and prepared by WRI and as reviewed by the City of Black Diamond and Parametrix.

Despite Dr. Cooke's and Ms. Bryant's general allegation regarding mis-categorization based on discrepancies between Core versus isolated wetlands, Dr. Cooke's exhibits only specifically identify five wetlands in which she questions the accuracy of the MPD Constraint Maps' wetland categorization: Lawson Hills Wetlands K, F⁶, MM, J, and O. Thus, there is a professional disagreement between Dr. Cooke and Mr. Brainard regarding a very small subset of the MPDs' wetlands. Notwithstanding this disagreement, Mr. Brainard's categorizations were in fact confirmed by the City's third party reviewer – Parametrix. *See* Attachment 1 to Exhibit 139. As such, there is no need or basis to revisit the MPDs' wetland categorizations.

New Wetlands Inventory.

Contrary to Ms. Bryant's allegations in Exhibit C-22, the Hearing Examiner did not find that the City Council can order a new wetlands inventory. Instead, the Examiner stated on page 53 that if the Council has any concerns on the accuracy of the wetland delineations on the Constraint Maps, it could require that the "wetland boundaries be subject to further review by Parametrix or another third party reviewer." MPD Condition of Approval Nos. 155 (Villages) and 159 (Lawson Hills) state:

Once the mapped boundaries of sensitive areas have been agreed to, the Development Agreement shall include text that identifies that these areas are fixed. If during construction it is discovered that the actual boundary is smaller or larger than what was mapped, the mapped boundary shall prevail. The applicant shall neither benefit nor be penalized by errors or changes in the sensitive area boundaries as the projects are developed.

⁶ In Ms. Bryant's Exhibit C-22, she also describes Lawson Hills' Wetlands K and F as headwater wetlands that require 225-foot buffers.

Note the timing indicated in these conditions of approval - that agreement over mapped boundaries will occur prior to the execution of the Development Agreements and that the Development Agreements will then memorialize such agreement. This is exactly what has occurred to date between the City and YarrowBay. *See* Attachment I to Exhibit 139. The condition does not indicate that mapping shall occur at the project review level. As such, there is no reason or basis to revise the Development Agreements to require a new wetland inventory at the time of MPD Implementing Project review.

SAO Vesting.

On page 9 of C-22, Ms. Bryant alleges that the City Council should not vest the MPDs to the SAO in the Development Agreements. Contrary to this assertion, however, the MPDs' vesting is governed by the provisions of BDMC 18.98.195. This municipal code section states that MPD Permits vest an applicant to the City's development regulations in effect on the date of approval except for stormwater regulations, conditions related to the fiscal analysis, and building codes. The City's SAO is not one of these exceptions. As such, Ms. Bryant's request is contrary to City Code and must be rejected by the City Council.

Third Party Verification.

On page 9 of C-22, Ms. Bryant alleges that no further verification of wetlands was done after the Parametrix Technical Memorandum dated August 27, 2008. Contrary to this assertion, the EISs were not published in their final version until December 2009. Between the date of the cited 2008 Parametrix memorandum and the publication of the final EISs, Parametrix did in fact complete its third party verification. *See* Attachment I to Exhibit 139. There is no evidence in the

record to the contrary. As such, there is no reason or basis to require further third party verification of the MPDs' wetland boundaries and/or delineations.

Wetland Delineation Methodology.

During her oral statement to the City Council and on pages 11-12 of Exhibit C-22, Ms. Bryant alleges there is a conflict in the wetlands delineation methodology used for the Constraint Maps (set forth in Exhibit "G" of each Development Agreement). Specifically, she argues that a new federal manual was published in March 2011 and that all MPD wetlands should be re-evaluated under that new manual. The new federal manual, however, does not change the delineations. In Exhibit 272, the record reflects that the new federal manual says that the intent of the new manual is to: "bring the Corps Manual up to date with current knowledge and practice in the region and not to change the way wetlands are defined or identified." (Emphasis added). Also reflected in Exhibit 272 is the State Department of Ecology's confirmation that: "Based on our experience, it is very rare that wetland boundaries differ when applying the state manual and the new federal manual with applicable supplements. . . . the two manuals should result in the same boundary." (Emphasis added). Finally, Exhibit 272 also includes wetlands expert Scott Brainard's confirmation that it is his "professional opinion that the wetland delineations would not change if the Corps Regional Supplement is used."

Moreover, the Examiner concluded on page 53 of his Recommendation that YarrowBay used the correct manual for its delineations:

Dr. Cook (sic) and Mr. Brainard (on behalf of YB) had a significant disagreement on what delineation manual applied to the project. The City regulations to which the MPD vests governs the delineation criteria and methods for wetland boundaries. BDMC 19.10.210(A) requires that wetland must be delineated in accordance with the requirements of RCW 36.70A.175, 90.58.380 and the

Washington State Identification and Delineation Manual (1997). RCW 90.58.380 requires DOE to adopt by rulemaking wetland delineation manuals. Consequently, YB would be required to use the delineation manual that was adopted by DOE at the time YB vested its MPD applications. In her declarations Ms. Cook indicates that the current DOE manual wasn't adopted by DOE until March, 2011. City staff should verify this, but it does appear that the DOE manual employed by YB was the version adopted by DOE at the time YB vested its MPD applications.

Because the correct manual was used to delineate the MPDs' wetlands and because even if the new federal manual was used the projects' wetland boundaries would not change, there is no reason or basis to revise the Development Agreements to require a re-evaluation of wetlands under the new federal manual.

Federal & State Wetland Review.

During her oral statement to the City Council and on page 12-14 of Exhibit C-22, Ms. Bryant alleges that the Development Agreements are in conflict with state and federal agency review requirements. Contrary to Ms. Bryant's statements, however, the City and YarrowBay may agree on wetland boundaries and buffers through the Development Agreement. However, these agreements are binding only on the City and YarrowBay. YarrowBay must still obtain all required approvals from the U.S. Army Corps of Engineers and the Department of Ecology prior to undertaking any fill or other regulated development activity. Even though the wetland delineations were performed in accordance with the delineation methodologies currently approved by the U.S. Army Corps of Engineers and the Department of Ecology, those agencies are not bound by the Development Agreements and the wetland boundaries and buffers to be established in the Agreements. State and federal agencies may change the approved delineation methodologies over time. To the extent YarrowBay, in the future, proposes fill or development activities in the wetlands and those activities require a permit or approval from the U.S. Army

Corps of Engineers or the Department of Ecology, those agencies will require a current delineation of the wetlands using a methodology consistent with their regulations. The future wetland delineation(s) may differ from the ones approved in the Development Agreements, and if so, the agencies will require the new delineations to be used for purposes of evaluating any application to place fill material or engage in any other regulated development activity in the wetland. The Examiner concluded similarly on page 53 of his Recommendation: "...[the] need for regulatory approval by the Army Corps of Engineers and DOE [is] largely a nonissue because the MPDs will have to comply with DOE and Army Corps requirements whether addressed in the DAs or not."

Ms. Bryant also alleges that there is some way to avoid state and federal jurisdiction by "dividing projects in a way so as not to report these small wetlands at all." YarrowBay is not aware of any means of land division that somehow affects the jurisdiction of DOE or the Corps. As recognized by the Hearing Examiner in his Recommendation, the potential for future Corps and DOE wetland review is a "nonissue" and provides no basis for the revision of the Development Agreements.

Wetland Restoration Impact Fee.

In her oral statement to the City Council and on page 15 of Exhibit C-22, Ms. Bryant requests the imposition of an impact fee of at least \$1000 per home to cover potential wetland restoration costs. Ms. Bryant cites no legal authority, and there is in fact no legal authority, for the City to impose such an impact fee. Moreover, restoration is already addressed by the City's SAO and code enforcement provisions. As such, Ms. Bryant's request for further impact fees must be rejected by the City Council.

Judith Carrier (oral argument and Exhibits C-25 and C-38)

Wetland Delineations.

In both her oral statement to the City Council and her written presentation (Exhibit C-25), Ms. Carrier expresses concerns regarding the wetlands delineated on the Constraint Maps contained within Exhibit “G” of both Development Agreements. *See* YarrowBay’s response to Ms. Bryant.

Army Corps Review of Wetlands.

In both her oral statement to the City Council and her written presentation (Exhibit C-25), Ms. Carrier requests that the MPDs’ “wetland boundaries [be] verified by the US Army Corps of Engineers.” The Corps, however, does not have jurisdiction until a specific wetland impact is proposed over. *See* Exhibit 210. The MPDs are designed to avoid impacts to sensitive areas. To date, YarrowBay has not proposed any specific wetland impacts. The Corps, therefore, does not have authority to verify all the MPDs’ wetland boundaries and, as a result, Ms. Carrier’s request condition cannot be imposed in the Development Agreements.

Green Valley Road.

Ms. Carrier requests revisions to Condition of Approval 33.a to change the members of the Green Valley Road committee and to alter the committee’s and YarrowBay’s obligations. YarrowBay does not agree to these changes, and as explained by the Examiner at p. 105 of his Recommendation these changes are not appropriate:

[t]he MPD conditions have set the composition of the committee and this cannot be revisited without an amendment to the MPD, which is beyond the scope of this process. The composition of the committee is set up so that if the Applicant and

the community members disagree on mitigation, the City has the final decision-making authority via a tie-breaking vote on what to require of the Master Developer. Given that the City can be held legally accountable for the mitigation required of the Master Developer, the committee composition is well suited for deferred decision-making on project mitigation. The MPD conditions do not require the Green Valley Road Review Committee to be formed prior to the approval of the DAs.

The COAs do not require the DA to address Green Valley Road traffic except for the preparation of a traffic calming study and its implementation as outlined in the COAs. Consequently, any DA terms beyond the traffic study would be subject to the voluntary approval of YB.

We also direct the Council to the discussion of Green Valley Road issues regarding Ms. Cross's arguments.

South Connector Roadway on The Villages.

Next, Ms. Carrier asks for a Supplemental Condition to develop a plan for The Villages South Connector road alignment that minimizes impacts to existing wetlands that will be subject to SEPA review, and assures the timing for construction of the road. This Supplemental Condition is not necessary and YarrowBay does not agree to it. The timing for the construction of the South Connector road is set by TV COA 28, and The Villages Development Agreement Section 6.4.1: construction of the South Connector is required prior to approval of any Implementing Projects located east of Development Parcel No. 48. We note that at page 78 of his recommendation, the Hearing Examiner's language may confuse the South Connector roadway timing with the independent obligation to assure secondary access to any set of 300 dwelling units. The design of the road network planned for the northern areas of the Villages includes secondary access to development projects to assure two points of access to any set of 300 dwelling units; the South Connector is not required to be constructed to serve the first 300

units of The Villages. Finally, the alignment of the South Connector roadway has been set to minimize impacts to wetlands, and the roadway will be subject to additional environmental review, as described in Exhibit 8, pp. 42 - 44, Exhibit 139 p. 87, and Ex. 245 pp. 5 – 6. At p. 87 of the Recommendation, the Examiner confirmed that the alignment of the South Connector was not a topic for the Development Agreement and that the South Connector “will be subject to SEPA review at the implementing project level.”

Request for Additional Buffering.

Next, Ms. Carrier requests Supplemental Conditions that would impose vegetative, light and noise buffers along the southern property boundary of the Villages north of Green Valley Road. At pp. 108 – 109 of his Recommendation, the Examiner reviewed these requests (as presented by Mr. Bortleson) and properly concluded that they cannot be imposed upon the MPDs through the Development Agreement process, in large part because the “visual and aesthetic impacts of the MPDs were addressed by the EISs, which found that no mitigation was required as no significant impacts would occur,” and “Mr. Bortleson has provided no new information.” In addition, the Examiner pointed to the myriad existing protections for the City’s natural setting.

Request to Monitor and Repair Green Valley Road.

Ms. Carrier also requests a Supplemental Condition imposing upon YarrowBay the obligation to monitor the road surface of Green Valley Road, to repair the road surface, and to not use Green Valley Road for construction traffic. There is no evidence in the record to support imposing an obligation to maintain a public road on a private developer. As to construction traffic, at pp. 87- 88, the Examiner properly concluded that “The scale and development timing

of the MPD were approved by the City Council and cannot be altered in this venue. Any additional requirements will have to be approved by YB. Individual project level SEPA review will provide an adequate opportunity for the City to review the implementing project level impacts, including those of construction impacts, and provide appropriate mitigation.”

Off-Site Wells and Springs.

On page 5 of her Exhibit C-38, Ms. Carrier requests the addition of a condition to the Development Agreements to protect potable water (wells and springs) for Green Valley Road residents. On pages 35 and 36 of his Recommendation, the Examiner discussed potential impacts to wells and springs and concluded:

. . . impacts to springs, aquifers, and sources of water (wells) were analyzed and presented in Appendix D of the Villages EIS (pp. 7-8 through 7-12). . . . Regardless, the EIS considered potential impacts to the wellhead protection areas as part of the analysis of impacts to all water sources (EIS, Appendix D). Pursuant to the EIS and FOF 19, impacts to wells and wellhead areas will not be significant. Therefore, there does not appear to be any compelling reason to seek supplemental conditions on this issue.

As such, there is no evidence in the record to support the addition of conditions to the Development Agreements regarding off-site wells and springs. Ms. Carrier’s request must be denied by the City Council.

Clarissa Cross (oral argument and Exhibit C-18)

Green Valley Road

Ms. Cross requests many revisions to the MPD Conditions of Approval as well as additional conditions to address her desired outcomes regarding traffic using Green Valley Road. *See* the discussion of Green Valley Road under Ms. Carrier.

In addition, as the Examiner concluded, the MPD Conditions of Approval “do not require the DA to address Green Valley Road traffic except for the preparation of a traffic calming study and it[s] implementation as outlined in the COAs. Consequently, any DA terms beyond the traffic study would be subject to the voluntary approval of YB.” YarrowBay does not agree to the provisions requested by Ms. Cross. We refer the Council to Exhibit 30, *SE Green Valley Road: Traffic Calming Strategies* by Parametrix. That report confirms that Green Valley Road has sufficient capacity to carry additional traffic.

Les Dawson (oral argument and Exhibit C-21)

Rural Facilities.

In his oral and written statements to the City Council (Exhibit C-21), Mr. Dawson requests the addition of a condition to the Development Agreements compelling the Master Developer to locate facilities within the Urban Growth Area. Per the MPDs' COAs and the current terms of the Development Agreements, YarrowBay proposes to site a regional stormwater facility within King County as well as three school sites – one elementary and two middle schools. The Examiner addressed the location of the regional stormwater facility on page 38 of his Recommendation:

The proposal to locate the Regional Stormwater Detention facility outside of the City's urban growth area was subject to a significant amount of discussion during the MPD hearings. The location of that facility has been recognized and at least implicitly approved by the City Council in the MPD COAs, which anticipate its location outside the UGA. The only new issue raised in the DA hearings is that the location could induce urban growth outside of the urban growth area. That is largely a GMA issue, which is a consideration when land use regulations are adopted, as opposed to when they are implemented. Unless King County's review permit review criteria directly authorize the consideration of urbanizing impacts, King County probably won't have the authority to make this issue a significant factor in its permit review. If this is a concern to the Council, it can have the City Attorney provide an evaluation of whether King County could deny development permits on the basis of GMA considerations. However, even if King County were to prohibit the development of schools outside in its rural areas, the Applicant then has the option to build within the City's urban growth area.

And, on page 91, the Examiner stated the following regarding the three proposed rural school sites:

The tri-party agreement provides two options for acquiring alternative school sites should the ESD be unable to acquire approval for schools located outside the UGA. One option involves relocating the school to alternative sites designated in the tri-party agreement. The second option authorizes the ESD to sell the school site and use the proceeds for another site.

Finally, on page 94 of his Recommendation, the Examiner made the following statement regarding the Master Developer's siting of facilities within unincorporated King County: "The Hearings Boards have exclusive original jurisdiction to consider GMA compliance and that authority can only be exercised by a timely appeal of local regulations adopted pursuant to the GMA." Thus, the City Council does not have jurisdiction to decide whether the regional stormwater facility and the three school sites comply with the GMA and/or to compel YarrowBay to site such facilities within the UGA. Moreover, even if YarrowBay ultimately cannot locate these facilities within King County, the Examiner found that there are alternatives available to site the facilities within the City. As such, there is no reason or basis for the City Council to adopt Mr. Lawson's requested condition.

Cooperation.

In his written statement to the City Council (Exhibit C-21), Mr. Lawson recommends that the City Council add a condition requiring "stronger evidence of the 'spirit of cooperation' with surrounding jurisdictions for transportation mitigation required of the applicant and staff when the MPD was approved." MPD Conditions of Approval Nos. 11 (Villages) and 10 (Lawson Hills) provide the following in regards to the creation of a new regional transportation demand model for the MPDs:

Key to the success of the new model is a well-coordinated effort and cooperation among the cities of Black Diamond, Maple Valley and Covington, the Applicant, King County and the Washington State Department of Transportation. Although the specific assumptions ultimately made in the model may be the subject of differences in professional judgment, the City Council's goal is that, notwithstanding these differences in judgment, the model will be comprehensive and therefore acceptable to all parties. The City Council therefore directs staff in preparing the model to work within the spirit of openness and cooperation with

these other agencies and the Applicant, and similarly requests that other agencies and the Applicant join with the City of Black Diamond staff in working together in the same spirit for the common good.

(Emphasis added). These conditions, however, are self-enforcing and Section 15.1 of the Development Agreements requires that the Master Developer comply with the MPD COAs during its term. As such, there is no reason or basis to add supplementary language regarding “cooperation” to the Development Agreements.

Brian Derdowski (oral argument and Exhibit C-24)

Unintended Consequences.

In Mr. Derdowski's oral and written statement (Exhibit C-24), he argues that master planned developments generally have unintended consequences. The unintended consequences alleged by Mr. Derdowski, however, have already been resolved by The Villages and Lawson Hills COAs and the Development Agreements. Each of these alleged unintended consequences is addressed below.

- Rental Housing: The MPD Permit Approvals and Development Agreements cap the number of multi-family dwelling units and set dwelling targets for each phase of development. These two factors help ensure proportional development as the MPDs build-out over time. Moreover, it is also important to note that in Washington State it is illegal to single out a project because it is an apartment building. *See, Westmark Development Corp. v. City of Burien*, 140 Wn.App. 540, 556 (2007).
- Construction Traffic: At page 87-88 of his Recommendation, the Hearing Examiner found in regards to construction traffic specifically that “[i]ndividual project level SEPA review will provide an adequate opportunity for the City to review the implementing project level impacts, including those of construction impacts, and provide appropriate mitigation.”
- Construction Noise: The Hearing Examiner found at page 102 of his Recommendation that “[t]he City’s noise regulations already require a significant amount of noise protection,” including compliance with state law as identified by

Mr. Derdowski. Moreover, the Development Agreements require more restrictive construction hours for the MPDs than elsewhere in the City.

- Evaluating the Effectiveness of Transportation Mitigation. The MPD Conditions of Approval (e.g. TV COA 17) already require periodic transportation review to test the how the transportation system is operating with the MPD traffic and, if needed, to impose additional traffic-related mitigation requirements on the Master Developer.
- Run-off & Erosion: The Villages and Lawson Hills MPD Conditions of Approval require numerous erosion and run-off related mitigation measures, including an erosion and sediment control plan with strict erosion control measures and a detailed emergency response plan in the case that mitigation fails; requirements that stormwater and groundwater shall be managed to prevent slope instability; structural measures such as silt fences and temporary sediment ponds be used to avoid discharging sediment into wetlands and other critical areas; and regulations regarding stormwater outfalls to avoid impacts to environmentally sensitive resources.
- Clearing & Grading: Pursuant to Section 13.2 of each Development Agreement, clearing and grading is limited to active development parcels and/or when grading is proposed on another Development Parcel in the vicinity of an Implementing Project to assure a balance of cut and fill for the proposed Implementing Project. Moreover, an overall grading plan for each phase is required by the MPD's COAs prior to the City's approval of the first MPD Implementing Project application.

- Groundwater Impacts: Groundwater impacts were analyzed in the MPDs' EISs within Appendix O and mitigation measures that address potential impacts to these features have been incorporated into the MPD Conditions of Approval.⁷
- Variances: The MPD Conditions of Approval and the Development Agreements require compliance with the variance criteria set forth in the City Code and City's Engineering Design and Construction Standards. No special considerations or deviations are provided to the Master Developer.
- Direction & Speed of Development: Per the terms of the Development Agreement Section 11, the Master Developer has to fund and construct effectively all of the infrastructure improvements necessary to serve the MPDs. The size and breadth of this obligation has the effect of controlling the speed of development because of the realities associated with financing and constructing such improvements.
- Costs & Revenues Out-of-Balance: The fiscal analysis provisions set forth in Section 13.6 of the Development Agreements combined with the proposed new MPD Funding Agreement (Exhibit "N" to each Development Agreement) ensure no adverse fiscal impacts to the City of Black Diamond.

Objection Dated July 13, 2011.

In his Exhibit C-24, Mr. Derdowski includes an objection that was filed with the Examiner dated July 13, 2011. The Examiner, however, rejected Mr. Derdowski's objection in an email dated July 19, 2011 stating:

⁷See page 2 of Exhibit 210.

Brian Derdwoski and Robert Edelman have both objected to the entry of Exhibit 8, the "Guide to MPD Design and Build-Out as Envisioned by the Development Agreements", authored by the Applicant. The objections are overruled and Exhibit 8 is admitted into evidence.

One of the concerns of Mr. Derdwoski is that the exhibit was not submitted under oath. Written materials are generally not required to be submitted under oath. None of the numerous letters submitted by the general public have been submitted under oath and there is no rule that would single-out the Applicant for such a requirement. Pre-Hearing Order II was admittedly not very clear on this issue by requiring that "all testimony" shall be taken under oath. It should be understood to apply to all verbal testimony.

To subject all written submissions to an oath requirement would create an unnecessary and undue burden on public participation.

The other concerns raised by Mr. Derdowski and Mr. Edelman relate to disagreements over the content of the exhibit as opposed to issues relating to admissibility. Admissibility is generally limited to issues of relevance and authenticity (i.e. whether the exhibit is what the submitter purports it to be -- for example if the Applicant submitted a document purported to be an ordinance passed by the Black Diamond City Council, that document would not be admitted if it was not in fact an ordinance passed by the City Council). Of course, Mr. Derdowski and Mr. Edelman are free to submit their own written comments disputing the accuracy and positions taken in Exhibit 8.

As such, no action by the City Council is required by Mr. Derdowski's inclusion of his July 13th objection in his written statement. YarrowBay's Exhibit 8 entitled "The Guide" remains in the record of the MPD Development Agreement proceedings.

Mine Hazards.

In his oral statement to the City Council, Mr. Derdowski raised a concern regarding the use of the term "agreement" in the implementing language that YarrowBay proposed to satisfy the Examiner's Recommended Implementing Condition "L" on page 22 of Exhibit C-7. Contrary to Mr. Derdowski's statement, however, the term "agreement" comes directly from the

Examiner's recommended language for this specific implementing condition. On page 61 of this Recommendation, the Hearing Examiner stated:

As described above, modification of Section 8.2.3 of the Lawson Hills DA has been proposed by the project proponents, requiring additional exploration of mine conditions and hazards in the same areas of uncertainty identified in the original technical reports and referred to by Dr. Breeds. This additional exploration is to result in "final" maps for mine hazard areas, which, upon agreement by both the City and YB that they are adequate, will become fixed. The Hearing Examiner recommends the Council adopt YB's suggested changes to the DA.

(Emphasis added). Compare this language to the language proposed by YarrowBay on page 22 of Exhibit C-7:

However, in the event that a new or higher classification of mine hazard area is discovered during the term of this Agreement, that area will be assessed and protected pursuant to the City's Sensitive Areas Ordinance, BDMC 19.10 (Exhibit "E") and no Implementing Project within such affected area will be approved until agreement between the City and Master Developer is reached on the boundaries of the new or higher classification of mine hazard area.

Thus, the "agreement between the City and Master Developer" language utilized by YarrowBay in Exhibit C-7 was as a result of the Examiner's Recommendation.

Steep Slopes.

In his oral presentation to the City Council, Mr. Derdowski questioned YarrowBay's addition of new steep slope language in response to the Examiner's Recommended Implementing Condition "K". See pages 18-21 of Exhibit C-7. The language was added to provide additional clarity to the scope of Section 8 of the Development Agreements, to the details of Constraint Maps, and to the removal of sensitive areas buffers that is proposed in Exhibit C-7. Moreover, the steep slope language was specifically reviewed and approved by City Staff.

Accessory Dwelling Units (ADUs).

See YarrowBay's response to Richard Ostrowski.

Response to Mr. Derdowski's Written Testimony to the Hearing Examiner.

For a point-by-point response to Mr. Derdowski's statement to the Hearing Examiner (Exhibit 40) that he reinserted into his written Black Diamond City Council presentation, *please see* YarrowBay's Exhibit 139.

Robert Edelman (Exhibit C-34)

In his written statement to the City Council (Exhibit C-34), Mr. Edelman alleges that the Hearing Examiner did not have enough time and thus failed to address eight issues. As to the time taken by the Hearing Examiner, please see the Introduction section of this Memorandum.

YarrowBay's response to Mr. Edelman's alleged issues follows.

1. Development Agreements do not Provide for Exact Terms and Conditions of the Required Fiscal Analysis as Required by MPD Condition 156 (Villages) and 160 (Lawson). Contrary to Mr. Edelman's allegation, however, the Examiner did in fact note Mr. Edelman's "exact terms and conditions" issue on page 97 of his Recommendation.⁸ However, after reviewing all of the concerns presented by parties of record on the fiscal analysis set forth in Section 13.6 of each Development Agreement, the Examiner concluded that only one revision needed to be made to the fiscal analysis: the addition of police and fire LOS. *See* the Examiner's Recommending Implementing Condition "Q." Thus, the Examiner found that the "exact terms and conditions" language of MPD Conditions of Approval Nos. 156 (Villages) and 160 (Lawson Hills) had been met by the fiscal analysis set forth in Section 13.6 of each Development Agreement. *See also* Randall Young's Declaration at Exhibit 217.
2. Building Permit Surcharge. In his Exhibit C-34, Mr. Edelman alleges that the building permit surcharge provision contained within the MPD Funding Agreement

⁸See #5 on page 97 of the Recommendation.

(Exhibit “N” to each Development Agreement) is illegal and must be stricken by the City Council. Mr. Edelman presented his building permit surcharge argument in full to the Examiner and YarrowBay comprehensively responded at Exhibit 139 (pages 65-68) and Exhibit 245 (pages 35-42). The Examiner reviewed the MPD Funding Agreement and concluded at page 98 of his Recommendation that the “Funding Agreements, Ex. N to the DAs, reasonably assure that the projects will not impose a financial burden on BD residents.” In completing his review, the Examiner recommended only one change to the MPD Funding Agreement to confirm it was executed prior to approval of any Implementing Projects (*see* Recommended Implementing Condition “W” at page 113) and raised two language issues that the City Council may want to consider. Most importantly, however, the Hearing Examiner does not recommend removal of the building permit surcharge provision from the MPD Funding Agreement within his Recommendation.

3. Vesting. Mr. Edelman raises a concern regarding the vesting dates cited in Section 15.1 of the Development Agreements. On pages 25 and 26 of Exhibit 209, YarrowBay responded to this same concern previously raised by Mr. Edelman:

There are three sources of authority that govern the vesting of The Villages and Lawson Hills MPDs: (i) the Pre-Application Agreements; (ii) the City’s MPD Ordinance (BDMC Ch. 18.98); and (iii) the City’s Vesting Ordinance (BDMC Ch. 18.14). Each of these three sources is summarized below.

Section 5.2 of The Villages and Lawson Hills Pre-Application Agreements dated April 16, 2009, and April 28, 2009, respectively, provides: “The MPD application shall vest to the City policies, standards, application requirements, and land use regulations in effect on the date the moratorium referenced in paragraph 5.1 is lifted or

otherwise expires . . .” (Emphasis added). Under these Agreements, The Villages and Lawson Hills MPD Applications vested to the City codes in effect on June 28, 2009, the date the moratorium imposed by the City pursuant to Ordinance No. 08-885, was lifted by the City Council’s adoption of Ordinance No. 09-913.

The City’s MPD Ordinance at BDMC 18.98.195 provides that “the MPD permit approval vests the applicant for fifteen years to all conditions of approval and to the development regulations in effect on the date of approval.” (Emphasis added). Thus, per this section, all development in The Villages and Lawson Hills MPDs is vested to the City codes in effect on the date of MPD Permit Approval – September 20, 2010.

Finally, the City’s Vesting Ordinance at BDMC 18.14.030 provides that:

All project permit⁹ applications shall be considered under the zoning and other land use control ordinances in effect on the date a complete application for such permit is filed. [However,] [v]esting of a complete project permit application does not vest any subsequently required permits . . . provided: . . . (4) vesting of subsequent permits and approvals as part of a master planned development shall be governed by this chapter . . .

Emphasis added. Therefore, under the City’s Vesting Ordinance, while an MPD application is vested to the City codes in effect on the date of a complete application, all subsequent MPD Implementing Projects are not. Read together, these three sources of vesting authority can only reasonably be interpreted to mean the following. An MPD application vests to the land use controls in effect on the date of application (unless subject to an agreement such as the Pre-Application Agreements in which case the vesting date is June 28, 2009, when the moratorium was lifted). All subsequent development within the MPD vests to the conditions of the MPD permit approval and cannot be affected by regulations adopted after MPD permit approval.

For purposes of clarity, we analogize to RCW Ch. 58.17. RCW 58.17.033 plainly vests a preliminary plat application for consideration under the land use controls in effect at the time of application. Similarly, BDMC Ch. 18.14 vests an MPD application for consideration under the land use controls in effect at the time of application. Then, RCW 58.17.170

⁹BDMC 18.14.010 defines “project permit” to include master planned developments.

provides that a final plat can be approved when it conforms to the terms of the approved preliminary plat, and that the final plat is “governed by the terms of approval of the final plat, and the statutes, ordinances and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five [or seven] years...” BDMC 18.98.195 states that the implementing projects for the build-out of an MPD are vested for a period of 15 years to the terms of the approved MPD and all of the municipal code in effect on that date.

Thus, contrary to Mr. Edelman’s allegations, the vesting provided for The Villages and Lawson Hills MPDs in Section 15.1 of the Development Agreements is consistent with the three sources of vesting authority summarized above. As such, there was no reason or basis for the Hearing Examiner to revise Section 15.1 of the Development Agreements.

4. Condition 10. MPD Condition of Approval Nos. 10 (Villages) and 9 (Lawson Hills) is satisfied in relevant part by Section 11.4(B) of each Development Agreement:

If the Master Developer elects to construct Regional Facilities or projects from the City’s Capital Improvements Plan (“CIP”), it may seek reimbursement for costs incurred to Construct any or all of the necessary off-site Regional Facilities in excess of the Master Developer’s proportionate share (except from “Exempt Properties”). The Master Developer may recover costs in excess of its proportionate share (except from “Exempt Properties”) using methods approved and allowed by City Code, state law, and existing agreements (e.g., WSFFA), including grant funding and mitigation payments received by the City for growth-related impacts, including impacts occurring outside the City’s boundaries.

This section identifies the projects that qualify for cost recovery (e.g., those on the City’s CIP) as well as the methods available to be used for such cost recovery (e.g., any method allowed by law). Thus, the MPD Conditions of Approval have in fact

been satisfied. As such, there is no reason or basis to revise the Development Agreements on the basis these conditions.

5. Condition 18. Pro rata shares (as well as the methods of calculation) for transportation improvements are set forth in both Development Agreements at Sections 11.4 and 11.5. Collectively, these sections satisfy COA 18 (Villages) and COA 17 (Lawson Hills).

6. Condition 34. The Villages MPD Condition of Approval No. 34 states: “The Development Agreement shall address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery.” Collectively, Sections 11.4 and 11.5 and the Traffic Monitoring Plan (Exhibit “F”) assign construction responsibility of all traffic improvements identified within Table 11-5-1 and 11-5-2 to the Master Developer. Cost recovery for transportation improvements is addressed in Section 11.4(B) of The Villages Development Agreement. Thus, the requirements of The Villages MPD Condition of Approval No. 34 have been met. There is no reason or basis for the City Council to revise The Villages Development Agreement on the basis of this condition.

7. Public Access. Contrary to Mr. Edelman’s statement, the Hearing Examiner addressed public access to MPD parks and trails on pages 75 and 76 of his Recommendation and found the related COAs satisfied. *See* YarrowBay’s response to Sheila Hoefig.

8. Trails. In Exhibit C-34, Mr. Edelman alleges that the Development Agreements fail to meet the requirement of BDMC 18.98.150(B) to establish the sizes of trails. Contrary, to Mr. Edelman's allegations, however, the City Code contains no requirement that the length of trails be set forth in the Development Agreements. Moreover, the City Council already specifically determined that the MPDs comply with BDMC 18.98.150(B) in Conclusion of Law 59 of the Villages and Lawson Hills MPD Permit Approvals (Black Diamond Ord. Nos. 10-946 and 10-947). As noted by the Hearing Examiner in his Recommendation, the MPD Permit Approvals' conclusions of law cannot be revisited in the context of the Development Agreement Hearings. Because the City Council has already determined that the MPDs satisfy the requirements of BDMC 18.98.150(B), compliance with this code section cannot be revisited now.

Eric Frimodt for the Covington Water District (oral argument)

Covington Water District.

YarrowBay has two potential water providers for a 98-acre portion of The Villages MPD. Pursuant to the text revisions requested by YarrowBay in The Villages Development Agreement, all MPD Development that is located within Covington Water District's water service area boundaries and that is ultimately connected to and physically served by Covington Water District facilities shall comply with the District's requirements and standards. In his oral presentation to the City Council, Eric Frimodt, legal counsel for the Covington Water District ("CWD"), noted CWD's agreement with the implementing language proposed by YarrowBay in Exhibit C-7 in follow-up to Hearing Examiner's Recommended Implementing Condition "E".

Melanie Gauthier (oral argument and Exhibit C-28)

Funding Agreement.

See YarrowBay's response to William Wheeler and Jack Sperry.

Building Permit Fees.

In her oral and written statement (Exhibit C-28) to the City Council, Ms. Gauthier requested that the City adopt a building permit fee schedule and apply such schedule to the Master Developer in the MPD Funding Agreement (Exhibit "N" to each Development Agreement). As noted in the updated Staff Report (Exhibit C-40), the City already has adopted building permit fees and a fee schedule. *See* the City's adopted fee schedule set forth in Attachment 10 to Exhibit 139. Moreover, pursuant to Section 3(d) of the MPD Funding Agreement, the Master Developer is required to pay the building permit fees adopted by the City unless building staff is included in the MDRT. If building staff is included in the MDRT, then the Master Developer will be paying the actual full staff cost of building permit review and, as such, building permit fees are no longer applicable. As such, there is no reason or basis to revise the MPD Funding Agreement to include a new building permit fee schedule.

Vicki Harp (oral argument and Exhibit C-9)

Noise.

The noise attenuation mitigation language in Section 13.7 of The Villages and Lawson Hills Development Agreements incorporates directly the language of Conditions of Approval Nos. 44 (The Villages) and 42 (Lawson Hills) of the MPD Permit Approvals. In both her oral presentation and written statement (C-9), Mrs. Harp requests the inclusion of additional noise attenuation mitigation in the Development Agreements. Contrary to Mrs. Harp's request, the Examiner's Recommendation on page 102 states: "The COAs do not require the DA to add any additional [noise attenuation] mitigation measures, so any pursued by the Council would require the voluntary approval of YB." Moreover, the Hearing Examiner also recognized on the same page of his Recommendation that "The City's noise regulations already require a significant amount of noise protection..." At this time, YB does not agree to any additional noise mitigation beyond that already required by the MPD Conditions of Approval and the Development Agreements.

Noise Variance Request.

The City's noise variance procedures do not authorize special noise conditions for The Villages and Lawson Hills MPDs. Contrary to Mrs. Harp's statements to the City Council and included in her Exhibit C-9, BDMC 8.12.030 does not authorize the City to impose special noise conditions. Instead, BDMC 8.12.030 is a varianceprocess through which property owners can request special, limited exemptions to the City's noise standards. A variance process is not the

source of municipal authority to impose additional noise criteria on specific property owners or projects.

Work Hours.

The Development Agreements at Section 12.8.13 set forth more restrictive work hour standards than required by the Black Diamond Municipal Code at BDMC 8.12.040. Nevertheless, in both her oral and written statements, Mrs. Harp requests further work hour restrictions be included within the Development Agreements. As the Hearing Examiner recognized on page 103 of his Recommendation, the Development Agreements require “YB to restrict work hours even more than City code generally requires (one hour earlier on Saturday and weekdays)” and none on Sunday. As such, there is no legal authority for the City Council to further restrict the work hours for the MPDs in the Development Agreements.

Property Boundaries.

The Development Agreements at Section 4.5 incorporate the requirements of the City’s MPD Framework Design Standards and Guidelines set forth in the section entitled “Interface with Adjoining Development”, which provides guidelines to ensure a transition between Development within the MPDs that abuts Development outside the project sites. In both her oral presentation and written statement (C-9), Mrs. Harp alleges non-compliance with respect to property boundaries and the requirements of the BDMC. The Examiner, however, rejected Mrs. Harp’s same comments on property boundaries on page 24 of his Recommendation:

2. Property Boundaries. There were four comments regarding property boundaries. In Ex. 3-13i, Vicki Harp expressed concerns about the MPD design standards as they relate to adjoining development.

Examiner Response: *DA 4.5 requires MPD perimeter development to comply with the section entitled "Interface with Adjoining Development" of the MPD Framework Design Standards and Guidelines. Given the comprehensive nature of these design standards, the Council may not be able to impose additional requirements through the DAs without the consent of YB.*

As such, there is no reason or basis to require revisions to Section 4.5 of the Development Agreements with respect to property boundaries.

Susan Harvey (oral argument and Exhibit C-20)

Minor Amendments.

On page 1 of Exhibit C-20, Ms. Harvey questions the propriety of having the final decision of whether a Development Agreement amendment is Major or Minor rest with the Designated Official. *See* Section 10.4.2 of each Development Agreement. This proposed procedure, however, mirrors the review procedure for amendments to MPD Permit Approvals as set forth in BDMC 18.98.100(I): “The final determination regarding whether an amendment is "minor" or "major" shall rest with the director, subject to appeal to the hearing examiner.” In addition to conforming to City Code, the Hearing Examiner concluded at page 19 of his Recommendation as follows:

The review process and standards for the MPDs are governed by BDMC 18.98.100 and cannot be varied by the DA. Minor amendments of the DA are governed by DA 10.4.2, which provides that a minor amendment is a change to the DA that does not materially change the intent and policy of the DA. Minor amendments are subject to the approval of the Mayor and the decision to classify the amendment as minor are appealable to the Examiner. To provide for some public oversight over the minor amendment process, the DA could require that all decisions to classify an amendment as minor be posted on the City’s website so that the public has an opportunity to appeal them.

The minor amendment procedure proposed in Section 10.4.2 of the Development Agreements conforms to City Code and was approved by the Hearing Examiner. As such, there is no reason or basis to revise the Development Agreements’ minor amendment process.

Assignment of Development Agreements.

In regards to Susan Harvey’s request for the addition of a consent provision to the Development Agreements’ assignment clause, the City and YarrowBay did in fact specifically

discuss the need for the City's consent during negotiation of the Development Agreements. For direction, the parties looked at the development agreements of other King County master planned developments (Talus, Issaquah Highlands, Snoqualmie Ridge II, and Redmond Ridge). While the release of liability terms and conditions differed amongst the master planned developments, not one of these five development agreements included a consent provision within their assignment clauses. See, e.g., Redmond Ridge Development Agreements at Section 2.4 (Blakely Ridge at King County Recording No. 9601090553 and Northridge at King County Recording No. 9702181008). City Staff and YarrowBay did, however, agree to incorporate a 30-day prior notice provision into the Development Agreements' assignment clause. Thus, there is no need or basis to revise this section of the Development Agreements. *See also* page 34 of YarrowBay's Exhibit 245 for additional discussion of "assignment" and municipal liability concerns associated with such consent provisions.

Sheila Hoefig (oral argument and Exhibit C-8)

Amount of Open Space.

The Villages and Lawson Hills MPDs' open space as set forth in the Development Agreements at Section 9.1 satisfy the prior agreements and fifty percent requirement of BDMC 18.98.140(F). Nevertheless, in both her oral and written comments (Exhibit C-8), Ms. Hoefig expresses concern that the MPDs are not individually meeting each of their separate, project-specific Open Space requirements and that The Villages' open space is being used to satisfy the Lawson Hills' open space requirement. However, as the Examiner stated on page 66 of his Recommendation, "the open space proposed in both MPDs satisfies prior agreements and the 50% requirement of BDMC 18.98.140(F). That issue can no longer be revisited." In addition, The Villages MPD is not being used to satisfy the Lawson Hills MPD's project-specific open space requirements. Pursuant to the Lawson Hills-specific MPD Condition of Approval No. 145, which is reflected in Section 9.1 of the Lawson Hills Development Agreement, and as the Hearing Examiner noted in his Recommendation on page 67, the Lawson Hills MPD must provide an additional 9.3 acres of Open Space within its own boundaries prior to approval of the final Implementing Project in order to fulfill its open space requirements. Thus, the record supports that both MPDs will meet their individual, project-specific open space requirements as build-out progresses. As such, there is no reason or basis to revise Section 9.1 of the Development Agreements.

In-Lieu Recreational Facility Fees.

Section 9.5.3 of each Development Agreement sets forth a process through which the Master Developer shall have the option to request that Designated Official accept a lump sum payment in lieu of constructing a certain recreational facility set forth in Table 9-5. In both her oral and written presentation to the City Council, Ms. Hoefig expresses concern that the in-lieu fee process does not contain enough protections. To the contrary, however, the City retains sole discretion to determine if fee-in-lieu payments will be accepted and, pursuant to both State law and specific language in Section 9.5.3, such in-lieu payments may only be used by the City for the purpose of constructing recreational facilities. Moreover, as outlined in the revised staff report at C-40, City staff cannot spend in-lieu funds without the City Council's approval. This process is consistent with The Villages Conditions of Approval Nos. 91-93 and Lawson Hills Conditions of Approval Nos. 93-95, which, in addition to contemplating off-site recreational facilities, require the City and the Master Developer to re-evaluate fee in-lieu values for park facilities as part of the Development Agreements. In his Recommendation on page 72, the Hearing Examiner found that the "DA provisions provide enough standards to legally delegate decisions about in-lieu payments to City staff." As such, there is no reason or basis to further revise Section 9.5.3 of the Development Agreements. Adequate protections are provided by the Development Agreements, the City's municipal code and State law.

Lake Sawyer Park.

The Development Agreements do not authorize the Master Developer to receive open space credit for areas within Lake Sawyer Park. Contrary to Ms. Hoefig's assertions, the Development Agreements are not a means to "back door takeover" of the Lake Sawyer Regional

Park (LSRP). On page 70 of his Recommendation, the Hearing Examiner finds that the Development Agreements do “not authorize YB to acquire an open space credit for the construction of active recreational facilities on LSRP. The Council is not required to maintain the LSRP as passive because it was assessed as passive in the EIS. [A proposal to use LSRP for active use] could trigger additional environmental review, such as an EIS addendum, but the decision as to whether and what additional review is necessary is left to the City’s SEPA responsible official and is not subject to review by the Examiner or Council.” As concluded by the Hearing Examiner, there is no reason to revise the Development Agreements on the basis of this concern.

Off-Site Recreational Facilities.

The Villages MPD Condition of Approval Nos. 89 and 91-93 and the Lawson Hills MPD Conditions of Approval Nos. 93-95 specifically contemplate off-site recreational facilities. In both her oral and written statement to the City Council, Ms. Hoefig expresses concern regarding City control over the construction of off-site recreational facilities. Per Sections 9.5.2 and 9.5.3 of the Development Agreements, however, the City retains sole discretion regarding whether the required recreational facilities set forth in Table 9-5 may be constructed off-site. While the conditions of approval do not require a definition of either location or percentage (limits) to off-site placements, these concerns are addressed at Section 9.5.1 of the Development Agreements through the application of the City’s level of service requirements. The section provides that all MPD dwelling units shall have access to and be located within ¼ mile of a park that is at least 1500 square feet in size. Compliance with this condition will effectively limit off-site park construction. At page 71 of his Recommendation, the Examiner concurs with this summary of

off-site recreational facilities. As such, there is no reason or basis to revise those portions of the Development Agreements relating to off-site recreational facilities.

Open Space versus Recreational Facilities.

In both her oral and written comments (Exhibit C-8), Ms. Hoefig expresses concern that on-site MPD Open Space will be replaced with off-site Open Space. This concern, however, is unfounded. The Development Agreements do not allow Open Space to be moved off-site, i.e., off-site Open Space replacement cannot occur and cannot be used to satisfy the MPDs' open space requirements. The MPDs' recreational facility requirements, on the other hand, may be constructed off-site or satisfied by a fee in-lieu, but only if approved by the City. Again, it is very important to understand that the MPDs' Open Space requirements and recreational facility requirements are two separate things. While recreational facilities may be constructed within designated Open Space on the MPD sites, such facilities may also occur elsewhere.

Walkable Parks.

The Development Agreements at Section 9.5.1 ensure that parks will be walkable for all MPD residents. In her oral and written comments (Exhibit C-8) to the City Council, Ms. Hoefig expresses doubt regarding walkability. Pursuant to Section 9.5.1 of both Development Agreements, “[a]ll Dwelling Units shall have access to and be located within ¼ mile walking distance of a Park. If an existing or planned Park is not accessible and located within ¼ mile (walking distance of a proposed Implementing Project, then the Implementing Project shall include a new Park at a rate of 100 square feet per Dwelling Unit to be served by the Park. Parks must be at least 1,500 square feet in size to be counted against [the MPDs’] Park requirements.”

Therefore, no modifications are necessary to the Development Agreements to ensure that parks are in fact walkable.

MPD Site Plan Amendments to Open Space.

In her oral and written testimony (Exhibit C-8), Ms. Hoefig expresses concern regarding the open space amendment process outline in Section 4.4.4 of the Lawson Hills Development Agreement and Section 4.4.6 of the Villages Development Agreement. Her primary concern regarding this amendment process appears to be founded on the belief that the MPDs' required Open Space could be moved off-site. Because such Open Space cannot be moved off-site as explained above, this concern appears to have been addressed. Moreover, the Hearing Examiner reviewed and approved these sections of the Development Agreements with minor revisions as outlined in his Recommended Implementing Condition "A" as he discussed on page 20 of his Recommendation:

LH DA 4.4.4 [and V DA 4.4.6] allows changes to open space boundaries by a minor amendment to the MPD so long as the total amount of open space required of the MPD is still satisfied. This amendment process is implicitly required by code, where BDMC 18.98.100(D) generally allows the use of the minor amendment process for open space boundary changes that do not decrease the total amount open space approved for the MPD. Since the DA must be consistent with the City's code, it cannot be used to modify city review processes. However, BDMC 18.98.100(E) also provides that an amendment only qualifies as minor if it doesn't increase any environmental impacts, amongst other restrictions. In order to provide for consistency between the DA and the City's code, it is recommended that LH DA 4.4.4 provide that amendments to open space boundaries shall be processed as a minor amendment so long as all the requirements of 18.98.100 are met. The safeguards of 18.98.100 should ensure that any changes in open space boundaries will not create any adverse impact environmental resources or otherwise adversely affect the public interest.

The revisions requested by the Examiner to these sections are addressed on page 3 of YarrowBay's Exhibit C-7. As such, there is no need to further revise Sections 4.4.4 (Lawson Hills) or 4.4.6 (Villages) of the Development Agreements.

Constraint Maps versus MPD Site Plans.

During her oral comments, Ms. Hoefig appeared confused between the MPDs' Constraint Maps (contained in Exhibit "G" of each Development Agreement) and the MPD Site Plans (contained within new Exhibit "U" of each Development Agreement) and whether or not such maps are surveyed. The property boundaries and sensitive area boundaries shown on these Constraint Maps are in fact surveyed. The MPD Site Plans (Exhibit "U" as provided in Exhibit C-7), on the other hand, are not surveyed maps because the scale of the exhibit prevents that specific level of detail. Despite not being surveyed, YarrowBay assigned approximate acreages to each Development Parcel to aid in understanding the plans. As such, the acreages of these development parcels may change slightly when Implementing Project applications are reviewed and approved for such reasons as accommodating on the ground surveying and detailed engineering designs for necessary infrastructure.

Public Access.

Section 9.9.3 of each Development Agreement provides public access to all parks and trails within the MPD in conformance with MPD Conditions of Approval Nos. 94 (The Villages) and 92 (Lawson Hills). In her written statement (Exhibit C-7), Ms. Hoefig questions the provision of required public access to recreational facilities. Section 9.9.3 provides that "Pursuant to Condition of Approval No. 94 ... public access is authorized to all Parks and trails

unless otherwise determined by the Designated Official.” (Emphasis added.) This is a reference to the same authority that City Staff currently has to close access to any other park for security or other reasons. BDMC 9.86.230 provides the authority to City Staff to promulgate and adopt reasonable rules and regulations pertaining to park operations. The Hearing Examiner found on page 76 of this Recommendation that Section 9.9.3 is “as precisely required” by the COAs. As such, there is no reason or basis to amend this section of the Development Agreements.

At this time, YB does not agree to any additional open space and/or recreation facility mitigation conditions beyond that already required by the MPD Conditions of Approval and the Development Agreements.

Michael Irrgang (oral argument and Exhibit C-31)

Mr. Irrgang raises many of the same arguments asserted by Mr. Rimbos, such as the misunderstanding that the Traffic Monitoring Plan found at Exhibit F to each Development Agreement is re-active. *See* Response to Mr. Rimbos.

Mr. Irrgang also repeats his assessment that the MPD traffic will result in what he names “gridlock.” YarrowBay engaged an expert traffic engineer to refute Mr. Irrgang’s analysis. We direct the Council to Exhibit 208 (Declaration of Kevin Jones and letter dated August 12, 2011).

Mr. Irrgang also asks the Council impose “some new traffic conditions.” Like Mr. Rimbos, Mr. Irrgang’s proposed new conditions require revision of the existing MPD Permit Conditions of Approval and, therefore, are outside the scope of the Development Agreement process.

Development Agreement Process.

On page 2 of his Exhibit C-31, Mr. Irrgang alleges that the City Council is using an “inappropriate” process for its review of the Development Agreements. *See* YarrowBay’s response at page 71-72 of Exhibit 139. In short, the City is required by law to follow its own municipal code, including when that code calls for a quasi-judicial process. Therefore, because the BDMC at Chapter 18.08 renders development agreements Type 4-Quasi-Judicial actions, the City Council is following the correct process (i.e., open record hearing before the Hearing Examiner and closed record hearing before the City Council) for The Villages and Lawson Hills Development Agreements.

Angela Jennings (Exhibit C-32)

Size of MPDs:

In her Exhibit C-32, Ms. Jennings alleges that the MPDs “are simply too big for Black Diamond . . .” In response to similar concerns, the Hearing Examiner noted on page 12 of his Recommendation: “As the Council knows from its review of the MPD, density is a major issue with the MPD proposals. The Council has conclusively set a minimum density of four units per acre in its MPD approvals. It cannot be re-visited in the DA hearings.” And, on page 110 of the Recommendation, the Examiner stated further:

This matter has already been considered in both MPDs, see MPD COL 27, which concludes that the minimum densities of the MPDs are legally required. As discussed elsewhere, V COA 131 requires all implementing project applications to propose densities of at least four dwelling units per acre. Unless the Council can have YB voluntarily agree to not develop portions of its property, this means that the Council cannot consider changing the density of the project without an MPD amendment. As testified by YB at the DA hearings, the author of ‘Rural by Design’ has concluded that the MPD design meets the objectives of his book. No one other than Mr. Rimbo has made any other suggestions on how to maintain rural character within the densities required for the project. The suggestions made by Mr. Rimbo can be required to be included in the DAs if the Council chooses. Beyond this, the Council will have to work within the parameters of the densities required by the COAs for the MPDs to protect rural character.

As concluded by the Examiner, the size and density of the MPDs cannot be revisited in the context of these Development Agreement proceedings. As such, no revisions to the Development Agreements are required as a result of Ms. Jennings’ written statement.

Ulla Kemman (oral argument and Exhibit C-10)

Transportation Concurrency and Schedules to Build Transportation Infrastructure.

Ms. Kemman argues that the Development Agreements do not provide any details about transportation concurrency. As described in YarrowBay's Exhibit C-7, pp. 52 -53, The Villages MPD Condition of Approval No. 10 (and Lawson Hills No. 9) already assured that the transportation improvements would be built on a schedule that was better than the transportation concurrency program, because the Conditions of Approval require actual project construction, and do not include an allowance for strategies or funding to be in place. Nonetheless, YarrowBay has offered to accept the Examiner's Recommended Implementing Condition "U" to add more transportation concurrency testing, as described at Exhibit C-7, pp. 33 – 36. Transportation concurrency is already assured as part of the MPD Conditions of Approval, was incorporated into the Development Agreement by virtue of inclusion of those Conditions of Approval as Exhibit C, and is now also referenced in Exhibit F to each Development Agreement. Contrary to Ms. Kemman's argument, The Villages Condition of Approval No. 17.f does not require a description of how "funding, timing, moratoriums will be made should a particular improvement fail the Concurrency test." The Villages Condition of Approval No. 17.f authorizes the City to revise the transportation mitigation list in the event that a periodic review process calls for such revisions. Also, it is worth noting that the transportation improvements themselves (i.e., a new turn lane at an intersection) do not undergo a concurrency test; it is the Implementing Projects (i.e., a preliminary plat application) that are the subject of concurrency review.

The MPD Conclusions of Law, particularly The Villages Conclusion of Law 23 (and the corresponding Conclusion for Lawson Hills) provide a thorough explanation of how “facilities, infrastructure and public services” will be provided in a timely manner. At Section 11 and Exhibit K, each Development Agreement provides additional explanation as to the schedule, and Exhibit F describes how the timing for construction of mitigation projects will be determined.

Cost/Benefit/Risk Analysis.

Contrary to Ms. Kemman’s argument, The Villages MPD Condition of Approval 34.a does not call for the Development Agreement to include a “Cost, Benefit, Risk Analysis.” Pursuant to Condition of Approval No. 34.a, the Development Agreements do include a list of which traffic projects will be built by the developer and what projects will qualify for cost recovery at Section 11, including Section 11.5, Tables 11-5-1, 11-5-2, and Sections 11.3(B) and 11.4(B). As described in Exhibit 208, p. 19, there is no legal authority to assess the cost of mitigation measures. Further as described at Exhibit 245, p. 6 of the Memorandum Re “YarrowBay’s Reply to Transportation-Related Response Testimony”, Mr. Rimbos’s oft-repeated demands for a “Cost-Benefit-Risk” analysis appear to derive from a planning metric used by his employer, the Boeing Company. While a “Cost-Benefit-Risk” analysis may be perfectly appropriate to assist Boeing in deciding whether or not it would be profitable to pursue a modified aircraft design, a “Cost-Benefit-Risk” analysis is completely unnecessary and pointless when the FAA mandates that Boeing re-design some element of an aircraft. Here, the transportation mitigation conditions imposed on YarrowBay are like that FAA mandate – YarrowBay doesn’t have a choice, the projects need to be provided.

Proposed Supplemental Conditions.

Ms. Kemman requests the Council implement Mr. Rimbos's request for "Supplementary Conditions." At p. 80 of the Hearing Examiner's Recommendation, the Examiner confirmed that "the issue at hand is whether the DAs adequately implement the MPD Conditions of Approval. Changes to the MPD Conditions of Approval are not the focus of this hearing process and would require a Major Amendment to the MPD—a process that is separate from this hearing process." Therefore, the Examiner confirmed that any Supplemental Conditions that alter the terms of the MPD Conditions of Approval would require the "voluntary approval of YB." As described in response to Mr. Rimbos's arguments, Mr. Rimbos's requested Supplemental Conditions specifically require changes to the MPD Conditions of Approval and YarrowBay does not agree to those Supplemental Conditions.

Matthew Nolan for King County (Exhibit C-27)

During the Examiner's Open Record hearings, the County's Traffic Engineer, Mr. Nolan, requested Supplemental Conditions that would require YarrowBay to monitor traffic volumes on Green Valley Road and to cease development of the MPDs if volumes exceeded a certain threshold. In Exhibit C-27, Mr. Nolan revises that request slightly. As noted by the Examiner on p. 105 of the Recommendation: "[t]he COAs do not require the DA to address Green Valley Road traffic except for the preparation of a traffic calming study and its implementation as outlined in the COAs. Consequently, any DA terms beyond the traffic study would be subject to the voluntary approval of YB. The Council is not likely to get YB to agree to King County suggestions that it cease MPD development if traffic is disruptive to Green Valley Road." The Examiner's assessment is correct. YarrowBay does not agree to King County's suggestions. YarrowBay does note that The Villages Condition of Approval No. 17 (Lawson Hills No. 16) does require periodic review of the transportation impacts of the MPDs. If additional or different impacts to Green Valley Road are discovered, they can be mitigated through the periodic review process.

Jay McElroy (oral argument)

Open Space.

See YarrowBay’s response to Ms. Hoefig.

Rural By Design.

In his oral presentation to the City Council, Mr. McElroy alleged that The Villages and Lawson Hills MPDs are inconsistent with Randall Arendt’s “Rural by Design” as adopted by the City of Black Diamond. Mr. McElroy’s allegations, however, are not supported by the record. To the contrary, on page 110 of his Recommendation, the Hearing Examiner finds that “the author of ‘Rural by Design’ has concluded that the MPD design meets the objectives of his book.” Randall Arendt himself also confirmed this when he said the MPDs contain “a number of the features I believe are essential to building strong communities. I am confident the City of Black Diamond, in concert with YarrowBay, will be able to do a much better job than other nearby communities have done attaining the City’s vision for growth, while maintaining the historic, small-town character that is essential to Black Diamond’s community identity.”¹⁰ As such there is no reason or basis for the City Council to conclude that the MPDs are inconsistent with “Rural by Design.” For further information regarding how the MPDs meet the objectives of “Rural by Design,” *please see* pages 9-13 of YarrowBay’s Exhibit 8.

Green Valley Road (GVR).

See YarrowBay’s response to Ms. Carrier and to Ms. Cross.

¹⁰*See* Voice of the Valley Op Ed dated April 26, 2011 and which is included as part of the Guide YarrowBay presented to the Hearing Examiner (Exhibit 8).

Matthew McGibney (oral argument)

Roundabouts.

During his statement to the City Council, Mr. McGibney expressed a concern that roundabouts be considered prior to installing a traffic signal. As required by Condition of Approval 18 (Lawson Hills) and 19 (Villages) and restated in Section 11.5(B) of both Development Agreements, for each potential traffic signal improvement constructed by the Master Developer, it must first consider and present a conceptual design for a roundabout at the City's preferred method of intersection control. Thus, Mr. McGibney's concern regarding the use of roundabouts is satisfied by both the COAs and the Development Agreements. As such, no revision to the Development Agreements is necessary to address this issue.

Quality Design.

Mr. McGibney also asked that the MPDs not look like Covington and Maple Valley. As the Council is aware, the adopted MPD Framework Design Standards & Guidelines apply to control aesthetics. In addition, the MPD Conditions of Approval required "project-specific" design guidelines which are provided at Exhibit "H" to each Development Agreement. Together, these guidelines assure that The Villages and Lawson Hills will be aesthetically pleasing communities.

Joe May (oral argument)

Funding Agreement.

See YarrowBay's responses to William Wheeler and Jack Sperry.

Development Agreements' Term.

In his oral statement to the City Council, Mr. May requested that the Development Agreements' term be shortened to ten years. This request, however, is contrary to the City's MPD Ordinance and, therefore, must be rejected by the City Council. BDMC 18.98.090 requires that "MPD conditions of approval shall be incorporated into a development agreement" and that "[t]his agreement shall be signed by the mayor and all property owners and lien holders within the MPD boundaries, and recorded, before the city may approve any subsequent implementing permits or approvals (preliminary plat, design review, building permit, etc.)." In addition, BDMC 18.98.195(A) and (E) provide that "the MPD permit approval vests the applicant for fifteen years to all conditions of approval and to the development regulations in effect on the date of approval" and that "[t]he council may grant an extension of the fifteen year vesting period for up to five years." Thus, per the City's municipal code, the MPD conditions of approval are vested for 15-20 years and must be incorporated into a development agreement. This means, by definition, The Villages and Lawson Hills Development Agreements must also have a 15-20 year term. As such, there is no reason or basis to modify Section 15.16 of the Development Agreements.

Erika Morgan (oral argument and Exhibit C-23)

Black Diamond Lake Buffers.

In both her oral statement to the City Council and written presentation (Exhibit C-23), Ms. Morgan states that the Black Diamond Lake requires a “much wider buffer zone than exists in our SAO today.” As the Examiner noted on page 55 and 57 of his Recommendation, “the City’s Sensitive Areas Ordinance has been determined by the City Council to adequately protect wetlands. If the Council chooses to exceed the mitigation required by that ordinance, it will probably need to get voluntary consent from YB” and “FOF 13 states that application of the City’s SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals.” Moreover, under State law, the City of Black Diamond is required to follow its own municipal code, including when that code calls for a quasi-judicial process. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 835-36 (2011). As such, the City Council cannot revisit the buffers established by the City Code for Black Diamond Lake in the context of the Development Agreement proceedings. Mr. Morgan’s request for larger Black Diamond Lake Buffers than required by the City’s SAO must be denied by the City Council.

Flooding.

In her Exhibit C-23, Ms. Morgan expresses concerns regarding flooding as a result of MPD development. See YarrowBay’s and the Hearing Examiner’s response to flooding concerns in response to Jack Sperry.

Mine Hazard Release Forms.

In her Exhibit C-23 on page 22, Ms. Morgan expresses concerns regarding use of the Mine Hazard Release Forms in Exhibit “M” of both Development Agreements. As recognized by the Hearing Examiner on page 63 of his Recommendation, signing of these release forms is a requirement of COA 116 for the Villages and COA 118 for Lawson Hills and, in fact, the releases indemnify the City from liability associated with mine impacts. As such, there is no reason or basis to revise Exhibit “M” of both Development Agreements.

Richard Ostrowski (oral argument and Exhibit C-14)

Single Family Attached Housing.

In his oral and written statement (Exhibit C-14) to the City Council, Mr. Ostrowski expresses concerns regarding single family attached housing. This issue was addressed by the Hearing Examiner on page 17 of his Recommendation where he finds “[t]he MPD approvals do not hold YB to the mix of attached and detached single family homes it proposed in its MPD application.”

MPD Conditions of Approval No.1 of both The Villages and Lawson Hills Development Agreements specifically provide: “Approval of the MPD is limited to the terms and conditions set forth in the City Council’s written decision, and does not include approval of any other portion of the MPD set forth in the application.” The Executive Summary of The Villages and Lawson Hills MPD Permit Applications was not specifically approved by the Black Diamond City Council in its MPD Conditions of Approval. Instead, the City Council explicitly adopted Conditions of Approval Nos. 128 (The Villages) and 132 (Lawson Hills) that placed caps on the total number of dwelling units allowed in The Villages and Lawson Hills MPDs (4,800 and 1,250, respectively) and explicitly approved specific portions of Chapter 3 of the MPD Permit Applications. The approved components of Chapter 3 are included in the Development Agreements as Exhibit “L”. But notably, the portions of Chapter 3 in Exhibit “L” do not limit The Villages MPD to 3,600 single family detached units.

The City Council went on to require, in MPD Condition of Approval Nos. 129 (Villages) and 134 (Lawson Hills), that the Development Agreements establish targets for various types of housing for each phase of development. These required targets are set forth in Table 4-8-4 (The

Villages) and Table 4-8-1 (Lawson Hills.). Again, there is no requirement in these tables for 3,600 single family detached units in The Villages MPDs.

As noted in YarrowBay's Written Response dated August 12, 2011 (Exhibit 209), while 4-plexes are considered single family, each unit in the 4-plex counts as a separate dwelling unit. Thus, the MPDs will not exceed their total number of dwelling units as set forth in Section 4.2 of each Development Agreement. It is important to note that, as a general rule, single family attached units, as compared to single family detached units, have fewer environmental impacts. Attached single family units are generally smaller in size than detached single family units. As a result of the size difference, generally fewer people live in attached single family units and therefore generate fewer vehicle trips as compared to single family detached dwelling units. To the extent the FEISs estimated that The Villages MPD would consist of 3,600 single family detached dwelling units, the environmental analysis was conservative and would in fact over-estimate the impacts associated with 3,600 single family units that include both detached and attached housing products. There are other benefits associated with this conservative approach to analysis. In terms of the triggers for recreational facility requirements outlined in Table 9-5, 3,600 single family units that include both detached and attached housing products means that recreational facility threshold requirements will be triggered where there are fewer people living in the MPDs than originally projected.

For pictures of single family attached housing products that are consistent with both the City's MPD Framework Design Standards and Guidelines and the Project Specific Design Guidelines in Exhibit "H" of each Development Agreement, *please see* Exhibit 261.

Because single family attached housing has, as a general rule, fewer environmental impacts than detached housing and because the Development Agreements as drafted are consistent with the MPD Conditions of Approval, there is no reason or basis to further amend the Development Agreements.

Accessory Dwelling Units.

In both his oral and written statements (Exhibit C-14) to the City Council, Mr. Ostrowski asks that the Examiner's Recommended Implementing Condition "C" be included in the final Development Agreements. On page 6 of Exhibit C-7, YarrowBay has proposed language to implement Implementing Condition "C". A summary of YarrowBay's arguments regarding ADUs is provided at Exhibit 139 (page 13), Exhibit 245 (page 8), and Exhibit C-7 (page 57).

School Agreement.

See YarrowBay's responses to Cindy Proctor regarding the School Agreement and Cindy Wheeler regarding the updated high school fiscal analysis and the Examiner's Recommended Implementing Condition "P".

RCW 58.17.110.

In his oral and written statement (Exhibit C-14) to the City Council, Mr. Ostrowski expresses disagreement with the Hearing Examiner's conclusions regarding RCW 58.17.110. On page 93 of his Recommendation, the Examiner finds the following regarding this state statute:

. . . RCW 58.17.110 only applies to subdivision review. That position actually supports the arguments made by Ms. Ostrowski and Pat Pepper. RCW 58.17.110 requires findings to be made on school infrastructure during subdivision review.

Section 3.1 of the development agreements commits the City to findings on those potentially years in advance of those subdivision applications. It is legally questionable whether the City can commit in advance to findings required for approval of a permit application. It should be noted, however, that RCW 58.17.110 only requires that appropriate provisions are made for school sites and sidewalks and other planning features to assure safe walking conditions to and from school. RCW 58.17.110 does not require a finding of appropriate school buildings or other on-site capital facilities. Given that the tri-party agreement has several measures in place to assure that adequate school sites are available, there is a good chance that the City will be able to find compliance with the school site requirements of RCW 58.17.110 whether or not it is contractually bound to do so.

As YarrowBay noted on page 51 of Exhibit 139, arguments regarding RCW 58.17.110, the State's subdivision statute, are premature and simply not relevant to the Development Agreement proceedings. Such arguments can be addressed during the City Staff's and Hearing Examiner's review of preliminary plat applications for The Villages and Lawson Hills MPDs. As such, there is no reason or basis to revise the Development Agreements to address RCW 58.17.110.

Cindy Proctor (oral argument, Exhibit C-12, and Exhibit C-37)

Vesting.

In her oral and written statements (Exhibit C-12) to the City Council, Ms. Proctor requests that the language offered by YarrowBay on page 34 of Exhibit C-7 in response to the Hearing Examiner's Recommended Implementing Condition "U" be revised to allow amendments to the City's concurrency requirements in its Comprehensive Plan. This request, however, is contrary to BDMC 18.98.195 which vests an MPD applicant to all conditions of approval and development regulations in effect on the date of approval except for stormwater regulations, conditions related to fiscal analysis, and building codes. Because this request is contrary to the City's municipal code, it must be rejected by the City Council.

School Agreement.

In her oral and written comments (Exhibit C-12), Ms. Proctor requests that the City Council invalidate the School Agreement without citing any authority for proceeding with such invalidation. The City Council does not have authority to unilaterally void the School Agreement. It is a three party agreement and any modifications require the agreement of all parties. The Hearing Examiner, on page 91 of his Recommendation, made the following finding regarding the School Agreement:

Chris Van Hoof, President of the Enumclaw School Board ("ESD"), testified that he knows of no better school mitigation agreement in the state. That may well be true. While citizens provided ample examples of overcrowded schools and failed bond measures, no one came forward with an example of any better school mitigation arrangement. It could be that few if any developers have agreed to as much school mitigation as YB. Relatively speaking, the school district and the City negotiated a good deal. Unfortunately, a "relatively" good agreement may not be sufficient to assure adequate schools. The record makes it abundantly clear that relying upon bond

measures funded by persons residing in Enumclaw borders on wishful thinking; that schools will probably be well over capacity during the first few years of MPD build out and that King County may not approve permits necessary to construct schools outside the City's urban growth area.

The Council's options for mitigating school impacts are limited at this stage of development review. The City's MPD regulations only specifically require adequate school sites, not school construction. V COA 98 and LH COA 99 conclude that the tri-party agreement "provides adequate mitigation of impacts to school facilities". Section 3.1 of the tri-party agreement provides that the agreement constitutes complete mitigation of school impacts and that the City will not seek any additional mitigation for those impacts. The agreement even prevents the City from increasing school impact fees beyond specified levels, eliminating an important option normally available to communities. With these decisions and commitments, the Council is largely at the mercy of YB to volunteer further mitigation. Ideally, YB would agree to a school capacity monitoring program that prohibits construction whenever school capacity is exceeded by MPD development. Of course, that's not likely to happen. The Council could impose terms under its SEPA supplemental authority, but that is very legally risky given the contractual and regulatory commitments the City has made. A more realistic goal may be to resurrect the Black Diamond School District to give bond levies a chance of passing.

On page 92:

As correctly noted by the Applicant in Ex. 139, BDMC 18.98.080(A)(14) only requires that the number and sizes of sites shall be designed to accommodate the number of children generated by the project for schools. No MPD regulation specifically requires the Applicant to address construction costs in the MPD approval process. The omission of any reference to construction costs in this school specific language evidences an intent to exclude this consideration from the MPD review process, although more broadly worded provisions such as BDMC 18.98.080(A)(2)(requiring that all significant adverse environmental impacts be mitigated) arguably still require construction costs to be addressed. As previously discussed, the MPD COAs also expressly provide that the tri-party agreement constitutes adequate school mitigation and the agreement prohibits the City from imposing any additional mitigation. For all these reasons, the Applicant cannot be compelled to participate in any further school mitigation except under the legally risky exercise of SEPA supplemental authority.

And, finally, on page 93:

The tri-party agreement and the COAs do not require school construction to be completed at any particular time. Any mitigation in this regard would have to be done through the voluntary agreement of YB or the legally risky imposition of SEPA mitigation.

Nowhere in the Examiner's findings regarding the School Agreement does he recommend that the City Council invalidate the School Agreement. Without any legal authority, the City Council must reject Ms. Proctor's request.

Funding Agreement.

In her oral and written comments (C-12), Ms. Proctor requests certain amendments to the MPD Funding Agreement (Exhibit "N" to the Development Agreements) and that it be processed as a separate legislative agreement at a public meeting. *See* YarrowBay's responses to William Wheeler, Jack Sperry, and Robert Edelman. In addition, Ms. Proctor argues in Exhibit C-37 that the MPD Funding Agreement should be rejected and/or revised because it results in zero net benefit to the City of Black Diamond. Contrary to Ms. Proctor's understanding, however, the MPD Funding Agreement's purpose is not to produce a fiscal benefit to the City. Pursuant to BDMC Ch. 18.98 and, more specifically, BDMC 18.98.080(B), the purpose of the MPD Funding Agreement is to mitigate adverse fiscal impacts:

So long as to do so would not jeopardize the public health, safety, or welfare, the city may, as a condition of MPD permit approval, allow the applicant to voluntarily contribute money to the city in order to advance projects to meet the city's adopted concurrency or level of service standards, or to mitigate any identified adverse fiscal impact upon the city that is caused by the proposal.

(Emphasis added). The MPD Condition of Approval 156 (Villages) and 160 (Lawson Hills) provide similarly:

The applicant shall be responsible for addressing any projected city fiscal shortfall that is identified in the fiscal projections required by this condition. This shall include provisions for interim funding of necessary service and maintenance costs (staff and equipment) between the time of individual project entitlements and off-setting tax revenues; . . .

(emphasis added). In fact, and most importantly, Washington State law prohibits municipalities from raising revenue by charging fees to development. *See* RCW 82.02.020. Voluntary mitigation agreements between a jurisdiction and a developer are authorized only to the extent they mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision or plat. Moreover, municipalities may only seek “reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans . . .” Thus, the MPD Funding Agreement is not intended to, nor can it lawfully be required to, generate positive cash flow for the City of Black Diamond. Its failure to do so cannot lawfully be used as a basis for its denial by the City Council.

Building Permit Surcharge.

See YarrowBay’s response to Robert Edelman.

Community Facilities Districts (CFDs).

In her oral and written statement to the City Council (Exhibit C-12), Ms. Proctor alleges that “there must be an alternate source of infrastructure financing in place to ensure that approval of a Development Agreement that contemplates CFDs only doesn’t force the creation and approval of laws that constrain fundamental duties of a future City Council and take away the rights of the public they serve . . . The City Council can simply add two options; CFDs and/or Developer Impact Fees.” To the contrary, and as provided in the updated Staff Report at C-40, the Development Agreements do not reference CFDs anywhere other than in Section 13.4 where alternative timing is provided if the satellite fire station is financed through a CFD (500th

dwelling unit) or using other means of financing (750th dwelling unit). Nowhere in the Development Agreements is the City asked to commit to subsequent approval of a CFD petition.

While CFDs may be YarrowBay's preferred form of financing, it is not the only option. Finally, there is no legal authority for the City to impose a "Developer Impact Fee" as requested by Ms. Proctor and, most importantly, because the City is not obligated to construct any of the infrastructure improvements set forth in Section 11 of the Development Agreement, it is unclear what such an impact fee would be spent on. As such, there is no reason or basis to revise the Development Agreements regarding CFDs. Please *see also* YarrowBay's discussion of CFDs in the record at Exhibit 209 (pages 36-40) and Exhibit C-7 (page 51).

Expansion Areas.

In her oral statement to the City Council, Ms. Proctor expressed concern regarding required rezones and Comprehensive Plan amendments if certain Expansion Areas are included within the MPDs pursuant to the process set forth in Section 10.5 of the Development Agreements. Her concern, however, is specifically addressed in the language of Section 10.5, which provides: "If a defined Expansion Parcel is neither designated with a MPD Overlay on the City's Comprehensive Plan Future Land Use Map nor is zoned MPD, then a Comprehensive Plan Amendment and rezone shall be required." Moreover, on pages 62-63 of his Recommendation, the Hearing Examiner finds:

DA 10.5.1 provides that the addition of any expansion parcels will require a minor or major amendment, as required by the MPD regulations, that the review process will involve the submission of updated constraints map and will trigger additional SEPA review. The amendment process will involve a full assessment of mine impacts pursuant to the City's sensitive areas ordinance. No additional protections appear necessary at this time.

Given the Hearing Examiner's conclusions and the Development Agreement's inclusion of language to address future required Comprehensive Plan amendments and rezones, there is no need or basis to revise this section of the Development Agreements.

Peter Rimbos (oral argument and Exhibit C-39)

Transportation Demand Model Timing and Assumptions.

Mr. Rimbos argues that the new Transportation Demand Model should be finished and used now, and that additional assumptions should be included. YarrowBay has already addressed these comments from Mr. Rimbos in Exhibit 8, Exhibit 139 (*see* Attachment 6, the Declaration of Kevin Jones, and accompanying letter), Exhibit 208, and Exhibit 245 (*see* Memorandum Re “YarrowBay’s Reply to Transportation-Related Response Testimony”), as has the City’s expert Parametrix at Exhibit 216.

In particular, we direct the Council to Exhibit 208, at pp. 1 – 3, for an explanation of how all of the MPD Conditions of Approval work together to assure appropriate transportation improvements are provided so as to mitigate the impacts of both MPDs. That discussion explains the distinction between the Traffic Monitoring Plan found at Exhibit F to each Development Agreement, and the transportation mitigation project list that will result from each round of “periodic review” that is conducted under The Villages Condition of Approval No. 17 (and Lawson Hills No. 16). All of the detailed allegations raised by Mr. Rimbos were already addressed. For example, Mr. Rimbos continues to assert that traffic “queuing analyses” need to be provided in the Development Agreements. As described in Exhibit 208, p. 17, the Hearing Examiner has confirmed that queuing analysis should be done “when looking at specific improvements in the construction phase.” Similarly, Mr. Rimbos persists in arguing that schools were never included in transportation analyses, despite the explanation that they absolutely were included, and will be included in subsequent analyses for periodic review, all as explained in Ex. 208, at the bottom of p. 1 of YarrowBay’s Traffic Signal Assessment Table.

As stated by the Examiner at p. 80 of his recommendation, the timing for use of the new model was set in the MPD Conditions of Approval and cannot be modified without either a Major Amendment to the MPD Approvals or the voluntary approval of YarrowBay. As stated by the Examiner at p. 81 of his Recommendation, the MPD Conditions of Approval “provide an extensive list of modeling assumptions to be included in the new model” and “also define the timing for model calibration . . . and validation.” The Examiner further confirmed that “further modeling assumptions are unwarranted at this time and that any changes to the MPD COA would require a separate Major Amendment to the MPD.” There is no factual basis in the record to justify any of Mr. Rimbos’s requests that the new Transportation Demand Model should be finished and used now, and that additional assumptions should be included. In addition, YarrowBay does not agree to Mr. Rimbos’s requests, therefore, there is no legal process by which those requests could be approved by the City Council.

Traffic Monitoring Plan (Exhibit “F”) to the Development Agreements.

Mr. Rimbos again argues that the Traffic Monitoring Plan found at Exhibit F to the Development Agreements is re-active not pro-active. These arguments were fully addressed at Exhibit 139, Attachment 6 pp. 2 – 3, and Exhibit 208, pp. 7 – 11. Despite these explanations, Mr. Rimbos appears not to understand how the Traffic Monitoring Plan and the separate periodic review process (described in The Villages Condition No. 17) operate. Given that Mr. Rimbos’s argument to Council focused on the difference between “monitoring” and “modeling,” it now appears to YarrowBay that Mr. Rimbos’s concern arises from the use of the word “Monitoring” in the title of Exhibit F. But as stated many times throughout Exhibit F, the Traffic Monitoring

Plan includes both modeling and monitoring. The record reflects absolutely no basis to amend the Traffic Monitoring Plan as requested by Mr. Rimbos.

Concurrency and Mitigation Project Funding for State Facilities.

Mr. Rimbos supports the Hearing Examiner's Recommended Implementing Condition to add concurrency testing to the Exhibit F Traffic Monitoring Plan. So does YarrowBay. Exhibit C-7 provided to the Council on September 29, 2011, at pp. 33 – 36, includes amendments to address this issue.

As to the timing for infrastructure construction and Mr. Rimbos's argument that any concurrency testing must supersede any other timing provision in the MPD Conditions of Approval, we note that The Villages MPD Condition of Approval No. 10 (and Lawson Hills No. 9) already assure proper timing by providing that:

. . . over the course of project buildout, construct any new roadway alignment or intersection improvement that is: . . . necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service deficiency as determined by the City's adopted level of service standard. . .

As explained in Exhibit 139, Attachment 6, p. 3, this standard is more stringent than Black Diamond's transportation concurrency system, meaning that it provides more protection to the City and its residents than the transportation concurrency system. That is, as explained in Exhibit 139, Attachment 6, p. 3, the "MPD Conditions of Approval and Development Agreements . . . require[] that the construction of a particular improvement begin *before* the street or intersection is predicted to no longer meet the applicable operations standard; whereas the City's [concurrency requirement in the] *Comprehensive Plan* authorizes the possibility that

an improvement will be completed up to six years *after* the development occurs.” Allowing the City’s concurrency timing to supersede the MPD Conditions of Approval actually would be less protective to the City.

Mr. Rimbos also argues that the Council should amend the MPD Conditions of Approval to add a concurrency testing standard on SR-169, a Highway of Statewide Significance. Again, at p. 80 of the Recommendation, the Hearing Examiner confirmed that “the issue at hand is whether the DAs adequately implement the MPD Conditions of Approval. Changes to the MPD Conditions of Approval are not the focus of this hearing process and would require a Major Amendment to the MPD—a process that is separate from this hearing process.” In addition, at p. 85 of the Recommendation the Examiner confirms that State law is crystal clear that “GMA concurrency only applies for transportation projects within the City of Black Diamond . . . for ‘locally owned facilities’.” And, at p. 86, the Examiner confirms that the “City of Black Diamond does not have jurisdiction over state-owned facilities” and “cannot compel the State to cooperate,” but “can compel the Master Developer to provide its proportionate share contribution to mitigation projects on state-owned facilities.” YarrowBay does not agree to any amendments to the MPD Permit Conditions of Approval to impose a requirement to test concurrency on SR-169.

Mr. Rimbos also argues that MPD Conditions of Approval 10, 17, and 18 require or imply that the Development Agreements must include a “credible Financial Plan” and that it “puzzles” him that the Hearing Examiner did not so recommend. The Examiner did not include a recommendation for the Development Agreements to add Mr. Rimbos’s desired “credible Financial Plan” because that is absolutely not required by the MPD Conditions of Approval.

YarrowBay has already responded to Mr. Rimbo's arguments in Exhibit 208 (item 6 on pp. 14 – 15 and *see also* item I on p. 13).

Phasing of Development.

In the context of phasing, Mr. Rimbo re-argues his position on concurrency, with reference to the Examiner's Addendum discussion. As described above, YarrowBay has already agreed to include the Examiner's Recommended Implementing Condition for transportation concurrency. In addition, timely construction of transportation mitigation already is assured by the MPD Conditions of Approval. Mr. Rimbo also includes here a summary attack on YarrowBay's Exhibit 208, Traffic Signal Assessment Table. YarrowBay stands by its assessment that all items must be graded with a "green" light based on the analysis provided in that Table.

Alleged Hearing Examiner Unaddressed Items.

Mr. Rimbo alleges the following problems with several sections of the Development Agreements, noting that the Examiner did not address these items:

- The allegation that Section 4.10 means that no new transportation mitigation or cost can be imposed on the Master Developer.
- The allegation that Section 11.2 means that amendments to the MPD Permit Approvals are required.
- The allegation that Sections 11.3.B. and 11.4.B. mean that YarrowBay is relying on other people's money to build infrastructure.

- The allegation that Section 11.4.A implies some road will be required to service the offsite stormwater facility.
- The allegation that Exhibits Q and R do not include sufficient transportation mitigation.

As to each of these points (and other concerns), YarrowBay already explained why Mr. Rimbo is incorrect at Exhibit 208, pp. 4 – 12. And as to mitigation along SR-169, we again point out that residents of the City of Maple Valley also use that corridor. The Black Diamond City Council should take comfort from the fact that the City of Maple Valley believes the mitigation in Exhibit Q is sufficient for the corridor.

Proposed “Supplementary” Conditions.

Even Mr. Rimbo concedes that the Conditions of Approval that were adopted by the Council for each MPD are not the same conditions that were requested by YarrowBay. The Conditions of Approval provide substantial protections and assurances to the City and the public that transportation impacts will be mitigated. We again direct Mr. Rimbo and the Council to the explanation in Exhibit 208, at pp. 1 – 3.

However, Mr. Rimbo still asks the Council to impose five “Supplementary” Conditions. At Exhibit 208, pp. 20 – 21, YarrowBay already explained why each of those proposals was inappropriate, including the fact that each of Mr. Rimbo’s requests requires modification of the MPD Permits’ Conditions of Approval. At p. 80, the Examiner’s Recommendation confirmed YarrowBay’s position that “[c]hanges to the MPD Conditions of Approval are not the focus of this hearing process and would require a Major Amendment to the MPD.” At the very least, the “voluntary approval” of YarrowBay would be required to achieve Mr. Rimbo’s primary goal to

shift the timing of the first run of the new model. YarrowBay does not agree to any of Mr. Rimbos's proposed Supplemental Conditions. Therefore is it not surprising that the Examiner's Recommendation does not include any of Mr. Rimbos's requested Supplemental Conditions.

Conclusions.

Here, Mr. Rimbos broadly summarizes and restates his prior arguments. YarrowBay has already responded to all of Mr. Rimbos's assertions. That the Hearing Examiner did not adopt Mr. Rimbos's position is evidence that his requests were outside the bounds of what the Council is allowed to do in these Development Agreement hearings. Indeed, as stated at p. 4, the "priority" of the Hearing Examiner's Recommendation was to "ensure that all significant concerns of the public were addressed and that the development agreements implement the master plan conditions of approval. That priority has been met." Other than the changes to Exhibit F of the Development Agreements, the Hearing Examiner did not include any of Mr. Rimbos's requested revisions. Also, as explained at p. 13, Item I of Exhibit 208, Mr. Rimbos's personal definitions of the items he requests the City Council impose (such as a "Transportation Plan") are NOT items referenced or used by professionals in the transportation planning industry, nor are they required by the MPD Conditions of Approval.

Recommendations.

Mr. Rimbos asks the Council accept the Hearing Examiner's Recommended Implementing Condition to assure City approval of all traffic monitoring reports and to assure concurrency testing. YarrowBay agrees and provided Exhibit C-7 to the Council on September 29, 2011 which includes amendments to address these issues, at pp. 33 - 36.

Mr. Rimbos also asks the Council to adopt his 5 “Supplementary” Conditions as “MPD Ordinance Amendments.” As YarrowBay has described from the outset of the Development Agreement hearings and as the Examiner has confirmed at p. 80 of his Recommendation, “the issue at hand is whether the DAs adequately implement the MPD Conditions of Approval. Changes to the MPD Conditions of Approval are not the focus of this hearing process and would require a Major Amendment to the MPD—a process that is separate from this hearing process.” The Council cannot adopt Mr. Rimbos’s recommendation to amend the MPD Ordinances.

Robert Rothschilds (oral argument)

Phosphorous.

In his oral presentation to the City Council, Mr. Rothschilds requested that the City Council make sure to include enforcement mechanisms and timelines for phosphorous mitigation in the Development Agreements. Mr. Rothschilds' requests are reflected in the Hearing Examiner's Recommended Implementing Conditions "I" and "X". YarrowBay has proposed language to implement these conditions on pages 14-15 and 40 of Exhibit C-7. As such, Mr. Rothschilds's requests have been addressed and there is no reason or basis to further revise the Development Agreements.

Wetland Restoration.

In his oral presentation to the City Council, Mr. Rothschilds expressed concern that the Development Agreements do not contain a wetland restoration plan and that the agreements should be amended to address restoration of sensitive areas in the event of damage during construction. In fact, the City's adopted Engineering Design & Construction Standards, which are part of the Development Agreements in Exhibit "E", already require field markings of sensitive areas prior to construction. Thus, there are protections in place to avoid having construction equipment driving through wetlands. *See* ED&CS Section 2.6. In addition, the City's adopted SAO and Code Enforcement ordinance, BDMC Chapters 19.10 and 8.02 – which again, are part of the Development Agreements in Ex. E, are the authority by which the City can seek voluntary correction of any violation, or issue a stop work order, or seek immediate correction to the violation, or pursue a number of other remedies depending on the severity of

damage. Therefore, by requiring compliance with the City Code, the Development Agreements already address wetland restoration. As such, there is no need or basis for the City Council to revise the Development Agreements on the basis of Mr. Rothschild's statement.

Lisa Schmidt (Exhibit C-41)

Section 3.1.

In Exhibit C-41, Ms. Schmidt requests that the City Council delete Section 3.1 from the Development Agreements. YarrowBay's arguments regarding inclusion of Section 3.1 are set forth in Exhibit 139 (pages 4-6), Exhibit 209 (pages 3-4), and Exhibit 245 (pages 4-7).

Moreover, the Hearing Examiner concludes the following regarding Section 3.1 on page 12 of his Recommendation:

YB asserts that the agreements have been satisfied and there is nothing in the record to the contrary. The COAs do not require the DA to address the prior agreements. Despite this DA 3.1 provides that the terms of the DA shall supersede any conflicting provisions in the prior agreements as between the City and YB. The City has no obligation to DA 3.1 because it is not required by the COAs. If the Council would like to ensure that the prior agreements remain fully enforceable, they can refuse to agree to DA 3.1. It should be recognized, however, that the terms of the open space agreement will still remain fully enforceable to the extent that they involve third parties who are parties to the agreements. Of course, if the open space agreements have been fully performed DA 3.1 wouldn't make any difference on their enforceability. If the Council has any reservations about DA 3.1 it should get a briefing from the City Attorney on what impact it would have on any agreement terms that are still enforceable and how the prior agreements may conflict with the DAs if the obligations as to the City and YB remain intact.

The Hearing Examiner recognizes, above, that Section 3.1 does not impact the rights of third parties and that the record lacks any evidence that the prior agreements have not been satisfied or are in conflict with the Development Agreements. As such, there is no reason or basis for the City Council to delete Section 3.1.

Section 4.2.

See YarrowBay's response to Mr. Ostrowski regarding single family attached housing.

Section 4.8.

In Exhibit C-41, Ms. Schmidt draws attention to an alleged “discrepancy” in target dwelling unit counts for Phase 1: LH DA Table 4-8-4 Target Unit Count by Phase gives a total dwelling unit count of 1085 for phase 1A and 1B. The MPDs listed 880. On pages 23-24 of his Recommendation, the Hearing Examiner responds to Ms. Schmidt’s concern as follows:

The numbers of units per phase listed in the LH application were not adopted into the MPD approvals and do not need to be followed in the DAs. The MPD LH Application (12/31/09) lists on page 9-4 and 9-5 a total of 1050 units in Phase 1, not 880. There is a minor discrepancy of 35 units in the count between the DA and the MPD for phase 1. There is no discrepancy in the total count for all of the phases.

As confirmed by the Examiner, such a “minor discrepancy” does not to be resolved by the City Council in the Development Agreements. There is no reason or basis for revisions.

Section 5.5.8.

In Exhibit C-41, Ms. Schmidt requests that the City’s Director of Natural Resources and Parks review the MPDs’ landscape plans. The Development Agreements as currently drafted, however, already provided for the Director’s review at Section 5.5.2(A):

Pursuant to BDMC 18.72 (Exhibit “E”), a landscaping plan or alternative landscaping plan designed or approved by either a landscape architect licensed in the State of Washington or a Washington State Nurseryman shall be submitted by an applicant to the Designated Official for review and approval as a Construction Permit. Pursuant to Condition of Approval No. 124 of the MPD Permit Approval, prior to approval, the Designated Official shall review each submitted landscape plan with the City’s Director of Natural Resources and Parks for compliance with the following FEIS mitigation measure: “Mast-producing species (such as hazelnut) and such other native, preferred vegetation shall be used to mitigate for reduced food sources resulting from habitat reductions when designing landscape plans for development parcels adjoining wetland buffers, or for wetland buffer enhancement plantings.”

(Emphasis added.) As such, there is no reason or basis to revise the Development Agreements.

Water Conservation Plans.

In Exhibit C-41, Ms. Schmidt asks that the Examiner's recommended revisions to the MPDs' water conservation plans (e.g., Recommended Implementing Condition "G") be implemented. Consistent with the Hearing Examiner's Recommendation, YarrowBay has proposed language for implementing Recommended Condition "G" at page 11 of Exhibit C-7. As such, there is no need for further City Council revisions to the Development Agreements' Water Conservation Plans.

Green Technologies.

On page 12 of Exhibit C-41, Ms. Schmidt requests that the MPD Condition of Approval Nos. 9 (Villages) and 8 (Lawson Hills) regarding green technologies be detailed in the Development Agreements. This request, however, is not supported by the record. To the contrary, the Hearing Examiner found at page 14 of his Recommendation that all COAs

. . . are not required to be included in the DA beyond a general reference that the MPDs are subject to them. All COAs apply to the MPDs whether or not they are included in the DAs and are enforceable. However, BDMC 18.98.090 does require that the MPD conditions of approval shall be incorporated into a DA, suggesting that all COAs should be referenced in the Agreement. This does not require that each condition be repeated verbatim or even summarized, but the DA should provide that YB agrees to comply with all COAs, which it does not as proposed. The Hearing Examiner recommends a general clause requiring conformance to all COA provisions be added to the DA.

Because COAs 9 (Villages) and 8 (Lawson Hills) are self-enforcing, there is no reason or basis to revise the Development Agreements to include certain requirements regarding green technologies. In addition, YarrowBay has agreed to add language to Section 15.1 to ensure that the all COAs must be met.

Examiner's Implementing Condition "M".

At page 13 of Exhibit C-41, Ms. Schmidt alleges that YarrowBay in Exhibit 7 does not satisfy the Examiner's Recommended Implementing Condition "M". Ms. Schmidt's allegations are misplaced as YarrowBay explains on page 24 of Exhibit C-7:

While the Hearing Examiner references Villages Development Agreement Section 9.1 in Recommended Implementing Condition "M" above, on page 67-68 of his Recommendation dated September 14, 2011, he specifically notes that revisions to Section 9.1 are needed to address the remaining 9.3 acres of open space necessary to meet the requirements of LH MPD COA 145 in order to protect against the possibility that a final implementing project "does not have any property suited to accommodate quality open space of that size." While recognizing that under BDMC 18.98.140(A) effectively all undeveloped property meets the definition of "open space," YarrowBay drafted revisions to Section 9.1 of the Lawson Hills Development Agreement to address the concerns of the Examiner as set forth below.

As detailed above, the Examiner's Recommended Implementing Condition "M" is fully implemented by YarrowBay's suggested language. There is no reason or basis to further revise the Development Agreements on this basis of this condition.

Section 13.2.

On page 15 of Exhibit C-41, Ms. Schmidt requests that the City Council implement the Hearing Examiner's recommendations regarding revisions to Section 13.2. YarrowBay already addressed this request at pages 43-44 of Exhibit C-7. As such, there is no reason or basis to further revise Section 13.2 of the Development Agreements.

Walkable Schools.

On page 17 of Exhibit C-41, Ms. Schmidt asks the City Council to request that YarrowBay agree to a condition restricting the distance of schools to within a half-mile of MPDs. This request, however, is not supported by the record. To the contrary, the Hearing Examiner found on pages 95-95 of his Recommendation:

There is indeed a conflict in the City's MPD decisions on required walking distance to schools. VMPD COA 98 and LHMPD COA 99 both require schools to be located "within the MPDs or within one mile of the MPDs". BDMC 18.98.80(A)(14) provides that "school sites shall be identified so that all school sites meet the walkable school standard set for in the comprehensive plan." VMPD Conclusion of Law 40 and LHMPD Conclusion of Law 40 both conclude that the "walkable school standard" is a half mile, as does the Examiner in his recommendation on the MPD applications, see p. 128 of Villages MPD recommendation. As correctly noted by the Applicant in Ex. 139, the conditions of approval supersede any conflicting conclusions of law or findings of fact. Of course, the Council can request that the applicant agree to a condition restricting the distance of schools to within a half-mile of MPDs or impose such a requirement through the legally risky imposition of SEPA conditions.

At this time, YarrowBay does not voluntarily agree to inclusion of a new condition with the Development Agreements further restricting the distance of schools from the MPDs.

Bonnie Scott (oral argument and Exhibit C-26)

Wildlife.

In both her oral presentation and Exhibit C-26, Ms. Scott expresses concern that the Development Agreements do not ensure compatibility of the MPDs with wildlife. This concern, however, is not substantiated by the record. To the contrary, on page 50 of the Recommendation, the Examiner concludes:

The COAs do not require the DA to address wildlife impacts beyond adopting fish and wildlife sensitive area boundaries. There is no new information beyond that already addressed above that suggests that additional protection is warranted. If the Council wishes to add additional protective measures to the DA it will have to get the voluntary agreement from YB.

As such, there is no reason or basis to revise the Development Agreements to further address wildlife impacts. At this point in time, YarrowBay is not willing to voluntarily agree to any additional wildlife mitigation.

Bicycles.

In both her oral presentation and Exhibit C-26, Ms. Scott expresses concern regarding the MPDs' impacts on bicyclers. Again, however, this concern is unsubstantiated by the record. To the contrary, on page 88 of his Recommendation, the Hearing Examiner found:

The design of the internal portions of the MPD includes many provisions for non-motorized users. With respect to project improvements outside of the MPD, the design of streets (with or without non-motorized improvements) will depend on the standards imposed by the applicable jurisdiction (namely the City of Black Diamond, the City of Maple Valley, the City of Covington, King County, and WSDOT). The City Council, in the approval of the MPD, has bound the Applicant to comply with the City's codes and standards. The City of Black Diamond has no jurisdiction to impose alternative standards outside its municipal limits.

As such, there is no reason or basis to add further bicycle-related mitigation to the Development Agreements.

Jack Sperry (oral argument and Exhibit C-42)

Funding Agreement.

See response to William Wheeler. In addition, on page 2 of his Exhibit C-42, Mr. Sperry requests that the City Council move to “extract” the MPD Funding Agreement (Exhibit “N”) from the Development Agreements. The Examiner, however, does not request that the MPD Funding Agreement be separated from the Development Agreements. At page 98 of his Recommendation, the Examiner provides: “The DA[s] include a proposed Funding Agreement, Ex. N. to the DAs that assures compliance with the COA ‘no adverse impact’ requirement. The Agreement has not been executed and its terms as proposed are necessary to find that the DA has adequately implemented fiscal requirements, in particular that the increased demand for City staff services is adequately compensated. It is recommended that the DA be revised to require that the proposed funding agreement attached as DA Ex. N, or a substantially similar agreement, be executed prior to the acceptance of any implementing project applications and that no applications already received be processed further until the Ex. N. agreement is executed.”

(Emphasis added.) And the Examiner echoes that statement within his Recommended Implementing Condition “W” at p. 113, that the Funding Agreement “be executed prior to the acceptance of any implementing project applications or prior to the execution of the DA and that no applications already received be processed further until the Ex. N agreement is executed.”

In response to Recommended Implementing Condition “W,” YarrowBay proposed at page 39 of Exhibit C-7 that “the Development Agreements provide for concurrent approval of both the MPD Funding Agreement and the Development Agreement thereby ensuring that no MPD implementing projects are approved prior to execution” of both. Stated most simply,

approval of the Development Agreements is approval of the MPD Funding Agreement. As such, there is no reason or basis to “extract” the MPD Funding Agreements from the Development Agreements.

Sewer & Water Availability Certificates.

In both his oral and written statement (C-42) to the City Council, Mr. Sperry requests that the City Council adopt the Examiner’s Recommended Implementing Conditions “F” and “H”, which provide that the Development Agreements serve in the place of certificates of water and sewer availability. YarrowBay, on pages 9 and 13 of Exhibit C-7, have proposed language that implements these Hearing Examiner conditions. As such, there is no further need or basis to revise Sections 7.2.1 and 7.3.1 of the Development Agreements.

Increased Flooding Risk to Lake Sawyer.

In both his oral and written statements (Exhibit C-42), Mr. Sperry alleges that the MPDs will increase Lake Sawyer’s flooding potential. The record, however, does not support this allegation. On page 43 of his Recommendation, the Examiner finds:

FOF 8 of the MPDs clearly and unequivocally determined that the MPDs would not create any flooding impacts to Lake Sawyer. There was no new information presented in the DA hearings that would lead to a different conclusion, except for some lay person calculations presented by Mr. Sperry. The record does not provide a compelling reason to seek supplemental conditions to address Lake Sawyer flooding.

Mr. Sperry did provide a lengthy analysis of his own calculations and evidence arguing for a higher flooding potential than original described, including repeated assertions that downstream flow, past the weir at the end of the Lake, was constricted and a contributing factor not originally factored into the EISs and previous analyses. Repeated rebuttals by two experts (Ex. 123, 215) supported the original analysis and found Mr. Sperry’s analysis to be incorrect.

In the record before the Hearing Examiner, both YarrowBay's expert Al Fure (Attachment 9 to Exhibit 139 and Attachment 2 to Exhibit 245) and the City's expert Dan Ervin (Exhibit 215) conclusively showed that the MPDs would have no noticeable impact on Lake Sawyer flooding. As such, there is no reason or basis to add further mitigation to the Development Agreements to address flooding. In addition, it is worth noting that Exhibit 215, at pp. 3 -4 and p. 11 explains the legal process by which Lake Sawyer property owners can seek to alter the lake level.

Dan Streiffert (oral argument, Exhibit C-17, and Exhibit C-33)

Environmental Impacts.

In Exhibits C-17 and C-33, Mr. Streiffert alleges that the Development Agreements fail to provide adequate environmental mitigation for MPD project level impacts. This allegation, however, is contrary to the record and the conclusions of the Hearing Examiner. On page 88 of his Recommendation, the Examiner concludes: “Individual project level SEPA review will provide an adequate opportunity for the City to review the implementing project level impacts, including those of construction impacts, and provide appropriate mitigation.” As such, there is no reason or basis to further revise the Development Agreements on the basis of an alleged failure to provide project level environmental mitigation.

Habitat, Wildlife, and Corridor Protection.

See YarrowBay’s response to Gil Bortleson.

Rural Facilities.

See YarrowBay’s response to Les Dawson.

Open Space.

See YarrowBay’s response to Sheila Hoefig.

Overall Grading Plan.

See YarrowBay’s response to Gil Bortleson.

Stormwater Runoff and Retention.

In Exhibits C-17 and C-33, Mr. Streiffert alleges that the Development Agreements do not adequately mitigate stormwater impacts. These allegations, however, are not supported by the record. To the contrary, on page 45 of his Recommendation, the Hearing Examiner concludes:

The EISs for the MPDs addressed issues of stormwater and water quality, both surface water and ground water. Mitigation was developed and described in the EISs and that mitigation was incorporated into the MPD approvals as Conditions of Approval (Ordinance 10-946 and 10-947). Furthermore, the COAs for both MPDs include several measures to protect surface and ground water as well as to retain the natural water cycle as much as is practical (Villages COAs 60-65, 67, 68, 70-71, 73-74, 80, 82, 85 and their equivalents in the Lawson Hills COAs).

No new information was presented to merit supplemental conditions for additional stormwater/water quality mitigation. The COAs for both MPDs include a substantial number of requirements for the protection of water quality, both on the surface and below the ground, as well as general protective measures and adaptive management options in the case that environmental advantages are identified in the future. The 2005 stormwater manual and other applicable regulations will provide for extensive mitigation at project level implementation. As such, there is no compelling reason to seek supplemental DA terms to address these impacts for these projects.

As such, there is no reason or basis for the City Council to impose additional stormwater mitigation requirements within the Development Agreements. The MPDs' stormwater impacts are adequately mitigated.

Air Quality Preservation Plan.

Mr. Streiffert alleges that the City Council should require the Development Agreements provide an Air Quality Preservation Plan. The Hearing Examiner addressed air quality on pages 110-111 of his Recommendation, stating the: "MPD FEIS notes at 4-88 through 89 that YB will be required to comply with the Puget Sound Clean Air Agency's (PSCAA) Regulation I, Section

9.15 requiring reasonable precautions to avoid dust emissions. This environmental protection may include application of water or other dust suppressants during dry weather. The COAs do not require the DAs to address dust impacts. Any further mitigation would require the voluntary consent of YB.” At this time, YarrowBay does not agree to any further air quality mitigation.

Sensitive Areas Ordinance.

On page 4 of Exhibit C-17, Mr. Streiffert states that the “Development Agreements must meet the provisions of the City’s Sensitive Areas Ordinance during buildout to protect fragile wetland and stream watershed complexes.” Section 8.1 of each Development Agreement provides in relevant part: “All Development within The Villages MPD shall be subject to the standards, requirements and processes of the Sensitive Area Ordinance.” Therefore, the Development Agreements already require conformance with the SAO during MPD build-out. As such, no further revisions are required by the City Council.

Corps and DOE Approval of Wetland Boundaries.

See YarrowBay’s response to Kristen Bryant.

Hazardous Trees.

Mr. Streiffert requests that the Development Agreements be modified to limit the removal of hazard trees and increase buffers where numbers of hazardous trees exist. This request, however, is contrary to the findings of the Examiner at page 65 of his Recommendation:

Regarding the removal of hazard trees, V COA 86 and LH COA 87 require that the DA include a process for “selectively” removing hazard trees while retaining the function of a native forest. DA Section 8.4 provides a process and rationale for removal of hazard trees, including the ability to leave removed hazard trees as

snags and deadwood for the purpose of providing habitat. The concerns of the public appear to be addressed . . .

Per the conclusions of the Examiner, the revisions requested by Mr. Streiffert are unnecessary to meet the MPD Conditions of Approval. As such, there is no need or basis to revise the Development Agreements on the basis of hazardous trees.

Forest Preservation.

On page 8 of Exhibit C-33, Mr. Streiffert states that MPD Conditions of Approval Nos. 87 (Villages) and 88 (Lawson Hills) are not adequately addressed in the Development Agreements. However, in response to the Hearing Examiner's Recommendation on page 91, YarrowBay has proposed revisions to Section 13.2 entitled "Forest Practices" of each Development Agreement. *See* pages 44-44 of Exhibit C-7. With these requested revisions, there is no reason or basis to further revise the Development Agreements.

Transportation Concurrency.

See YarrowBay's response to Peter Rimbos.

Traffic Monitoring Plan.

See YarrowBay's response to Peter Rimbos.

Angela Taescher (oral argument)

Eagles.

During her oral presentation to the City Council, Ms. Taescher expressed concern that the MPDs and Development Agreements do not provide adequate protection for eagle roosting and nesting sites. As YarrowBay summarized in Exhibit 245 on page 52, testimony by WDFW staff during SEPA's EIS review process indicated bald eagles do not nest at the MPD sites. Moreover, should a bald eagle nest be established at any time during site preparation or construction under the Development Agreements, the relevant state and federal laws would still be in effect – they are not in any way negated or circumvented by the approval of the MPD or DA. And, on page 47 of his Recommendation, the Hearing Examiner concluded: “The City Council already considered bald eagle protection during MPD and EIS review and there has been no new information provided suggesting bald eagle protection needs to be addressed in the DAs. The Applicant’s assertions here are correct. Bald eagle habitat is protected in the Sensitive Areas Ordinance, BDMC 19.10.310(B)(2). Any impacts to bald eagle habitats would therefore be addressed during project implementation. Finally, LH MPD COA 153 and V MPD COA 149 both provide that impacts to sensitive areas will be addressed at project implementation on a case by case basis.” As such, there is no reason or basis to revise the Development Agreements to address further eagle protection.

Robbin Taylor (oral argument)

Lawson Hills Elementary School Site.

In her oral testimony, Ms. Taylor expressed concerns regarding potential reversion of the Lawson Hills Elementary School Site to medium density residential. Contrary to Ms. Taylor's assertions, however, MPD Condition of Approval No. 132 (Lawson Hills) adopted by the City Council explicitly approved the "description of categories" in Chapter 3 of the Lawson Hills MPD Permit Application. On page 3-9 of the description of categories (contained in Exhibit "L"), the application stated: "The Schools category is an overlay intended for a school site and other accessory uses and facilities. Parcel L5 is proposed as an Elementary School Site. In the event that the parcel is not needed for a school, it shall revert to the MPD-M category." Because reversion of the Lawson Hills Elementary School Site to medium density residential was specifically adopted by the City Council, there is no reason or basis to revise the Lawson Hills Development Agreement.

Signage.

In her oral testimony, Ms. Taylor requests that City enforcement of the MPDs' private sign standards be removed from the Development Agreements. On page 7 of Exhibit C-7, YarrowBay has proposed implementing language for the Examiner's Recommended Implementing Condition "D" that removes the opportunity for the City to enforce private adopted sign standards in Section 5.4.3 of each Development Agreement. As such, Ms. Taylor's request has been addressed by both the Hearing Examiner and YarrowBay and there is no reason or basis to further revise Section 5.4.3 of the Development Agreements.

Cindy Wheeler (oral argument)

High School Fiscal Analysis:

In her oral statement to the City Council, Ms. Wheeler requests that the City Council implement the Examiner's Recommended Implementing Condition "P", which provides: "City staff should clarify, using information in the record, if the high school is proposed for a commercially designated area. If so, the Council should specify in the DA when an updated fiscal analysis will be necessary to ensure the fiscal neutrality of the MPDs." On page 28 of Exhibit C-7, YarrowBay has proposed language to comply with Implementing Condition "P". As such, there is no further reason or basis to further amend the Development Agreements.

Funding Agreement.

See YarrowBay's responses to William Wheeler and Jack Sperry.

William Wheeler (oral argument and Exhibit C-30)

In-Lieu Recreational Facility Fees.

See response to Ms. Sheila Hoefig.

Funding Agreement.

Mr. Wheeler asserts in his oral and written statement (C-30) that the MPD Funding Agreement contained in Exhibit “N” of each Development Agreement is “full of conflicts of interest.” This is contrary to the Examiner’s unbiased legal opinion on page 101 of his Recommendation where he stated in regards to the MPD Funding Agreement that “[a]ny conflict of interest would be minimal, because the Applicant’s control over City personnel is minimal.” As noted by the updated Staff Report (Exhibit C-40), the MPD Funding Agreement “doesn’t set the pay scales of the MDRT, City Council has the authority to set salaries.” Moreover, Section 2 of the MPD Funding Agreement specifically acknowledges that the “City will solely determine the method and manner of hiring and retaining City staff positions . . .” Finally, on page 98 of his Recommendation, the Hearing Examiner also concludes that the MPD Funding Agreements” assures compliance with the COA ‘no adverse impact’ requirement” and “reasonably assure that the projects will not impose a financial burden on BD residents. . .” As such, there is no reason or basis to revise the MPD Funding Agreement on the basis of a conflict of interest.