Before the City of Black Diamond Council

Regarding Calculation of Open Space and Identification Parks in Development Agreements

Sheila Hoefig

I will be referring to both agreements unless otherwise stated.

Although many of the conditions in the Lawson and Villages MPDs are exactly the same, in regards to the Parks and Open Space there are some subtle and some substantial differences for implementation that could create inconsistency when the City must deal with two separate Master Developers. Additionally, the conditions themselves create conflict and in some cases violate the conditions of the MPD.

Hearing Examiner's Summary of Oral Testimony

9.0 Parks, Open Space and Trail Standards

9.1 Overall Open Space Requirement

1. Total Amount of Open Space and the 50% Requirement. Several comments in the public testimony and a number of exhibits expressed concern about the amount of open space, and in particular if the amount of Open Space was consistent with the 50% requirement as indicated in the Black Diamond Comprehensive Plan (5-14 MPD overlay criteria 7), BDMC 18.98.140(F), and the MPD Framework and Design Standards and Guidelines

EXHIBIT 8

(General Principles and Site Planning (B) Using Open Space as a Design Element, p4). See Exhibits 15 (McElroy), 56 (Sierra Club), 117 (Schmidt), 143 (Morgan) and 209 (Nelson), Exhibits 199, 239

(Edelman), verbal testimony Jay McElroy, Dan Streiffert, Pat Pepper, Gil Bortleson, Cindy Wheeler, Sheila Hoefig.

Nelson asserted that DA 2.2 shows the amount of space needed to comply with the 50% requirement, but that the values shown were less than those indicated in FOF 18. Edelman (Exhibit 199) took exception to the applicant's statements about the relationship of previous open space agreements to the YB's obligations.

Applicant Response: YB responded at length (Ex. 139), stating both MPD open space percentages were approved as part of the MPD (DA Exhibit L and LH MPD COA 145). BDMC 18.98.140(A) defines open space to include "environmentally sensitive areas and their buffers." Only portions of the MPD's are subject to the 50% Open Space requirements contained in BDMC 18.98.020. Open space percentages of the MPD areas subject to prior agreements are governed by the specific provisions of those agreements. DA 2.2 describes the amount of Open Space that each MPD must provide based on the City's Open Space and the requirements of prior agreements.
The Applicant cited Exhibit 8, their guide to development. The MPD's are subject to the requirements of prior open space agreements plus the 50% open space requirement for those portions of the MPD's not subject to the prior agreements. Open Space within the MPD perimeters is not the only Open Space that is being protected and preserved as a result of the MPD's. The Villages MPD and Lawson Hills MPD will provide 505 acres and 153.3 acres, respectively, of Open Space within their perimeters. Open Space provided for The Villages exceeds the amount

required by the DA. When taken together, the total amount of Open Space that has been dedicated or will be dedicated associated with the MPD's is 1895.3 acres, or 67% of all MPD-related land being retained as Open Space.

Examiner Response: *V MPD COL 57 and 58 and LH COL 57 and 58 determined that the open space proposed in both MPD's satisfies prior agreements and the 50% requirement of BDMC 18.98.140(F). That issue can no longer be revisited.*

Sheila Hoefig's Comments to City Council

I disagree with the Hearing Examiner on his response. Although Yarrow Bay meets the standards of Open Space in the Villages and also meets the standards in the total amount of Open Space that has been dedicated it does not meet the standard for the Lawson Hills development. The two developments have been filed separately creating certain benefits for the developer, and now they are asking for acceptance to combine the two projects(essentially double dipping at the city's expense) in order to meet their open space obligations. Ms. Roger's has even acknowledged in her opening statements to the DA Hearing Examiner that they were short (approximately 9 to 14 acres) on open space. This maybe allowable with the Hearing Examiner but is not in the best interest of our city, our wild life habitat, and the people living in the developments at a later date.

Yarrow Bay's Summary of Oral Testimony

Comments:

Sheila Hoefig (July 16, 2011): In Sheila Hoefig's testimony on July 16th, Ms.

Hoefig expressed concerns that Section 4.4.6 of The Villages Development Agreement could be used to reduce the total amount of open space provided by the Master Developer in the MPDs.

Yarrow Bay Response:

While Section 4.4.6 of The Villages Development Agreement allows amendments to the open space areas shown on the MPD Site Plan (Exhibit "A"), such amendments cannot reduce the total amount of open space provided by the Master Developer. Collectively, Section 4.2 and Section 4.4 prohibit the Master Developer from reducing the total amount of open space provided as a requirement of either MPD. If, pursuant to Section 4.4.6 (The Villages) or Section 4.4.4 (Lawson Hills), the Master Developer reduces the amount of open space provided in one area of the MPD Site Plan (Exhibit "A"), it will have to increase the amount of open space it provides in another area of the MPD Site Plan. There is no need or basis to revise these sections of the Development Agreements.

Sheila Hoefig's Response to YB:

The Yarrow Bay response only responds to one portion of my concerns. The primary issue is not whether the off-site replacement reduces the total open space requirement; the request is for the Development Agreement to clarify what happens to the proposed on-site open space in each phase when it is replaced off-site i.e. can it become developed space; and what type of limitations to reductions in onsite open space per each phase is in place. An on-going compliance matrix to track this would be prudent and should be part of the Development Agreement. Allowing the project to fully build out and only accounting for total open space in

the last phase is dangerous and would allow the MPD to be fully built before compliance is an issue. Compliance should be with each phase.

Sheila Hoefig's Comments to City Council

This has not been addressed by the Hearing Examiner. I assume that this is due to the lack of time created with the denial of his request for a time extention. This is a very important issue and I hope that City Council will be diligent in covering this matter for the protection on the city and the new residents of Yarrow Bay.

Sheila Hoefig's written Testimony

Lawson Hill's MPD Ordinance condition 94 requires:

> **The details regarding the timing of construction and optional off-site construction or payment of fee in lieu of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be specified in the Development Agreement.**

The City Staff Report compliance matrix shows this requirement being satisfied by Section 9.5.5 of the Development Agreement. Section 9.5.5 purports to include the information required by Condition 94 in Table 9-5. However, Table 9-5 does not include any information on off-site construction. It may be the intent of the developer that every facility designated for

optional payment of fee in lieu of construction be constructed off-site. If that is the case then every facility in the table is intended to be constructed off-site and the agreement should so state. The following proposed changes are requested for the Development Agreement:

- **The Development Agreement shall define how faraway off-site placement is; and it shall be consistent with walkable parks as defined in the City's Parks Plan LOS.**

- **The Development Agreement shall define a maximum percentage of offsite placements consistent with LOS guidelines and/or smart growth standards to ensure that the MPDs are adequately served.**

Hearing Examiner's Summary of Oral Testimony

3. Off-Site Facilities. Several commentators expressed concerns that Sections 9.5 would allow the Developer to construct too many recreation facilities off-site. See Exhibit 60 (Dawson), Exhibits 40, 138 (Derdowski), Exhibit 143 (Morgan). Concern was that off-site location of facilities would negate the intent of providing recreation facilities within the Master Planned Development and would increase off-site vehicle trips. Exhibit 73 (Hoefig) added an additional concern that off-site facilities could be located at faraway sites, further undercutting MPD objectives

Applicant Response: YB responded V MPD COA 91-93 and LH MPD COA 93-95 specifically contemplate off-site recreational facilities. Per DA 9.5.2 and 9.5.3, the City retains sole discretion if facilities may be constructed off-site and if fees in-lieu will be accepted.

V MPD COA 94 and LHMPD COA 92 do not require a definition of either location or percentage (limits) to off-site placements. However, these concerns are addressed at DA 9.5.1through 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.

Examiner Response: *The Examiner concurs in the YB responses as summarized above. V MPDCOA89 requires the DA's to provide details on what parks may be constructed off-site. The Council is free to require the addition of further restrictions on distance and percentage to the DA, although since the COA's contemplate off-site facilities they cannot be completely prohibited.*

Sheila Hoefig's Comments to City Council

The Hearing Examiner agrees with my request to maintain the concept of walkable parks within the developments which is what Yarrow Bay has promised this community. As the DA is written currently, Yarrow Bay can walk away from this commitment with the city staff's approval. It would be prudent of the Council to require additional restriction on the distance of the off-site facilities and the percentage of offsite placements sites consistent with LOS guidelines and /or smart growth standards to ensure that the MPD's are adequately served.

Sheila Hoefig's written Testimony

Section 9.2 of the Development Agreements state that all parks, trails, shall be constructed **or** bonded (clarification is needed, is the intent to have these constructed **and** bonded under a 2-yr maintenance bond; or is the intent to have them constructed **or** a bond issued in lieu of construction) with each phase and prior to occupancy;

- However Condition 96 of the Villages only requires trails be constructed or bonded and Lawson Condition 96 only requires Parks to be constructed or bonded prior to occupancy. Furthermore, neither Development Agreement defines when the parks, facilities, or trails will be built if the Developer elects to make a lump-sum payment to the City; thus there is the ability for the parks, facilities, and trails to remain un-built for years if the City doesn't get around to building them with the payments received.

  - **The Development Agreement should add language that requires an implementing development plan from the City in regards to all lump-sum payments received from developers in lieu of required park, trail or facility.**

Hearing Examiner's Summary of Oral Testimony

4. In-Lieu Payments. Several exhibits expressed concerns over the lump sum or fee-in-lieu option for construction of off-site recreation facilities. See Exhibit 10 (Taylor), Exhibit 40(Derdowski), Exhibit 60 (Dawson), Exhibit 73 (Hoefig), Exhibit 108 (Wheeler), Exhibit 113 (Bortleson), Exhibit143 (Morgan). Derdowski felt that the fee-in-lieu procedure would pre-empt legislative authority. Dawson, Bortleson, and Morgan all expressed concerns that there appeared to be no limits to the use of fee-in-lieu payments. Wheeler objects to the in-lieu decision being made by the "Designated Official" rather than through the City Council.

Applicant Response: YB responded that The Villages Conditions ofApproval91-93 and Lawson Hills Conditions 93-95, in addition to contemplating off-site recreational facilities, require the City and the Developer to re-evaluate fee in-lieu values for park facilities as part of the Development Agreements. As noted above, the City retains sole discretion to determine if recreational facilities may be constructed off-site and if fee in-lieu payments will be accepted.

The Villages Condition ofApproval94 and Lawson Hills Condition 92 provide that "details regarding the timing and construction and optional off-site construction or payment of fee in-lieu of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be specified in the Development Agreement." Neither the conditions language nor the BDMC require a public hearing prior to the City accepting a lump sum payment for any of the facilities listed in Table 9-5. Subsection 9.5.3 provides the sufficient details for in-lieu payments required

By these two conditions. The conditions do not require that the Development Agreements establish lump-sum limits; this discretion is also left to the City.

Examiner Response: *The DA provisions provide enough standards to legally delegate decisions about in-lieu payments to City staff. If the Council chooses, it is free to require that the DA provide*

that the Council make the final decision and also that a public hearing will be held prior to making the decision

Sheila Hoefig's Comments to City Council

I agree with the Hearing Examiner that the City Council has an option and should require that the DA provide Council with a public hearing and the final decision on in-lieu payments. I strongly suggest that the language below be added to the DA to insure that the city receives the parks. I also suggest that language be added to include an implementation development plan of all lump-sum payments. The sole decision must not be given to city staff alone.

Sheila Hoefig's written Testimony

Lawson Hills MPD Ordinance condition 92 requires:

The Development Agreement shall include provisions to define which parks and trails facilities will be public and which shall be private. The Agreement shall also include language to guarantee public access to privately-owned parks and trails facilities.

The City Staff Report does not show compliance with this requirement. The Development Agreement has the following statement in Section 9.9.3:

> Pursuant to Condition of Approval No. 92 of the MPD Permit Approval, public access is authorized to all Parks and trails unless otherwise determined by the Designated Official.

There is no guarantee of public access. In fact, contrary to the MPD condition, this would give the Designated Official the power to deny public access.

Sheila Hoefig's Written Testimony

2. Public Access. Exhibits 73 (Hoefig) and 75 (Edelman) questioned the provision of required public access to recreational facilities. Mr. Edelman also alleged that Section 9.9.3 of the Development Agreements improperly delegates authority to city staff, or "Designated Official." Exhibit 73 (Hoefig) requested several new conditions related to the current topic:

a. **"That the developer shall not be given open space credit for Lake Sawyer Regional Park now or in the event of any off-site improvements under the Development Agreement."**

b. **The Development Agreement shall explicitly state what happens to the property that was designated to be a park/recreation facility if off-site planning is used. Is it left natural, or is it landscaped."**

c. **If the City accepts money from the developer in lieu of parks the money should be held in a dedicated capital Parks Fund for each development; the money should first be used within the development from which it was received to insure that our city receives those parks."**

d. "The Development Agreement shall have [i] A constraint map that shows all parks, trails, and recreational facilities that the applicant has current existing site control of and that is properly zoned; [ii] An initial open space and parks compliance matrix (excel spreadsheet of similar data sheet) that reflects all the MPD's required open space, parks, trials and recreational facilities…"

Applicant Response: YB responded (Ex. 209) that DA 9.9.3 stated 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. YB responded requested conditions (ii), (iii), and (iv) reflect requirements not contained within the MPD conditions of approval. Requested condition (i) is discussed in Credit for Lake Sawyer Park.

Examiner Response: *DA 9.9.3 authorizes public access to public parks unless otherwise determined by the Designated Official as precisely required by COA 94. The Council cannot alter this requirement without amending the MPD COA. As to proposed condition (i), as previously discussed, YB is not entitled to any open space credit for adding recreational facilities to Lake Sawyer Regional Park. No clarification is necessary in the DA on this issue. LH COA 94___ and V COA 89 requires the DA to provide details of the parks and recreational facilities that will serve the MPD's, so the Council can require condition (ii) to be added to the DA if it chooses. The COA's do not require the information requested in conditions (iii) and (iv) so this can only be added to the DA with the consent of YB.*

Sheila Hoefig's Comments to City Council

My recommendation is that the City Council look at LH COA 94 and COA 89 condition (iii) and (iv) and request supplemental conditions. Yarrow Bay would have to agree since the MPD COA's are in place but it comes down to the fact that this is a value decision that is worth working on.

Development Agreement Section 9.5.3

In the event the Master Developer makes a lump sum payment, the City shall use the funds for the sole purpose of constructing the Recreational Facility. If the Master Developer provides off site Recreational Facilities and/or Parks, it shall receive credit equivalent to the credit it would have received if that Recreational Facility and/or Park had been provided on the Project Site." (Condition No. 91 and No. 93, Villages and Lawson)

Although I have many, many concerns about the where, when and how of the various parks, trails and recreational facilities, my biggest concerns lies with the fact that the MPD Conditions and Development Agreements appear to have opened the back door for the take-over of the Lake Sawyer Regional Park (LSRP). The LSRP is currently undeveloped and used *passively {excluding the Lake Sawyer Boat Launch, which is active}* and is already owned by the taxpayers. Although the City has considered allowing *active* use to serve those from the MPD sites, there has been no public hearing to date regarding changing how the park can be used and the hundreds of signatures in the petition to remove the reference of the LSRP as a possible Joint-Use-Lands in the Tri-party Agreement is a clear indication of the opposition that the City will face in trying to reclassify this jewel within our community.

The Development Agreement also contemplates giving the Developer open space credit for offsite replacement. If placement is at the LSRP, which is publically owned it would in essence allow the developer substitute publicly funded and owned land, for a portion of their private property purchase obligation of open space. If this is latter designated Joint-Use-Lands for the High School the developer would receive both open space and school mitigation if replacement. This is well beyond double dipping. Again, there is no large scale open space that isn't already designated sensitive, wetlands, private forest, etc. currently available to place many of the items identified in tab 9.5 other than the MPD sites themselves or the LSRP.

As stated above the Lake Sawyer Regional Park is currently being used as a passive park. Passive parks posses picnic tables, trails, fishing and scenic views with a tranquil vibe. Lake Sawyer is abutted by additional critical habitat of Frog Lake, is fed by Ravensdale Creek and Rock Creek and its water quality and habitat need protection and vigilance. An active park is considered organized sports that need open fields, lights and possible sound systems, large public gatherings. The development of an active park will require those who have no parks to travel shifting the burden of the development on to the park. The EIS did not contemplate the transformation of the Regional Park into a heavily used active park with dogs, cars, and human activities of this scale similar to a Lake Meriden or Lake Sammamish. Nor did the EIS consider the impacts on the water quality, wildlife and habitat of converting the Lake Sawyer Regional Park into an active park.

The City cannot modify its present or future parks designations by simply stating or implying in the Development Agreement that City's designated official has the authority to unilaterally make this decision.

The designation for the Lake Sawyer Regional Park (LSRP) (and other non-public spaces outside the MPDs) to a public use allowing an active park requires a change to the Black Diamond Comprehensive Plan, and in-fact the City has recently raised the idea of converting the LSRP to a public use[1] and immediately received vocal opposition. The Hearing Examiner has already seen the petition to keep any joint-use-agreements out of the LSRP during FEIS/MPD hearings.[2] In addition to the Comprehensive Plan amendment, the change of LSRP and other non-MPD sites to public will require review by the Black Diamond Planning Commission, a public hearing and the *future* approval by the Black Diamond City Council.

I am concerned that if the Development Agreement is approved as written, both the City and Developer will argue that they must follow the Development Agreement standards exactly and approval of the Development Agreement in essence was the public process. I do not want any inference that the Development Agreement now allows for the siting of off-site parks and facilities within the LSRP or any other non-MPD designated space that isn't currently approved for the MPD use identified in table 9.5.

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[1] Planning Commission Package July 19, 2011
http://www.ci.blackdiamond.wa.us/Depts/CommDev/planning/Planning%20Commission/PC%20Packet%20Material/PCPacket071911.pdf

[2] See Exhibit C #WH-9 Wheeler/Proctor of the MPD Exhibits

Accordingly, I request that the Hearing Examiner recommend to the City Council that the Development Agreement be revised to clarify and state under the appropriate section of 9.0

- ***That the developer shall not be given open space credit for Lake Sawyer Regional Park now or in the event of any off-site improvements under the Development Agreement.***
    - (It was bought with King County tax payer money-turned over to the city from King County before the MPD's ever existed. The regional park development is the cities responsibility and not for Yarrow Bay to capitalize off while leaving their own development with a lack of facilities and open spaces.)

- ***The Development Agreement shall explicitly state what happens to the property that was designated to be a park/recreation facility if off-site planning is used. Is it left natural, or is it landscaped.***
    - (It should not be allowed to become commercial and/or developable space.)

- ***If the city accepts money from the developer in lieu of parks the money should be held in a dedicated capital Parks Fund for each development; the money should be first used within the development from which it was received to insure that our city receives those parks.***
    - Parks must not be in gated community to insure accessibility by the whole community.

Another thing that can affect the open space is if there is a boundary error and the Developer is the only one holding the detailed map data as it would allow them to count open space that does not exist. I am a Survey Engineer by trade, educated by the only University on this side of the Mississippi that offers this education. I can assure you that boundary errors exist and that in the survey world the existing ground data is held and the only one map data benefits are the developer. If the property is short on acreage the open space will be short but this provision will allow the use of the mapping numbers and if the acreage is larger than the developer can do as he chooses with the excess.

- **The Development Agreement shall have;**
    - **A constraint map that shows all parks, trails, and recreational facilities that they Applicant has current existing site control of and that is properly zoned;**
    - **An initial open space and parks compliance matrix (excel spreadsheet or similar data sheet) that reflects all the MPDs required open space, parks, trails and recreational facilities;**
        - **A requirement that the open space and parks data sheet is updated with each phase;**
        - **That any shortage is accounted for and required to be made up for within the next implementing project**

PG 38: Comments:

Sheila Hoefig (July 16, 2011): In her oral testimony on July 16a', Ms. Hoefig expressed concern that the Master Developer would receive open space credit for Lake Sawyer Park.

Yarrow Bay Response:

Section 9.5.2 of the Development Agreements does not authorize the Master Developer to receive open space credit *for* Lake Sawyer Park. With the City's permission, the Master Developer may construct Recreational Facilities in Lake Sawyer Park that would count towards the Master Developer's Recreational Facilities requirements as set forth in Table 9-5 of both Development Agreements. There is no need or basis to revise this section of the Development Agreements. SECTION 9.6 (The Villages and Lawson Hills)

Sheila Hoefig Response to Yarrow Bay:

Yarrow Bay's comment is non-responsive. Section 9.5.2 of the Development Agreement <u>does not explicitly exclude</u> the Master Developer from receiving open space credit from the publically owned open space within the Lake Sawyer Regional Park. The request was to add clarifying language excluding private developers from obtaining <u>open space credit</u> in the future for any recreational facilities placed in the Lake Sawyer Park or any other publically owned open space.

9.5 Recreation and Useable Open Space Standards

1. Open Space Credit for Lake Sawyer Park. In oral testimony and Exhibit 73, Sheila Hoefig expressed concern that the provisions of DA 9.5.3, "appear to have opened the back door for the take-over of the Lake Sawyer Regional Park (LSRP)." The LSRP is currently undeveloped and, with the exception of the boat launch, used passively. Ms. Hoefig further stated the Development Agreement contemplates giving the Developer Open Space credit for offsite replacement and that if

such placement was at the LSRP, it would allow publicly owned land to meet the developer's obligation to purchase open space. Use of LSRP as a heavily used active park was not anticipated in the FEIS. Ms. Hoefig requested the Development Agreement be modified to prohibit use of LSRP for Open Space credit.

Applicant Response: In Ex. 209, YB responded that DA 9.5.2 does not authorize the Developer to receive Open Space credit for Lake Sawyer Park. The Master Developer may, with the consent of the City, construct Recreational Facilities in Lake Sawyer Park that would count toward the Recreational Facilities requirements as set forth in Table 9.5 of both Development Agreements.

Examiner Response: *The Hearing Examiner agrees DA 9.5.2 does 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. Changes to the LH MPD proposal 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. The COAs leave room for the Council to require that the DA exclude LSRP as a receiving site for Recreational Facilities.9*

Sheila Hoefig's Comments to City Council

I request that you absolutely require that the DA exclude LSRP as a receiving site for Recreational Facilities which the Hearing Examiner explains your ability to do so.

If you don't make this request, you have:

-left the LSRP vulnerable to a back-door take over by Yarrow Bay.

-re-introduced the possibilities of Joint-Use Land as seen in the Tri-party agreements

-allowed the LSRP to serve those from the MPD sites rather than providing for them on site

-facilitated the move of reclassifying the LSRP

-allowed all environmental concerns to be determined by one person's sole discretion (city staff SEPA official)

-shut out your citizen's wishes and allowed the move from passive use towards full active use.

-shut your own City Council out of all decision making processes.

This is property that has been owned by the taxpayers long prior to Yarrow Bay's arrival.

The DA states that the construction of Recreational Facilities in Lake Sawyer Park would count toward the Recreational Facilities requirements as set forth in Table 9.5 of both Development Agreements. Yarrow Bay should not be allowed to place Recreational Facilities that accommodates the Developments on publically owned property.

In conclusion I request that Development Agreement be amended as stated above or be found inadequate and remanded back to the City staff.

PUBLIC SERVICES – PARKS AND RECREATION

88. If a school site is developed and the proponent proposes to build a joint-use facility, the proponent shall provide one or more youth/adult baseball/softball fields, soccer fields, tennis courts, or basketball courts in conjunction with the school site(s) or at an alternative location. [FEIS Mitigation Measure]

89. The details of the park and recreation facilities to serve the new demand from the MPD shall be set in the required Development Agreement, including whether such facilities may be constructed on- or off-site. [FEIS Mitigation Measure]

90. The cost of such facilities, including a proportionate share of facilities not fully warranted by the MPD build out, could be provided by payment of fees. [FEIS Mitigation Measure]

91. As part of the Development Agreement, the fee-in-lieu values for park facilities shall be re-evaluated to ensure appropriate levels of funding and to include a mechanism to account for inflationary rises in construction costs and potentially, the costs of maintaining these types of facilities in the future. The City shall maintain discretion concerning when and if a lump sum payment will be accepted in lieu of constructing off-site recreational facilities

92. The details regarding the timing of construction and optional off-site construction or payment of fee in lieu of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be specified in the Development Agreement.

93. Dependant on the availability of land, the adequacy of funds to construct City-approved recreational facilities and an ability to maintain these facilities, the City shall retain the sole discretion to determine when and if the applicant will be allowed to provide a lump sum payment in lieu of constructing off-site recreational facilities. This condition may be further defined within the Development Agreement.

94. The Development Agreement shall include language authorizing public access to parks and trails facilities.

95. As proposed in the Master Plan Application, on-site trails (i.e. on the site of the implementing project) shall be constructed or bonded prior to occupancy, final site plan or final plat approval, whichever occurs first. Off-site trail connections shall meet the same standard to the extent authorized by law.

96. Parks within each phase of development shall be constructed or bonded prior to occupancy, final site plan or final plat approval of any portion of the phase, whichever occurs first, to the extent necessary to meet park level of service standards for the implementing project.

97. The Development Agreement shall include a tabular list of the characteristics of passive open space and active open space and permitted activities thereon so that future land use applications can accurately track the type and character of open space that is provided.

Lawson:

PUBLIC SERVICES – PARKS AND RECREATION

91. If the Lawson Hills school site is developed and the proponent proposes to build a joint-use facility, the proponent shall provide one or more youth/adult baseball/softball fields, soccer fields, tennis courts, or basketball courts in conjunction with the school site(s) or at an alternative location. [FEIS Mitigation Measure]

92. The Development Agreement shall include provisions to define which parks and trails facilities will be public and which shall be private. The Agreement shall also include language to guarantee public access to privately-owned parks and trails facilities.

93. As part of the Development Agreement, the fee-in-lieu values for park facilities shall be re-evaluated to ensure appropriate levels of funding and to include a mechanism to account for inflationary rises in construction costs and potentially, the costs of maintaining these types of facilities in the future. The City shall maintain discretion concerning when and if a lump sum payment will be accepted in lieu of constructing off-site recreational facilities

94. The details regarding the timing of construction and optional off-site construction or payment of fee in lieu of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be specified in the Development Agreement.

95. Dependant on the availability of land, the adequacy of funds to construct City-approved recreational facilities and an ability to maintain these facilities, the City shall retain the sole discretion to determine when and if the applicant will be allowed to provide a lump sum payment in lieu of constructing off-site recreational facilities. This condition may be further defined within the Development Agreement.

96. As proposed in the Master Plan Application, on-site trails (i.e. on the site of the implementing project) shall be constructed or bonded prior to occupancy, final site plan or final plat approval, whichever occurs first. Off-site trail connections shall meet the same standard to the extent authorized by law.

97. Parks within each phase of development shall be constructed or bonded prior to occupancy, final site plan or final plat approval of any portion of the phase, whichever occurs first, to the extent necessary to meet park level of service standards for the implementing project.

98. The Development Agreement shall include a tabular list of the characteristics of passive open space and active open space and permitted activities thereon so that future land use applications can accurately track the type and character of open space that is provided.

Closed Record Hearing Comments Lawson & Villages MPD:

I am disappointed that the HE did not have time to address all the issues that the citizens brought forward as concerns, and that his time was limited by Yarrow Bay's denial of his request for additional time and the City Council's failure to exercise its right to remand back to the HE for additional conclusions of law. This makes a mockery of the City's desire to build the best community and to hear all of its constituents. This process has resulted in a prioritization by the HE of items due to lack of time **which this Council should not construe as acceptance of the items left off his recommendations**. The City and the council owe a debt of gratitude to the citizens without who we would not even have these recommendations. I am upset that the City Council failed to put detailed and tight conditions in the MPDs COAs and will need to seek YB's permission on any thoughtful compliance and/or mitigation.

Two good men, two fine public servants, two tremendous council-members are not before me today to hear my voice and it saddens me; it saddens me that you allowed Yarrow Bay to manipulate the process. I pray that you will use the powers vested in you to finally serve this community and this region on not for you own personal benefit and need to be right or in control.

In regards to noise please add these hearing examiner recommendations in Section 13.7:

1) *In order to avoid abuses, the Council may wish to clarify that the 6 months is over any two year term or something similar.*
2) *Require YB to add compliance to city/state noise standards to the hotline and to the review of the noise committee.*
3) *Clarify within the DA to provide that the noise study required by V COA 44 will be completed prior to the commencement of construction.*

Noise committee:

1) *It is recommended that the Council seek agreement from YB to revise the DA to allow the community to write their own minority reports to accompany the annual report when necessary, so that opinions can be shared without restriction.*
2) *Require noise committee to begin meeting proposals before construction commenced.*

Work Hours:

Examiner Response: *The Development Agreement is required by the V COA 43 to identify work hours. Consequently, the Council* ***can*** *require the DA to contain work hours reasonably necessary to address the unique long term construction activities of the MPDs.*

As I stated in my written testimony (Ex. 3-13i) the City has the legal ability to authorize a noise variance under BDMC 8.12.030 if they chose to do so; It is unreasonable to allow noise levels that exceed OSHA health standards and intrude up our rural existence when it is NOT common in other

EXHIBIT 9

jurisdictions to have Saturday construction let alone all day on Sunday as well. I am certainly open to discuss emergency construction hours related to extreme weather conditions but generally speaking M-F 7-6 at extreme noise levels is more than sufficient for the applicant. Their rights end where my property line starts and I am already losing a healthy environment and will be confined to my home to avoid these unhealthy noise conditions. **This is a value decision on how the City wants to treat their existing citizens.**

8.12.030 - Variance.

A.

A variance from the regulations in this chapter may be granted by the city council, after conducting a public hearing as set forth herein. A variance may only be granted if it is necessary to further a public purpose, no reasonable alternatives are available, and it is for the shortest time duration possible in order to accomplish the public purpose.

Property Boundaries: There were four comments regarding property boundaries 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.***

The BDMC requires a transition from one zone to the next to allow for an integrated planned community that visually looks connected. BDMC 18.98.140 (b) specifically recommends buffers and open space along perimeter to minimize the visual impact of development and the adverse impact on abutments to wildlife areas. The BDMC and the MPD do not allow **any** variances to allow dissimilar zoning of more than one zoning type.

What this means is that City Council chose to violate their own BDMC regarding the location of High Density and commercial development next to SF homes. The City Council chose to bestow special rights on the private developer that I do not have as property owner; the City Council failed to protect me and my rights by failing to enforce their own codes upon the MPD approvals and further harmed my rights by not adequately mitigating with larger natural buffers when they consciously violated the BDMC for the benefit of Yarrow Bay.

Vicki Harp
32508 236th Ave SE
POB 97
Black Diamond, WA 98010

October 4, 2011

The City Council of Black Diamond

The 1990 Growth Management Act gives cities the tools to restrict development until the infrastructure, roads, water, etc exist to support it. The concept is called 'concurrency'. In the case of the Issaquah Highlands this concurrency led to the potential for traffic relief that the state otherwise could not afford on its own. Port Blakely (developer of Issaquah Highlands) could only build a certain number of homes with each phase of transportation improvements. In other words the roads came first, proactive, rather than after 800 plus homes were built, reactive.

Major developments such as the MPDs are required to meet Transportation Concurrency so that the road system can handle the new levels of traffic as required in the City's Comprehensive Plan and the State's RCW36.7-A.070.

For any mitigation plan to succeed, at a minimum, Transportation Concurrency must be met. However, the Development Agreements fail to provide any details on how concurrency analyses will be accomplished to ensure "concurrency at full build-out" (as referenced in MPD Approval Ordinances 10-946 & 10-947, Exhibit B—Conclusions of Law, paragraph 30). The Development Agreements also fail to describe and explain how any adjustments such as funding, timing, moratoriums will be made should a particular improvement fail the Concurrency test .This is required by the Ordinances' Condition 17 f. The Development Agreements don't discuss how Transportation Concurrency will be assessed.

The Development Agreements lack any details on how "necessary facilities, infrastructure and public services" will be provided in a timely manner (reference in MPD Approval Ordinances 10-946- & 10-947, Exhibit B—Conclusions of Law, paragraph 23A). This is paramount in any Traffic Mitigation Finance Plan.

The Development Agreements contain no plan to develop and conduct critical and timely Cost, Benefit, and Risk Analyses. Without such analyses and their results there is no way to anticipate critical funding needs and timing, thus leaving the city unprotected when the Master developer seeks 'cost recovery'. This is required by MPD Approval Ordinances 10-946 & 10-947, Exhibit C—Conditions of Approval, Condition 34 a.

The Development Agreements lack any details on the following items necessary to a successful Traffic Mitigation Plan: 1) A schedule to plan, design, finance, build, maintain and operate the vast Transportation infrastructure required to accommodate an additional 10,000+ vehicles daily and 2) enforcement mechanisms to be use to meet Transportation Concurrency.

EXHIBIT 10

The Hearing Examiner wrote as Condition 16 in your MPD Application Recommendation, Section VI-Recommendation: "The resulting project impacts and mitigations must be integrated into the development agreement or processed as a major amendment to the MPD prior to City approval of any implementing projects."

The issues that Yarrow Bay does not want the council to address are now called the 'Supplementary Conditions'. The Hearing Examiner did not say 'oh just ignore these' he instead charged the council to carefully examine these supplementary conditions. These are issues that the Hearing Examiner was not given enough time to thoroughly address. Many of the 'Supplementary Conditions' proposed by Peter Rimbos deal directly with the critical issues of transportation that will insure that Black Diamonds transportation concurrency will be met.

The Development Agreements are deficient in the critical area of Traffic Mitigation. We, the citizens of Black Diamond still do not know what mitigations will work, how much they will cost, who ultimately will pay and when they will be in place.

The Hearing Examiner is the most knowledgeable person involved in these proceedings. The Hearing Examiner is probably the only impartial person involved in these hearings. His recommendations of the '24 Implementing Conditions' should be given the utmost attention and consideration by our city council.

Ulla Kemman
29863 232nd Ave SE
Black Diamond, WA 98010

EXHIBIT 11

CITY OF BLACK DIAMOND

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COMMUNITY DEVELOP.

OCT 0 4 2011

RECEIVED

NOTICE OF CLOSED RECORD HEARING
PROPOSED DEVELOPMENT AGREEMENT FOR THE "LAWSON HILLS" MASTER PLANNED DEVELOPMENT

CITY OF BLACK DIAMOND CITY COUNCIL

CLOSED RECORD HEARING: **SEPTEMBER 21, 2011 at 6:30 PM**
BLACK DIAMOND ELEMENTARY SCHOOL GYMNASIUM
25314 BAKER ST, BLACK DIAMOND WASHINGTON

ISSUE UNDER CONSIDERATION: City of Black Diamond Hearing Examiner's recommendation regarding a proposed Development Agreement for the approved Lawson Hills Master Planned Development (MPD) permit, which authorized a development consisting of a mix of residential, retail, commercial, office, industrial, educational, recreational, and open space with 1,250 dwelling units and 390,000 square feet of retail, industrial and offices on 371 acres.

APPLICATION NUMBERS: PLN10-0021/PLN11-0014

PROPONENT: BD Lawson Partners, LP, 10220 NE Points Drive Suite 310, Kirkland, WA 98033

PROPERTY LOCATION: The Lawson Hills project consists of two su and the North Triangle. The "Main Property" is located between the SR 169 to the west and extends to the eastern city limits, with the majority of Lawson St. The "North Triangle" is located on the west side of SR 169, ap the SR 169/Roberts Drive intersection. Specifically in the SW ¼ of Sect Range 6 East, SE 3-21-6, SE 11-21-6, NE 14-21-6, NW 13-21-6, SW 12-21-6, NE 13-2 and SE 13-21-6 Willamette Meridian, King County, Washington.

Mrs. Lola Karr
22813 SE 288th St
Black Diamond WA 98010

STAFF CONTACT:
Steve Pilcher, Community Dev. Director
spilcher@ci.blackdiamond.wa.us
360-886-2560

Participation in the closed record hearing is limited to parties of record who either testified and/or submitted written comments to the Hearing Examiner.

1. The "Mistress of Ceremonies" was very rude.
2. The microphones were improperly used by those on the "Panel" feed back was irritating to the ears.
3. I feel it was an absolute waste of my time as a citizen of Black Diamond for more than 18 years.

Sincerely, Mrs. Lola Karr

Cindy Proctor 2950 Sun Mountain Dr, Enumclaw, WA 98022

I am collectively speaking to both the Villages Development Agreement and the Lawson Hills Development Agreement unless expressly written.

Edmund Burke said~ "All that is necessary for the triumph of injustice is that good men to nothing"

Like many citizens here tonight I am incredibly saddened by the illegal proceedings the City has undertaken to bestow special benefits for one landowner beyond what they are entitled to; I am saddened that the City Attorney with this administrations permission, has endeavored to persecute the public; the individuals or groups bound together collectively asking that their voice to be heard on how we want this community governed; Ms. Hanson once stated that the City Stayed the GMHB compliance period because, "Yarrow Bay had the right to appeal and the City had to respect that right"…yet when we the citizens exercise their right to appeal we are treated with hostility, and a campaign to discredit the citizens appeal was painted as a few disgruntled naysayers…why won't the City grant the same respect to the public.

To illustrate the most egregious disrespect to this community and to the Citizens one only has to look to the first week of hearings. Two good men, who cared for their community, who took the time to understand the laws and the complex agreement, and embodied integrity, were forced out of this process; if that wasn't enough you double-slapped the community by setting the timeline based on your own personal needs, vacations, busy time, with the statement that the people have to understand that you have lives and you have already planned things; let me assure you, **the people do not understand**; we do not understand why anyone in the City and/or Council would think it was reasonable to schedule a vacation at any point this year, let alone last quarter. The people in this community have spent 100s if not 1000s of hours researching, writing, attending hearings, fundraising, educating, advocating; all the while in their lives, friends and family have died, suffered major health emergencies, battled serious medical conditions such as community stalwart Bob Edelman; and the joy of embracing babies and weddings, and the personal and professional achievements that happen in the course of life; but they still were committed, they still turned out, they still put in their time for their community…and the three of you made a mockery of the process, and showed your contempt of our voices by saying you needed to wrap this up October 31, 2011 so you could get about your business. **Your business is this City and this Community and if you cannot commit enough time to give 100% to this job, to this community, then there is the door.**

Now I will speak specifically to the DA. It is the cold hard reality that the City Council in issuing the MPD Conditions of Approval (COA) repeatedly contracted away the City's rights and control and bestowed them onto Yarrow Bay. Furthermore, Yarrow Bay argued profusely

EXHIBIT 12

throughout the public hearing that there was nothing that the City Council could do because they approved the MPDs with these COAs.

In order to accept Yarrow Bay's logic and defense of the various deficiencies of the Development Agreement one must decide whether one is going to embrace the idea that the Black Diamond City Council's intent was to knowingly, and capriciously violate numerous sections of the BDMC and Comprehensive Plan; that you knowingly and willfully intended to use the Development Agreement to supersede prior third party agreements; that you knowingly intended to waive or supersede other jurisdictions' codes, laws and/or design standards; that you knowingly and willfully intended to 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; that you knowingly and willfully intended to violate the rights of all interested parties by circumventing various public hearings on standalone agreements such as the Tri-Party agreement and the Funding Agreement; that you knowingly and willfully approved illegal land-uses; that you knowingly and willfully violated the public participation process as determined by the Growth Management Hearing Board.

That is absurd. No matter what I feel about this process, in my heart through common sense, I cannot believe that this entire council knowingly intended to approve these violations. The City Council relied heavily on City Staff and the City Attorney to guide them in the MPD decision making process; on the wording of the COAs, and eventually on the presentation of a thorough, complete, and legal Development Agreement. It is clear that City Council, rightly or wrongly, deferred many decisions, clarifications, and completion of implementing documents to the Development Agreement. **The City staff and Attorney had an obligation to protect the welfare of the City and public; they had an obligation and duty to ensure consistency with BDMC and Comprehensive Plan and prevent conflicts that may result in legal action against the City and her taxpayers.** Yarrow Bay cannot uniformly claim that there is absolutely nothing that can be done because the City Council Approved the MPD and corresponding conditions.

The Hearing Examiner is explicit about this as well and in reading his decision; he tells you that you could find other alternatives that correct the mistakes, add clarifications or additional supplemental conditions or invalidate the MPDs. You better bet that Yarrow Bay knows this. Yarrow Bay knows the power that you have, that is why they came out of the gate agreeing to meet 100% of the recommendations of the Hearing Examiner, but only if the City Council did not impose any new supplemental conditions. This is low-hanging fruit. The bar was set so low by the Councils MPD COAs that they could meet many of these conditions, conditions I might add the Hearing Examiner was limited to addressing and conditions that Yarrow Bay is interpreting differently than the intent of the Hearing Examiner and the people, "**Caveat Emptor" (Let the buyer beware.)**

This is eerily similar to what YB did last year when it came in with completely rewritten Conditions and then the City Council used them to gut the HE's MPD Recommended Conditions. In fact the City Attorney even altered final council conditions *after* approval by council.

In page of the Hearing Examiner Development Agreement Recommendations he states:

> "The Council has wide discretion as to what it can include in the development agreements and the public has corresponding wide latitude in suggesting what they'd like to see in the development agreements."

It is clear that Yarrow Bay wants to try and vest prior to their appeal being heard regarding the GMHB decision; It is also why Yarrow Bay is strategically placing the following request into their proposal (Ex 7):

YB Proposal:

"...to comply with xxxxx requirements as defined in the City of Black Diamond's Comprehensive Plan (2009)."

To protect the City and this Community, the Council should replace that language with something like this:

"...to comply with xxxxx requirements as defined in the City of Black Diamond's Comprehensive Plan in effect at the time of implementing project approval."

Next:

The Council must use their authority to fix the horrendous school mitigation debacle. No where do I feel more vindicated and angry then the HE decision and response regarding the lack of adequate school mitigation. I have been publically skewered by uninformed members of the public that have not participated in any aspects of these two years of hearings to the point where the HE had to caution that person to be very careful about what they put in writing. I have advocated for my school district my entire life and was dismayed at the exclusion of the public, primarily by the former City Attorney Loren Combs, but certainly perpetuated by this City Administration with the failure to approve school impact fees as requested/presented by the ESD over the course of several years; and the failure to have a public hearing on the Tri-Party Agreement. Here are some bullet points of pages 91-96 of the HE decision please read them all:

- Unfortunately, a "relatively" good agreement may not be sufficient to assure adequate schools;
- 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;

- Normally the City would also have the option of increasing school impact fees if funding become inadequate, but the City contracted away this authority in the tri-party agreement by agreeing to caps on impact fee amounts. It is debatable whether the Council can legally contract away its legislative authority in this fashion, but it is a commitment made by the Council. { Beyond advocating for a separate school district, the Council can always try to have the Applicant agree to contingent funding or to DA terms that prohibit development when schools have exceeded capacity due to MPD development or impose such requirements through the legally risky SEPA process.}
- The Council's approval of the tri-party agreement before commencement of the DA hearings largely precludes any meaningful public comment as to its contents during the DA hearings and the Examiner has no authority to address the situation.

This agreement is unconscionable and it cost the ESD over $304K in legal fees of which none were recovered under this agreement; Councilmember Hanson, I know you struggled with its approval initially, and you asked what else can we do? The HE is clear that you have the authority to fix this agreement; to not do so will speak volumes about what this City and this Council thinks about adequate schools;

1. Invalidate the Tri-Party Agreement; the City needs to take it on the chin and admit that they approved an irrevocable long-term contract with financial implications under the wrong municipal process; this should be a legislative action subject to public hearings; it is invalid.
2. Get an independent legal opinion as whether the City Council can contract away its authority regarding the funding of schools; it will reflect that you cannot and then you must invalidate;
3. Add supplemental COA regarding the School Mitigations
    a. The city shall request the school district provide written status on adequacy of school facilities during MPD development at frequent periodic intervals as specified by the city council.
    b. The city shall request a written confirmation of agreement from the school district prior to making any decisions or statements concerning the adequacy of school facilities.
    c. Create an Adequate Public Facilities Ordinance (APFO) that allows the city shall conditionally approve MPD permits to only allow development to continue when adequate school facilities will be available. If at any time the school district decides provisions for schools have or will become inadequate then all development must stop immediately and be delayed no matter what stage it is until the issue is resolved to the school district's satisfaction.

If I could, I would advocate that mandatory civics classes are taught to all these children, then maybe our children's and grand-children's future will represent a true government ran by the people; with the voice of all the people.

Fiscal and the Funding Agreement Exhibit N: First I would direct to Mr. Bob Edelman's written testimony on the funding agreement. They are superb!

The Funding Agreement is included as Exhibit N to the development agreements. Yet it is written as a stand-alone agreement complete with an execution date, recitals, contract boilerplate clauses and its own signature block. It was obviously structured to be an agreement to be executed about the same time as the development agreements rather than as a part of the Fiscal Analysis in the Development Agreement. Similar to the Tri-Party Agreement it is not governed under the one hearing rule and is subject to legislative action separately in front of City Council, as was the first funding agreement.

On Page 98: The Hearing Examiner concurs with this understanding and states:

- 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.

- HE: It should be noted, however, that the MPD conditions only require that the developer "address" projected shortfalls at build-out and that the funding agreement only requires the City and Applicant to "negotiate" solutions to the fiscal shortfalls. **{CP: what that means is that the Applicant is not required to agree to the City's terms for resolution of funding shortfalls}** This language leaves ample room for the City and Applicant to conclude that there is no reasonable solution that will address on-going shortfalls and that a compromise is acceptable. The developer also has room to argue that it is entitled to an agreement of inadequate fiscal solutions if no adequate solution is reasonably available.

- If the flexibility identified in the preceding paragraph was not the Council's intent **{CP: was this your intent…to give Yarrow Bay all the flexibility and the City none?}** , the Agreement can be clarified by revising the last sentence of Paragraph 4(a) as follows: "The City shall not approve any Phase III implementing development permits until a written agreement between the City and Developer is executed that reasonably assures that any build out fiscal deficits caused by the MPDs are completely mitigated." The City Attorney may conclude that such a condition is not constitutionally supportable. In that case the agreement should make it abundantly clear that a reduction in density or other change in land use shall be one of the options considered in solving any on-going fiscal problems if other options are not reasonably available and that the City shall have no obligation to authorize the MPD to move forward if the Applicant is unwilling to agree to any changes in land use that still allow a reasonable use of its property

- The Funding Agreement (DA Exhibit N) states the total revenue from the MPD are "expected to be sufficient to maintain the Villages MPD's and Lawson Hills MPD's proportionate share of the City's adopted staffing levels of service and capital facility needs" (DA Exhibit N, Recital K). <u>However, nothing in the DAs explicitly requires that the funding of the developer be the minimum necessary to maintain the City's level of service. The failure of the DAs to require these LOS levels to be maintained leaves the very real possibility that the expenses projected in the YB's fiscal analysis will not be sufficient to maintain police and fire LOS.</u>

- In regards to conflicts of interest in from the Funding Agreement the HE recommends that the FA contain a provision <u>prohibiting the Applicant from threatening to withhold funding on the basis of City personnel/decision making issues and that if any such threat is made that the Applicant be required to fund the affected City staff member's position for as long as MPD work necessitates the position as reasonably determined by City staff.</u>

Unfortunately, since the Hearing Examiner was denied sufficient time to review all the documents he was unable to discuss the issues of the Surcharges that the Yarrow Bay has added to the Funding Agreement. I am adamantly opposed to any surcharge mechanism being within the Funding Agreement. First the surcharge as proposed is as a way for Yarrow Bay to **recover expenses through a City surcharge on permits that is illegal under State law, and conflicts with the municipal code.**

The Funding Agreement includes definition of a potential Surcharge Agreement that might be passed by the City Council. The legislation would impose a surcharge on future building permits within the MPDs to recover costs that Yarrow Bay has expended under the current Black Diamond Staff and Facilities Funding Agreement (SFFA). The current SFFA is to be superseded by the new Funding Agreement. The purpose of the Surcharge Agreement is to supplant the reimbursement clause in the current SFFA with a Surcharge Agreement. The potential Surcharge Agreement is illegal, conflicts with the municipal code, and potentially exposes the City to claims, and is unnecessary. Under the agreement the City would become an agent of Yarrow Bay.

- **The Surcharge Agreement is illegal under State law.**
  RCW 82.02.020 provides in part Except as provided in RCW 64.34.440 [relating to conversion condominiums] and 82.02.050 through 82.02.090 [relating to impact fees] , no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. [Annotations added] There are a number of exceptions, none of which apply to a surcharge on building permits.

- **Yarrow Bay could recover costs through other means.**
  There is no expressed reason for Yarrow Bay to recover costs through the mechanism of the Surcharge Agreement. They could recover those costs by direct charges to purchasers of MPD property.

Yarrow Bay's defends this by saying:

- That it isn't requesting it be imposed now; so City Council shouldn't worry about it; and
- They indicate that if it is not deemed legal they will hold the City harmless;

My response is:

- Yarrow Bay is trying to backdoor *vest* to future laws without opening their existing development agreement up to a new council and new public hearing;
- Yarrow is trying to tie a future Council and City into a legal knot where they will argue in the future that the DA infers the City's desire to enter into surcharges;
- That inclusion would knowingly and willfully force the creation and approval of future laws that constrain fundamental duties of a future City Council and take away the rights of the public they serve;
- That there is no reason why the City would or should be paying Yarrow Bay back for anything; the City has no liability to Yarrow Bay, why would the City agree to collect a surcharge and pass it through to Yarrow Bay?
- Does council understand that the FA allows YB to purchase a portion of the government for their own benefit? That 100% of the MDRT/City staff is paid for by YB; AND this is the kicker…if that staff were to work on a non-MPD related permit/project i.e. the Kahne Plat, than 100% of the revenue that the City collects off that project MUST be handed over and credit against YB's funding requirements; how do we make money on this? Show me the money!? (page 9 #8)

Again, I would read and re-read the extensive public comments related to the fiscal and funding agreement as the Hearing Examiner was unable to address all the concerns; I surmise that he believes that all these concerns would be addressed under the separate legislative process and since he has correctly determined a separate process is needed for the funding agreement he addressed the concept of the Funding Agreement and pulled it out of the Development Agreement.

It is important to understand that the CRH Council cannot approve this during the CRH; this is a separate legislative agreement and therefore must be presented to the entire sitting council, at a public meeting.

Cindy Proctor 2950 Sun Mountain Dr, Enumclaw, WA 98022

CFDs

The Hearing Examiner never had the time to issue final conclusions of law regarding CFDs due to lack of sufficient time; It may sound Poly-Anna but I am really bummed about this because I worked very, very hard to educate myself, my community members and worked with Yarrow Bay in the CFD Council Workshop. So please read my CFD exhibits and corresponding rebuttals back to Yarrow Bay. Below is a highlight.

Yarrow Bay Comment:
While Ms. Proctor complains about the City's reliance on the Master Developer's self-financing, she does not appear to recognize the municipal benefits of CFD funding mechanism.

I never complained in my comments that CFDs were not a viable or worthy financing mechanism. In fact, I participated with the facilitation of the CFD Workshop with YB and by asking Mr. Hugh Spitzer of Foster Pepper PLLC to provide relevant information on CFDs to ensure that City Council at least had an idea what CFDs were.

Furthermore, professionally I would be happy and fascinated to see a successful CFD. I am not opposed to CFDs per se. I do have concerns about possible tax burdens and the attempt to use CFDs for parks and/or schools, but generally speaking I am supportive of the CFD concept and wholly recognize the municipal benefits, although I believe a Developer Lid has similar qualities. **Again, my comment was 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. (It bears repeating!)**

The City Council can simply add two options; CFDs and/or Developer Impact Fees. At the time that there is a need to construct the infrastructure the City Council can and would have a clear choice to select either CFDs and/or the Developer Impact Fees.

Attach Exhibit

In the words of my President, Barack Obama: If the people cannot trust their government to do the job for which it exists - to protect them and to promote their common welfare - all else is lost.

Before the Hearing Examiner of Black Diamond
Response to YB Development Agreement Comments Exhibit 209

Ex 209 pgs 37-40 (Proctor)

Yarrow Bay Comment:
"Without development, there is no need or requirement that infrastructure be constructed. This means that the infrastructure improvements described in the Development Agreements will be phased. Id. As explained below, on day one of development, the Master Developer does not need funding in place to construct all the infrastructure improvements outlined in the Section 11."

Proctor Response:
Yarrow Bay is correct that if there is NO development there is NO need for infrastructure to be constructed. However, Yarrow Bay has not spent many years and millions of dollars to NOT develop their land; that is absurd, of course they intend to develop the land or at a minimum sell the Master Developer rights. In fact the ability to immediately start development, thus supposedly generating revenue for the City, is the primary reason for approval of the MPDs in the first place. MPD revenue has already been removed from the 2011 City budget and it will now be moved into the 2012 projected City budget. The financial ability and solvency of Yarrow Bay for infrastructure cost goes to the heart of the municipal code 18.98.080(A) (3) that development pays for development.

Regardless of this issues, Yarrow Bay has a complete misunderstanding of this public comment, the issue is not ***whether*** the financing needs to be in place on day one of the development - it is ***which*** financing will be in place; the issue is that Yarrow Bay has already proclaimed to the Mayor, and Council (audio Ex. 97 CFD Workshop) that the **only** way Yarrow Bay can build the MPD infrastructure is with CFDs. If there are no CFDs then they cannot move forward as there is no other financing available for infrastructure of this scale.

Contrary to Yarrow Bay's blatant attempt to continue to re-direct the evidence away from the public's true intent, my comment did not disparage the use of CFDs as a financing source. My point was that the inclusion of CFDs as the only financing source of infrastructure (no developer lid or impact fees are currently contemplated) knowingly and willfully has the intent to 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. My comment was that approval of the CFDs must take place now prior to the finalization of the Development Agreement and/or other financing mechanism should be included in the Development Agreement to ensure future options for the City Council and the public.

Yarrow Bay Comment:
"Contrary to Ms. Proctor's allegations, costs in excess of the Master Developer's proportionate share may be recovered using any method approved and allowed by City code, state law, or existing agreement. See, e.g., Section 11.3(B) of the Development Agreements. If the Master Developer does not have financing to construct the necessary capacity improvements for an

Implementing Project (whether through CFDs and/or other funding sources), it cannot proceed with development. Thus, Section 11 is by definition self-limiting."

Proctor response:
I concur that the Master Developer cannot proceed forward if the Master Developer does not have financing to construct the necessary capacity improvements. This is our greatest fear, and again the Applicants Attorney, John Hempelmann, has already confirmed that this is the case and that the ONLY way they can finance the MPDs is through CFDs. Ex. 97.

Yarrow Bay Comment:
"Specific sites for eminent domain are not specifically contemplated by the Development Agreements"

Proctor Response:
This is another misleading statement by the Applicant and frankly is egregious. Technically speaking YB can twist the fact that they have not specifically identified, lets say "John Doe's Home" for eminent domain, however table 11.3.1 of the Villages/Lawson Development Agreements clearly list projects that will require eminent domain including but not limited to areas near HWY 169, Auburn-Black Diamond RD, Green Valley RD, Construction Easements, ROW at intersection and many others Furthermore, John Hempelmann and City Council had a long discussion about the need for eminent domain for some of the larger infrastructure needs and Mr. Hempelmann had a frank conversation about an inter-local agreement for the execution of the eminent domain process. Ex. 97.

Yarrow Bay Comment:
While Ms. Proctor complains in Exhibit 70 about the City's reliance on the Master Developer's self-financing, she does not appear to recognize the municipal benefits of CFD funding mechanism

Proctor Response:
Once again, this is an attempt to "hide the cheese" or "re-direct", I never complained in my comments that CFDs were not a viable or worthy financing mechanism. In fact, I participated with the facilitation of the CFD Workshop working with Colin Lund and David MacDuff of YB and by asking Mr. Hugh Spitzer of Foster Pepper PLLC to provide relevant information on CFDs to ensure that City Council at least had an idea what CFDs were. Furthermore, professionally I would be happy to see a successful CFD. I do have concerns about possible tax burdens and the attempt to use CFDs for parks and/or schools, but generally speaking I am supportive of the CFD concept and wholly recognize the municipal benefits, although a Developer Lid has similar qualities. Again, my comment was 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. (It bears repeating!)

Yarrow Bay Comment:
"Last, Yarrow Bay objects to the inclusion of any testimony regarding CFDs in these Development Agreement Hearings. There is no CFD petition pending in front of the Hearing Examiner, Such information is irrelevant to the Examiner's recommendation on the Development Agreements. Nevertheless, to the extent the Hearing Examiner allows the YarrowBay's Written Response Pursuant to Hearing Examiner's Pre-Hearing Order II inclusion of CFD-related testimony into the record, YarrowBay responds as follows."

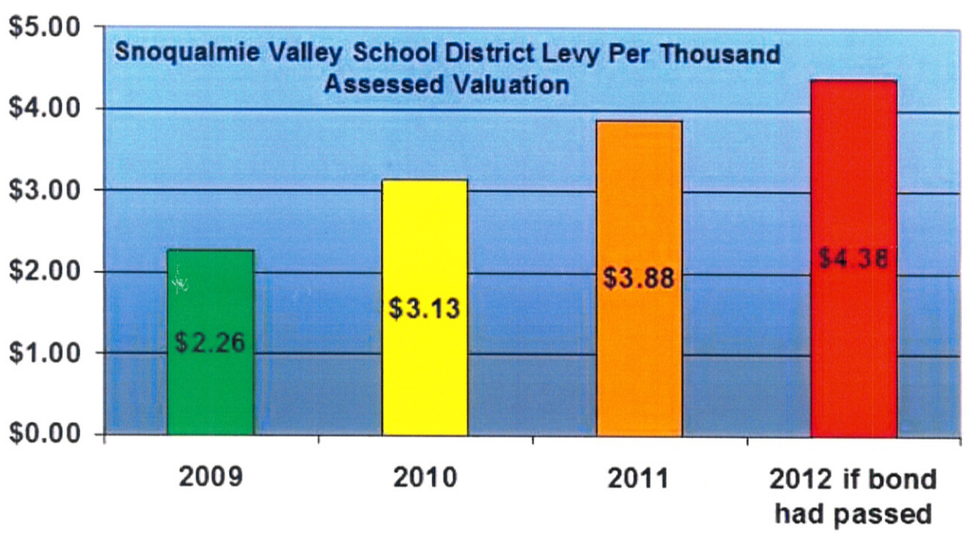
Proctor Response:
Yarrow Bay objects to pretty much any facts or positions other than their version. The CFD is the most critical financing piece of the massive MPD infrastructure requirements; Yarrow Bay's legal representation, John Hempelmann spent over two-and-half hours in a **"public"** Council workstudy talking about the need for CFDs; Mr. Hempelmann and his guest Rep. Chris Hurst are the ones who voluntarily told Black Diamond City Council and the Mayor that there will be no public funds out of Olympia (The State of WA) for years to come; YB Legal is the one who voluntarily stated that there is no financing out there to finance all the infrastructure to implement the MPDs as approved; YB Legal is the one who emphatically stated that YB must have a CFD to complete the financing of the infrastructure. All of these statements were voluntarily and publically made on behalf of Yarrow Bay by Yarrow Bay's legal staff.
(Hopefully you have time to listen to the CFD Workstudy Ex 97 in its entirety)

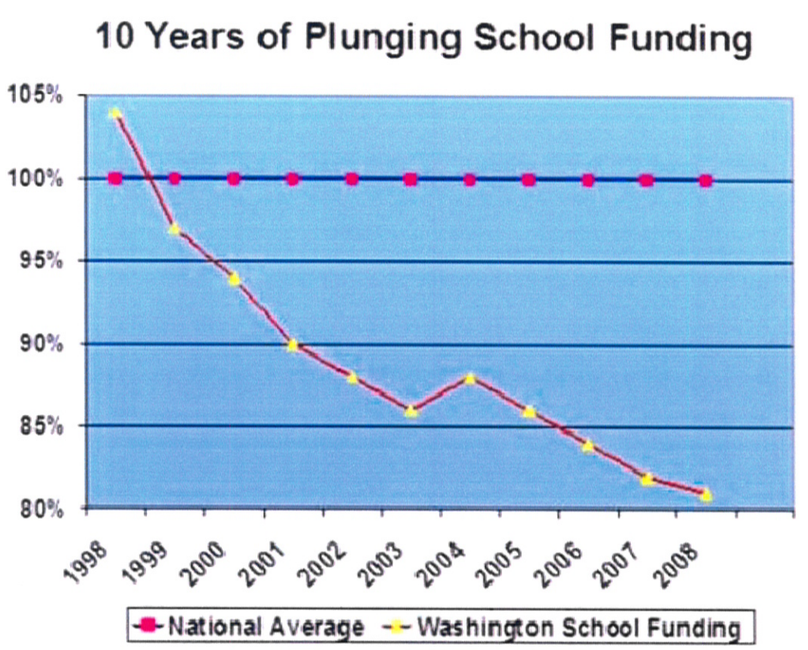
Yarrow Bay's objection about the inclusion of testimony on CFDs since no petition or ordinance is pending in-front of the Hearing Examiner is baseless in so much that I am not asking the Hearing Examiner to approve or disapprove CFD legislation; furthermore this is no different than talking about future Fire Impact fees, they are referenced in the Development Agreement and there is no petition or ordinance pending in front of the Hearing Examiner on that either. Finally CFDs are mentioned as a financing mechanism in the conditions of approval and it is clear that they are contemplated in the future as financing tool.

School Related Property Tax Rates have Skyrocketed in Washington State during the past 10 years

In 2000, the legislature raised the local property tax levy lid from 20% State school funding to 24% of State and federal School Funding. In 2009, after making numerous State budget cuts, the legislature raised the levy lid again by making it 24% of what the State would have paid had the State not actually cut funding for schools. In 2010, the State legislature raised the local property tax levy lid again from 24% to 28% - again not based on what the State is actually paying, but what the State might have paid had they not cut funding for schools by billions of dollars.

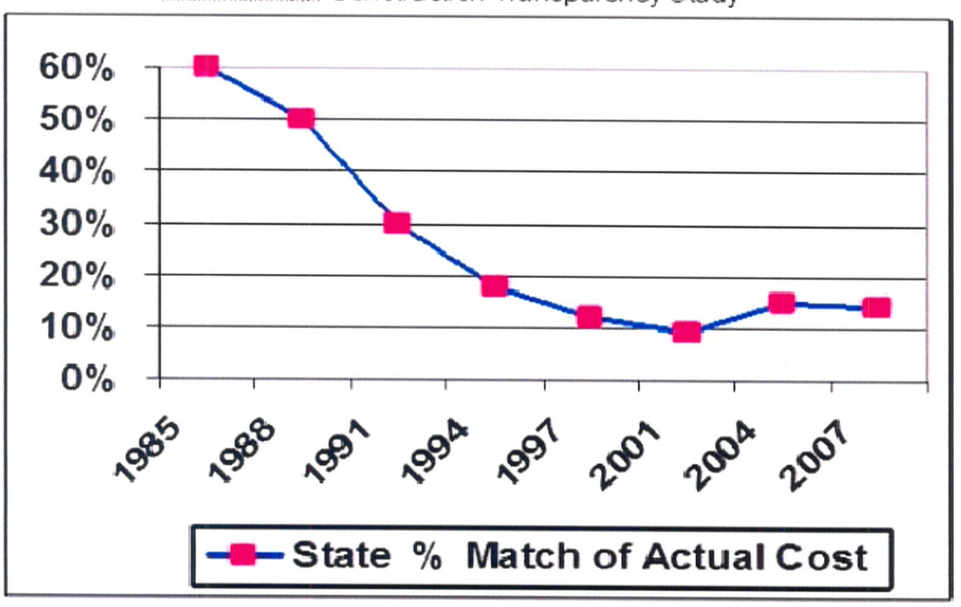
All of these levy lid increases in the past 10 years has caused local property tax rates to go through the roof in the past 2 years – further increasing the unfair tax burden on poor and middle class homeowners in our State. As a result of this dramatic rise in the levy lid, local school related property tax rates have gone through the roof. Here is the recent rise in local property taxes in the Snoqualmie Valley School District:



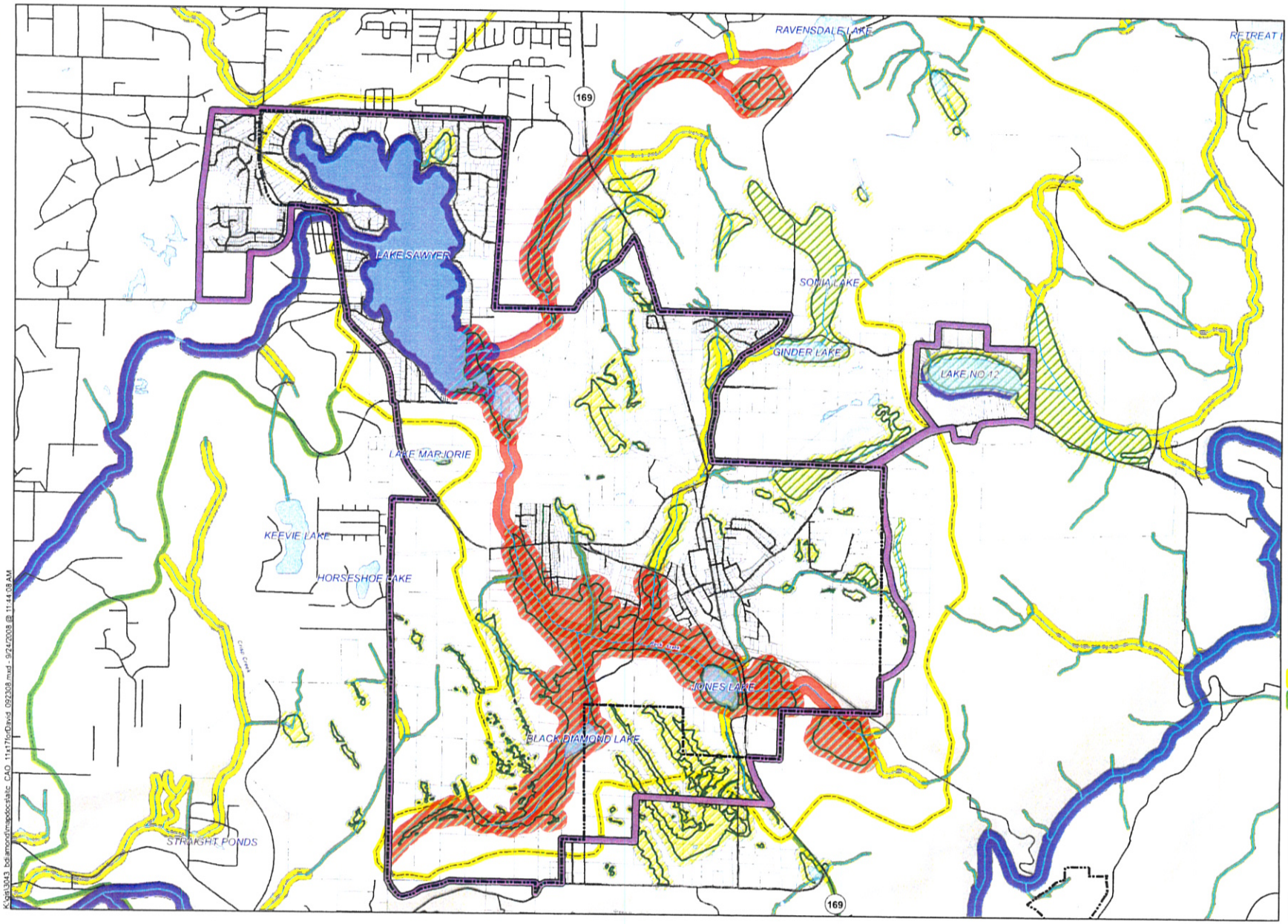


In the past 20 years, State matching funds for school construction and repair projects have fallen from 60% of actual cost to less than 20% of actual costs.

State % Match of Actual School Construction Costs 1985 to 2007
Source: 2008 OSPI School Construction Transparency Study



The current State Match is less than a third of the national average 50-50 State Match:



Parametrix

N

0 1,250 2,500

Scale in Feet

Legend

- Black Diamond City Limits
- UGA Boundary
- SR 169
- Road
- Water Body
- WADNR Streams
- CAO Wetland boundaries

Wetland Buffer Alternative C

Category and Buffer Distance

- Headwaters - 225 ft
- CORE - 225 ft
- I - 180 ft
- II - 150 ft
- III - 80 ft
- IV - 50 ft

Stream Buffer Alternative C

Category and Buffer Distance

- CORE - 225 ft
- S - 200 ft
- F - 150 ft
- Np, Ns - 50 - 100 ft

Study Area

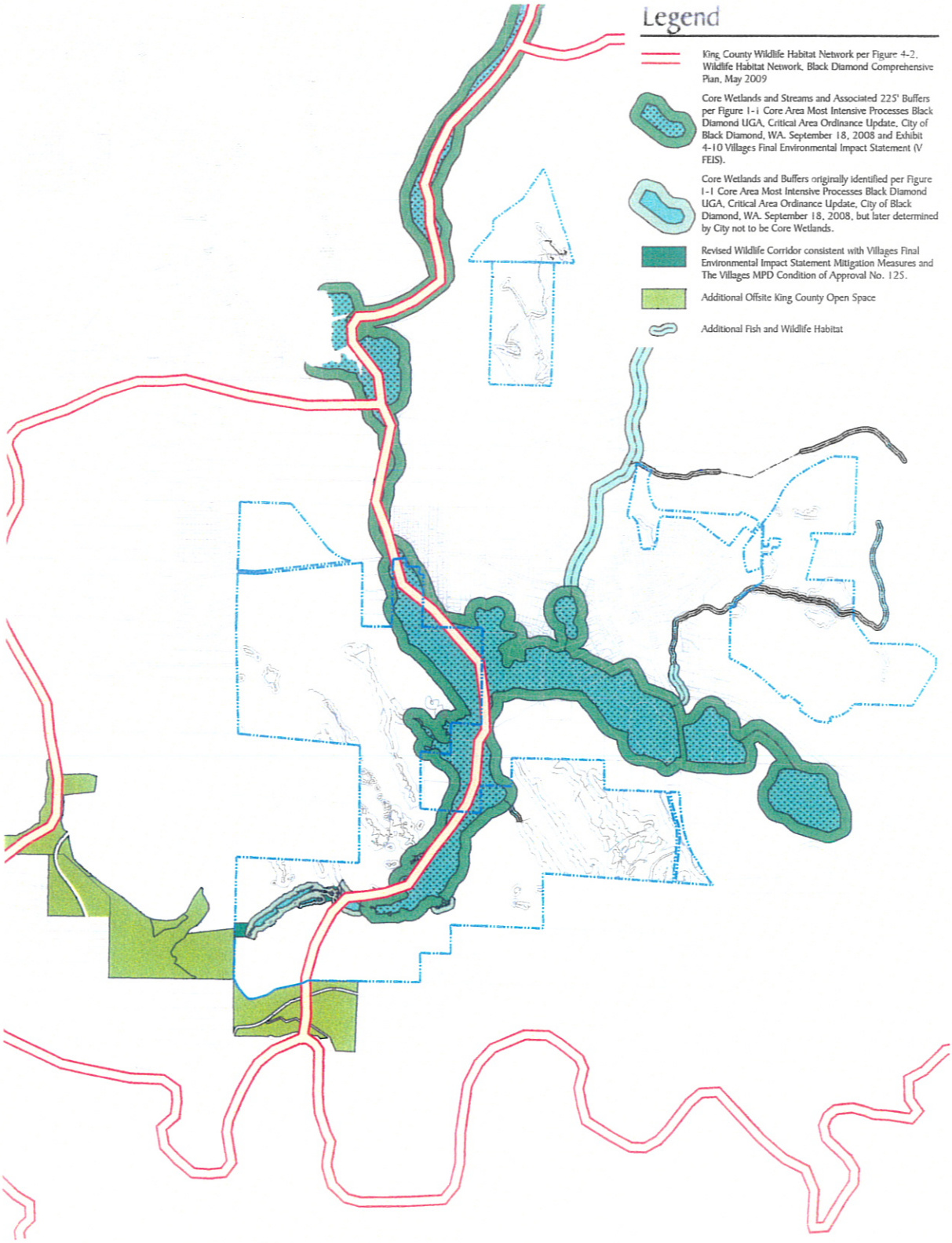
- Lake Sawyer Watershed
- Green River Watershed

Data Source: King County GIS, WA DNR

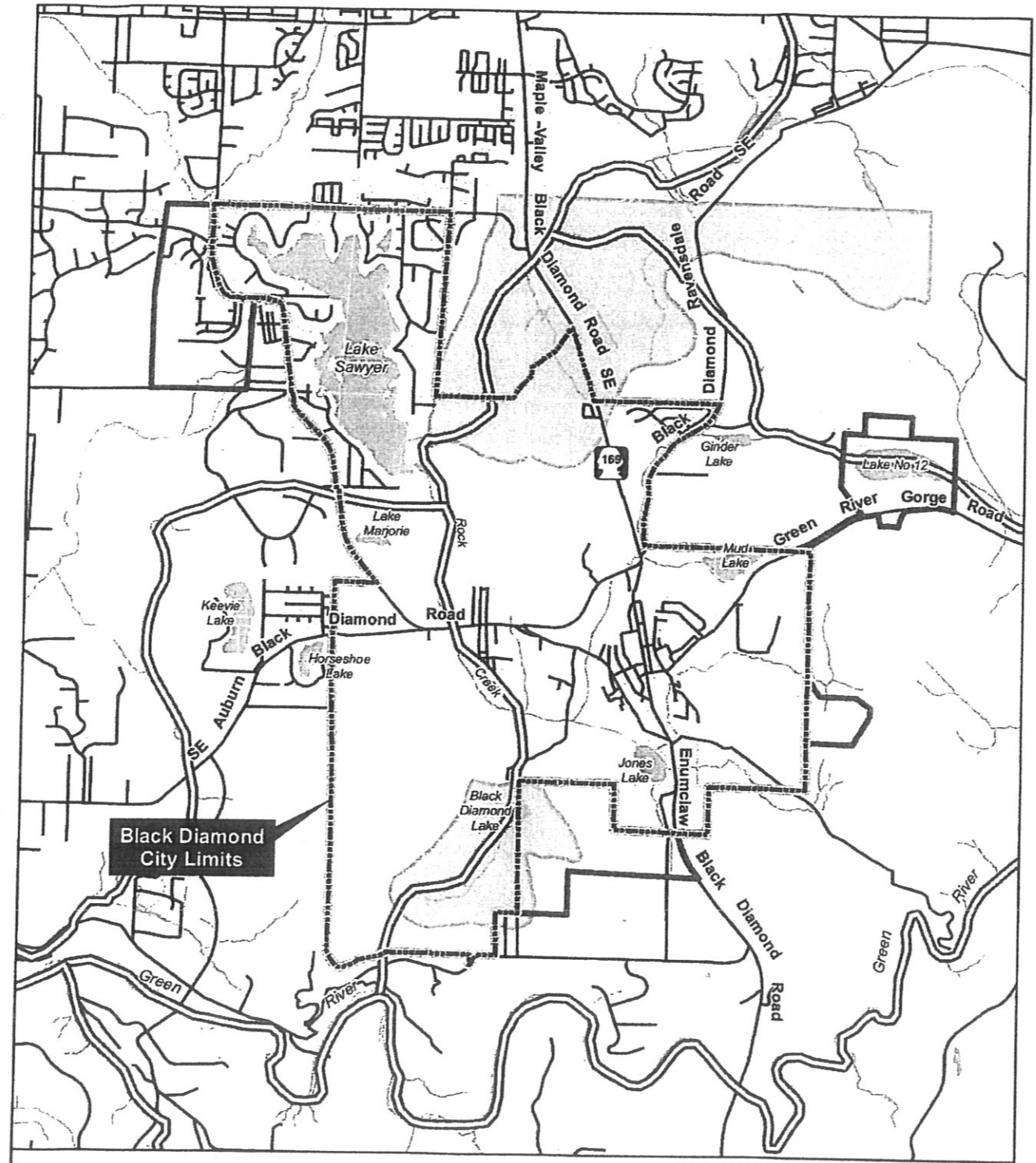
Figure 1-1
Core Area
Most Intensive Processes
Black Diamond UGA

Sensitive Area Ordinance Updat
City of Black Diamond, WA

EXHIBIT 13



Black Diamond Fish and Wildlife Habitat Conservation Areas and King County Wildlife Habitat Network



Sources: City of Black Diamond (2006); King County (2007)

Road
City Limits
Potential Annexation Area
Parcel Boundary
King County Wildlife Habitat Network
Study Area for Potential Fish and Wildlife Habitat Conservation Area

N

0 0.5 1
Miles

ICF Jones & Stokes
an ICF International Company

Figure 4-2. Wildlife Habitat Network
Black Diamond Comprehensive Plan
May 2009

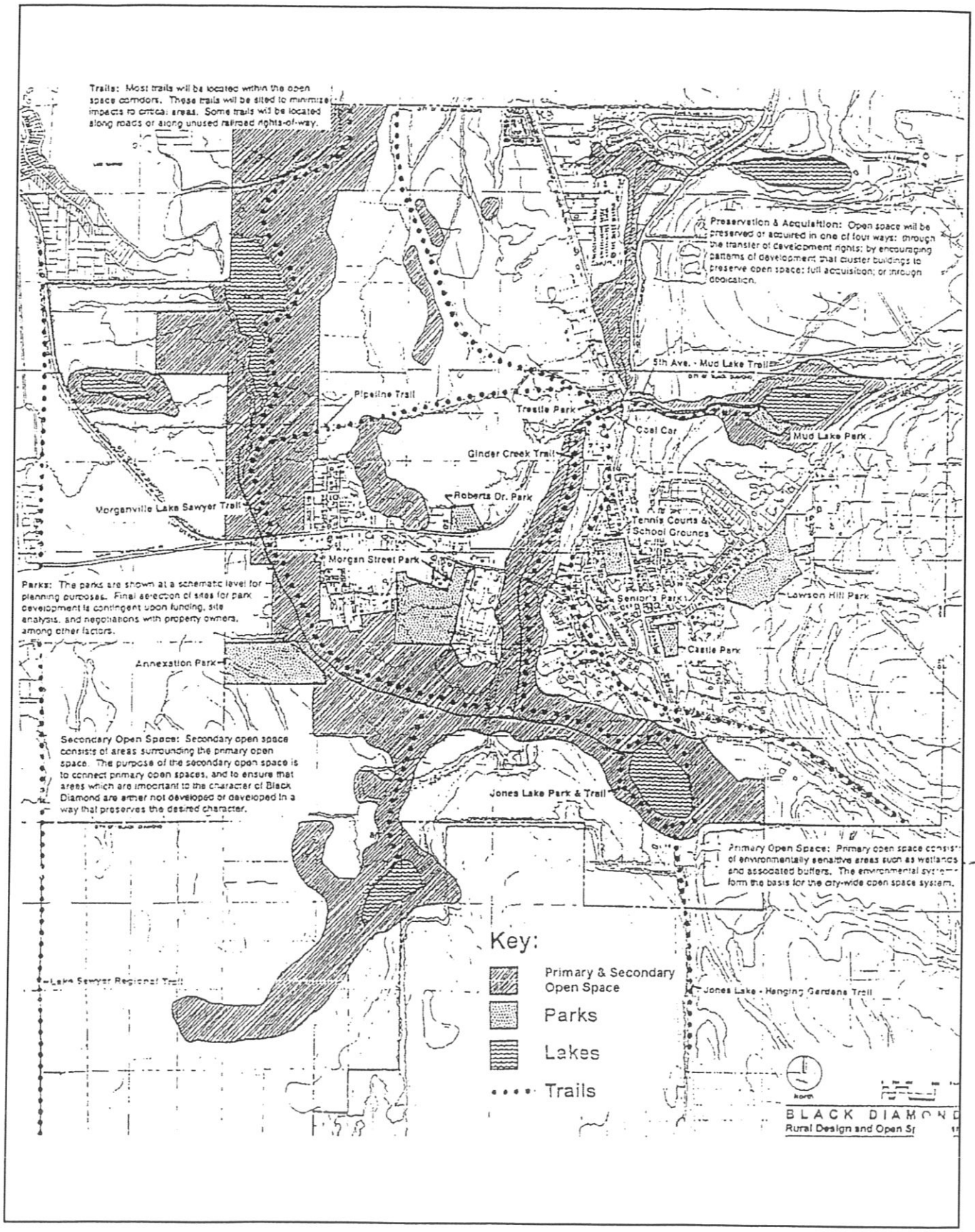
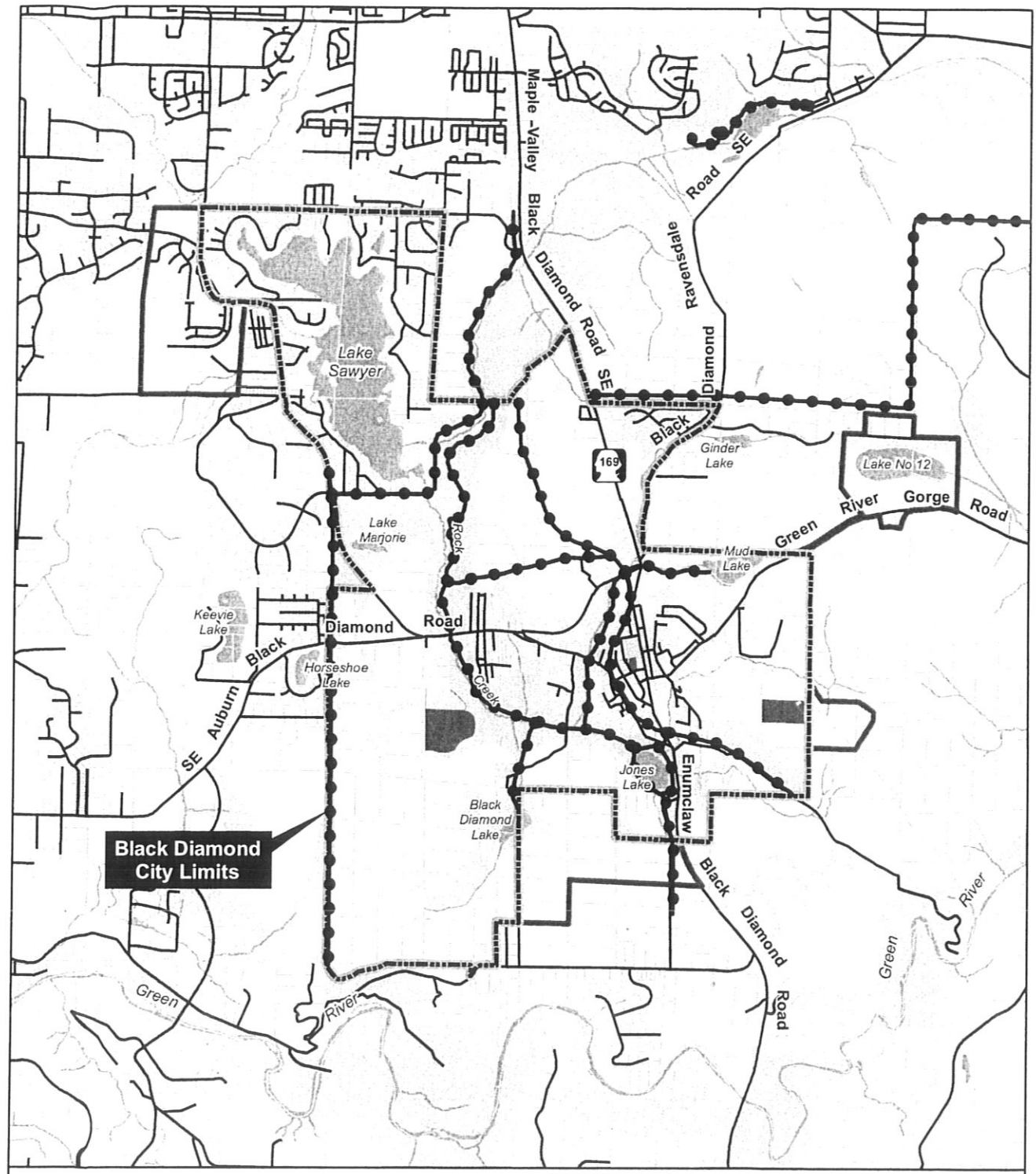


Figure 2-3
Black Diamond Primary and Secondary Space



Sources: City of Black Diamond (2006); King County (2007)

Road
City Limits
Potential Annexation Area
Parcel Boundary
Trail
School
Park
Open Space

N

0 0.5 1
Miles

ICF Jones & Stokes
an ICF International Company

Figure 5-2. Parks and Open Space Map
Black Diamond Comprehensive Plan
May 2009

October 2011 Testimony for Villages and Lawson Hills Development Agreement

Rich Ostrowski, 31314 293rd Place SE. Black Diamond, WA 98010

Good Evening Mayor and Council Members,

I support and agree with the citizens testifying at these closed record hearings and their requests for changes and additional language which will improve the Development Agreements. I also have some requests; one for each council member.

1) My request for Council Member Mulvihill is to:
Ensure that Single-Family Dwellings remain single-family dwellings instead of becoming Duplexes, Triplexes, and Quadplexes as is now proposed in the Development Agreement

The definition of a single-family dwelling in the Development Agreements is very different from what was proposed in the MPD applications and is also very different from what was stated on the large public notification signs which were posted on the MPD property boundaries. The definition of a single-family dwelling is important because it determines the mix between multi-family and single family housing which will effect the characteristic of the development.

Throughout the EIS and MPD approval process "single-family" dwellings were identified and specified as being "single-family detached" dwellings. The word "detached" was used to differentiate single-family dwellings from multi-family dwellings. The Development Agreement no longer defines single-family dwellings as being "detached". The Development Agreement now defines "single-family" dwellings as including duplexes, triplexes, and quadplexes. There is not any language specifying that single-family dwellings are required to be detached structures as they were portrayed previously and have always been historically. Duplexes, triplexes, and quadplexes are not single-family dwellings. They are multi-family dwellings and should be counted as such.

The Hearing Examiner noticed this also and in his response on page 17 he states that "MPD COA 128 does authorize the Council to set the specifics of the project's land use standards in the DA. Consequently, the Council can, within its land use policy making discretion, require that the DAs adhere to the attached/detached numbers proposed in the MPD applications."

I am asking the Council to consider the Hearing Examiner's advice and change the language in the Development Agreements to specifically ensure that single-family dwellings are required to be detached, and that duplexes, triplexes, and quadplexes are classified as multi-family dwellings.

EXHIBIT 14

2) My request for Council Member Hanson is:
ADUs must count toward the total of number of allowed dwellings in the MPDs.

The proposed addition of several hundred ADUs (Accessory Dwelling Units) to the Development Agreements was not disclosed or addressed in the original MPD applications.

An Accessory Dwelling Unit can be a separate detached dwelling or it could be one side of a duplex type structure. In either case, ADUs can accommodate multiple tenants and be as large as some apartments and single-family homes in the same neighborhood. The significant impacts from the several hundred additional accessory dwelling units now being proposed in the Development Agreement has not been studied and the detrimental effects on traffic, schools, and other areas has not been mitigated.

On page 16 of the Hearing Examiners recommendation he responds that "ADUs are defined as dwelling units by BDMC 18.56.010, which is incorporated by reference in to the DA definition of ADU. Consequently, ADUs should be applied to the total number of dwelling units allowed for each MPD." And to reinforce the importance of this, The Hearing Examiner specifically included Condition C in Section VIII of his recommendations which states that "DA 4.7.3 should be clarified to provide that accessory dwelling units count towards the total number of dwelling units authorized for the MPDs."

I am asking the Council to agree with the Hearing Examiner and change the language in the Development Agreements to ensure that the number of Accessory Dwelling Units is included in the count for the total number of MPD dwelling units allowed.

3) My requests for Council Member Boston involve:
School Issues.

On School issues, I both agree and disagree with the hearing examiner findings. I agree with Condition P in Section VIII of the Hearing Examiner's recommendation that an updated fiscal analysis is necessary when a High School is proposed to be located in an area that is supposed to be commercial space.

I do not agree with the Hearing Examiners interpretation of RCW 58.17.110 which is the Revised Code of Washington's section for conditions on subdivision approval. On page 93 of the Hearing Examiners recommendation he states 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." The examiner also states that "RCW 58.17.110 does not require a finding of appropriate school buildings or other on-site capital facilities." I respectfully disagree with the Hearing Examiner and have included the complete text of RCW 58.17.110 in my written testimony which shows that the RCW clearly and specifically states that conditions for both "schools and schoolgrounds" must be appropriate prior to approving any subdivision. Paraphrasing paragraph two of the RCW it states:

A proposed subdivision shall not be approved unless the city makes written findings that appropriate provisions are made for schools and schoolgrounds.

Also, as mentioned in my previous open record testimony; the Tri-Party School Agreement does not guarantee adequate schools will exist and does not supersede State Law requirements that adequate schools exist prior to approving subdivisions. Revisions to the King County Comprehensive Plan may not allow schools on the three proposed sites which are outside of the Urban Growth Area. Also, residents of the Enumclaw School District, even those who support schools, are unlikely to vote for levies which will potentially more than double their property taxes to build seven new schools to accommodate residents of the Yarrow Bay developments.

Condition 98 of "The Villages" MPD ordinance and Condition 99 of the Lawson Hills MPD Ordinance contain language which state that the School Mitigation Agreement shall provide adequate mitigation of impacts to school facilities. To absolutely ensure this I am requesting that additional language be included in both the "The Villages" and "Lawson Hills" Development Agreements as follows:

a) The City shall request the School District provide written status on the adequacy of school facilities during MPD development at frequent periodic intervals as specified by the City Council.

b) The City shall request a written confirmation of agreement from the School District prior to making any decisions or statements concerning the adequacy of school facilities.

c) The City shall "conditionally approve" MPD permits to only allow development to continue when adequate school facilities will be available. If at any time the School District decides that provisions for schools have or will become inadequate then all development must stop immediately and be delayed, no matter what stage it is in, until the issue is resolved to the School District's satisfaction.

Reference - RCW 58.17.110 from Revised Code of Washington

RCW 58.17.110 Approval or disapproval of subdivision and dedication — Factors to be considered — Conditions for approval — Finding — Release from damages.

(1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) **A proposed subdivision and dedication shall not be approved unless the city**, town, or county legislative body **makes written findings that**: (a) **Appropriate provisions are made for** the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, **schools and schoolgrounds** and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

4) In closing, I'd like to share a story with you.

In one of my earlier jobs, I was the Naval Architect for a small shipyard which built tugboats that serviced New York Harbor. I had an office with a nice view in a building on the Hudson River where I could hide out in. One day the yard foreman requested that I meet him at the shipway where we were building our newest tugboat. He pointed to the tug and said; "There are actually three different tugboats here, but you only see one. When you look at this tug, you envision the one you designed on paper in your office. The customer only sees the one they are paying for and expect to receive. But my responsibility forces me to see a different tug which is the one currently being built and that is the reality of the situation. This is the only one of the three tugs that matters and this boat has some serious problems."

Pretty eloquent speaking and insight for a shipyard foreman, don't you think? The actual conversation was very different though, with quite a few swear words. Regardless, the concept of this one tugboat being seen from three different perspectives was imaginative and resembles the diverse viewpoints various parties have on the MPDs.

The purpose in all of this was that the shipyard foreman was trying to point out to me the differences between the vision and the reality and most importantly that they are never the same.

Differences in vision and reality are significant and these differences will profoundly affect Black Diamond.

It is very difficult to visualize the enormity of the proposed MPDs. Just the number of additional cars will be staggering. There is not enough room to park these additional cars bumper to bumper on the Maple Valley Highway between Black Diamond and Renton even if you use two lanes of the Highway. Additional stoplights, turn lanes, and traffic circles can not adequately mitigate this.

Please try to visualize inadequate roadways with never ending traffic jams, large apartment and quadplex complexes with limited constructive opportunities for the residents and their children, increased crime and 911 calls requesting police and medical services, along with inadequate commercial development providing insufficient job opportunities and tax revenues. This is the likely scenario for Black Diamond.

The future is bright for YarrowBay, however the future of Black Diamond is a different story and one for which you will be writing the ending.

Thank You.

The following is my previous Open Record Testimony for the Development Agreements.

While there are many serious deficiencies within the proposed Development Agreements. My testimony will address issues concerning schools.

Condition 98 of The Villages MPD Ordinance includes the following requirements:
1) The applicant shall enter into a separate school mitigation agreement.
2) The agreement shall be approved by both the City and the School District.
3) The agreement shall be incorporated into the Development Agreement by reference.
4) The agreement shall provide adequate mitigation of impacts to school facilities.

Condition 99 of the Lawson Hills MPD Ordinance contains similar requirements.

There is no evidence and no studies have been conducted which indicate that the Tri-Party School Agreement will provide adequate mitigation for the the impacts of the MPD developments on school facilities. I do not recall any School Officials or City Council Members stating that the mitigation contained in the School Agreement was adequate. I do recall discussions by both the School Board and City Council indicating that since this was a voluntary agreement with the developer that the amount of mitigation offered was the best that could be expected. I also recall two City Council Members stating that the mitigation was not adequate and they voted against the agreement.

The public has been and still is concerned that the mitigation proposed by the Tri-Party School Agreement is woefully inadequate. Requests for public hearings prior to voting on the school agreement were denied by both the School Board and the City.

Based on Condition 98 of "The Villages" MPD ordinance and Condition 99 of the Lawson Hills MPD Ordinance concerning schools, I am requesting that additional language be included in both the "The Villages" and "Lawson Hills" Development Agreements as follows:

1) The City shall request the School District provide written status on the adequacy of school facilities during MPD development at frequent periodic intervals as specified by the City Council.

2) The City shall request a written confirmation of agreement from the School District prior to making any decisions or statements concerning the adequacy of school facilities.

3) The City shall "conditionally approve" MPD permits to only allow development to continue when adequate school facilities will be available. If at any time the School District decides that provisions for schools have or will become inadequate then all development must stop immediately and be delayed, no matter what stage it is in, until the issue is resolved to the School District's satisfaction.

Without conditions in the Development Agreements requiring appropriate provisions for schools, the City could allow development to continue even while there is no available school capacity. For instance, the City may deny that additional school capacity is required or may believe that additional portables for new classrooms are acceptable for schools at capacity. The School District, not the City, must remain the controlling authority deciding school adequacy issues.

The requested conditions are appropriate and their inclusion into the Development Agreements is prudent and necessary since a significant inconsistency exists between Section 3.2.1 of the Tri-Party School Agreement and state law. State laws concerning adequate school provisions take precedence over the Tri-Party School Agreement.

RCW 58.17.110 which is the Revised Code of Washington's section for conditions on subdivision approval mandates that a subdivision shall not be approved unless the city makes written findings that appropriate provisions are made for schools and school grounds. However, language in Section 3.2.1 of the Tri-Party School Agreement states (and this is a direct quote) that "the City will find that appropriate provision will be made for school and school grounds to serve the MPDs." So, unfortunately the City has already agreed ahead of time that no matter what the actual school conditions are or will be, that they, the City will find that appropriate provisions have been made for schools.

It is impossible for the City to presuppose and agree that they "will find that appropriate provisions will be made for schools" and thereby preempt state law RCW 58.17.110. The City can not conclude that appropriate provisions are made just by agreeing to this in the Tri-Party School Agreement. The City may claim that the Tri-Party School Agreement satisfies the requirements of RCW 58.17.110 but that would be an incomplete and incorrect interpretation of this state law.

Mitigation from a School Agreement is a component of this state law, but the law does not infer that a school mitigation agreement satisfies the requirement that appropriate provisions are made for schools. The purpose of the state law is to prohibit development if adequate school facilities will not be available. When school facilities will not be appropriate the amount of mitigation has no bearing unless it is enough to ensure that school facilities will be adequate. The Tri-Party School Agreement only specifies the minimum amount of mitigation required of the developer and nothing more.

The following points explain why the Tri-Party School Agreement does not ensure that school facilities will be adequate:

1) The low value of mitigation will require large property tax increases.

The Tri-Party School Agreement's estimated value over 20 years in actual future dollars collected is 35 to 50 million dollars. The total land and construction costs for seven new schools is about 300 million dollars in today's dollars. Mitigation from the Tri-Party Agreement offsets about 15% of the total costs (but this percentage will be much lower after accounting for inflation and school bond interest). The remaining costs will be shared by all residents of the School District. The majority of residents will not be living in the MPD areas serviced by the new schools, but they will be asked to pay more than half of the costs for the new schools. School Bonds require a 60% voter approval rate. It is unlikely the bonds will be approved.

Historically, development in the Enumclaw School District has been gradual and schools have evolved rationally. Because of this only a small portion, about 2 million dollars per year, of school property taxes are used to repay school construction bonds and the rest can be used for other purposes. Building seven new schools will require enormous construction bonds and even if the land for these schools is provided by the developer, it will still cost about 250 million dollars to build these schools. Compare this to the 2 million a year being spent now which would pay about 2 months of interest on these future school bonds. All residents could see their school property taxes double, redouble and potentially double redouble. And the situation will worsen as funding assistance for schools from the state is reduced. Even voters who want appropriate schools will not approve school bonds if they are not affordable.

2) The required impact fees are low.
The impact fees per dwelling are low due to the negotiated option in the Tri-Party School Agreement for receiving school sites. Besides being low they are also vested for up to 20 years and their upper limit is capped without an adequate adjustment for inflation. The school impact fees proposed for the first five years are one-third of those recommended by the School District's own 2010 Capital Facilities Plan and the maximum impact fees for 20 years in the future can never be more than what was recommended for last year. It is also important to understand that impact fees collected are returned to the developer up to the appraised value of school sites when the school sites are conveyed.

3) The advanced mitigation credits allowed before school sites are conveyed is risky. Section 10.7 of the Tri-Party School Agreement allows the developer to obtain mitigation fee credits for school sites before they are conveyed to the School District by adding an encumbrance using a deed of trust. This is effectively a long term no interest loan from the School District to the developer (which lasts until the school site is conveyed or the agreement ends) and this allows the developer to delay paying impact fees. If the developer becomes insolvent, it may be difficult for the School District to receive compensation. The courts could remove the encumbrance and compensate another creditor earlier in line or one with a higher priority.

4) The agreement does not guarantee that all school sites can or will be provided.
One school site is conveyed at the beginning of the agreement (Elementary School A). The remaining six schools sites may be conveyed during the agreement after voter approval of school construction bonds when a specific number of dwelling permits are approved. At the end of agreement three school sites (Elementary School B, Middle School A and the High School) may be conveyed under certain conditions without voter approved bonds. Without voter approved school construction bonds there are three school sites (Elementary School C, Elementary School D and Middle School B) which are never conveyed.

5) The School District will be in a predicament if full build-out does not occur.
Various conditions and termination clauses affect the school agreement's value, especially when full build-out does not occur. In one case 26% (which is 1,599 of the 6,050 dwellings) in the development can be built and if construction stops, only the land for one elementary school is provided and possibly some low impact fees are collected. Also the school site conveyance schedule as defined in the school agreement lags the growth required for school facilities.

6) Schools serving urban Cities may not be allowed on rural county land.
King County has stated numerous times that they will discourage and may not approve conditional use permits for the proposed middle schools located outside of the Urban Growth Boundary (Middle School A & B). The School District's sole remedy for school sites not allowed by King County will be to sell the land at it's actual rural market value which will likely be substantially less than the impact fee credit received by the developer for the same land when appraised for it's value as an urban school site. Middle School B may be essentially worthless since it is potentially land-locked without road access inside of a larger parcel. No alternate school sites will be provided by the developer for Middle School A and B.

7) Changes to School District Boundaries will be required.
The Auburn School District may not agree to adjust its school boundaries for the proposed school located in their district (Middle School B). The School District's sole remedy for this school site if not allowed by the Auburn School District will be to receive mitigation fees for the land when appraised for it's value as an urban school site, but only after voters approve school construction funding bonds for Middle School B. No alternate school site will be provided by the developer for Middle School B.

In Summary:
The Tri-Party School Agreement is a gamble with no winning possibilities and the results of the most probable outcomes will be school facilities that are not adequate to meet the needs of the MPD developments. Additional language is required in the Development Agreements to ensure that appropriate school facilities will exist and to establish that development will not be allowed to continue when adequate schools facilities do not or will not exist.

With my remaining time, I would like to discuss one other school issue. I am going to state the facts as best I know them and let the Hearing Examiner and City Council sort this out.

Condition 99 of The Villages MPD Ordinance includes the following requirement:
An updated fiscal analysis shall be required for any proposal to locate a high school within any lands designated on Figure 3-1 (Land Use Plan) for commercial/office/retail use.

Using the latest land use plan which was submitted and approved with the MPD Ordinances during last year's City Council's closed record MPD hearings; there are portions of the currently proposed High School location as shown in the Tri-Party School Agreement which will be located on land designated as "commercial/office/retail" and also on land designated as "potential locations for light industrial overlay".

The intention of Condition 99 was to require an updated fiscal analysis if this type of location was selected for the High School.

Language in a portion of Section 7.2 of the Tri-Party School Agreement states that:
No later than ten (10) years after the Agreement Effective Date, the Developer shall select the Identified High School Site.

Sections 7.2.4 of the Tri-Party School Agreement states:
If the High School Site or the Alternative High School Site is located on lands identified in the Village Project as being used for commercial purposes, then prior to the conveyance of the High School Site or Alternative High School Site the Developer in its sole discretion shall either (a) amend, or (b) shall already have amended, its MPD application to add additional Commercial-zoned expansion areas to offset the fiscal impact to the City for the loss of the commercially zoned property, or (c) shall otherwise show that the Village Project, even with the loss of the commercially zoned property will still be at least fiscally neutral for the City.

My concerns are as follows:
1) An important aspect in the MPD planning and approval process is to identify final locations for all School sites. The locations affect traffic patterns, the viability of both the schools and the MPD, and in this case the newest proposed location for the High School detrimentally alters the overall fiscal analysis which was required to obtain approval for the MPD Ordinance.

2) Condition 99 was a requirement for approval of The Villages MPD and the expectation was that the final location of the High School and any fiscal ramifications from it's final location would be known and addressed prior to obtaining approval for the Development Agreement.

3) The Villages current fiscal analysis is questionable and language in the Tri-Party School Agreement delaying the resolution of Condition 99 of the MPD ordinance for 10 years is unacceptable.

I have two other comments I would like to enter into the record which I believe establish a foundation that shows a favorable bias towards the developer by the city which is prejudicial against those opposed to the development in it's present form.

1) My first comment involves the word "detached" and I would like to know why this word is now missing from all references to "single-family" dwellings. Throughout last year's EIS and MPD approval process both the MPD applications and the large public notification signs posted on the MPD property boundaries always referred to "single-family" dwellings not just as "single-family" dwellings but specifically as "single-family detached" dwellings. This designation, which specifically identified single-family dwellings as being "detached" was included until the MPD ordinances were approved by the City Council. After that point in time the language in the approved MPD Ordinances no longer contained the word "detached" when referencing "single-family" dwellings. Now the development agreements define "single-family" dwellings as including duplexes, triplexes, and quadplexes. I can not believe that the initial inclusion of the word "detached" when referencing single-family dwellings and it's subsequent removal after the approval of the MPDs was an accident or oversight. I wonder if this was a secret and deliberate methodically orchestrated act to change the scope of the MPD proposal to the benefit of the developer.

2) Last night during the City's Opening MPD remarks it was mentioned that besides the 6,050 proposed dwellings units in the MPD that there could also be several hundred accessory dwelling units in the MPD but that this was nothing new as it is allowed by the Black Diamond Municipal Code and was known from the start of the MPDs. I have attended the EIS and MPD meetings for over a year now and this was the first time I have heard about these accessory dwelling units being part of the MPD. Several hundred accessory dwelling units will have a significant effect on both the Tri-Party School Agreement and the Traffic Studies. Since this was known from the start, I wondered why the potential effects from such a large number of accessory dwelling units was not included in the various EIS studies to determine their impact and what mitigation measures should have been required but will now be overlooked.

Thank You.

Bruce Earley
22963 SE 292nd Pl.
Black Diamond, WA 98010
T 360-886-8286
bearley777@gmail.com

October 5, 2011

City of Black Diamond
City Council
PO Box 599
Black Diamond, WA 98010

Members of the city council,

In the matter of the Yarrow Bay proposed Development Agreements (DA's), I last commented in the open record hearings earlier this year. My final comment was "The above, in combination of the arguably willful actions of the city council regarding these issues raises red flags in my mind. These massive projects need to be slowed down now, before we are all forced to pay the price for poor planning and deception for years to come.". The reference to "the above" refers to my concerns regarding storm water and traffic, a few of which have been addressed by Yarrow Bay in its proposed changes to the DA's. My comments in relation to the actions of the city council (and the mayor and staff, I would add) not only still apply, but unfortunately have grown even more problematic.

As you know, in his comments, the Hearing Examiner gave "Implementing Conditions", basically his recommendations for implementation of the DA's. I agree with them as they relate to storm water and traffic. However, they do not go far enough. An example is in the park system changes currently being considered and how they relate to these DA's. Additionally, as the largest MPD in the county, envisioned in an area without major egress, I firmly believe that this is a regional issue looking for a regional solution.

What is much more troubling to me is what appears to be a concerted and continuing effort on the part of Yarrow Bay, the city staff and elected officials to hasten this process along before either the upcoming election or the results of the appeal of Growth Management Hearings Board order. As you know, that ruling stated that the city had improperly used a quasi-judicial process to enact the ordinances, thereby limiting public participation. If the DA's are approved before either of these events, it of course allows the applicant to "vest" his rights to develop these properties under the conditions specified in these DA's.

The Hearing Examiner included a rebuke of the City and Yarrow Bay for not allowing sufficient time to properly review the oral and some 3500 pages of written testimony. They only allowed ten working days for him to make his recommendations. The City's municipal code gives the applicant sole authority to allow more time and Yarrow Bay, supported by our own City Attorney, adamantly refused. As a result there are a large number of issues that were not fully addressed or not addressed at all. In a letter to the mayor and the city council dated this last September 29th, David Bricklin of the law firm Bricklin-Newman reminded you of your right to remand the DA's back to the Hearing Examiner for a more thorough review and recommendations. I implore you to do so.

The schedule of these hearings is yet another example of an apparent attempt to hasten this process. These closed record hearings were scheduled even before the above referenced Hearing Examiner's recommendations were issued, thereby allowing little time for our citizens to digest them. Once these were issued and the closed record hearings began, the schedule was further hastened by certain council members not wanting these hearings to infringe on their "busy" November personal schedules. In fact, under the current timeline, one council member has calculated 3 days for deliberation on these DA's. We as citizens have had a similar lack of time and notice on a number of occasions dating back at least as long as I've been aware of these proposed developments, including one short comment period over the Christmas holiday almost 2 years ago (EIS). This pattern, in my opinion has gone

EXHIBIT 15

on for far too long. If the full time Hearing Examiner was not able to fully cover the DA material in the 10 working days given to him, how will the 3 of you remaining council members be able to, especially given these additional days of testimony and volumes of new written submissions? Need I remind this council of the nearly 4 weeks they took for deliberation on the MPD's themselves?

Not only has this process been rushed, but it has the appearance of favoring the applicant. The rushed timing, as I have already mentioned favors the applicant. Additionally, 2 council members are not here deliberating this issue, having recused themselves out of fear of personal financial loss had they voted in a way not favoring the applicant. The remaining council members are perceived by the public as largely favoring the developments. This issue was covered extensively last week during the "appearance of fairness" portion of these hearings, with significant time spent in "executive session" not open to the public. The applicant has asked that 4 of the 5 council members recuse themselves, thereby invoking the "doctrine of necessity" and thereby allowing all to vote. There is just one catch: Those voting against the applicant could be subject to personal loss as a result. How can this be considered a fair hearing? Why should council members fear voting as they feel led? This has led to a perfect catch 22, only allowing those council members perceived as favoring the developments to participate. Ridiculously, this "doctrine of necessity" has already been used earlier in the MPD process. The reasons for the applicant's recusal request are dubious at best as outlined in the letter submitted by Kristen Bryant after the September 26th meeting. Truth is, it would be hard to find anyone not impacted by these large developments in our small community. This has truly made a mockery of our government and is a gross injustice.

While I welcome some of the "Implementing Conditions" specified by the Hearing Examiner and conditionally accepted by Yarrow Bay, I take great exception to the requirement that they be accepted without supplemental conditions. This nullifies the legal rights we as citizens have in the Development Agreements. The Hearing Examiner has already stated

"The Applicant's position results in a bifurcated review process where the city and the Applicant are free to discuss and negotiate terms that both implement and supplement the MPD conditions of approval <u>while the public can only comment on terms that implement them.</u> As authorized by the state statutes that create them, DA's are an opportunity for the city and the applicant to both satisfy the requirements of Black Diamond Municipal Code and negotiate the mitigation of any other impacts associated with the development proposal."

The Hearing Examiner made it very clear in his recommendations that the council has wide discretion in what it can do in finalizing and approving the Development Agreements. He stated "The Council has wide discretion as to what it can include in the development agreements and the public has corresponding wide latitude in suggesting what they'd like to see in the development agreements." (Ref.: Hearing Examiner Development Agreement Recommendations; pg. 1). Before the City Council agrees to any proposal by Yarrow Bay, it should first remand the DA's back to the Hearing Examiner for a more thorough review. Then it should reconvene and listen to all oral testimony, read all written statements and responses, delve deeply into what the Hearing Examiner has written, and carefully look at all proposed "Supplementary Conditions". Only then should a decision be rendered.

Finally, I take great exception to the funding agreement being tied to the DA's. This obviously puts pressure on a city already used to significant operational funding by Yarrow Bay to rule in favor of the applicant. How is this supposed to help deliver an impartial decision?

This is not an issue that should be rushed. It will impact every citizen of not only Black Diamond, but indeed much of southeast King County for many years to come. This is a unfortunately an issue with large regional impacts being decided by a small municipality. Your names and signatures will live on in this region, for better or for worse, long after you leave office. It deserves a complete analysis by the full council unencumbered by artificial timelines and biases. More time would go a long way to heal some of the wounds this process has inflicted on Black Diamond and its residents. It would demonstrate a level neutrality the city administration desperately needs.

Sincerely yours,

Bruce Earley

Brenda Martinez

›m: Bruce Earley User <bearley777@gmail.com>
Sent: Thursday, October 06, 2011 10:50 AM
To: Brenda Martinez
Subject: YB Dev Agreement CR Hearing Written Submittal
Attachments: BricklinSept29_11.pdf; BryantSept29_2011.pdf; BDDACR.pdf

Brenda,

The attached pdf is my written submission on the matter of the Yarrow Bay Development Agreement closed record hearing. Also attached are files supporting this submission. Please note that a forward will follow this email which further supports my submission.

I would appreciate a response from you indicating that both emails were received and added to other written submittals by the public.

Thank you,

Bruce Earley
360-886-8286

Bricklin & Newman LLP

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1001 Fourth Avenue
Suite 3303
Seattle, WA 98154

Spokane Office:
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Reply to: Seattle Office

September 29, 2011

VIA E-MAIL

Mayor Rebecca Olness
Black Diamond City Council
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010

Re: Authority to Remand Development Agreements to Hearing Examiner Hearings

Dear Mayor Olness and Council Members:

I am writing regarding the legal issue of whether the City Council has authority to remand Yarrow Bay's Development Agreement proposals to the Hearing Examiner for further consideration. As you know, because of Yarrow Bay's refusal to provide the Examiner additional time, he was unable to prepare a recommendation to you that "contained an evaluation of every section of the Development Agreements." Examiner Rec., page 3. Also, because of inadequate time, he could not provide "more detailed findings of fact and conclusions of law" and was unable to provide you with a fully organized summary of the testimony. *Id.* While he accomplished one "priority" of addressing the most "significant concerns," there were many items left unaddressed. *Id.* For instance, he acknowledged that it "was not possible for the Examiner to view the constraint maps in the limited time to prepare this" recommendation. *Id.* at 55.

Consequently, the issue arises as to whether the City Council can remand the matter to the Hearing Examiner for his further consideration. Council Member Hanson suggested that an e-mail she had received from the Municipal Research and Services Center suggested that the Council lacked authority to do so. I am attaching to this letter a copy of that e-mail. It says nothing of the sort. The MRSC e-mail addresses the time deadline for the Examiner's recommendation, not the City Council's authority to remand.

The remand issue also was addressed, briefly, by one of your City attorneys. He noted that the City Code does not expressly state that the City Council may "remand" to the Hearing Examiner for additional fact finding and recommendations. But your attorney did not alert you that a City Council has not only those powers expressly stated in the Code, but also "those powers necessarily or fairly implied in, or incident to, the powers expressly granted." *Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 14, n.14 (2010). *See also Noe v. Edmonds School District 15*, 83 Wn.2d 97, 103 (1973).

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It is clear that the power to remand for further fact finding and recommendations is "fairly implied" from the power to grant or deny the applications outright. A remand does not finally dispose of the applications, but rather allows a more complete record and more complete recommendations to be developed. Where the Examiner expressly states that he has not had adequate time to address all the issues and all the testimony, and where the applicant has refused to allow the Examiner to take additional time, you certainly would be justified in simply denying the applications outright. Instead of that more drastic action in response to a timing concern, it is "fairly implied" that the Council also has the lesser included authority to simply remand for additional review by the Examiner.

Your attorney also noted that in another section of the Code (dealing with MPD permits), the Code expressly provides for remands. He suggested that because there was an express reference to remands in that section of the Code and no reference to remands in the section of the Code dealing with development agreements that the drafters of the Code had made a conscious decision not to allow remands in this situation. I strongly doubt that that is the correct inference to draw from the different between those two Code sections. It is highly unlikely that the City Council that approved the two different Code sections were even aware of the discrepancy between the two sections. A more probable inference to be drawn is that the discrepancy was a mere oversight. The applicable rule of statutory construction is that codes should be construed to avoid unlikely results. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (1996) (code should be construed to "avoid a literal reading if it would result in unlikely, absurd or strained consequences"). It is extremely unlikely that the City Council which adopted the Code section at issue here intended to preclude future City Councils (like this one) from seeking additional information from the Examiner if the Examiner had not had adequate time to fully address all issues – and stated so in his recommendation.

Thank you for considering these comments. If you have any questions, I would be happy to address them.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Rogers
Clients

Save Black Diamond
saveblackdiamond@gmail.com

To: Black Diamond City Council

RE: City of Black Diamond Closed Record Hearing
Proposed Development Agreement for the "Lawson Hills" and "The Villages" Master Planned Development
Appearance of Fairness Doctrine Issues

To the City Council and others it may concern:

After the September 26 meeting continuing Appearance of Fairness hearings, we were able to see the document submitted on September 21 by Yarrow Bay regarding the Appearance of Fairness of four council members. We disagree with the issues raised about Council members Goodwin and Saas for the following reasons:

1. The communications to Goodwin and Saas cited in the YarrowBay letter were not made regarding quasi-judicial matters.
    a. Any conversation regarding the MPD Ordinances passed in September of 2010 were not quasi-judicial because the Ordinance was already passed and no longer pending. In addition, the standing court ruling is that the MPD Ordinance was not a quasi-judicial matter. We recognize this ruling is being appealed, but at the current time and the time of the communications, the standing ruling is the only one which can reasonably be expected to be acted upon.
    b. It is our position that a Development Agreement must be legislative by its nature. This legislative interpretation would also make sense in light of the ruling that the MPD Ordinance is legislative. Therefore, the question of ex parte conversations is invalid.

2. In the unlikely event it is determined that the Development Agreements are quasi-judicial, or if the city of Black Diamond feels it must treat them as such given its ordinances, the issues raised in YarrowBay's letter are still not a reason for recusal for the following reasons:
    a. Any conversation specifically regarding the Development Agreements, which it is not clear there were any, would have been about documents not yet deemed complete by staff and the applicant and not yet pending before council. It was not pending until June 10, 2011.

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b. A communication is allowed and must simply be made part of the record if it occurs. At the commencement of the hearings on the 21st, the first meeting where city council was present on the Development Agreement matter, the communications in question were made part of the record because they were included in Yarrow Bay's letter. RCW 42.36.060 is shown below. It clearly states that written communications are allowed and must be placed on the record and announced publicly at each hearing were action is taken on the subject to which the communication is related.

RCW 42.36.060
Quasi-judicial proceedings -- Ex parte communications prohibited, exceptions.

During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:

(1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and

(2) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.

c. Membership in the Lake Sawyer Community Club is not a reason for recusal. This community organization's primary focus is not political. In addition, in the last year, it has been silent on development issues. It is valid for this organization and any member and any council member to be concerned about Lake Sawyer water quality. This does not make them too biased to rule on this Development Agreement.

We disagree with objections to any council member for the following reasons:

d. Property in close proximity to the development parcels is not a reason for recusal. Black Diamond is a small place and Yarrow Bay plans to develop large land areas on 3 sides of the city. Hundreds of people live in proximity to see the tree removal, hear the noise, experience the changes in water runoff and wildlife, and otherwise be affected by the developments.
e. Property directly bordering the development parcels may not a reason for recusal for the same reason stated above. We believe it is appropriate for city council to debate this matter.

In addition, we finally must state that there would be a gross injustice if the two members of the council who have been so thoughtful in their prior considerations are not at the table. It would also be a gross injustice if the only members debating this issue are the ones who have been perceived to be supportive of Yarrow Bay's development proposals. We all seek a better product, and members of council who have more information will yield a better product.

In addition, Save Black Diamond did not put its objections to various members of council regarding Appearance of Fairness on the record yet, but our objections are well known and those conflicts were disclosed last year during the MPD process, and those conflicts are still present.

Kristen Bryant (425-247-9619)
for Save Black Diamond

Contact information: saveblackdiamond@gmail.com

Brenda Martinez

ɔm: Bruce Earley User <bearley777@gmail.com>
Sent: Thursday, October 06, 2011 11:02 AM
To: Brenda Martinez
Subject: B. Earley additional submission Yarrow Bay DA CR Hearing
Attachments: Mayor Olness and Council Letter - 10 04 11.pdf; Mike Kenyon Response on Remand.doc

As noted in my written submission in regards to the matter of the Yarrow Bay Development Agreements (Closed Record Hearings), this forward and the attachments are sent to add in support of my submission.

Please include them with my earlier email written submission (sent 10/6/2011) and reply for verification of submittal.

Thank you,

Bruce Earley
360-886-8286

FW: EMAIL FROM MIKE KENYON CONFIRMING COUNCIL'S RIGHT TO REMAND:

From: "Dave Bricklin" <bricklin@bnd-law.com>
To: rolness@ci.blackdiamond.wa.us, khanson@ci.blackdiamond.wa.us, cgoodwin@ci.blackdiamond.wa.us, bboston@ci.blackdiamond.wa.us,wsaas@ci.blackdiamond.wa.us, leih@ci.blackdiamond.wa.u craig@nwcascade.com, williamsaas@comcast.net, "jean bill boston" <jean.bill.boston@comcast.net>, leih@tx3.net, tkswhanson@hotmail.com
Cc: "MIKE KENYON (mike@kenyondisend.com)" <mike@kenyondisend.com>, "BOB STERBANK (BOB@kenyondisend.com)" <BOB@kenyondisend.com>, "Nancy Rogers" <NRogers@Cairncross.com>, spilcher@ci.blackdiamond.wa.us
Sent: Tuesday, October 4, 2011 3:48:13 PM
Subject: EMAIL FROM MIKE KENYON CONFIRMING COUNCIL'S RIGHT TO REMAND

Mayor and Council members,

Attached please find an email from your attorney, Mike Kenyon, regarding your right to remand the proposed development agreements to the Hearing Examiner. A brief cover letter from me is also attached.

As before, I am providing a copy to Yarrow Bay's counsel and your attorney, so there is no concern about "ex parte" contacts. Everyone is getting the same letter and same attachment.

Thank you.

David Bricklin

Bricklin & Newman, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
206-264-8600
206-264-9300 (fax)
bricklin@bnd-law.com
http://www.bnd-law.com

Confidentiality Notice: This e-mail may contain confidential and privileged information. If you have received this message by mistake, please notify me immediately by replying to this message or telephoning me, and do not review, disclose, copy or distribute it. Thank you.

Bricklin & Newman LLP

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Seattle, WA 98154

Spokane Office:
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Suite 300
Spokane, WA 99201

Contact:
Phone: 206-264-8600
Toll Free: 877-264-7220
Fax: 206-264-9300
www.bnd-law.com

Reply to: Seattle Office

October 4, 2011

VIA E-MAIL

Mayor Rebecca Olness
Black Diamond City Council
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010

Re: Authority to Remand Development Agreements: Confirmation by City Attorney

Dear Mayor Olness and Council Members:

Last week, I wrote to you regarding the issue of whether the City Council has authority to remand Yarrow Bay's Development Agreement proposals to the Hearing Examiner for further consideration. I recently obtained an e-mail from your City Attorney confirming that you have that authority. You will find a copy of that e-mail provided along with this letter.

The e-mail is from Mr. Kenyon to Andy Williamson with copies to Mayor Olness, City staff (Mr. Pilcher and Ms. Martinez), and Mr. Kenyon's colleague, Robert Sterbank. The e-mail is dated June 27, 2011. In the e-mail, Mr. Kenyon is discussing the issue of whether the City Council could consider changes to the Development Agreement and, if so, what procedure could be employed to obtain information regarding possible changes. Mr. Kenyon explained to the Mayor that if the proposed changes were significant (*i.e.*, if they were "big enough"), "**then the Council would have the option to remand back to the Examiner to re-open the hearing on the new 'big enough' items.**"

Mr. Kenyon's opinion is consistent with the opinion I expressed in my September 29, 2011 letter. For the reasons stated therein and in various public comments provided to you separately, we believe you have the authority to remand this matter to address a variety of issues that were not fully resolved by the Hearing Examiner in his recommendations and/or issues which have arisen during the course of your consideration of public testimony regarding the Development Agreements.

Thank you for your attention to this matter. As before, if you have any questions, I would be happy to address them.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Rogers
Clients

177

Steve Pilcher

From: Andy Williamson <AWilliamson@ci.blackdiamond.wa.us>
Sent: Tuesday, June 28, 2011 3:15 PM
To: Craig Goodwin; Bill Boston
Cc: Steve Pilcher
Subject: FW:

Good afternoon council members
Hopefully I have asked the correct question as we had discussed in our meeting I think the answer lands some were in the middle of where we all thought Andy

-----Original Message-----
From: MIKE KENYON [mailto:MIKE@kenyondisend.com]
Sent: Monday, June 27, 2011 5:13 PM
To: Andy Williamson
Cc: Brenda Martinez; Rebecca Olness; Steve Pilcher; BOB STERBANK
Subject: RE:

Certainly.

Michael R. Kenyon
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Tel: (425) 392-7090 ext. 2197
Fax: (425) 392-7071
mike@kenyondisend.com
www.kenyondisend.com

>>> Andy Williamson <AWilliamson@ci.blackdiamond.wa.us> 6/27/2011 4:41
>>> PM >>>
Mike I would to forward this on to Mr. Goodwin and Mr. Boston would that be ok?

-----Original Message-----
From: MIKE KENYON [mailto:MIKE@kenyondisend.com]
Sent: Monday, June 27, 2011 4:38 PM
To: Andy Williamson
Cc: Brenda Martinez; Rebecca Olness; Steve Pilcher; BOB STERBANK
Subject: Re:

Andy:

These will be necessarily general answers because the questions are pretty general. So, generally speaking:

1. Questions from the Council are fair game as long as they're intended to gain clarification or expand upon things that are fairly within the record. While there is some latitude in that respect, questions theoretically could go so far afield as to bring in new information, which would be impermissible at the Council level.

2. Negotiation of new items would be permissible as long as the new items fall fairly within the fairly broad orbit of the information in the record and the related public comments, testimony, exhibits, etc.

3. If the new items are fairly within that broad orbit, then no new opportunity for public comment is likely required. In the Growth Management context (not applicable here), a new public hearing would be required if the changes were "big enough." We'd have to see what potential changes actually might occur here. If they are "big enough," then the Council would have the option to remand back to the Examiner to re-open the hearing on the new "big enough" items.

Clear as mud? Probably not, but we'd need more specifics before we can provide a more specific response. Let me know what else you need. Thanks. MK

Michael R. Kenyon
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The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Tel: (425) 392-7090 ext. 2197
Fax: (425) 392-7071
mike@kenyondisend.com
www.kenyondisend.com

>>> Andy Williamson <AWilliamson@ci.blackdiamond.wa.us> 6/27/2011 2:54
>>> PM >>>
Good afternoon Bob/Mike
Please answer a couple of questions
After the open record hearing on the development agreement and after the council closes there hearing Can the council ask questions of staff or the public and would they be able to negotiate new items or a new agreement with yarrow bay and if so Would the new agreed upon items then need to have another public comment time Or do they get only a thumbs up or down vote I ask these questions because I have been asked to get an answer I look forward to your comments

Andrew Williamson
Director
Engineering Services/Economic Development City of Black Diamond
(360)886-2560
awilliamson@ci.blackdiamond.wa.us

This message has been scanned for malware by SurfControl plc. www.surfcontrol.com

Bricklin & Newman LLP

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Reply to: Seattle Office

October 4, 2011

VIA E-MAIL

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EXHIBIT 16

Thank you for your attention to this matter. As before, if you have any questions, I would be happy to address them.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Rogers
Clients

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Andrew Williamson
Director
Engineering Services/Economic Development City of Black Diamond
(360)886-2560
awilliamson@ci.blackdiamond.wa.us

This message has been scanned for malware by SurfControl plc. www.surfcontrol.com

177

Steve Pilcher

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Sent: Tuesday, June 28, 2011 3:15 PM
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