Brenda Martinez

From: smile meadow <smilemeadow@tx3.net>
Sent: Friday, October 14, 2011 9:59 PM
To: Brenda Martinez
Cc: smile meadow
Subject: rebuttal to YB objections

Erika Morgan
33624 Abrams Ave
Black Diamond Wa 98010
<smilemeadow@tx3.net>
360 886 0187

Ms. Brenda Martinez, City Clerk
City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, Wa 98010

Rebuttal to YB objections: to Erika Morgan's testimony

First, a great big thank you for the combo of our city and YB for sprucing up the "development coming" notice boards. Council please keep in mind this combo could not be self starting to take care of this housekeeping on their own. They had to know and understand about the dilapidation, because it was well on its way when they added the second notices, to those boards. The lesson to learn from this, is our city staff and YB will not be self starting about keeping up any sort of standard on its own initiative. Council will need very specific requirements and most particular inspection and oversight to be a major part of their DA if a good project is the expected result. These requirements need to be as onerous as the Law will allow because past behavior is the best possible predictor of what is coming to Black Diamond with this developer and this city staff in the way of providing a "good, efficient and acceptable job. To put these requirements into your product you also must engage the HE to complete his job to his satisfaction as he asked.

My wetland walk with Dr. Cooke is presented as expert testimony substantiating what I have said right along, that section 22 & 23 are indeed "whole section wetland" just like it says on the plat maps. I have shared these maps with the city council. Dr. Cooke explains from the experts point of view, just what is apparently scientifically needed in the way of an actual, on the ground study, by qualified observers who are given actual time to complete a scientifically defensible and comprehensive study, over time, of the land and its environment. This study is needed, to be able to inform the council, so that decisions you make protect and preserve what you expect to protect
and preserve. Remember your stated goal is to actually protect our
wetland complex as a valued and substantially contributing phenomenon of "what Black Diamond is". We hope our council expects to actually protect and conserve the actual working core wetland complex for ourselves and the greater ecology of the region generally as the Law demands. We welcome the intervention of County, State and Federal regulations that demand these protections, and we understand that what happens with our natural hydrology will have implications for all of the Puget Sound region. We wonder why YB has not contacted all the involved agencies to approve their plan. But are not suprised because their plans are not sufficiently developed so that these professionals would actually know what the proposal is. I wonder if you know what the proposal actually is?

The observations I present in my lower case lettered list are an average persons observations of actual conditions presented as a "local understanding, born of over 30 years of working with my land" to inform the council. These concerns will come up as problems for engineers who

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create plans for this project. I present them so council can be
forewarned of requirements they should make, to protect Black Diamond in the future. In this way the Development Agreement can actually serve the needs of Black Diamond. Specifically, because YB has indicated they will be selling their development rights once those rights are secured, parceling them out to other individual actors, it is particularly important for continuity that Council provide coordinated oversight requirements that achieve their stated goal as presented in their stated Comp Plan. However it does not matter whether YB or some other developer takes on the task in the end the same engineering requirements will arise. It is very important that their purchasers understand the fragile and precariousness nature of the land, and the interconnection of the water and our requirement that actual preservation of our hydrologic peculiarities are carried forward into plans for the land. If this does not happen the projects will be a lot less fiscally viable and that will ultimately turn into a financial liability for Black Diamond. All of the points on my list are from various discussions that I have had with city council, city staff and are dialoged about in my open record testimony, but not in this tabular form so you have to read through all of it to find them, another example of the due diligence which I find lacking from all the actions of this particular applicant.

The statements made by Dr. Cooke are also confirmed in her written testimony and they stand on their own. Supplementary, I will add that our HE also supplied the council with very strong recommendations as regards to Dr. Cooke's testimony and further coordination with over riding agencies with responsibility for wetlands. I will also reiterate once again, the importance of installing actual protection of the Black Diamond Lake peat bog in its actual functional state going forward. This is an absolute treasure with State and Federal protections particularly as the only lowland undisturbed peat bog in the lower 48, you have to visit Alaska to find a treasure like this.
My fundamental understanding of the conditions surrounding my property is confirmed by actual expert testimony that the current DA is found wanting in this regard. We were told that for the MPD hearing we could not bring up specific problems with the plan because it was a "programatic over view". Now at the DA, YarrowBay is attempting to argue that these specific problems with defining wetlands are a done deal. I present to the council the most egregious trespass, (there are many others), the wetland markers, red capped stakes placed along the logging road at the cliff edge 110 feet above the waters of Black Diamond Lake, at the top of an 80 degree clay slope, which would need its own buffer zone (think wet clay slide when the ground is disturbed above). I point out that the logging road is only passable because it has a series of road blankets, as proven by the deep ruts on its east side where vehicular traffic has fallen off the blanket demonstrating the wetland nature of the ground there. The rest of the lands basic water load has been continuously my mantra, remember I brought a chicken waterer to the MPD closed record hearing, and had Mayor Olness hold it for me as I spoke of the moving nature of the water over these lands. And remember I also spoke of the fact that the chicken waterer held a finite amount of water, but our Cascade Range which is our waterers jar, never runs out of water to send our way. Also I stated that any disruption of the waterers tray would result in flooding of Mayor Olness's desk just like any displacement or injury to our clay sheets would result in water disasters down stream. So you see Dr.
Cooke is just giving you the scientific explanation, and the legal reference to the agencies who have jurisdiction to keep Black Diamond on the right side of the law and within their stated requirements on these subjects. Please make sure that all these agencies come together to a decision that answers all their concerns cooperatively as this is the only responsible thing to do here.

I presented the whole archive about these properties into the record before the HE, and as it is part of the public record on some of these lands, YB has had access to this information all the time they have been working on this project. Their apparent innocence of the record proves their lack of diligence about their core business.
The State Supreme Court decision I cited "You will obey the written Law" after two years of appeals will also stand on its own as a part of the record filed with the archive on these properties. It was issued when PCC did not wish to comply with the need to complete an EIS.

I have never said the YB experts lied to me. I have stated only what they told me, and the why and how of, that. I know they were misinformed or unknowing. It is however a problem for an "expert" to be proven misinformed by a lay-person about things which should be in their area of expertise, because these mistakes bring all their "findings" under question. I had asked about specific geological formations and was told there was no way to know without excavating the ground. The question was over the existence of earth scanning to detect various levels of geology as seen recently on 60 minutes. It has been used to find surface water under dense plant growth, ground water and ruins just under the surface, as well as mines and particular deep targets for mining activity, like where the coal, oil, gas, gold etc. is. Really anything can be discovered as there can be slices of many depths and this sort of study would indeed create a lot of predictability that we don't currently have for this project. I also suggested that there are more traditional less expensive ways for trained geologists to understand what they will expect to find and where they will find it.

My testimony before the Hearing Examiner stands for itself, the reported lack of knowledge of the public record of these lands as part in the open record hearing, is another example of lack of the due diligence which a project of the dimensions presented in this DA deserves.

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In-Lieu Payments for Recreational Facilities

Yarrow Bay wants the current wording to stay the same because it is to their advantage, plain and simple. For example, if Yarrow Bay was coming up short on some required space for a storm water pond and changing a currently planned Recreational Facility to a storm water pond was the easiest solution , all they would need to to is request that the Designated Official accept a fee instead of Yarrow Bay building the Recreational Facility. The decision about accepting the payment is completely outside the control of the City Council. The only voice the City Council would have is a yes or no vote on a proposal presented before them on what City Staff would like to spend the funds on.

My proposed change to 9.5.3 gives the power to, both, decide when to accept and how to spend in-lieu payments, and allows for the all important public input. The current wording only lets you approve or disapprove the spending after the acceptance of funds is a done deal. My proposed wording follows. Changes in **large**.

The new proposed language.

9.5.3 The *City Council* shall have the option to request that the *Master Developer pay* a lump sum payment in lieu of constructing any of the individual Recreational Facilities in Table 9-5. The request shall be made prior to triggering the need for the next Recreation Facility. The *City Council may vote to accept a lump sum payment instead of Parks or Recreation Facilities* ***only*** *after a public hearing on the merits of accepting such funds AND the consequences of eliminating the proposed recreational facility.* Determination shall be based on the following four criteria: (i) availability of land; (ii)

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adequacy of funds to construct City-approved recreational facilities; and (iii) City's ability to maintain recreational facilities AND the input of the public who will be the user base for the amenity and tax base who will be ultimately paying for the maintenance of same. *PursuanttoConditionofApprovalNo.93oftheMPDPermitApproval,theamountofthepayment that may be provided in lieu of construction sha# be set through the fo#owing process:*

Funding Agreement

The Hearing Examiner did comment on a possible conflict of interest in the funding Agreement. He did NOT say there was NO CONFLICT OF INTEREST, he said MINIMAL, meaning there is SOME conflict of interest. As the Hearing Examiner is an attorney, limited to legal definitions and to making his determination based strictly on the words in the Funding Agreement, and no actual experience of the last 2 plus years of current funding agreement, for him to even say "minimal" is saying quite a bit.

I disagree with the Yarrow Bay interpretation of the HE recommendations. If you read the entire text (next paragraphs), and perhaps if the Hearing Examiner had more time it would be more clear, but the Funding Agreement must be executed **prior** to executing the Development Agreement. See Implementing Condition W immediately below.

HE Recommended Implementing Condition (bold added)

W. Funding Agreement. 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 or **prior to the execution of the DA** and that no applications already received be processed further until the Ex. N agreement is executed.

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Excerpt P 98,99 from Section VIII Issues of Concern, of HE recommendations

Examiner Response: *The DA includes a proposed Funding Agreement, Ex. N. to the DAs that assures compliance with the COA "no adverse impact" requirement. The agreement has not been executed and its terms as proposed are necessary to find that the DA has adequately*
14 *implemented fiscal requirements, in particular that the increased demand for City staff services*
15 16 17 18 19 20 21 22 23 24 25 26
is adequately compensated. It is recommended that the DA be revised to require that the proposed funding agreement attached as DA Ex. N, or a substantially similar agreement, be executed prior to the acceptance of any implementing project applications and that no applications already received be processed further[8] *until the Ex. N agreement is executed. The Funding Agreements, Ex. N to the DAs, reasonably assure that the projects will not impose a financial burden on BD residents, but do give some flexibility to the City and Applicant to negotiate fiscal mitigation that fall short of preventing fiscal short falls. Section 4(a) of the funding agreements put the City firmly in control by requiring YB to pay any amounts deemed necessary by the City, subject to a dispute resolution process to contest any amounts paid.As to shortfalls at build-out, Section 4(a) of the funding agreements provide that development permits will not issue for the final phase unless and until agreement is reached on addressing any funding shortfalls. 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. 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*

[8] The City Attorney will have to evaluate whether the City can cease processing the subdivisions currently under review, given the mandatory Regulatory Reform, Chapter 36.70B RCW, permitting timelines.

 has room to argue that it is entitled to an agreement of inadequate fiscal solutions if no adequate
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Yarrow Bay's conclusion that implementing the Funding Agreement within the Development Agreement satisfies the Hearing Examiner recommendations is flawed (see below). It ignores the the fact that there is a conflict of interest within the Funding Agreement(fact), that the Hearing Examiner recommendation uses the word "**prior**" not

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"**concurrent**" to describe execution(fact), that the Funding Agreement is actually a legislative act and should not fall in with quasi judicial proceedings.

The last paragraph of Yarrow Bay response to written and oral testimony, P 91

In response to Recommended Implementing Condition "W," YarrowBay proposed at page 39 of Exhibit C-7 that "the Development Agreements provide for concurrent approval of both the MPD Funding Agreement and the Development Agreement thereby ensuring that no
MPD implementing projects are approved prior to execution" of both. Stated most simply, approval of the Development Agreements is approval of the MPD Funding Agreement. As such, there is no reason or basis to "extract" the MPD Funding Agreements from the Development Agreements.

Remand

Yarrow Bay would like you to believe that because BD Code 18.08.070 does not specifically give you the power to remand the DA back to the HE you can not send it back. That, however, is not the case. As pointed out in David Bricklin's letter dated Sept. 29, 2011 exhibit number 5 (see below), **you can remand it back to the Hearing Examiner** for numerous reasons such as needing more time, more fact finding, more case law, or most anything that you as City Council feel is necessary to render a fair and informed decision. You have implied powers not specifically prohibited by BDMC.

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Bricklin & Newman LLP

Seattle Office:
1001 Fourth Avenue
Suite 3303
Seattle, WA 98154

Spokane Office:
35 West Main
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

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

TO YARROW BAY RE THEIR RESPONSE TO ME, "IT'S COVERED":

IT IS ADMIRABLE THAT THE SITUATION WITH THE EAGLES IS "COVERED," BUT WE, THE PEOPLE, BOTH AS BLACK DIAMOND RESIDENTS AND AS U.S. CITIZENS, NEED TO KNOW THE SPECIFICS OF WHERE THE INDIVIDUAL EAGLE ROOSTS HAVE BEEN IDENTIFIED BY YARROW BAY IN CON-JUNCTION WITH THE WILDLIFE AND FISHERIES DEPARTMENT, IN PER-PERPETUITY AND EVERY TIME A SPECIFIC YARROW BAY SITE PLAN IS ROLLED OUT. A WILDLIFE BIOLOGIST MUST BE CONSULTED AND INVOLVED IN

EVERY PROCESS OF EAGLE NEST AND ROOST IDENTIFICATION AS PER WASHINGTON STATE LAW. WHO IS THE WILDLIFE BIOLOGIST IN-VOLVED? WHAT IS HIS OR HR CONTACT INFORMATION? WHAT ARE THE NUMBERS OF THE PERMITS INVOLVED IN EACH EAGLE NESTING AND ROOSTING SITE? THESE SIGNATURES AND DOCUMENTS SPECIFYING COMPLIANCE MUST BE PRINTED OUT ON EACH AND EVERY SITE PLAN SO THAT THE CITIZENRY CAN SEE THAT UPDATINGS ARE COMPLETED BY BOTH YARROW BAY AND THE DEPARTMENT OF FISH AND WILDLIFE WITH REGARD TO SPECIFIC COMPLIANCE. IN OTHER WORDS, FOR AS LONG AS BUILDING AND DEVELOPING OF SPECIFIC SITES GOES ON, YARROW BAY MUST SHOW ON MAP PLANS THAT NESTS AND ROOSTS ARE SPECIFIED PER INCREMENT OF LAND PARCELS.

THERE IS A WA STATE LAW, THE BALD EAGLE PROTECTION LAW OF 1984 RCW 77.12.655: "THIS LAW REQUIRES THE ESTASBLISHMENT AND EN-

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ROUNDING AREAS ARE THE HOMES OF THE BALD EAGLES. THEY CHANGE FROM YEAR TO YEAR. THE LAKES AND FORESTS PROVIDE FOOD FOR THE EAGLES. WHAT WILL BE DONE BY YARROW BAY TO THE TALL TREES AND LAKES? EAGLES CANNOT READ A SIGN TELLING THEM WHERE IT IS OK TO FISH, HUNT, ROOST AND NEST, BUT WE, THE CITIZENS OF BLACK DIAMOND CAN DEMAND THAT YARROW BAY BE SPECIFIC TO US IN EVERY FACET OF ITS PLANNING IN MPDS REGARDING THE EAGLES. THE BURDEN OF PROOF RESTS WITH YARROW BAY AS OUTLIND BY FEDERAL AND STATE LAWS AND IN CONJUNCTION WITH THE FISHERIES AND WILDLIFE DEPARTMENT IN EVERY PHASE OF DEVELOPMENT.

QUOTATIONS AR TAKEN FROM THE BALD EAGLE PROTECTION IN WASHINGTON STATE DOCUMENT INCLUDED WITH THIS STATEMENT.

SINCERELY, Angela Therese Taeschner

ANGELA THERESE TAESCHNER
BLACK DIAMOND, WA
OCTOBER 19, 2011

Bald Eagle Protection in Washington State

Bald eagles are protected by both state and federal law. This document covers Washington state law, which addresses bald eagle habitat protection. Federal law, which addresses both nest tree protection and protection from disturbance, is discussed in the Harm or Harassment of Eagles section, below. In July 2007, the bald eagle was removed from protection under the federal Endangered Species Act. However, two other federal laws still provide protection for the bald eagle, the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. These laws primarily address nest tree protection and protection from harassment. Federal laws and regulations come into play when a federal permit is required (such as a dock permit from the Army Corps of Engineers), or when a federal crime, such as harm to an individual eagle or nest, is suspected. The federal delisting is expected to be followed by state downlisting. However, bald eagles will remain protected under other state and federal laws.

Bald eagle habitat protection in Washington State is authorized by the Bald Eagle Protection Law of 1984, RCW 77.12.655. This law requires the establishment and enforcement of rules for buffer zones around bald eagle nest and roost sites. The law states that the rules shall take into account the need for variation of the extent of the zone from case to case. A group of stakeholders developed the Bald Eagle Protection Rule, WAC 232-12-292, and it was adopted by the Washington State Wildlife Commission in 1986. The primary focus of the Bald Eagle Protection Rule is to protect habitat via site management plans.

Bald Eagle Management Plans

A Bald Eagle Management Plan (BEMP) is a habitat protection agreement between Washington State Department of Fish and Wildlife (WDFW) and the landowner ensuring minimal impact on bald eagles and reasonable land use for the owner.

Prior to most property improvement or other land use, a permit application must be submitted to the appropriate agency. Washington Dept. of Natural Resources (DNR) reviews all proposed timber and mining proposals, and county permitting departments handle clearing, storm water and shoreline, septic and building permits, etc. If you are not sure about the need for a permit, it is best to ask beforehand. Delays and penalties can be costly. If the activity is near an eagle nest or roost (discussed below), the permitting agency works with WDFW and the landowner to develop a Bald Eagle Management Plan (see WAC 232-12-292, section 4.4). This plan will not prevent the landowner from reasonable use of the property, but it will ensure that development will have the least impact possible on the eagles and their habitat. There are no specific requirements established by the enabling language of the rule, but to ensure consistency across landowners, WDFW has established basic guidelines. WDFW has described the scientific basis for bald eagle site management in the Priority Habitat & Species Management Recommendations for the Bald Eagle. Management Guidelines are used by WDFW biologists in developing bald eagle management plans and ensure that fair and even treatment is extended to all landowners. The bald eagle management plan guidelines have changed significantly since the bald eagle management planning process was begun in 1986. These changes reflect the increasing population of eagles, the apparent increasing tolerance of eagles in urbanizing areas, and WDFW's interest in accommodating landowner goals and reducing landowner burdens while minimizing impacts on critical eagle habitat. The guidelines discussed below were developed in 2001.

Please be aware that activity on federal land, or involving a permit from a federal agency such as the Army Corps of Engineers, requires approval from the U.S. Fish & Wildlife Service. Contact your federal permit reviewer for guidance.

The Standard Bald Eagle Management Plan

For activities that are within 800 ft of an eagle nest, but not within 400 ft of the eagle nest, and for activities that are within 250 ft of the shoreline or its adjacent bank and within ½ mile of an eagle nest, but not within 400 ft of an eagle nest, the following basic conditions are applied. See diagram below.

1. Retain all known perch trees and all conifers greater than or equal to 24 inches diameter at breast height (24" dbh, measured at 4 ½ ft above the ground).

2. Retain all cottonwoods greater than or equal to 20" dbh, in counties where cottonwood nests occur.

This document was prepared in November 2005 as a general response to frequently asked questions by Julie Stofel, WDFW Endangered Species Biologist, Region 4 (Northwest Washington). It was revised and updated in 2007 and 2008 by Elizabeth Rodrick, WDFW Bald Eagle Management Coordinator, and Gretchen Blatz, WDFW Wildlife Data Management Biologist

3. Retain at least 50% of pre-clearing or pre-construction conifer stand with diameter distributions representative of the original stand (>6 feet tall).

4. Windowing and low limbing of trees is acceptable provided no more than 30% of the live crown is removed. Topping of trees is not allowed.

The conditions listed above are part of what is called the "Standard Short Plan". It is pre-approved by WDFW for activities that do not require a DNR permit (forest practice application). It is available from the county or city permit desk for parcels and activities that meet the distance definitions. No site visit by WDFW is necessary in these cases. There is no cost for the Standard Short Plan.

The Site-Specific Bald Eagle Management Plan

For activities that are within 400 ft of an eagle nest, a site-specific plan is required. Any landowner who feels that the conditions of the Standard Short Plan cannot be met may request a site-specific plan. A site-specific plan is also required for any forest practice activity that is within ½ mile of an eagle nest (but see "No Conditions Plan", below). A site-specific plan is also required for any activity within ¼ mile of a bald eagle communal roost. There is no cost for a WDFW prepared plan, but it is more time consuming to obtain. Typically, a site-specific plan can be obtained in 2-6 weeks, depending on the complexity. Landowners may hire a qualified consultant at their own expense to prepare a bald eagle management plan for WDFW approval. While this is not necessary in most cases, it can help save time by ensuring that all the necessary documents are complete. To request a site-specific bald eagle management plan, provide the following information to the WDFW bald eagle biologist for your area:

1. Landowner name, mailing address, telephone number, and email address

2. Requestor's name, mailing address, telephone number, and email address (if different from above)

3. County in which the activity will occur

4. Parcel number

5. Site address of parcel (if available)

6. Parcel map (available from county) or Forest Practice Base Map (available from DNR) showing the parcel/activity area and the Township, Range, Section, and Quarter Section

7. A site map showing the activity:
   a. Forest Practice Activities: the timber harvest boundary and buffer boundaries must be marked, with the location of the eagle nest shown.
   b. Subdivisions and short plats: include the plat map and show the location of the eagle nest, and the location of currently forested areas.
   c. Building Permits (and related permits, like clearing and grading and septic): show the location of the eagle nest, and the locations of conifer trees greater than or equal to 24" dbh that will be affected by the activity. Also show the locations of conifer trees greater than or equal to 24" dbh that will be protected and retained. Show the proposed locations of house, driveway, garage, septic, and any other clearing activity

   Note: For site-specific information, contact the WDFW bald eagle biologist for your area.

Once the biologist has received the above information, you may be contacted to arrange a site visit. A site visit may be required for activities within 400 ft of a nest site.

The "No Conditions" Bald Eagle Management Plan

Forest Practice Rules (WAC 222-16-080 6e) require a bald eagle management plan for activities within ½ mile of and eagle nests or ¼ mile of an eagle roost. In many cases, however, WDFW does not require conditions, because the activity is not within 250 ft of the shoreline and is not within 800 ft of the nest. In these cases, WDFW provides the landowner with a plan that explains why no conditions are needed.

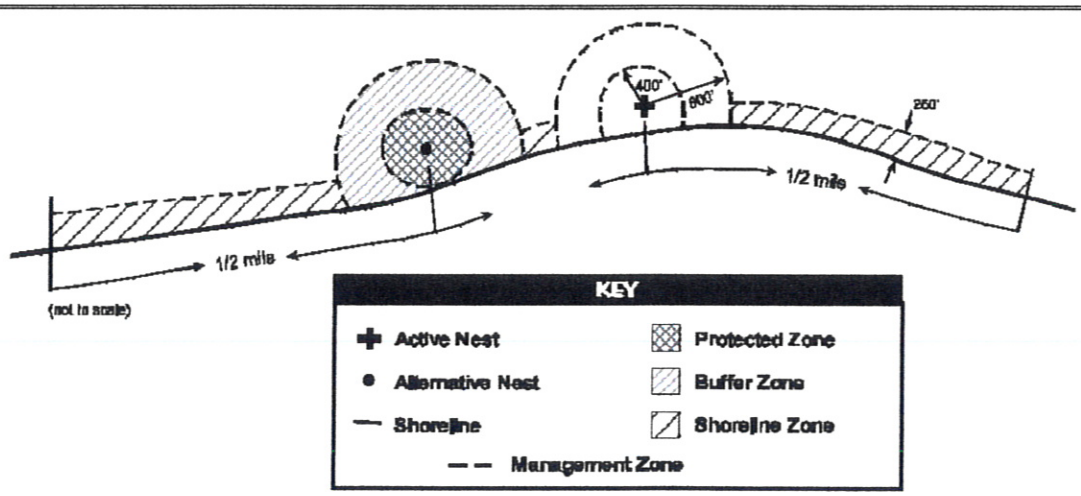
This document was prepared in November 2005 as a general response to frequently asked questions by Julie Stofel, WDFW Endangered Species Biologist, Region 4 (Northwest Washington). It was revised and updated in 2007 and 2008 by Elizabeth Rodrick, WDFW Bald Eagle Management Coordinator, and Gretchen Blatz, WDFW Wildlife Data Management Biologist

Bald Eagle Protection in Washington State

The Communal Roost Bald Eagle Management Plan
Bald eagle communal night roosts are important winter habitat. Eagles use night roosts as protection from inclement weather and temperature extremes. Night roosts may also serve important social functions. Winter night roosts are generally associated with large, salmon-bearing rivers, although there are some associated with coastal foraging areas. Night roosts are usually on forested slopes, up to 5 miles from the feeding areas. The combination of topography and trees provides the microclimate that is important to roosting eagles. For the purpose of inclusion in the WDFW database of protected sites, a roost is defined as a tree or a group of trees in which at least 3 eagles roost for at least 2 nights and during more than one year. The definition refers to at least 3 eagles to differentiate the communal roost from a perch used by a territorial pair of eagles. Site-specific Bald Eagle Management Plans are required for activities within ¼ mile of communal night roosts. Activities within ¼ mile of eagle roosts are restricted in the winter, generally from Nov 1 to Feb 15, although this may be modified (shortened) for roosts with known activity periods that do not extend through the entire winter season. Leave tree buffers are also required, although the buffer distance varies with the conditions of the site. Timber harvest within communal night roosts is not permitted.

How Do I Find Out What Kind of Plan I Need?

Your county planning or permit desk can tell you whether you need a bald eagle management plan and if you are eligible to use the Standard Plan. The Department of Natural Resources will direct you to the WDFW bald eagle biologist for your area. In all cases, you can request a site-specific bald eagle plan from the WDFW bald eagle biologist for your area.



Bald Eagle Management Plan Zones

Management Plan Zones are defined by distance from a bald eagle active nest tree:

- Within 400' (Requires a Site-Specific BEMP from WDFW)
- From 400' to 800' (Eligible for a Standard 1-Page WDFW BEMP)
- Shoreline Zone: within 250 ft of shoreline if also within ½ mile of a nest. (Eligible for a Standard 1-Page WDFW BEMP)

How Long Are Eagle Management Plans Good For?

Each year bald eagles return to the same area, known as a breeding territory. In many cases, there are several nests per territory, only one of which will be occupied at a given time. Territories are generally

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occupied year after year, although it is not unusual for a territory to be unoccupied for one or several years at a time. Sometimes, nests that have not been used for many years are reoccupied by a new pair of eagles that take over part of another pair's territory. The most extreme example known from Washington was a nest that was unoccupied for 12 years before a new pair moved in to take over the north part of the resident pair's territory. Examples such as these demonstrate why it is important to maintain large trees capable of supporting nests, in order to provide for the species as a whole. Nest structures may blow or fall out of a tree, or even be dismantled by energetic chicks, but as long as the tree is capable of supporting a new nest, the tree is protected as a nest site. Individual nest sites within a territory are removed from the list of protected sites only if the tree falls naturally or breaks in such a way as to prevent new nest construction.

A Bald Eagle Management Plan constitutes an agreement by the landowner to protect the eagle habitat on their property. The plan remains in effect indefinitely. However, a change of ownership or a request for a new activity may lead to a new bald eagle plan. If a landowner believes that the site is no longer capable of supporting bald eagles, the landowner can also request a review by WDFW to determine if the bald eagle plan is still needed. This is determined by reviewing the history of the site, as well as the physical state of the habitat. In general, WDFW uses a guideline of 5 consecutive years of absence throughout the whole territory (not just at a single nest site) to determine whether a site is truly "not active".

As of 1998, WDFW no longer conducts annual nest surveys. The last complete statewide survey was conducted in 2005. Sampling surveys will be conducted at 5-year intervals for the next 20 years to comply with federal monitoring requirements under the Endangered Species Act, but annual surveys are no longer conducted. Therefore, documenting absence for a period of 5 years will become the responsibility of the landowner making the request.

Timing of Logging or Construction

The Bald Eagle Management Plan is focused on maintaining habitat (nest trees, perch trees, and associated screening trees). As of December 2001, WDFW recommends but does not require that construction or logging activities take place during the least sensitive times periods for eagles, July 15 – January 31.

Eagles are most sensitive to disturbance Feb 1 - April 15. They are establishing territories and beginning incubation at this time. The chicks typically hatch in mid to late April. Once the chicks have hatched, the adults are less likely to abandon as a result of disturbance. The chicks are able to keep themselves warm and feed themselves by late April to early May, so are more easily able to survive periods when the adult is off the nest due to temporary disturbance. The young typically fledge (leave the nest) in mid July. At that time, just before fledging, they are vulnerable and can be frightened off the nest before they are able to fly. When conducting activities that are noisy or that involve people within 400 feet of a nest tree, landowners should take the following approximate schedule into account as much as possible: Feb 1 - May 1, more sensitive; May 1-July 1, less sensitive; July 1-July 15, more sensitive; July 15 - Jan 31, least sensitive.

Harm or Harassment of Eagles

Harm and harassment of eagles is prohibited by law. The relevant State law is RCW 77.15.130 (regarding harm of protected wildlife). The relevant Federal laws are: USC Title 16 Chapter 5A Subchapter II Section 668 Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act (USC Title 16 Chapter 7 Subchapter II Section 703). If harm or harassment of eagles is suspected, please call Washington State Patrol and ask to have a wildlife enforcement officer dispatched. In addition, failure to comply with the Bald Eagle Habitat Protection Rule (WAC 232-12-292) may constitute harm to eagles under RCW 77.15.130 (b).

What About Other Species?

Red-tailed hawks and ospreys are two other species that build large nests in trees. Ospreys also commonly nest on cell phone towers, power poles, and on marine structures like "dolphins" (a group of pilings used for mooring). Great blue herons build medium-sized stick nests in trees, often in groups or colonies. Crows build medium sized stick nests, but they do not nest in colonies like herons. All birds, (except game birds and the following species which are considered nuisance species: starlings, and English sparrows), are protected by state law (WAC 232-12-011). Nests and eggs of protected species are protected from malicious harm under RCW 77.15.130. Contact your local WDFW biologist to determine whether a nest is active, the species at the nest, and the best methods by which to ensure habitat protection while initiating development near such a nest. Generally, human activity can coexist with nesting wildlife. In rare cases, such as osprey nesting on equipment, the nest may be incompatible with safety or operation of the

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equipment. In those cases, arrangements can be made with WDFW to determine the best time and method of removal.

Web Links

Federal Endangered Species Act
http://www.fws.gov/laws/lawsdigest/ESACT.HTML

Washington State Status Report for the Bald Eagle
http://wdfw.wa.gov/wlm/diversty/soc/status/baldeagle/baldeagle_status07.pdf

RCW 77.12.655 - Habitat buffer zones for bald eagles -- Rules.
www.leg.wa.gov/RCW/index.cfm?section=77.12.655&fuseaction=section

WAC 232-12-292 - Bald eagle protection rules.
www.leg.wa.gov/wac/index.cfm?fuseaction=Section&Section=232-12-292

WDFW: PHS Management Recommendations for the Bald Eagle
wdfw.wa.gov/hab/phs/vol4/baldeagle.pdf

WAC 222-16-080 Forest Practices requiring Bald Eagle Management
www.leg.wa.gov/wac/index.cfm?fuseaction=Section&Section=222-16-080

RCW 77.15.130 Protected fish or wildlife - Unlawful taking - Penalty.
www.leg.wa.gov/RCW/index.cfm?section=77.15.130&fuseaction=section

USC Title 16 Chapter 5A Subchapter II Section 668
(Federal Bald and Golden Eagle Protection Act)
www4.law.cornell.edu/uscode/html/uscode16/usc_sup_01_16_10_5A_20_II.html

USC Title 16 Chapter 35 Section 1538
(Endangered Species Act definition for "take")
uscode.house.gov/download/pls/16C62.txt

USC Title 16 Chapter 7 Subchapter II
(U.S. Migratory Bird Treaty Act)
www4.law.cornell.edu/uscode/html/uscode16/usc_sup_01_16_10_7_20_II.html

USC Title 16 Chapter 53
(The Lacey Act)
http://www4.law.cornell.edu/uscode/html/uscode16/usc_sup_01_16_10_53.html

National Bald Eagle Management Guidelines
http://www.fws.gov/migratorybirds/issues/BaldEagle/NationalBaldEagleManagementGuidelines.pdf

Additional Information

Washington State Department of Fish and Wildlife (WDFW homepage)
wdfw.wa.gov/

U. S. Fish & Wildlife Service (USFWS) Endangered Species Information
www.fws.gov/endangered/wildlife.html

USFWS Species Profile for the Bald Eagle
ecos.fws.gov/species_profile/servlet/gov.doi.species_profile.servlets.SpeciesProfile?spcode=B008

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Before the Black Diamond City Council Hearings on Yarrow Bay Master Planned Development Agreements

Reply to Applicant Responses to Close Record Written Testimony

October 19, 2011

The following is in reply to Applicant Exhibit C-44, pp 33-38. Numbered paragraphs correspond to numbered paragraphs in Applicant's response which, in turn, correspond to numbered paragraphs in Edelman written testimony, C-34.

General

Yarrow Bay infers in several responses that failure of the Examiner to address an issue means that the issue is resolved in Yarrow Bay's favor. Nothing can be further from the truth. The Examiner's position on issues cannot be inferred from his failure to address the issues. Only expressed positions are valid. To try to infer otherwise is an obvious logical fallacy.

The reason some issues were omitted should be obvious – either the Examiner overlooked the issue or failed to develop an opinion. Yarrow Bay and the City forced the examiner to complete his tasks in an unreasonable amount of time. He was not allowed to prepare his report as required by the Municipal Code. This was expressed in the Examiner's Recommendations, pp 3-4. BDMC 2.30.110(A) requires that all "decisions or recommendations of the examiner must be supported by findings of fact and conclusions of law." The Examiner was not given sufficient time to prepare his recommendations in a detailed and organized manner and to properly develop

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findings of fact and conclusions of law regarding all issues. This is evident from the large number of issues that were raised in testimony but not addressed by the Examiner.

Section VII of the Examiner's Recommendations is a summary of the "Issues of Concern". Failure to include issues in this section is evidence that those issues were overlooked. Failure to address an issue and prepare findings of fact, conclusions of law, and, if necessary, recommendations regarding that issue can only mean that the report is incomplete. No one, other than the Examiner, can say what his findings and conclusions would have been if the issue had been discussed. To attempt to read omission of an issue from the report as agreement with Yarrow Bay's position cannot be justified.

1. **Failure to meet the requirement of Condition 156 (Villages) and 160 (Lawson) for <u>exact</u> terms and conditions was not addressed by the Hearing Examiner.**

   Yarrow Bay states that "the Examiner did in fact note Mr. Edelman's 'exact terms and conditions' issue on page 97 of his Recommendations". This statement is false. On page 96 the Examiner noted that

   > "V MPD COA 156 and LH MPD COA 160 require the following:
   >
   > ***
   >
   > 5. The exact terms and process for performing the fiscal analysis and evaluating fiscal impacts shall be outlined in the DAs
   >
   > ***

This is the sole reference by the Examiner and does not note the issue at all – it simply notes the requirement. Further, Yarrow Bay, asserts that the "Examiner concluded that only one revision needed to be made to the fiscal analysis" [emphasis in the original]. This is Yarrow Bay's oft repeated argument that if the Hearing Examiner did not make a recommendation concerning an issue than the issue is decided. There is no basis for such a conclusion.

The fact remains that the Development Agreement does not and cannot meet the requirement for "exact terms and process" because the methodology is not adequately defined and key defining decisions are left to future agreement between Yarrow Bay and the City. This is discussed extensively in Exhibit 62, pp 2-5, Exhibit 256, pp 5-9, and Exhibit C-34, pp 1-4. Those arguments will not be repeated here because of space limitations.

2. The illegal surcharge agreement in the Funding Analysis was not addressed by the Hearing Examiner.

There is no discussion of the Surcharge Agreement by the Examiner. Yarrow Bay refers to the Examiner statement that the "Funding Agreements, Ex. N to the DAs, reasonably assure that the projects will not impose a financial burden on BD residents". This statement offers no opinion as to whether or not the surcharge agreement is required or legal. It is neither. The Surcharge Agreement provides a benefit to Yarrow Bay and a legal risk to the City. Yarrow Bay again infers that the lack of an Examiner recommendation on the issue represents concurrence with their position. On the contrary, the absence of a discussion by the Examiner means that the issue remains unresolved.

3. The issue of vesting on two different dates was not addressed by the Hearing Examiner.

In Exhibit C-44, Yarrow Bay repeats its response regarding the issue of vesting dates from its Exhibit 209. That response was replied to in Exhibit 256, p9. Yarrow Bay does not address the issue of law raised in Exhibit 64 that the MPDs cannot be legally vested on two different dates. The Examiner did not address this legal vesting issue at all.

The City and Yarrow Bay have taken the position that MPDs are project-specific actions that vested when the vesting moratorium was lifted. However, Section 15.1 also asserts that the MPDs are vested when approved. Both cannot be true if the MPDs are project permits.

When Yarrow Bay's application was submitted there were two possibilities for vesting. They could either be vested as of the date their application was deemed complete (July 6, 2009) per the pre-application agreement with the City or they could be vested when the applications were approved (September 28, 2010) per BDMC 18.98.195. They could not choose both or selectively waive one for the other if their project permit claims are correct. The Washington State Court of Appeals found in *East County Reclamation Co. v. Bjornsen* that vested rights are not waivable; a developer cannot selectively benefit from old and new regulations. *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 438.

If Yarrow Bay wanted its MPD applications to be vested when the City took action then it should not have vested its applications on June 28, 2009. Instead, they desire both.

By vesting at the point the moratorium was lifted, Yarrow Bay and the City had concluded that the BDMC had been updated as contemplated by their pre-application agreement. (See Exhibit 2 to Exhibit 64.) Section 5.2 of that agreement stated the vesting intent:

> "The MPD application shall vest to the City policies, standards, application requirements, and land use regulations in effect on the date the moratorium referenced in paragraph 5.1 is lifted or otherwise expires ("Vested Standards")."

Since the moratorium was lifted the municipal code has undergone several changes which Yarrow Bay now wants to vest in to their advantage.

Yarrow Bay ignores the fact that each MPD application was and remains a single proposal. Each MPD proposal was first the subject of the MPD ordinance and now is the subject of a proposed Development Agreement. Under the case law cited above, Yarrow Bay does not have the option of having an MPD proposal vested to one set of laws for the initial decision (the MPD ordinances) and then vest to another set of laws for a latter decision (the Development Agreement). The case law makes clear that a developer cannot pick and choose in this manner. It's "all in" or "all out." Yarrow Bay's efforts to have the initial decision for its proposals judged by laws in effect in 2009 and the second set of approvals judged by laws in effect in 2010 directly conflicts with the holding of these cases.

4. **Failure to meet the requirement of Condition 10 to specify the mechanism for credits or cost recovery was not addressed by the Hearing Examiner.**

Villages Condition 10 and Lawson Condition 9 require in part:

"The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanism this shall occur. [Emphasis added]"

Yarrow Bay asserts that the requirement to specify the mechanism for cost recovery for eligible projects is satisfied by "any method allowed by law". It should go without saying that illegal methods will not be used. However, to say that the mechanism that will be used for cost recovery is any legal method hardly qualifies as a specification.

The Examiner did not address this issue.

5. **Failure to meet the requirement of Condition 18 to establish pro-rata shares of transportation mitigation projects was not addressed by the Hearing Examiner.**

Villages Condition 18 and Lawson Condition 17 require in part:

"The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established in the two Development Agreements …"

Yarrow Bay claims that this condition is met by Sections 11.4 and 11.5. However, the requirement to establish pro-rata shares as required by the condition is not satisfied. Stating that the obligations will be shared on a proportionate share basis does not establish what the pro-rata share will be nor does it even specify how one would determine pro-rata share.

The Examiner did not address this issue.

6. **Failure to meet the requirement of Condition 34 to identify which traffic projects will qualify for cost recovery was not addressed by the Hearing Examiner**

Villages Condition 34 requires:

> "The Development Agreement shall address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery."

Yarrow Bay notes that all traffic projects will be built by the developer and none by the City. It is correct that this is stated in paragraph 11.4(B). However, the fact remains that there is no discrete identification of which projects will qualify for cost recovery. Only very general criteria for determining cost recovery are discussed.

The Examiner did not address this issue.

7. **Failure to meet Condition 92 (Lawson) for guaranteed public access to private parks and trails was not addressed by the Hearing Examiner. The Examiner did address a differently worded requirement for The Villages but not the more stringent requirement of Lawson Hills.**

Yarrow Bay falsely characterizes the issue and the Examiners conclusions. I will repeat my discussion from Closed Record testimony, <u>this time with additional emphasis</u>:

The Villages MPD ordinance and the Lawson Hills MPD ordinance are different regarding public access to private parks and trails.

The Lawson Hill MPD 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." [Emphasis added]

The Villages MPD condition 94 requires:

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

Yarrow Bay suggests that these two conditions be read together and then concludes that all that is required is that there be "some authorizing language in the Development Agreements".

The two ordinances cannot be interpreted together. The MPDs are separate and the MPD authorizing ordinances are separate. The above emphasized sentence in the Lawson Hills ordinance is quite clear in its meaning and intent: there must be language that guarantees access to privately-owed parks and trails facilities. The public cannot be denied access.

Yarrow Bay cites BDMC 9.86.230 as confirming the "City's existing authority to put reasonable limitations on public access, including but not limited to, hours of operation or the ability to host private events". The language relied on provides in part:

"Such rules and regulations may include the establishment of hours during which any park or portion thereof as designated by signs located within the designated portion, shall be closed to the general public; such closures may be for reasons of public safety, welfare and convenience, or for reasons of park maintenance."

The City has no authority to apply this code to private parks. If applied to private parks it would allow closure of parks to "the general public" which would include the park owners, and would regulate park owners' access to their own parks. An obvious exception would be closing for public safety under code that permits closing any property for that reason.

The Hearing Examiner addressed the Condition 94 (Villages) only and did not address the Lawson Hills condition which requires guaranteed access.

8. **Failure to meet the requirement of BDMC 18.96.150(B) to establish the sizes of trails was not addressed by the Hearing Examiner. The Examiner did make a recommendation to correct the failure to identify the sizes of parks.**

BDMC 18.98.150(B) requires:

"The MPD permit and development agreement shall establish the sizes, locations, and types of recreation facilities and trails to be built and also shall establish methods of ownership and maintenance."

The Examiner did not address the requirement that the sizes of trails to be built must be established. Yarrow Bay makes two arguments.

Yarrow Bay argues that the City Code contains no requirement that the length of trails be set forth in the Development Agreements even though the ordinance requires that the size of trails be established in the Development Agreements. They seem to be contending that the length of a trail is not required to specify its size. A tenet of statutory construction is that statutes are to be interpreted using the ordinary meaning of the language of the statute, unless a statute explicitly defines some of its terms otherwise. The plain meaning of the ordinance is that the dimensions of the trails be specified. The "size" of a trail cannot be specified without specifying its most important dimension – its length. It is absurd to claim otherwise.

The second argument is that the MPD Conclusions of Law determined that the MPDs comply with 18.98.150(B). However, the MPD Conclusions of Law addressed compliance of the MPDs and not the Development Agreements. The Municipal Code places the requirement on the Development Agreements as well as the MPDs. The MPD ordinances could not bless the Development Agreement language before it existed.

Respectfully submitted,

Robert Edelman

29871 232nd Ave SE

Black Diamond, WA 98010

Les Dawson's Reply to Yarrow Bay's Response re: My Written Statement (On behalf of Steve Hiester, Chair of Greater Maple Valley Unincorporated Council)

Rural Facilities.

Yarrow Bay's comments:

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

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

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

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

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

Response:

Yarrow Bay continues to argue that Black Diamond should not make siting of urban-serving facilities inside the Urban Growth Area a requirement of the Development Agreement, or any other provision for approving the MPDs. Further they continue to argue that it is the responsibility of King County, in this case, to make the decision whether these facilities will be permitted in the Rural Area.

Yarrow Bay attempts to argue jurisdictional issues with the Hearings Boards (see Yarrow Bay comments above) as justification for Black Diamond not having the authority to "decide whether the regional stormwater facility and three school sites comply with the GMA and/or to compel Yarrow Bay to site such facilities within the UGA". This argument attempts to distract from the real issue of whether urban-serving facilities, driven by the MPDs, be required by Black Diamond to be located inside the UGA. The question is not the jurisdiction of the Hearings Boards but whether Black Diamond's responsibility under GMA is to contain urban development inside the UGA.

The most basic element of GMA is the establishment of an Urban Growth Area to contain "urban growth", thus protecting the Rural Area. What's being requested is to simply make it clear that Black Diamond expects Yarrow Bay, or any other developer, to keep urban development inside the urban areas.

There is no solid argument that makes stormwater facilities or schools that are driven by urban development somehow excluded from the GMA requirement.

Every urban jurisdiction in King County not only has the authority but also the responsibility to require urban development being driven in their jurisdictions to stay inside the UGA. To do otherwise is unfair, irresponsible, and unnecessary. Why would Black Diamond shift its responsibility to King County's permit process just because Yarrow Bay chooses not to comply with the intent of GMA to keep urban development inside the UGA?

Regional Stormwater Facilities

Yarrow Bay continuing to call stormwater retention/detention facilities "regional" detracts from the fact that the requirement for the proposed facility is being driven by the MPDs being addressed in the Development Agreement. "Regional" implies additional use which is not part of the MPD proposal. To imply future other uses is to speculate on additional development outside the scope of the MPDs or to scramble to find some justification that detracts the focus from the fact that the facility is being driven by the MPDs. Only now is Yarrow Bay attempting to find other possible users of the stormwater facility which is relevant and specifically addressed in Black Diamond's Municipal Code, but not contained in the Closed Record for these Hearings (see next paragraph). If Yarrow Bay were interested in supporting GMA, the original siting of the stormwater retention/detention facilities in support of the MPDs would have been inside the UGA. Instead, as they have with schools, Yarrow Bay chooses to start with a position that violates GMA and unnecessarily puts Black Diamond and King County in positions to spend resources to defend GMA.

In the case of the stormwater facilities, Yarrow Bay could have started with a commitment to GMA and then, and only then, looked for possibilities that would support creating a regional facility and the possibility of locating such a facility outside the UGA. Black Diamond's Municipal Code specifically states that regional ponds are to be within the MPD: 18.98.180 - MPD standards—Stormwater management standards. Para. D. "The use of small detention/retention ponds shall be discouraged in favor of the maximum use of regional ponds within the MPD." [Emphasis added]

Keep in mind that "regional" does not mean outside the UGA so Yarrow Bay's attempt to site the stormwater facility for the MPDs in the Rural Area is both presumptive and inappropriate considering GMA's intent to keep urban development and its impacts inside the UGA.

Urban-Serving Schools outside the Urban Growth Area

Yarrow Bay continues to argue that there is a Tri-Party Agreement that contains alternatives if King County denies permits for schools in their jurisdiction. The objective in the public comment is simply to have Black Diamond put a condition in the Development Agreement that those alternatives be the required approach for siting all urban-serving schools driven by the MPDs.

Although not part of the Closed Record, it is fait accompli that Black Diamond is a member of the Suburban Cities Association who, in a June 2011 vote, supports the policy that urban-serving schools be located inside the Urban Growth Area. As a member of the SCA, Black Diamond should be compelled to follow the organization's position.

The only debate regarding the SCA policy is an exemption for 16 existing school-owned sites in the Rural Area, which do not include the Yarrow Bay-owned properties for MPD schools. This debate is occurring at the Growth Management Planning Council, something Yarrow Bay is very much aware of.

Yarrow Bay is attempting to manipulate the GMPC work on the Countywide Planning Policy that would clarify the area's position on urban-serving schools by attempting to get the 3 schools it wished to site outside the UGA supporting the MPDs added to the list of exempted school sites. The SCA's exemption argument is based on concerns for the financial impact to school districts who have invested school bond funds in rural land. The 3 MPD school sites do not fit that concern which means Yarrow Bay, in spite of their comments about the alternatives available in the Tri-Party Agreement, is making it clear they do not want to exercise those alternatives.

This is a blatant attempt by Yarrow Bay to manipulate the process and a strong indication that Yarrow Bay has no interest in supporting the GMA objective of keeping urban-serving facilities inside the UGA, whether a county-wide policy or one of the SCA.

To argue that urban-serving facilities, whether stormwater facilities or schools, be sited outside the UGA demonstrates Yarrow Bay's disdain for GMA. Contrary to Yarrow Bay's argument, this is not an issue of interpretation of GMA.

It is unfair, irresponsible, and unnecessary for Black Diamond to shift their GMA responsibility to keep urban development wholly inside the UGA by deferring the responsibility to another jurisdiction, in this case, King County.

Black Diamond needs to do the right thing which is to follow the policy of the SCA and the objectives of GMA to tightly control intrusions of urban-serving facilities into the Rural Area. The way to do that is to establish clear GMA-supporting conditions in the Development Agreement.

Cooperation.

Yarrow Bay's comments:

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

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

(Emphasis added). These conditions, however, are self-enforcing and Section 15.1 of the Development Agreements requires that the Master Developer comply with the MPD COAs during its term. As such, there

is no reason or basis to add supplementary language regarding "cooperation" to the Development Agreements.

Response

What's being requested here are stronger statements in the Development Agreement or an amendment to the MPD Ordinance outlining the goals of "openness and cooperation", particularly when it comes to how that manifests from Yarrow Bay. This is simply because, with the exception of dialogs with Maple Valley and Covington, the new traffic model being discussed is not complete and, thus, does not exist and Yarrow Bay has made no effort to proactively address how they intend to support the "openness and cooperation" intended with all parties in the model, including King County and Washington State Departments of Transportation.

The public is being asked to agree to words that have little, if any, meaning since there is no new traffic model which would demonstrate ways to judge whether the objectives of "openness and cooperation" have been attained. The fact that the model being developed is already later in the process than desired, goals like "openness and cooperation" should be made less nebulous as Development Agreement conditions unless a modification to the MPD Ordinance is made.

What would "openness and cooperation" by Yarrow Bay look like? Would they commit to stop all development if any jurisdiction saw erosion of their transportation service levels as a result of the MPDs? Would they voluntarily commit to not drag out the purpose of the model by arguing technical issues with any jurisdictions? Would they remove their preference to site schools in the Rural Area because of the transportation impacts of such schools?

Similar to Yarrow Bay, what is Black Diamond's specific commitment to "openness and cooperation" in the model? Would the city's demonstration of "openness and cooperation" be a supplemental condition in the Development Agreement (or MPD Ordinance) requiring no impact to any jurisdictions service levels? Would the city show commitment by not allowing any urban-serving facilities outside the UGA?

Black Diamond needs to make their intent much clearer by looking for measures or other indicators of either conformance or unorthodox behavior in the context of the model being developed. With Yarrow Bay's demonstrated track record of manipulating the system, their lack of commitment to fully mitigate any impacts of the MPDs, and their blatant lack of concern over the Rural Area, the public looks to Black Diamond to exercise its authority and responsibility to measurably clarify its expectation for "openness and cooperation".

Yarrow Bay Response to Proctor's Community Facilities Districts (CFDs).

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

Proctor Response to Yarrow Bay Response to Proctor's Community Facilities Districts (CFDs).

Yarrow Bay has strenuously fought against any limiting factors related to CFDs for use of infrastructure financing; they argued that I do not recognize the municipal benefit of CFDs; they have argued that no CFD testimony should be allowed in the record including the CFD workshop audio where John Hempelmann argued for CFDs for infrastructure financing as the only viable way to build the infrastructure. All those arguments failed, so now Yarrow Bay argues, there is no legal authority for the City to impose a "Developer Impact Fee" and that because the City is not obligated to construct a of the infrastructure improvements they are unsure what the a Developer LID or Impact Fee would be used for…this clearly another attempt to confuse the issues so let me clearly state:

- If used wisely, CFDs appear to have a clear municipal benefit and I generally support CFDs;
- CFDs only came into existence in 2010 in Washington State and to date have not been implemented; ***prior to CFDs development still happened***; Cities imposed infrastructure improvements on the developer through various tools; by obtaining infrastructure bonds; Transportation/Water/Sewer impact fees and or Developer LIDs; these are new concepts and City's have clear authority to implement different tools for infrastructure improvements;
- The purposes of many of these tools are to ***ensure*** that the "City" can take over and complete infrastructure improvements in the event the Developer fails to complete their obligation (remember the land is already re-zoned);
- The recommendation isn't to exclude CFDs it is to have City Council add alternate infrastructure financing to give the City as much flexibility to protect the City's interest;

This is no different than the Development Agreement language (13.4. (B) and (D.v.) regarding Fire Mitigation. The Development Agreement offers two alternate sources of revenue to finance fire mitigation requirements because Fire Impact Fees are not currently legal / allowed. How is the request that infrastructure financing have alternate options to ensure full protection for the City any different? It is confusing as to why Yarrow Bay is adamant to restrict any flexibility to the City in the event that there are financial and/or legal issues with a CFD or that a CFD isn't the most beneficial mechanism to the City.

13.4 FIRE MITIGATION

B. Impact Fees. ***When the City adopts a City-wide fire impact fee program*** that complies with RCW Chapter 82.02, payment of fire impact fees shall be at the rate adopted by the City fire impact fee.

Yarrow Bay Response to Proctor Funding Agreement:

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

Proctor Response: I am completely aware the BDMC does not require the MPDs to provide a fiscal benefit to the City. My point is why would the City enter into any agreement that restricts the benefit to the City? The City can ask Yarrow Bay to guaranty the "Revenue Stream"…if Yarrow Bay's development generate excess revenue to the City it keeps the revenue; if Yarrow Bay's development does *not* deliver the revenue stream the City would draw down on the Letter of Credit. This would eliminate all funding agreement conflicts.

Please review my submitted written response Exhibit #37 regarding the "Funding Agreement";

The FA is a legislative document that is required to be approved separately from the development agreement.

Yarrow Bay Response to Surcharge/CFDs/Funding Agreement:

The Hearing Examiner Addressed All Significant Concerns in his Recommendation. The Hearing Examiner, by his own admission, addressed "all significant concerns of the public."' Several parties of record noted during their oral and written presentations to the City Council that the Hearing Examiner did not specifically address a certain issue (e.g., building permit surcharge or CFDs) because he didn't have enough time. Contrary to this conclusion, however, the Hearing Examiner ***may*** have decided these issues were not relevant to his Recommendation on the Development Agreements.

Proctor Response: This entire reasoning is speculative at best; of course we could remand back to the Hearing Examiner and ask him to address it as he proposed. The more likely scenario is that the Hearing Examiner, as a condition of approval of the DA**,** ***removed*** the entire Funding Agreement from the Development Agreement process. Therefore there was no need to address each component of the funding agreement individually, because there was no funding agreement under his purvey, similar to his deferring the legislative Tri-Party Agreement from the MPD process. The items in the Funding Agreement are to be discussed and negotiated separately, legislatively, in front of a full sitting council. In regards to CFDs, it is more likely that the Hearing Examiner does not have knowledge of the CFDs as it has never been used in land-use before and only became legislative law last year. This would clearly be an area where the Hearing Examiner would need substantially more time to review, **but he was denied**.

Vicki Harp's Response to Yarrow Bay's Response to Party of Record Arguments CRH The Lawson and Villages Development Agreement

Yarrow Bay Response to Harp Noise Work Hours:

Work Hours. There is no legal authority for the City Council to further restrict the work hours for the MPDs in the Development Agreements.

Harp Response to YB Noise Work Hours:

Yarrow Bay claims their work hours are more restrictive than BDMC 8.12.40.C, however that does not mean the work hours are reasonable, in-fact the BDMC 8.12.40.C is so lax that Yarrow Bay's offer to stop a few hours earlier on a Sunday make a mockery of the effectiveness of the noise ordinance requirements. Furthermore, Yarrow Bay gives no supporting analysis to support their position other than to say the City cannot impose additional work hours.

This is absolutely false; the City has sole authority to set hours of operations. The MPD COA 43 specifically anticipated that these work hours would be different by stating that the work hours were to be set at the time of the Development Agreement. The City Council's MPD COA could have easily stated that work hours were set by BDMC 8.12.40.C *but they didn't.* <u>BDMC 8.12.30 allows the City Council to set special noise requirements; the City Council has wide latitude and authority to define the work hours and does not need Yarrow Bay's permission to set these hours.</u> (See Harp Testimony)

Condition43. *Work hours of operation* shall be established and made part of the Development Agreement: does **NOT** state that the work hours of operation shall be governed by BDMC 8.12.040.C. BDMC 8.12.040.C is the general noise ordinance that applies for the day to day

activities of a City this size. It is not all encompassing to include the massive, ongoing construction activities that will go on for years and years by these MPDs. That is why the **BDMC 8.12.30** allows for special noise requirements. Since Condition 43 did not provide the specificity of BDMC 8.12.040.C it can be inferred that Council intended for work hours of operations to be customized for this large development, and with consideration of the existing rural ambience and existing SF homes sited near the MPDs. This would exclude Saturday hours (accept for emergency reasons related to wet weather conditions) and Sunday work should be forbidden outright.

YB Property Boundaries: There were four comments regarding property boundaries. In Ex. 3-13i, Vicki Harp expressed concerns about the MPD design standards as they relate to adjoining development. (Page 42 of 101)

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

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

Vicki Harp's Response to Yarrow Bay's Response to Party of Record Arguments CRH The Lawson and Villages Development Agreement

Harp Response to YB Property Boundaries: There is a reason for the revision or correction; it is that it violates the BDMC. The City Council options are that it can a) Request voluntary compliance from Yarrow b) Add supplemental conditions of approval c) Invalidate the MPDs d) Knowingly and willfully violate the BDMC for the benefit of a private corporation

Vicki Harp POB 97 Black Diamond WA 98010

Cindy Proctor's Response to Yarrow Bay's Response to Party of Record Arguments

CRH The Lawson and Villages Development Agreement

Yarrow Bay's Response to Proctor School Agreement:

In her oral and written comments (Exhibit C-12), Ms. Proctor requests that the City Council invalidates the School Agreement without citing any authority for proceeding with such invalidation. The City Council does not have authority to unilaterally void the School Agreement.

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

Proctor Response to Yarrow Bay and the City:

If we adopt Yarrow Bay's interpretation of the Tri-Party School Agreement/Contract and its approval process it would violate the 14th Amendment, the BDMC and would violate public process. The City Council does not have the authority to contract away its legislative power, the Courts and the Hearing Examiner concur with this fact. The possession of these legislative powers carries with it the duty to act in the public's interest. This duty is breached when a legislative body abdicates its power to render future public service. Contracts and agreements involving such a breach are contrary to public policy and interest. The Courts have ruled that all agreements/contracts whose object or tendencies in anyway interfere with, or unduly influence legislative actions, whether by congress, by a state legislature, or by a

municipal council or other like body, are contrary to public policy and interest and therefore void.

The Supreme Court of the United States said that education is a property interest protected by the Fourteenth Amendment's due process clause. This promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, *whether or not those procedures have been provided for in the law on the basis of which it is acting*. Action denying the process that is "due" would be unconstitutional.

A fair procedure and due process would have been to have a public hearing on the Tri-Party agreement to ensure that the public's interests were met. However, if the Fourteenth Amendment isn't sufficient for Yarrow Bay and this Council, they can look to expressly written references in the BDMC that support the position that the Tri-Party School Agreement is subject to a public hearing:

> **"BDMC 01.010 Adoption of Black Diamond Municipal Code:**
> Pursuant to the provisions of Sections 35.21.500 through 35.21.570 of the Revised Code of Washington, there is hereby adopted the "Black Diamond Municipal Code," as compiled, edited and published by Book Publishing Company, Seattle, Washington. (Ord. 472 § 1, 1992)"

RCW 35.21.530 gives guidance on how our City codifies its ordinances: Compilation, codification, revision of city or town ordinances — Filing — Notice of hearing.

> "When a city or town codifies its ordinances, it shall file a typewritten or printed copy of the codification in the office of the city or town clerk. After the first reading of the title of the adopting ordinance and of the title of the code to be adopted thereby, ***the legislative body of the city or town shall schedule a public hearing thereon.*** Notice of the hearing shall be published once not more than fifteen nor less than ten days prior to the hearing in the official newspaper of the city, indicating that its ordinances have been compiled, or codified and that a copy of such compilation or codification is on file in the city or town clerk's office for inspection. The notice shall state the time and place of the hearing. [1985 c 469 § 21; 1965 c 7 § 35.21.530. Prior: 1957 c 97 § 4.]

RCW 35.21.540 Compilation, codification, revision of city or town ordinances —

Legislative body may amend, adopt, or reject adopting ordinance — When official code.

> "***After the hearing***, the legislative body may amend, adopt, or reject the adopting ordinance in the same manner in which it is empowered to act in the case of other ordinances. Upon the enactment of such adopting ordinance, the codification shall be the official code of ordinances of the city or town."

To preemptively respond to Yarrow Bay's or the City's future response that the Tri-Party School Agreement was not subject to an ordinance, it was by virtue of being a *Legislative* action as defined by the Hearing Examiner, MRSC, and the State of Washington.

- Only ministerial and administrative acts may be exercised by resolution. [*State ex rel. Morrison v. Seattle*, 6 Wn. App. 181, 492 P.2d 1078 (1971).] Legislative acts, however, it has been suggested, should be made by ordinance. ["Ordinances, Resolutions and Motions: When to Use Which - How to Adopt Personnel Policies," by James K. Pharris, Senior Assistant Attorney General and Robert J. Fallis, Assistant Attorney General , State of Washington. WSAMA *Proceedings*, November 8-9, 1985, pp. 155- 168.]

- The general guiding principle is that "[a]ctions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative." [*Durocher v. King County*, 80 Wn.2d 139, 153, 492 P.2d 547 (1972).]

I strenuously argue that the City Council followed the wrong process when it approved the Tri-Party School Agreement without a public hearing and notice to all the interested parties including Enumclaw; and that it denied due process to the citizens under both the Fourteenth Amendment; and when it violated its own BDMC ordinance requirements.

Whereas the City Council cannot contract away its legislative powers; Whereas the City Council has the express authority under the rights of "Due Process" afforded by the Fourteenth Amendment, but failed to provide due process; Whereas the City Council has written authority under the BDMC to provide a public hearing and provide proper notice to all interested parties but failed to do so; Whereas the City Council willfully and capriciously used a "Resolution" approving format to intentionally by-pass the public hearing process; Whereas the City Council has breached its duties and obligations to protect the public interest in regards to public schools; Therefore the City Council must invalidate the Tri-Party School Agreement and send it back for a public hearing as required by BDMC and under the Constitution of the United States of America.

To Black Diamond City Council:

Attention: Brenda Martinez

bmartinez@ci.blackdiamond.wa.us.

October 19, 2011

Subject: Off-Site Wells and Springs written in Memorandum by Yarrow Bay Holdings to Black Diamond City Council, dated October 14, 2011, pg 22 of 101, responding to Ms. Judith Carrier's oral testimony.

As I stated in oral testimony to the Hearing examiner on July 13, 2011 and then wrote in follow-up written testimony on August 3rd (see attached), I pray that the Hearing Examiner's conclusions on this subject (as quoted by Yarrow Bay in the Subject memorandum) reflect the true result and thus there is no need for concern regarding the wells and springs surrounding the Yarrow Bay development project. We all want that. But if he is wrong; If in fact what Mr. Brian Derdowski states as "unintended consequences" has any chance at all of affecting our life-sustaining drinking water systems, I beg of you to reconsider your position and adopt some form of protection for us who are living on the fringes of this development, as recommended by myself in written testimony to the Hearing Examiner and per Judith Carrier's oral testimony to you.

If you as City Council of our peaceful, historic, bucolic settlement on the upper reaches of the beautiful Green River, feel that you are representing your neighbors--those who moved miles from everywhere to escape the hectic stresses of suburban living and associated crime--those who in good faith elected you to represent their interests—if you feel that building a city in our midst represents these interests, and you must proceed forward with authorizations for proceeding with the development, **then at least provide the protections necessary to support our basic necessities**. You are already taking away our comforts—our chosen life-style.

If in fact there is no chance of disrupting the surrounding wells and springs by the proposed development actions, then what could be the harm of writing in a clause or two to offer the protections. What

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possibly could motivate the objections? Why the refusal to guarantee? Any human-natured being would not want to destroy his neighbor's pursuit of life. This is the nature that separates us from the brutes; the basis of the greatness of this country.

But if in fact there is a remote chance that our potable water systems could be disrupted (pollution or flow), there must be some protection. In my written testimony to the Hearing Examiner (see attached), I tell of our experience in 1996 with Plumb Creek logging above our spring system and us getting the KC Health Department involved. We, I believe all parties, did all we knew in all good intentions to prevent impact to our spring system. But Mr. Derdowski's "unintended consequences" ruled, just like Murphy's Law--we suffered the consequences. Luckily the relative ease of installing a chlorinator solved the problem (partly-it'll never pure again). But it could have been worse. Even if there is no chance of humanizing this decision, it makes sense to make pre-agreements, strictly from a business view (unless you're a lawyer, of course): the resulting lawsuits would be expensive—lose-lose to all concerned.

At the end of my referenced letter to the Hearing Examiner, I thanked him for listening, reading, and considering. I now **ask-even beg**- you to listen, read and consider with a **human heart**. After all, you are my neighbors, and the good book tells us "Whatsoever ye would that men should do to you, do ye even so to them, for this is the Law and Prophets (Matt 7:12). This is the crux of the Christian-Jewish and all reputable human creeds. I guarantee you that I would not destroy your life-sustaining water system. I wouldn't even walk on your grass without your permission. And If you want that in a certified writing, I'm happy to give it to you.

Sincerely, hopefully, Prayerfully,

Max D. Beers
22134 SE GreenValley Rd.
Auburn, Washington 98092
253-833-1760
maxbeers@hotmail.com

See attachment: Regarding: MPD Hearings on Yarrow Bay Developments in Black Diamond, Washington

Regarding: MPD Hearings on Yarrow Bay Developments in Black Diamond, Washington

Aug 3, 2011

From: Max Beers

22134 SE Green Valley Rd., Auburn,Washington 98092

253-833-1760

maxbeers@hotmail.com

While giving oral testimony to the Hearing Examiner, July 13th, I promised a writing describing in more detail my concerns and recommendations. Here is my humble attempt.

In 1996, Plum Creek announced they would be logging above our spring system (Group B, W&S#1 public water system serving 6 families). The King County Health Department worked with us and Plum Creek to ensure the protection of our water quality and flow. Even with KC Health Department imposed restrictions on logging certain areas, immediately after the logging we were required to install a chlorinator to purify the water. Since 1978, when the water system was installed, all water tests had resulted in pure water – no coliforms. Now we must chlorinate.

The Yarrow Bay major development of property on the plateau above our combined properties is a matter of grave concern for the integrity of our water system, and all other like public and private water systems surrounding the development. If a simple logging and replanting can disrupt our system, what is the potential of disruption from a major development? As stated in my oral testimony, I hope and pray that this ends up a non-issue. But, if it is an issue it could be devastating. Increased traffic, earth slides, stream and river contamination, etc., are major concerns for major action and consideration, but **disrupting our life-supporting water systems would be disastrous; it could make our homes un-inhabitable.** Therefore there must be considerable attention to ensure this does not happen. There are many small public and private water systems on the periphery of this monstrous development project.

Washington State RCW 36.70B.170(4) states in part: *A development agreement shall reserve authority to impose new or different regulations to the extent required by a serious threat to public health or safety.* The Yarrow Bay development project, adding 6,000 homes to rural Black Diamond, is definitely a "serious threat" to our public health and the safety of our drinking water systems.

The remark was made at the oral hearings that the "surrounding residents should not have to worry about their wells and springs". I'm writing this testimony to inform you that at least some of us are worried – seriously worried.

The Growth Management Act (GMA, Chapter 36.70A Revised Code of Washington) requires comprehensive land use planning by counties and cities. The environmental planning goal is to "protect the environment and

enhance the state's high quality of life, including air and water quality, and the availability of water" (RCW 36.70A.020). The GMA requires the designation and protection of "critical areas" to prevent harm to the community from natural hazards and to protect natural resources.

This is an exact quote from Washington State Ecology Dept.'s website addressing Critical Aquifer Recharge Areas (CARAs). It defines Natural Resources as: *wetlands, fish and wildlife habitat conservation areas, and "areas with a critical recharging effect on aquifers used for potable water," which are called Critical Aquifer Recharge Areas (CARAs).* It further states: ***The goal of establishing CARAs is to protect the functions and values of a community's drinking water by preventing pollution and maintaining supply.***

This is my specific area of concern. The MPD conditions do not address sufficiently the potential impact to the surrounding potable water systems. Condition 68 addresses some actions required to avoid contamination of the ground water running into sensitive areas, but does not identify the private and small public water systems directly. Condition 68 actions must be addressed fully to avoid contamination of the ground waters that can run into these sensitive areas, including the surrounding drinking water systems.

The State Ecology Department has issued, available on line, The Critical Aquifer Recharge Areas Guidance Document. This document provides detailed instruction for the 8 steps needed to protect groundwater resources. For example, step 1 (*Identify where groundwater resources are located)* discusses the mapping of existing groundwater systems. I understand that the areas within the MPDs have been mapped for "highly susceptible to ground water contamination" in the Black Diamond Comprehensive Plan. I believe that this should be expanded to mapping the specific public and private water systems which could possibly be affected by these areas of possible contamination. And then **monitoring and working with these water system owners** to ensure no impact to the quality and quantity of their potable water. To go a step further, I believe that the **entire surrounding area of the development project should be mapped showing all small public and private water systems and the monitoring and working with owners, to be absolutely sure that none are forgotten – this is such a critical issue**. We must assure that no home owner's drinking water system is affected by the development project.

The Critical Aquifer Recharge Areas Guidance Document Step 8 (Manage groundwater withdrawals and recharge) addressing maintaining the availability for drinking water sources, and stream-base flows states: *Development has a profound effect on the hydrology of an area. The increase in impervious surfaces and disturbance of natural vegetation result in increasing runoff and decreasing recharge. Local jurisdictions can improve recharge by encouraging methods that increase recharge, such as low impact development and rain gardens.* I'm not an expert in this field, so am not prepared to make specific recommendations for potential methods

to mitigate the disruptions of groundwater flows, like rain gardens, etc. **But experts should be enlisted to do all that is possible to protect these water systems.**

I have been in contact with water specialists in the Washington State Department of Ecology. Answering my specific questions regarding how to ensure protection of our water systems, and supporting my recommendations above, they stated: *"We agree these systems should be monitored for water quantity and quality prior to and during the proposed development. Ecology is not responsible, however, for conducting such monitoring. If developments pose significant risks to local water supplies or water quality,* ***monitoring should be recommended or required as a development condition.****"*

They further stated: *"If environmental consequences are observed in association with any construction activity, Ecology's Environmental Report Tracking System (ERTS) should be notified so that Ecology inspectors can respond if appropriate."* If this worst-case scenario does occur, what are our options as home owners? **Is Yarrow Bay and/or Black Diamond ready to step in and provide suitable replacement water systems?** They should be liable. Wouldn't it be appropriate to include a condition to cover this possibility? The alternative is costly lose-lose court processes.

I've attached a scanned copy of the letter from the Department of Ecology.

So in summary, I recommend the addition of one or more MPD conditions (depending on how written) to: 1) map the area surrounding the development project, identifying the specific small public and private water systems (Group B and individual wells and spring systems). 2) Working with these specific water system owners to monitor both quality and quantity of the water systems before, during and immediately after the development project. (3) To enlist the support of experts to determine what systems, such as Low impact Development and Rain Water Gardens, etc., can be installed to mitigate disruption to the ground waters. and 4) To require Yarrow Bay and/or Black Diamond repair or replace water systems which are affected in a worst-case scenario at no cost to the owners.

Thank you for listening, reading and considering.

Your humble neighbor,

Max Beers

Attached: Letter dated July 27, 2011 to Max Beers from Washington State Department of Ecology

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Reply by Mike Irrgang to YarrowBay & City Staff response to Oral Testimony

YarrowBay in their response to my testimony states that any new conditions (such as what I and Mr. Peter Rimbos suggest) which might be imposed relating to mitigation of traffic and ensuring traffic concurrency are outside the scope of the Development Agreement and would require revision of the existing MPD Permit.

However, I remind the City Council that the Hearing Examiner said on page 1 of his DA recommendations, "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."

YarrowBay also states that their traffic expert Kevin Jones refutes my statement that the MPD will result in gridlock. In fact, as I stated in my written testimony, at certain times *there already is gridlock*, and I proved both through mathematical analysis as well as through going to a key intersection on Hwy. 169 *and counting cars* that:

1. not only is there gridlock now (implying maximum reasonable carrying capacity has already been reached for this 2-lane road)
2. using YB's own numbers, Hwy. 169 traffic would (at least) double
3. implying that if Hwy. 169 was increased to four lanes, even that four lane road would be at maximum capacity.

Considering that BDMC and the GMA require concurrency, and that there is neither a plan nor money from YB nor money from any other entity (King County or the State of Washington DOT) to turn Hwy. 169 into a four lane highway, then the only way to guarantee that traffic concurrency is achieved is to codify this into the Development Agreements and require that there be sufficient on-going and active traffic modeling as well as traffic benchmarking, with a requirement to halt development until *current* (2011) traffic concurrency is met, at each stage of development. In other words, a full traffic analysis needs to be done using both a validated traffic model (to predict future traffic) and an actual traffic assessment (to validate the traffic model) before approval of the DAs, and at each stage of development.

Regarding concurrency, RCW 36.70A.070 states, "local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development."

Since the "locally owned transportation facilities" are all roads which will dump traffic into either Hwy. 169, Auburn-Black Diamond Road, or Kent Kangley Road for traffic to Seattle, Renton and Bellevue, or all points north, east and west, then it is important to note that when the traffic levels on these roads are exceeded, then traffic will back up onto the "locally owned facilities", and that the only way to achieve concurrency on these facilities will be to wait for suitable expansion of these variously named *two lane* roads which are fed from the MPD traffic. Such measures must be added into the DAs.

YarrowBay provided a revised Exhibit F Traffic Monitoring Plan, as their response to the Hearing Examiner's implementing conditions "T" and "U". I do not believe that their revisions were sufficient to meet the HE's conditions, so I therefore propose a serious of revisions to YB's "revised" Exhibit F, as follows:

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TRAFFIC MONITORING PLAN

The transportation mitigation measures imposed on The Villages MPD include projects that address the potential full transportation impacts of complete build□out of The Villages MPD together with build-out of the Lawson Hills MPD. The build□out of both MPDs will occur over a period of years and, therefore, the transportation mitigation also should be implemented over a period of years. To assure that the mitigation keeps pace with MPD Development and appropriate improvements are constructed at the appropriate time, the following monitoring and trigger protocol is established. The approval of all Implementing Projects is predicted upon Transportation Concurrency Testing and compliance with GMA concurrency requirements as adopted into the City's concurrency regulations.

A. Required Timing for Modeling and Monitoring

Before submitting Implementing Project applications for each Phase of the combined MPDs, and in the middle of each Phase, the Master Developer shall model and monitor traffic to identify the expected traffic impacts of that ~~Phase~~ Implementing Project and to determine what improvements or strategies, if any, will be necessary to comply with the City's transportation concurrency requirements as adopted into the City's concurrency regulations. The middle of a Phase is defined as the point at which occupancy has been granted for the mid□point ERUs1 for the MPDs. The modeling shall take into account the number of new homes and commercial buildings that are actually occupied and generating traffic. In the event that one MPD is not proceeding, the modeling and monitoring need only be conducted for the active MPD. In the event that there are separately controlled Master Developers for each MPD, and both are proceeding, the Master Developers shall be required to coordinate to model and monitor traffic and submit a joint report. In the event that a subsequent Phase is submitted prior to full build□out of an existing Phase, the subsequent Phase shall establish as its baseline what is constructed and occupied as of the date of submittal of the report. The subsequent Phase shall also assume buildout of the remainder of the existing Phase as part of the modeling in addition to what is being submitted in the Implementing Project application.

When the City has completed its regional transportation model and validated it, all subsequent modeling and monitoring shall be done with that regional model.

B. Report Requirements

The results of the traffic modeling and monitoring shall be presented to the City in a written report. When submitting any Implementing Project application, a traffic monitoring report accounting for that Implementing Project shall be included. The traffic monitoring report shall be prepared by a registered professional engineer chosen by the Master Developer and licensed to practice in the State of Washington with experience in traffic engineering and transportation planning. The written report shall document the findings including an evaluation of the existing conditions, ~~and~~ (including traffic counts), a forecast of future traffic volumes based on the next Phase's (or the remaining portion of the Phase's) projected level of development. , and identification of expected

Implementing Projects' impacts. The report shall also evaluate the phase using the City's transportation concurrency requirements as adopted into the City's concurrency regulations, so as to identify any improvements or strategies necessary to maintain the City's adopted level of service (LOS) standard on transportation facilities within the City of Black Diamond.

The existing conditions section of each traffic monitoring report shall include a summary of updated peak hour turning movement counts for intersections or two□direction roadway counts for roadway segments for all of the transportation mitigation projects included in the traffic monitoring plan (refer to Section C below). Existing level of service shall also be calculated for each transportation mitigation project included in the traffic monitoring plan. Traffic counts shall be conducted on representative weekdays (Tuesday, Wednesday, or Thursday during weeks not affected by holidays, bad weather such as snow, or other days with unusually high or low traffic volumes) and when school is in session. To enable comparisons back to prior monitoring reports, traffic counts shall be conducted during the same month to the extent feasible—alternatively, seasonal adjustment factors shall be applied to counts conducted during different months.

Evaluation of potential future traffic volumes from other Black Diamond development shall not be required because the City will independently require other projects to evaluate and mitigate their own impacts. However, infill traffic growth (exempt from SEPA) and background traffic growth from outside of Black Diamond (also exempt from SEPA) shall be included in modeling. Traffic counts will be made and reported. For intersection improvements, the report shall compare the results with the LOS threshold for each existing facility to determine whether and at what time any improvement to an existing facility is required.

The report shall also evaluate the extent to which MPD traffic would cause or contribute to any level of service failure on an existing facility in Black Diamond or need for access to or circulation within the MPD. The City, in its reasonable discretion, may use the report to determine whether to request that the Master Developer alter its proposed timing for construction of any new roadway alignments or intersection improvements described in MPD Condition of Approval No. 10 of the MPD Permit Approval.

As described in Development Agreement Section 11.4.A, all documents that result from the Traffic Monitoring Plan, including traffic monitoring reports, are required to be "submitted to the Designated Official for approval." The City of Black Diamond shall be responsible for reviewing and approving each traffic monitoring report submitted by the Master Developer pursuant to the requirements of this Traffic Monitoring Plan. Moreover, the City shall not approve an Implementing Project until a traffic monitoring report is prepared (and submitted concurrent with the Implementing project application) by the Master Developer per this Exhibit—and approved by the City—demonstrates compliance with the City's transportation concurrency requirements as adopted into the City's concurrency regulations.

C. Transportation Projects to be Monitored and Modeled

The following projects shall be monitored and/or included in the model of the Phase's future traffic impacts: all projects listed in Table 11□3 of the Development Agreement, (and any modifications to that list following the periodic review process of Condition of Approval No. 17 of the MPD Permit Approval), together with existing facilities in the City of Black Diamond where the level of service impacts of the MPD may be addressed by construction of a new roadway alignment or intersection improvements

inside Black Diamond as described in Condition of Approval No. 10 of the MPD Permit Approval. ~~However~~Also, if the Master Developer has entered into a mitigation agreement with an outside jurisdiction that either sets the timing for payment towards or construction of the mitigation projects, ~~or exempts that jurisdiction's projects from later monitoring, modeling or other review, that mitigation agreement is deemed to satisfy all mitigation and no further~~ monitoring or modeling of facilities within that jurisdiction are required. Results shall be documented in the traffic monitoring report and made available to the outside jurisdiction.

The monitoring plan and model and monitor ~~need not~~ shall analyze a specific improvement after that improvement has been constructed.

D. Triggers and Timing for Construction of Transportation Projects

For intersection improvements, the threshold trigger is when the intersection level of service (LOS) (as defined in the Highway Capacity Manual, TRB, 2000) for the entire PM peak hour would (1) no longer meet the adopted LOS standard (as defined in the City of Black Diamond's ~~Comprehensive Plan, 2009~~ concurrency requirements as adopted into the it's concurrency regulations, or other jurisdiction's standard applicable to the MPD Approval) or (2) in the event that the LOS is already below the applicable threshold, the trigger shall be when traffic volumes from the new MPD Phase begin to increase traffic throughput delay at the intersection causing an additional impact.

For new roadway improvements inside Black Diamond, the MPD Phasing Plan including each Implementing Project anticipates that the transportation mitigation projects will be constructed to service the new MPD development of each Phase, including for access to and circulation within the MPD. For purposes of the modeling and monitoring plan, the threshold trigger to construct the improvement is when MPD traffic would increase delay or impact LOS at any intersection on existing roadways to a point at which the new roadway would be warranted. This trigger does not supersede other City standard requirements such as providing two points of access or the obligations for constructing the Pipeline Road.

The Master Developer shall ~~only~~ be required to perform an improvement if it is anticipated that the applicable threshold ~~is~~ will be triggered within the next 200 homes built.

The specific construction timing shall be set in each report, based on the results of the required monitoring and modeling. For City of Black Diamond projects, by execution of the Development Agreement, the City commits to prompt permit review, such that the Master Developer's prompt construction of transportation improvements shall commence before the impacted street or intersection falls below the applicable level of service. For projects within Black Diamond that are also within the State right-of-way, the report shall set a deadline for commencement of only engineering and design of the improvement but not a deadline for commencement of construction. For projects outside the City of Black Diamond where additional permitting from another jurisdiction is required, the report shall set the time at which the Master Developer must commence the permitting and/or engineering and design process, but shall not set a deadline for commencement of construction. Within the City of Black Diamond, if additional public right-of-way should be needed for the design of a particular improvement, the Master Developer shall first demonstrate a good faith effort to acquire the right-of-way needed. If, after making an offer equal to the fair market value, the

Master Developer is unable to purchase the needed right of way, the City shall be responsible for acquiring the needed right-of-way.

"Stop-Light" Assessment

In the open record hearings, Peter Rimbos introduced a "Stop Light" assessment table, in Exhibit 118. Based on the Hearing Examiner implementing conditions "T" and "U", I have revised that table and include the entire updated table and description below.

The Development Agreements do not meet the minimum requirements of the MPD Application Ordinances' Exhibit C--Conditions of Approval. The Development Agreements are supposed to be the mechanism by which the "Master Developer" shows in detail how it plans to meet the MPD Application Approval Ordinances, which are the "law of the land."

Specifically, the following minimum transportation requirements have not been met in the Development Agreements (1) A Traffic Analysis Plan that provides sufficient detail to determine, analyze, and mitigate future traffic scenarios; (2) Any specificity on needed Transportation Mitigation costs, schedules, risks, and funding mechanisms; and (3) No real Transportation Plan to address future traffic loads, develop and finance needed mitigations, and provide contingencies.

A "Stop-Light Assessment Table" on the next several pages summarizes all Transportation Requirements; provides an Assessment of compliance or non-compliance of the Development Agreements against those requirements; and lists Grades for the Development Agreements. The Grades are based on the following:

RED: Failure to meet requirements of MPD Ordinances' Exhibit C--Conditions of Approval or Black Diamond Municipal Code.

YELLOW: Partial compliance of a Ordinance Condition or Municipal Code; insufficient information provided; or non-compliance with a provision of either Black Diamond Comprehensive Plan policies or King County Code (primarily permitting provisions).

WHITE: MPD Condition itself is deemed inadequate. Although there are many Transportation Conditions that possess inadequate portions, there is one, Condition 15--Outside Black Diamond Mitigation, graded in the table as "White." It completely fails the needs of the region in that it "supersedes" all aspects of the MPD Ordinance Conditions of Approval and does not provide for ANY changes should mitigations prove inadequate. Details are provided in Section VI. Proposed "New" Conditions.

There are no GREENs (i.e., full compliance), since the Development Agreements possess some deficiency against every measure evaluated.

Against the MPD Ordinance Conditions and Black Diamond Municipal Code the Development Agreements receive an overall Grade of RED because they fail to meet several requirements or supply insufficient information, as enumerated in the "Stop-Light Assessment Table."

Against provisions of either Black Diamond Comprehensive Plan policies or King County Code provisions the Development Agreements receive an overall Grade of YELLOW because they only partially comply with these provisions or supply insufficient information, as enumerated in the "Stop-Light Assessment Table."

The Hearing Examiner's implementing conditions "T" and "U," if added, help, but do not alter my assessment of V COA 20 (Transportation Monitoring Plan--YELLOW) and V COA 29 (Regional Infrastructure Implementation Schedule--RED). However, they do change both my assessment against BDMC 18.98.080(A)(4a) and BDCP 7.2.2 (LOS & Concurrency) from RED to YELLOW.

			Stop-Light Assessment		
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
MPD Ordi-nance	# 10	Trans-portation Planning	...construct any new roadway alignment or intersection improvement....specify for which projects...eligible for either credits or cost recovery and by what mechanisms....	**No *Transportation Plan* detailing tasks and schedule.** **No details on Credit or Cost Recovery mechanisms.**	
Exhibit C-- Condi-tions of Appro-val	# 11	Traffic Demand Model	The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation.	No ***Model Validation Plan*** to validate and re-validate the model leading to identification and evaluation of additional mitigation.	
	# 12	Model Assump-tions & Analyses	The model must be run with currently funded transportation projects...shown in the applicable 6-yr & (unfunded) 20-yr TIPs.	No ***Traffic Analysis Plan*** No details on assumptions.	
	# 14	Model Internal Capture Rate (ICR)	The new model must include a reasonable ICR assumption. The assumed ICR must be based upon and justified by an analysis....	No ***Traffic Analysis Plan*** No details on assumptions.	
	# 15	Outside BD Mitigation	Any agreement so incorporated supersedes all other conditions and processes that may set mitigation measures and that are contained in the MPD Conditions or DAs.	***[White, because the Condition isn't violated. Poorly worded Condition allows Outside Mitigation Agreements that cannot be changed.]***	
	# 17a. thru j.	Trans-portation Analysis ***[most critical Transp. Condition]***	[Three pages long.] 17f.: Proposed conditions & mitigations ...shall be revised if...the conditions or mitigation measures...have resulted in an unsatisfactory level of mitigation....	No ***Traffic Analysis Plan*** describing what will be done with results and how they will be used to inform needed mitigations. No [post-850-building-permit] ***Traffic Analysis Plan***.	
	# 18	Funding Responsi-bility & Pro-Rata Shares	The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established...which must cover the complete mitigation list.	No ***Financial Plan*** that provides assurance obligations can be met, nor provides a process to evaluate pro-rata shares amongst jurisdictions.	
	# 20	Trans-portation Monitoring Plan	The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....	Transportation Monitoring Plan is re-active, not pro-active; does not identify proper "trigger mechanisms" that can be measured and assessed.	

			Stop-Light Assessment		
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
	# 25	Pre-Phase Modeling	...model...traffic impacts of a...phase before submitting land use applications...to determine at what point a ...(facility)...is likely to drop below...adopted LOS....	No ***Traffic Analysis Plan*** [Also, Condition conflicts with provisions of Conditions 11 and 17 on timing.]	
	# 29	Regional Infra-structure Implemen-tation Schedule	Prior to the first implementing project...being approved, a more detailed implementation schedule of the regional infrastructure projects...shall be submitted for approval.	No ***Transportation Plan*** that includes a detailed implementation schedule (i.e., What information will inform such a Schedule and How will it be vetted?).	
	# 33a	Limiting Green Valley Rd Traffic	...a description of the process and timing required for the Applicant to seek permits from King County should King County allow installation of the (calming) improvements....	The "process" simply states the Master Developer will submit permit applications. No description of a process whereby the Master Developer, GVR residents & KCDOT develop mutually agreeable solutions. ***[Traffic Calming Study was simplistic.]***	
	# 33b	Green Valley Rd Review Com-mittee	A Green Valley Rd Review Committee shall be formed....The Committee...specifically shall meet to review the study required by Condition 33(a) and attempt to reach agreement on whether any suggested traffic calming devices should be provided....	No Committee has been formed. ***[MPD Ordinance constrained Committee to only 2 residents (of 5 members), didn't include KCDOT, and mandated a "take-it-or-leave-it" approach.]***	
	# 34a	Project Responsi-biltity Split	...address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery.	No ***Financial Plan*** that provides cost estimates, timing, funding sources, contingencies, or risks. No ***Cost-Benefit-Risk Plan***.	
BD Munici-pal	18/98.010 (H); [COL 11]	---	Provide environmentally sustainable dvmt. (COL 11 implies this includes Vehicle Trip Reduction)	No ***Vehicle Trip Reduction Plan***.	
Code	18.98.010 (I); [COL 12]	---	Provide needed...facilities in an orderly, fiscally responsible manner.	☐ No ***Transportation Plan*** ☐ Insufficient detail	
	18.98.020 (G); [COL 23]	---	Timely provision of all necessary facilities, infrastructure....	☐ No ***Transportation Plan*** detailing tasks & schedule.	

			Stop-Light Assessment		
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
	18.98.080 (A)(4a); [COL 30]	---	...Prior to or concurrent with final plat approval...improve-ments have been constructed ...to have concurrency at full build-out...for...transportation improvements to serve the project....	☐ No ***Transportation Plan*** including process whereby mitigations may change to as issues develop. ☐ No ***Transportation Concurrency Plan***. ☐ No enfrcm'nt mechn'sms	***REV. 10/19***
BD Comp. Plan	7.2.2	LOS & Concur-rency	...To ensure...future dvmt. will not cause City's transp. system performance to fall below the adopted LOS, the jurisdiction must do one or a combination of...: modifying...land use element, limiting or "phasing" dvmt., req'g appr. mitigation, or changing...adopted std.	☐ No ***Transportation Concurrency Plan***.	***REV. 10/19***
	7.6	Travel Forecasts	A 1.0% annual growth rate...along SR 516, and a 1.5% annual growth rate...for all other intersections within the study area.	☐ The MPDs, as described, will vastly exceed these forecasts.	
	7.6.1	Future Land Uses/Tran sp. Concepts	The City intends for the...Transportation and Land Use Elements work together to maintain the City's "small town" character....	☐ The MPDs, as described, will not meet this policy.	
	7.7.2 Road	Table 7-8 Inter-sections	[Much detail on Intersection LOS and Time Delays including potential mitigations]	☐ With mitigations planned it's improbable times cited in this policy can be met.	
	Condi-tions--2016	Table 7-9: Improve-ments	SR 169---Widen to 4 lanes from SE 288th St to Roberts Dr---Provides add'l capacity....	☐ No ***Transportation Plan*** or ***Financial Plan*** to make this happen.	
	7.8 Funding Strategy	Table 7-11: Sources	Impact Fees...Developer Contributions....the potential for immediate concurrency....	☐ No ***Financial Plan*** showing details to meet.	
	7.9.2	Concur-rency	...imprvmnts...are in place at... dvmt., or a financial commitmnt is in place...to complete... improvements...within 6 yrs....	☐ No ***Transportation Concurrency Plan***.	
	7.11.1 Transp. Goals/Poli cy	T-13--Concur-rency	...transp. improvements...are constructed or financed concurrent with development.	☐ No ***Transportation Concurrency Plan***.	
		T-14--Sources	Secure adequate long-term funding sources...through all feasible...methods.	☐ No ***Financial Plan***. ☐ Encourages City seek Grants & lobby for CFDs!	
		T-15--Mitigation	Require developers to contribute (to) transp. imprvmts ...to meet the LOS stds.	No ***Financial Plan***. No ***Vehicle Trip-Reduction Plan***.	

			Stop-Light Assessment		
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
King County Code	TITLE 14--ROADS	14.46 Public & Private Utilities	[This pertains to siting and permitting Utilities on King County real property]	Stormwater Detention Facility outside UGA does not meet guidelines.	
	AND BRIDGES	14.65 Integr'd Tranps. Program	Transportation Concurrency Management, Mitigation Payment System, & Intersection Standards.	The Development Agreements do not meet permitting guidelines.	
		14.70 Transp. Conc. Mgmt.	Permitting "...based on adequate transportation improvements needed to maintain LOS."	Schools sited outside UGA do not meet permitting guidelines.	
		14.75 Mitigation Payment System	"...applies transportation impact fees to new development for ...improvement(s)... needed...."	The Development Agreements do not meet permitting guidelines.	
		14.80 Intersec-tion Stds.	"...to assure...improvements to mitigate...impacts...are completed...."	The Development Agreements do not meet permitting guidelines.	

Overall Grade: Meeting Ordinance Conditions or BC Municipal Code

Overall Grade: Meeting Provisions of BD Comprehensive Plan or KC Code

Cynthia Wheeler Response
to
Yarrow Bay's Response
to
Party of Record Arguments
CRH The Lawson and Villages Development Agreement

Clearly, the Hearing Examiner has given you his experienced and professional recommendation that you ONLY approve these Development Agreements ***if at a minimum*** you implement his Conditions A-W.

You must be clear on the fact that several of those conditions are recommended to be done, complete - **PRIOR** - to the City Council voting for approval on these Development Agreements.

I beg you to withhold approval until all of the action items, especially including the contractual execution and signing of Inter Local Agreements, are COMPLETE.

Also, there were items that came in after the Hearing Examiner's insufficient 10 day deadline that clearly warrant the **same level of adherence as the *original* mandatory conditions**. These are to be found in the Examiner's Addendum.

(http://www.ci.blackdiamond.wa.us/Depts/CommDev/planning/MPDDevAgreements/June2011/Hearings/Addendum.pdf)

These relate to the wetlands boundaries and border settings.

YOU are WARNED by the Hearing Examiner that **the proposed wetland boundaries can NO LONGER be subject to change once approved by the City Council.**

They can NEVER be changed. This makes it essential that you make a good decision here. Ms. Hanson has noted publicly with pride her commitment to and participation in the Sensitive Area Ordinances.

The proposed boundaries do NOT meet with the minimums set by the SAO.....and signing the agreement as written gives them permission to not have the SAO apply to them. It is a get out of jail free card. It is not appropriate or responsible to excuse Yarrow Bay or any developer from the SAO guidelines, ever.

Phil Olbrechts - RECOMMENDATION ADDENDUM - PG 2

The FACT that implementing projects MUST COMPLY with the Sensitive Area Ordinance (SAO) ***DOES NOT ALTER THE FACT THAT WETLAND BOUNDARIES IN THE DAs CANNOT BE REVISITED*** *DURING THAT REVIEW.*

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Cynthia Wheeler Response
to
Yarrow Bay's Response
to
Party of Record Arguments
CRH The Lawson and Villages Development Agreement

ALL STATEMENTS BY CONCERNED CITIZENS THAT THE PROPOSED BOUNDARIES DO NOT COMPLY WITHTH SAO MUST BE CAREFULLY CONSIDERED.

We are talking about a GROSS case of "lack of compliance". The large wetland system running from Jones Lake to Black Diamond Lake would - according to Black Diamond code - requires a 250 foot buffer.

The Development Agreement before you ONLY assigns 60 or 110 foot buffer.

LESS THAN HALF OF WHAT IS REQUIRED BY OUR CODE.....City law!

When Ms. Hanson publicly assures constituents that "The Law will be followed".....MAKE IT SO.

These agreements do NOT enforce our laws.....They change them and make it so no one can say anything about it ever again....

Once you approve this.....Fates are sealed.

WRITTEN RESPONSE TO STAFF RESPONSE AND YARROW BAY RESPONSE TO PARTIES OF RECORD FOR THE CLOSED DEVELOPMENT AGREEEMENT HEARING

RESPONSE FROM: Clarissa Metzler Cross

1910 SE Green Valley Road

Auburn, Washington 98092

Staff states on Pg 20 of the response

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

My response to the above:

Please again review COA 33. A. and note the underlined portions:
"The City shall commission a study, at the Applicants expense on how to limit MPD traffic from using Green Valley Road, and which shall include an assessment of traffic calming devices within the existing improved right –of-way. The study shall also include an analysis and recommended mitigation ensuring safety and compatibility of the various uses of the road. All reasonable measures identified in the study shall be incorporated into the Development Agreement together with a description of the process and timing required for the Applicant to seek permits from King County should King County allow installation of the improvements, and with a proviso that NONE of the measures need to be implemented if not agreed to by the Green Valley Road Review committee."

First: The Green Valley Road Review Committee never has materialized and all reasonable measures have not been incorporated into the Development Agreement as stated in the COA.

Secondly: The Staff and Yarrow Bay have totally ignored the condition in COA above that calls for limiting MPD Traffic using Green Valley Road. They have jumped to the conclusion that the study was ONLY for assessing the use of traffic calming devices and not to LIMIT MPD traffic on GVR. If the Parametrix study is to be looked at in depth, then you would see that they mentioned that traffic calming devices on GVR would have an adverse effect on those living and farming along the road. The conclusion that Parametrix draws on page 17 of their study is:

> **"To minimize adverse effects to the existing SE Green Valley Road residents, the ideal locations for implementing traffic calming strategies would create a "gate" to minimize interconnectivity between the MPDs and SE Green Valley Road. These "gate" locations would be along 218th Avenue SE and along SE Green Valley Road near SR 169.**

Next response to the following quoted response:

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

of the MPD were approved by the City Council and cannot be altered in this venue.

My response to this is that the above stated COA 33a did express a need to limit traffic from the MPDs to Green Valley Road. Wouldn't you think that the developer would agree to send their construction traffic on a different road than our historic, agricultural servicing road? The DA could easily include this condition to support such a concern.

Next area for response from the following Written Response by Yarrow Bay:

YarrowBay does not agree to the provisions requested by Ms. Cross. We refer the Council to Exhibit 30, *SE Green Valley Road: Traffic Calming Strategies* by Parametrix. That report confirms that Green Valley Road has sufficient capacity to carry additional traffic.

My request to this response from Yarrow Bay regarding the Paramerix study shows that the actual usage and class tier of Green Valley Road has NEVER been taken into consideration. In my Closed Hearing Testimony I stated:

"This road is listed as a collector arterial road (lowest class of road) which means it is to service its immediate type of community which in our case is rural agriculture. GVR runs through 1 of 5 designated Agriculture Production Districts in King County. It is bordered by approximately 9 miles of land that is part of the Preserved Farmlands Program."

"In addition, GVR is listed as a "Shared Roadway" which means it is frequently used by bicyclists. GVR is the longest Historical Corridor in King County. GVR is listed as a tier 3 road, which places its status as one of the lowest in the county for maintenance. Any increase of traffic from the MPD's would lead to further deterioration of the road."

If Parametrix, the Staff, Yarrow Bay, and the council were to understand the capacity load Green Valley Road can handle, then they need to come and sit by it at 5 pm on a week day and envision the traffic increased by 300 -400%. That amount is a lot different than at 10 am in the morning! Then consider the class and designated usage for this road.

A build out the size of this MPD still does not address the complete devastation its infrastructure is doing to the surrounding Agricultural Area.

Next response:

Yarrow Bay's Response

Given that the City can be held legally accountable for the mitigation required of the Master Developer, the committee composition is well suited for deferred decision-making on project mitigation. The MPD conditions do not require the Green Valley Road Review Committee to be formed prior to the approval of the DAs.

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

Again in response to this, this statement is in error. The Ordinances and COA 33b. state "A Green Valley Road Review Committee shall be formed.".

Its' findings shall be included in the final Development Agreement since it stated the study needs to be implemented if not agreed to by the Green Valley Road Review Committee. So at this time, enough has not been done to complete this study so to conclude the "study is done" is totally in error since it left out the committee input.

In response to the following, please see the above state comments as this is already addressed there and completely shows lack of adherence to the limiting traffic from the MPDs on GVR.

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

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Response to the Following:

Green Valley Road

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

Response: How can anything be included for the preservation of Green Valley Road being limited from having MPDs traffic, if the Ordinances forming a Road Review Committee are not even established and

its findings put into the DA??? This is a large error. Traffic calming devices were not the only subject discussed. LIMITING traffic is the consideration that is being entirely overlooked. It is not a VOLUTARY solution of YB.

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

IN CONCLUSION:

The responses showed a complete denial of the required portions of the original ordinance. The concern expressed here is for the infrastructure that is stressed outside of Black Diamond that only the build out can effect under the guidelines of this DA. These DA must incorporate protection for the surrounding areas. Please review the 8 requested items in my testimony again. They had to be expressed since the review committee never materialized.

Thank you,

Clarissa Metzler Cross

of the MPD were approved by the City Council and cannot be altered in this venue

REPLY to YarrowBay's Response (in Exh. #44) to Peter Rimbos' Written Statement (Exh. #39)

1.0 INTRODUCTION

We can summarize YarrowBay's (YB's) Response to my 17,000+ word Closed-Record Hearing (CRH) Written Statement (WS) as follows (actual quotes from YB's response): (1) *"All of the detailed allegations raised by Mr. Rimbos were already addressed;"* (2) *"YB does not agree to Mr. Rimbos's requests, therefore, there is no legal process by which those requests could be approved by the City Council;"* and (3) *"YB does not agree to any of Mr. Rimbos's proposed Supplemental Conditions."* Obviously, I do not agree with those statements. My extensive written testimonies, all on the critical subject of transportation (ORH--317 pp and CRH--25-pg WS plus this 10-pg Reply), provide ample explanation in detail.

But, let's for a moment assume YB is correct on all counts. Where does that leave us? It means the City Council (Council) plays no role whatsoever, except to accept YB's proposed Development Agreements (DAs) (flaws and all) **and** not improve the *MPD Ordinance* ***COAs*** to protect the City. Yet the City's Hearing Examiner (HE) clearly stated the flexibility Council can exercise in what was probably his most strongly worded statements to Council in his Recommendations (see *Fig. 1-1*):

Figure 1-1: HE Recommendations on Council Discretion (my underlining)
"The Council has wide discretion as to what it can include in the DAs and the public has corresponding wide latitude in suggesting what they'd like to see in the DAs. There are few legal standards to govern this discretion...."
"Council authority to address each issue usually falls into one of four categories: (1) the Council is required to revise the DA; (2) the Council can compel the YB to agree to a revision to the DA; (3) the Council can only revise the DA with the YB's voluntary agreement; or (4) the Council is prohibited from revising the DA...."
"Council discretion in negotiating a DA is wide because its contents are not limited to any permitting criteria. The DA can address any conceivable MPD impact...."
"... the DAs serve as a powerful opportunity for the Council to look at the impacts of the MPDs as a whole to ensure that they will develop as intended and that all impacts are adequately mitigated...."
"If the Council would like to include a term in the DA that is not necessary to implement the conditions and that YB is not willing to accept, exploring the option of withholding approval is worth investigating with the City Attorney...."
"Although ... Council arguably doesn't have the leverage to compel the inclusion of supplementary conditions into the DAs, in many instances it can still impose them as a permitting requirement pursuant to its authority under SEPA."

So, where does this leave Council? First, Council members are about to make the most critical decision of their careers. Second, Council should seek advice of its attorneys; if Council members believe they need independent legal advice, they should call for and seek same. Finally, Council should avail themselves of the detailed arguments I have presented in all my writings; ask Staff and the City's Transportation consultants probing questions; and ask themselves the most obvious and important question related to the proposed MPDs: *"On SR-169 can adding a few turn lanes and new signals here and some extra lanes there really mitigate the addition of 10,000+ vehicles per day that will be generated?"* I believe that when Council members delve into all the details and ask all the probing questions, they will answer this question with an emphatic *"No!"*

You might be thinking: *"Well, that is at full build out, we'll be doing traffic monitoring, etc. periodically."* True, but are future Councils going to drastically alter the Mitigation list based on periodic analyses? In fact, the Maple Valley Traffic Mitigation Agreement is fixed and almost entirely predicated on the availability and the size of to-be-determined Grants! Black Diamond residents will be commuting through those *"mitigations"* on a daily basis, so future Councils will be very much concerned with those commuters and the impacts on City businesses in drawing customers to feed the City's tax base.

EXHIBIT 57

You might also be thinking: *"Well, future Councils will get to look at all this after 850 building permits are issued."* But will they have the leverage (and exercise it) to call for new and/or changed mitigations at that point (1,400+ more vehicles daily) when the new Traffic Demand Model (once validated) coupled with Traffic Analyses provide results which call for them?

One last thought: YB has literally thrown an army of people at me, yet still hasn't been able to refute my arguments. Throughout the process a massive array of transportation experts have shot holes in all the YB arguments: WSDOT, KCDOT, Consultants, and Maple Valley. In the latter's case, Council put Maple Valley in a difficult position by originally writing *MPD Ordinance* ***V COA 15*** in such a way that Maple Valley was obliged to make the best deal it could with YB and take what it could get, probably betting that full MPD build-out will never happen and it will at least get some mitigation built.

In the following sections I fully reply to YB's Response to my CRH WS (Exh. #39). A word of advanced caution: On Friday, October 21 YB will submit its "Re-Reply" to the Public's Replies, including this one. That "Re-Reply" undoubtedly will follow YB's standard pattern of stating *"everything already has been covered in Exhibits X, Y, and Z."* Please call YB's bluff and check for yourselves. What you will find is that YB continues to duck the issues to the detriment of the City and its citizens.

I encourage Council to carefully review the thorough assessment provided in my **Stop-Light Assessment Table** (ORH WS--Exh. #118), as it should help guide Council. It evaluates all applicable Transportation parts of the **(1)** ***MPD Ordinances' COAs***; **(2)** ***BD Municipal Code (BDMC)***; **(3)** ***BD Comprehensive Plan (BDCP)***; and **(4)** ***King County Code (KCC)***. Please understand YB's Traffic-Signal Analysis Table (ORH Exh. #208) simply plagiarized my format and unrealistically, but not surprisingly, graded everything GREEN! [In fact, YB "objected" to any consideration of the applicability of BDMC, BDCP, and KCC or that the DAs must meet their provisions!] Your HE's "Implementing" Conditions "T" and "U," if added, help, but do not alter my assessment of ***V COA 20*** (Transportation Monitoring Plan--YELLOW) and ***V COA 29*** (Regional Infrastructure Implementation Schedule--RED). However, they do change both my assessment against *BDMC 18.98.080(A)(4a)* and *BDCP 7.2.2* (LOS & Concurrency) from RED to YELLOW.

2.0 SUMMARY

Figure 2-1. The Path to Today	
6/09	Council is deluged with a massive number of detailed comments on both the DEISs and FEISs from a broad array of the Public, Organizations, Jurisdictions, and Government Agencies.
5/10	Your HE finds the FEISs *"adequate,"* but imposes a very strong and lengthy set of **Conditions**--especially in the area of Transportation--on the MPD Applications.
6/10	YB requests of Council--HE **Conditions 11-17** be replaced entirely and HE **Conditions 18, 21, 24, and 34** be revised--nearly half the HE's Transportation Conditions and, possibly, the most important ones! Of particular concern are your HE's 2010 ORH **Conditions**: **16**: *"The resulting project impacts and mitigations must be integrated into the DA or processed as a major amendment to the MPD prior to City approval of any implementing projects."* AND **17**, [in part]: *"The Monitoring Plan shall require that improvements be constructed with development...to bring mitigation projects into service before LOS is degraded below the City's standard."*
9/10	Council approves *MPD Ordinances* with YB's proposed Transportation Conditions, not HE's.
9/11	Your HE, though constrained to address ONLY the *MPD Ordinances'* ***COAs***, still imposes 24 "Implementing" Conditions on the DAs--two of which are strong Transportation Conditions to protect the City.
10/11	The Public provides Council with "Supplementary" Conditions your HE states is up to Council to consider. These include five strong Transportation "Supplementary" Conditions to protect the City--many of which harken back to your HE's *original* (*circa* May 2010--see 2. above) strong set of Transportation Conditions.
??/??	Council either remands DAs back to HE or uses its leverage to revise *MPD Ordinances'* ***COAs*** to protect the City and ensure a sustainable set of MPDs that maintain the City's vision of *"Rural by Design."*

3.0 HE DA RECOMMENDATIONS

11.5 TRANSPORTATION REGIONAL FACILITIES

1. Transportation Demand Model

a. Revisions to Current Model through 850 Dwelling Units

In this subsection in my CRH WS (Exh. #39) I provided detailed responses to Q/A #1 - #3 of Mr. Jones' Transpo Letter (contained within ORH Exh. #139). Unfortunately, YB in its response to my CRH WS simply referred back to Mr. Jones' Letter, as well as its own ORH submittals (ORH Exh. #139, #208, & #216)--all of which *pre-date* my responses! As a result, YB thus failed to address all the detailed answers I provided to Mr' Jones' Transpo Letter. Those answers dealt with important subjects such as Traffic Demand Model assumptions (the foundation of any such analyses), model timing (which directly influences mitigations proposed), and scope of the new model (i.e., "regional" breadth and extent). **I urge Council to review the answers in my CRH WS (Exh. #39) , as they have never been rebutted by YB or Transpo's Mr. Jones.**

Simply repeating *ad infinitum* the "FEISs were found adequate" (as YB continues to do) does not make your HE's clear recommended Conditions for the MPD Applications go away, nor negate the following with regards to the Traffic Demand Model used to support the FEIS and MPD Applications: (1) It was found inadequate in its regional coverage; (2) It was found to use inadequate assumptions; and (3) It, coupled with accompanying traffic analyses, identified inadequate mitigations. Your HE recognized all of this in his MPD Applications ORH Conclusions. He then carefully, prudently, and methodically formulated his MPD Applications ORH recommended Conditions accordingly. YB cannot change any of those facts, only ignore them.

A new model is yet to be complete, but when it is, it will not even be validated (in Engineering parlance: The confidence level is unknown if it can *repeatedly* predict traffic volumes and distribution accurately) until some future date, possibly 2016, according to a meeting I and City Staff had with Parametrix' John Perlic (4/18/11). So, my statement that "there is no validated baseline traffic model" is true. YB cannot make that fact go away by continually stating that the *"FEISs were found adequate."*

Prior to the 850 threshold being reached--a~50% increase in Black Diamond's population, all traffic analyses will be based on either the "old" flawed model or the "new" non-validated model. Neither case is acceptable, nor technically advisable! The specious argument about waiting to use "real data" ignores the fact that real data can be used whenever it is available. If one were to take YB's argument back to its logical genesis, one would conclude all analyses used to support the FEISs and MPD Applications were worthless because no "real data" was used. Of course, that is not the case and not the way analyses work.

Let's be perfectly clear--when it comes to the new Traffic Demand Model, YB does not want it to be used until the DAs are approved, it's Development Rights are fully vested, and 850 building permits are issued. Why? Because the new Model and accompanying Traffic Analyses could (and, most likely, will) show that 6,050 homes and 1.15M sq ft of Commercial/Business space CANNOT possibly be accommodated in Black Diamond. Plane and simple!

b. Modeling Assumptions

In my CRH WS (Exh. #39) I covered several items in this subsection: **A. Mr. Jones' Transpo Letter** (Q/A #4 contained in Exh. #139); **B. Parametrix' Perlic's Reply** (Exh. #216); **C. Proposed "Supplementary" Condition 12 a. -- Traffic Analyses** (please see Sect. 5.0 herein); and **D. Your HE's Recommended Revision to DAs' Traffic Monitoring Plan**.

I provided detailed responses to Mr. Jones' Transpo Letter Q/A #4. Unfortunately and once again, YB in its response to my CRH WS simply referred back to Mr. Jones' Transpo Letter and its other ORH submittals. Mr. Jones' Q #4 dealt with important analysis assumptions: internal trip capture rates (ICRs), peak-hour factors (PHFs), and vehicle queue lengths. Although the *MPD Ordinances'* ***COAs*** address ICRs and PHFs, the DAs do not: (1) *provide* the methodology for choosing the final ICRs; (2) *describe* at what intervals ICRs will be *recomputed/reassessed* and fed into the Model; and (3) *explain* how the expected differences between Institute of Transportation Engineers (ITE) ICR categories (e.g., "residential") and actual ICR data from other MPDs in *"Western Washington"* will be weighed and subsequently resolved (see KCDOT's CRH Exh. #27 and its other Testimonies). In addition, Queueing Analyses *never* have been done (as recommended by WSDOT during the FEIS Appeals Hearings). While your HE stated in his FEIS Appeals decision that such analyses need not be done at the *"programmatic"* level of an FEIS, he also stated they should be done at the *"project"* level. Unfortunately, at this stage with the DAs--where such details are to be discussed and methodologies laid out, we still have no evaluation of Queueing (or even a discussion of what and how such analyses will be done). Worse, there are two signed and sealed Traffic Mitigation Agreements with the Cities of Maple Valley and Covington listing specific projects, none of which have ever been evaluated for Queue lengths. Unfortunately, this appears to be another "shell game"--didn't have to do it before, not planning for it now, and won't do it later!

Incredibly, but part of its now typical pattern, YB simply ignored both KCDOT's Expert Transportation Witness, Matthew Nolan (CRH Exh. #27), and I (CRH Exh. #39) detailed responses to Parametrix's John Perlic's twenty-four-paragraph letter (ORH Exh. #216). Mr. Nolan in his WS (CRH Exh. #27) made several excellent points, especially regarding KCDOT's experience with Traffic Models, predictive Traffic Analyses, and *"trip internalization rates"* (i.e., ICRs) that have *"never been fully realized in the County's MPDs--Triology and Redmond Ridge."* **I urge Council fully review Mr. Nolan's CRH Exhibit #27.** I devoted nearly 3 pages of my WS (CRH Exh. #39) to respond to Mr. Perlic's paragraphs 11 - 24 on a wide variety of Transportation subjects. **I urge Council review those responses s well.** Neither YB or Mr. Perlic, have provided any reply.

One last point regarding Mr. Perlic regarding impact of school sites. Traffic from and to the seven planned Schools cannot be ignored. While YB claims school sites were *"included"* in Traffic Demand Model, Mr. Perlic stated this had not been done and he should know: *"We were not aware of those sites."* (ref.: 4/18/11 Perlic Meeting). This deficiency could have a profound effect on the AM commute. As a fellow engineer, I understand why Mr. Perlic stated so--the school sites keep changing!

YB continues to claim the Traffic Monitoring Plan is *"pro-active,"* not *"reactive."* As detailed in my ORH Reply (Exh. #262), I fully recognize the Traffic Monitoring Plan has two components: a Predictive element and a Monitoring element. However, the Predictive element, comprised of the Traffic Demand Model and accompanying Traffic Analyses, is wanting both technically and in timing. The "new" regional model will not be validated until 850 building permits are issued and, thus it cannot be used to provide credible traffic distribution patterns and volumes until that time. Consequently, the DAs must (but don't) provide a Predictive element plan to be used prior to that point (which represents a ~50% increase in BD's population). In spite of YB's continual fog on this point, this is why the Traffic Monitoring Plan prior to 850 building permits are issued is *"reactive."*

2. Concurrency.

a. Timing of Review.

In my CRH WS (Exh. #39) I covered several items in this subsection: **A. Your HE's Recommended Revision to DAs' Transportation Concurrency ("Implementing" Condition "U" "Project-Level Concurrency")**; **B. Mr. Jones' Transpo**

Letter (Q/A #5 & #6 contained in Exh. #139); **and C. Transportation Concurrency Plan** (I apologize as I must *refer* Council to Exh. #39's *Fig. 3-2--Transportation Concurrency Plan*, as I cannot include it within the 10 double-spaced page limit).

I preface this discussion with a critical point Council should carefully study. Unfortunately, throughout the recently proposed changes to the DA's Exhibit "F" *Traffic Monitoring Plan* (ref.: YB's CRH *Exh. #7*) language has been added to effectively vest to the 2009 Comprehensive Plan: *"...to comply with the City's transportation concurrency requirements as defined in the City of Black Diamond's Comprehensive Plan (2009)."* Clearly, Council should not approve this language, but rather should protect the City by changing the language as follows: *"...to comply with the City's transportation concurrency requirements as defined in the City of Black Diamond's Comprehensive Plan in effect at the time of implementing project approval."* Concurrency requirements should not be subject to any vesting, as Concurrency cannot be vested! The City must wield this powerful tool to ensure the MPDs are served by adequate traffic infrastructure and its citizens are protected.

Regarding Concurrency Testing of SR-169, a critical tool the City also must have available to it, unsurprisingly YB states it *"does not agree to any amendments to the MPD Permit Conditions of Approval to impose a requirement to test concurrency on SR169."* Of course, YB would not agree to having this needed capability be placed in the City's tool kit--one that King County currently possesses and uses and one Maple Valley might soon possess. Although your HE correctly suggests the City *"cannot compel the State to cooperate"* in improving SR-169 to accommodate the proposed massive MPDs, the City can adopt common-sense provisions to conduct Concurrency testing of SR-169 to ensure traffic improvements are *"concurrent with development"*--the stated purpose of GMA Concurrency. This is no reason why Council should not want to adopt this useful and critically needed tool. **I urge Council seek a Major Amendment to the *MPD Ordinances' COAs*.**

Finally, YB attempts to claim that *MPD Ordinances'* ***V COAs 10, 17, and 18*** do not call for a credible "Financial Plan." However, ***V COAs 10 and 18*** *require* same and ***V COA 17*** *implies* same. ***V* COA 10** states: *"Over the course of project build out, construct any new roadway alignment or intersection improvement that is...otherwise necessary to maintain the City's then-applicable, adopted LOS.... The DA shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur."* ***V COA 18*** states: *"The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established in the two DAs, which must cover the complete mitigation list and be consistent with one another."* These two Conditions call for construction of improvements, cost mechanisms, responsibilities, and shares of costs. These are some of the elements of a credible "Financial Plan." ***V COA 17*** (~3 single-spaced pp long) mentions: *"unsatisfactory level of mitigation," "responsibilities," "proportionate share."* **I urge Council ensure the DAs call for Financial Plans are in place, periodically reviewed, and adjusted as necessary to protect the City.**

11.7 Phasing of Development

3. Project Phasing [including HE ADDENDUM (pp. 4-5)]

While YB continues to imply everything is taken care of, your HE stated what must be addressed by Council in the DAs:

1. Improvements *"not linked to implementing project level concurrency."* ["Implementing" Condition "U' suffices--**GOOD!**]
2. Concurrency results must *"supersede"* any *"timing requirements for infrastructure improvements" in Traffic Monitoring plans.*
3. ***V COA 3***, by adopting same Phasing Plan, establishes *"timing of traffic infrastructure"* through *"the traffic monitoring plans."*
4. The DAs could be interpreted as violating the *"timing requirements of GMA traffic concurrency"* in BDCP Sect. 7.9.2 Concurrency (see Exh. 118, p. 23) and BDMC 18.98.080(A)(4) (see Exh. 118, p. 20). Also see *Fig. 5-4* ("Background") herein.

5. *"GMA concurrency" must be "conducted at project implementation"* and *"supersede...conflicting timing" of other plans.*

Bottom line: There is no **Transportation Plan** including a process whereby mitigations may change as issues develop; no **Transportation Concurrency Plan**, and no enforcement mechanisms identified. **I urge Council fix these glaring problems.**

4.0 HE UNADDRESSED DA ITEMS

Once again, YB simply "dismissed" my detailed concerns by referring to its ORH Response (Exh. #208) to my WS (Exh. #118). However, those concerns never went away. In the paragraphs that follow I refer to DA section numbers and titles.

4.10 DEVELOPER IMPROVEMENTS. This effectively states all necessary mitigations have already been accounted for and no additional cost can be levied on YB. **I urge Council to instruct City attorneys to thoroughly vet this section.**

11.2 PHASING OF IMPROVEMENTS. *MPD Ordinance* ***V COA 3*** does not state *"...infrastructure and timing of Development different from the MPD Phasing Plan (Exhibit "K") may be proposed by the Master Developer, without an amendment to the MPD Permit Approval or this Agreement..."* as alleged by YB (ORH Exh. #139). **I urge Council include language in the DAs that: "*any changes from the MPD Phasing Plan in Exhibit K needs to be processed as an amendment to either the MPD Permit Approval or the DAs.*"**

11.3 PHASING AND CONSTRUCTION OF ON-SITE REGIONAL FACILITIES: B. Construction and Funding. [similar for ***11.4 B.***] Incredibly, YB states a "Financial Plan" is not required or necessary! What Council faces is lack of financial estimates, over-reliance on CFDs, no risks identified, and no contingency planning--any of which could cause major problems for the City. Such Financial Plans are developed everyday for small and large projects and protect all parties involved. Although cost estimates can (and, most likely, will) change, with no such estimates to begin with, their is no program to manage, no costs to contain, and no risk management of funding sources. **I urge Council to modify DA language accordingly to ensure the City and its taxpayers are protected. This is possibly where Council's biggest risk lies!**

11.4 PHASING AND CONSTRUCTION OF OFF-SITE REGIONAL INFRASTRUCTURE IMPROVEMENTS. A. Phasing. No Stormwater facilities are listed in the Tables, nor any ingress/egress infrastructure, yet the off-site major Stormwater Detention Facility is shown in Exhibit K--Phasing Plan *(Ph. 3: fig. 9-5, Proj. III-13)*. **I urge Council to modify DA language to address these deficiencies with respect to Stormwater facilities and accompanying transportation infrastructure.**

EXHIBITS Q and R – TRANSPORTATION MITIGATION AGREEMENTS. YB included the *specious* arguments that: *"...as to mitigation along SR-169, we again point out that residents of the City of Maple Valley also use that corridor. The Black Diamond City Council should take comfort from the fact that the City of Maple Valley believes the mitigation in Exhibit Q is sufficient for the corridor."* For 32 years I've lived in Maple Valley and commuted on SR-169 multiple times every week. I take absolutely no *"comfort"* in the Exhibit Q *"mitigations,"* which are fixed and not subject to any *"monitoring plan"* and are completely predicated on the availability of vast unknown Grant monies materializing and being made available!

5.0. PROPOSED "SUPPLEMENTARY" CONDITIONS

Your HE wrote in his *DA Recommendations*; *"The relevancy of supplementary conditions has been a major point of disagreement between the Examiner and the City and YB....Even though YB may indicate it's not agreeable to a supplemental condition during the hearings before the Examiner, the conditions may still be a priority for the Council. The Council may want*

to try to negotiate a deal with YB to agree to the supplementary condition, or require the condition either under the State Environmental Policy Act or by taking the position that it can withhold approval of the development agreements for any reason it chooses. The Examiner chose not to close the door on any testimony related to supplemental conditions, so that all options for the Council remained intact during their stage of review."

As part of my ORH WS (Exh. #118), I submitted a number of proposed "Supplementary" Conditions: *12 a.--Traffic Analyses; 14 a.--Transportation Concurrency Testing; 14 b.--Transportation Monitoring Plan; Condition 29 a.--Transportation Planning; and 33 c.--Citizen Review Committees*. In *Figures 5-1* thru *5-5* I provide the proposed language for each of these, respectively. I preface each proposed "Supplementary" Condition with a background discussion that provides supporting rationale on why each "Supplementary" Condition is "necessary and appropriate." **I urge Council to review each of these proposed "Supplementary" Conditions and consider their inclusion in amending the MPD Ordinances.**

Figure 5-1: "Supplementary" Condition 12 a.--Traffic Analyses	
BACKGROUND	Because ***V COA 12*** deals with **Traffic Analyses**, I recommend a **new Condition 12 a.** to deal with **Sensitivity Analyses**. Although *V COA 17 b.* does call for **Sensitivity Analyses** on Peak-Hour Factors (PHFs), it does so only after the **Traffic Demand Model** has been validated following the issuance of 850 building permits. That is inadequate, since, as stated earlier, 850 building permits represents a ~50% increase in the City of Black Diamond's population and is estimated to not occur for ~5 years until 2016!
Supplementary Condition 12 a.--Traffic Analyses	*The new Traffic Demand Model shall be used to conduct Sensitivity Analyses to understand the effects of changes in projected Peak-Hour Factor (PHF), intersection spacing, signal timing, and Queue length assumptions. The varying consequences to travel times, overall project impacts, and mitigation measures shall be presented to the City and all affected jurisdictions for full evaluation of performance. In addition, a rigorous Cost-Benefit-Risk Analysis shall be performed, at a minimum, for three scenarios: 6-year Transportation Improvement Plans (TIPs) are funded on time; 20-year TIPs are not fully funded; and 20-year TIPs are funded on time.*

Figure 5-2: "Supplementary" Condition 14 a.--Transportation Concurrency Testing	
BACKGROUND	Because ***V COA 14*** deals with **Traffic Demand Model** assumptions and revisions, I recommend two **new Conditions 14 a** and **14 b.** Unfortunately, with respect to the new **Traffic Demand Model**, HE's recommended Conditions 16 & 17 were eliminated. This must be rectified. By eliminating these two conditions there will be no evaluation of impacts and mitigations and no transportation monitoring plan prior to entering into a DA. This is very risky and does not protect the City, its businesses, and its citizens. For any mitigation plan to succeed, at a minimum, **Transportation Concurrency** must be met. Essentially, the City committed to density before concurrency! The MPD Ordinances' *Exhibit B--Conclusions of Law, para. 30* mentions ensuring *"concurrency at full build-out."* Unfortunately the *MPD Ordinance COAs* fail to stipulate Transportation Concurrency testing, nor require adjustments--such as funding, timing, moratoriums, etc.--to be made should a particular improvement fail the Concurrency test. A viable and executable **Transportation Concurrency Plan** must be required. Lastly, **Transportation Monitoring** must be pro-active, not re-active, as testified to by WSDOT and many other Expert witnesses during the FEIS Appeals Hearings held in 2010.
Suppl. Condition 14 a--Transportation Concurrency Testing (HE's MPD Applic. Recom'd TV Cond. 16, but with additions: underlined sentences are new).	*Once a new Traffic Demand Model is developed, validated, and run, the resulting project impacts and mitigations must be integrated into the DA or processed as a major amendment to the MPD prior to City approval of any implementing projects. Transportation Concurrency testing shall be periodically conducted for each implementing project and at the beginning, midpoint, and end of each Phase to ensure concurrency at full build-out. Subsequent model revisions also shall be validated to ensure results are real and reproducible. Sensitivity analyses shall be conducted to gage the adequacy of key assumptions such as the internal trip capture rates. These sensitivity analyses must assess the risks associated with assuming different sets of assumptions. All results, assessments, conclusions, and recommendations shall be fully documented.*

Figure 5-3: "Supplementary" Condition 14 b.--Transportation Monitoring Plan	
BACKGROUND	Please see supporting rationale above under **Condition 14 a** discussion. This also should fix the "timing" conflicts between ***V COA 25*** and that of ***V COA 11 and 17*** "*to bring mitigation projects into service before the Level of Service is degraded below the City's standard.*"
Suppl. Condition 14 b--Transportation Monitoring Plan (HE's MPD Applic. Recom'd TV Cond. 17).	*The intersections needing mitigation as identified in the analysis required above shall be monitored under a Transportation Monitoring Plan which shall be incorporated into the DA for the MPD, with each designated improvement being required at the time defined in the Monitoring Plan. The Monitoring Plan shall require that improvements be constructed with development in order to bring mitigation projects into service before the Level of Service is degraded below the City's standard."*

Figure 5-4: "Supplementary" Condition 29 a.--Transportation Planning	
BACKGROUND	Because ***V COA 29*** deals with Implementation Plans, I propose **Supplementary Condition 29 a.** The *BDMCs* require Transportation Planning be done and when it should be done, as shown below. 1. **BDMC 18.98.010** states for an MPD--under *Paragraph I: "Provide needed services and facilities in an orderly, fiscally responsible manner."* This includes all transportation-related improvements. 2. **BDMC 18.98.020** states, in part, Public Benefits to be derived--under *Paragraph G: "Timely provision of all necessary ... infrastructure ... equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops."* All transportation-related infrastructure must be provided in a "timely" matter to avoid even worse gridlock than today. Plus, it is the law! 3. **BDMC 18.98.080** states, in part, as COAs of any future MPD permits--under *Paragraph A.4.a* that there be a: *"...phasing plan and timeline for the construction of improvements ... so that: Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted ...."* So, the required improvements must be in place at final plat approval. However, the City's current *Six-Year TIP* contains projects that clearly will not mitigate the impacts of the MPDs and do not have real funding sources identified, securing ROWs, etc. This effectively lets the Master Developer largely off the hook for funding such mitigations. Once again, where is *"growth paying for growth"*? In addition, mitigations proposed for Maple Valley and Covington must be addressed in an overall **Transportation Plan**. Those proposed mitigations (out to at least 2026!) must not be "frozen in time" based on 2009 flawed analyses. **Transportation Plans** must define needs, routes, concepts, schedule, estimates, funding sources, risks, cost-benefit-risk analyses, and potential impacts.
Supplementary Condition 29 a--Transportation Planning	*A complete set of Transportation Plans shall be developed that include, at a minimum, project descriptions, project impacts, mitigations proposed, estimated costs, cost shares, identified funding mechanisms, and risks of potential revenue sources for both route and intersection improvements to fully mitigate all transportation-related impacts on all geographic areas (including the Cities of Maple Valley and Covington and the surrounding unincorporated areas of King County) studied before each Phase begins. Cost-Benefit-Risk Analyses shall be conducted for each mitigation proposed that provide specific details for decision-makers and assess potential impacts associated with slips in schedule, not securing adequate funding, and traffic pattern changes. Such Plans shall be submitted to the City for review and approval 180 days before a Phase is scheduled to begin.*

Figure 5-5: "Supplementary" Condition 33 c.--Citizen Review Committees	
BACKGROUND	Because ***V COA 33*** deals with Green Valley Road--a King County road--and residents outside the city limits, a **new Condition 33 c.** is proposed that deals with all King County roads that will be affected by the massive traffic to be generated by the MPDs on these 2-lane windy country roads.
Supplementary Condition 33 c--Citizens' Review Committees	*Separate Citizen Review Committees will be established for Issaquah-Hobart-Ravensdale-BD Rd., Auburn-BD Rd., Kent-BD Rd., Lake Holm Rd., Thomas Rd., Covington-Sawyer Rd., and Green Valley Rd. Some may be combined should the citizens agree. Each Committee will be comprised of five members. KCDOT shall be invited to participate as a member in each committee. The other members will include three citizens along the road in question and one representative of the Master Developer. Black Diamond can send a non-voting representative to participate in Committee meetings. The Committees will be responsible for setting their goals and agendas. The express intent is to provide the Public a voice on potential impacts that could affect their quality of life.*

6.0 CONCLUSIONS

YB blithely dismisses my detailed set of Conclusions by stating my *"requests were outside the bounds of what the Council is allowed to do in these Development Agreement hearings."* That is not true and your HE stated so. **I urge Council carefully consider them** *(Fig. 6-1)*. **I FULLY STAND BY THE COMPREHENSIVE SET OF CONCLUSIONS PRESENTED IN MY WS.**

The **DAs** are deficient in Transportation Plans & Mitigation, Financial Plans, Traffic Demand Model & Analyses, Concurrency, Vehicle Trip Reduction, and Transportation Monitoring and require specific revisions. *MPD Ordinance* ***COAs*** *potentially* handcuff Council in addressing some of these, but the HE provides good advice for Council to consider.

Figure 6-1. Conclusions
1. **Traffic Demand Model** under development needs to be validated and used to inform detailed Traffic Analyses to identify potential mitigations prior to DA approval. Mitigation list is suspect, as HE found the old model and key assumptions flawed.
2. Traffic modeling/analyses **assumptions** need reassessment, especially ICRs, which *inordinately* drive overall mitigation.
3. No **Transportation Plan** detailing Tasks and Schedule, integrating the other plans mentioned herein, and including design, construction, maintenance, and operation of the vast transportation infrastructure the MPDs will require.
4. No **Traffic Demand Model Validation Plan** to validate/re-validate the model to identify and evaluate additional mitigation.
5. No **Traffic Analysis Plan**, along with no details on assumptions to be used and their sensitivities.
6. No **Financial Plan** to assure transportation obligations can be met, nor a process to evaluate jurisdictional pro-rata shares.
7. **Transportation Monitoring Plan** is primarily "re-active" and provides the City no leverage to assess mitigation needs.
8. Transportation infrastructure improvements are not linked to implementing project level **Transportation Concurrency**.
9. **Traffic Monitoring Plan** does not require transportation concurrency testing for implementing projects.
10. **DAs** violate timing requirements of **GMA Transportation Concurrency** in **BDCP 7.9.2** and **BDMC 18.98.080(A)(4)**.
11. **Traffic Monitoring Reports** do not require City approval to ensure an impartial and accurate traffic assessment.

7.0 RECOMMENDATIONS

YB brushes off my specific set of Recommendations for Council by stating: *"The Council cannot adopt Mr. Rimbos's recommendation to amend the MPD Ordinances."* YB is not in charge here, Council is. **I urge Council exercise its right and critically review and consider my Recommendations. I FULLY STAND BY THE COMPREHENSIVE SET OF RECOMMENDATIONS PRESENTED IN MY WS.**

The HE provided an excellent "blueprint" for how Council could proceed. There are several DA changes Council should make and several Amendments Council should append to the *MPD Ordinance* ***COAs*** to ensure MPDs benefit the City.

1. **ACCEPT**: The HE's recommendation the DA Traffic Monitoring Plan be revised to require City approval of Traffic Monitoring Reports to protect the City and ensure impartial Reports to include:

   (1) How forecasts of future traffic volumes will be made and used to adjust the model *(**V COA 11 & 17**)*;

   (2) Frequency of Traffic Counts and LOS computations;

   (3) Comparison of results from a validated model & subsequent analyses with LOS threshold for each existing facility;

   (4) Evaluation of extent MPD traffic would cause/contribute to LOS failure on existing facilities *(**V COA 15**)*; and

   (5) After-the-fact Monitoring results of traffic improvements and proposed plans to remedy any deficiencies found.

2. **ACCEPT**: The HE's recommendations:

   (1) No implementing project to be approved unless it complies with City Concurrency requirements and

(2) Monitoring plan state GMA concurrency review to be conducted at project implementation and supersede any conflicting timing in the monitoring plan.

The State's GMA requires the City ensure each Implementing Project satisfies concurrency. So, at each stage transportation mitigation projects must be funded and included in the 6-yr TIP so that LOS requirements are met. The Traffic Monitoring Plan must be revised to incorporate such concurrency requirements. Transportation concurrency comprises possibly the most critical and far-reaching of the HE's recommendations.

3. **ADOPT**: The five proposed "Supplementary" Conditions (see Section 5.0 herein) as *MPD Ordinance* Amendments:

12 a.--Traffic Analyses: Conduct traffic analyses using *new validated model* to evaluate key parameter sensitivities and Cost-Benefit-Risk Analyses related to potential funding shortfalls to evaluate future mitigation deficiencies.

14 a.-- Transportation Concurrency Testing: *Prior to DA approval* conduct analyses using the new validated model to determine needed mitigations and test concurrency at Phase beginning, midpoint, and end to ensure concurrency at full build-out

14 b.-- Transportation Monitoring Plan: Monitor transportation infrastructure to identify those improvements to be constructed with development to bring mitigation projects into service *before* the Level of Service is degraded below applicable standards.

29 a.-- Transportation Planning: Develop Transportation Plans that include: mitigations proposed, project impacts, estimated costs, cost shares, funding mechanisms and potential revenue sources for both route and intersection improvements to *fully mitigate* all transportation-related impacts on all geographic areas (including Maple Valley, Covington & KC) before each Phase begins.

33 c.-- Citizen Review Committees: Establish Committees (incl. KC, at its *discretion*) for Issaquah-Hobart-Ravens.-BD Rd., Auburn-BD Rd., Kent-BD Rd., Lake Holm Rd., Thomas Rd., Covington-Sawyer Rd., and Green Valley Rd.

Final concerns for Council to assess and address are given in *Figure 7-1*.

Figure 7-1: Final Concerns for the City Council to Assess and Address
• Since there is no validated **Baseline Traffic Demand Model**, complete the new model and validate it now, then use it coupled with detailed Traffic Analyses to provide predictions, reduce risk, and lend some certainty to understanding impacts on the City's and Region's Transportation infrastructure. Otherwise, the City lacks reliable forecasts of what future traffic patterns and volume scenarios could look like and what transportation infrastructure mitigations might even work.
• **Mitigation Agreements** with outside jurisdictions do not include Transportation mitigations the HE believed were technically defensible. Nor did all the *independent* Technical Experts and the vast majority of the Public. Consequently, those negotiations have no common database with which to work, thus, the mitigations listed are suspect, at best; completely inadequate, at worst.
• YB effectively is vested on all transportation-related stds. & requirements through full build-out. Such standards and requirements protect the Master Developer, **not** the City, its residents, or the Region's citizens. They will unduly handcuff future City Councils by putting the burden of proof on the City to substantiate the MPDs are causing future traffic problems--a recipe for future lawsuits.
• Major changes needed to the region's **Transportation Infrastructure** due to MPD total size--6,050 homes and 1.1 million sq ft commercial footprint and generating over 10,000 daily commuter trips--are not likely to be feasibly or economically mitigated due to the geographic and funding constraints. The region's Transportation infrastructure could suffer gridlock for several decades.
• YB proposes **Funding Sources** that rely primarily on other people's money to build needed infrastructure or monies that currently do not exist and are not likely to exist. Both the WA State and King County Departments of Transportation have precious little funds to allocate in southeast King County. The Alaskan Way Viaduct Replacement and 520 Bridge Replacement projects will drain State funding coffers for a very, very long time. King County is trying to stretch its ever-dwindling transportation budget to simply maintain road safety, not increase capacity, in the unincorporated areas. State-elected officials, WSDOT, KCDOT, and the PSRC (e.g., Transportation 2040) have made these points abundantly clear. This is possibly where risks are the greatest !

Brenda Martinez

From: smile meadow <smilemeadow@tx3.net>
Sent: Wednesday, October 19, 2011 3:40 PM
To: Brenda Martinez
Cc: smile meadow
Subject: rebut the city staff

Erika Morgan
33624 Abrams Ave.
Black Diamond 98101
<smilemeadow@tx3.net>

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

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

This comment by the city staff, once again illustrates the profound need for enough time to actually read and digest what the commenters are saying. City staff have repeatedly told the Council that there has been enough time to adequately evaluate our testimony. They have completely misunderstood what my concern is as evidenced with their response. These release forms will not be signed by all property owners. Only the buyers of those few properties that have been identified as at risk, will be given the forms to sign.

I will describe the problem I see scratching at BD finances with the release forms.

A. Family purchases home in "The Villages", note: this is not in the mine hazard area of Lawson Hills.
B. Family is elated to have a new baby.
C. Home is undated by a smell of rotten eggs.
D. Baby's asthma gets worse at home, but improves with less time in the home.
E. Tests are done on the home's atmosphere at owners expense, high levels of methane and ethane gas are found, as well as the sulfur.
F. Environmental testing proves that the gasses are from mine workings that are seeping into the home.
G. Family hires a sharp lawyer.
H. Lawyer finds that there is a record of a flooded mine puncture spewing sulfurous water along Abrams Ave. Lawyer also visits and lights the methane flame at the "Flaming Geyser State Park", where he reads the explanation that the methane he can light is coming from mine workings in this area.
I. Lawyer looks over records of BD and finds that in some areas of town prospective purchasers have been warned of mine hazards and have been asked to sign the releases that indemnify the City.

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J. Fast forward to the trial; The Lawyer argues that the City knew, or should have known, there could be a mine hazard in the Villages. The city understood how to indemnify itself from liability as evidenced by the releases they had some new residents sign. Ergo, the city of Black Diamond wishes to accept fully, the complete financial responsibility, for making all other property owners, whole both for their financial stake in this dwelling unit, but also for any health issues the family has or any development issues the baby has for the rest of their natural lives.

H. Judge or Jury finds for the damaged home owner, Black Diamond had good warning of responsibility and chose to make it theirs, as evidenced by the asking of release forms from some but not all, of these other homes in the citys studied wisdom, **Black Diamond pays.**

Erika Morgan (oral argument and Exhibit C-23) Black Diamond Lake Buffers. In both her oral statement to the City Council and written presentation (Exhibit C-23), Ms. Morgan states that the Black Diamond Lake requires a "much wider buffer zone then exists in our SAO today." As the Examiner noted on page 55 and 57 of his Recommendation, "the City's Sensitive Areas Ordinance has been determined by the City Council to adequately protect wetlands. If the Council chooses to exceed the mitigation required by that ordinance, it will probably need to get voluntary consent from YB" and "FOF 13 states that application of the City's SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals." Moreover, under State law, the City of Black Diamond is required to follow its own municipal code, including when that code calls for a quasi-judicial process. Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 835-36 (2011). As such, the City Council cannot revisit the buffers established by the City Code for Black Diamond Lake in the context of the Development Agreement proceedings. Mr. Morgan's request for larger Black Diamond Lake Buffers than required by the City's SAO must be denied by the City Council. Flooding. In her Exhibit C-23, Ms. Morgan expresses concerns regarding flooding as a result of MPD development. See YarrowBay's and the Hearing Examiner's response to flooding concerns in response to Jack Sperry. Page 62 of 101

Black Diamond Peat Bog is indeed a very special place, it is the hand of nature at work. The peat bog will become a peat meadow over the next thousands of years if it is properly allowed to go about its natural development. The City of Black Diamond has solemnly avowed that this pristine Lake with State and Federal significance, as the only example of a low land temperate bog in the lower 48, will never know in any way the stain of human development impacting it.

Peat bogs are very special, the water in them is layered with cold ancient water at the bottom, and new temporary water at the surface. Rain spills into the lake from the sky but also in curtains skating over stable clay pan. This skating water picks up forrest debris; woody shrub stems, broken windfall branches and conifer needles that make up most of the edges. There are also the dead drowned trees which continually fall into and contribute their water logged woody bits. These woody bits float at the level of water where their current specific gravity places them, depending on how long they have been in the water and how swollen their cell structure has become. The wood bits can not escape through the downstream creeks as they are held back by the brush that acts as a natural sieve. There is no rotting going on in a bog. Bodies who are pulled out of the eventual peat meadow are perfectly preserved.

All this biology at Black Diamond Bog is very sensitive to any pollution but also to any disruption of its relationship with the dynamic water situation that feeds it. Black Diamond Lake is far more sensitive, then for instance Jones Lake or Lake Sawyer because it requires a certain kind of water to be recharging it, water that comes to the Lake in a very prescribed condition.

What I have actually asked for was seconded by the HE and Dr. Cooke. I have asked that the governing bodies be called in now to tell us what will actually be required in protections for Black Diamond Lake. I have asked

for this intergovernmental intervention at this point because the Development Agreement sets up expectations for developer / city interaction going forward. We were told at the MPD that we could not bring up specific problems with the plan because the discussion was only at an overview programatic, from outer space level. Now the City staff wants to pretend that all these concerns have been addressed, but they have not been. **I have myself have found many places where our SAO were not followed by the misclassifying of actual conditions specifically:**

1. Everywhere on section 23 where there was an infiltration well dug, water was found. They won't show that the water was found, also to be moving across their holes, maybe they didn't watch long enough but I did. Their maps show these wells as small isolated wet pockets, every hole they dug now has a small ring of wetland around it, there were no dry holes.

2. The truth is that anywhere a hole is dug on that section, water will be found, it is just a question of doing the digging.

3. The southeast shore of Black Diamond Lake has three frank year round streams with culverts coming under the blanketed ring road, as well as the uninterrupted curtain of water; none of these appear on any maps. All that higher ground is very dense and wet. This is one of the areas where water is not properly recorded on the parametrix map and simply does not appear on the invalidated constraint maps. Dwelling units appear here on YB maps instead. This is why I say that your buffers are inadequate for the lake's protection.

4. The cliff that forms the southeast edge of Black Diamond Lake with its 110 foot height and 80 degree slope has been marked to have no buffer setback at all as the wetland markers are about three feet from the edge of the road blanket. {note: YB did not wish you to see what their plan had been, so they removed the red capped rebar that was fairly near their test well when they went in and cut the blackberries from the well head.} The other stakes however remain as I did not mention them in my testimony.

5. Parametrix stated that many areas were "too dense with underbrush" to evaluate properly. These areas are the areas where it is too wet for the douglas fir to grow, hence there is light getting to the ground to support the undergrowth.

6. It has been the City staff's mantra that the constraints caused by our wetlands have been addressed by definition of themselves, this is the circular argument of which they are so fond, but the questions and problems and reality all still remain.

7. Abrams Ave right now can only be properly "fixed" with a 500 foot bridge over Rock Creek. More surface water off Lawson Hills going into Jones Lake can only mean faster flooding of the Abrams causeway. Is there a mitigation measure for YB to pay the whole cost of a 1000 foot bridge over Rock Creek at Abrams Causeway?

8. The South connector road follows the Horseshoe Lake Inlet stream from Black Diamond Lake rather then crossing it, does Black Diamond want another of these Abrams Ave type headaches with many more residents they must serve, this area if you walk it is very wet?

9. The main circle at the villages where the "tree cutting" incident happened is currently very wet.

10. It is interesting that City Staff understands that it must follow its municipal code for the SAO; when in fact it freely violates its municipal code, and has been found in violation of its municipal code by the LUPA court, but still continues in its violation instead of rectifying its mistake as the court asked.

I ask again to make it more clear:

There must be a specific year round and year to year, scientific evaluation of the extent of the wetland and the methods needed to protect it. This must be conducted cooperatively by all the concerned agencies. Dr. Cooke gave you the names of the contact persons and the citations of the Laws that require them to become involved. I say it again, these wetlands must be properly accommodated, so they continue in their regional significance. Failure on the part of BD at this requirement will have the result of encouraging expectations for these lands that can not be met because of actual real world constraint.

Fortunately for Black Diamond Lake Peat Bog, queen of pristine lakes, important part of a cleansing aquifer for Puget Sound, its future is in the hands of the State and Federal regulators. Black Diamond should get on board with its protection too. The Land Conservancy, Ecology, Fish& Game, wildlife, water quality, surface water management and the various relevant departments at our WSU and WSU will be invaluable resources for the city of Black Diamond in its respect of its responsibilities.

And also once again, YB big developer with much experience in the Pacific Northwest, purchased property described as "whole section wetland". Furthermore there is a significant file about much of this property describing the extent of the wetland and thus the unsuitability of this land for any additional infiltration as well as all the same arguments we have been hearing so much about, in every one of the areas of concern. If they were innocent of these facts when they purchased the land, they failed themselves due to their own lack of dilligence about their major business.

October 19, 2011

To: the Black Diamond City Council
for Closed Record Hearings, Response to Yarrow Bay Rebuttals dated Oct 14

From: Kristen Bryant, 1006 139th Pl NE, #C-4, Bellevue, WA 98005
And on behalf of Save Black Diamond

Thank you for the opportunity to provide this response. It will be useful to refer also to my testimony from October 8, 2011, which still is valid. The testimony from Dr. Sarah Cooke from August 12, 2011 is also still important to refer to and the Yarrow Bay response has not effectively countered the information provided there.

As a general opening comment, it appears that on the topic of wetlands, the city staff agreed to every request by the developer. As part of our government system it is necessary to provide checks and balances. You as the city council are the real negotiators for this potential Development Agreement, not city staff. In addition, the true parties are the people who live in Black Diamond, now and for the next twenty years. You've heard ample concern on their part, so recognizing the need to play devil's advocate, and to sometimes be in the uncomfortable position of disagreeing is what is required here.

Timing of Locking in Project-Specific Wetlands

The first issue to address is one of timing. Yarrow Bay asks for an interpretation of the MPD Ordinance that requires you to lock in project-specific sensitive areas that have not been verified. They did not provide an effective reason why the suggestion from page 10 of my testimony could not be used.

Proposed Language for 8.2.1:	Current section 8.2.1
8.2.1 Wetland Determinations and Delineations Final Sensitive Areas are fixed so that during construction, if it is discovered that the actual boundary is smaller or larger than mapped, the mapped boundary shall prevail. The mapped boundary will come from surveys required by both state law and city code to be included with subdivision and binding site plan applications.	**8.2.1 Wetland Determinations and Delineations Final** ~~The presence and absence of wetlands, wetland typing, and delineations, consistent with the Sensitive Areas Ordinance, are shown on the Constraint Maps attached hereto as Exhibit "G".~~ ~~The wetland delineations and types outlined in the Constraints Map as surveyed on 7/27/09 are deemed final and complete through the term of this Agreement.~~

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An independent 3rd party verification of sensitive areas must be completed, as well as required reviews by applicable government agencies, and required public notice and opportunity for comment. Once the city council deems these requirements are satisfied and agrees to the boundaries, those boundaries will be fixed.	~~Pursuant to Condition of Approval No. 155 of the MPD Permit Approval, if during construction it is discovered that the actual boundary is smaller or larger than what was mapped, the mapped and described boundary shall prevail.~~

Constraint Maps

On page 3, the staff recommends acceptance of the constraint maps. However, there is no negative consequence to the city of not doing so, and the fact is that the City Council can bring a fresh eye to this and recognize the constraint maps are not ready to be accepted.

> *Examiner finds the delineations to comply with City regulations, subject to the verification of a couple issues as identified below. If the Council has any concerns on the accuracy of the delineation, it could certainly require in the DA that the wetland boundaries be subject to further verification by Parametrix or another third party reviewer.*

In Yarrow Bay's response, their expert insists again the wetlands are correct. This statement is irrelevant because the third party review was not sufficient to lock in wetlands boundaries. Generally accepted development practices are to require much more verification before locking in, and a twenty-year lock in is unheard-of. Black Diamond wants to be ahead of the curve on its environmental practices, but this development agreement pushes us into negative territory.

The wetland boundaries in the constraint maps have not been verified. There is nothing on the record saying that staff went to the field themselves and no one on staff is qualified to do wetland boundary verification. The developer's consultant used the wrong protocol to delineate the wetlands over what was required by the State and US Army Corps of Engineers at the time, which could affect the wetland boundaries. Finally, the city's third-party reviewer stated in their review that they only spot-checked the boundaries, with the bulk of the wetland boundaries having had no independent review. Therefore, it would be very unwise for the City to lock into these

boundaries at this point in time. They should be used as inventory level only. The Development agreement states that these boundaries could not be contested for the duration of the development. This could be for 20 years.

For verification of the problems with locking in wetlands boundaries, Erik Stockdale, Washington State Department of Ecology was contacted. He stated in Personal Communication on 10/19/2011: "I know of no other jurisdictions that have established a development agreement that 1) locks in wetland boundaries into the development agreement where they cannot be contested at a later date, 2) includes wetland boundaries that have not been completely peer reviewed, and 3) Ecology recommends that local jurisdictions use a 5-year approval time frame for wetland boundary approvals. The five year approval gives regulatory consistency with the US Army Corps of Engineers who also only recognize wetland boundaries for a five year period."

Additionally Erik stated the following: "I do not understand Why would the City of Black Diamond would think that approval of non-peer reviewed wetland boundaries for a period greater than the State and Federal agencies is consistent with the Growth Management Act." "The GMA requires local governments to adopt an ordinance that designates and protects wetlands. A development agreement that accepts non-peer reviewed wetland boundaries, that locks in wetland boundaries that cannot be contested at a later date, and that approves the boundaries for longer than the accepted 5-year period is essentially circumventing the GMA."

Additional Specific Comment on Yarrow Bay's response

1. Yarrow Bay's Oct 14 response refers to Scott Brainard's testimony from their August 4 Develpoment Agreement Hearing response document, Appendix 1 from Wetland Resources dated Aug 2, 2011.

   Here is an excerpt from that letter:

Based on the testimony provided by Sarah Cooke on July 21, 2011, and the documents submitted and reviewed over the course of these projects, it is my professional opinion that Exhibits G for both The Villages and Lawson Hills accurately depict the wetland boundaries, DOE ratings and buffers as delineated and prepared by WRI and as reviewed by the City of Black Diamond and Parametrix. The Constraint Maps in Exhibit G of both The Villages and Lawson Hills Development Agreements contain sufficient detail to make future accurate permit review decisions when subsequent MPD

Comment on Third Party Review

Parametrix was only asked to do a limited review in a limited scope of work. They did not do a complete 3rd party verification of all the wetlands. To demonstrate this, we point to the fact that for field review, Parametrix states that they went to the f field on July 8 and 9, 2008. If there are dozens of wetlands over 1500 acres, then it's impossible for them to review in such a short amount of time. It would be virtually impossible to check more than a couple of wetlands in two partial days. The wording Parametrix used was general on purpose because they weren't tasked with sufficient scope to accurately verify all the wetlands.

Comment on City Review

It is not appropriate to say the city of Black Diamond has not reviewed the wetland boundaries because it implies the city has a qualified person on staff to do so. There is no wetlands expert on staff, and the staff did not walk the field. The staff took the word of the applicant.

In summary, staff and the developer are asking the developer to approve and lock in wetland boundaries that only the developer's consultant has examined.

2. Also in Yarrow Bay's Oct 14 response, page 15:

Third Party Verification.

On page 9 of C-22, Ms. Bryant alleges that no further verification of wetlands was done after the Parametrix Technical Memorandum dated August 27, 2008. Contrary to this assertion, the EISs were not published in their final version until December 2009. Between the date of the cited 2008 Parametrix memorandum and the publication of the final EISs, Parametrix did in fact complete its third party verification. *See* Attachment 1 to Exhibit 139. There is no evidence in the

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

I have reviewed Attachment 1 of Exhibit 139, and there is no detail on the third party verification. By referring to the 2008 document I did not state that it was the last piece of information from Parametrix, just that it pointed out some unfinished works. There are also letters in Appendix O to both MPD's from 2009. They both clearly state that the job is not done.

The statement on page 15 of Yarrow Bay's response (above) that "there is no evidence on the record to the contrary" is false. Dr. Cooke stated that complete the 3rd party verification was not done in her August 2011 testimony. More importantly, **there is no evidence on the record that the third party verification <u>was</u> done. If Parametrix reviewed these boundaries, then where are their documents with their field sheets and notes**? If Parametrix did this, then how many weeks were they in the field?

If additional studies and information were done, they would need to be posted.

The letter from Parametrix dated June 29, 2009 is 2 pages long and in that short length manages to state a number of items that are incomplete just on the basis of one document review. In this case, they reviewed a document. They did not go in the field. They were not asked to review every boundary, designation, and buffer. They were only given budget to review one document, and they found issues. This is intended to be an example to show that there is work to be done. It is presented to the City Council so that you can see based on this example that the work is incomplete and therefore they cannot agree to the wetlands delineations.

Parametrix would never have expected their work on these limited items to constitute a full verification and third party review that would lock in for twenty years. They did their limited scope review of specific documents, their two partial days in the field, because that's all the city asked them to do and all the city paid them for. It was a high level EIS, and before locking anything in, any typical development process would be complete field verification.

Just because Yarrow Bay and Wetland Resources is telling you this does not mean it is the case. They are hoping you will believe this, but this is not standard practice. It is not in Yarrow Bay's best interest

to have someone third party review their boundaries. This is inappropriate, it allows Yarrow Bay to police themselves on wetlands since no city staff are specialists in this specific area.

3. On page 11, Yarrow Bay states:

> where inconsistencies and/or inaccuracies were identified, WRI worked with Parametrix to resolve any and all concerns. *See* Letter from Scott Brainard of Wetland Resources, Inc., Attachment 1 to Exhibit 139.

The city's own consultant (Parametrix) stated that there were many inconsistencies with their wetland rating and buffer assignments. The buffers assigned were also not consistent with State recommendations for Best Available Science nor were they consistent with the City's own Best Available Science report written by their consultant. So, if Mr. Brainard consulted with them, he didn't incorporate their recommendations.

4. On its page 13, Yarrow Bay states:

> *Core Wetland and Stream Complex.* The wetland complex associated with Rock Creek, Jones Creek, Black Diamond Lake, Black Diamond Creek, and Ravensdale Creek are designated as the Core Stream and Wetland Complex. The *general* boundaries of the area affected are designated within the Best Available Science Document, Technical Appendix B, provided that the dimension of the area shall be defined by the *field verified wetland boundaries* and the buffer defined in Section19.10.230.

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

This is another example of missing "field verified boundaries." The full verification has not been done. In response to the additional bullets on page 13:

- First bullet, Wetland F and all wetlands west: The wetlands identified on the maps presented are NOT separated by 100 feet. There are single digit or 10-15 feet separation in most cases, and given the time of year the delineation was done and the fact that the most of wetland boundaries were

not verified, it is not possible to state these wetlands are in fact actually isolated and not part of the Category I system.

- Second and Third bullet: Without more review, one cannot verify they are in a separate sub-basin from Black diamond creek basin. Even still, it is entirely possible that during different times of the year, and at high water levels, that water can flow from one sub-basin to another and so some of these wetlands could be hydrologically connected.
- Finally Parametrix made it clear they were doing a high level review, so the applicant continually stating that Parametrix completed a 3rd party review worthy of a twenty year lock-in is simply not true.

5. Yarrow Bay also contends on page 14 that there are only a small number of wetlands where there is disagreement.

Again, it is important to note as I did in my original testimony that in a short review, an expert found those disagreements. It was an example to show that you can't trust the applicant's conclusions and there may be more discrepancies.

Regarding Parametrix

Given that Parametrix did not solely provide independent comment to the city, but actually compiled the Environmental Impact Statement for the applicant, it is useful to consider whether they can be wholly unbiased. They work for the city, but they work to process this application. It makes sense to consider a different third party reviewer for future work on this project.

Removal of Buffer widths

On page 12, Yarrow Bay states:

Map, this process will provide the City the opportunity to double-check that the buffer widths comply with the SAO. Given the submittal of updated Constraint Maps without buffers, Ms. Byrant's buffer-related concerns have been resolved.

The concerns have not been resolved. A review of my Oct 8 testimony explains this. The problem is that the development constraint maps are identifying both the location and size of the development pads as well as the zoning type (including lot densities) in the constraint maps that are all tied to the allowed activities next to a particular buffer width and wetland rating. So, simply taking off the buffers does not change the fact that the lot boundaries are still delimiting the buffer widths. Once the development is designed it will be a lot harder for the City to re-visit the buffer widths.

Wetlands Delineation Methodology

On page 16, yarrow Bay addresses the dispute over the Delineation Methodology. In response, please note that Charlie Newling, senior instructor for the Wetland Training Institute, and Lisa Palazzi, past Pacific Northwest chapter president of the national Society of Consulting Soil Scientists and a SSSA certified professional soil scientist, have both stated that in actual fact, wetland boundaries can and do differ between the two manuals, especially with respect to the soils and hydrology criteria and that it is essential to utilize the new manual as required. At the very least a subsample should have been re-delineated to see if the boundaries would be different.

Involvement of the Army Corps and the State DoE

Despite Yarrow Bay's statement on this subject, there are many choices they can make regarding how to divide this project. Because Yarrow Bay makes more money if they can build on more acreage, it is very likely Yarrow Bay will try to apply for Army Corps or DoE permits on a piecemeal basis and try to limit the amount of fill for any given implementing project. The end result will result in less protection and more damage.

Yarrow Bay has proposed specific impacts because many of the roads cross wetlands and streams. It is not accurate that they haven't proposed any specific impacts. Dr. Cooke's preliminary review indicated many acres of proposed impact. The most obvious impact is the South Connector Road. True, this road is not locked into an exact position measured in inches. But there is no physical way for it to connect to Highway 169 without disturbing wetlands. By contacting the Corps for a look at the overall MPD, the city would get the opportunity to get feedback before being locked into road placement based on other implementing projects. Additionally, other roads in the

Villages and Lawson Hills have impacts based on maps. Even if the roads are moved, they must cross somewhere and there is no way to go around all the wetlands.

One Specific Example - Buffer Reduction in Core Wetlands

If you lock in all these details too early, This Development Agreement is your only chance to have your rightful say on specifics such as the following buffer reduction. On Sep 24, 2009, Yarrow Bay's Wetlands scientist submitted a letter to attempt to reduce the Best Available Science 225 foot buffers. The letter was in Appendix O of the Villages MPD application.

The Development Agreement is the first time this has been put forth for your agreement. They want you to accept reduction of buffers to 110 feet from our strong 225 foot buffer based on one letter stating a weak reason for reduction. Part of the letter is pasted below.

September 24, 2009

Mr. Steve Pilcher, SEPA Official
City of Black Diamond
Community Development Department
P.O. Box 599
Black Diamond, WA

Re: The Villages MPD Draft EIS

Dear Mr. Pilcher,

Thank you for the timely issuance of The Villages MPD Draft EIS (DEIS). I have evaluated the Draft EIS with respect to wetlands and wildlife and have made comments directly through Yarrow Bay Communities. One additional comment is necessary for a full and accurate depiction of wetland and wildlife conditions within the bounds of The Villages MPD.

The wetland complex associated with Rock Creek, Jones Lake, Jones Lake Creek, Black Diamond Lake, Black Diamond Lake Creek, and Ravensdale Creek is designated as the Core Wetland Complex (DEIS page 4-62). The DEIS (page 4-65) also states that under City Codes (BMC 19.100.230) a 225-foot buffer is required from their delineated boundary. It further states that the applicant will be required to provide justification in accordance with City codes and Best Available Science to support any request for reducing buffers on these wetlands.

...

As discussed throughout the pre DEIS process by Andy Kindig of A.C. Kindig & Associates (memo dated November 13, 2008), virtually all of the water quality improvement function of the buffer is provided in its first 100 feet. In addition, we have shown through topographic analysis that the wetland areas west of, and including, Wetland F drain to the west and not toward the Black Diamond Lake/Rock Creek System. Therefore this 225-foot buffer is not necessary for water quality improvement.

The applicant must provide justification for variance from the SAO and Best Available Science. Of course, they may come up with something and try to put it forth as justification as they did above. The city council is the only chance to truly draw the line. You don't have to accept it. The justification proposed does not have to satisfy you. It sounds logical on the surface, but if you step back, you realize there are issues. Just because one source alleges that wetlands water quality improvements occur with the first 100 feet of buffer, does not mean the next 125 feet serve no value. They trees are so vulnerable to blowing down that the additional buffer protects the trees in the first 100 feet. If the buffer is reduced, and then the buffer is compromised by inevitable windstorms, you will have water quality issues. Water quality is also not the only reason for a buffer. Additional reasons are to maintain extra natural area for truly special places, to protect from wind as discussed, and protect the aesthetics of the wetlands.

Final Comments

I have heard that staff has commented that no one prior to now has tried to work with them. I would like to note that the people are not aware that they can work with staff. The people who have the time and some awareness of the development application know that there will be a public hearing and they come to that, expecting to have their public say. The subtle realization that they would somehow have to negotiate with staff ahead of time and work with them as peers to Yarrow Bay over the prior months is just not something anyone realizes. It seems even improper to go down that path. Now, in hindsight, it seems to make sense. But it seems completely un-knowable for most people.

Thank you for your time and attention to this information. I would be happy to answer any questions or have further discussion.

CLOSED RECORD HEARINGS

BEFORE THE BLACK DIAMOND CITY COUNCIL THE BLACK DIAMOND MASTER PLANNED DEVELOPMENTS –THE VILLAGES AND LAWSON HILLS

Respectfully submitted by Gil Bortleson, 23831 SE Green Valley Road, Auburn, WA 98092

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Overview

The Hearing Examiner noted that the Development Agreement serve as a powerful opportunity for the Council to look at the impacts of the master planned development as a whole to ensure that they will develop as intended. A stated purpose of the MPD permit according to BDMC 18.98.010 (M) is to "*Implement the city's vision statement, comprehensive plan, and other applicable goals, policies and objectives set forth in the municipal code.*" The Council needs to weigh the intentions and public benefits provided in the Comprehensive Plan and municipal codes Vs the adequacy of the Development Agreement to deliver those intentions and public benefits. Only the City Council can provide the value choices to meet public benefit objectives to include all eight MPD public benefits listed in BDMC 18.98.020. According to the Hearing Examiner, "*The Council has wide discretion as to what it can*

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include in the Development Agreements and the public corresponding wide latitude in suggesting what they would like to see in the Development Agreements." Circumstances for the acceptance for supplementary conditions have been provided by the Hearing Examiner.

Reply to Applicant Response

Open Space

Condition 151. *The Development Agreement shall include a tabular list of the types of activities and the characteristics of passive open space and active open space so that future land applications can accurately track the type and character of open space that is provided.* ***Assertion***: Complete documentation of active/usable open space is required according to MPD standard 18.98.150 (B): "*The MPD permit and development agreement shall establish the sizes, locations, and types of recreational facilities and trails to be built and also shall establish methods of ownership and maintenance.*" The Development Agreement needs to provide complete documentation of the amount of open space (in acres) for on- and off-site by categories of active and passive open space. ***Applicant Response***: Also refers to Condition 97 indicating Applicant needs only to respond to characteristics of active and passive open space. Moreover, the Development Agreements do not propose allowing off-site open space to be counted toward the total open space required for each MPD. While off-site recreational facilities count towards Master Developer's recreational facilties requirements set forth in Table 9-5, off-site open space does not count towards either The Villages MPD's or Lawson Hill's MPD's total open space requirements. There is no reason or basis to revise the Development Agreements as a result of this condition of approval. ***Reply:*** *Despite the clarifying comments and apparent limitation requested of Condition 151. A compliance matrix (data base) showing open space accounting to track the sizes, location, type of recreational facilities and whether the facilities are on- or off-site is warranted to assist City officials in assessing level of service requirements and to provide oversight by the public for open space accounting. The compliance matrix for all active and passive open space accounting would serve its purpose from the first to the final implementing plat. Lisa Schmidt noted, "Pursuant to BDMC*

18.98.140 (Exhibit "E") and the MPD Permit Approval, The Villages MPD is required to provide at least 481.4 acres of Open Space. (The FEIS was done on a figure of 507 acres of open space, and the MPD's on a figure of 505 acres of open space.) The DA needs to state the exact figures for open space of various types." [Emphasis added]

Wetlands

Assertion: In both her oral statement to the City Council and written presentation (Exhibit C-23), Ms. Morgan states that the Black Diamond Lake requires a "much wider buffer zone then exists in our SAO today." ***Applicant Response:*** As the Examiner noted on page 55 and 57 of his Recommendation, "the City's Sensitive Areas Ordinance has been determined by the City Council to adequately protect wetlands. If the Council chooses to exceed the mitigation required by that ordinance, it will probably need to get voluntary consent from YB" and "FOF 13 states that application of the City's SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals." Moreover, under State law, the City of Black Diamond is required to follow its own municipal code, including when that code calls for a quasi-judicial process. Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 835-36 (2011). As such, the City Council cannot revisit the buffers established by the City Code for Black Diamond Lake in the context of the Development Agreement proceedings. Mr. Morgan's request for larger Black Diamond Lake Buffers than required by the City's SAO must be denied by the City Council. ***Reply –buffer width increase for Black Diamond Lake:*** *It is recommended that the Council deliberate on increasing the core wetland buffer width for Black Diamond Lake because of its world class status of a pristine peat bog and its positive influence on the water quality of Lake Sawyer. The water-quality benefit to Lake Sawyer was one of the summary findings of the 2008 Best Available Science report to the City. The summary indicated of a variety of factors identified, the large wetlands of Rock Creek, Jones Lake/Jones Creek, and Black Diamond Lake/Black Diamond Creek within Urban Growth Area have the*

most positive influence on the water quality of Lake Sawyer. Because of the steep sides for much of Black Diamond Lake, a core wetland buffer greater than the minimum 225 foot is warranted under 19.10.320 (G) which allow an increase in wetland buffer widths on a case-by-case basis to protect wetland functions and values based on site-specific criteria such as where adjacent uplands has a slope greater than 15 percent. Support is provided in one of the stated purposes of the Sensitive Area Ordinance (SAO): "To limit development and alteration of sensitive areas to achieve the goal of no net loss of sensitive areas or their functions and values" (SAO, p.5). ***Assertion****: In written testimony, Ms. Bryant noted that wetland designation problems exist. She said, "Yarrow Bay understands the seriousness of the problem because they offered to make a "change," removing their buffers from the DA in September 29 update."* ***Reply- buffer width deletion from Constraint Maps****: The buffer widths as shown on the prior Constraint Maps were informative and instructive for purposes of comparisons if recognized as preliminary.* ***Reply- fixed wetland boundaries and categorizations****. Ms. Bryant in her testimony pointed out the Applicant is not fixing the problem by removing the buffer widths from the Constraint Maps and declaring the wetland boundaries and categories are to remain fixed in the Development Agreement. Ms. Bryant goes on to say, "The problem must be fixed by removing the "fixed" wetland boundaries and categorizations from the DA. If the DA is not changed to make it clear the designation and boundary can change when the subdivision surveys are done, then the buffers will re-appear identical to the ones in the constraint maps previously." Ms. Bryant adds the following request to City Council concerning the wetland boundaries: "The DA Constraint Maps should be amended that the wetland boundaries are preliminary.". The City Council is urged to carefully consider the wetland-related comments made by the Hearing Examiner, Dr. Cooke, and testimony of Ms. Bryant during their deliberations.* ***Assertion:*** It is recommended that a Wetland Preservation Plan be incorporated in the Development Agreement. One objective of Wetland Preservation Plan would be to provide long-term strategies for restoration of wetlands and buffers after construction, especially the core wetlands of Black Diamond

Lake which would be surrounded by development. ***Applicant Response:*** In his Exhibit C-35, Mr. Bortleson echoes the request made by Dr. Sarah Cooke in Exhibit 56 for a Wetland Preservation Plan detailing construction mitigation via fencing and other protective methods and also separately requests greater measures than silt fencing for slopes and streams for sensitive area protection. First, there is no need to include these measures specifically within the Development Agreements because MPD Implementing Projects must be consistent with the City Engineering Design and Construction Standards Sections 2.2.02.6, 2.3.01.2, and 2.6.2, which require "appropriate fencing and erosion controls" for any projects in the vicinity of sensitive areas. Moreover, the Hearing Examiner already rejected both of these requests on page 57 of his Recommendation: FOF 13 states that application of the City's SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals. Regarding Ex. 150, Dr. Cooke's argument is based on the idea that the EISs and the MPD COAs are inadequate to address wetland impacts, including those from erosion and siltation. The adequacy of the EIS and COAs cannot be challenged in this proceeding, but her comments are relevant to the extent that the Council may wish to pursue voluntary agreement from YB for additional DA conditions. All of the issues addressed by the commentators above are already regulated by City development standards that have been presumably that have been found by the Council to be adequate and have been presumably applied to development projects throughout the City. As such, there is no reason or basis to require a Wetland Preservation Plan or greater measures for sensitive area protection in the Development Agreements. The SAO and other City code provisions already provide adequate sensitive area protection. ***Reply:*** *One objective of wetland protections is to provide long-term wetland restoration strategies. Wetland restoration strategies are needed to address such issues as replanting at wetland buffers edges and replanting of fallen trees in wetlands that have not developed roots systems adapted to new vegetation and soil conditions due to clearing and grading. A wetland preservation plan would provide guidelines to*

restore wetland functions and values after construction of roads, utilities, and housing. Dr. Sarah Cooke endorsed a Wetland Preservation Plan in her written testimony August 4, 2010. She also said it is impossible to declare wetlands will be protected when statements are made like, "Sensitive areas and their buffers may be modified through updated wetland reports, buffer averaging, grading to eliminate steep slopes, and/or filling of wetlands or otherwise allowed by and in compliance with the City's Sensitive Areas Ordinance (SAO)……".

Fish and Wildlife Habitat

Assertion: In both his oral argument and Exhibits C-13 and C-35, Mr. Bortleson asserts that the wildlife corridors are insufficient, and that a Wildlife and Habitat Preservation Plan should be included in the DA. See YarrowBay's response to the Examiner's Recommended Implementing Condition "J" at page 16 of Exhibit C-7. ***Reply—Wildlife Corridor***: *The Applicant has provided a new illustration (entitled Black Diamond Fish and Wildlife Habitat Conservation Areas and King County Wildlife Habitat Network) showing a 300- foot wildlife corridor from the western boundary of the properties to the southern end of Black Diamond Lake. It remains unclear on the intent of a wildlife corridor running through Black Diamond Lake. Logically a 300-foot wildlife corridor should be routed from the southern end of Black Diamond Lake to either side of Black Diamond Lake for continuity and connectivity. Because of the steep sides for much of Black Diamond Lake, a core wetland buffer greater than the minimum 225 foot appears justified under 19.10.230 (G) which allows an increase in wetland buffer width where land is adjacent to steep slopes, and under 19.10.325 (H) which would allow an increase stream buffer width (unnamed stream, S5) on a case-by-case basis to protect fish and wildlife habitat. An increase in sensitive area buffers would serve to add wildlife corridor area and lend toward meeting intended benefits of BDMC 18.98.140 (B): "Natural open space shall be located and designed to form a coordinated open space network … provide connections to existing or planned open space networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD." The Hearing Examiner noted that several testifiers concurred that the wildlife corridor lacks connectivity---"Erika*

Morgan (Ex 143) restated previous testimony that her private property at the east end of Black Diamond Lake on the eastern border of the MPD was apparently to serve as a wildlife corridor, yet was totally unsuitable for such use. Dan Streiffert, representing the Sierra Club, also noted the lack of sufficient connectivity in verbal testimony and Ex 56. Susan Dawson offered verbal testimony that designated wildlife corridors were insufficient to make up for habitat destruction." A large area around Black Diamond Lake has been considered as a study area potential for an additional Fish Wildlife Habitat Conservation Area (FWHCA) (Black Diamond Comprehensive Plan, figure 4-2). The Comprehensive Plan (figure 2-3) also shows additional open space around Black Diamond as a conceptual open space plan. Thus, the Comprehensive Plan also provides rationale for an expanded buffers or a larger FWHCA around the mostly steep-sided Black Diamond Lake. In order to provide long-term guidelines for a high degree of wildlife compatibility with new development and for wildlife and habitat restoration, it is recommended a Wildlife and Habitat Preservation Plan be incorporated in the Development Agreement.

***Reply* --Fish Wildlife Habitat Conservation Areas**: *FWHCA's for small streams, except stream S5, are not shown on the new illustration provided by the Applicant. Unnamed stream S5 (type Na) flowing into Black Diamond is shown as a FWHCA; however, unnamed streams S6 (Type 5), S4 (Category F, fish bearing), S2 (Ns), and S1 (Ns) are not indicated as FWHCA's in the new illustration entitled, Black Diamond Fish and Wildlife Habitat Conservation Areas and King County Wildlife Habitat Network.*

Sensitive Areas

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

work between October 1 and March 31 requires a winterization plan approved by the City Engineer. As such, the dates of the "wet season" are established and cannot be changed. However, Engineering Design and Construction Standards 2.2.05 also states that the City Engineer cannot approve work in those dates where erosion risks are "significant." Therefore, if actual ground conditions at a given time indicate that significant erosion could occur, the City Engineer cannot not allow grading. Consequently, it appears that the commentator's concerns are addressed, but the Council can request YB to voluntarily agree to additional mitigation if it finds a need to do so. As such, there is no need to add further conditions to the Development Agreements. Mitigation is adequately addressed by the City's Engineering Design and Construction Standards. Moreover, YarrowBay is not willing to voluntarily agree to additional mitigation at this time. ***Reply:*** *A desired outcome is to cause no net loss of wetlands and to preserve the core wetland of Black Diamond Lake; therefore, the City Council may wish to deliberate providing special protections to the core wetland of Black Diamond Lake because of its positive influence on the water quality of Lake Sawyer and its unique features. These special protections may include assessing the impact of winter grading activity that would affect Black Diamond Lake core wetland.*

Visual and Aesthetic Values

Assertion. On pages 19-20 of Exhibit C-35, Mr. Bortleson requests that the City Council require a Visual, Aesthetic and Buffer Plan in the Development Agreements. Mr. Bortleson previously presented this same request to the Hearing Examiner, who concluded on page 109 of his Recommendation: The visual and aesthetic impacts of the MPDs were addressed by the EISs, which found that no mitigation was required as no significant impacts would occur (V EIS pp. 3-65 through 3-67; LH EIS pp. 3-61 through 3-64). Mr. Bortleson has provided no new information beyond that considered by the EISs and the City during the consideration of the MPDs. Of additional consideration is the fact that the MPDs and DAs incorporate many of the features called for by Mr. Bortleson, including buffers and setbacks. The City's tree preservation ordinance

requires the retention of trees. BDMC requirements for buffers between non-compatible land uses (BDMC 18.72.030) would apply to the MPDs. Given the Examiner's finding, there is no reason or basis to the requirement for such a plan in the Development Agreements. ***Reply:*** *However, in the same argument above the Hearing Examiner went on to say, "Despite all this, as an aesthetic standard, the Council could reasonably require additional setback/vegetative retention standards through its authority to add land use restriction to the DA under V COA 128." Support is given in the MPD permit purpose (D): "allow alternative, innovative forms of development and encourage imaginative site and building and development layout with the intent of retaining significant features of the natural environment." [Emphasis added]. One objective of a Visual, Aesthetic and Buffer Plan would be to provide guidelines for setbacks distances between buildings and sensitive areas to preserve sensitive area buffers and native tall trees that are so vital to retaining significant features of the natural environment that the City and the Applicant wish to promote.* ***Assertion:*** Landscaping Plans. Bortleson (Exhibit 113) and Morgan (Exhibit 143) asserted the DAs are insufficient because they fail to provide for a review of landscape plans by the Director of Natural Resources. ***Applicant Response*:** YB responded in Ex. 209 that MPD S 5.5.2 does "specifically require landscaping plan review by the Director of Natural Resources prior to approval". ***Examiner Response:*** DA 5.5.2 requires landscape approval by the Designated Official, not necessarily the City's Director of Natural Resources and Parks as asserted by YB. The Designated Official must review the landscape plan with the Director of Natural Resources and Parks to consider compliance with V MPD COA 124 and LH MPD COA 129 to ensure that the plans contain mast producing species as discussed in a prior Examiner response above. Within its authority to require add land use restrictions to the DAs under V COA 128, the Council can require the Director of Natural Resources and Parks to approve the landscape plans if consistent with City code. [Emphasis added] ***Reply—landscape plans:*** *On landscape plans, it is not clear whether the Development Agreement calls for the review and approval of all landscaping plans by the Director of Natural Resources or a narrower review and approval requirements for* ***Condition 124****: "Mast-producing species (such as*

hazelnut) and such other native, preferred native vegetation shall be used to mitigate for reduced food sources resulting from habitat reductions when designing landscape plans for development parcels adjoining wetland buffers, or for wetland buffer enhancement plantings. The Development Agreement shall specify a process by which such landscape plans are to be reviewed and approved by the Director of Natural Resources and Parks for compliance with the mitigation requirement herein.". It is recommended the Director of Natural Resources and Parks review and approve all landscaping plans prior to permit approval to ensure compliance with BDMC18.98.140 (B) : "Natural open space shall be located and designed to form a coordinated open space network resulting in continuous greenbelt areas and buffers to minimize the visual impacts of development within the MPD, and provide connections to existing or planned open space networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD."

Closing Remarks

The City's Comprehensive Plan gives a direction for the City to retain small-town atmosphere, incorporate unconventional Rural-by-Design principles, control the scale of the development, and grow at a moderate pace. The accelerated urbanization in southeast King County has implications that extend far beyond the boundaries of Black Diamond. The Hearing Examiner has provided, in many instances, a path the City Council can so choose to address a critical issue. The citizens have provided collectively hundreds of hours of effort to assist the Council in understanding critical concerns and to produce a better Development Agreement to serve the City and the public good. The City Council is urged to weigh in and join the many citizens to determine what it can include to better the Development Agreements for the public good.

City Staff's/ Yarrow Bay's Response to City of Black Diamond Development Agreements

Closed-Record Hearings Oral and Written Testimony by Parties of Record

Judith Carrier

October 19, 2011

Supplementing conditions for the Development Agreements (DAs) have been put forward by many to protect the health and safety of residents, their properties, and the unique character of SE Green Valley Road (GVR) on the southern boundary of The Villages (TV). Responses to testimony in these DA Hearings (and earlier MPD Hearings), generally, indicate the needs of GVR are not considered necessary by the City or Yarrow Bay. Conditioning for the GVR Review Committee, development-generated traffic increases to GVR, protective buffering, mitigation for damage to the GVR road bed, future mitigation for current GVR residents' water sources, and proactive planning for the South Connector to SR 169 to prevent indirect or direct development traffic using GVR are specifics I mentioned.

Green Valley Road Review Committee/Traffic Impacts

I realized before giving my testimony that the Conditions of Approval (COAs) are now law, but can be changed by Amendment and Yarrow Bay's (YB's) approval of supplementary conditions as is stated in the Responses. Without a change in the voting membership of the GVR Review Committee, citizens (and not just those on GVR) see the work of such a committee to be of little value to the minority. The public can meet to work with this imbalance with the City and YB and it is possible some mutual agreement could be found for the protection of GVR....not only by using traffic calming devices. I still request a change to this membership, if only with the addition of a King County Traffic Engineer. Such a member would have valuable input legally as well as technically. The City, YB, and the BDCC can make this happen through an amendment to the COA. Further, the Hearing Examiner (HE) in his wording in his EIS Decision spoke to many more impacts to GVR that were never recognized in EIS studies. "Traffic calming devices" were only one suggestion for traffic-specific impacts. The EIS was approved by the HE as the City and YB very often point out. It is not often mentioned at those times how very close the Statement came to being unapproved because of what it was lacking.

TV EIS HE Decision p. 6

The Road has Heritage Status under the King County Historic Preservation Program. Testimony from several citizens makes it clear that this road is a historic, aesthetic and recreational resource. The road is frequently used by bicyclists, horses and farm equipment. The MPDs will add 300-400% traffic to this community resource. As a condition of MPD approval, further analysis should be undertaken to find ways to discourage MPD traffic from using Green Valley Road, such as (my underlining) the use of traffic calming devices like medians and speed bumps. The factors that merit special treatment of Green Valley Road are subjective and it is within the parameters of a "reasonable discussion" that the TV FEIS failed to single out Green Valley Road for additional analysis.

The Traffic Calming Study (TCS) concluded that GVR has the capacity to handle additional traffic volume. Residents who travel the road frequently wonder about the environmental and safety issues that were not

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analyzed in the EIS or the TCS and have not been considered. Approve an amendment to the COAs to change the membership of the GVR Review Committee and, condition (in whatever legal way necessary) to include GVR in the use of a properly validated, fine-meshed traffic model that will give unquestionable analysis of traffic additions to the road as well as direction toward proactive mitigations that will likely be necessary and available funding.

Green Valley Road Buffering

As for buffering on GVR for light, aesthetics, and noise; the discussion at pp. 108-109 appears to be in regard to the City of Black Diamond. This would seem so, since GVR was never analyzed for these impacts. It is true that that the City has some protections for its natural setting. Green Valley Road is not in the City and, as mentioned, never analyzed in the EIS, but (because of its significant rural, historic, aesthetically pleasant character) the buffering request for natural, current vegetation of a depth to shield it from urban impacts would give its residents only that for which Black Diamond citizens hope. The following quote from the HE in regard to construction noise would logically seem to apply to GVR as well.

TV EIS HE Decision p.5

Perhaps the second greatest shortcoming of the TV FEIS is its analysis of noise. Some of the noise levels identified in the TV FEIS will generate levels of 90 db on some properties, which a SEPA Appellant expert testified is the equivalent of a fire alarm. These noise levels are primarily attributable to tree clearing activities, which presumably will not be adjacent to residences for extended periods of time (there are only so many trees). However, truck traffic needed to carry away fill could conceivably involve 153,000 two-way trips over the course the 15-year development, as testified by Thomas Hansen. According to the TV FEIS, dump trucks can generate 82-92 dBA within 50 feet from a residence. The TV FEIS noise analysis does a good job in identifying noise sources and their impacts. However, it doesn't take into account the exceptional scale and duration of the MPD projects. In this context, construction noise is not "temporary" as contemplated in typical noise regulations, such as those adopted by DOE. The TV FEIS should have included an assessment of noise duration and mitigation that was reasonably designed to protect residents during this time period.

Please give Green Valley Road conditioning in the way of buffering at least comparable to that in the City and of the nature explained and areas described in Carrier Closed-Record written testimony of October 8, 2011.

Green Valley Road Monitoring and Repair

There are specific areas on the eastern portion of GVR that are fragile. They have been mentioned in many testimonies (with pictures provided). These places are on the road about 1 to 1.5 miles from TV western boundary. There may be "no evidence in the record to support imposing an obligation to maintain a public road on a private developer." There was no analysis either to specifically identify these vulnerable places in the Road. As mentioned, this was not done at the time of the EIS and the Traffic Calming Study excluded this consideration (questionably so, from my point of view) from its analysis. Please include GVR in the "individual project level SEPA review" that will "provide an adequate opportunity for the City to review the implementing project level impacts, including those of construction impacts, and provide appropriate mitigation." (YB/City HE quote from pp. 87-88)

Green Valley Road Wells and Springs

Please refer again to this condition in Carrier Closed-Record written testimony of October 8, 2011. I did not make myself clear. I am suggesting a condition for the future for water resources on currently existing properties that might possibly be shown at some later time when Best Available Science present at that time might show that due to circumstances that could occur on developed property (currently TV) that

effects the wells and/or springs (and, therefore, the quality of life, if not the livelihood) of the residents occupying those GVR properties. It may not seem likely at this stage that the Developments might not have the water resources they plan for projects of the proposed number of units (or more...witness the 80 units proposed for the 218th/Auburn-Black Diamond Road Development that will use water from the Covington Water District. As I explained, water is scarce along the eastern end of GVR.

What protections are in place for aquifer recharge areas within the Developments? Are they adequate? According to State law, these recharge areas are to be safeguarded. This is not within the scope of my response to the City/YB response, but our goal here is do the best for Black Diamond (and, therefore, Green Valley Road).

Wetland Delineations and Review of the Wetland Boundary Determinations

According to the Hearing Examiner's Implementing Condition regarding the Constraint Map conflicts:

K. p. 112. Detail of Constraints Map. It is recommended that staff make the constraint maps that set the sensitive area boundaries in V DA 8.2 available for City Council review and explain to the Council, based on information contained in the record, the level of detail provided in the map so that Council may determine if they are detailed enough to be used for implementing projects.

The City Staff will be the body to explain how the maps' conflicts are resolved or of no concern. It is of concern to Green Valley Road what happens in regard to the wetlands in TV especially....their continued existence, damage that occur effecting water resources and storm run-off, to name a few. Because of the testimony of Dr. Sarah Cooke, I am not at ease with YBs or the Staff's assurances.

In their responses, they say the Army Corps of Engineers "does not have jurisdiction until a specific wetland impact is proposed over (sic?)" and "Yarrow Bay has not proposed any specific wetland impacts". A specific impact would be the crossing of Stream 4.8 that parallels Plass Road over which the South Connector will pass. Although there are other circumstances of this sort of impact elsewhere in the Developments, I concentrate on what I know that will affect GVR if the studies, maps, boundaries, buffers, and especially the planning is not carefully done so that everything that should be covered in the DAs is covered....the area to cross as outlined in my handout of Colin Lund's letter of Oct, 2009, is "constrained" in his words. It is possible that that connection will be thwarted if information needed now is not included in these current documents.

There are many other conditions for which I would ask inclusion into the DAs. The Green Valley Road Review Committee/Traffic; Green Valley Road Buffering; Green Valley Road Monitoring and Repair; Green Valley Road Wells and Springs Conditions are specific to my original concerns with these Developments several years ago. Now, I have concern for the City of Black Diamond and SE King County in certain respects. The City Staff and/or Yarrow Bay oppose conditions for some of these.

Why should Yarrow Bay and the City approve conditions (supplementing or implementing) with which they disagree? In a Yarrow Bay Black Diamond Development brochure from an Open House they held in January, 2008, they printed the "City of Black Diamond Vision Statement" created in 1991. I remember reading in its last paragraph..."There will be good cooperation among nearby jurisdictions, and adequate public services and environmental protection to provide a safe and healthy quality of life for all citizens, from children to seniors". I felt relief that outlying neighborhoods such as ours would not be left out of the planning. Will that be fulfilled?

Brenda Martinez

From: Bob Rothschilds <redshield3@comcast.net>
Sent: Wednesday, October 19, 2011 4:58 PM
To: Brenda Martinez
Cc: Peter Rimbos
Subject: REPLY to YB Response to WS

Brenda,

Please include my Reply to Yarrow Bay's response to my oral testimony.

In my oral testimony I requested that the Black Diamond City Council consider a specific case where a wetland was damaged and needed resoration.

Based on experience at Issaquah Highlands it would have been helpful, to avoid prolonged negotiations with the developed and the community, to have specific guidelines on how to restore wetlands in terms of the density of plantings, what type of plantings (trees, etc.), how to water them, and how long they have to survive to be considered a completed resoration. I don't expect the developer to be perfect, but I do expect our City to be prepared to restore damaged wetlands when they occur.

I urge the City Council to review the wetlands restoration enforcement and ensure that specific guidance is in place so that restoration can be accomplished in a timely and efficient manner when it occurs.

Thank you,

Robert Rothschilds

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Before the City of Black Diamond City Council
Response to City Staff and Yarrow Bay Oral and Written Testimony

Sheila Hoefig

The Development Agreements were solely crafted by the City Staff and Yarrow Bay. Accepting the mandatory conditions and the addendum mandatory conditions approval represent the minimum requirement by law. The supplemental condition that the Hearing Examiner has indorsed represents your citizen's voice. Decisions or recommendations of the examiner must be supported by finding of facts and conclusions of law. The Hearing Examiner has stated that Council has the power to exercise the supplement conditions. The City Attorney (Kenyon) has confirmed on record that Council has the power to exercise the supplemental conditions. My request is that require the supplemental conditions below in the effort of creating a better community.

Open Space

Hearing Examiner noted in his Recommendation on page 67, the Lawson Hills MPD must provide an additional 9.3 acres of Open Space within its own boundaries prior to approval of the final Implementing Project in order to fulfill its open space requirements.

An on-going compliance matrix to track the open space would be prudent and should be part of the Development Agreement. Allowing the project to fully build out and only accounting for

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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.

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 extension. 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.

In-Lieu Recreational Facilities

The Hearing Examiner states *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*

You have the authority to provide for a public hearing and that the final decision is made by Council.

Lake Sawyer Park

The Development Agreements may not give the Developer open space or park credit within the Lake Sawyer Regional Park but it does give Recreational Facility credit. This is a "back door takeover" of the Lake Sawyer Regional Park. This is public land already owned by the taxpayers and it must be protected from the developer by not allowing the issuance of credit. LSRP is a passive park by the citizen's voice. Use in any other way would be a violation of the citizen's trust. It must not be used as a receiving site for Recreational Facilities.

The Hearing Examiner states *the COAs leave room for the Council to require that the DA exclude LSRP as a receiving site for Recreational Facilities.*

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

Off-site Recreational Facilities

The Hearing Examiner states that *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.*

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. A walkable community is what we are trying to achieve.

Public Access

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.

The examiner states that *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.

My recommendation is that the City Council looks 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.

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

October 19,2011

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 submit the following in response to the Yarrow Bay's comments (exhibit 43 &44) regarding my written and verbal testimony in the recent public Closed Record hearings.

In the above exhibits, Yarrow Bay doesn't even address my comments, instead merely stating that my concerns were "wholly addressed in responses to other parties of record" (Ex. 44 pg.2). After reading all 101 pages of that exhibit as well as the others associated with this issue, I fail to see an adequate response to much of what I said.

In my comments, I implored you to remand back to the Hearing Examiner for further consideration. Yarrow Bay, in its comments about others who brought up the time allowed the HE (Ex. 43/44) basically stated the he had adequate time. I beg to differ, as the Hearing Examiner himself stated that he was "unable to prepare a recommendation to you that contained an evaluation of every section of the development agreements" (examiner recommendations, pg. 3). Also, because of inadequate time he could not provide "more detailed findings of fact and conclusions of law". He obviously needed more time and was denied that by the applicant (with the cities concurrence).

The legality of remanding back to the Hearing Examiner is clear, as illustrated by the David Bricklin letters to the council and Mayor dated Sept. 29th and October 4th (available in public record).

Of additional concern for me is what looks like the willful efforts of the city, in concert with Yarrow Bay 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. Yarrow Bay is silent on this in their response.

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 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?

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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. Why were the recused council members not allowed to vote as they saw fit and not fear for their own well being? I saw nothing from Yarrow Bay on this. Certainly not an offer to not litigate.

I take great exception to the requirement that the DA's be accepted without supplemental conditions. This nullifies the legal rights we as citizens have in the Development Agreements and was not addressed in Yarrow Bay's responses. 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.

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

Reply to City Staff and YB responses regarding Development Agreement recommendations

In its "GENERAL COMMENTS," the City staff responds to written testimony by stating, "In essence, many written comments are advocating additional, modified or supplemental Conditions of Approval (COA) to the MPDs, which cannot be done at this time." Yet, the HE made it very clear in several areas within his recommendation that additional, modified, or Supplemental Conditions are not only open for negotiation with the Applicant, but are actually *recommended* by the HE. I do not know what legal authority the City references here, but I would definitely trust the HE's legal authority to say that the City has every right to ask YB to agree to Supplemental Conditions. There are many areas where Supplemental Conditions could help provide safety for the City.

This is the only opportunity to ask for things to be in the DA that aren't. This isn't just a period to look things over to make sure they're legal before approval. It's time to come to a consensus with YB as to how they can meet the needs of the City, as well as those of the surrounding community. In Section E. City Council Discretion, even YB reminds the Council that BDMC 18.98.090 states that in addition to seeing that the COAs, the City Council's discretion allows that "Other matters are *subject to negotiation"* (emphasis added).

I advise the Council seek to dispel any ambiguity. YB states, "In both his oral and written statement (C-42) to the City Council, Mr. Sperry requests that the City Council adopt the Examiner's Recommended Implementing Conditions "F" and "H", which provide that the Development Agreements serve in the place of certificates of water and sewer

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availability." The wording here is very ambiguous. It implies that the HE recommends that the DA serve in place of certificates of water and sewer availability, when, in fact, the opposite is true. The HE stated, *F. Certificates of Water Availability. V DA 7.2.1 should be eliminated. It provides that the DA shall serve in the place of certificates of water availability for the MPDs.* In his explanation, he said that those elements of the DA that could be interpreted as confirming water or sewer availability should be stricken from the DA, and that water and sewer certificates will need to be provided where required by the City. I hope the Council will remember this truth at the time of implementing projects.

In its "FUNDING AGREEMENT" section, the City states, "A core team of City staff will be augmented by consultants as necessary, depending upon the amount and nature of anticipated Implementing Projects. In other words, growth will be paying for growth." I would like to remind the Council that the method of hiring extra City staff to review projects related to the MPD is a miniscule aspect of the concern over growth paying for growth.

In its TRANSPORTATION section, the City reminds Council that "the MPD Conditions of Approval require monitoring of traffic as the projects develop and provide for the potential of new mitigation measures being implemented, based upon results of that monitoring (TV COA 17f, LH COA 16e). In other words, traffic mitigation will be an iterative process throughout the duration of the build-out period."

The problem with this is that no valid studies are currently available in order to begin, and the methodology and timing is not properly identified. The flaws detailed in Mr. Rimbos' testimony

continue to need serious consideration. I recommend the Council request implementation of his Supplementary Conditions.

YB Section D:

"It is important to note that the Hearing Examiner did not request a remand for more time, had more than 10 business days to draft his Recommendation, and in fact stated in his Recommendation that the "priority in this recommendation was to ensure that all significant concerns of the public were addressed and that the development agreements implement the master plan conditions of approval. That priority was met."

YB's quote misconstrues the essence of what the HE was trying to say. He asked more time be granted in order to provide his recommendation. Since it was not, he was forced to prioritize, and only because of his time constraints did he not address the DA section by section, which is what he stated he would have done if given more time. He went on to state, at length, that there is more to be considered in a DA than merely whether the Conditions of Approval are met. How else does the Council modify the proposal except by remand? I would check to see if the option of remanding is implicit in BDMC.

Section 3.1.

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

Moreover, the Hearing Examiner concludes the following regarding Section 3.1 on page 12 of his Recommendation:YB asserts that the agreements have been satisfied and there is nothing in the record to the contrary. The COAs do not require the DA to address the prior agreements. Despite this DA 3.1 provides that the terms of the DA shall supersede any conflicting provisions in the prior agreements as between the City and YB. The City has no obligation to DA 3.1 because it is not required by the COAs. If the Council would like to ensure that the prior agreements remain fully enforceable, they can refuse to agree to DA 3.1. It should be recognized, however, that the terms of the open space agreement will still remain fully enforceable to the extent that they involve third parties who are parties to the agreements. Of course, if the open space agreements have been fully performed DA 3.1 wouldn't make any difference on their enforceability. If the Council has any reservations about DA 3.1 it should get a briefing from the City Attorney on what impact it would have on any agreement terms that are still enforceable and how the prior agreements may conflict with the DAs if the obligations as to the City and YB remain intact. The Hearing Examiner recognizes, above, that Section 3.1 does not impact the rights of third parties and that the record lacks any evidence that the prior agreements have not been satisfied or are in conflict with the Development Agreements. As such, there is no reason or basis for the City Council to delete Section 3.1.

Response: What the HE says is that the terms of the <u>open space agreement</u> shall remain fully enforceable. The HE does not guarantee that future Implementing Projects will not require more detailed reference to the FEIS or other prior agreements than required by the DA. This becomes important in the consideration of Implementing Project proposals deemed not subject to SEPA,

or during consideration of requests for minor amendments, which are not subject to SEPA. In such future instances, reference to the more detailed language and context of the FEIS could become an invaluable resource in the City's ability to protect itself if the need arises. All the elements of prior agreements not concerning open space are not mentioned by the HE.

Section 4.8.

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

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

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

Response: Details are important in a DA. Generally speaking, "minor" changes can sometimes add up to huge deviations. My illucidation of the fact that there is, indeed, a discrepancy in unit count by phase is an attempt to take the document seriously and to not make assumptions. ..

Examiner's Implementing Condition "M".

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

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

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

Response: Again, nothing addresses The Villages in YB's language implementing Condition M. I urge Council to read the implementation language carefully and recommend revisions where needed to be sure it fully satisfies Condition M.

I hereby restate all other concerns in my prior response by reference to Exhibit C-41.