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BEFORE THE HEARING EXAMINER FOR  
THE CITY OF BLACK DIAMOND

Development Agreements Lawson Hills PLN10-0021; PLN11-0014 Villages PLN10-0020; PLN11-0013	Recommendation
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**I. Overview**

For those who want to go straight to the point, the Examiner recommends approval of the development agreements if the revisions recommended in Section VIII of this recommendation are incorporated into the development agreement. Section VII contains a detailed summary and analysis of the concerns expressed by the public at the hearings, along with numerous suggestions and options to address those concerns. Section VII is arranged in order of Development Agreement sections.

As with the Master Plan Developments, the citizens of Black Diamond have undergone tremendous effort to ensure that the development agreements protect their community. The public provided over 3,500 pages of written testimony and over 20 hours of verbal testimony. Their input and suggestions will result in the substantial improvement of those agreements. Yarrow Bay (“YB”) has been very cooperative in addressing concerns expressed by the Hearing Examiner during the hearings on issues such as mine hazards and ambiguous development agreement terms, and in providing detailed responses to all of the concerns raised by the public. Both the public and YB have served as invaluable resources in ensuring that the development agreements fully implement the Master Plan Development conditions of approval.

This is a unique hearing examiner recommendation because most of the issues brought up by the public and addressed in the DAs are subject to the discretionary contractual and policy authority of the Council. 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. There are few legal standards to govern this discretion and the

1 Examiner has little business in making recommendations on policy choices to the Council. As a  
2 result, a primary focus of this recommendation is to organize and evaluate the information provided  
3 by the public so that the Council has an accessible means of making informed choices on the huge  
4 record of information provided by its constituency. This recommendation organizes the information  
5 provided by the public according to the chapters of the proposed development agreements. This  
6 information is located at Section VII of this recommendation. For each issue of concern to the  
7 public, the recommendation identifies what options and what authority the Council has to address  
8 the issue. Council authority to address each issue usually falls into one of four categories: (1) the  
9 Council is required to revise the development agreement (“DA”); (2) the Council can compel the  
10 YB to agree to a revision to the DA; (3) the Council can only revise the DA with the YB’s voluntary  
11 agreement; or (4) the Council is prohibited from revising the DA. Most issues require the voluntary  
12 agreement of the YB to be addressed in the DA.

13 Council discretion in negotiating a development agreement is wide because its contents are not  
14 limited to any permitting criteria. The development agreement can address any conceivable master  
15 plan development impact. The only significant limitation on content is that the development  
16 agreements cannot be approved unless they implement the master plan conditions of approval as  
17 required by those conditions. As a result, the development agreements serve as a powerful  
18 opportunity for the Council to look at the impacts of the master plan developments as a whole to  
19 ensure that they will develop as intended and that all impacts are adequately mitigated.

20 Although the scope of a development agreement is not much in doubt, the Council’s leverage to  
21 compel YB to agree to various agreement terms is not so straightforward. The City’s master plan  
22 regulations require the execution of the development agreements that implement the master plan  
23 conditions of approval. The regulations further provide that the City cannot approve any  
24 implementing development permit applications for a master plan development until a development  
25 agreement is executed and recorded. If the City Council can refuse to approve a development  
26 agreement for any reason it chooses, as argued by some at the hearings, the Council can use the  
threat of withholding approval to require YB to agree to add almost anything it wishes to the  
development agreements. If the Council is required to approve the development agreements if they  
reasonably implement the master plan development conditions of approval, the Council’s leverage  
is substantially diminished. In that case it will need YB’s consent for any terms not reasonably  
necessary to implement the master plan conditions of approval.

This recommendation is written with the premise that the City Council must approve the  
development agreements if they reasonably implement the master plan development conditions of  
approval. The law on whether the Council actually has that responsibility is far from clear. If the  
Council would like to include a term in the development agreement 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. Under the premise that the Council is  
required to approve a development agreement, this recommendation distinguishes between  
“implementing” and “supplementary” conditions. Implementing conditions are those development  
agreement terms that are necessary to implement the conditions of approval. The Council can

1 withhold approval of the development agreements if YB refuses to agree to them. Supplementary  
2 conditions are conditions that are not necessary to implement the master plan conditions of  
3 approval. The Council cannot withhold approval of the development agreements if YB refuses to  
4 accept supplementary conditions. The Examiner advised the public both in his prehearing orders  
5 and during the hearings that implementing conditions were far more likely to be incorporated into  
6 the DAs than supplementary conditions. A large portion of the public testimony is still devoted to  
7 supplementary conditions.

8 Although the Council arguably doesn't have the leverage to compel the inclusion of supplementary  
9 conditions into the DAs, in many instances it can still impose them as a permitting requirement  
10 pursuant to its authority under the Washington State Environmental Policy Act ("SEPA"). As with  
11 the authority to withhold approval of the development agreements, the authority of the City to use  
12 SEPA is also far from clear. Its authority is complicated by the fact that many permitting and  
13 environmental decisions have already been made and arguably cannot be revisited. The authority to  
14 impose SEPA requirements is much more solid than the authority to withhold agreement to the DA  
15 for compelling compliance with most supplemental conditions, but the Council will always be better  
16 off exploring mutual agreement before engaging the SEPA option.

17 The relevancy of supplementary conditions has been a major point of disagreement between the  
18 Examiner and the City and YB. The City and YB have strenuously objected to any testimony  
19 related to supplementary conditions, on the premise that City regulations only require the  
20 development agreements to implement the master plan conditions of approval. This was despite the  
21 fact that City staff and YB had already negotiated supplementary conditions into the proposed  
22 development agreements considered at the hearings. In later briefing the City acknowledged that the  
23 development agreements can include supplementary conditions, but still argued that testimony on  
24 supplementary conditions is irrelevant if YB objects to it.

25 Since YB must agree to any supplemental conditions, its objections to testimony about them is a  
26 valid consideration in assessing relevancy. However, another important consideration is that this is  
a closed record review process. If the Examiner excludes testimony on a supplemental condition,  
the Council is prevented from re-opening the hearing to consider that testimony. 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.

27 In reviewing this recommendation the Council should realize that its regulations required the  
28 Examiner to put together a recommendation within 10 working days<sup>1</sup> of the close of the record.

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29 <sup>1</sup> It's also worth mentioning that the City's ten day requirement is not mandated by state law. RCW 35A.63.170  
30 requires Examiner decisions to be issued within ten days, not recommendations. RCW 35A.63.170 clearly

1 Given the huge record of the development agreement hearings it was a monumental challenge to  
2 review, organize, evaluate and prepare a written recommendation for all of this information at the  
3 rate of hundreds of pages of written testimony per day. Given more time the Examiner could have  
4 prepared an annotated version of the development agreements that contained an evaluation of every  
5 section of the development agreements. Given more time the Examiner could also have further  
6 consolidated and organized the testimony summaries. Given more time the Examiner could have  
7 written more detailed findings of fact and conclusions of law. There was no reasonable opportunity  
8 to do that. The priority in this recommendation was to ensure that all significant concerns of the  
9 public were addressed and that the development agreements implement the master plan conditions  
10 of approval. That priority has been met.

## 11 **II. Acronyms and Definitions**

12 Implementing Condition: A development agreement term that is required by the conditions of  
13 approval of the Lawson Hills and Villages master plan development approvals.

14 Supplementary Condition: A development agreement term that is not required by the conditions of  
15 approval of the Lawson Hills and Villages master plan development approvals.

16 DA: Development agreement.

17 MPDs: The Villages and Lawson Hills Master Plan Developments.

18 MPD COA: An MPD condition of Approval.

19 MPD COL: An MPD conclusion of Law.

20 MPD FOF: An MPD finding of fact.

21 V: Villages

22 LH: Lawson Hills

23 YB: Yarrow Bay, used generically for BD Villages Partners, LP and BD Lawson Hills Partners, LP.

## 24 **III. Testimony**

25 A summary of the verbal hearing testimony, color coded as to topic, is attached as Exhibit A.

## 26 **IV. Exhibits**

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distinguishes between recommendations and decisions in its requirements. It's unlikely a court would interpret the ten day rule as applying to recommendations as well.

1 An exhibit list for documents admitted into the hearing record is attached as Exhibit B.  
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### 3 **V. Procedural Summary**

4 The Examiner held a prehearing conference on May 23, 2011. At that time the hearings for the  
5 development agreements were scheduled for June 27, 2011. The prehearing conference was held  
6 during the day and concerned citizens filled the City Council chambers to capacity. Numerous  
7 persons testified that the June 27, 2011 hearing date did not provide sufficient time to review the  
8 development agreements and its arguably voluminous exhibits. Particularly compelling was that a  
9 final draft of the development agreements was not yet available for review. For these reasons the  
10 Examiner struck the prehearing date and ordered that the hearings could not be scheduled any earlier  
11 than 30 days from the date that a final draft of the development agreements were posted on the  
12 City's website. Staff posted final drafts of the agreements on June 10, 2011 and scheduled the  
13 hearings to commence on July 12, 2011. Several pre-hearing motions and concerns were filed  
14 requesting further postponement of the hearings due to the high volume of information and issues to  
15 review. In a pre-hearing order issued June 30, 2011 the Examiner left the hearing date as is but,  
16 since the City has not delayed the hearing date for any significant amount of time, authorized two  
17 weeks from the close of the verbal portion of the hearings for written comment with a one week  
18 response time and two day reply time.

19 Hearings were held over four evenings and two days. The general public testified on the evenings  
20 of July 11-14, 2011 and all day on July 16, 2011. Limited expert testimony was presented all day on  
21 July 21, 2011. Members of the general public were given ten minutes each to speak. Persons could  
22 cede their time to another speaker if they were present at the hearing to do so. Speakers had the  
23 option to schedule their speaking time in advance. Most speakers reserved time near the end of the  
24 hearings. Many of those speakers read from prepared statements and were unwilling to submit their  
25 statements into the record because they were still works in progress. It was apparent that many  
26 Black Diamond residents were struggling with the timeframes they were given to present their  
testimony. YB and on at least one occasion even the City objected strenuously to any requests for  
additional time.

A particularly difficult procedural issue in this case was the setting of time limits for expert  
testimony. The Examiner is sensitive to the fact that the citizen group that wanted to present expert  
testimony, SAVE, had spent a considerable amount of volunteer money for its experts and that it felt  
the testimony was of critical importance to the review process. The Examiner issued an order on  
July 14, 2011 that severely limited the scope of verbal expert testimony. The order limited most  
verbal expert testimony to the issue of whether the terms of the development agreements adequately  
implement the MPD conditions of approval. This restriction was imposed in light of the debatable  
relevance of the proposed expert testimony, the high cost of accommodating it and the fact that  
extensive opportunity for providing expert testimony on the impacts asserted in the testimony had  
been provided during the MPD hearings. The costs of accommodating expert testimony are high  
because they typically take an extensive amount of hearing time, necessitate the presence of

1 attorneys and usually necessitate expert rebuttal. Although the scope of the verbal expert testimony  
2 was limited during the hearing, there was no such restriction placed upon expert written testimony.  
3 Testimony provided in writing does not cause as much hearing expense or delay as verbal testimony  
4 and for those reasons is more easily accommodated into the hearing process.

## 4 VI. General Conclusions of Law

5 1. Authority. BDMC 18.08.030 provides that development agreements are subject to a Type 4  
6 review process. BDMC 18.08.070 provides that in a Type 4 review process the hearing examiner is  
7 required to conduct a public hearing and make a recommendation to the City Council. The City  
8 Council reviews the recommendation in a closed record review.

9 2. Quasi-Judicial Role of Examiner. In order to maximize fairness and equal participation to  
10 all hearing participants, the Examiner conducted himself as a quasi-judicial decision maker. This  
11 may or may not be required by the law, but it is most consistent with the tasks assigned to him. The  
12 tasks of an Examiner, as defined by his contract with the City and traditionally exercised, generally  
13 include an objective application of law to facts and the conduct of a hearing process that provides  
14 for fair and equal participation. This role is in line with the definition of a quasi-judicial  
15 proceeding, which is a proceeding that involves a determination of legal rights, duties, or privileges  
16 of specific parties in a hearing or other contested case proceeding. RCW 42.36.010. The role is  
17 also in contrast to the alternative: acting in a legislative/policy making capacity. Legislative/policy  
18 choices in the land use arena are essentially value choices on the future development of the Black  
19 Diamond community. A hearing examiner is in no better position to make value choices in this  
20 regard than Black Diamond's elected representatives and its citizens.

21 The quasi-judicial/legislative distinction is of significance to the development agreements because  
22 they incorporate both modes of decision making. As discussed in Conclusion of Law No. 8 below,  
23 Black Diamond regulations require that the development agreements implement the MPD  
24 conditions of approval. Under the quasi-judicial definition, MPD conditions of approval are laws,  
25 so the analysis of whether the development agreements implement them is a quasi-judicial  
26 determination. This is especially true given that the determination of consistency with COAs will  
often involve an application of MPD code criteria. In contrast, the development agreement can also  
include negotiated terms that are not necessary to implement MPD conditions of approval or any  
legal requirements. These are the value choices previously referenced and are clearly done in the  
legislative/policy making role of the City Council.

As previously noted, the Examiner's role is limited to quasi-judicial decision making. In this regard  
the Examiner will provide the Council with detailed recommendations on whether the proposed  
development agreements implement the MPD conditions of approval as required by BDMC  
18.98.090. However, a significant portion of the public testimony addressed supplemental  
conditions. True to his quasi-judicial role, the Examiner will avoid making any recommendations  
on the supplementary conditions, beyond identifying any legal issues (such as consistency with the  
City's comprehensive plan) that may apply to those issues and providing information that will help

1 the Council make an informed decision. In this regard, any comments or conclusions made on the  
2 advisability of supplementary conditions should not be construed as findings of fact or conclusions  
3 of law.

4 3. Relevance/Scope of Hearings. The scope of the development agreement hearings is  
5 broad and encompasses permitted land uses, mitigation measures, development conditions, vesting  
6 periods and all other elements identified as development standards in RCW 36.70B.180(3). The  
7 scope is broad only because the issues that can be voluntarily addressed by the YB and the City are  
8 broad. The development agreement process arguably can only compel the YB to implement the  
9 conditions of approval of the approved master plans.

10 The YB and City argue that the scope of the hearing is primarily limited to implementing the  
11 conditions of approval of the master plans. The Black Diamond and state regulations do not support  
12 this position. BDMC 18.98.090 does provide that a development agreement shall implement MPD  
13 conditions of approval. However, nothing in this provision states that the development agreement  
14 shall be limited to this function. Indeed, the DAs proposed by the City and YB contain several  
15 terms that are not necessary to implement the MPD COAs. RCW 36.70B.170-230, which governs  
16 development agreements, also does not limit development agreements to implementing conditions  
17 of approval. Those statutes are notably silent on the scope of development agreements, merely  
18 providing that “*a development agreement must set forth the development standards and other  
19 provisions that shall apply to and govern and vest the development, use, and mitigation of the  
20 development of the real property for the duration specified in the agreement.*” See RCW  
21 36.70B.170(1). RCW 36.70B.170(3) defines a development standard to include development  
22 restrictions such as permitted uses, mitigation measures, development conditions, vesting and “*any  
23 other appropriate development requirement or procedure*”.

24 4. Entitlement. The scope of what can be included in the development agreements  
25 should not be confused with what can be required as opposed to requested from the YB. Brian  
26 Derdowski made a compelling argument during the DA hearings that the City has no obligation to  
agree to a DA because the state law that authorizes DAs contemplates that they are voluntary  
agreements. Black Diamond, however, has altered the voluntary nature of development agreements  
by mandating them for master planned developments in BDMC 18.98.090.

It is questionable that a court would allow a City to “undo” an MPD approval with the  
refusal to approve a DA that reasonably contains all necessary implementing conditions. This  
position becomes even more tenuous if the MPD approval is considered an entitlement. In that  
situation, the rejection of a DA that reasonably contains all necessary implementing conditions  
would essentially convert the entitlement of an MPD to a discretionary policy decision.

Mr. Derdowski turns this situation on its head, arguing that since a DA is a pre-requisite to  
the development of an MPD, and since DAs are completely voluntary, the MPDs must be voluntary  
as well. That is certainly one factor to consider, but that may not be enough to overcome all of the  
factors that support a finding that the MPDs are an entitlement, including the detailed review criteria  
that are typically associated with permit review and the classification of the DA as a Type 4 quasi-  
judicial decision.

1 Washington courts do not use the term “entitlement” in assessing development rights.  
2 Functionally, the term “entitlement” is defined in this recommendation as development applications  
3 that entitle a developer to damages and/or decision reversal in circumstances where the application  
4 complies with all permitting criteria but is still denied the permit. If the MPDs and DAs don’t meet  
5 this definition of entitlement, the Council can refuse to agree to any DA for any rational reason and  
6 there would be no liability consequences or potential for their decision to be overturned.

7 Unfortunately, the law is very unclear in several respects as to whether the MPD approval  
8 qualifies as an entitlement. The first place one would look is the Land Use Petition Act (“LUPA”),  
9 Chapter 36.70C RCW, which authorizes a court to reverse the denial of a “land use decision” if the  
10 permit complied with all permitting criteria. A “land use decision” does not encompass the review  
11 of development regulations by the Growth Management Hearings Board. *Coffee v. City of Walla*  
12 *Walla*, 145 W. App. 435 (2008). As the Council knows, the Central Puget Sound Growth  
13 Management Hearings Board has ruled that the MPDs are development regulations subject to their  
14 jurisdiction. The GMA review process arguably does not create an entitlement because the  
15 Hearings Boards do not have the authority to compel a City to approve a development regulation  
16 proposed by a private citizen, only to determine whether regulations adopted by the City are  
17 consistent with the GMA. *See* RCW 36.70A.300.

18 The current GMHB ruling on the MPDs supports Mr. Derdowski’s position, but there are  
19 other laws at play as well. If the MPDs qualify as a permit under Chapter 64.40 RCW, YB would  
20 be entitled to damages for wrongful denial of its permit. If the MPDs qualify as a property interest  
21 under federal civil rights statutes, 42 USC Section 1983, YB could be entitled to compensation of its  
22 federal constitutional rights for wrongful denial of its MPD applications. There is no clear case law  
23 that addresses these issues either way for the unique combination of legislative and quasi-judicial  
24 characteristics of master plan development applications.

25 To compound matters, even purely legislative decisions can be reversed by a court if they are  
26 highly irrational. More technically a legislative decision must not be arbitrary or capricious,  
meaning it may not be willful and unreasonable action, without consideration and regard of facts or  
circumstances. *Tacoma v. Zimmerman*, 119 Wn. App. 738 (2004). In this case the record is replete  
with rational reasons to deny the MPDs, such as inadequate school funding, uncertain funding of  
state road facilities and transportation/environmental issues related to separation from major  
employment centers. Usually those reasons would suffice, but the City in this case is in a  
disadvantage because it made several contrary findings in its MPD approvals. Given the City’s  
position that everything was fine with the MPDs when it approved them, a court may be inclined to  
find that the City acted “without consideration and regard of facts or circumstances” in reversing  
itself by refusing to agree to a DA that reasonably implements MPD COAs.

In short, no one with any reasonable degree of certainty can predict whether or not a court  
would find the MPDs to qualify as an entitlement. In this recommendation the Examiner takes the  
conservative route of treating the MPDs as an entitlement for purposes of differentiating between  
situations where the City can threaten to withhold DA approval if YB doesn’t agree to a condition  
(for implementing conditions) and where it cannot (for supplementary conditions). If the Council  
finds itself in a position where YB will not agree to a supplementary condition and there is no other  
avenue for requiring it, it can certainly consider taking the position that the MPD/DAs are not  
entitlements and withhold approval on that basis.

1  
2 5. SEPA Substantive Authority. Another critical legal ambiguity imbedded in this case  
3 is the authority of the City Council to impose conditions under the Washington State Environmental  
4 Policy Act, Chapter 43.21C RCW (“SEPA”). SEPA can be used unilaterally by the City Council to  
5 impose conditions outside of the DA. It can serve as a means of requiring YB to comply with  
6 conditions it would not agree to within the DA. However, the use of SEPA to address evidence that  
7 has already been considered at the MPD hearings is doubtful. If the Council chooses to exercise its  
8 SEPA authority to impose additional conditions on the MPD proposals, a conservative approach  
9 would be to limit that authority to issues that have been delegated to the DA by the COAs and only  
10 in cases where compelling information justifies the mitigation that hadn’t been considered during  
11 MPD review. Other restrictions to SEPA authority also apply, as discussed below.

12 The exercise of SEPA authority in this case is different from what the Council and public have  
13 probably experienced in SEPA review. In the majority of permitting situations, SEPA mitigation  
14 measures are imposed in one of two scenarios: (1) as part of a mitigated determination of  
15 significance, used to reduce impacts so that an environmental impact statement is not required; or (2)  
16 adopted from the conditions recommended in an environmental impact statement, as was done in  
17 approval of the MPDs of this case. The authority to impose mitigation under SEPA goes well beyond  
18 these two scenarios. RCW43.21C.060 provides that “any governmental action may be conditioned or  
19 denied” pursuant to SEPA. (emphasis added). So long as the conditions in RCW 43.21C.060 are  
20 satisfied, the City can condition approval of the DAs under SEPA. This gives the City Council broad  
21 authority to unilaterally impose additional requirements upon the YB beyond many of the limitations  
22 that apply to the development agreement process. The Council also needs to recognize that the  
23 authority to impose SEPA mitigation is highly discretionary, i.e. a court probably won’t force the  
24 Council to impose SEPA mitigation measures if someone demonstrates significant adverse impacts.  
25 At most, it appears that the Council is subject to the deferential arbitrary and capricious standard for  
26 declining to impose mitigation. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* Section 18.01(3) (2002).

As previously noted, RCW43.21C.060 attaches some strings to the exercise of SEPA authority, outlined as follows:

- 19 a. The mitigation measures must be related to specific, adverse environmental impacts  
20 clearly identified in the environmental impact statements of the MPDs. WAC 197-11-  
21 660(1)(b).
- 22 b. The mitigation measures must be based upon SEPA policies adopted by the City of  
23 Black Diamond. WAC 197-11-660(1)(a).
- 24 c. The mitigation measures must be reasonable and capable of being accomplished.  
25 WAC 197-11-660(1)(c).

26 The first two requirements will usually be easily met for the DAs. The EISs for the MPDs covers almost every conceivable environmental impact so it should generally not be difficult to link a proposed condition to EISs. The City has also adopted very broad and comprehensive documents as its SEPA policies, including its comprehensive plan, zoning ordinances and shoreline ordinance. *See*

1 BDMC 19.04.240. It generally will not be difficult to find a policy basis for imposing a condition.  
2 The one area above that may prove to be a significant obstacle is the requirement that the conditions  
3 be reasonable. In its constitutional analysis of permitting requirements, which under takings and due  
4 process encompasses the concept of reasonableness, Washington courts have strictly limited  
5 permitting requirements to proportionately mitigating impacts caused by the development. *See, e.g.,*  
6 *Isla Verde Intern. Holdings, Inc. v. Camas*, 99 Wn. App. 127 (1999). Since the DA is only required  
7 to address the issues delegated to by the MPD COAs, SEPA authority can arguably only be used to  
8 mitigate those issues, i.e. impacts caused by the implementing conditions. The City certainly couldn't  
9 use its SEPA authority to mitigate MPD wide impacts when reviewing a three lot short plat within the  
10 MPDs. The same reasoning would apply to the DA, although as previously discussed DAs can at  
11 least potentially address any development impact.

12 Beyond the express limitations on the exercise of SEPA authority identified above, there is the  
13 somewhat open legal issue of to what extent SEPA can be used to revisit past decisions. The  
14 necessity of SEPA mitigation was already extensively reviewed in the MPD review process. The  
15 FEISs suggested comprehensive mitigation measures and the Council have already determined what  
16 MPD-wide SEPA measures are necessary to mitigate MPD impacts. The question arises; can the City  
17 impose additional mitigation to address the same concerns, arguments and information provided at  
18 the MPD hearings? Does SEPA actually allow the same issues to be brought over and over again, a  
19 distinct possibility for the MPDs because of their numerous levels of permitting review?

20 The available case law on the issue suggests that these multiple reviews are to be tolerated in  
21 deference to the regulatory gap filling role assumed by SEPA. SEPA overlays and supplements all  
22 other state laws and mandates governmental bodies to consider the total environmental and ecological  
23 factors to the fullest in deciding major matters. *Adams v. Thurston County*, 70 Wn.2d 471, 475  
24 (1993). The most recent case that addresses the issue of whether prior land use decisions preclude the  
25 exercise of SEPA is *Quality Products, the Thurston County Board of Commissioners*, 139 Wn. App.  
26 125 (2007), the County Commissioners denied a special use permit application on the basis that a  
proposed gravel mining operation would adversely affect the Black River and was therefore  
inconsistent with the permit criteria that the project would not cause substantial adverse impacts to  
the environment. The YB argued that the Commissioners were barred from making this  
determination because the SEPA responsible official had already determined that the proposal would  
not have a probable significant adverse environmental impact in issuing a SEPA mitigated  
determination of non-significance. The court rejected this argument, pointing out that the MDNS did  
not constitute approval of the project and that the YB had to comply with all applicable permitting  
requirements. The court also found it significant that information on impacts to the Black River had  
not been presented to the County when it issued its MDNS but that it was presented and considered  
by the County Commissioners for their decision to deny the special use permit application. 139 Wn.  
App. at 141. *Quality Products* shows that even though review issues in SEPA may be the same as the  
permit to which it attaches, SEPA and its permit must still be assessed independently, i.e. even  
though the Council could or should have mitigated all MPD-wide environmental impacts in its MPD  
approvals, this doesn't prevent the Council from reassessing those same environmental impacts  
through its SEPA substantive authority in the DA review. It must be noted, however, that the *Quality*

1 *Products* court found it significant that the information used by the Commissioners to deny the  
2 special use permit hadn't been considered in the prior SEPA review. This suggests that the courts  
3 may want to see new information in order to validate SEPA authority on matters that could have been  
addressed in earlier permit review.

4 *Quality Products* is a unique case in that it's the only SEPA opinion that addresses whether a  
5 permitting decision can affect the exercise of SEPA authority. In contrast there have been a number  
6 of cases where SEPA mitigation has been upheld even though it departs from prior legislative  
7 decisions. One of the earlier examples is *Victoria Tower Partnership v. Seattle*, 59 Wn. App. 592  
8 (1990), where the court upheld a SEPA mitigation reducing the proposed height of an apartment  
building, even though the proposed height was consistent with the height adopted in Seattle's zoning  
code. One could argue that just as in *Victoria Tower*, the City Council may have found some impacts  
acceptable in its MPD approvals (analogous to Seattle's zoning restrictions on building height), but  
upon closer inspection at DA review additional mitigation through SEPA is necessary.

9 Of course, the distinguishing feature in *Victoria Tower* is that the Council didn't have the  
10 apartment complex proposed by the developer when it approved the building heights in its zoning  
code. In this case the Council is looking at the same project in the DAs that it mitigated in its MPD  
11 approvals. Under those circumstances, the court's reference to new information in the *Quality*  
12 *Products* case could be an important factor. If the Council chooses to use its SEPA substantive  
authority, it should try to limit that exercise to circumstances where information was not presented in  
13 the MPD hearings below. That is one of the reasons that the topic summaries below often identify  
whether information is new as opposed to a repeat of what was produced at the MPD hearings.

14 6. Limitation on Supplementary Authority. A limitation on supplementary authority that plays a  
15 prominent role in the analysis below is that supplemental conditions must be consistent with the  
16 MPD approvals. YB can voluntarily agree to reduce the development rights it acquired from the  
17 MPD approvals or take on more responsibility than required by the approvals, but it can't agree to  
terms that contradict the MPD approvals. For example, if the MPD approvals require monitoring of  
18 phosphorous levels at Lake Sawyer five times per year, YB can agree to a DA term requiring  
monitoring six times per year because that still complies with the five time requirement. YB could  
not agree to a DA term mandating a 2 du/acre density for its implementing projects, because the MPD  
COAs require a minimum of 4du/acre.

19 7. Review Criteria. BDMC 18.98.090 provides the only City code standards for approval of a DA.  
20 It requires that the COAs shall be incorporated into a DA. Surprisingly, it doesn't appear that any DA  
clause requires compliance with all COAs, beyond the contract recitals that the DA will ensure that  
21 development will be subject to the COAs. One of the recommendations for revision in Section VIII  
will be to have a clause expressly providing that all MPD development shall be subject to the COAs.  
22 BDMC 18.98.090 also requires that the DA shall be recorded and binding on all MPD property  
owners and their successors. These requirements are met by the provisions of DA 15.1. The most  
23 significant standards governing DA compliance are the COAs themselves. Numerous COAs defer  
MPD permitting compliance issues to the DA. Most of the recommendations for revision in Section  
24 VIII are based upon the determination that the DA does not adequately fulfill the requirements of the  
DA. As identified in Section VIII, the DAs will adequately implement the COAs if the recommended  
25 revisions are satisfied. With the recommended revisions adopted, all requirements of BDMC  
26 18.98.090 are fulfilled.

1  
2 VII. Issues of Concern

3 Arranged according to development agreement section:

4 3.0 Prior Agreements

5 3.1 Effect of Development Agreements

6 1. Status of Prior Agreements. Two persons voiced concern that earlier progress made  
7 through the Black Diamond Urban Growth Area Agreement and the Black Diamond Area Open  
8 Space Protection Agreement might not be carried forward under the new agreements. See  
9 Exhibits 3-13a (Paulsen) and 3-13c (Cascade Land Conservancy).

10 **Applicant Response:** YB stated the MPD open space percentage areas are in compliance with  
11 the agreements referenced above (Ex. 139).

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

25 4.0 Land Use and Project Elements

26 OVERVIEW

As the Council knows from its review of the MPD, density is a major issue with the MPD proposals. The Council has conclusively set a minimum density of four units per acre in its MPD approvals. It cannot be re-visited in the DA hearings.

Land Use concerns focus primarily on neighborhood commercial within the residential areas, the precision of boundaries of Exhibit L (the Land Use Map), the mix of uses allowed particularly the inclusion of attached units and Accessory Dwelling Units, building height, setbacks, design standards, changing property boundaries, specificity of commercial use square footage, and general opposition to the MPDs.

BACKGROUND

1 The City's MPD regulations do not regulate bulk, dimensional and use standards traditionally  
2 addressed in zoning districts, such as height, setbacks and permitted, conditional and prohibited  
3 uses. These details are left to the MPDs and their implementing DAs. As of adoption of the  
4 MPDs, the Council has approved the number of dwelling units and amount of commercial space  
5 allowed for each MPD, a land use plan map, and a general description of land use categories  
6 assigned to the uses depicted on the map that includes some bulk and dimensional standards. V  
7 MPD 146 adopted design standards for high density residential use and the COAs also provide  
8 requirements for other limited land use issues as well. The DA is the last opportunity the  
9 Council has to specify zoning-type standards for MPD development. The DA proposes more  
10 detailed bulk and dimensional standards. It also includes a "Design Concept and Land Use  
11 Plan", DA Ex. L, which is the equivalent of a Zoning Map with approximate use boundaries and  
12 a "Conceptual Site Plan", which conceptually identifies the location of lots and roads.

## 13 GENERAL CONCERNS

14 1. Density is Too High. Seven persons wrote in Ex. 40, 44, 98, 113, 118, 129, and 197,  
15 that they were highly opposed to the densities proposed for the MPDs, stating that the densities  
16 would cause significant infrastructure problems and that existing Black Diamond residents would  
17 have to pay to fix them.

18 **City Response:** Bob Sterbank in Ex. 218 states that distilled to its essence, the project  
19 opponents' is a collateral attack upon the City Council's 2009 policy decisions to adopt an MPD  
20 density standard of a minimum of 4 units per gross acre. These policy decisions are beyond the  
21 reach of the Examiner's limited jurisdiction concerning the DAs.

22 **Examiner Response:** *LH COA 136 and V COA 131 require a minimum density of 4 du/acre for  
23 all implementing projects. All of the requests for lower project densities directly contradict these  
24 approved conditions. The Council cannot adopt any DA provisions that would require the lower  
25 densities requested above. Theoretically, the Council could ask YB to commit in the DA to not  
26 submit any implementing project applications for portions of its project area without violating  
the approvals, but it is not likely YB would agree to any such arrangement.*

### 27 2. Miscellaneous Land Use Issues.

28 a) Residential use above commercial use. In Ex. 3-13e Peter Rimbo noted that  
29 V MPD COA 146 requires that no more than two floors of residential uses above ground  
30 floor commercial/office uses are allowed and that this requirement is not in the DA.

31 b) Alley Loading. In Ex. 3-13i and Ex. 74 Peter Rimbo and Larry Baird  
32 questioned why V MPD COA 142, which requires detached dwelling units to be alley  
33 loaded, is not addressed in the DA.

34 c) Preserving views of Mt. Rainier. In Ex 3-13e Peter Rimbo questioned why V  
35 MPD COA 147 which requires the orientation of public building sites and parks to  
36 preserve and enhance views of Mt. Rainier are not reflected in the DAs.

1 d) Green Technology. In Ex. 3-13e Peter Rimbos questioned why V MPD COA  
2 143 which requires CC&Rs and green technologies is not reflected in the DAs.  
3 Specifically, Homeowners Association conditions, covenants and restrictions (CCRs) or  
4 the Architectural Review Committee shall review, but shall not preclude, the use of green  
5 technologies such as solar panels.

6 e) FAR Standards. In Ex. 126 Peter Rimbos questioned why V MPD COA 145  
7 which requires FAR standards is not reflected in the DAs.

8 **Examiner's Response:** *V MPD COA 142, 143, 145, 146 and 147 are not required to be included  
9 in the DA beyond a general reference that the MPDs are subject to them. All COAs apply to the  
10 MPDs whether or not they are included in the DAs and are enforceable. However, BDMC  
11 18.98.090 does require that the MPD conditions of approval shall be incorporated into a DA,  
12 suggesting that all COAs should be referenced in the Agreement. This does not require that each  
13 condition be repeated verbatim or even summarized, but the DA should provide that YB agrees  
14 to comply with all COAs, which it does not as proposed. The Hearing Examiner recommends a  
15 general clause requiring conformance to all COA provisions be added to the DA.*

16 3. Lack of Specificity in Land Use Restrictions. In Ex. 117 Lisa Schmidt and  
17 Derdowski (Ex. 40) noted V MPD COA 128 provides that "Approval of the design concept and  
18 land use plan (Chapter 3) shall be limited to the plan map (Figure 3-1). All other specifics shall  
19 be resolved through the Development Agreement process." They asserted this condition is not  
20 met, because all other specifics are not resolved in DA.

21 **Examiner Response:** *The general level of detail in the land use restrictions proposed in the DA  
22 is sufficient to ensure that project impacts are not deferred to project level review in such a  
23 manner that they can no longer be adequately addressed. The level of detail of the land use  
24 restrictions is commensurate with those found in zoning ordinances. Specific issues with lack of  
25 specificity have been separately addressed in this recommendation.*

#### 26 4.1 MPD Site Plan

1 1. Procedural. In Ex. 205 Mr. Derdowski argues that YB wants the DA recognized as a  
2 rezone but doesn't want the DAs to be subjected to the same criteria as any other legislative  
3 decision.

4 **Examiner Response:** *Mr. Derdowski is arguing a variant on what was successfully argued  
5 before the Growth Management Hearings Board in the appeals of the MPDs. As the Council is  
6 aware, the hearings board ruled that the MPDs are development standards and should have  
7 been subject to the public review process that applies to the adoption of development standards.  
8 The same argument could apply to the DA as well. The COAs require the DAs to address the  
9 zoning standards to which Mr. Derdowski refers. The Examiner has no authority to address the  
10 validity of the COAs.*

1           2. Contiguous Properties. Four commentators noted in Ex. 3-13e, Ex. 3-13iEx 75 and Ex  
2 117) assert that the MPDs violate BDMC 18.98.030(C), which they interpret as requiring all  
3 non-commercial properties in the MPDs to be contiguous. The Villages has a unique parcel of  
4 about nine acres associated with the isolated commercial area known as the “North Property.” In  
5 Ex. 32 Robert Edelman notes that BDMC 18.98.030(C) requires all MPD properties to be  
6 contiguous except for commercial properties other than neighborhood commercial. He noted the  
7 Villages non-contiguous commercial area also known as the “North Property” or Parcel B  
8 included a strip of high density residential. This is about 9 acres and would contain  
9 approximately 200 DUs. This area is non-contiguous to the MPD and is not intended for  
10 commercial purposes. Therefore this land use violates the municipal code.

11 **Applicant Response:** In Ex. 139, the Applicant responded the Villages MPD Permit Approval  
12 (Ord. No. 10-946) at Condition of Approval No. 128 expressly approves the Villages "Land Use  
13 Map" and the Land Use Map included multi-family residential uses on a portion of Parcel B.  
14 Because the terms of the MPD Permit Approval's conditions cannot be challenged, this issue  
15 cannot be raised or decided in the Development Agreement proceeding. There is no need or  
16 basis to revise this exhibit of the Development Agreements.

17 **Examiner Response:** *As noted by YB, the City Council has approved the Land Use Plan, which  
18 includes the land uses to which Mr. Edelman objects. The issue cannot be issued with amending  
19 the MPD approvals. The location of the commercial and non-commercial areas has been  
20 approved by the adoption of the Future Land Use Map in LH COA 132 and V COA 128. Those  
21 map designations cannot be revisited without amendment to the MPD approvals.*

22           3. Legend of Land Use Plan. In Ex. 75, R. Edelman noted LH MPD COA 151 requires  
23 that prior to DA approval the legend on the approved land use plan must be clarified to  
24 differentiate between wetlands, their associated buffers, other critical areas and open space, trails  
25 and parks and to incorporate the additional required open space area. Edelman notes this has not  
26 been done.

**Examiner Response:** *The legend does not differentiate between various land uses as required  
by LH MPD COA 151. This should be done before DA approval as required by Condition 151.  
In the alternative, the City may be able to amend out the requirement as a minor amendment  
prior to DA approval.*

#### 4.2 Total Number of Dwelling Units

1           1. Clustering of Units. The Muckleshoot Tribe (Exhibit 3-13f) expressed a concern that  
2 the high densities of the developed portions of the MPD sites would make it difficult to retain  
3 trees.

4 **Applicant Response:** In Ex. 3-13q, YB responded that the MPDs provide clustering of units to  
5 retain large contiguous forested and open space areas. As a result of this significant benefit, there  
6 is less opportunity to retain existing trees and vegetation in development areas due the clustered  
7 style of development. All future MPD implementing projects will be subject to the City’s Tree

1 Preservation Ordinance as codified in BDMC Chapter 19.30 and significant tree inventories will  
2 conducted on a project by project basis. The Black Diamond Municipal Code at Section  
3 18.72.020(E) establishes the sixty percent (60%) requirement for native and non-native  
naturalized plant species that are drought tolerant.

4 **Examiner Response:** *The Examiner concurs in the YB response. Further, there is little room to*  
5 *provide for more vegetative retention within the confines of the MPD approvals. As previously*  
6 *discussed, the MPD approvals require a minimum of four units per acre and also limit*  
7 *development to a relatively small portion of the overall project area via approval of the Land*  
8 *Use Plan. These minimum densities and the Land Use Plan cannot be modified by the DA even if*  
9 *YB were willing to do so. Consequently, the Council has few options to retain more trees and/or*  
10 *vegetation. If this is a priority for the Council, it could confer with staff as to what options are*  
11 *available within the confines of the MPD approvals to add further restrictions to the tree*  
12 *protection ordinance and other vegetation retention measures.*

13 2. Accessory Dwelling Units. In Ex. 40, Brian Derdowski asserted that the units were not  
14 included in the MPD permit approval and not evaluated in the EIS and should be excluded. In  
15 Ex. 117, in response to YB comments, Lisa Schmidt said the problem is not due to what they are,  
16 but to the fact they were not counted in the EIS, which therefore under reports the impact. She  
17 asserts that changes to population have huge environmental impacts, as well as implications in  
18 such areas of concern as water supply

19 **Applicant Response:** YB (Ex. 139) responded that the ADUs were approved by reference of the  
20 Council adopted portions of its land use application.

21 **Examiner Response:** *LH MPD COA 132 and V MPD COA 128 limit the total number of*  
22 *dwelling units for each MPD. ADUs are defined as dwelling units by BDMC 18.56.010, which is*  
23 *incorporated by reference in to the DA definition of ADU. Consequently, ADUs should be*  
24 *applied to the total number of dwelling units allowed for each MPD.*

25 3. YB Approval of ADUs. In Ex. 10, Ron Taylor took issue with DA 4.7.3, which  
26 prohibits any property owner within the MPDs from submitting an ADU application to the City  
without the approval of YB. Mr. Taylor stated this section unduly restricts property owners from  
exercising a right that should belong to them.

**Examiner Response:** *The City Attorney can provide an opinion to the Council on the validity of*  
*this provision if that is a concern. As an alternative to this provision YB can simply subject ADU*  
*applications to its prior approval in its CC&R's. This alternative would remove any need for the*  
*City to be involved in the issue.*

4. Attached/Detached Dwelling Units. In Ex 3-13e, Peter Rimbo noted that the Villages  
MPD application proposed approximately 3,600 detached single family homes and 1,200  
attached single-family homes but that the DA authorizes 3,600 single family units composed of  
single family detached, courtyard homes, duplex, triplex and fourplexes units in addition to 1,200

1 multifamily units. Lisa Schmidt stated in Ex. 117 that per DA 4.2 (Total Number of Dwelling  
2 Units), “single family residential” in the FEIS was based on detached single family and was not  
3 approved for the DAs interpretation of attached housing or cottages as listed in this section of the  
DAs. She stated either housing needs to be redefined, or an updated FEIS needs to be performed.

4 **Applicant Response:** In Ex 139 YB stated that contrary to Mr. Rimbo's assertions, the BDMC,  
5 the MPD Framework Design Standards and Development Guidelines, and the COAs contemplate  
6 attached housing within the MPDs. In Ex. 189, YB generally objects to this comment and other  
comments made by Ms. Schmidt on the grounds that no SEPA appeal is pending. There is no  
specific response to the issue.

7 **Examiner Response:** *The MPD approvals do not hold YB to the mix of attached and detached*  
8 *single family homes it proposed in its MPD application. However, the V MPD COA 128 does*  
9 *authorize the Council to set the specifics of the project's land use standards in the DA.*  
10 *Consequently, the Council can, within its land use policy making discretion, require that the DAs*  
11 *adhere to the attached/detached numbers proposed in the MPD applications. Mr. Rimbo did*  
*not assert that the same discrepancy existed for the LH approvals, but the same reasoning would*  
*apply to that MPD if it does.*

12 *As to Ms. Schmidt's assertions, the EIS projections are actually higher than proposed by the DAs*  
13 *because the EIS bases its projections on detached single family homes, which have more persons*  
*per dwelling unit and a higher trip count than those in attached dwellings.*

14 5. “Target” Dwelling Unit Counts. In Ex 3-13e Peter Rimbo expressed concern the  
15 number of dwelling units assigned to each MPD phase in V DA Table 4-8-4 are only identified  
16 as approximate “targets” in V DA 4.8.

17 **Applicant Response:** In Ex. 218 Bob Roberts responds the Examiner should reject opponents’  
invitation to rewrite the development agreements in pursuit of unreasonable specificity.

18 **Examiner Response:** *The City does not elaborate on Mr. Rimbo's argument specifically, rather*  
19 *it is lumped in with other arguments and some important details are overlooked. The Council*  
20 *can require a more precise allocation of dwelling units per phase if it so chooses, such as*  
21 *requiring a DA amendment if the targeted amount is exceeded by more than 5%. The Council*  
22 *may find that more rigorous phase caps are not necessary, given that (as recommended) the*  
*Land Use Plan sets the location of the dwelling units, there's an overall cap of dwelling units*  
*and there bulk and dimensional standards limit how the dwelling units can be developed.*

23 6. Affordable Housing. In Ex. 3-13e Peter Rimbo stated the DA does not provide for  
24 sufficient specificity on meeting the affordable housing requirements of V MPD COA 138.

25 **Examiner Response:** *V MPD COA 138 requires the DA to provide for a phase by phase*  
26 *analysis of affordable housing to ensure that housing provided at affordable housing prices. V*  
*DA 11.8 requires the City to do the affordable housing analysis after each phase as required by*  
*V MPD COA 138. However, V COA 138 also requires that specifications for MPD affordable*

1 housing “shall be determined” as a result of the phase by phase analysis while DA 11.8 only  
2 requires that the City “may” set specifications for affordable housing for on-going or upcoming  
3 phases. While it is recognized that COAs do not require the setting of affordable housing caps at  
4 every phase, nothing in the DAs reflects the COA requirement that affordable housing  
5 requirements are mandatory at some point during MPD implementation. DA 11.8 should be  
6 clarified that affordable housing requirements “shall” be adopted at some point in MPD review  
7 and that these requirements may include specified affordable housing measures to apply to  
8 implementation projects.

#### 6 4.3 Total Amount of Non-Residential Development

7 1. Commercial Split. In Ex. 3-13 Peter Rimbos and Ex. 74 Larry Baird note that e LH  
8 COA 140 and V COA 136 require the DAs to include a commercial split (commercial, office and  
9 industrial) in the DA and the DAs do not address this requirement.

10 **Examiner Response:** *The DAs do address the commercial split. V DA 4.3 outlines the*  
11 *commercial split for the Villages MPD: 325,000 square feet of commercial space, 450,000 of*  
12 *office and light industrial with a maximum of 200,000 square feet for light industrial. LH DA*  
13 *4.3 provides similar information.*

14 2. Nursery. S. Von Walter commented in Ex. 3-13m that a nursery, one the quality of  
15 Molbaks would attract customers for miles around, and make some of the "grumblers" about the  
16 MPD growth a little less grumpy.

17 **Examiner Response:** *YB is free to place a nursery on its commercially designated properties.*  
18 *Beyond this, portions of the MPDs have been assigned residential and other uses that could not*  
19 *accommodate a nursery use without an MPD amendment.*

20 3. Commercial Areas. In Ex. 3-13e, Peter Rimbos cited V MPD COA 137 and that it  
21 requires that all commercial/office uses (other than home occupations and identified live/work  
22 areas) shall only occur on lands so designated. He asserts this requirement should be included in  
23 the DAs.

24 **Examiner Response:** *The DA contains a Land Use Plan Map, Ex. L, designates commercial*  
25 *areas. This Map limits the areas to which commercial areas can be located as required by V*  
26 *MPD COA 137.*

#### 22 4.4 PD Site Plan Amendments

23 1. Minor Amendments. Lisa Schmidt (Ex. 117) claimed that the community should be  
24 allowed to consider “minor” changes, because even minor changes can result in heavy impacts (it  
25 is unclear in her testimony whether Schmidt was speaking to the DAs or MPDs). In the context  
26 of minor amendments, Schmidt stated the City should exercise the right to enforce strict  
standards where applicable, citing BDMC 14.04.330 – “Director may modify minimum  
requirements.” She reasoned this chapter presents minimum standards for achieving the City’s

1 goals, and that the Director has the authority to increase requirements to protect the public  
2 interest on the bases of reports pertaining to threatened water quality, erosion, habitat destruction,  
3 protection of uninterruptible services and endangerment to property. In addition, Schmidt spoke  
4 to “minor” vs. “major” amendment language, and due to lack of specificity it is unclear.

4 **Applicant Response:** The Applicant argued through the MPD approval ordinances, the Council  
5 found the MPD consistent with the City’s code, the Comprehensive Plan and the GMA (Ex.  
6 189).

6 **Examiner Response:** *The review process and standards for the MPDs are governed by BDMC  
7 18.98.100 and cannot be varied by the DA. Minor amendments of the DA are governed by DA  
8 10.4.2, which provides that a minor amendment is a change to the DA that does not materially  
9 change the intent and policy of the DA. Minor amendments are subject to the approval of the  
10 Mayor and the decision to classify the amendment as minor are appealable to the Examiner. To  
11 provide for some public oversight over the minor amendment process, the DA could require that  
12 all decisions to classify an amendment as minor be posted on the City’s website so that the  
13 public has an opportunity to appeal them. Since provisions on the amendment process are a  
14 necessary part of DA implementation, the Council can withhold approval of the DAs if it cannot  
15 reasonably agree with YB on this issue.*

13 2. Density Category Increases. In Ex. 117, Lisa Schmidt expresses concern with DA  
14 4.4.I, which authorizes YB to shift MPD residential land use categories (i.e. MPD-L, MPD-M  
15 and MPD-H) up or down one level of intensity through a minor amendment to the DA. She  
16 asserts that these density should not qualify as a minor amendment, because they effect changes  
17 in mitigation, available resources, and the analysis of the FEIS.

16 **Applicant Response:** In Ex.209 YB stated V MPD COA 132 and LH MPD COA 137 expressly  
17 approved the proposed shift in land use categories provided that the requirements outlined in  
18 BDMC 18.98.100 for minor amendments are met.

18 **Examiner Response:** *Any minor amendments would ultimately still have to comply with BDMC  
19 18.98.100(A), which prohibits minor amendments that increase the total number of dwelling  
20 units authorized for the MPD and would not increase any environmental impacts, amongst other  
21 restrictions. Ms. Schmidt did not provide any examples of how allowing the density changes  
22 authorized by DA 4.4.1 would change any of the mitigation analysis done for the MPDs nor is  
23 any such impact apparent from the minor nature of the amendments, given the restrictions that  
24 apply to minor amendments.*

23 3. Too Much Latitude. In Ex. 10, Ron Taylor asserted LH DA 4.4.4 and 9.2 provide far  
24 too much latitude to park and open space boundaries. Vicki Harp expressed similar concerns in  
25 Ex. 3-13i. Mr. Taylor asserts that the boundaries can be moved anywhere at any time at the  
26 discretion of the developer. Similarly, Lisa Schmidt in Ex. 117 felt that changes in open space  
boundaries should be processed as major as opposed to minor amendments. And similar to the  
foregoing comment regarding 4.4.4, parcels can change in size and shape without notification.

1 **Applicant Response:** In Ex 209 YB states that contrary to Mr. Taylor’s assertions, open space  
2 boundary modifications require a minor amendment and shall not modify the overall Open Space  
3 requirement set forth in DA 9.1.

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

17 *DA 9.2 provides only approximate locations of parks. However, the DAs and COAs contain a*  
18 *detailed level implementation of the City’s level of service standards, including minimum*  
19 *distances from residents to park facilities and precisely what type and number of facilities, such*  
20 *as parks and basketball courts, are required for each MPD. See, e.g. LH DA Table 9.5. This*  
21 *level of detail is sufficient to ensure that the MPDs will provide parks that satisfy the City’s level*  
22 *of service standards.*

#### 23 4.5 Interface with Adjoining Development

24 1. Interface with Adjoining Development. In exhibit 3-13e Mr. Peter Rimbois questioned  
25 why DA 4.5 doesn’t include buffers between uses inside the MPD to provide a community that is  
26 visually connected through a continuous network of buffers as required by BDMC 18.98.140.B.  
Mr. Derdowski (Exhibit 40) noted the stipulation in DA 4.5 that it only applies to adjacent  
“developed” properties but ignores adjacent undeveloped properties.

**Applicant Response:** Regarding Mr. Derdowski’s objection that DA 4.5 applies only to areas  
where adjacent properties are already developed, YB proposed the following textual modification  
to the section, shown in strikethrough/underline:

When an Implementing Project application for a Development Parcel along the Project Site  
perimeter is submitted, and the abutting property outside the MPD to such Development Parcel  
is already developed on that submittal date not owned by the Master Developer, then the  
Development Parcel is subject to the section of the MPD Framework Design Standards and  
Guidelines entitled "Interface with Adjoining Development," which provides guidelines to ensure  
a transition between the Development within The Villages MPD that abuts Development outside  
the Project Site but within the City limits.

1 Mr. Derdowski responded to this proposed revision in Ex. 205, stating that removing YBs  
2 responsibility for interface mitigation for all properties save those owned by YB is inappropriate.  
3 In their response to Mr. Derdowski (Ex. 245), YB pointed out that Mr. Derdowski misunderstood  
4 their intent; the revision applies interface mitigation to all adjacent properties, not only developed  
5 properties as the original text stated.

6 **Examiner Response:** *Regarding Mr. Rimbo's assertion that interface buffers are required*  
7 *within the MPD by BDMC 18.98.140(B), the Council has already determined that the MPDs*  
8 *comply with BDMC 18.98.140(B) as approved by the MPD ordinances. In its authority to impose*  
9 *land use controls in the DA through V COA 128, the Council could reasonably require the*  
10 *buffers requested by Mr. Rimbo to be included in the DA, if interface buffers within the MPD*  
11 *development are not already required within the MPD by the City's design standards. As for*  
12 *Mr. Derdowski's original objection that interface guidelines would only apply to developed*  
13 *adjacent parcels, the modified language proposed by YB does in fact extend interface guidelines*  
14 *to undeveloped parcels, addressing his concern.*

#### 10 4.6 Expansion Parcels

11 1. Construction/Field Office. Robbin Taylor (Ex. 77) testified DA 4.7.1 allows for the  
12 use of existing structures on MPD property to be used as construction/field offices, even though  
13 streets may not be adequate to handle the traffic generated by them. Ms. Taylor focused her  
14 concern about an existing construction office located off of Botts Drive.

15 **Applicant Response:** The Applicant stated the testimony was irrelevant to this proceeding (Ex.  
16 189).

17 **Examiner Response:** *The Council is free to remove or revise DA 4.7.1 as it reasonably sees fit.*  
18 *DA 4.7.1 already does subject the field offices to City approval, giving the City the ability to*  
19 *restrict the intensity of the field offices to prevent traffic and other problems.*

20 2. Public Review. Karen Walter of Muckleshoot Tribes inquired in Ex. 3-13f whether  
21 expansion parcels would be subject to public review.

22 **Applicant Response:** YB in Ex. 3-13q cited DA 2.5. The addition of Expansion Parcels to the  
23 MPDs is governed by Sections 10.5 and 12.6.1 (C) of the revised Draft Development Agreement.  
24 The Master Developer's request to add an Expansion Parcel must include the location of  
25 proposed land use categories and open space and sensitive areas (see Section 10.5.1(C) & (F)(d)).  
26 Public notice of the Master Developer's request to add an Expansion Parcel is required per  
Section 12.6.1(C). The City shall also require SEPA review prior to the addition of any  
Expansion Parcel to the MPDs (see Section 10.5.2). Any SEPA appeals are governed by RCW  
Chapter 43.21 C.

**Examiner Response:** *Public review would be required as outlined in the YB response.*

1                   4.7     Additional Use Standards

2           1. Conceptual Site Plan. In Ex. 117 Lisa Schmidt also identified problem with the lack  
3 of specificity in the MPD conceptual site plan, DA Exhibit A. She noted that DA Sec. 4.1  
4 provides that the lot layouts, building footprints, parking and circulation areas shown on  
5 conceptual site plan are only conceptual and may be modified pursuant to Implementing Projects  
6 (e.g., subdivisions and binding site plans) without an amendment to the DA.

7 **Applicant Response:** In Ex. 209, YB responded pursuant to V MPD COA 132 and LH MPD  
8 COA 137 residential land use categories can be adjusted one category up or down through an  
9 administrative approval process provided they also otherwise meet the requirements for minor  
10 amendments outlined in BDMC 18.98.100.

11 **Examiner Response:** *Ms. Schmidt again raises a valid point. If the conceptual site plan can be*  
12 *altered to any degree at the discretion of YB, there is no point in including it in the DA. It's*  
13 *inclusion only misleads the public into expecting a particular site design to which YB has no*  
14 *obligation to adhere. The site plan has utility as an example of what YB could do with the*  
15 *property, but it has no regulatory utility and should not be in the DA unless the Council provides*  
16 *some level of compliance with it. The MPD standards in the BDMC do not appear to require a*  
17 *conceptual site plan. The Council should make sure that the locations of streets are identified in*  
18 *the DA that have a classification greater than neighborhood collector as anticipated by BDMC*  
19 *18.98.040(A)(1)(c), but beyond this the conceptual site plan does not appear to be required or*  
20 *necessary. The site plan should be removed<sup>2</sup> from the DA unless the Council requires some level*  
21 *of compliance with the plan.*

22           2. Land Use Map - Neighborhood Commercial. There were six comments regarding the  
23 land use map. In Ex. 13-3(e) Peter Rimbo stated that the 40,000 square foot neighborhood  
24 commercial uses authorized by DA 4.7.2 are not compatible with the residential use districts in  
25 which they're proposed.

26 **Background:** V MPD COA 128 and LH MPD COA 132 authorize “corner-style neighborhood”  
commercial uses in the MPDs residential land use categories. The COAs require the DAs to  
define those uses. DA 4.7.2 authorizes all uses allowed in the City’s Neighborhood Center  
zoning district, which includes supermarkets and grocery stores up to 40,000 square feet.

**Applicant Response:** In Ex. 208 YB responds that V MPD COA 128 and LH MPD COA 132  
state “corner-style neighborhood” commercial uses may only be allowed in residential land use  
categories through a minor amendment processes. DA 4.7.2 limits grocery stores to 40,000  
square feet.

**Examiner Response:** *Whether or not to allow grocery stores up to 40,000 square feet in*  
*residential areas is purely a policy choice for the Council. The Council should keep in mind that*

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<sup>2</sup> The site plan is also used to set the approximate boundaries of open space areas as outlined in LH DA 4.4.4, but it appears that the Land Use Plan Map. DA Ex. L, could be used for this purpose.

1 *the neighborhood commercial uses authorized for the MPD residential districts by the DAs are*  
2 *uses reserved for a commercial district in its Zoning Code. The only regulatory control over the*  
3 *placement of these uses in the residential districts is the DA requirement for a minor amendment.*  
4 *If the Council chooses to retain the neighborhood commercial uses proposed by the DAs, it may*  
5 *wish to subject those uses to a conditional use approval process in addition to minor amendment*  
6 *approval. Since the DAs specifically identify the approval process for neighborhood commercial*  
7 *uses, it is reasonable to conclude that the COAs did not anticipate the DAs to add another review*  
8 *process and YB would have to voluntarily agree to any additional review process.*

9 3. Land Use Plan. In Ex. 117, Lisa Schmidt addressed DA 4.4.8, which adopts the Land  
10 Use Plan for the MPDs, the equivalent of the City's Zoning Map in its Zoning Code. Ms.  
11 Schmidt noted that the Land Use Plan shown in Exhibit "L" was not a specifically surveyed map  
12 and that the acreage of any Development Parcel may be increased or decreased concurrent with  
13 the City's processing of an Implementing Project application without an amendment to the MPD  
14 Permit Approval or this Agreement. This needs to include a limit to the possible inaccuracies  
15 mapped in order to remain in compliance with the MPD.

16 **Applicant Response:** DA 4.4.8 does not alter the land use map, but merely recognizes the  
17 approximate nature of the stated acreages and provides a process to adjust the acreage of a given  
18 Development Parcel to adapt to realities on the ground. In no case may the adjustment of any  
19 parcel's acreage increase the total dwelling units or commercial square footage (Ex 139).

20 **Examiner Response:** *Ms. Schmidt has a valid concern over the uncertainty of the size of these*  
21 *use districts. Zoning Maps tend to have significantly more precise boundaries, but this is largely*  
22 *because they can use existing roads and the lots of developed subdivisions as boundaries. It*  
23 *would be somewhat of an unnecessary burden to require YB to survey the boundary lines and*  
24 *then have to accommodate its development proposals to those artificial boundaries, especially*  
25 *when topographical features and other site constraints may make the boundaries impractical for*  
26 *various types of development at the implementing stage. It is recommended that the DA require*  
*conformance to the proposed Land Use Plan at the level of detail depicted in the plan, with the*  
*added requirement that the "approximate acreage" assigned to each category in the legend of*  
*the Plan may not be altered by more than 5% without an MPD amendment.*

#### 4.8 Process to Track Total Dwelling Units and Floor Area

1. Accuracy of Phase Unit Counts. In Ex. 117 Lisa Schmidt stated LH DA Table 4-8-4  
Target Unit Count by Phase gives a total dwelling unit count of 1085 for phase 1A and 1B. The  
MPDs listed 880.

**Applicant Response:** In Ex.189 there is a general objection to Ms. Schmidt's statements that she  
lacks authority to change any MPD condition, but there is no specific response to this issue.

**Examiner Response:** *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*

1 is a minor discrepancy of 35 units in the count between the DA and the MPD for phase 1. There  
2 is no discrepancy in the total count for all of the phases.

3 5.0 Bulk, Landscape and Sign Standards

4 5.1 DRC Review Required for Design Guidelines and Standards

5 1. Design Standards. In Ex. 3-13e Peter Rimbo asserts that the DA doesn't include  
6 project specific design standards as required by V MPD COA 135.

7 **Examiner's Response:** *Project-specific standards are outlined in the DAs as Exhibit H.*

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

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

15 5.2 Dimensional Standards

16 1. Setbacks. In Ex. 74 and 126 Larry Baird and Peter Rimbo noted that Table 5-2-1 in  
17 LH DA authorizes front yard setbacks of 10 feet yet the BDMC 18.30.040 requires a 20 foot  
18 setback for a minor street and 25 feet for a major street.

19 **Examiner Response:** *BDMC 18.30.040 only applies to the R-4 and R-6 zoning districts. Given  
20 the open space and other amenities of the MPD district, the comparatively smaller setbacks are  
21 justifiable from a policy standpoint. As a policy decision, the width of the setbacks is largely left  
22 to the reasoned discretion of the Council. In the MPD approvals the Council did not adopt the  
23 setbacks proposed by YB in its land use application so it is free to require setbacks of greater  
24 width in the DA if it so chooses.*

25 5.4 Signage Standards

26 1. Signage. On the subject of signage, Robin Taylor (Ex. 77) challenged the final  
sentence of DA Sec. 5.4.3, which provides that the City may enforce sign standards adopted by  
the Design Review Committee. Ms. Taylor argued that the City has no authority to enforce  
privately adopted sign standards.

**Applicant Response:** The Applicant responded specifically to Ms. Taylor's concerns by noting  
the DA specifically allow the City to enter onto the MPD property and enforce private signage  
issues at the City's discretion. The Applicant further noted the MPD sign programs will comply  
with the City's applicable code, BDMC 18.82.060(B) and (C) (Ex. 139).

1 **Examiner Response:** *Ms. Taylor makes a valid point. DA. 5.4.3 authorizes a private committee*  
2 *(the design review committee) to formulate sign standards and then the City to enforce those*  
3 *standards. Sign standards qualify as development standards that must be approved by ordinance*  
4 *by the City Council. See RCW 35A.63.100. A privately adopted sign standard would not be a*  
5 *legally adopted City regulation. The City cannot enforce legally invalid standards. The City*  
6 *Council has several options to correct the situation. It could have the DA provide that the City*  
7 *would have the authority to adopt any sign standards of the design review committee and that*  
8 *those standards would not be subject to the vesting provisions of the DAs. Note that the City*  
9 *Council could not otherwise apply those standards to the MPDs because the DA vests the sign*  
10 *code in effect on June 28, 2009, per DA 15.1. Another option would be to exempt the sign code*  
11 *entirely from vesting or to limit the exemption to specific types or categories of signs, such as*  
12 *signs located in residential areas.*

## 5.5 Landscape Standards

13 1. Landscaping Installation. Mr. Brian Derdowski expressed concerns with language in  
14 DA Section 5.5.7 in Exhibit 40 and 138, as well as his verbal testimony. He asserted Section  
15 5.5.7 would allow the developer to delay installation of landscaping for up to three years  
16 resulting in visual impacts.

17 **Applicant Response:** YB responded to this issue in exhibit 139, stating that DA 5.5.7 in fact  
18 requires bonding to ensure that landscaping is maintained for three years. They do agree that DA  
19 5.5.8 would allow a delay in landscaping installation. However, they argue that such an  
20 allowance was negotiated with the City expressly to prevent impacts to that landscaping from  
21 continuing construction in the vicinity.

22 **Examiner Response:** *DA Section 5.5.7.B discusses maintenance requirements for three years*  
23 *as YB asserts. Likewise, DA 5.5.8 allows a six-month delay in landscaping installation for*  
24 *parking lots (if bonded) and an unspecified delay for landscaping in right-of-ways (again, if*  
25 *bonded.). There are no COAs or Findings of the MPDs which apply to this issue. Likewise,*  
26 *landscaping requirements of the BDMC do not include allowances for delay.*

*While DA 5.5.8 allows for delays in the installation of certain landscaping, required bonds will*  
*ensure that the landscaping is constructed at some point. Furthermore, no new information has*  
*been provided that such delays will have any significant visual impact other than in one*  
*commenter's personal opinion. As an implementation of land use standards through V COA*  
*128, the Council is free to require additional reasonable landscaping standards if it so chooses.*

2. Mast-Producing Species in Landscape Plans. Brian Derdowski (Exhibit 40) asserted  
that V and LH S 5.5.2 fail to establish the standards for mast-producing species required by the  
MPD permit approval requirements.

**Applicant Response:** YB responded that DA 5.5.2 requires that prior to the approval of any  
landscape plan for an Implementing Project, the City's Director of Natural Resources and Parks

1 must review such plan for compliance with FEIS mitigation measures that protect mast  
2 producing species (Ex. 139).

3 **Examiner Response:** *V MPD COA 124 and LH MPD COA 129 requires landscaping plans*  
4 *shall include mast-producing species and “other native, preferred vegetation as may be specified*  
5 *in the development agreement” to be used to mitigate for reduced food sources resulting from*  
6 *habitat reductions when adjoining wetlands buffer or for wetland enhancement plantings. The*  
7 *COAs further require the DAs shall specify a process by which such landscape plans are*  
8 *reviewed by the City’s Director of Natural Resources and Parks. The DAs incorporate this*  
9 *requirement without much further detail and do not identify “other, native preferred vegetation”*  
10 *as authorized by the COAs. It is not apparent from the record why any additional*  
11 *implementation details are necessary, but since the implementation plan is expressly authorized*  
12 *by the COAs the Council is free to add implementation measures to the DA it finds reasonably*  
13 *necessary.*

14 3. Wildlife Forage Preferences. Bortleson (Exhibit 113) asserted the Compliance Matrix  
15 (Staff Report, June 2011) does not indicate V MPD COA 123 has been addressed, and the DA  
16 needs to detail plant species selection as wildlife forage preference for enhancement areas. V  
17 MPD COA 123 states, “Wildlife forage preferences shall be of primary consideration in plant  
18 species selection for enhancement areas.”

19 **Applicant Response:** YB responded this COA requires no action in the DA. Compliance with  
20 the condition will be reviewed by City Staff at the time an implementing Project application is  
21 submitted for approval (Ex. 209).

22 **Examiner Response:** *The COAs do not require the DA to address the requirements of V COA*  
23 *123. The Council would have to acquire the voluntary agreement of YB to implement V COA*  
24 *123 in the DA.*

25 4. Landscaping Plans. Bortleson (Exhibit 113) and Morgan (Exhibit 143) asserted the  
26 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.*

1           7.0     Water, Sewer and Stormwater Utility Standards

2                   7.1     General Requirements

3           1. Infrastructure Details. Several exhibits concerned a perceived lack of detail in  
4 infrastructure plans, including stormwater, water supply, and sewer. See exhibits 3-13p, 3-13q,  
5 52, 68, 75, 108, 113, 117, 144, 215, and 253 as well as the verbal testimonies of Ms. Nancy  
6 Rogers, Mr. Dan Streiffert, Ms. Peggy Sperry, Mr. Steve Heister, Ms. Patricia Stumpton, and Ms.  
7 Melanie Gauthier. Opponents to the MPDs state that sufficient detail is not available for the  
8 Hearing Examiner to determine that the conditions of approval for the MPDs and the mitigation  
9 requirements of the FEISs have been met. Specific concerns include:

- 10           a. Timing of storm drainage reports;
- 11           b. Timing of future stormwater infrastructure improvements;
- 12           c. Location, specific designs, and constraints (e.g. critical areas) of the proposed  
13 regional stormwater facility;
- 14           d. Specific designs of stream outfalls and other stormwater controls;
- 15           e. Exact location and type of all stormwater infrastructure;
- 16           f. Exact location and type of all water supply infrastructure;
- 17           g. Specific measures related to stormwater quality and quantity;
- 18           h. Sufficient detail to show consistency with the Municipal Code;
- 19           i. An overall grading plan (stormwater runoff details);
- 20           j. Description of standards for sewer design, consistent with King County  
21 requirements;

22 Other commenters simply mentioned general desires that the DAs include greater detail for  
23 infrastructure development.

24 **Applicant Response:** In its response to this issue, the Applicant pointed out that the detail  
25 provided in the DAs is sufficient for the Hearing Examiner to find those documents adequate and  
26 complete and that final design/location/timing of such improvements is a function of later  
implementing project approvals, not the DAs (Ex. 209).

**City Response:** Mr. Daniel Ervin, the City's Engineering Consultant, added that the language in  
the DA is sufficient to retain the City's control on the final placement and design of future  
infrastructure improvements in order to ensure that these improvements are adequate and meet  
the requirements of the conditions of approval for the MPDs, regardless of the specifics provided

1 in the DAs (Ex. 215). The City supports the position of the Applicant and further adds that many  
2 of the requests for additional details are addressed by existing conditions to the MPD approvals  
(Ex. 218).

3 **Examiner Response:** *The level of detail in the DAs is consistent with that required by the MPD*  
4 *COAs. COAs related to stormwater management include LID practices, restrictions on*  
5 *roof/drainage types, and compliance with NPDES permits, and allowances for deviations from*  
6 *stormwater facilities listed in the EISs (Villages COAs 58, 67-68, 70, 77; Lawson Hills COAs 55,*  
7 *69-70, 73, 80). The requirements of COA 58/55 are addressed in Section 7.2.5 of the DAs. The*  
8 *requirements of COA 67/69 are addressed in Section 7.4.4.A.6. The requirements of COA 68/70*  
*are addressed in Section 7.4.4.A.3. The requirements of COA 70/73 are addressed in Section*  
*7.4.4.A.2. The requirements of COA 77/80 are addressed in Section 7.4.2. The requirements of*  
*all these COAs have been met.*

9 *Regarding concerns 3a through 3g and 3i above, these requests for additional details in the*  
10 *Development Agreements are based largely on implied disbelief that the environmental and*  
11 *other effects of the MPDs have been adequately addressed. However, no new technical data or*  
12 *expert testimony has been provided (save for that discussed in the other concerns here) that*  
13 *would indicate that the City's original approval of the MPDs was inappropriate. The concerns*  
*raised here are matters that can be addressed through the City's stormwater regulations at*  
*project implementation and do not need to be addressed at DA review.*

14 *As for concerns expressed by Ms. Gauthier, asking for a description of standards for sewer*  
15 *design consistent with King County requirements, the DAs address sewer standards specifically*  
16 *in Section 7.3.2. 7.3.2 expressly provides that Black Diamond design standards do not apply to*  
17 *sewer facilities within King County jurisdiction. Further, no sewer infrastructure is planned by*  
18 *the MPDs outside the City's incorporated boundary, save for limited collection lines serving*  
19 *houses in the portion of the Lawson Hills development that lies outside the City limits. There is*  
*nothing in the record to suggest that KC standards may create inconsistencies with the proposed*  
*sewer plan that necessitate further elaboration of design in the DA, nor would it be reasonably*  
*expected that the difference in regulations would create such a problem. No additional*  
*specificity in sewer design is recommended for the DAs.*

20 **2. Infrastructure Standards Deviations.** Two exhibits concerned language in the DAs  
21 allowing deviation from engineering standards and substitution of other stormwater infrastructure  
22 than that described previously for the MPDs. See exhibits 3-13e and 117. Commenters were  
concerned that this would preclude public input on the approval of such changes.

23 **Examiner Response:** *The DAs allow deviations from engineering standards only as already*  
24 *authorized in the City's adopted Engineering Design and Construction Standards. This is an*  
*existing process that has not been modified by the DAs.*

25 *As for substitution of infrastructure, V MPD COAs 66 and 77 allow for deviation from the City's*  
26 *Comprehensive Plan and the facilities described in the EIS when other technologies are*

1 available that are functionally equivalent. Similarly, the LH MPD includes COA 80, which  
2 stated the same. Section 7.4.2 of the DAs allows alternate means of achieving stormwater  
3 service through a Utility Permit when justified by a technical analysis and risk assessment. This  
4 language is consistent with the deviations authorized by COAs 77 and 80. No revision to the  
5 language is recommended.

6 3. Infrastructure Inspections. Section 7.1.5 of the DAs, requiring inspection of  
7 infrastructure improvements within one business day of the request for inspection. See exhibits  
8 117, 138, 139, and 197. The commentators stated this requirement is inappropriate and places an  
9 undue burden on the City.

10 **Applicant Response:** The Applicant responded to this issue in exhibit 139, arguing that the one  
11 day requirement was negotiated with the City and that the City was the proper entity to determine  
12 if that was adequate, not the commenter.

13 **Examiner Response:** *The Examiner agrees City staff is free to determine whether it wants to*  
14 *assume this type of responsibility. It should be recognized that a large portion of the concerns*  
15 *raised during the DA hearings could only be considered because the DAs provide an opportunity*  
16 *for the Applicant to agree to mitigation it would otherwise not be compelled to provide. The*  
17 *same applies to the City. By providing “extras” such as providing for expeditious reviews, it is*  
18 *in a better position to negotiate extras from the Applicant. It should also be noted that the*  
19 *provision in question, DA Section 7.1.5, only requires that “the City shall make a reasonable*  
20 *effort” to conduct the inspection within a day. As qualified, 7.1.5 does not set an unreasonable*  
21 *burden on the City.*

22 4. Water Quality Review Committee. Cindy Wheeler asserted in verbal testimony that  
23 the Water Quality Review Committee required by COA 85 is required to provide input on the  
24 DAs.

25 **Applicant Response:** In its response to this issue (Ex. 139), the Applicant stated it intended to  
26 form the committee within 30 days of the approval of the DAs.

**Examiner Response:** *COA 85 (The Villages) and 86 (Lawson Hills) do not require or authorize*  
*the committee to provide input on the contents of the DAs.*

## 7.2 Water System Standards

1. Private Water Systems. Five exhibits dealt with perceived potential impacts to  
private water systems adjacent to the MPDs. See exhibits 3-13h and 78 as well as verbal  
testimony by Mr. Max Beers, and Mr. Gil Bortleson. Concerns centered on water quality impacts  
to those property owners whose water sources are located in the vicinity of the MPDs and  
concerned both stormwater impacts to those groundwater sources (runoff from construction) and  
long term water quality impacts related to infiltration of pollutants into the sources of those  
private water systems.

1 **Applicant Response:** In their response to this issue (Ex. 212), the Applicant stated that the  
2 original EISs for the MPDs found that impacts to adjacent private water systems would not be  
3 significant and that it is inappropriate to reopen this issue for the DAs, as supported by the  
Findings of Fact. This issue was addressed by the City in the original EISs and MPD approvals.

4 **Examiner Response:** *Potential impacts to springs, aquifers, and sources of water (wells) were*  
5 *analyzed and presented in Appendix D of the Villages EIS (pp. 7-8 through 7-12). It was the*  
6 *finding of that report that no measurable impact would occur to ground water resources and no*  
7 *additional mitigation was required. This conclusion was further documented in the EIS and*  
8 *FOF 19 of the Villages and Lawson Hills MPD approvals, which expressly stated that the MPD*  
*would avoid any risk of adverse impact to private wells and springs. The same analysis and*  
*conclusions were recorded for the Lawson Hills MPD permit approval (Ordinance 10-947, FOF*  
*19; Lawson Hills EIS, Appendix D, pp. 71, 73).*

9 *The concerns expressed over the proposed project consist of personal testimony by local*  
10 *residents and anecdotal evidence and do not provide any new information that wasn't already*  
11 *considered by the City in approving the MPD. Conversely, the City's finding of no significant*  
12 *impact to water systems, including private wells and springs, is based on technical reports and*  
13 *analysis provided during the preparation of the two EISs for the MPD permits. The MPD*  
*conditions do not require that private wells be addressed in the DAs. The Council would have to*  
*acquire agreement from the developer to further protect the private wells in the DAs.*

14 2. Water Supply. Several concerns were raised by commenters in regards to adequate  
15 water supply to the MPDs. See exhibits 3-13f, 3-13q, 117, 120, and 197 as well as the verbal  
testimony of Ms. Melanie Gauthier. Comments centered on a number of issues, including:

- 16 a. General belief that water supply is inadequate (Ex. 120, et al.). Certificates and/or  
17 other additional “proof” showing adequate water supply should be required prior  
to approval of the DAs (Ex. 117, 138, et al.).
- 18 b. Perceived inconsistencies in population projections for the MPDs between the  
19 FEISs and the DAs preclude a finding of adequate water supply (Ex. 197).
- 20 c. New wells within the MPD areas should not be allowed (Ex. 3-13f).
- 21 d. More specific information is required in the DAs regarding the Water Supply and  
22 Facilities Funding Agreement (testimony of Ms. Melanie Gauthier).
- 23 e. Additional detail as to the location and design of reservoirs on the MPD sites is  
24 required as well as the location/status of additional sources of water (ex 117).

25 **Applicant Response:** The Applicant responded to the assertion that adequate water supply is  
26 available; stating that water supply was available by right (Ex. 3-13f). The Applicant responded  
to the new wells concern in exhibit 3-13q, stating that water supply rights are currently held for  
the MPDs via the Water Supply and Facilities Funding Agreement (WSFFA) and that they do not

1 intend to install any new wells. Any water that could not be served by their existing rights would  
2 be purchased from the County via the Tacoma intertie (Ibid.).

3 **Examiner Response:** *Both EISs found that the City’s current water entitlement (both springs*  
4 *and the Tacoma intertie) were more than adequate to serve the MPDs (Villages EIS, p. 3-37;*  
5 *Lawson Hills EIS, p. 3-36). FOF 19 of both MPD approvals identifies the sources of water*  
6 *supply but makes no determination that water supply is adequate. More important, neither the*  
7 *EIS nor the MPDs conclude that water will be available at the time project permit applications*  
8 *will be submitted for approval.*

9 *The DAs contain specific information regarding water availability in Section 7.2.1, including*  
10 *reference the rights to 1.08 million gallons per day granted to the Applicant by the “Three Party*  
11 *Agreement” between Plum Creek Land Company, Black Diamond Associates, Ltd., and Palmer*  
12 *Coking Coal Company (dated August 8, 2003). Furthermore, the DAs currently state,*  
13 *connections are allowed via the WSFFA until such time as that capacity is reached. Lastly, the*  
14 *DAs include the statement: “Any Implementing Project application process that calls for a*  
15 *certificate of water availability shall be satisfied by reference to this Agreement.”*

16 *No State or local law, including MPD permitting standards, requires that the DA certify*  
17 *adequate water supply. As such, requiring that the DAs not be approved without “proof” that*  
18 *adequate water exists is inappropriate. This would include the exact location and design of*  
19 *reservoirs, the possible requirement for new wells, or a description or analysis of the WSFFA.*  
20 *As for the assertion that population projections have bearing on water usage, this issue is moot.*  
21 *Standard City and County practice for water adequacy determinations utilize Equivalent*  
22 *Residential Units, not population. ERUs are a function of overall single-family water usage in*  
23 *the City, divided by the number of single-family connections (Black Diamond Water System Plan,*  
24 *p. 3-2).*

25 *It is recommended that the Council remove the provisions in DA 7.2.1 that nullify any project*  
26 *level requirements for certificates of water availability. As previously noted, no findings have*  
27 *been made in the MPD/EIS hearings that water will be available at the time of project*  
28 *implementation. The EIS only concludes that water will ultimately be available for project build*  
29 *out, but makes no assurance that water and supporting facilities will be available as*  
30 *implementing project applications are filed. Also, RCW 36.70B.170(1) requires DA provisions*  
31 *to be consistent with local development standards. If any Black Diamond regulations require a*  
32 *certificate of water availability at project implementation, this requirement cannot be waived by*  
33 *the DA.*

34 **3. Water Conservation.** Several exhibits requested additional requirements for water  
35 conservation and mitigation in the DAs. See exhibits 3-13e, 52, 117, 139, and 218 as well as  
36 verbal testimony by Ms. Peggy Sperry. Comments included the following:

- a. DAs should "ensure" that water savings targets are met prior to approval of the  
DAs (Ex. 52). Inadequate details are provided to ensure 10 percent water use

1 reductions required by the BDMC and conditions of approval 55 (Lawson Hills)  
2 and 53 (the Villages).

3 b. Water reduction measures should be required regardless of whether the MPDs  
4 meet the mandated 10 percent reduction in water usage (testimony of Ms. Peggy  
5 Sperry).

6 c. Monitoring water conservation/usage at the completion of 500 homes is  
7 inappropriate as those homes may be unoccupied. Monitoring at 500 occupied  
8 homes would be more effective (Ex. 3-13e, 52, 117 and testimony of Ms. Peggy  
9 Sperry). In exhibit 3-13e, the commenter went further, asking that the water usage  
10 be averaged over six months, rather than taken for one peak week.

11 **Applicant Response:** The Applicant responded directly to the testimony of Ms. Sperry in Ex.  
12 139 by proposing additional language for Section 7.2.6 of the DAs<sup>3</sup>. These requested changes  
13 are shown below in underline/strikethrough:

14 Pursuant to Condition of Approval No. 54 of the MPD Permit Approval, following the  
15 City's issuance of a certificate of occupancy for or final inspection of the 500th Dwelling  
16 Unit, a representative block of homes, representing 5% of the total (25 Dwelling Units),  
17 will be selected by the Designated Official from the different home types.

18 ...

19 If the data results show water use of any particular Phase has not been reduced by at least  
20 23 GPD (10% below the City's current existing City use standard of 230 GPD), then an  
21 updated mitigation plan reasonably acceptable to the City will be developed by the Master  
22 Developer at that time to bring the future Development within the required standard and  
23 to offset any excess water usage from prior Development that did not meet this standard.

24 **City Response:** The City gave a general response to those wishing the hearing examiner add  
25 additional conditions or requirements for the MPDs via the Development Agreement process  
26 (Ex. 218). Their argument is that the Hearing Examiner does not have jurisdiction to revise or  
request revision to the City's adopted conditions of approval for a given project.

**Examiner Response:** *Before responding to citizen concerns on water conservation, a major  
flaw in the conservation plan needs to be addressed. The Water Conservation Plan proposed by  
the Applicant has conservation targets that are probably substantially higher current average  
water use. If the Applicant achieves its conservation targets, MPD residents will be using water  
at a rate that is more than 10% above the rate of usage by other Black Diamond residents. The  
Applicant's conservation plan has been expressly approved in COA 53/55. However, the COAs  
provides some room for the City Council to set conservation targets that actually conserve  
water.*

<sup>3</sup> Note, Ex. 139 incorrectly refers to Section 7.2.5, but the text quoted is from 7.2.6, which is referenced herein.

1 *The approved water conservation plan sets conservation targets that are considerably above the*  
2 *historical water use of Black Diamond residents. P. 8-3 of the Applicant's MPD applications*  
3 *and DA 7.2.5 set the baseline usage figure as 230 gpd per ERU. DA 7.2.5 requires the Applicant*  
4 *to reduce that 230 gpd to 207 gpd to meet the 10% water conservation reduction requirement.*  
5 *The 230 gpd figure is taken from the City's Water System Plan, where it is used to project future*  
6 *water needs. The water system plan acknowledges that the 230 gpd figure is a conservative*  
7 *(high) amount. The average gpd per ERU for water system users for 2005-2007 in the water*  
8 *system plan is 187 gpd per ERU. This was the most current historical data available in the plan.*  
9 *In short, the 10% "reduction" required of the Applicant in its water conservation plan is more*  
10 *than 10% higher than the average daily use of the City's water system, at least as computed from*  
11 *2004-2007.*

12 *Although the water conservation plan proposed by the Applicant is expressly approved in COA*  
13 *53/55, the Applicant's plan does not have to be construed as setting a conservation target of 203*  
14 *gpd as set by the DA. COA 53/53, using the language of BDMC 18.98.190(B), requires that the*  
15 *DA shall address "the impacts if the required savings targets of 10% less than the average water*  
16 *use in the City by residential uses at the time the MPD was submitted are not achieved". It is*  
17 *noteworthy that the quoted language does not use the 230 gpd figure proposed by the Applicant*  
18 *for a conservation baseline, but still refers back to the "average water use" baseline required by*  
19 *BDMC 18.98.190(B). Consequently, it is reasonable to interpret COA 53/53 as not including the*  
20 *Applicant's use of 230 gpd as a baseline in the approval of its conservation plan. Further, it is*  
21 *obviously absurd to conclude that 230 gpd qualifies as "average water use" for purposes of*  
22 *water conservation, when a 10% "reduction" is still more than 10% above historical average*  
23 *use. It is recommended that an accurate average use be used as a conservation baseline, either*  
24 *as computed in the water system plan or more current data reflecting actual average use at the*  
25 *time the Applicant submitted its MPD applications. The conservation measures proposed by the*  
26 *Applicant may well not be sufficient to meet this more accurate 10% reduction goal, so it will*  
*have to update its conservation plan after the effectiveness of its plan has been monitored as*  
*required by COA 53/55.*

*As to Ms. Sperry's comment that the Applicant's conservation plan should reduce employ*  
*conservation measures even if it meets the 10% target, COA 53/56 have expressly approved the*  
*Applicant's conservation plan and the plan provides identifies what measures are mandatory*  
*(generally those measures specifying water conservation plumbing fixtures) and what measures*  
*are discretionary (generally outdoor measures such as limiting the amount of lawn). The*  
*mandatory provisions remain in place even if the 10% target is reached. Beyond this, the*  
*discretionary measures cannot be converted to mandatory use in the DA unless authorized by the*  
*Applicant.*

*As to Ms. Sperry's comments on adequacy of monitoring, the DA provides a reasonable*  
*mechanism whereby the City can require an updated conservation plan, subject to approval of*  
*the City, which requires additional measures to bring the MPDs within the required 10%*  
*conservation target.*

1 *As to the concern that monitoring includes only occupied dwellings, it appears that the*  
2 *commenters are of the impression that while the trigger for the monitoring is 500 occupied*  
3 *dwellings, the sample selected for that monitoring might include unoccupied homes. This is an*  
4 *issue with verbiage, not the actual requirement. It is recommended that the wording of this*  
5 *requirement be modified to make it clear that homes selected for the sample should be occupied*  
6 *homes. As for the revisions requested by the Applicant, they would move the trigger for*  
7 *monitoring back to the issuance of a certificate of occupancy. Since there can be a time lag*  
8 *between the issuance of that certificate and the actual occupancy of a given home, it is*  
9 *recommended that those changes not be made.*

7 4. Covington Water Service Area. Several exhibits concerned the possible conflict  
8 between the City and the Covington Water District regarding water service to a 98-acre portion  
9 of the Villages MPD. See exhibits 25, 50, 52, 75, and 108 as well as verbal testimony by Mr.  
10 Steve Pilcher, Mr. Max Beers, Ms. Peggy Sperry, and Ms. Gwenn Maxfield. Exhibit 75 stated  
11 that the Hearing Examiner cannot find that the DAs satisfy the V MPD COA 46 through 54 until  
12 the water service boundary issue is resolved (Ex. 75).

11 **Applicant Response:** In their response to this issue, the Applicant provided language for a new  
12 Section 7.2.7 of the Villages DA to address the fact that the City may not be the proper water  
13 purveyor for part of the project (Ex. 139). The Applicant goes on to state that the City will  
14 provide a request for the same language – though no such City support for the new language  
15 provided by the Applicant has been received by the Hearing Examiner. Likewise, neither the  
16 Covington Water District nor any other commenter has responded to the proposed changes to the  
17 DA language.

15 The changes for the Villages DA consist of the following new text to be inserted immediately  
16 following Section 7.2.6:

17 Section 7.2.7

18 This Agreement governs MPD Development and, as such, nothing in this Agreement  
19 shall have any effect on, nor constitute legal support for, any right of either the Covington  
20 Water District to provide water service to that portion of the MPD Development lying  
21 within Covington Water District's water service area boundaries as shown in the South  
22 King County Coordinated Water System Plan (SKCCWSP), or the City of Black  
23 Diamond to provide water service to that same area as shown in the City's Water System  
24 Plan.

23 All MPD Development that is located within Covington Water District's water service  
24 area boundaries and that is ultimately connected to and physically served by Covington  
25 Water District facilities shall comply with the District's adopted standards, procedures  
26 and system extension requirements for water service and connection to District facilities.

26 **City Response:** According to the City, this dispute is currently under negotiation (verbal  
testimony of Mr. Pilcher and Ex. 218). However, the South King County Coordinated Water

1 System Plan indicates the area as served by the Covington Water District (Ex. 50). In its  
2 response to testimony, the City asserted that it is not the jurisdiction of the Hearing Examiner to  
3 make a determination as to appropriate water service (Ex. 218). Furthermore, the City asserted,  
4 Covington Water District does not hold a franchise to install water supply infrastructure in this  
area. Lastly, the City argued, the City's adopted Comprehensive Water System Plan, approved  
by the County, indicates that the City would provide water service to this area.

5 **Examiner Response:** *The COAs do not require that the water purveyor be correctly identified*  
6 *in the DA, nor is it necessary to address water system requirements at this level of project*  
7 *review. However, there are provisions in the DA that would conflict with the jurisdiction of the*  
8 *Covington Water District if the District does in fact have jurisdiction over part of the MPD*  
9 *project area. The language proposed by the Applicant falls short of remedying the situation,*  
10 *since it still leaves DA provisions that could not be enforced against the Covington Water*  
11 *District. For example, DA Section 7.2.2 requires that project water facilities comply with City*  
12 *design standards and that they become part of the City's system upon completion. This provision*  
13 *would require modification as well to allow for Covington Water District's possible service to*  
14 *part of the MPD. In order to more globally address any conflicts with the Covington Water*  
15 *District, it is recommended that the following sentence should be added to Section 7.2 of the DA:*  
16 *"The DA shall not apply within the Covington Water District to the extent that this section*  
17 *unlawfully conflicts with the authority of the Covington Water District."*

18 5. Diamond Springs Water Association. In their comments on the MPDs, the Diamond  
19 Springs Water Association asserted that the Villages MPD would pose a potential hazard to their  
20 clean water supply and would impact their wellhead protection area. See exhibit 142 and the  
21 verbal testimony of Ms. Angela Jennings.

22 **Applicant Response:** In response to this issue, the testimony of Mr. Curtis Koger was provided,  
23 a licensed professional geologist (Ex. 211). His response asserted that no significant impact is  
24 expected to the Diamond Spring Wellhead Protection Area. He cited The Villages EIS as well as  
25 supporting technical reports. Attached to Mr. Koger's exhibit is a report by Associated Earth  
26 Science, which stated that the Diamond Springs Water Association water sources were  
documented in the technical report attached to the EIS and that those sources are hydraulically  
separated from The Villages and the area of potential effects.

27 **Examiner Response:** *See discussion under Concern 2 above regarding private wells. As*  
28 *discussed therein, impacts to springs, aquifers, and sources of water (wells) were analyzed and*  
29 *presented in Appendix D of the Villages EIS (pp. 7-8 through 7-12). As described in the*  
30 *attachment to Ex. 211, the Diamond Springs Water Association sources were included in that*  
31 *discussion and not only are impacts not expected, but those water sources are hydraulically*  
32 *separate from the Villages area, precluding any possible impact. No concerns from the*  
33 *Diamond Springs Water Association were raised prior to the DA hearings. Regardless, the EIS*  
34 *considered potential impacts to the wellhead protection areas as part of the analysis of impacts*  
35 *to all water sources (EIS, Appendix D). Pursuant to the EIS and FOF 19, impacts to wells and*  
36

1 *wellhead areas will not be significant. Therefore, there does not appear to be any compelling*  
2 *reason to seek supplemental conditions on this issue.*

### 3 7.3 Sanitary Sewer Design Standards

4 1. Sewer Supply. Several exhibits questioned whether there is adequate sewer capacity  
5 to serve buildout of the MPDs. See exhibits 68, 108, 117, 120, 197, and 205. Aside from  
6 general statements that sewer is inadequate, the following comments were made:

- 7 a. Additional details as to the reliability and feasibility of the peak flow storage  
8 facility are required prior to approval of the DAs and there is no basis for DA  
9 7.3.1, that sewer is available for the project (Ex. 68). Similarly, a commenter  
10 stated that permission from property owners whose property will be crossed by  
11 new sewer lines must be secured prior to approval of the DAs, namely the Palmer  
12 Coking Coal property (ex 117). See Concern 3 above for a response to this  
13 comment.
- 14 b. Certificates of sewer availability should be required of all future implementing  
15 projects prior to approval (Ex. 108, 197, and 205).

16 **Applicant Response:** In response to item (b) above, the Applicant stated that no law or  
17 regulation prevents the approval of a development agreement without such certificates and that  
18 language in the DAs requires that sewer service be available prior to approval of implementing  
19 projects (Ex. 209). In Ex. 215, Bob Ervin, an engineering consultant for the City, pointed out  
20 that the City has an agreement with King County requiring King County to accept sewage from  
21 Black Diamond and build facilities as necessary to accept the sewage. Add that he also concluded  
22 that the details of design can be deferred to project implementation.

23 **Examiner Response:** *DA 7.3.1, stating that the DA provides for sewer availability, should be*  
24 *stricken. The necessity and meaning of the section is unclear and could be construed as a*  
25 *preemptive finding that sewer will be available for all implementing projects at any time. While*  
26 *the EISs conclude that adequate sewer will be available at some point in time for MPD*  
*development (Villages EIS, p. 3-49; Lawson Hills EIS, p. 5-6), nothing in the EISs or elsewhere*  
*in the record suggests that adequate sewer will be available at any time that an implementing*  
*project application is filed.*

*The uncertain timing of sewer availability arises from the City's dependence upon Metro to*  
*provide sewer service. An agreement between the City and the Municipality of Metropolitan*  
*Seattle (referred to as "Metro") regarding sewer service (Ex. 215, Ex. D) allows the City to*  
*connect local sewer collection infrastructure to the Metro system and to transmit locally*  
*generated wastewater to Metro for treatment. Metro, in exchange, is required to construct*  
*whatever sewer facilities are necessary to treat the sewage. However, the agreement does not*  
*require King County to build the sewer facilities within any specified time period, providing*  
*merely that the City's facilities shall connect to those of King County at such time as King*  
*County's facilities become available. See Ex. 215, Ex. D, Section 4. Consequently, there is no*

1 *guarantee that adequate sewer will be available whenever the Applicant decides to apply for an*  
2 *implementing project. As to requests for more detail in the location and design of sewer*  
3 *facilities, the COAs do not require the DAs to address this issue and there is no compelling*  
4 *reason to engage in that level of detail at the MPD/DA level of review. As noted in Mr. Ervin's*  
*declaration, an engineer testifying for the City, those specific design issues can be effectively*

5 *addressed at project review.*  
6 *As to needing permission for the location of sewer lines, that also can be addressed at project*  
7 *review. If any significant alterations to the proposed location of sewer lines would be necessary*  
8 *because necessary permissions are not acquired, that can be addressed in an MPD amendment.*

#### 7 7.4 Stormwater Management Standards

8 1. Stormwater Infrastructure Outside the UGA. Several exhibits concerned the proposed  
9 Regional Stormwater Facility proposed by the MPDs for a location outside the Urban Growth  
10 Area. See exhibits 3-13b, 115, 117, 196, 212, and 259 as well as verbal testimony by Mr. Steve  
11 Hiester and Mr. Paul Reitenbach. Concerns were raised regarding direct impacts to rural areas  
12 as well as growth inducing effects resulting from the installation of urban infrastructure  
(stormwater facilities) in a rural area outside the UGA. It was stated in at least two exhibits that  
13 placement of such a facility outside the UGA would violate the Growth Management Act.

14 **Applicant Response:** The Applicant responded to this issue in exhibit 139. They argued that the  
15 City does not have the legal ability to prevent a property owner from filing an application,  
16 especially in another jurisdiction (in this case, King County). Additional response was given by  
17 the Applicant and their expert consultants in exhibits 209 and 212, indicating that the proposed  
18 location for the stormwater facility is ideal due to topographic, geologic, geographic,  
19 hydrologic, and economic considerations. In a rebuttal of Ex. 212, the Greater Maple Valley,  
20 Four Creeks, and Upper Bear Creek Unincorporated Area Councils (the UAC) stated that while  
21 the concerns of topographic, geologic, geographic, hydrologic, and economic considerations are  
22 valuable, they are not the only concerns to be addressed for the location of the regional  
23 stormwater facility (see Ex. 259).

24 **Examiner Response:** *The EIS for the Villages MPD described the off-site regional stormwater*  
25 *facility, described generally on page 3-53 of the EIS and shown graphically on EIS Exhibit 3-25.*  
26 *As shown, this regional facility would be located outside the incorporated City boundary to the*  
*west of the MPD (Villages EIS, Ex. 3-25). As described for all stormwater infrastructure, the*  
*direct environmental effects resulting from construction and operation of stormwater*  
*infrastructure was found by the EIS to be effectively managed by application of the current*  
*Stormwater Management Manual (Villages EIS, p. 3-59 and pp. 4-41 to 4-43). Indirect impacts*  
*of the MPD were addressed by the EIS as well, finding that indirect impacts were not significant,*  
*but noting that extension of urban roads to connect with rural roadways is not consistent with*  
*County policy (Villages EIS p. 5-15). No mention is made of the growth-inducing impact of*  
*placing a stormwater basin outside the UGA, as cited by the commenters above. Chapter 6 of*  
*the EIS stated that application of the 2005 Stormwater Management Manual for Western*

1 Washington (“the 2005 Stormwater Manual”) would mitigate any direct impacts of the proposed  
2 stormwater system.

3 Two COAs from the Villages recognize that the stormwater facility may be located outside of city  
4 limits. COA 63 requires an agreement with King County for long-term City ownership of  
5 stormwater facilities located outside City Limits (the regional stormwater facility).d COA  
6 78requires the Applicant to obtain any necessary permits from King County and the submission  
7 of engineering for the regional stormwater facility to the City for approval regardless of their  
8 jurisdiction over the facility.

9 The proposal to locate the Regional Stormwater Detention facility outside of the City’s urban  
10 growth area was subject to a significant amount of discussion during the MPD hearings. The  
11 location of that facility has been recognized and at least implicitly approved by the City Council  
12 in the MPD COAs, which anticipate its location outside the UGA. The only new issue raised in  
13 the DA hearings is that the location could induce urban growth outside of the urban growth  
14 area. That is largely a GMA issue, which is a consideration when land use regulations are  
15 adopted, as opposed to when they are implemented. Unless King County’s review permit review  
16 criteria directly authorize the consideration of urbanizing impacts, King County probably won’t  
17 have the authority to make this issue a significant factor in its permit review<sup>4</sup>. If this is a  
18 concern to the Council, it can have the City Attorney provide an evaluation of whether King  
19 County could deny development permits on the basis of GMA considerations. However, even if  
20 King County were to prohibit the development of schools outside in its rural areas, the Applicant  
21 then has the option to build within the City’s urban growth area.

22 2. Phosphorous and Lake Sawyer. A major concern on the proposed stormwater system  
23 was the discharge of phosphorous to Lake Sawyer. See exhibits 3-13p, 81, 87, and 198 as well as  
24 the verbal testimony of Steve Pilcher, Nancy Rogers, and Robert Rothschilds. Areas of concern  
25 included:

- 26 a. Mitigation is not fully described in the DAs;
- 27 b. Annual sampling of phosphorus outflow should be required by the DAs;
- 28 c. Monitoring of phosphorus should continue for “a few years” after project  
29 completion – according to Ex. 87 monitoring should continue beyond five years  
30 after project occupation as it will take more than five years for pollution effects to  
31 “show up;”
- 32 d. Descriptions of actions to be conducted in the case that the MPDs do not meet the  
33 “no net increase in phosphorus” to Lake Sawyer requirement, DA Section 7.4.3,  
34 should be included in the DAs;

35 \_\_\_\_\_  
36 <sup>4</sup> This assumes that the MPDs do not qualify as land use regulations themselves. If they do, as currently ruled by the  
37 GMA Hearings Board, the location of the stormwater facility as a GMA issue may very well be a valid consideration  
38 before the Hearings Board.

1 e. Inconsistencies were identified between the drainage report by the *Drainage*  
2 *Report on Lake Sawyer Flooding and Project Effects and the Estimated Total*  
3 *Phosphorous Loading from the Completed MPDs report* (the “*Total Phosphorous*  
*Report*”, namely that different drainage area sizes were used.

4 **Applicant Response:** According to the Applicant, as a result of negotiations to develop the DAs  
5 they conceded to a requirement that the MPDs would result in “no net increase” in phosphorous  
6 loading (Ex. 139).

7 Regarding item d. above (Ex. 245), the Applicant countered that the variable nature of any  
8 possible shortfall in phosphorous control, coupled with the complex nature of stormwater  
9 control, precluded the inclusion of specific remedial actions that would be taken in the case that  
10 phosphorous exceeded the “no net increase” quantity. Furthermore, they stated, the language of  
11 the COAs and the DAs allowed the City to determine the amount of remedial action that would  
12 be required.

13 Regarding item e. above (Ex. 245), the Applicant provided rebuttal in the form of a  
14 memorandum from Mr. Alan Fure. Mr. Fure is a public engineer and an expert in water and  
15 stormwater management. Mr. Fure rebutted the assertion of Mr. Sperry that inconsistencies exist  
16 between the *Drainage Report on Lake Sawyer Flooding and Project Effects* (provided by Ex.  
17 139, attachment 9) and the Total Phosphorous Report, and thus the amount of phosphorous that  
18 would reach Lake Sawyer is understated. According to Mr. Fure, the two reports had different  
19 purposes and thus included different assumptions in the analysis. The *Drainage Report on Lake*  
20 *Sawyer Flooding and Project Effects* considered the effect of infiltration that would occur in  
21 certain basins, whereas the Total Phosphorous Report did not, nor was it required to for the  
22 purposes of that particular report. As such, Mr. Fure asserted, comparison between the two  
23 reports is not feasible and perceived inconsistencies between the two reports does not represent  
24 evidence that one or the other report is invalid.

25 **City Response:** Verbal testimony given by the Mr. Steve Pilcher supported the idea that the  
26 phosphorus impacts of the project on Lake Sawyer are not significant and would be consistent  
with existing regulations/plans/etc.

**Examiner Response:** *Phosphorous impacts to Lake Sawyer are documented in extensive detail*  
*in the EISs as well as FOF 7 of the MPDs. Phosphorous impacts were a major concern during*  
*the MPD/EIS hearings and the City ultimately concluded in FOF 7 that phosphorous impacts fell*  
*within phosphorous guidelines enacted by DOE, expressed in terms of Total Maximum Daily*  
*Load, TMDL. As a result of recent measurements of phosphorous loading to Lake Sawyer, the*  
*Applicant has agreed to incorporate a “no net increase” of phosphorous to Lake Sawyer, as*  
*required by DA Section 7.4.3(A). This standard exceeds the TMDL required by DOE. In*  
*voluntarily assuming the “no net increase” standard, the Applicant also proposed its own*  
*monitoring plan for the standard, added to Ex. O of the DAs as a February 25, 2011 memo from*  
*Alan Fure and hereinafter referenced as the “Fure monitoring plan”. Ex. O also contains a*

1 *monitoring plan for all other COA water quality standards, hereinafter referenced as the*  
2 *“Kindig monitoring plan”.*

3 *For clarity, the following conclusions are referenced directly to the comments above:*

- 4 *a. Mitigation required by the COAs, including detailed information on monitoring and*  
5 *phosphorous controls mandated for future implementing projects, is included in the*  
6 *body of the DAs (Sections 7.4.3 and 7.4.4) as well as in Exhibit O of the DAs at a*  
7 *level of detail sufficient for MPD/DA review.*
- 8 *b. The monitoring plan described in Exhibit O of the DAs includes a requirement that*  
9 *the total phosphorous entering the stormwater system be monitored annually,*  
10 *addressing the commenters concerns.*
- 11 *c. The Fure plan clearly requires the monitoring to extend. According to Exhibit O of*  
12 *the DAs, monitoring of phosphorous inflow will continue for a period of five years.*  
13 *However, it is unclear in the Kindig monitoring plan (DA Ex. “O”) when this term of*  
14 *monitoring begins. If it would begin upon completion of a stormwater feature, it’s*  
15 *conceivable that construction of homes and other features that would feed stormwater*  
16 *to that structure could continue for a longer period than five years, potentially*  
17 *rendering the results of the monitoring moot. It is recommended that the monitoring*  
18 *period of the Kindig plan be clarified to extend for at least five years beyond the*  
19 *completion of all development that discharges water into the stormwater facility*  
20 *subject to monitoring. As for the request that monitoring extend beyond five years*  
21 *after project occupation, there is no technical or expert evidence which would*  
22 *indicate that this is necessary.*
- 23 *d. It is agreed that the proposed monitoring plans lack timelines and enforcement*  
24 *mechanisms. These themes should and can be required to be in the DA. V COA 73*  
25 *and LH COA 76 require the DAs to include stormwater monitoring plans. COA81/85*  
26 *requires that the Master Developer modify existing practices and facilities and/or*  
*provide for other mitigation measures to respond to any situation where monitoring*  
*indicates that phosphorous outflow exceeds the maximum value. In implementing*  
*these requirements, the DAs provide no timeline for compliance or any enforcement*  
*mechanism for the City. It is recommended that the DAs impose deadlines for*  
*remedial phosphorous mitigation and also provide enforcement mechanisms for the*  
*City to compel compliance. The City can compel the Applicant to agree to such terms*  
*as they relate to enforcement of DOE TMDL standards because the COAs require the*  
*DAs to include a monitoring plan and to specify actions to be taken should*  
*monitoring reveal that stormwater standards are not met. It should be noted,*  
*however, that The Applicant can only be required to terms that monitor and enforce*  
*the stormwater standards imposed by the COAs. The COAs only impose the DOE*  
*TMDL standard for phosphorous. Consequently, the Applicant must agree to any*

1 *monitoring or enforcement standards that would apply to its voluntarily assumed “no*  
2 *net increase” standard.*

- 3 *e. The expert testimony of Mr. Fure credibly addresses the inconsistencies cited by Mr.*  
4 *Rothschilds. Further, any inconsistencies will become moot since the monitoring*  
5 *plan requires the Applicant to off-set any phosphorous loading that exceeds TMDL*  
6 *standards.*

7 3. Surface Water Quality. A large number of exhibits concerned surface water quality  
8 impacts from the MPDs. Twenty-three of these comments were form letters submitted by the  
9 Sierra Club on behalf of private citizens (Ex. 80, 82-86, 88-93, 100-106, 112, 114, 134, and 140).  
10 The remaining seven commenters were individually submitted (Ex. 3-13f, 3-13q, 44, 56, 116,  
11 and 117 as well as the verbal testimony of Angela Jennings). The surface water quality impacts  
12 fell into a few areas, including:

- 13 a. General statements that water quality would be significantly impacted. See the  
14 form letters plus Ex. 3-13f, 116, 117.
- 15 b. Runoff and stormwater infrastructure impacts to surface waters. See Ex. 3-13f,  
16 56, 117, and the testimony of Ms. Angela Jennings.
- 17 c. Impacts to surface waters from infrastructure installation/operation (e.g. sewer  
18 lines), namely the locating of sewer lines parallel to and within stream buffers.  
19 See Ex. 3-13f. While the commenter does not specify the route in question, it  
20 appears that Route B shown on Figure 7.3 of the Lawson Hills DA follows a  
21 stream.
- 22 d. Additional/expanded surface water mitigation requirements, including the need  
23 for a water quality monitoring plan and monitoring of water quality beyond  
24 buildout of the MPDs and expanded use of Low-Impact-Development practices.  
25 See Ex. 3-13f, 56, and 117.

26 **City Response:** The City stated in their response to surface water quality issues that compliance  
with the 2005 Stormwater Manual will adequately protect surface waters from impacts related to  
runoff and stormwater (Ex. 3-13q). Furthermore, the City asserted, the locations of roadways,  
sewer facilities, stormwater facilities, etc. has been designed in order to avoid sensitive areas  
such as wetlands. It is the opinion of the City that application of the 2005 Stormwater Manual,  
coupled with required compliance for implementing projects with the Sensitive Areas Ordinance  
will address any surface water quality concerns.

Specifically regarding item C above, the City asserted that the sewer line shown parallel to a  
stream represents an existing system. As such, no new impact would occur (3-13q).

**Examiner Response:** *According to the EISs for both MPDs, most surface water quality impacts  
of the MPDs could be mitigated by application of the 2005 Stormwater Manual. Remaining*

1 *impacts were addressed by additional measures specific to certain water bodies (e.g. Lake*  
2 *Sawyer), but overall the 2005 Stormwater Manual was found to be sufficient to address water*  
3 *quality impacts (Villages EIS, pp. 6-7 to 6-8; Lawson Hills EIS, p. 6-9). AS discussed in FOF 7,*  
4 *the project incorporates certain low-impact development principals which would prevent*  
5 *significant water quality impacts, specifically including those generated by stormwater. Several*  
6 *requirements for the protection and monitoring of water quality were included in the decisions*  
7 *for both MPDs (Villages COAs 60, 66-68, 70-71, 82, 85; Lawson Hills COAs 62, 69-70, 73-74,*  
8 *64, 86).*

9 *While several commenters stated concerns with surface water quality issues, most of a general*  
10 *nature and few with specific concerns, no new technical information or expert testimony has*  
11 *been presented that wasn't already presented during the MPD/EIS hearings. The issues of*  
12 *concern are also heavily mitigated and no need for additional mitigation at this level of review is*  
13 *apparent.*

14 *In the case of the sewer route located parallel to a stream (item c. above), the line already exists*  
15 *so no new impacts are anticipated. Even if additional work on the line were necessary, the*  
16 *City's sensitive area regulations would address any impacts. The City Council has determined*  
17 *that the sensitive areas ordinance is adequate to protect streams and other sensitive area*  
18 *impacts by the adoption of COA 149, which requires that sensitive area impacts be addressed*  
19 *through the sensitive areas ordinance at project implementation.*

20 *Regarding the request for additional stormwater monitoring requirements (item d. above), as*  
21 *discussed for phosphorous impacts, the DAs contain extensive mitigation and monitoring*  
22 *requirements. As identified in DA Section 7.4.5, the Kindig monitoring program referenced in*  
23 *the phosphorous discussion also applies to temperature, turbidity, conductivity and dissolved*  
24 *oxygen. As previously discussed, the EIS has concluded that stormwater impacts are adequately*  
25 *mitigated. As further identified in the phosphorous discussion, the DA should include timelines*  
26 *and enforcement mechanisms. With these recommended additions to the DAs, the record shows*  
*no need to provide for additional mitigation at this level of review.*

4. Flooding and Sawyer Lake. A number of exhibits related to perceived flooding hazards at Lake Sawyer due to increased runoff from the MPD project areas. See exhibits 67, 198, 215, 248, and 258 as well as the verbal testimony of Mr. Jack Sperry. Unspecified concerns with flooding on Lake Sawyer were also included in the form letters sent by the Sierra Club on the behalf of commenters (Ex. 80, 82-86, 88-93, 100-106, 112, 114, 134, and 140). Aside from general statements of concern regarding flooding, Mr. Sperry provided lengthy calculations of his own regarding potential water rise (Ex. 67). Other concerns were stated that existing flow constrictions downstream of the lake's weir prevent drainage of the lake at times of high water.

**Applicant Response:** The Applicant provided repeated expert rebuttal of the commenters' concern (Ex. 139, 209, 215, and 258). Aside from the multiple declarations from the Applicant's engineers and water experts, the Applicant argued that the project opponents were only qualified to give personal testimony, not expert testimony in this matter.

1 **City Response:** The City argued that the flooding impact has been addressed in the EISs and  
2 that it is not the jurisdiction of the Hearing Examiner to reopen this issue in regards to approval  
of the DAs (Ex. 218).

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

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

10 *In regards to downstream flow, it was the findings of both that while it appeared that flow  
11 ceased during flood events, it continued in a manner that is not visible and thus the observation  
of locals (including Mr. Sperry) that the flow "stopped."*

12  
13 5. Runoff Quantity and Impacts to Adjacent Properties. Four exhibits expressed general  
14 concerns about stormwater impacts to downstream properties. See exhibits 44, 56, 124, and 135.  
15 Some gave anecdotal examples of prior impacts, including logging activities and similar  
development in other locations. (Several comments regarded additional details needed for the  
DAs regarding runoff quantities. These are addressed under Concern 3 above.)

16 **Applicant Response:** The Applicant responded to concerns about stormwater by referring to  
17 the standards of the 2005 Stormwater Manual, calling them "the most stringent standards that can  
be applied" (Ex. 209).

18 **City Response:** The City responded to similar concerns about stormwater, but limited to  
19 phosphorous concerns, by referring to the 2005 Stormwater Manual as well (see Concern 9  
above).

20 **Examiner Response:** *No new information was presented on stormwater impacts beyond what  
21 was already considered at the MPD/EIS hearings. The EISs prepared for the MPDs included  
22 discussion of impacts related to stormwater quality and quantity. It was the conclusion of the  
23 EIS that the application of the 2005 Stormwater Manual and the use of Low Impact Development  
24 (LID) technology would be adequate to address any stormwater issues (Villages EIS, pp. 3-59, 4-  
25 29; Lawson Hills EIS, pp. 3-55, 4-38). FOF 7.M reflects this conclusion, in that LID is found to  
reduce stormwater impacts. Given the absence of any new information, the extensive mitigation  
required by the 2005 stormwater manual and the prior determinations of adequacy, there does  
not appear to be any compelling reason to seek supplemental conditions on this issue.*

1           6. Additional Mitigation/Requirements. A number of exhibits requested expanded/more  
2 stringent mitigation and requirements than originally mandated from the projects in order to  
3 address perceived stormwater and water quality issues. Most requested new mitigation or  
4 requirements not previously discussed during original approval of the MPDs. See exhibits 3-13f,  
5 3-13p, 3-13q, 113, 132, 253, and the verbal testimonies of Mr. Dan Streiffert, Ms. Kristen  
6 Byrant, and Ms. Patricia Sumption. New/expanded requirements requested included:

- 7           a. Use of reclaimed water where feasible;
- 8           b. A new City staff position to handle infrastructure inspections;
- 9           c. Creation and enforcement of a stormwater runoff plan;
- 10          d. Unspecified additional measures to protect groundwater quality;
- 11          e. Prohibition of grading between October 1 and April 1;
- 12          f. Maintenance of the water system in as “natural” a state as possible;
- 13          g. More advanced stormwater control technology;
- 14          h. Stronger review standards and required reviews for each phase;
- 15          i. Use of “lowest impact technologies” to avoid water quality impacts to surface  
16             waters (see Concern 10 above); and
- 17          j. A general perception that overall stormwater mitigation is inadequate or that  
18             mandated measures will fail. One commenter included the following requested  
19             requirements:
  - 20                i. Collection of fees from the developer to pay for “potential” stormwater  
21                  corrective measures;
  - 22                ii. A provision in the DAs allowing the City to halt construction in the case  
23                  that problems with the stormwater system/improvements are identified;  
24                  and
  - 25                iii. A provision in the DAs allowing the City to call for more stringent  
26                  controls during approval of implementing projects.

**Applicant Response:** The Applicant argued that reopening prior findings and requiring additional mitigation/regulation above those called for in the conditions of approval and Findings of the MPD permit approvals is not appropriate and not within the jurisdiction of the Hearing Examiner when considering the DAs (Ex. 209).

1 **City Response:** The City responded to some of these issues in exhibit 3-13q, stating that the  
2 additional requirements are not called for in the 2005 Stormwater Manual, adopted by the City,  
and that use of the Manual is adequate to address any stormwater impacts that could occur.

3 **Examiner Response:** *The EISs for the MPDs addressed issues of stormwater and water quality,  
4 both surface water and ground water. Mitigation was developed and described in the EISs and  
that mitigation was incorporated into the MPD approvals as Conditions of Approval (Ordinance  
5 10-946 and 10-947). Furthermore, the COAs for both MPDs include several measures to protect  
6 surface and ground water as well as to retain the natural water cycle as much as is practical  
7 (Villages COAs 60-65, 67, 68, 70-71, 73-74, 80, 82, 85 and their equivalents in the Lawson Hills  
COAs).*

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

13 7. Stormwater/NPDES Standards Timing. Stormwater goals and standards should be  
14 strengthened and should be applied to each implementing project, not just by “phase.” See  
15 exhibit 138 and 139. (Note: strengthened stormwater standards are addressed in Concern 13  
above and are not discussed further here.)

16 **Applicant Response:** The Applicant rebutted the argument in exhibit 139, stating that vesting  
17 stormwater requirements by phase, not by project, is consistent with Conditions of Approval nos.  
18 75 (The Villages) and 78 (Lawson Hills) of the MPD permit approvals (Ordinances 10-946 and  
10-947).

19 **Examiner Response:** *COA 75/78 of the DAs concerns only the size of storm ponds, not  
20 stormwater standards as the Applicant asserted. There are two provisions of the DAs, in Section  
21 7.4.4, to which the commenter’s comments could apply. One is Section 7.4.4.A.1, which applies  
any new stormwater standards adopted by the City prior to buildout only to the start of the next  
22 phase, not any phase currently under construction. The other is Section 7.4.4.A.2, which applies  
any current NPDES permits in effect by phase. As with stormwater standards, a phase under  
23 construction would not be required to meet the requirements of any new NPDES permit, only  
new phases that have not yet begun.*

24 *BDMC 18.98.195(B) requires that vesting of stormwater regulations shall occur on a phase by  
25 phase basis. Any different scheme would be considered to conflict with, as opposed to  
supplement, this requirement. The phase vesting requirement is set by city code can cannot be  
26 modified in the DAs.*

1           8. Construction Activity and Erosion. Peter Rimbo (Ex. 3-13e) discussed MPD COL  
2 104, 105 and 110 with respect to construction season earth moving and grading, stream and bank  
3 stabilization, and the overall grading plan.

4 **Examiner Response:** *Mr. Rimbo is commenting on MPD conditions that have already been*  
5 *adopted by the Council. The conditions in question involve review typically conducted during*  
6 *project implementation and there is no indication from the record that any supplementation is*  
7 *necessary in the DAs.*

8           8.0     Sensitive Areas Standards

9                   8.1     Sensitive Areas Ordinance Applicability

10           1. Enhancement of Open Space. Two exhibits raised the issue that the Development  
11 Agreement failed to meet key requirements of BDMC 18.98.020, specifically the “preservation  
12 and enhancement of the physical characteristics (topography, drainage, vegetation,  
13 environmentally sensitive area) of the site.” See Exhibit 113 (Bortleson) and Exhibit 117  
14 (Schmidt). Mr. Schmidt’s assertion is that the Development Agreement does not provide for the  
15 enhancement of vegetation or environmentally sensitive areas.

16 **Examiner Response:** *The MPD COLs determined that the MPDs meet the requirements of*  
17 *BDMC 18.98.020. The accuracy of the COLs cannot be revisited in the DA hearings and the*  
18 *COAs do not require that the DAs further address the issue. The City’s SAO already provides*  
19 *for extensive protection of environmentally sensitive areas and open space will protect other*  
20 *natural features. If the Council believes that additional protective measures are necessary, it*  
21 *can attempt to negotiate supplemental conditions that do so with YB.*

22           2. Bald Eagle Protection. Four exhibits concerned the protection of the American Bald  
23 Eagle and Bald Eagle habitat, in particular nests and roosts. See exhibits 230 and 231, submitted  
24 by Jacqueline Paolucci Taescher and Robert Taescher. (Exhibit 11, also submitted by Ms.  
25 Taescher, expressed similar concerns.) Exhibit 69 provides additional information previously  
26 submitted by Angela Taescher during the EIS process, in particular concerns over preservation of  
large trees (potential nesting sites) and night roosts. In summary, the concern is that the MPD  
and DA do not provide inadequate protection for eagle roosting and nesting sites, especially  
during earth-moving and building periods.

**Applicant Response:** The Applicant noted the “disclosure and discussion” of an off-site eagle  
nest near Lake Sawyer in the Villages FEIS, p 4-74. The Applicant responded in Exhibit 245  
(point 2, page 53) that testimony by DFW staff indicated bald eagles do not nest at the subject  
site. However, this same testimony also noted that “as the habitat’s landscape changes, there is  
always the possibility that protected species, like a bald eagle, will take up residence.” Should a  
bald eagle nest or roosting site be established at any time during site preparation or construction  
under the DA, the relevant state and federal laws would still be in effect – they are not in any way  
negated or circumvented by the approval of the MPD or DA.

1 The Applicant’s rebuttal in Ex 209, p 43 provides an example of how this protection could come  
2 into effect:

3 “In order to clear merchantable timber from the property, YarrowBay must file for a  
4 Forest Practice Application (FPA) with the Department of Natural Resources (DNR).  
5 WAC Title 222-20 requires DNR to coordinate and cooperate with Washington  
6 Department of Fish & Wildlife (WDFW) in the review of the FPA. If WDFW has reason  
7 to believe that priority habitat or protected species may be threatened by the activity,  
8 WDFW must inform DNR. Similarly, the applicant of an FPA is directed to work with  
9 WDFW to identify critical habitats as identified by the board (WAC 222-30-020(10)). If  
10 the applicant did not comply with either WDFW direction, or the conditions imposed on  
11 the permit by DNR, DNR can take corrective action and enforcement pursuant to WAC  
12 222-46, which includes halting work and assessing fines.”

9 **Examiner Response:** *The City Council already considered bald eagle protection during MPD  
10 and EIS review and there has been no new information provided suggesting bald eagle  
11 protection needs to be addressed in the DAs. The Applicant’s assertions here are correct. Bald  
12 eagle habitat is protected in the Sensitive Areas Ordinance, BDMC 19.10.310(B)(2). Any  
13 impacts to bald eagle habitats would therefore be addressed during project implementation.  
14 Finally, LH MPD COA 153 and V MPD COA 149 both provide that impacts to sensitive areas  
15 will be addressed at project implementation on a case by case basis.*

14 3. Continuous Wildlife Corridor. Bortleson (Exhibit 113) asserted the Constraints Map  
15 (Exhibit G) needs to show a continuous wildlife corridor from the western boundary to northern  
16 boundary (The Villages) in order to meet V COA 125. Harris (Ex 140) also commented on the  
17 lack of connectivity of proposed wildlife corridors. King County (Ex 3-13b) also noted that  
18 plans for the Northern Corridor directly contradict other MPD documents (FEIS 3-71) and city  
19 code, especially BDMC 18.98.140(B), “Natural open space shall be located and designed to form  
20 a coordinated open space network ... provide connections to existing or planned open space  
21 networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD.”  
22 Erika Morgan (Ex 143) restated previous testimony that her private property at the east end of  
23 Black Diamond Lake on the eastern border of the MPD was apparently to serve as a wildlife  
24 corridor, yet was totally unsuitable for such use. Dan Streiffert, representing the Sierra Club, also  
25 noted the lack of sufficient connectivity in verbal testimony and Ex 56. Susan Dawson offered  
26 verbal testimony that designated wildlife corridors were insufficient to make up for habitat  
destruction.

23 **Applicant Response:** YB responded that Constraints Map does show 300 foot wildlife corridor  
24 extension from western edge of core-stream-wetland Black Diamond Lake complex to the  
25 western edge of the MPD site. YB contends that this extension is all that is required by V COA  
26 125 (Ex. 209).

25 **Examiner Response:** *V MPD COL 53 concludes that the MPDs satisfy the requirements of  
26 BDMC 18.98.140(B) and the constraints map depicts a 300 foot wildlife corridor as required by*

1 V COA 125. However, concerns identified above suggest some problems with the corridor  
2 system proposed for the MPDs. Any fish and wildlife habitat boundaries agreed to the Council  
3 under V COA 155 must comply with the City's sensitive areas ordinance. It is recommended that  
4 staff provide the Council an explanation, based upon the record, of whether the wildlife  
5 corridors comply with the City's Sensitive Areas Ordinance and that the corridor boundaries be  
6 revised as necessary if they do not. The suitability of some of the areas designated for wildlife  
7 corridors, as addressed by Ms. Morgan above, should also be addressed. If the corridors are  
8 consistent with the City's sensitive area ordinance requirements, the Council can probably only  
9 add additional corridor requirements in the DA with the voluntary agreement of YB."

7 The lack of delineated FWCA on the constraints map contributes to the inability to determine the  
8 adequacy of the wildlife corridors; in addition to the two extensions being provided by YB, the  
9 SAO-designated FWCA should be shown on the constraints map. The HE suggests that City staff  
10 prepare a map showing the FWCA's defined in the SAO along with the King County Wildlife  
11 Habitat Network. This map would be similar to combining Figure 4-2 in the Black Diamond  
12 Comprehensive Plan with Exhibit 4-10 in the V FEIS.

11 4. Wildlife and Habitat Protection Plan. Bortleson (Exhibit 113) asserts that the wildlife  
12 corridors are insufficient, and that a Wildlife and Habitat Preservation Plan should be included in  
13 the DA. Guidelines for the size, placement, and connections with on- and off-site habitats should  
14 be done in consultation with King County and other agencies with region-wide wildlife  
15 networks. Bortleson cites BDMC 18.98.155(B), 18.98.010(C) and 18.98.140(C) as authority for  
16 this request. Sierra Club (Ex 56) also endorsed a Wildlife and Habitat Preservation Plan, and  
17 stated that the DA fails to provide a high degree of connectivity with the wildlife corridor  
18 winding through Black Diamond Lake with no coordinated use of non-wetland habitat. Erika  
19 Morgan (Ex 143) also supported the need for a Plan to coordinate the MPDs with the City's  
20 Comprehensive Plan. Pat Pepper (verbal testimony) also endorsed a wildlife habitat protection  
21 plan.

18 **Applicant Response:** In Ex. 209, YB responded that the City Council found that MPDs  
19 satisfied the wildlife criteria at COL 6, COL 54, and COL 61 of the MPD Permit Approval  
20 Ordinances (Nos. 10-946 and 10-947).

20 **Examiner Response:** *As discussed in the previous Examiner response, the adequacy of the*  
21 *wildlife corridors in relation to the City's Sensitive Areas Ordinance should be addressed by*  
22 *staff.*

23 5. Fish & Wildlife Habitat Conservation Areas. One exhibit noted that Fish & Wildlife  
24 Habitat Conservation Areas (FHCWA) were not shown on the Constraints Map (Exhibit G). See  
25 Ex. 3-13e (Rimbos, et. al). Bortleson (Ex 113), in comments related to (5) above, also noted that  
26 the Development Agreement makes no direct mention of wildlife corridors in DA 8.2.2, yet  
states that the Fish and Wildlife Habitat Conservation Areas are deemed final and complete  
through the term of the agreement. Bortleson questioned if a wildlife corridor is intended to  
overlay the Black Diamond Lake wetland buffer; if so, an expansion of the core wetland complex

1 of at least 300 feet is recommended east of the Lake. This would fully meet the intent of V COA  
2 125 and meet BDMC 18.98.140(C). Erika Morgan (Ex 143) also noted the failure of YB to show  
3 Fish and Wildlife Habitat Conservation Areas on the Constraints Map.

4 **Applicant Response:** YB offered no specific response to Ex 3-13e. The response in (3) above  
5 would seem to apply here as well.

6 **Examiner Response:** *The Examiner offers the same recommendations for this issue as for the  
7 constraint map as discussed in the Examiner Response to (3) above.*

8 6. Impact on Fish Habitat. Karen Walter, Watersheds and Land Use Team Leader for  
9 the Muckleshoot Tribe (Ex 13-f,w), made several comments on the potential impact of the MPD  
10 Development Agreements on the Tribe's treaty protected fisheries resources. Most of these  
11 comments relate to water quality and surface water management issues and are summarized in  
12 that section. Two issues are addressed here:

- 13 a. DA 8.4 Alterations of wetlands and streams – The FEIS lack sufficient details and  
14 there are no details provided in the DAs. During the EIS process, the Tribe was  
15 informed that these concerns would be addressed during the MPD permit review  
16 process.
- 17 b. DA 9.3 Sensitive areas and buffers – Trails should be located outside of stream  
18 and wetland buffers since they reduce buffer functions for ecological processes  
19 and habitat.

20 **Applicant Response:** In Ex. 3-13q, YB responded that as regards alterations of wetlands and  
21 streams, the MPDs have been designed to minimize sensitive area impacts where ever possible.  
22 Roadways and utilities have been sited and designed to use existing stream crossings and avoid  
23 wetlands to the maximum extent. Any MPD Implementing Project that will result in impacts to  
24 sensitive areas or buffers will be subject to the review and mitigation standards of the Sensitive  
25 Areas Ordinance. As regards trails, YB responded that all future MPD Implementing Projects –  
26 including trails and recreation facilities – will be subject to the SAO (Ex. 209).

**Examiner Response:** *The City's Sensitive Areas Ordinance was adopted and found by the  
Council using best available science to adequately protect fishery resources. If the Council  
wishes to add additional mitigation measures to the DA, it will probably need the voluntary  
agreement of YB.*

23 7. General Loss of Habitat. Several exhibits expressed general concerns over the loss of  
24 wildlife habitat. See Ex 44 (Brazier), Ex 56 (Sierra Club), Ex 69 (Taeschner), Ex 81 (Stern), Ex  
25 107 (Davis), Ex 122 (Gibson), Ex (140) Harris. Verbal testimony relating to loss of habitat  
26 quantity and quality was provided by Jacqueline Taeschner, Robert Taeschner, Susan Dawson,  
and Brock Deady.

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

## 6 8.2 Sensitive Areas Determinations

7 1. Adequacy of Constraint Map. Several exhibits questioned the adequacy of the  
8 constraint map, in particular the scale, level of accuracy, and level of detail. See Exhibits 197  
9 (Schmidt), Exhibit 40 (Derdowski), Oral Testimony & Exhibit 150 (Cooke). Derdowski  
10 expressed concern that the constraint map was not sufficiently detailed to depict sensitive areas  
11 adequately, especially considering the mapped boundaries are deemed final and complete  
regardless of detailed surveys and construction level review in the future. Mr. Derdowski also  
asserted that Section 4.1 amends the land use map outside of the MPD process, and that sensitive  
areas and buffers may be changing. Expert witness Dr. Sarah Cooke, in verbal testimony, stated  
that she did not believe that the constraint maps provide sufficient detail to allow approval of the  
Development Agreements.

12 **Applicant Response:** The Applicant responded that the boundaries and categories of sensitive  
13 areas shown on the constraint map (Exhibit G) of each development agreement are based on field  
14 data as presented in The Villages and Lawson Hills FEIS. Section 2.3.2 of both Development  
15 Agreements provides that a full scale version of the map be kept on file with the City. Section  
16 4.1 of the Development Agreements does not amend the land use plan (Figure 3-1) and does not  
17 alter the sensitive area buffer widths applicable to the MPDs. The approved Land Use Plans for  
18 each development are included in Exhibit L of each Development Agreement. Sensitive area  
19 buffer widths, as established by the Sensitive Areas Ordinance, are shown on the Constraint  
20 Maps (Exhibit G) of each Development Agreement. Buffer areas and buffer widths in some  
21 areas are shown with greater accuracy than on earlier site plans. Buffers may only be modified  
22 from those shown in Exhibit G if allowed by and in compliance with the City's Sensitive Areas  
23 Ordinance and sought together with an implementing project application.

24 In response to various deficiencies raised by Dr. Cooke, the applicant submitted testimony from  
25 Scott Brainard, WRI.(Exhibit 210) Brainard concludes that the Constraint Maps are consistent  
26 with BDMC 19.10.210(B)(1), provide sufficient detail to meet the requirements of BDMC  
19.10.230 and make accurate review decisions when future Implementing Permit applications are  
submitted to the City.

27 The Applicant offered this response in summary:

28 "To the extent Ms. Cooke believes the Constraints Maps in Exhibit "G" and the  
29 Development Agreements fail to protect wetland resources because of an alleged lack of  
30 detail based on failure to include lot lines and building footprints, she is overlooking the  
31 way the City of Black Diamond requires MPD Development to be constructed. Future  
32 applications will be made for subdivisions and binding site plans to divide the MPDs'

1 Development Parcels into buildable lots. Those applications are required by both State  
2 law and City code to include surveys. Those surveys will reflect the surveyed wetland  
3 boundaries shown on the Constraints Maps in Exhibit "G" (which again, exists as a multi-  
4 page plan set at a much more legible scale in the City's offices). Thus, the MPDs' wetland  
5 areas will be protected."

6 **Examiner Response:** *It was not possible for the Examiner to view the constraint maps in the*  
7 *limited time to prepare this decision, given only one copy of the maps is available can only be*  
8 *viewed at City Hall. The maps were not presented during the hearings and they were too small*  
9 *to be subject to any meaningful review on the City's website. It is recommended that staff make*  
10 *the maps available for City Council review and explain to the Council, based on information*  
11 *contained in the record, the level of detail provided in the maps. In reviewing the maps the*  
12 *Council should keep in mind that the DAs are fixing most of the sensitive area boundaries for 15*  
13 *to 20 years. In that time frame the boundaries must be precise enough to establish the*  
14 *boundaries for project level development. If the boundaries do not meet this degree of precision,*  
15 *the Council should require that they be redone or provide that the boundaries set by the DAs are*  
16 *only approximate and shall be delineated at project level review.*

17 2. Early Delineation and Freeze of Wetlands Delineation. Several exhibits were  
18 concerned with the provisions of Section 8.2 of the Development Agreements that "freeze"  
19 wetland determination by deeming the wetland delineations and types final and complete. See  
20 Exhibits 3-13e (Rimbos, et. al), Exhibit 40 (Derdowski). Mr. Derdowski expressed concern that  
21 sensitive areas, especially wetlands, change over time and that the level of existing review was  
22 not as detailed as a project level review. He further expressed the opinion that the "freeze"  
23 would result in "profound SEPA problems since new data could not be considered." Expert  
24 witness Dr. Sarah Cooke, in verbal testimony, stated that if a new assessment were required at  
25 each stage that wetlands would be better protected.

26 **Applicant Response:** The applicant responded that the fixing of sensitive area boundaries is  
consistent with The Villages Conditions of Approval 155 and Lawson Hills Condition 159,  
which state that "[o]nce the mapped boundaries of the sensitive areas have been agreed to, the  
Development Agreement shall include text that identifies that these areas are fixed." With the  
exception of certain mine hazard areas, YB asserted that all sensitive areas described in Section  
8.2 of the Development Agreements received a full analysis and delineation matching the level of  
work conducted for site-specific permitting. Various appendices to the FESI and Exhibits to the  
Development Agreement describe in detail the work conducted. The applicant further responded  
that Mr. Derdowski failed to cite any specific provisions of state law, the BDMC, or federal and  
state regulatory agency rules that would preclude the City from fixing the sensitive area  
boundaries now.

**Examiner Response:** *V COA 155 and LH COA 159 provide that once sensitive area boundaries*  
*are agreed upon, they "shall" become fixed in the DA. The Council cannot do anything that*  
*conflicts with this provision. However, given the permanence of the boundaries the Council*

1 *should not agree to any boundaries unless they are as accurate as any boundaries that would be*  
2 *expected for an implementing project.*

3 3. Review of Wetlands Delineation. Several exhibits expressed concern that sensitive  
4 area delineation, and in particular wetland delineation, had not been subject to complete and  
5 required reviews. See Exhibit 3-13 (Rimbos, et. al.), Exhibit 138 (Derdowski), Ex. 139, att. 1  
6 (Brainard), Exhibit 150 (Cooke), Exhibit 270 (Cooke). Dr. Sarah Cooke, a wetlands ecologist,  
7 testified both verbally and in declarations that the wetlands delineation was inadequate and  
8 should have been reviewed by both the US Army Corps of Engineers (Corps) and the  
9 Washington State Department of Ecology (DOE).

10 **Applicant Response:** In response to the concerns raised by Dr. Cooke, the applicant offered  
11 detailed rebuttal comments in Ex. 210 by Scott Brainard, a wetland scientist from Wetland  
12 Resources, Inc. (WRI). In his comments, Brainard stated that the boundaries had been delineated  
13 by his firm and then subjected to peer review from the City’s consultant, Parametrix. He noted  
14 that both his firm and Parametrix looked at individual wetland flags, data, and wetland ratings  
15 forms and deemed them accurate. He further stated that the City’s regulations do not require  
16 wetland boundary review by either the Corps or DOE. Brainard continued that both WRI and the  
17 applicant fully understand that if wetland impacts are proposed as a part of any individual  
18 development activity, preconstruction notification will be required by the Corps, and that this  
19 process will involve the Corps and DOE reviewing the delineated wetland boundaries, Sensitive  
20 Area Studies, and Mitigation Plans.

21 In Ex. 270, Dr. Cooke called into question the accuracy of several statements pertaining to third  
22 party review. Dr. Cook noted that Parmetrix had acknowledged in its technical report, “Two  
23 biologists visited most of the accessible wetlands on the property.” In Dr. Cooke’s opinion, this  
24 does not constitute a thorough review that would be necessary for mapping wetlands whose  
25 boundaries would be without dispute for the next 15 to 20 years. Dr. Cook also asserted that YB  
26 had used an outdated manual to delineate the wetlands and the manual currently adopted by the  
Washington State Department of Ecology (“DOE”) would yield different results. In Ex. 270, Dr.  
Cooke also asserted that the wetland boundaries could have been much larger if the relationship of  
the wetland to off-site wetlands had been considered. She quoted from some comments from  
Parametrix that suggested that the some of the MPD wetlands are part of a larger system.

Mr. Brainard responded in Ex. 272 that the DOE has issued an advisory that the new manual  
should yield the same results as the manual employed by YB. Mr. Brainard explained that the  
current manual does not adopt new delineation criteria but only changes the procedures to assess  
compliance with the criteria. In Ex. 272 Mr. Brainard also referenced his comments in Ex. 139,  
att. 1, where he cites to field verified studies that show that the wetlands apparently referenced by  
Dr. Cook in her assertion that certain wetlands may be associated with off-site wetlands are in  
fact isolated wetlands.

**Examiner Response:** *The City Council is encouraged to review the declarations of Dr. Cooke  
and Mr. Brainard, given the permanence of the proposed sensitive area boundaries. All of the*

1 wetland experts involved in this issue are highly credible. In the end, deference must be provided  
2 to the findings of Parametrix, as they served as the only neutral reviewers in the process. The  
3 Examiner finds the delineations to comply with City regulations, subject to the verification of a  
4 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.

5 Dr. Cook and Mr. Brainard (on behalf of YB) had a significant disagreement on what  
6 delineation manual applied to the project. The City regulations to which the MPD vests governs  
7 the delineation criteria and methods for wetland boundaries. BDMC 19.10.210(A) requires that  
8 wetland must be delineated in accordance with the requirements of RCW 36.70A.175, 90.58.380  
9 and the Washington State Identification and Delineation Manual (1997). RCW 90.58.380  
10 requires DOE to adopt by rulemaking wetland delineation manuals. Consequently, YB would be  
11 required to use the delineation manual that was adopted by DOE at the time YB vested its MPD  
12 applications. In her declarations Ms. Cook indicates that the current DOE manual wasn't  
13 adopted by DOE until March, 2011. City staff should verify this, but it does appear that the  
14 DOE manual employed by YB was the version adopted by DOE at the time YB vested its MPD  
15 applications. If the incorrect manual was used, the Council should require use of the proper  
16 manual.

17 Another point of disagreement was apparently whether on-site wetlands are associated with off-  
18 site wetlands and this association could affect wetland boundaries. As noted above, Ms.  
19 Brainard referenced some Parametrix comments that apparently suggest on-site wetlands are  
20 associated because they are headwater wetlands. Mr. Bainard does not address the Parametrix  
21 comments directly, but instead cites to field verified studies that conclude that the on-site  
22 wetlands are isolated. It is unclear from the exchange of declarations between Dr. Cook and Mr.  
23 Bainard if they are discussing the same wetlands and what significance the Parametrix  
24 comments referenced by Dr. Cook have in that discussion. For the closed review by the Council,  
25 the parties should clarify these points using the information in the record. If there is any  
26 reasonable doubt that the buffer widths are inaccurate due to associations with off-site wetlands,  
the Council should require further review by Parametrix or some other third party reviewer.

Dr. Cook and Mr. Brainard devoted a large portion of their declarations discussing the need for  
regulatory approval by the Army Corps of Engineers and DOE. That is largely a nonissue  
because the MPDs will have to comply with DOE and Army Corps requirements whether  
addressed in the DAs or not. If Army Corps/DOE requirements result in a widening of buffers,  
YB will have to acquire an amendment to the MPD to accommodate those buffers and impacts of  
the change in those boundaries will be fully addressed through that amendment process.

4. Accuracy of the EIS. In Ex. 270 Dr. Cooke disputed the accuracy of the science used  
in the EIS for wetland impacts.

**Examiner Response:** The opportunity to challenge the adequacy of the EIS was provided during  
the MPD hearings, at which days of expert testimony from some of the most qualified experts in

1 *the state was considered at length by the Examiner and the City Council for a wide range of*  
2 *impacts addressed in the EIS. The Examiner issued a final ruling on the adequacy of the EIS in*  
3 *2010. That ruling cannot be contested this proceeding.*

4 5. Off-site Wetlands and Regional Hydrology. See Exhibit 3-13e (Rimbos, et. al.),  
5 Exhibit 113 (Bortleson), Exhibit 150 (Cooke), Exhibit 259 (Bortleson). Dr. Sarah Cooke, in  
6 Exhibit 150, expressed concern that insufficient work had been done on assessing impacts to  
7 groundwater systems. She noted that alterations in base flows could have serious impacts on  
8 protected wetlands.

9 **Examiner Response:** *The COAs do not require the DAs to address groundwater or wetland*  
10 *impacts beyond establishing wetland buffers. Any additional mitigation required of YB in the*  
11 *DAs would require the consent of YB. Consent would also probably be required for any*  
12 *mitigation that exceeds that required by the City’s Sensitive Areas Ordinance, since the Council*  
13 *determined that the Ordinance provides adequate protection for environmentally sensitive areas*  
14 *as dictated by best available science.*

15 6. LH Northern Triangle Wetland. In Exhibit 3-13, attachment 2, King County  
16 Department of Natural Resources and Parks noted a wetland buffer affects the western edge of  
17 the Northern Triangle (see “Sensitive Areas Map – North Triangle” on the final page of the WRI  
18 wetland study). This buffer is also repeated in the Lawson Hills EIS in Exhibit 2.2, but does not  
19 appear in Figure 10-3.

20 **Examiner Response:** *The Lawson Hills MPD DA S 2.3.2 notes the existence of a wetland off-*  
21 *site to the west of the North Triangle that was not fully delineated as of the date of the*  
22 *agreement. The WRI Wetlands report notes that this is a Category I wetland that will require a*  
23 *150 foot buffer. The Constraints Map needs to be updated to reflect the location of the wetland*  
24 *and the buffer before an Implementing Project can be approved.*

25 7. Functions and Integrity of Buffers. Several exhibits addressed concerns with the  
26 functions and integrity of buffers. See Exhibits 143 (Morgan), 150 (Cooke), 214 (Bryant), oral  
testimony (Cooke). Bryant asserted that the applicant’s use of Issaquah Highlands as an  
example of a project using early fixed wetland boundaries ignored the fact that the Issaquah  
Highlands wetlands protection was a failure. Exhibit 214 included a presentation by Dr. Cooke  
showing these alleged failures, many resulting from fallen or removed trees in wetland and  
riparian buffers.

**Applicant Response:** In Ex. 258, YB submitted testimony from Daniel Ervin, Project Engineer  
for the Issaquah Highlands MPD. Mr. Ervin rejected the idea that the use of fixed boundaries  
would lead to failure to protect wetlands. Mr. Ervin stated that “the fact that trees were coming  
down in windstorms had nothing to do with the fact that the wetland buffers, were fixed by the  
Development Agreement. Mr. Ervin also noted that the protections applied to wetland critical  
areas subject to the Issaquah Highlands Development Agreements were determined based on a  
mitigation program that included preservation of large tracts of open space, and not a surveyed

1 delineation based on sensitive area biological characteristics. In addition, the Issaquah Highlands  
2 tracts are governed only by the Development Agreement, while the Black Diamond MPDs will  
3 have the full protection of the underlying Sensitive Areas Ordinance.

4 **Examiner Response:** *As noted previously, the City’s Sensitive Areas Ordinance has been*  
5 *determined by the City Council to adequately protect wetlands. If the Council chooses to exceed*  
6 *the mitigation required by that ordinance, it will probably need to get voluntary consent from*  
7 *YB.*

8 8. Degradation and Encroachment into Sensitive Areas. Several commentators were  
9 concerned that Development Agreement provisions would allow excessive encroachment and  
10 degradation of sensitive areas. See Exhibit 3-13 (Rimbos, et. al.), Exhibit 40 (Derdowski), and  
11 Exhibit 205 (Derdowski). Mr. Derdowski asserted that Section 9.3 of the development  
12 agreements would allow trails, crossings and encroachments into sensitive areas as a blanket  
13 provision, in violation of the BDMC and other laws.

14 **Applicant Response:** YB responded that Section 9.3 does not authorize such a “blanket  
15 provision”, but only allows encroachment within sensitive areas if placement is consistent with  
16 the Sensitive Areas Ordinance (BDMC 19.10) and appropriate mitigation is identified per the  
17 ordinance.

18 **Examiner Response:** *As noted by YB, use of sensitive areas for various encroachments is only*  
19 *authorized to the extent permitted by the Sensitive Areas Ordinance. As previously discussed, if*  
20 *the Council wants to exceed the protections of the Sensitive Areas Ordinance it will need*  
21 *agreement from YB.*

22 9. Buffer Width Not Consistent with Protocols. Dr. Sarah Cooke, in verbal testimony,  
23 noted wetlands ratings and buffer widths on the constraints map are not consistent with Black  
24 Diamonds sensitive areas maps as required by Section 8.2.1. As an example, she noted the large  
25 wetlands system running from Jones Lake to Black Diamond Lake. Black Diamond code would  
26 require a 250 foot buffer for this wetland system, but the Development Agreements only assign a  
60 or 110 foot buffer. In Exhibit 143, Erika Morgan notes that marker indicating the “setback”  
(buffer) along the south side of Black Diamond Lake is near the edge of a cliff leading down to  
the lake, and indicates that there should be a setback from the cliff, even if there weren’t a lake  
below. Ms. Morgan estimates this “cliff” as an “80 degree slope that raises (sic) at least 110  
feet”.

**Examiner Response:** *Due to technical difficulties an addendum will be forthcoming to address*  
*this issue.*

10. Requirements of COAs and DA Contents. The majority of comments provided on  
erosion and siltation centered on details and mitigation called for by the COAs not being present  
or evident in the DAs. See Exhibits 3-13e, 56, 113, 117, 132, 139, 143, 209, 250, and 269. The  
concerns were separated out by COA as follows:

- 1 a. COA 71 requires that the MPDs include an erosion and sediment control plan  
2 including strict erosion control measures and a detailed emergency response plan  
3 in the case that mitigation fails;
- 4 b. COA 104 prohibits grading during the “wet season” per BDMC requirements;
- 5 c. COA 105 requires in some instances that stream banks shall be protected from  
6 disturbance;
- 7 d. COA 110 requires an overall grading plan prior to the submission of the first  
8 implementing project.
- 9 e. COA 112 requires that stormwater and groundwater shall be managed to prevent  
10 slope instability.
- 11 f. COA 117 requires that structural measures such as silt fences and temporary  
12 sediment ponds be used to avoid discharging sediment into wetlands and other  
13 critical areas.
- 14 g. COA 119 regulates stormwater outfalls to avoid impacts to environmentally  
15 sensitive resources.

16 **Applicant Response:** YB responded to these comments in two separate exhibits, Ex. 139 and  
17 209. However, their answer was largely the same for all cases, stating that the COAs do not  
18 require the DAs implement the COAs, rather that these requirements will be enforced upon  
19 submittal of implementing proposals to the City. Regarding grading in the “wet season,” YB  
20 argues that there are stipulations in the City’s Engineering Design and Construction Standards  
21 and COA 104 to allow for wet season grading activities, provided certain requirements are met.

22 **Commenter Rebuttal:** In exhibit 269, Mr. Bortleson responded to YB’s responses, stating that  
23 while he understands COAs 104, 110, 112, 71, and 119 do not directly encumber the DAs, he  
24 requests that the information he originally requested in Ex. 113 be included for the purposes of  
25 specificity and for informative purposes.

26 **Examiner Response:** *None of the COAs identified above require that they be implemented into  
the DAs. The Council would need to acquire voluntary approval from YB to include them.*

11. Additional Mitigation and Requirements. A number of commenters requested  
additional requirements and/or mitigation for perceived erosion effects of the projects. See  
exhibits 56, 117, 132, 139, 150, 205, 210, 250, and 254. The individual requests included the  
following:

- a. Sensitive areas should not only be field marked, but also protected by temporary  
barriers and silt fencing (Ex. 40 and 138);

- 1           b. The DA's should include a Wetland Preservation Plan detailing construction  
2 mitigation via fencing and other protective methods (Ex. 56);
- 3           c. Greater measures than silt fencing for slopes and streams should be required (Ex.  
4 117);
- 5           d. Erosion control plans should be reviewed by a third party prior to approval (Ex.  
6 132 and 250);
- 7           e. Grading during the wet season should be required to adhere to a pre-development  
8 monitoring plan (Ex. 132 and 250);
- 9           f. The DAs should include specific requirements for erosion and wetland/buffer  
10 impacts, not just state the requirement that they occur (Ex. 150);

11 Exhibit 150 (item f.) was provided by Ms. Sarah Cooke, a certified Professional Wetland  
12 Scientist.

13 **Applicant Response:** YB responded to the issue of silt fencing and barriers in Ex. 139, stating  
14 that these measures were not listed specifically because implementing projects must be consistent  
15 with the City Engineering Design and Construction Standards Sections 2.2.02.6, 2.3.01.2, and  
16 2.6.2, which require "appropriate fencing and erosion controls" for any projects in the vicinity of  
17 sensitive areas. The original commenter, Mr. Derdowski, rebutted in Ex. 205, stating that the  
18 City Engineering Design and Construction Standards do not sufficiently detail monitoring and  
19 corrective actions for damage to sensitive areas.

20 Regarding the requested inclusion of erosion impacts to wetlands and buffers (item f. above),  
21 Scott Brainard, a certified Professional Wetland Scientist, responded to the commenters concerns  
22 in Ex. 210, stating that application of the City's SAO would be adequate to address any impacts  
23 to wetlands from erosion.

24 **Examiner Response:** *FOF 13 states that application of the City's SAO will be adequate to  
25 address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns  
26 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. The  
deficiencies cited by the commentators are not specific to any unique attributes of the MPDs but  
address the adequacy of the City's standards in general. If the City sees need to revise its  
development standards, it exempt the standards from DA vesting requirements to the extent they*

1 address erosion control and subsequently investigate additional requirements that, when  
2 adopted, would apply to any subsequently vested MPD implementing projects.

3 12. Sensitive Areas and the DAs. One commenter, Mr. Peter Rimbo, stated in Ex. 3-13e  
4 that the DAs should address and identify sensitive areas, including erosion hazard areas, in DA  
5 8.2.

6 **Examiner Response:** *DA 8.2 requires that sensitive areas be identified and marked in the field  
7 at the time of construction consistent with the City's sensitive areas ordinance. BDMC  
8 19.10.020 and 19.10.120 require a sensitive areas permit review for any permits that would  
9 occur within or adjacent to sensitive areas. BDMC 19.10.130.A requires the submittal of a  
10 sensitive areas report with any such permit application. BDMC 19.10.130.D.2.a requires that a  
11 sensitive area report contain a map to scale showing sensitive areas and their buffers. As such,  
12 sensitive areas will be mapped and identified at the implementing project stage, as required by  
13 the SAO.*

14 13. Landslides Caused by Erosion. Ms. Alice Baird asserts in Ex. 57 that the impacts of  
15 erosion leading to slope failure must be addressed for the MPDs prior to approval of the DAs.

16 **Examiner Response:** *Ms. Baird has not provided any new information beyond what was  
17 already considered during the original EISs preparation and MPD approvals. MPD FOF 14  
18 states that no evidence beyond personal opinion was provided that the MPDs would result in  
19 significant landslide impacts and that application of the SAO would be adequate to address  
20 landslide hazards. COA 112 requires that stormwater and groundwater be managed to avoid  
21 increases in overland flow and infiltration that could lead to slope failure. The potential for  
22 landslides to occur as a result of erosion appears to have been addressed, but if the Council  
23 concludes differently it can seek voluntary agreement from YB for additional DA requirements.*

24 14. Wet Season Definition. Ms. Erika Morgan states in Ex. 143 that the term “wet  
25 season” is too vague as it regards grading restrictions, and that a fixed date for such a season  
26 ignores differences in ground conditions in any given year.

**Examiner Response:** *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.*

15. MPD-Wide Consideration of Impacts. Ms. Llyn Doremus, licensed hydrogeologist,  
states in exhibits 144 and 254 that consideration of stormwater mitigation at the implementing

1 project stage is inappropriate given the scale of the MPDs and the fact that the EISs were  
2 “general” in nature and did not include adequate specificity of analysis. She goes on to say that  
3 the DAs general statements of guidelines and goals is inadequate and that specific calculation of  
and mitigation for stormwater effects should be included in the DAs.

4 **Examiner Response:** *Stormwater impacts, including erosion, were addressed in the MPD EISs*  
5 *(V EIS, pp. 3-58 to 3-60, 4-10; LH EIS, pp. 3-54 to 3-55, 4-10). FOF 7.J found that the MPDs*  
6 *would comply with the DOE Stormwater Manual as required by the BDMC. Furthermore, FOF*  
7 *13 and 14 found that the SAO would address any impacts to wetlands or stormwater effects*  
8 *which could cause erosion and landslide. The findings are not in dispute, nor has Ms. Doremus*  
*provided any new technical information that would indicate that stormwater impacts that were*  
*previously unaddressed would occur. As for her assertion that the DAs should include specific*  
*mitigation measures, see Concern 1 above.*

### 9 8.3 Alteration of Geologically Hazardous and Landslide Hazard Areas

10 1. Mapping of Mine Hazards. Several exhibits voiced issue with the clause in DA 8.2.3  
11 stating that the maps of mine hazards are final and complete. See Exhibits 3-13e, 3-13n, 34, 45,  
12 113, 124, 143, and 249 as well as the verbal testimony of Mr. Steve Pilcher, Dr. Chris Breeds,  
13 Ms. Pat Pepper, Ms. Cindy Wheeler, and Ms. Carol Lynn Harp. Commenters mentioned  
14 possible missing information due to small mines (Ex. 3-13e), recommended the use of “earth  
15 scanning” technology to find unknown mines (Ex. 143), and pointed out that some areas on the  
16 hazard map (DA Exhibit G) were marked “approximate” (Ex. 249). One exhibit was submitted  
17 by Dr. Chris Breeds, president of SubTerra, Inc., a geotechnical engineering firm (Ex. 45). Dr.  
18 Breeds stated that mine hazards would be significant and suggested additional requirements for  
19 the MPDs, including additional subsurface exploration and peer-review of mine hazards  
20 analyses. Dr. Breeds further stated “freezing” the maps as they are now ignores that fact that  
21 actual mine hazards may exist in different areas than currently mapped and that hazard areas are  
22 known to change as subsurface conditions shift. Dr. Breeds stated that mapping of low-hazard  
23 areas would not likely require additional mitigation as those areas are well marked. His concern  
24 was with the moderate- and high-hazard areas.

25 Most of the exhibits cited above stated similar concerns that freezing the mine hazards mapping  
26 at this point, without additional mine hazard information, could cause an unanticipated mine-  
related hazard.

27 **Applicant Response:** The Applicant responded to this issue with additional testimony provided  
28 by Mr. James Johnston, a geotechnical consultant (Exhibit 139, attachment 4). As part of Mr.  
29 Johnston’s rebuttal of these arguments (above), additional language was proposed for DA 8.2.3,  
30 allowing that some mapped zones were not certain and the classification of those areas might  
31 change as an exception to the “classification” of mine hazard areas. The modified text is as  
32 follows (shown in strikethrough/underline format):

33 Mine hazard areas for The Lawson Hills MPD were evaluated in the EIS's Appendix D  
34 and are shown on the Constraints Maps. ~~These~~ Subject to the exceptions described below,

1 these mine hazard areas for The Lawson Hills MPD as surveyed on 7/27/09, including the  
2 High Mine Hazard area buffer which the Master Developer mapped to protect even  
3 though such a buffer is not required in the City's Sensitive Areas Ordinance, BDMC19.10  
4 (Exhibit "E"), are deemed final and complete through the term of this Agreement.  
5 Pursuant to Condition of Approval No, 159 of the MPD Permit Approval, except as  
6 provided below, if during construction it is discovered that the actual boundary is smaller  
7 or larger than what was mapped, the mapped boundary shall prevail.

8 As of the time of execution of this Agreement, the mine hazard area boundaries for the  
9 following areas have been generally agreed to by the Designated Official, but additional  
10 subsurface exploration and analysis is necessary in order to further evaluate: (1) the  
11 location and extent of the Macks Mine hazard area near the northern end of the Project  
12 Site; (2) the mine hazard boundary for the McKay Section 12 Surface Mine and older  
13 underground mines beneath it; and (3) the width of the Moderate Mine Hazard zone  
14 above the Lawson Mine. Additional work to identify the Macks Mine hazard zone, the  
15 McKay Section 12 area, and the width of the Moderate Mine Hazard area for the Lawson  
16 Mine was described in the MPD materials as to be conducted pursuant to the standards  
17 set in the City's Sensitive Areas Ordinance, BDMC19.10 (Exhibit "E"). That work will be  
18 conducted together with Implementing Project applications involving Development in or  
19 near these locations, and will define the nature and extent of those mine hazard areas.  
20 Once the boundaries of (1) the location and extent of the Macks Mine hazard zones near  
21 the northern end of the Project Site; (2) the location of the hazard zone for the McKay  
22 Section 12 Surface Mine and older underground mines beneath it; and (3) the width of the  
23 Moderate Mine Hazard above the Lawson Mine have been agreed to, these boundaries  
24 shall also be fixed.

25 Finally, based on the level of surface exploration, historical document review, and mine  
26 exploration work conducted at the Project Site, it is unlikely that any new mine hazard  
27 areas will be discovered outside those areas mapped and referenced in this section.  
28 However, in the event that a new mine hazard area is discovered during Development,  
29 that area will be assessed and protected pursuant to the City's Sensitive Areas Ordinance,  
30 BDMC19.10 (Exhibit "E"). Any additional work provided with Implementing Project  
31 applications shall be reviewed by an independent qualified third-party reviewer as part of  
32 the MORT review process described in Exhibit "N", at the Implementing Project  
33 applicant's expense, to perform peer review of mine hazard reports.

34 **City Response:** Mr. Steve Pilcher of the City testified the establishment of sensitive areas  
35 boundaries now was appropriate because they had been thoroughly analyzed in the EISs.

36 **Examiner Response:** *As discussed by the exhibits above, mine hazard mapping was conducted  
37 as part of technical studies prepared for the Lawson Hills EIS (Appendix D). However, the  
38 original reports regarding mine hazard areas expressed limitations to the analysis for some  
39 mines (including the Macks Mine) based on property access and other factors (EIS Appendix D).*

1 *FOF 15 states that the findings of the EIS are sufficient and that any mine hazards will be*  
2 *adequately addressed by application of the City's Sensitive Areas Ordinance (SAO). Four COAs*  
3 *were included which dealt with mine hazards, stating that additional mitigation may be required*  
4 *in moderate mine hazard areas (to be evaluated at the implementing project stage), mandating*  
5 *the use of flexible utility lines above mine hazard areas, designation of severe mine hazard areas*  
6 *as open space and requiring that roads and utilities avoid these areas as much as is feasible,*  
*required conformance with BDMC 19.10 (Sensitive Areas), and a requirement that homeowners*  
*in hazard areas sign a release indemnifying the City from any liability related to mine hazards*  
*(Villages COAs 114-116, Lawson Hills COAs 114-118).*

7 *The DA language in question not only states that the mine hazards areas are deemed "final and*  
8 *complete" but also includes a stipulation that if the "actual" boundary is smaller or larger than*  
*what was mapped, the mapped zone will prevail.*

9 *According to FOF 15, mine hazards have been sufficiently addressed. The EIS indicated specific*  
10 *areas of mine hazards consistent with the technical studies. However, substantial areas of*  
11 *uncertainty were included in the mine hazards reports appended to the EIS. The technical*  
12 *reports as well as the expert testimony of Dr. Breeds indicate that additional borings and study*  
13 *are required in order to determine if the mine hazards areas are accurate. The issue as to*  
14 *whether portions of known mines have collapsed or not, a variable which directly affects the*  
*area of potential hazard, is unresolved. Experts have argued both sides of that issue. Further*  
*contributing to this uncertainty is the expert testimony by Dr. Breeds, which states that illegal*  
*coal mining may have occurred in the project vicinity and such mines would not be mapped.*

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

19 *While comments have been received that the fixing of hazard area maps in the DA is*  
20 *inappropriate, COA 159 fixes the mapped boundaries of sensitive areas once they have been*  
21 *agreed to. As for the comment from Dr. Breeds that peer-review of future mine hazards studies*  
22 *should be conducted for the MPDs; the funding agreement attached to the DAs as Ex. N allows*  
*the City to hire consultants for peer review per their discretion. Furthermore, the changes to the*  
*DA proposed by the project proponents specifically calls for peer review of mine hazard studies.*

23 *The revised conditions proposed by YB go a long way in addressing the issues raised by Dr.*  
24 *Breeds by (1) requiring further investigation in all the areas to which Dr. Breeds stated he had a*  
25 *concern; and (2) requiring reapplication of the Sensitive Areas Ordinance if any new mine*  
26 *hazards are discovered during "Development". It appears that YB probably intended this term*  
*to denote any time during development of the MPDs, but it could be construed as only allowing*  
*mine hazards to be re-delineated when a hazard is discovered while actually out in the field*

1 *undertaking a construction activity. In order to remove any ambiguity, “development” should be*  
2 *replaced by “during the term of this Agreement.” The language proposed by YB should also be*  
3 *clarified to provide that no implementing project within an affected area will be approved until*  
4 *agreement is reached on the mine hazard boundaries and that if a new “or more severe” mine*  
5 *hazard area is discovered that there will be a reevaluation of the sensitive area boundary.*

6 *With the replacement of the term “Development” as suggested above, the Hearing Examiner*  
7 *recommends the Council adopt the revisions suggested by YB.*

8 2. Mitigation and Requirements. A few exhibits regarded additional or expanded  
9 mitigation and/or requirements that should be included in the DAs. See exhibits 3-13e, 107, 117,  
10 and 143. Comments included:

- 11 a. What mitigation is available for mine hazards?
- 12 b. “Checkpoints” should be set at every stage and for every approval for the MPDs,  
13 including the DAs, which require that mine safety concerns be addressed.
- 14 c. Required setbacks from mine hazard areas.
- 15 d. Required establishment of the “largest possible” buffers between land uses and  
16 mine hazard areas.

17 **Applicant Response:** In regards to setbacks (items c. and d. above), YB stated setbacks are  
18 included in the DAs, as shown on Exhibit “G” of the DAs (see Ex. 209).

19 **Examiner Response:** *As discussed under Concern 1 above, the protection of mine hazard areas*  
20 *by the use of buffers is and will continue to be subject to extensive review and assessment. The*  
21 *issue of mine hazard areas has been subject to significant review and YB has agreed to modify*  
22 *the DAs to require more analysis and mitigation as outlined in Concern 1. FOF 15 indicated*  
23 *(among other assertions) that application of the City’s Sensitive Areas Ordinance, used to set the*  
24 *permanent buffers addressed in Concern 1 above, will ensure that issues related to mine*  
25 *hazards are adequately addressed. The comments summarized in this concern did not provide*  
26 *any new information that would suggest that any additional mitigation is necessary.*

27 3. Expansion Parcels and Mines. Two exhibits concerned section DA 10.5.2, stating  
28 that because the addition of expansion parcels is allowed as a minor amendment, such an action  
29 could incorporate unidentified mine hazard areas, such as the “Lake 12 Area,” without applying  
30 normal project review to those areas, including SEPA. See Exhibits 3-13e and 3-13i.

31 **Applicant Response:** A similar concern (not related to mines) was stated by Exhibit 71. In their  
32 response to that exhibit, YB cites DA 10.5.1 (see Examiner response below).

33 **Examiner Response:** *DA 10.5.1 provides that the addition of any expansion parcels will*  
34 *require a minor or major amendment, as required by the MPD regulations, that the review*

1 process will involve the submission of updated constraints map and will trigger additional SEPA  
2 review. The amendment process will involve a full assessment of mine impacts pursuant to the  
3 City's sensitive areas ordinance. No additional protections appear necessary at this time. V  
4 COA 134 and 162 require the DAs to detail the application process for addition of expansion  
5 parcels, so the City may reasonably require additional provisions to be added if it chooses.

6 4. Sensitive Areas and the DAs. One commenter asked why DA 8.2 does not include  
7 mine hazards in the discussion of sensitive areas standards. See exhibit 3-13e.

8 **Examiner Response:** Section 8.2.3 of the DAs specifically addresses mine hazards.

9 5. Unspecified General Statements. Three exhibits concerned general statements about  
10 mine hazards without giving any specific concerns or adding significant new data. See Exhibits  
11 96 and 143 and the verbal testimony of Ms. Johna Thompson. These general comments are  
12 summarized in the following:

- 13 a. Support for "all testimony" with concerns about abandoned mine shafts (Ex. 96);
- 14 b. Dismissing mine hazards will result in significant safety impacts to the City and  
15 its residents (Ex. 143); and
- 16 c. Support for the project and an assertion that the project proponents' have  
17 adequately researched and addressed mine hazard impacts (Ms. Johna Thompson).

18 **Examiner Response:** The adequacy of mine hazard mitigation has already been discussed.

19 6. Release Forms. Exhibit 37 included a statement that requiring the signing of release  
20 forms by future residents of the MPDs, indemnifying the projects from litigation related to mine  
21 hazards, indicates that such hazards are significant and violates the requirements of RCW  
22 36.70b.170(4). Ms. Cindy Wheeler, the author of Ex. 37, also gave verbal testimony to this  
23 effect. However, she referenced potential issues with a different state statute, RCW 36.70b.104  
24 [sic].

25 **Applicant Response:** YB stated in Ex. 139 that the signing of these release forms is a  
26 requirement of COA 116 for the Villages and COA 118 for Lawson Hills. Furthermore, the  
project proponent points out that the releases indemnify the City, not the developer or the project  
proponents, from liability associated with mine impacts, as Ex. 37 asserted.

**Examiner Response:** YB is correct in that V COA 116 and LH COA 118 requires these waivers.  
As for the first RCW mentioned by the commenter, RCW 36.70b.170(4) states that a development  
agreement "shall reserve authority to impose new or different regulations to the extent required  
by a serious threat to public health and safety." The DAs include language in Section 15.1 to  
this effect, consistent with the requirements of the RCW.

1           7. Open Space and Mine Hazard Areas. One commenter stated that buffers required for  
2 mine hazard areas should not count towards open space. See exhibit 197.

3 **Applicant Response:** In their response to this concern (Ex. 139), YB points out that  
4 environmentally sensitive areas and their buffers are included in the definition of “open space”  
5 provided by the Municipal Code (BDMC 18.98.140.A). Furthermore, they assert COA 116 for  
6 the Lawson Hills MPD allows the designation of these areas as open space.

7 **Examiner Response:** *LH COA 116 states that the most severe mine hazard areas shall be*  
8 *designated as open space. As The Villages MPD does not include any severe mine hazard areas,*  
9 *the approval for that MPD does not include such a COA. Additionally, BDMC 18.98.140.A*  
10 *expressly states that MPDs may designate “environmentally sensitive areas” and their buffers as*  
11 *open space. It goes on to say that such areas do not have to be integrated into a public trail or*  
12 *park system, as long as the area is required by the Sensitive Areas Ordinance (which includes*  
13 *mine hazard areas). As such, the response of YB is correct and the designation of buffers as*  
14 *open space cannot be revised in the DA.*

15           8. Schools and Mines. One commenter asked whether schools are planned within mine  
16 hazard areas. See Exhibit 125.

17 **Examiner Response:** *According to Exhibit 4-6 of the Villages EIS, and compared to Exhibit A*  
18 *of the DA, all of the areas identified for school construction in the Villages MPD are well outside*  
19 *identified mine hazard areas. As for the Lawson Hills MPD, the proposed school site lies outside*  
20 *(though adjacent to) a severe mine hazard areas.*

21           9. Classification of Mine Hazards and the BDMC. In her verbal testimony, Ms. Pat  
22 Pepper asked that the moderate mine hazard areas identified in DA 8.2.3 be reclassified as severe  
23 areas in the event that new information becomes available, pursuant to the definitions of such  
24 areas in BDMC 19.10.430.

25 **Examiner Response:** *The proposed new language for the DA presented in Concern 1 as revised*  
26 *by YB and the Examiner should address the concerns of Ms. Pepper.*

#### 8.4 Hazardous Tree Removal

1           1. Tree Removal. Several exhibits concerned about removal of trees and the associated  
2 visual impact that would occur. See exhibits 3-13e, 124, 126, 209, and 252. The stated concerns  
3 break down into three issues: (1) contesting the removal of hazard trees in open space areas as  
4 they provide habitat; (2) concern for the overall impact of removing a large number of trees  
5 during construction; and (3) concern that the removal of trees in development setbacks will have  
6 visual impacts.

7 **Applicant Response:** The Applicant responded to concerns regarding removal of trees in  
8 development setbacks, citing the requirements of BDMC 18.72.030 which, in the case vegetation

1 in the setbacks are removed, requires planting of “dense, evergreen vegetation to provide a visual  
2 screen.” The Applicant did not respond to the remaining issues.

3 **Examiner Response:** *Regarding the removal of hazard trees, V COA 86 and LH COA 87*  
4 *require that the DA include a process for “selectively” removing hazard trees while retaining*  
5 *the function of a native forest. DA Section 8.4 provides a process and rationale for removal of*  
6 *hazard trees, including the ability to leave removed hazard trees as snags and deadwood for the*  
7 *purpose of providing habitat. The concerns of the public appear to be addressed, but the*  
8 *Council is free to require reasonable additional DA terms since the COAs require the DAs to*  
9 *address hazardous tree removal.*

10 *Regarding the overall removal of trees and their visual effects, the visual effects of tree removal*  
11 *were addressed in the EISs and no mitigation was proposed (V EIS, pp. 3-65 through 3-67; LH*  
12 *EIS, pp. 3-61 through 3-64). Furthermore, the City’s tree preservation ordinance regulates the*  
13 *removal of trees. Regarding the removal of trees in development setbacks, BDMC 18.72.030*  
14 *only requires a dense evergreen vegetated screen between residential and non-residential uses.*  
15 *As the commenter’s property is residential, and as the project uses adjacent to his property are*  
16 *residential, the requirements of BDMC 18.72.030.F.2 would not apply. However, the MPDs will*  
17 *conform to the tree preservation ordinance (FOF 20) requiring that trees in buffers and open*  
18 *space be retained (BDMC 19.30.060.C.2). Furthermore, DA 4.5 requires that development on*  
19 *parcels adjacent to areas outside the MPDs conform to the City’s MPD Framework Design*  
20 *Standards and Guidelines (the “MPD Design Standards”). The MPD Design Standards include*  
21 *a requirement that multi-family and non-residential uses include a minimum 25-foot “dense*  
22 *vegetative buffer” when located along the MPD boundary. The commenter’s property is located*  
23 *adjacent to a proposed high-density residential area, ensuring that such a buffer will be included*  
24 *(V DA Appendix A).*

25 *As discussed above, the City’s regulations, MPD COAs and proposed DA provisions provide*  
26 *significant protection against the impacts of tree removal and fully implement the requirements*  
27 *of the V COA 86 requirement to include a process for removal of hazardous trees within the DA.*  
28 *The Council is free to require other hazardous tree removal conditions that it reasonably*  
29 *considers are necessary to the DA. As to conditions affecting the removal of other trees, the*  
30 *Council would need to acquire voluntary approval from YB.*

## 9.0 Parks, Open Space and Trail Standards

### 9.1 Overall Open Space Requirement

31 1. Total Amount of Open Space and the 50% Requirement. Several comments in the  
32 public testimony and a number of exhibits expressed concern about the amount of open space,  
33 and in particular if the amount of Open Space was consistent with the 50% requirement as  
34 indicated in the Black Diamond Comprehensive Plan (5-14 MPD overlay criteria 7), BDMC  
35 18.98.140(F), and the MPD Framework and Design Standards and Guidelines (General  
36 Principles and Site Planning (B) Using Open Space as a Design Element, p4). See Exhibits 15  
(McElroy), 56 (Sierra Club), 117 (Schmidt), 143 (Morgan) and 209 (Nelson), Exhibits 199, 239

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

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

7 **Applicant Response:** YB responded at length (Ex. 139), stating both MPD open space  
8 percentages were approved as part of the MPD (DA Exhibit L and LH MPD COA 145). BDMC  
9 18.98.140(A) defines open space to include "environmentally sensitive areas and their buffers."  
10 Only portions of the MPDs are subject to the 50% Open Space requirements contained in BDMC  
11 18.98.020. Open space percentages of the MPD areas subject to prior agreements are governed  
12 by the specific provisions of those agreements. DA 2.2 describes the amount of Open Space that  
13 each MPD must provide based on the City's Open Space and the requirements of prior  
14 agreements.

15 The Applicant cited Exhibit 8, their guide to development. The MPDs are subject to the  
16 requirements of prior open space agreements plus the 50% open space requirement for those  
17 portions of the MPDs not subject to the prior agreements. Open Space within the MPD  
18 perimeters is not the only Open Space that is being protected and preserved as a result of the  
19 MPDs. The Villages MPD and Lawson Hills MPD will provide 505 acres and 153.3 acres,  
20 respectively, of Open Space within their perimeters. Open Space provided for The Villages  
21 exceeds the amount required by the DA. When taken together, the total amount of Open Space  
22 that has been dedicated or will be dedicated associated with the MPDs is 1895.3 acres, or 67% of  
23 all MPD-related land being retained as Open Space.

24 **Examiner Response:** *V MPD COL 57 and 58 and LH COL 57 and 58 determined that the open  
25 space proposed in both MPDs satisfies prior agreements and the 50% requirement of BDMC  
26 18.98.140(F). That issue can no longer be revisited.*

27 2. Location, Type and Boundaries of Open Space. Several exhibits were concerned that  
28 the location, type, and boundaries of Open Space were too easily changed, resulting in a risk of  
29 loss of Open Space values. See Exhibit 10 (Taylor), Exhibit 73 (Morgan), Exhibit 113  
30 (Bortleson), Exhibit 143 (Morgan), Exhibit 75 (Edelman), Exhibit 117 (Schmidt.), verbal  
31 testimony Les Dawson. Some were concerned that Open Space changes need public input and  
32 should be subject to the Major Amendment process.

33 **Applicant Response:** YB responded that Open space boundary modifications require a Minor  
34 Amendment to the MPD Permit Approval and shall not modify Open Space requirement in Sec  
35 9.1 of the Development Agreements. BDMC 18.98.100 (D) and (I) contemplated minor  
36 amendments to open space, provided minimum threshold amount is not decreased and locations  
are not significantly altered. Approval of Minor Amendment is a Type 2 decision under BDMC  
18.08.125; see Sec 12.6.1(A) of Development Agreements.

1 Development Parcel acreage can only be changed with an Implementing Project application,  
2 subject to noticing requirements in BDMC 18.08.120-.180; see Sec 12.6.1 of the DA.

3 **Examiner Response:** *As recommended in 1(b) of the land use issue of concern, the Examiner*  
4 *is recommending that the any changes in the boundaries to any land use boundaries in the Land*  
5 *Use Plan, including open space boundaries, be subject to districts that result in a change of*  
6 *more than 5% are subject to an MPD amendment. Similar to what was concluded in land use*  
7 *issue of concern 4b, the DA 4.4.4 allowance for open space boundary changes by minor*  
8 *amendment will not result in any significant impacts if 4.4.4. is clarified to provide that the*  
9 *change can only be processed as a minor amendment if it meets all the requirements in BDMC*  
10 *19.98.100( E), which includes the requirement that the amendment not increase any adverse*  
11 *environmental impacts.*

12  
13 3. Additional Open Space – Lawson Hills. One exhibit expressed concern that DA 9.1  
14 did not comply with LH MPD COA 145, which stated that an additional 14.8 acres of Open  
15 Space shall be added to the LH MPD Land Use Plan by the DA or that the DA provide a plan for  
16 its inclusion. See Exhibit 61 (Edelman). Mr. Edelman further argued that Section 9.1 of the  
17 Development Agreement falls short of this requirement and the footnote to Table 9-1 fails as a  
18 “plan”.

19 **Applicant Response:** In its response in Exhibit 209, YB notes that 9.1 provides the plan  
20 required by Condition 145 by designated Parcels L1 and L2 to be designated as open space  
21 (which total 5.5 acres) and that LH DA 9.1 requires the remaining 9.3 acres required by COA  
22 145 is accounted for by the following language in 9.1: “Each Implementing Project on the  
23 Lawson Hills Main Property shall account for how much Open Space has been provided  
24 throughout the MPD, how much Open Space is being proposed with the Implementing Project,  
25 and how much remaining Open Space is required to be provided. When the final Implementing  
26 Project is proposed, all remaining Open Space shall be provided prior to approval of the final  
Implementing Project.”

**Examiner Response:** *The plan leaves the potential for YB to defer adding the remaining 9.8*  
*acres to a final implementing project that does not have any property suited to accommodate*  
*quality open space of that size. DA 9.1 should be revised to provide that in the specified project*  
*by project review of open space needs the City may require an earlier implementing project to*  
*accommodate the open space if there is a potential that property suited for open space will not*  
*be available in later implementing projects.*

## 9.2 Park and Open Space Plan

1. Park Construction Timing/Phasing. Several exhibits expressed concerns over the  
timing of park construction in DA 9.2. See Exhibit 10 (Taylor), Exhibits 40, 138 (Derdowski).  
Brian Derdowski in Exhibit 40 noted that Section 9.2 delays the construction of parks until  
Certificates of Occupancy are issued for 60% of each Phase (30% of Phase 3). Derdowski  
asserted this provision violates the BDMC (no citation provided) and is “extremely poor policy.”

1 **Applicant Response:** In Ex. 209, YB noted the Derdowski assertion overlooks the additional  
2 requirement that parks are required to meet level of service standards. Section 9.2 provides that  
3 the Master Developer may elect to build parks in advance of the triggers in the subsection. DA  
4 9.2 stated, “Parks within each Phase of [the] ... MPD shall be constructed or bonded prior to  
5 occupancy, final site plan or final plat approval of any portion of the Phase, whichever occurs  
6 first, to the extent necessary to meet park level of service standards for the Implementing  
7 Approval or Project.”

8 **Examiner Response:** *DA 9.2 requires that parks be completed or bonded prior to occupancy,  
9 final site plan or final plat approval, whichever occurs first. As noted by YB, the 60%/30%  
10 occupancy requirement only applies to bonded park improvements. DA 9.2 mirrors the  
11 requirements of V and LH COA 97, except that V and LH COA 97 don't identify when bonded  
12 park improvements must be constructed. Consequently, the Council is not tied down to the  
13 60%/30% DA proposal and can negotiate alternative timing. However, the COAs do not  
14 expressly defer the issue of timing to the DAs so it is debatable whether the Council can require  
15 YB to agree to alternative timing. The Council may wish to negotiate an outside time limit, such  
16 as the earlier of 60%/30% or two years.*

17 2. Bonding v. Construction, Implementation Plan. Exhibit 73 (Hoefig) raised two  
18 additional concerns related to bonding and in-lieu payments. Ms. Hoefig asserted that DA 9.2 is  
19 inadequate and needs to be: (i) clarified to understand if the intent is to have parks constructed  
20 and bonded or constructed or a bond issued in-lieu of construction, and (ii) revised to require an  
21 implementing development plan from the City (emphasis added) in regards to all lump-sum  
22 payments in-lieu. Taylor (Exhibit 10) and Hoefig (Exhibit 73 and verbal testimony) expressed  
23 concern that there was no overall implementing plan or timetable for city construction.

24 **Applicant Response:** YB responded that The Villages Conditions of Approval 95 and 96 and  
25 Lawson Hills Conditions 96 and 97 require that parks and trails be “constructed or bonded prior  
26 to occupancy, final site plan, or final site approval, whichever occurs first.” The conditions  
require construction or bonding, but not both. Section 9.2 of the Development Agreements  
provides that “parks within each phase . . . shall be constructed or bonded prior to occupancy,  
final site plan or final plat approval of any portion of the Phase, whichever occurs first, to the  
extent necessary to meet level of service standards for the Implementing Approval or Project . . .  
Parks must be completed when the Certificates of Occupancy or final inspection has been issued  
for 60% of the dwelling units located within ¼ mile of a given park in any Phase.” The effect is  
that the Development Agreement is more restrictive than the Conditions of Approval.

**Examiner Response:** *This is no ambiguity in the DAs about bonding verses “in lieu” payments.  
DA 9.2 clearly addresses bonding for deferred construction.*

### 9.3 Sensitive Areas and Buffers

1. Vegetative Buffers. In Ex. 126 Tom Hanson stated that he would like to see  
vegetation retained in MPD perimeter setbacks. He has a home along the setback.

1 **Applicant Response:** The Applicant responded they have voluntarily offered to provide a 50-  
2 foot wide vegetative buffer on the eastern boundary of The Villages MPD Development Parcel  
3 V13. See p. 14-15 of the Guide (Exhibit 8) and Exhibit A of the Development Agreement. The  
4 Applicant stated their plan is to leave existing vegetation on the Project Site where feasible and  
5 practical. Should there be a necessity to remove existing vegetation, landscaping would be  
6 provided consistent with BDMC 18.72.030, which requires dense, evergreen vegetation to  
7 provide full visual screening.

8 **Examiner Response:** *Natural vegetation is retained along large portions of the MPD perimeter  
9 in MPD open space and that the remaining perimeter is subject to setbacks of varying widths.  
10 The Hanson property is one of several on the northeast portion of the main MPD site where a  
11 35-foot buffer is required and the applicant has offered a 50-foot buffer. YB has addressed the  
12 concerns of Mr. Hanson. If the solution is acceptable to the Council, it should be incorporated  
13 into the DA.*

#### 14 9.4 Non-Sensitive Open Space

15 1. Inclusion of Wetlands, Sensitive Areas, and Stormwater Facilities in Open Space.  
16 Exhibit 117 (Schmidt) objected to the inclusion of sensitive areas in open space acreage, arguing  
17 that the MPD Overlay in Black Diamond Comprehensive Plan, June 2009, at 5-14, lists as  
18 designation criteria 7 that: “at least 50% of the MPD site is devoted to open space uses, which  
19 may include recreational amenities.” As recreational amenities are not allowed in sensitive areas,  
20 these areas should not be included as Open Space. Exhibit 138 (Derdowski) asserted that Section  
21 9.4 would allow stormwater facilities to be considered Open Space, even if inundated 9 months  
22 of the year, and that this violated the intent of the BDMC.

23 **Applicant Response:** YB responded that BDMC 18.98.140(A) defines open space to include  
24 “environmentally sensitive areas and their buffers.” The DA cannot be found noncompliant for  
25 complying with the City’s code. As to stormwater facilities, BDMC 18.98.140(A) allows  
26 stormwater detention/retention ponds to be counted as Open Space, provided they “have been  
developed as a public amenity and incorporated into the public park system.” V MPD COA 69  
and LH MPD COA 71 specifically require that stormwater facilities must be “suitable for active  
recreational use during at least 3 months of the year” to be considered by the City to be Open  
Space.

**Examiner Response:** *The Applicant is correct that sensitive areas may qualify as open space,  
since BDMC 18.98.140(A) expressly allows this. BDMC 18.98.140(A), as a zoning code  
provision, would supersede any conflicting comprehensive plan provision. Citizens of Mount  
Vernon v. City of Mount Vernon, 133 Wn.2d 861 (1997). As to stormwater detention/retention  
ponds qualifying as open space, V MPD COA 69 and LH MPD COA 71 set the parameters for  
open space designation and they cannot be revisited. However, they do provide discretion to  
include a nonexclusive number of factors in designating open space areas. This leaves room for  
the Council to treat inundated areas differently than those that are not. In general the Council  
probably doesn’t want to require added amenities for areas that are more frequently inundated.*

1 *There are other options. For example, the DA could provide that if a retention/detention facility*  
2 *is inundated for more than six months out of the year it may only qualify as active open space if*  
3 *it is adjoined by highly developed active space that is dry year round, such as a tennis or*  
4 *basketball court.*

## 5 9.5 Recreation and Useable Open Space Standards

6 1. Open Space Credit for Lake Sawyer Park. In oral testimony and Exhibit 73, Sheila  
7 Hoefig expressed concern that the provisions of DA 9.5.3, “appear to have opened the back door  
8 for the take-over of the Lake Sawyer Regional Park (LSRP).” The LSRP is currently  
9 undeveloped and, with the exception of the boat launch, used passively. Ms. Hoefig further  
10 stated the Development Agreement contemplates giving the Developer Open Space credit for  
11 offsite replacement and that if such placement was at the LSRP, it would allow publicly owned  
12 land to meet the developer’s obligation to purchase open space. Use of LSRP as a heavily used  
13 active park was not anticipated in the FEIS. Ms. Hoefig requested the Development Agreement  
14 be modified to prohibit use of LSRP for Open Space credit.

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

20 **Examiner Response:** *The Hearing Examiner agrees DA 9.5.2 does not authorize YB to acquire*  
21 *an open space credit for the construction of active recreational facilities on LSRP. The Council*  
22 *is not required to maintain the LSRP as passive because it was assessed as passive in the EIS.*  
23 *Changes to the LH MPD proposal could trigger additional environmental review, such as an EIS*  
24 *addendum, but the decision as to whether and what additional review is necessary is left to the*  
25 *City’s SEPA responsible official and is not subject to review by the Examiner or Council. The*  
26 *COAs leave room for the Council to require that the DA exclude LSRP as a receiving site for*  
*Recreational Facilities.*

27 2. Level of Service Standards. Exhibit 40 (Derdowski) expressed concern that the level  
28 of service (LOS) for recreational facilities is based on population generation rates that are  
29 unsubstantiated and standards that are not suitable for the Master Planned Developments.

30 **Applicant Response:** The Applicant responded that parks and recreation LOS standards were  
31 directly derived from adopted standards in the City’s Park and Open Space Plan (12/18/2008).  
32 Population rates were included in the FEIS, previously deemed adequate. (See Exhibits 1-4 of  
33 Chapter 1 of each FEIS.)

34 **Examiner Response:** *The population generation rates used in S 9.5.4 are the same rates used*  
35 *in Appendix A of each FEIS and serve as a credible, consistent estimate for assessing*  
36 *compliance with LOS standards.*

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

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

11 V MPD COA 94 and LH MPD COA 92 do not require a definition of either location or  
12 percentage (limits) to off-site placements. However, these concerns are addressed at DA 9.5.1  
13 through level of service requirements. The section provides that all MPD dwelling units shall  
14 have access to and be located within ¼ mile of a park that is at least 1500 square feet in size.  
15 Compliance with this condition will effectively limit off-site park construction.

16 **Examiner Response:** *The Examiner concurs in the YB responses as summarized above. V*  
17 *MPD COA 89 requires the DAs to provide details on what parks may be constructed off-site.*  
18 *The Council is free to require the addition of further restrictions on distance and percentage to*  
19 *the DA, although since the COAs contemplate off-site facilities they cannot be completely*  
20 *prohibited.*

21           4. In-Lieu Payments. Several exhibits expressed concerns over the lump sum or fee-in-  
22 lieu option for construction of off-site recreation facilities. See Exhibit 10 (Taylor), Exhibit 40  
23 (Derdowski), Exhibit 60 (Dawson), Exhibit 73 (Hoefig), Exhibit 108 (Wheeler), Exhibit 113  
24 (Bortleson), Exhibit 143 (Morgan). Derdowski felt that the fee-in-lieu procedure would pre-empt  
25 legislative authority. Dawson, Bortleson, and Morgan all expressed concerns that there appeared  
26 to be no limits to the use of fee-in-lieu payments. Wheeler objects to the in-lieu decision being  
made by the “Designated Official” rather than through the City Council.

**Applicant Response:** YB responded that The Villages Conditions of Approval 91-93 and  
Lawson Hills Conditions 93-95, in addition to contemplating off-site recreational facilities,  
require the City and the Developer to re-evaluate fee in-lieu values for park facilities as part of  
the Development Agreements. As noted above, the City retains sole discretion to determine if  
recreational facilities may be constructed off-site and if fee in-lieu payments will be accepted.

The Villages Condition of Approval 94 and Lawson Hills Condition 92 provide that “details  
regarding the timing and construction and optional off-site construction or payment of fee in-lieu  
of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be  
specified in the Development Agreement.” Neither the conditions language nor the BDMC  
require a public hearing prior to the City accepting a lump sum payment for any of the facilities  
listed in Table 9-5. Subsection 9.5.3 provides the sufficient details for in-lieu payments required

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

3 **Examiner Response:** *The DA provisions provide enough standards to legally delegate*  
4 *decisions about in-lieu payments to City staff. If the Council chooses, it is free to require that the*  
5 *DA provide that the Council make the final decision and also that a public hearing will be held*  
6 *prior to making the decision.*

7 5. Failure to Account for Future Costs Increases. Three exhibits express concern that  
8 the proposed fee in-lieu program is inadequate under The Villages Condition 91 because they fail  
9 to provide a mechanism to account for increases in construction costs for facilities built in the  
10 future.” See Exhibit 60 (Dawson), Exhibit 113 (Bortleson), Exhibit 143 (Morgan).

11 **Applicant Response:** YB responded that Section 9.5.3 of the Development Agreements  
12 describe a process for establishing fee-in-lieu based on published bid request. Bids will be  
13 solicited each time a fee-in-lieu request is made by the Master developer (provided the City  
14 grants approval). This process will automatically reflect increases in cost as required by  
15 Condition 91.

16 **Examiner Response:** *The bid process described by YB provides appears to provide a sound*  
17 *means of ensuring that lump sum payments will be adequate to pay for park facilities. DA 9.5.3*  
18 *only allows the City to deposit any funds supplied by YB once a contract is executed, which*  
19 *means that construction costs will be locked at that point. Further, YB is required to match the*  
20 *amount of the accepted bid. There do not appear to be any deficiencies in this process, but if the*  
21 *Council finds any they are free to reasonably require the DA to address them, since V COA 91*  
22 *requires DA to address the issue.*

## 16 9.6 Trail Plan

17 1. Trail Connections. Two exhibits express concern that the Development Agreements  
18 fail to satisfy The Villages Condition of Approval 95. See Exhibit 113 (Bortleson), Exhibit 143  
19 (Morgan), Exhibit 3-13b (Starbard), verbal testimony Pat Pepper. Bortleson asserted that the  
20 Development Agreement lacks conceptual plans for providing connections to current and future  
21 local and regional trails, and that no trails are shown in the North Triangle (Figure 9.2). Starbard  
22 also notes the need for a Northern Triangle trail, and cites connectivity claims in the MPD and  
23 requirements for connections in BDMC 18.98.140.B and p. 3-71 in the FEIS. Morgan adds that  
24 the Development Agreement falls short of providing a trail from The Villages to the City’s  
25 historic district as envisioned by Comprehensive Plan Policy CF-6.

26 **Applicant Response:** YB responded that the cited Condition does not require the requested  
trail connections, but stated that V COA 95 requires that “...on-site trails (i.e., on the site of the  
implementing project) shall be constructed or bonded prior to occupancy, final site plan, or final  
plat approval, whichever comes first. Off-site trail connections shall meet the same standard to  
the extent authorized by law.” Section 9.6 of the Development Agreements is consistent with  
Condition 95 as it provides that the “construction of trails located outside of the Project Site that

1 are necessary to achieve connectivity may be required by the City prior to the issuance of a  
2 certificate of occupancy, final plat approval, or final site plan approval for an Implementing  
3 Project to the extent authorized by law.” Thus, the connections requested by the commentators  
above will be addressed at the Implementing Project stage.

4 **Examiner Response:** *V COA 95 sets the limits on what may be required on the issue of trail*  
5 *connections. However, trail connectivity is certainly a critical part of trail function. The City*  
6 *Council may wish to pursue some additional voluntary terms that assure that trails have full*  
7 *connectivity, such as requiring that prior to approval of the final implementation project for a*  
8 *phase that YB complete construction of any trail portions necessary to achieve full connectivity*  
*within that particular phase. As an additional condition, or in the alternative, the Council could*  
*pursue a condition that requires YB to complete any trail gaps that exist for more than x years*  
*between the ends of a constructed trail system in any one phase.*

9       20. Trails Built by Implementing Project. Exhibit 40 (Derdowski) expresses concern that  
10 Section 9.6 of the Development Plans would allow the Trails Plan to be built on an implementing  
11 project basis, thus defeating the intent of interconnectivity provision of a regional trail system for  
many years.

12 **Applicant Response:** YB responded that Section 9.6 of the Development Agreements  
13 incorporates MPD Condition 95 (The Villages) and Condition 96 (Lawson Hills). These  
14 conditions require that trail construction be completed on an implementing project basis as  
proposed in each MPD Permit application.

#### 15                   9.7     Trail Standards

16       1. Sizes of Recreation Facilities and Trails. Exhibit 75 (Edelman) asserted that the  
17 Development Agreements fails to meet the requirements of BDMC 18.98.150(B), which stated  
18 that “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  
19 maintenance.”

20 **Applicant Response:** In Ex. 209, YB responded that the sizes of the recreational facilities and  
21 trails are defined in the City’s Parks, Recreation and Open Space Plan contained in Exhibit E of  
22 the Development Agreements. Where the MPD recreation facilities listed in Table 9-5 “go above  
and beyond” the City’s Code to provide amenities, additional definitions are found in Section  
14.0 of the Development Agreements (Definitions). Sizes of trails are described in Section 9.7.

23 **Examiner Response:** *The DA should be clarified to provide that the City’s Parks, Recreation*  
24 *and Open Space Plan shall govern park design standards to the extent that stricter standards are*  
25 *not imposed by the DA. With this clarification the detail of design requirements appears to be*  
*sufficient for this level of review, but the Council is free to require the addition of additional*  
*reasonable design standards if it chooses.*

1           2. Trail Amenities. In Ex. 40 Brian Derdowski asserted that Development Agreement  
2 9.7.3 makes trail “amenities” like restrooms and drinking fountains “subject to veto” by YB.  
3 Mr. Derdowski asserted that trail amenities should be specified and required.

4 **Applicant Response:** In Ex.139, YB responded that no requirement has been cited in the  
5 BDMC, MPD Permit Approval, or Washington State law that requires any specific trail  
6 amenities be identified within the Development Agreements.

7 **Examiner Response:** *V COA 89 requires the DA to address the details of park facilities to be*  
8 *included in the DA, so the Council could specify what types of amenities are required for the*  
9 *trails. However, if the amenities are not required in the City’s parks plan of other developers,*  
10 *the City may have some legal problems in requiring that of YB. If the Council would like to*  
11 *require YB to agree to the amenities identified in DA 9.7.3 it should consult with the City*  
12 *Attorney. Of course, the Council is always free to see if YB will voluntarily agree to such a*  
13 *requirement.*

## 14                           9.9     Ownership and Maintenance

15           1. Ownership and Protection of Open Space. Several exhibits were concerned about the  
16 manner and timing of protection that would be provided to open space and sensitive areas. See  
17 Exhibit 75 (Edelman), Exhibit 113 (Bortleson), Exhibits 40, 138 (Derdowski). Derdowski  
18 argued DA 9.9.1 makes dedication optional for sensitive areas and feels that such dedication  
19 should be mandatory. Edelman asserted that the Development Agreements fail to meet The  
20 Villages Condition 152 and Lawson Hills Condition 156 which require, in part, “language that  
21 specifically defines when the various components of permitting and construction must be  
22 approved, completed, or terminated. For example; when must open space be dedicated...” The  
23 Exhibit also cites The Villages Condition 153 and Lawson Hills Condition 157 which requires  
24 “Specific details on which open space shall be dedicated to the city, protected by conservation  
25 easements or protected and maintained by other mechanisms...” be included in the Development  
26 Agreement. He contends that the specific detail language requires that these decisions be  
included in the Development Agreement, and not left to future decision.

**Applicant Response:** YB responded DA 9.9.1 provides that ownership and maintenance of  
sensitive areas and buffers must be consistent with the requirements of the Sensitive Areas  
Ordinance. YB asserted, without code citation<sup>5</sup>, that the SAO allows these mechanisms for  
preserving sensitive area tracts:

- Held in undivided ownership by all lots with the MPD;
- Dedicated to the City or other governmental entity;
- Protected with conservation easements; or

<sup>5</sup> YB appears to be referring to BDMC 19.10.150(B), although this only applies to subdivisions.

- Conveyed to a non-profit land trust.

YB asserted that making easements (or dedications) mandatory would be inconsistent with City code.

**Examiner Response:** *It is disquieting that sensitive area boundaries for the entire project are set by the DAs while the manner of its dedication is left open to be addressed on a piecemeal basis during project implementation. Gaps in dedication could conceivably arise in the dedication of sensitive areas because some portions cannot be clearly attributable to any specific project. The Hearing Examiner recommends DA 9.9.1 be revised to require a dedication plan either for the entire MPD before any project implementation or that a plan be approved by the City at some designated point for each MPD phase. The revision should provide that no implementing projects will be approved until the plan is completed and approved within the timeframes required by the DA.*

*The Hearing Examiner does not agree the SAO necessarily leaves the manner of dedication to the property owner. BDMC 19.10.150(B)(1), which applies to sensitive areas in subdivisions, provides that a sensitive area “may” be subjected to the types of ownership interests as outlined by YB above. It does not expressly provide that the property owner makes that determination and its interpretation is partially dependent upon how the City has applied it in the past, which is not information provided in the record. The mode of dedication should be subject to the approval of the City, if the City Attorney determines that the City has this authority.*

2. Public Access. Exhibits 73 (Hoefig) and 75 (Edelman) questioned the provision of required public access to recreational facilities. Mr. Edelman also alleged that Section 9.9.3 of the Development Agreements improperly delegates authority to city staff, or “Designated Official.”

Exhibit 73 (Hoefig) requested several new conditions related to the current topic:

- “That the developer shall not be given open space credit for Lake Sawyer Regional Park now or in the event of any off-site improvements under the Development Agreement.”
- The Development Agreement shall explicitly state what happens to the property that was designated to be a park/recreation facility if off-site planning is used. Is it left natural, or is it landscaped.”
- If the City accepts money from the developer in lieu of parks the money should be held in a dedicated capital Parks Fund for each development; the money should first be used within the development from which it was received to insure that our city receives those parks.”
- “The Development Agreement shall have [i] A constraint map that shows all parks, trails, and recreational facilities that the applicant has current existing site

1 control of and that is properly zoned; [ii] An initial open space and parks  
2 compliance matrix (excel spreadsheet of similar data sheet) that reflects all the  
MPDs required open space, parks, trails and recreational facilities...”

3 **Applicant Response:** YB responded (Ex. 209) that DA 9.9.3 stated that “Pursuant to Condition  
4 of Approval No. 94 ... public access is authorized to all Parks and trails unless otherwise  
5 determined by the Designated Official.” (Emphasis added.) This is a reference to the same  
6 authority that City Staff currently has to close access to any other park for security or other  
7 reasons. BDMC 9.86.230 provides the authority to City Staff to promulgate and adopt  
reasonable rules and regulations pertaining to park operations. YB responded requested  
8 conditions (ii), (iii), and (iv) reflect requirements not contained within the MPD conditions of  
9 approval. Requested condition (i) is discussed in Credit for Lake Sawyer Park.

10 **Examiner Response:** *DA 9.9.3 authorizes public access to public parks unless otherwise  
11 determined by the Designated Official as precisely required by COA 94. The Council cannot  
12 alter this requirement without amending the MPD COA. As to proposed condition (i), as  
13 previously discussed, YB is not entitled to any open space credit for adding recreational facilities  
14 to Lake Sawyer Regional Park. No clarification is necessary in the DA on this issue. LH COA  
15 94\_\_\_ and V COA 89 requires the DA to provide details of the parks and recreational facilities  
16 that will serve the MPDs, so the Council can require condition (ii) to be added to the DA if it  
17 chooses. The COAs do not require the information requested in conditions (iii) and (iv) so this  
18 can only be added to the DA with the consent of YB.*

#### 14 9.10 Park Characteristics

#### 15 11.2 Phasing of Improvements

16 1. Phased Approval. M. Bertsch (Ex. 3-13o) commented in opposition to the proposed  
17 development agreement concerning allowing YB a full approval of all its construction without  
18 the opportunity to see what it does with a smaller amount of the housing and surrounding impact  
19 to the community. A smaller amount of development should be approved, and then award  
another parcel to be developed.

20 **Examiner Response:** *The MPDs as a whole have already been approved and the MPD COAs  
21 do not contemplate Mr. Bertsch’s phased approach to development. Consequently, YB would  
22 have to consent to such an approach as a supplementary condition and that consent would be  
23 very unlikely. The MPDs necessitate several regional infrastructure improvements that could  
24 not be planned or funded if full build out was subject to the uncertainties of Mr. Bertsch’s  
25 approach. Further, monitoring requirements for infrastructure such as traffic and infrastructure  
26 provide, in part, the adaptive management principles that underlie Mr. Bertsch’s proposal.*

#### 24 11.5 Transportation Regional Facilities

### 25 OVERVIEW

1 Transportation issues accounted for over a fifth of the Development Agreement (DA) hearing  
2 testimonies. Major issues revolved around the transportation demand model, concurrency,  
3 impacts to Green Valley Road, and others. The Hearing Examiner recommends a change to the  
4 Traffic Monitoring Plan to clarify the City’s authority with respect to the Transportation Demand  
5 Model. The Hearing Examiner also recommends a change in the Traffic Monitoring Plan to  
6 reflect implementation project level concurrency review.

## 7 BACKGROUND

8 Transportation was a major point of public concern in the hearings for the Final Environmental  
9 Impact Statements (EIS) and the Master Planned Development Approvals (MPDs). As a result  
10 the City Council chose to require the creation of a new transportation demand model that would  
11 go into effect upon the issuance of building permits for 850 dwelling units. A model prepared  
12 under the FEIS would be used prior to that point (V MPD COA 11-14, 17 and LH MPD COA  
13 10-13, 16). As will be discussed below, a large proportion of the public testimony for the DA  
14 approvals relate to the structure, timing and use of the FEIS/MPD and the new transportation  
15 demand model that applies upon issuance of the 850 building permits.

16 A major public concern expressed within the DA hearings surrounded the concept of  
17 concurrency. Concurrency is a Growth Management Act (GMA) requirement that prohibits  
18 cities and counties from approving development projects unless those projects are served by  
19 adequate traffic infrastructure. Under RCW 36.70A.070(6)(b), concurrency requires local  
20 jurisdictions to:

21 *“Prohibit development approval if the development causes the level of service on a  
22 locally owned transportation facility to decline below the standards adopted in the  
23 transportation element of the comprehensive plan, unless transportation improvements or  
24 strategies to accommodate the impacts of development are made concurrent with the  
25 development.”*

26 Concurrent with the development means that “improvements or strategies are in place at the time  
of development, or that a financial commitment is in place to complete the improvements or  
strategies within six years.” The City is obligated by the GMA to find that each project (in the  
DA parlance, each Implementing Action) complies with concurrency. Concurrency is defined as  
meeting level of service as supported by projects funded and included on the City's six-year  
Transportation Improvement Plan.

Another background issue is the relationship of transportation mitigation proposed as part of the  
MPD with surrounding jurisdictions including WSDOT, King County, and the cities of Maple  
Valley and Covington. The MPD approval required the Applicant and Staff to work in a spirit of  
cooperation with the surrounding jurisdictions (V MPD COA 11 and LH MPD COA 10). The  
MPD approval requirements also set a list of required mitigations for various Black Diamond and  
regional intersections in surrounding jurisdictions (V MPD COA 15 and LH MPD COA 14).  
With respect to the City of Maple Valley, an alternative list of mitigation measures and cost-

1 sharing agreements was required, should Maple Valley choose not to appeal or challenge the  
2 MPD or DA approvals (V MPD COA 16 and LH MPD COA 15). Separate mitigation  
3 agreements, which supersede the MPD list of mitigation agreements, have been signed with both  
4 the City of Maple Valley (DA Exhibit Q, dated October 6, 2010) and the City of Covington (DA  
5 Exhibit, dated December 14, 2010). The MPD require the DAs to define the responsibilities and  
6 pro-rate shares for the cumulative transportation mitigation projects (V MPD COA 19 and LH  
7 MPD COA 18). The Applicant is also required to include a Transportation Monitoring Plan as  
8 part of the DAs with trigger mechanism for the required mitigation and timing for  
9 commencement of engineering and design phases for proposed improvements (V MPD COA 20,  
10 25 and LH MPD COA 19, 24). The MPD specifically omit the requirement to provide a timeline  
11 for the commence construction activities for mitigation measures within the state right of way (V  
12 MPD COA 20 and LH MPD COA 19).

13 The final significant background issue pertains to Green Valley Road and the proposed Southern  
14 Connector. The City is concerned about the number of residences being served by a single  
15 access point. Therefore, the Council placed a condition requiring construction of a secondary  
16 access point (the Southern Connector) after no more than 300 residential units have been  
17 permitted (V MPD COA 27, 28 and LH MPD COA 26, 27). In response to extensive public  
18 comment on the potential impacts of the MPD on Green Valley Road, and specifically with the  
19 potential proximity of the Southern Connector to Green Valley Road, the Council chose to  
20 include a condition of approval requiring the Applicant to commission a traffic calming study for  
21 Green Valley Road and form a committee to discuss the issue (V MPD COA 33, 34 and LH  
22 MPD COA 32, 33). The DAs deal with the majority of the transportation issues in DA Section  
23 11 and DA Exhibits F, P, Q and R.

## CONCERNS

24 Many major and minor themes with respect to transportation and traffic emerged as part of the  
25 DA hearing process. Major themes were related to the transportation demand model in use by  
26 the City, the concept of concurrency with respect to the timing, effectiveness and funding of  
transportation mitigation strategies, and the impact on Green Valley Road. Minor themes  
included the impact of construction traffic, non-motorized uses, greenhouse gasses, and the use  
of transit and vehicle trip reduction schemes.

Comments related to transportation were present in over a fifth of the total testimony<sup>6</sup>. Of the 42  
separate commenters on the topic of Traffic and Transportation, Mr. Peter Rimbo was the most  
prolific (Ex. 13d, 13e, 118, 145, 224, 226, 247, and 262). Mr. Rimbo is a Boeing engineer in  
their modeling section. He is also the chair of a working advisory group to the City. In total, Mr.

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<sup>6</sup> See Exhibits King County (Ex. 13b, 51, 244), Peter Rimbo (Ex. 13d, 13e, 118, 145, 224, 226, 247, 262), 13h, 13p,  
13s, 13u, 13v, 15, 19, 30, 35, 39, 40, 44, 51, Sierra Club (Ex. 56, 80, 82-86, 88-93, 100-106, 112, 114, 119, 134,  
140), 57, 58, 59, Greater Maple Valley, Four Creeks and Upper Bear Creek Unincorporated Area Councils (Ex. 63,  
115), 66, 70, 75, 81, 87, 98, 107, 116, Lisa Schmidt (Ex. 117, 197), 120, Michael Irrgang (Ex. 121, 137, 242), 123,  
129, Judith Carrier (Ex. 130, 186, 246), 141, 143 and verbal testimony from Robert Taeschner, Dan Streiffert, Tim  
Gould, Steve Heister, Karen Meador and Brock Deady.

1 Rimbo provided 207 unique comments on the DAs; 144 were in reference to the transportation  
2 demand model and related concurrency issues. King County (Ex. 13b. 51, 244), Michael Irrgang  
3 (Ex. 121, 137, 242), Robert Edelman (Ex. 75), Lisa Schmidt (Ex. 117, 197, 249) Bruce Early  
4 (Ex. 87), Judith Carrier (Ex. 130, 186, 246) and Brian Derdowski (Ex. 40) each also provided a  
5 significant quantity of comments related to transportation.

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1. Transportation Demand Model.

- a. Revisions to Current Model through 850 Dwelling Units. As described in the  
Background section above, there is a transportation demand model in current use.  
This model is the same model used for the FEIS and MPD Applications. The  
MPD Conditions of Approval (MPD COA) required the creation of a finer-  
grained, more updated transportation demand model. The new model is being  
developed and will not be applied until 850 dwelling units have been permitted.  
Nine commenters; including Mr. Rimbo (Ex. 13d, 13e, 118, 145, 224, 226, 247,  
262), King County (Ex. 13b, 51), Mr. Irrgang (Ex. 121, 137, 242), and five others  
(Ex. 15, 35, 59, 63, 87, 141) presented concerns regarding the transportation  
demand models in use for the MPD. Many of these concerns centered on a desire  
to have the new transportation demand model created, put through a peer review,  
calibrated, and validated prior to approval of the DAs and/or any implementing  
projects—rather than at the 850 unit threshold set by the MPD COA.

**Applicant Response:** YB’s response to the majority of the timing concerns was  
to note the MPD COA does not require the use of the new model until permits for  
850 dwelling units have been issued (Ex. 139). The Applicant noted the FEIS for  
both MPDs, and the existing transportation demand modeling contained within  
them, were deemed adequate, and were adopted by the City Council (Ex. 189).  
They further argued through the MPD approval ordinances that the Council found  
the MPDs consistent with the City’s code, the Black Diamond Comprehensive  
Plan, and the GMA. The Applicant contended the MPD conditions of approval  
(MPD COA) were adopted as part of the MPD permit approvals and cannot be  
contested as part of the DA hearings (Ex. 189).

**City Response:** The City responded to this issue by stating the Examiner has no  
jurisdiction to either revise to recommend revision to the City Council’s adopted  
conditions of MPD Permit approval. The purpose of this hearing process is to  
determine whether the DAs incorporate the terms and conditions of MPD Permit  
approval (Ex. 218).

**Examiner Response:** *Both YB and the City are correct; in that the issue at hand  
is whether the DAs adequately implement the MPD Conditions of Approval.  
Changes to the MPD Conditions of Approval are not the focus of this hearing  
process and would require a Major Amendment to the MPD—a process that is  
separate from this hearing process. Should the City choose to include any*

1                   *calibration or validation of the model used prior to 850 dwelling units in the DA*  
2                   *it will need the voluntary approval of YB.*

- 3           b. Modeling Assumptions. Twelve commenters testified regarding the  
4           transportation demand model modeling assumptions. Mr. Rimbo and King  
5           County were the major contributors with respect to this issue, but many others  
6           provided input (Ex. Rimbo, King County, Sierra Club, Carrier, Irrgang, 35, 75,  
7           87, 115, 117, 123, and verbal testimony from Steve Heister). Commenters  
8           requested the inclusion of several additional intersections and roadway sections  
9           beyond those considered in the FEIS/MPD model. Commenters also made  
10           specific requests regarding the modeling assumptions related to queue length,  
11           volume/capacity ratios, internal trip capture rates, background traffic growth  
12           assumptions, trip generation rates, mode split, and others. Many of the  
13           commenters were concerned about the calibration and validation of the new  
14           model.

15           **Applicant Response:** YB argued there is no need to include supplemental  
16           conditions regarding the modeling assumptions because the MPD COA spell out  
17           the requirements for the new model in V MPD COA 14 and 17, and LH MPD  
18           COA 13 and 16 (Ex. 139). Kevin Jones of Transpo Group, representing the  
19           Applicant and citing the Hearing Examiner Conclusion of Law No. 11 from the  
20           MPD, also noted the analysis of queue lengths “should occur at the specific traffic  
21           improvement stage and not in conjunction with the new transportation model”  
22           (Ex. 139 attachment 6, Letter from Kevin Jones, the Transpo Group, Response  
23           Brief of the Villages and Lawson Hills MPD, p.2). As a point of clarity, the  
24           Applicant noted many additional intersections, including the entire limits of SE  
25           Green Valley Road, SE Lake Holm Road, 218th Avenue SE, and the SE Black  
26           Diamond-Ravensdale Road—Landsburg Road SE—Issaquah-Hobart Road SE  
          corridor extending from approximately 238th Way SE to the north to SR 169 to  
          the South will be included in the new model (Ex. 139 attachment 6, Letter from  
          Kevin Jones, the Transpo Group, Response Brief of the Villages and Lawson Hills  
          MPD).

**City Response:** The City also responded to this issue. The City noted the MPD  
          COA do not require the modeling assumptions or the methodology of calibration,  
          and validation to be included in the DAs. The City’s transportation consultant,  
          John Perlic of Parametrix, responded specifically to Mr. Rimbo’s testimony (Ex.  
          113) by noting the specific modeling criteria are spelled out in the MPD COA;  
          including the model boundaries with specified roadways and intersections (V  
          MPD COA 12 and LH MPDCOA 11), information from other jurisdictions to be  
          included (V MPD COA 13 and LH MPDCOA 12), mode split analysis (V MPD  
          COA 14 and LH MPDCOA 13), and internal trip capture assumptions (V MPD  
          COA 15 and LH MPDCOA 14). Mr. Perlic further notes the MPD COA allows  
          the City’s transportation engineer to determine how to implement the MPD Permit

1 conditions (Ex. 216). Mr. Perlic went on to state: “Validating the model after  
2 permitting 850 units will also allow the City to check whether the assumptions  
3 about the growth in background traffic were accurate, based on actual background  
4 traffic growth occurring between the time of MPD Permit approvals and the date  
5 of model validation after permits for 850 units have been issued,” (Ex. 216, p.10).  
6 Finally, Mr. Perlic noted volume to capacity standards, queuing analysis, and  
7 travel time analysis are not required to be performed as part of the MPD COA.  
8 The City Council reviewed these issues as part of the MPD and chose not to  
9 require them (Ex. 216).

7 **Examiner Response:** *The MPD COA requires the creation of a new  
8 transportation demand model to be used after 850 dwelling units have been  
9 permitted. The MPD COA provide an extensive list of modeling assumptions to  
10 be included in the new model (V MPD COA 11-14, 17 and LH MPD COA 10-13,  
11 16). The MPD COA also define the timing for model calibration (to provide  
12 internal consistency) and validation (to determine if the model is able to  
13 accurately describe present traffic conditions and thereby provide predictive  
14 value for future traffic conditions given a range of land use development  
15 scenarios). The Examiner agrees with the City and the Applicant that further  
16 modeling assumptions are unwarranted at this time and that any changes to the  
17 MPD COA would require a separate Major Amendment to the MPD.*

14 *V COA 20 requires the DA to include a transportation monitoring plan.  
15 Consequently, the Council can require that YB agree to reasonably necessary  
16 monitoring requirements. The monitoring plan in the DAs, Ex. F, requires YB to  
17 prepare monitoring reports but does not require City approval of the reports. The  
18 need for City approval is reasonably necessary to ensure an impartial and  
19 accurate traffic monitoring report. The DA monitoring plan should be revised to  
20 require City approval of traffic monitoring reports.*

19 2. Concurrency. Twenty-one unique commenters including King County, Mr. Rimbo,  
20 Mr. Irrgang, the Sierra Club, and others (Ex. 13h, 19, 44, 59, 63, 66, 75, 87, 115, 120, 123, 141  
21 and verbal testimony from Robert Taeschner, Dan Streiffert, Steve Heister, Karen Meador, and  
22 Brock Deady) expressed a concern that the MPD impacts would fail to meet concurrency  
23 requirements either by expressly mentioning GMA concurrency or by indirectly doing so in  
24 expressing concerns over the lack of City control over decision making in the timing and  
25 adequacy of transportation improvements. Ten commenters (Ex. 13b, 44, 63, 75, 87, 123, 130,  
26 137, 224, 141) expressed the sentiment that the DAs provided for a reactive (rather than  
proactive) approach to addressing concurrency issues. Nine members of the public expressed  
concern that inadequate funding beyond the Master Developer’s Proportionate Share and/or the  
required funding contributions defined in the Cities of Maple Valley and Covington Mitigation  
Agreements (DA Exhibits Q and R). This concern was most often voiced with respect to state  
right of way (Exhibits 19, 66, 70, 75, 87, 116, 120, 123, 137).

1 **Applicant Response:** With respect to public testimony related to concurrency, the Applicant  
2 objected to all exhibits “regarding transportation concurrency and mitigation” (Ex. 139) because  
3 they believe the environmental review for this phase is over. The Applicant argued the FEIS  
4 were deemed adequate for the MPD and that traffic mitigation conditions were imposed in the  
5 MPD Conditions of Approval. They noted the FEIS were adopted by the City for the DA and that  
6 because no SEPA appeal is pending before the Hearing Examiner, the entire issue is irrelevant to  
7 the DA Hearings.

8 YB went on to respond the project will be adequately mitigated from the beginning because the  
9 first phase of development includes nearly the 850 dwelling unit threshold required by the MPD  
10 COA (V MPD COA 17 and LH MPD COA 16). The Traffic Impact Study prepared as part of  
11 the MPD applications recommended intersection improvements to six existing intersections for  
12 the first phase (within the first three years). The Applicant further noted transportation  
13 mitigation is also required by the Cities of Covington and Maple Valley prior to the permitting of  
14 the first 850 dwelling units (DA Exhibits Q and R). The Applicant stated the proposed DA  
15 Traffic Monitoring Plan (DA Exhibit F) will monitor existing traffic and model future traffic  
16 before (and in the middle of) each phase of the combined MPDs. From this, the Applicant  
17 proposes to determine potential traffic impacts and the timing for necessary mitigation before a  
18 street or intersection is impacted by MPD Traffic (Ex. 139 attachment 6, Letter from Kevin  
19 Jones, the Transpo Group, Response Brief of the Villages and Lawson Hills MPD).

20 The Applicant noted the proactive measures of the Traffic Monitoring Plan include modeling the  
21 potential traffic impacts of an entire phase of development before submitting land use  
22 applications for that phase, determination of when particular transportation improvements will be  
23 necessary before submitting land use application for that phase, and beginning construction of a  
24 particular improvement before the street or intersection is predicted to no longer meet the  
25 applicable level of service standard. The Applicant also argued the Traffic Monitoring Plan is, in  
26 essence, more stringent than the City’s concurrency requirements because construction of  
mitigation improvements will be provided before a predicted fall in LOS standards, rather than  
within the six years after development occurs as is allowed by state law (Ex. 139 attachment 6,  
Letter from Kevin Jones, the Transpo Group, Response Brief of the Villages and Lawson Hills  
MPD).

**Examiner Response:**

- a. *Timing of Review.* The DA traffic modeling plan lacks assurances that traffic mitigation will comply with GMA mandated concurrency requirements. Adherence to concurrency requirements will effectively address the most serious traffic concerns expressed by the public, since the City would not be allowed to approve any MPD implementing project that fails to meet the City’s transportation level of service standards (“LOS”). It is recommended that the DA traffic monitoring plan be revised to incorporate concurrency measures and to require City approval of all traffic monitoring plans.

1        *Concurrency is a GMA requirement that prohibits cities and counties from approving*  
2        *development projects unless those projects are served by adequate traffic infrastructure.*  
3        *RCW 36.70A.070(6)(b) provides that “local jurisdictions must adopt and enforce*  
4        *ordinances which prohibit development approval if the development causes the level of*  
5        *service on a locally owned transportation facility to decline below the standards adopted*  
6        *in the transportation element of the comprehensive plan.” The statute further provides*  
7        *that the mitigation is in place at the time of development, “or that a financial commitment*  
8        *is in place to complete the improvements or strategies within six years”.*

9        *Black Diamond’s concurrency program is outlined in its comprehensive plan and*  
10       *implemented through permit criteria that require consistency with the comprehensive*  
11       *plan. Policy T-13 of the Black Diamond Comprehensive Plan requires that the City*  
12       *“ensure that transportation improvements or strategies are constructed or financed*  
13       *concurrent with development” and that “the City requires either a construction or*  
14       *financial commitment for necessary transportation improvements from the private or*  
15       *public sector within six years of development.” BDMC 18.98.080(A)(1) requires that the*  
16       *MPDs be consistent with the City’s Comprehensive Plan, which would include its*  
17       *concurrency provisions.*

18       *Nothing in the DA monitoring plan requires any concurrency during review of*  
19       *implementing projects. The traffic monitoring plans, Ex. F to both DAs, require that the*  
20       *timing of construction be determined for each MPD phase prior to the submission of any*  
21       *implementing permit applications for those phases. The plans are prepared by YB and*  
22       *must set out the timing of construction for traffic improvements. Construction of*  
23       *improvements is required to commence prior to LOS failure for projects within the City,*  
24       *and engineering plans must be completed prior to LOS for projects outside the City. For*  
25       *projects affecting roadways with an already failed LOS, the construction or engineering*  
26       *and design must commence before traffic impacts become worse. However, nothing in*  
27       *the monitoring plan requires concurrency review for implementing projects. Nothing*  
28       *requires that the City deny any implementing project applications that fail to meet*  
29       *concurrency.*

30       *The Applicant and the City did not directly address the legal requirements for*  
31       *concurrency, but it appears they would have to take the position that concurrency*  
32       *requires transportation improvements to be constructed within six years of*  
33       *“development” as referenced in comprehensive plan police T-13, and that the*  
34       *“development” in this case is the MPD as a whole or those portions of the MPD*  
35       *development that affect the LOS triggers and not its implementing projects. Since the*  
36       *MPDs and DAs apparently do not allow for any concurrency determinations to be made*  
37       *during project implementation, this would appear to be the only argument that the City*  
38       *and Applicant could make. Under their interpretation, the concurrency determination*  
39       *required by the GMA and the City concurrency regulations are made upon approval of*  
40       *the MPDs and DAs, i.e. since the monitoring plan requires traffic improvements to be*  
41       *commenced before LOS fails, this means that the improvements will of course be*

1 completed within 6 years of the development that necessitates them and certainly the  
2 completion of the MPDs as a whole.

3 There are a couple major problems with the presumed Applicant/City position that do not  
4 support consistency with GMA mandated concurrency. First, the City is approving a  
5 concurrency program that hasn't been developed yet. The timing of transportation  
6 improvements is required to be set out in the traffic reports YB is required to prepare for  
7 each MPD phase, as outlined in the monitoring plan. As shall be discussed, the MPD  
8 conditions strongly suggest that these phase model runs aren't subject to City approval.  
9 All that the City has at the MPD/DA stage of review is the framework for how  
10 concurrency will be evaluated. It has no idea at MPD/DA review whether the timing of  
11 the traffic improvements will actually comply with concurrency.

12 The second problem is the significant amount of development and the significant amount  
13 of time to develop in each phase creates the potential for a wide divergence from the six  
14 year concurrency requirement. An individual phase can theoretically take 20 years to  
15 develop and the monitoring plan only requires a calibration of the timing requirements  
16 for constructing traffic improvements half-way through each phase. In this time period  
17 hundreds of homes or hundreds of thousands of square feet of commercial space could be  
18 built. In short, it could take several years beyond the GMA six year maximum before  
19 improvements are actually completed to remedy LOS deficiencies caused by large  
20 development projects. It is unlikely that the City could be found to have satisfied its due  
21 diligence in assessing concurrency when it only approves a conceptual framework with a  
22 huge margin of error where most details are left to the control and discretion of the  
23 Applicant.

24 As proposed, the City's concurrency decision making is limited to MPD/DA approval  
25 because the MPD conditions and monitoring plan do not subject the traffic modeling  
26 reports for each phase to City approval. Rather than simply providing that the phase  
modeling is subject to City approval, LH MPD COA 24 and V MPD COA 25 provide that  
if the City and Applicant disagree on the timing of construction and the monitoring plan  
doesn't include period monitoring, the applicant shall monitor traffic levels mid-way  
through each phase. Section B of the monitoring plan provides that the City "may use  
the [monitoring] report to request that the Master Developer its [sic] proposed timing  
for construction of any new roadway alignments..." (emphasis added) This language  
strongly suggests that there is no intent to subject the monitoring plans to City approval.  
If that was not the intent, clarifying language is certainly in order. Better, the City  
should require the entire traffic monitoring reports be subject to City approval as  
recommended in the preceding Examiner response.

27 An important assumption made in the discussion above is that the City will not be  
28 conducting concurrency analysis during implementing project review. Nothing in the  
29 MPD COAs or the DA expressly prohibit implementing project concurrency. However,  
30 implementing project level concurrency would not be consistent with the mitigation

1 *framework currently proposed in the DA. The timing required in the monitoring plan*  
2 *only requires modifications to be considered midway through each MPD phase. If*  
3 *implementing project level concurrency were anticipated the monitoring plan would*  
4 *require the timing of improvement in the traffic reports to adapt changes in timing*  
5 *necessitated by project level concurrency. Perhaps even more indicative, the Applicant*  
6 *and City in their DA hearing responses have not referenced project level concurrency as*  
7 *a remedy to the traffic concerns raised by the public. If implementing project*  
8 *concurrency is still intended to apply, the monitoring plan should clearly identify its role*  
9 *in the review process and the plan should be required to be updated to accommodate any*  
10 *changes necessitated by implementing project concurrency.*

11 *For the reasons stated above, it is recommended that the DA contain a requirement that*  
12 *no implementing project shall be approved unless it complies with the City's concurrency*  
13 *requirements, i.e. that improvements or strategies are in place at the time of*  
14 *implementing project development to maintain required LOS or that a financial*  
15 *commitment is in place to complete the strategies or improvements within six years. The*  
16 *traffic monitoring reports for each phase should also be subject to City approval as*  
17 *recommended in the previous Examiner response.*

18 *To dispel any confusion on the issue, it should be noted that GMA concurrency only*  
19 *applies for transportation projects within the City of Black Diamond. RCW*  
20 *36.70A.07(6)(b) only requires concurrency for "locally owned facilities". Although there*  
21 *is some ambiguity as to whether "locally owned" refers to the local jurisdiction adopting*  
22 *the concurrency ordinance or any city or county, constitutional restrictions support an*  
23 *interpretation that only local (in this case Black Diamond) facilities are subject to the*  
24 *requirement. Requiring concurrency for facilities in other jurisdictions has the potential*  
25 *of placing a developer in a position where concurrency is impossible to reach, because*  
26 *the affected jurisdiction is unwilling to allow the improvements to be made within a*  
*reasonable amount of time.*

*Another consideration is LH MPD COA 14 and V MPD COA 13, both of which provide*  
*that the traffic mitigation agreements for those cities supersede any mitigation that could*  
*be required in the DA. Consequently, no concurrency can be imposed through the DAs*  
*for traffic mitigation in Covington or, Maple Valley, each of which has executed a traffic*  
*mitigation agreement.*

*A significant benefit to those concerned about density is that adherence to GMA*  
*concurrency could require a reconsideration of the approved densities for the project if*  
*funding doesn't become available to complete necessary improvements beyond those*  
*made available by the developer through its proportionate share. As shown in the City's*  
*concurrency management system, Figure 7-7 of the City's comprehensive plan, the*  
*lowering of LOS is one of the options to consider if development projects aren't meeting*  
*concurrency. However, under the DA the Applicant is vested to current LOS standards.*  
*A lowering of LOS would require an amendment to the DA, which the City could in turn*

1        *make contingent upon a re-evaluation of land use densities for the project through an*  
2        *MPD amendment. The resulting review would involve a consideration of several*  
3        *competing factors, including the urban densities required by the GMA, the adequacy of*  
4        *proposed LOS standards and the rights of the Applicant to derive a reasonable use of*  
5        *their property. The review would be similar to those conducted by communities re-*  
6        *evaluating their land use plans when it becomes apparent they cannot afford the LOS*  
7        *they have adopted for their community at current density levels.*

- 8        *b. Mitigation Project Funding for State Facilities. A significant source of concern with*  
9        *respect to funding for traffic mitigation was the lack of state funding to construct*  
10        *mitigation on state facilities; specifically SR 169 and SR 516. RCW 36.70A.070(6)(b),*  
11        *and by extension the City’s concurrency requirements, requires concurrency for “locally*  
12        *owned facilities,” but does not impose a concurrency requirement on state-owned*  
13        *facilities. The MPD specifically omit the requirement to provide a timeline for the*  
14        *commence construction activities for mitigation measures within the state right of way (V*  
15        *MPD COA 20 and LH MPD COA 19). The City of Black Diamond does not have*  
16        *jurisdiction over state-owned facilities, and cannot compel the State to cooperate with the*  
17        *Master Developer to construct project impact mitigation measures. However, the City of*  
18        *Black Diamond can compel the Master Developer to provide its proportionate share*  
19        *contribution to mitigation projects on state-owned facilities if and when the State is ready*  
20        *to authorize or construct those improvements. The only methodology available to the*  
21        *City to correct project-created impacts to the LOS of state-owned facilities is to limit the*  
22        *density of the MPDs. The MPD COAs have already authorized the density for the MPD;*  
23        *and therefore this remedy is no longer available.*

24        **3. Southern Connector Road.** Five commenters expressed concern about the alignment  
25        and impact of the proposed Southern Connector road. King County testified extensively to this  
26        issue. King County requested the City perform an entirely separate traffic analysis for the  
27        Southern Connector road along with an analysis of access alternatives for the road. King County  
28        recommended the alignment of the Southern Connector stay within the urban growth area and not  
29        extend urban services across rural lands, which would contradict the King County  
30        Comprehensive Plan (Ex. 51 and Nolan verbal testimony).

31        Ms. Carrier requested the alignment of the Southern Connector be designed such that it not  
32        intersect with Green Valley Road, and that an intersection with SR 169 be placed away, as far as  
33        possible, from the SR 169/Green Valley Road intersection (Ex. 130, 186, 246). Ms. Carrier also  
34        requested an amendment to V MPD COA 34b to provide more clarification with respect to where  
35        the Southern Connector would cross Plass Road, and when construction would occur.

36        Lisa Schmidt stated the DAs need to be modified to include the alignment of the Southern  
37        Connector Road (Ex. 197). Mr. Rimbos also expressed concern that the DAs need to include  
38        more analysis of the Southern Connector Road (Ex. 13d, 13e, 118, 145, 224, 226, 247, 262).

39        Kristen Bryant stated the Southern Connector roadway alignment should be subject to SEPA  
40        review (Ex. 123).

1 **Applicant Response:** YB responded to Mr. Nolan’s concern by stating the portion of the South  
2 Connector Road in unincorporated King County was chosen because it follows the alignment of  
3 an old logging road/trail, which will utilize an existing sensitive area crossing and minimize  
4 wetland impacts. They noted the City of Black Diamond has no jurisdiction here and that King  
County ultimately will have to approve any road grading permit. King County may choose to  
deny it (Ex. 139).

5 The Applicant responded to Ms. Carrier by noting the street vacation process is a public process,  
6 wherein the public will have a chance to comment. The Applicant also reiterated their  
7 willingness to work in good faith with the City, the County, and Plass Road residents to find a  
mutually acceptable solution to the vacation of Plass Road (Ex. 208).

8 The Applicant responded to Ms. Bryant, and indirectly to Mr. Rimbo and Ms. Schmidt, by  
9 noting the FEIS recognized the final location of roads may change. They further noted the DAs  
10 acknowledge all implementing projects, including roadway alignments, will undergo additional  
SEPA review (Ex. 139).

11 **City Response:** The City responded to Mr. Nolan by noting only a tiny portion of the roadway is  
12 expected to be located within the unincorporated area and that there would be no access points  
13 from the Southern Connector to the rural area. The City expects no urban impacts to the rural  
area to be a direct result of the Southern Connector’s potential location in the unincorporated area  
(Ex. 216).

14 **Examiner Response:** *The Southern Connector roadway alignment is an important issue with the*  
15 *potential to create environmental and traffic impacts. The MPD COA require a second access*  
16 *point without providing specificity as to the exact alignment or a requirement to do so as part of*  
17 *the DA. Therefore, concerns regarding the Southern Connector location are outside the scope of*  
18 *this review. However, because this is an issue of such importance, the City may wish to work*  
19 *with YB to provide more specificity regarding the future alignment mitigate any future impacts.*  
20 *The City has no authority to mandate any such changes and may only request them of YB. In any*  
21 *event, the project will be subject to SEPA review at the implementing project level.*

22 4. Impact of Construction Traffic. Six commenters were concerned about the impact of  
23 construction traffic (Ex. 13b, 13h, 44, 81 and 129).

24 **Applicant Response:** The Applicant argued through the MPD approval ordinances, the Council  
25 found the MPD consistent with the City’s code, the Comprehensive Plan, and the GMA (Ex.  
26 189). The Applicant noted there will be an opportunity for public comment and environmental  
review at the implementation project level through SEPA (Ex. 209).

**Examiner Response:** *The Examiner concurs with the Applicant. The scale and development*  
*timing of the MPD were approved by the City Council and cannot be altered in this venue. Any*  
*additional requirements will have to be approved by YB. Individual project level SEPA review*

1 will provide an adequate opportunity for the City to review the implementing project level  
2 impacts, including those of construction impacts, and provide appropriate mitigation.

3 5. Non-Motorized Users. Five commenters were concerned about provision of bicycle  
4 lanes on non-internal roads and the general need for consideration for non-motorized users (Ex.  
5 13b, 39, 57, 117, and 130).

6 **Applicant Response:** The Applicant responded that the DAs guarantee infrastructure for  
7 bicycles in Section 6.3 of the DAs (Ex. 209).

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

15 6. Transit, Vehicle Trip Reduction and the Reduction of Greenhouse Gasses. Reducing  
16 the production of greenhouse gasses (Sierra Club and Tim Gould), and lessening the impact of  
17 general traffic through the use of vehicle trip reduction (Rimbos), High Occupancy Vehicle  
18 (King County), and transit (Ex. 87) alternatives were a concern. Mr. Rimbos noted the DAs do  
19 not address vehicle trip reduction strategies. Mr. Rimbos also noted the DAs do include a transit  
20 park and ride facility, and non-motorized user provisions such as trails and bike lanes, but they  
21 do not discuss the programmatic requirements.

22 **City Response:** The City's response to this issue was to note the MPD COA LH MPD COA 12  
23 and V MPD COA 13 do require a mode split analysis (Ex. 216).

24 **Examiner Response:** *The MPDs, as proposed, provide many vehicle trip reduction strategies in  
25 the forms of trails and in the mix of uses. The MPD COA LH MPD COA 12 and V MPD COA 13  
26 require the creation of a new transportation demand model with a mode split analysis that  
"reflects the transit service plans of Sound Transit, King County Metro and any other transit  
provider likely to provide service in the study area ... This analysis must be presented to the City,  
the applicable transit agencies, and the jurisdictions in which trips are likely to use park and  
ride, Sound Transit parking garages or other facilities." As a matter of cost, it makes sense for  
the Master Developer to encourage as much transit use as possible. The traffic demand model,  
after 850 units are permitted, will be calibrated to actual traffic counts. The higher the traffic  
counts from the project, the more required mitigation. Lower traffic counts from transit usage  
on-site result in less need for mitigation and less expense to the Master Developer.*

## 11.7 Phasing of Development

3. Project Phasing. Peter Rimbos testified that, "Because some monitoring commitments  
in the DAs exist within a timeframe based on phases, all phases would need to be defined as

1 consecutive in order for a timeline to be developed,” (Ex. 117, p. 23). He further stated, “If a  
2 change is enforced by the City that does not allow concurrent phasing, then the inter-phase  
3 monitoring proposed in the DAs makes sense. Otherwise, they do not,” (ibid.). Mr. Rimbo  
4 reiterated this point with respect to transportation concurrency in Ex. 118, p. 22 and cited BDMC  
18.98.080(A)(4). This statute pertains to a phasing plan and timeline for construction of  
improvements and the setting aside of open space such that:

- 5 a. Prior to or concurrent with final plat approval or the occupancy of any residential  
6 or commercial structure, whichever occurs first, the improvements have been  
7 constructed and accepted and the lands dedicated that are necessary to have  
8 concurrency at full build-out of that project for all utilities, parks, trails,  
9 recreational amenities, open space, stormwater and transportation improvements  
10 to serve the project, and to provide for connectivity of the roads, trails and other  
11 open space systems to other adjacent developed projects within the MPD and to  
the MPD boundaries; provided that, the city may allow the posting of financial  
surety for all required improvements except roads and utility improvements if  
determined to not be in conflict with the public interest; and
- 12 b. At full build-out of the MPD, all required improvements and open space  
13 dedications have been completed, and adequate assurances have been provided for  
14 the maintenance of the same. The phasing plan shall assure that the required MPD  
15 objectives for employment, fiscal impacts, and connectivity of streets, trails, and  
16 open space corridors are met in each phase, even if the construction of  
17 improvements in subsequent phases is necessary to do so.

18 Mr. Rimbo stated the Development Agreements do not describe the enforcement mechanisms  
19 for the provisions in the statute.

20 **Applicant Response:** The Applicant did not specifically respond to this matter. The Applicant  
21 did provide a blanket objection to any portion of the testimony related to environmental impacts  
22 on the grounds that these had been addressed during the MPD approval process (Ex. 189).

23 **Examiner Response:** *The phasing plan as outlined in Chapter 9 of the MPDs calls out*  
24 *concurrency for infrastructural improvements as the project sites develop over time from the*  
25 *center outward. While utilities, street improvements, and storm water facilities dominate the*  
26 *components of the phasing plan, a minority of projects listed involve parks (i.e. the LH and*  
*Villages Phase 1A Improvements table lists 14 improvements, the Phase 1B table calls out no*  
*park/trail/recreational improvements, nor does Phase 2 and 3). While the phasing plan appears*  
*to address utilities, transportation and parks, other required concurrency elements are missing*  
*(open space, trails and other recreational amenities) as required by 18.98.080(A)(4).*  
*Transportation concurrency issues are addressed elsewhere in this analysis.*

*Due to technical difficulties this issue will be addressed by an addendum that is forthcoming.*

1                   12.3   Design Review Committee

2           1. Design Review Committee. In Ex. 117, Lisa Schmidt asserted the Design Review  
3 Committee established in DA 12.3 should review permits for utilities.

4 **Examiner Response:** *Design standards (as opposed to development standards) usually have*  
5 *only limited impact on the placement and design of utilities. City staff can address any design*  
6 *standard conflicts during staff level review.*

6                   13.2   Forest Practices

7           1. Logging Requirements. Several commenters expressed concerns regarding provisions  
8 in the DAs regarding logging of parcels. See exhibits 3-13e, 56, 113, 139, 143, and 209 and the  
9 verbal testimony of Mr. Dan Streiffert and Mr. Joe May. Two concerns were raised: (1) logging  
10 should be limited to only occur during the active phase of development, and (2) the amount of  
11 time a logged parcel can remain undeveloped before reforestation must occur is not delineated in  
12 the DAs, as required by the COAs.

13 **Applicant Response:** Regarding the first issue, that logging should only occur within an active  
14 phase, YB noted (Ex. 139) DA 13.2 allows logging activities only after an application for an  
15 implementing project on the same parcel has been proposed, or to assure a balance of cut and fill  
16 for a proposed implementing project. YB responded to the issue of the length of time a logged  
17 parcel may remain undeveloped in Ex. 209, stating that DA 13.2 sets the time limit for  
18 reforestation or development as whatever is conditioned of an implementing project or the Forest  
19 Practices Act, whichever is more stringent. YB stated that the Forest Practices Act (RCW  
20 76.09.080) sets the time limit at three to five years.

21 **Examiner Response:** *The commenters' concerns reference V COA 87 and LH COA 88, which*  
22 *require that the DA include specific requirements for the logging of properties in the MPD,*  
23 *including the two issues identified above. As YB asserts in their response, Section 13.2 includes*  
24 *a requirement that logging only occur when an implementing project has been proposed for a*  
25 *given parcel, or when an implementing project has been proposed for a parcel in the vicinity in*  
26 *order to assure a balance of cut and fill. However, current DA language would allow logging at*  
*the proposal stage, not at the approval of an implementing project. As significant time can pass*  
*between the application and approval of an implementing project, the Examiner recommends the*  
*word "proposed" in Section 13.2 be replaced with "approved" as it relates to this issue.*

*As for the time limit between when a parcel is logged and when it must be developed, YB is*  
*correct that Section 13.2 cites either the implementing project's conditions or the Forest*  
*Practices Approval, whichever is more stringent. RCW 76.09.080 does not discuss time limits*  
*for reforestation. RCW 76.09.070 does, however. RCW 76.09.070 states that reforestation must*  
*occur within three years, or five in certain extenuating circumstances. The Council may require*  
*a stricter time frame in the DAs if it so chooses.*



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## CONCERNS

1. Inadequate Funding. It is uncontested that adequate financing of the schools is dependent upon the passage of bond levies. According to the verbal testimony of Rich Ostrowski, the impact fees paid by the Applicant will only pay for 10% of the construction costs, which total approximately \$350 million dollars. Several people testified that it's unlikely that any bond measure will pass, since most residents within the ESD do not reside in the City of Black Diamond. Cindy Proctor supplied several articles and other written materials on school bond failure rates. See Ex. 47. For example, all 12 school bond levies presented to voters statewide in the April, 2011 elections failed. Ms. Proctor also noted that state matching funds for school construction have fallen from 60% to 20%. Ms. Proctor and others also gave examples of overcrowding in other communities, such as Snoqualmie Ridge and Maple Valley, where overcrowding has occurred due to the failure of bond levies.

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

*Despite the severe constraints on mitigation, project opponents make a compelling argument that construction of the schools is not adequately funded. Enumclaw residents are unlikely to vote to pay for Black Diamond schools, although of course as the MPDs develop the majority of the ESD population will shift towards Black Diamond residents. An obvious partial solution to the problem would be to create a separate school district for Black Diamond. Normally the City would also have the option of increasing school impact fees if funding become inadequate, but the City contracted away this authority in the tri-party agreement by agreeing to caps on impact fee amounts. It is debatable whether the Council can legally contract away its legislative authority in this fashion, but it is a commitment made by the Council. Beyond advocating for a separate school district, the Council can always try to have the Applicant agree to contingent funding or to DA terms that prohibit development when schools have exceeded capacity due to MPD development or impose such requirements through the legally risky SEPA process.*

*As to some additional ideas on mitigation, Richard Ostrowski provided the following suggestions during his verbal testimony:*

- 1 1. *The city shall request the school district provide written status on adequacy of school*  
2 *facilities during MPD development at frequent periodic intervals as specified by the city*  
3 *council.*
- 4 2. *The city shall request a written confirmation of agreement from the school district prior*  
5 *to making any decisions or statements concerning the adequacy of school facilities.*
- 6 3. *The city shall conditionally approve MPD permits to only allow development to continue*  
7 *when adequate school facilities will be available. If at any time the school district*  
8 *decides provisions for schools have or will become inadequate then all development must*  
9 *stop immediately and be delayed no matter what stage it is until the issue is resolved to*  
10 *the school district's satisfaction.*

11 2. Capacity Gap. Several people, including a couple teachers, expressed concern over  
12 the timing of new school construction. See 7/11/11 Testimony of Deronda Stanley and Robert  
13 Taeschner. In Ex. 47 Cindy Proctor notes that construction for new schools won't be completed  
14 until three years after the students need them. Ms. Proctor writes that the Enumclaw School  
15 District Capital Facilities Plan anticipates overcrowding for Black Diamond Elementary during  
16 the first few years of build out, necessitating portables and busing. "Un-housed" students are  
17 anticipated to be over 342 in "BD" (presumably the BD elementary school) by year 2013. She  
18 writes that no interim mitigation is called out in the tri-party agreement.

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

22 3. Violation of RCW 58.17.110. Rich Ostrowski and Pat Pepper verbally testified that  
23 they believed that the tri-party agreement violates RCW 58.17.110, which requires a finding of  
24 adequate school sites and sidewalks and other planning features that assure safe walking  
25 conditions to and from school.

26 **Examiner Response:** *As noted by the YB Ex. 139, RCW 58.17.110 only applies to subdivision*  
*review. That position actually supports the arguments made by Ms. Ostrowski and Pat Pepper.*  
*RCW 58.17.110 requires findings to be made on school infrastructure during subdivision review.*  
*Section 3.1 of the development agreements commits the City to findings on those potentially*  
*years in advance of those subdivision applications. It is legally questionable whether the City*  
*can commit in advance to findings required for approval of a permit application. It should be*  
*noted, however, that RCW 58.17.110 only requires that appropriate provisions are made for*  
*school sites and sidewalks and other planning features to assure safe walking conditions to and*  
*from school. RCW 58.17.110 does not require a finding of appropriate school buildings or*  
*other on-site capital facilities. Given that the tri-party agreement has several measures in place*  
*to assure that adequate school sites are available, there is a good chance that the City will be*  
*able to find compliance with the school site requirements of RCW 58.17.110 whether or not it is*  
*contractually bound to do so.*

1 4. Urban Growth Areas. At least six people wrote or testified that the schools should  
2 not be located outside the Black Diamond Urban Growth Area. See verbal testimony of Harp  
3 and Reitenbach and Ex. 48. This was also a concern expressed several times by the  
4 Unincorporated Area Councils for Maple Valley, Four Creeks and Upper Bear Creek as well as  
5 King County. Ex. 63, 115 and 196. The Councils also pointed out that three of the schools  
6 would connect to Green Valley Road. Most of those who addressed this issue stated that  
placement of schools outside UGAs violates the Growth Management Act and creates pressure to  
urbanize rural areas due to the extension of urban services. Siting outside the UGA also  
generated the following related issues:

- 7 a. Mr. Ostrowski testified that the tri-party agreement only sets up a process for  
8 selecting alternative locations if King County denies permits to build schools  
9 outside of UGAs and that no specific alternative locations are specified.
- 10 b. Cindy Proctor argued that locating schools outside of the UGAs violates Black  
11 Diamond Comprehensive Plan (“BDCP”) Policy UGA U9, which prohibits sewer  
12 and water facilities from serving adjacent rural or resource lands. Ex. 48.
- 13 c. The Unincorporated Area Councils also questioned whether the schools outside  
14 the City would comply with King County concurrency standards; in particular Mr.  
15 Heister questioned in his verbal testimony whether the schools could meet King  
16 County concurrency requirements such as KCC 14.70.285.

17 **Examiner Response:** *Whether the placement of some of the schools outside the City’s UGA is  
18 consistent with the Growth Management Act is presumably<sup>7</sup> a major issue in the appeals of the  
19 MPD approvals before the Growth Management Hearings Board. If the Board’s jurisdiction to  
20 consider the appeals is upheld, its ruling on the UGA issue should resolve it one way or another.  
21 If the Board’s jurisdiction is not upheld, the fact that King County regulations authorize the  
22 schools, see KCC 21A.08.050, with a conditional use permit should preclude any further  
23 consideration of Growth Management Act compliance, except to the extent GMA requirements  
24 are incorporated into or serve as an aid to the interpretation of King County regulations. The  
25 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. Cf. RCW 36.70A.280.*

26 *As to consistency with BDCP UGA U9, the policy provides that “sewer and water facilities  
extended to the UGA will not serve adjacent rural or resource lands”. In Ex. 245 the YB  
responded that various other parts of the City’s Comprehensive Plan anticipate that schools may  
be located outside City limits. BDCP 8.6.1 provides that it is important for BD children to  
attend schools “within or near the City” and CF-11 in the same section only requires that the  
City “work with” the district in placing school sites within city limits. YB also notes that there’s  
no evidence that the City will be the sewer and water purveyor outside its UGA and Ex. 25*

<sup>7</sup> The issues that will be presented to the Growth Management Hearings Board have not been made a part of the record.

1 suggests that the Covington Water District will serve that middle school site located west of TV.  
2 It is noteworthy that YB's policy citations anticipate urban services being extended outside city  
3 limits but not necessarily the City's urban growth area. The issue would be ultimately resolved  
4 by the City's adopted water and sewer service areas. Even if those service areas prove to be  
5 inconsistent with the BDCP UGA U9, the service area would arguably supersede the BDCP,  
6 either as a more specific comprehensive plan policy or a superseding City regulation. See  
7 *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861 (1997)(specific zoning ordinance  
8 prevails over inconsistent comprehensive plan). Of course, if the City's sewer and water service  
9 areas do not include the proposed school sites and there is no other service provider available,  
10 the service issues associated with the sites are more severe than suggested by Ms. Proctor.

11  
12 As to consistency with King County concurrency standards, more information is necessary on the  
13 availability of services and infrastructure to assess the issue.

14  
15 5. Fiscal Impacts of High School. Richard Ostrowski verbally testified that Villages V  
16 COA 99 requires an updated fiscal analysis to locate a high school in land designated for  
17 commercial use and that the tri-party agreement proposes a commercial location and no fiscal  
18 analysis has been done.

19 **Applicant Response:** In Ex. 139 YB responded that no updated fiscal analysis is necessary  
20 because the high school is not proposed for a commercial designated area.

21 **Examiner Response:** V COA 99 does require an updated fiscal analysis if a high school is  
22 proposed in a commercially designated area. The proposed location of the high school does  
23 appear to be located on commercially designated property when comparing the Land Use Plan  
24 Map, DA Ex. L, with the location of the high school depicted in Ex. B to the tri-party school  
25 agreement. City staff should clarify, using information in the record, if the high school is  
26 proposed for a commercially designated area. If so, the Council should specify in the DA when  
an updated fiscal analysis will be necessary to ensure the fiscal neutrality of the MPDs.

6. Walkable Distance Standard. Cindy Proctor argued that the proposed school  
locations fail to comply with BDMC 18.98.80(A)(14), which she interprets as requiring schools  
to be located within 0.5 miles from residential areas.

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

1 applicant agree to a condition restricting the distance of schools to within a half-mile of MPDs  
2 or impose such a requirement through the legally risky imposition of SEPA conditions.

3 7. Trails. In Ex. 47 Cindy Proctor notes that BDMC 18.98.020(H) requires trail  
4 connectivity for the schools but the staff report notes that a Trails Plan has not yet been adopted.

5 **Examiner Response:** *VMPD Conclusion of Law 24 and LHMPD Conclusion of Law 24 both*  
6 *conclude that the MPDs satisfy BDMC 18.98.020(H). The issue cannot be revisited without*  
7 *voluntary cooperation from YB or the legally risky exercise of SEPA supplemental authority. It is*  
8 *unclear if any trails are proposed by the Applicant to extend to all of the school sites, including*  
9 *those outside the UGA. The Council may wish to ensure that this issue is resolved in the DAs.*

10 8. Essential Public Facility. In Ex. 47 Cindy Proctor writes that the siting of the schools  
11 fails to comply with the siting process dictated by Chapter 18.58 BDMC for essential public  
12 facilities (“ESP”) by failing to comply with King County County-Wide Planning Policies.

13 **Examiner Response:** *Chapter 18.58 BDMC, which governs the siting of ESPs, creates a*  
14 *separate review process that will be reviewed independently from the MPD process. If the*  
15 *proposed school locations are denied under the ESP process, the alternative locations in the tri-*  
16 *party agreement will have to be utilized or the MPDs, DAs and/or tri-party agreement will have*  
17 *to be amended to accommodate a new location.*

18 9. Public Hearings. During verbal and written testimony Cindy Proctor and Melanie  
19 Gauthier noted that the tri-party agreement had not been subject to any City public hearings. See  
20 verbal testimony of Proctor and Gauthier and Ex. 47. Ms. Proctor argued that since the tri-party  
21 agreement is incorporated into the development agreement, it should be subject to a public  
22 hearing.

23 **Examiner Response:** *The Council’s approval of the tri-party agreement before commencement*  
24 *of the DA hearings largely precludes any meaningful public comment as to its contents during*  
25 *the DA hearings and the Examiner has no authority to address the situation.*

### 26 13.6 Fiscal Impacts Analysis

#### OVERVIEW

Finance and fiscal issues were a consistent concern during the hearings. Twenty nine comments  
were submitted discussing the issue. The dominant theme related to money was the concern  
taxpayers would have to subsidize the cost of the MPD. Other concerns centered around the  
appearance of impartiality from staff. The most repeated comment was growth should pay for  
itself.

V MPD COA 156 and LH MPD COA 160 require the following:

- 1 1. The projects shall have no adverse financial impact on the city, as determined after each  
2 phase of development and at full build-out.
- 3 2. A fiscal analysis shall be conducted and include the costs to the city for operating,  
4 maintaining and replacing public facilities required for the MPD or related to the MPD.
- 5 3. The fiscal analysis shall ensure revenues from the project are sufficient to maintain the  
6 project's proportionate share of adopted City staffing levels of service.
- 7 4. The fiscal analysis shall be updated to show continued compliance with these  
8 requirements and requires a new fiscal analysis to be done within five years or before  
9 beginning a new phase of construction.
- 10 5. The exact terms and process for performing the fiscal analysis and evaluating fiscal  
11 impacts shall be outlined in the DAs and
- 12 6. The DA shall include a specific "MPD Funding Agreement," Exhibit N to replace the  
13 existing City of Black Diamond Staff and Facilities Funding Agreement.
- 14 7. The applicant is responsible to address any projected city fiscal shortfall identified in  
15 fiscal projections and includes interim funding for service and maintenance costs (staff  
16 and equipment) between the time of permit approvals and off-setting tax revenues;  
provided, however, that in the event that the fiscal projection prepared prior to the  
commencement of Phase III indicates a likelihood of significant ongoing deficits in the  
city's general fund associated with operations or maintenance or properties within the  
MPD, the applicant must address the projected shortfalls by means other than interim  
funding.

17 The DA presented four distinct types of financial contributions from the Master Developer –  
18 school mitigation fees (DA 13.6), fire mitigation fees (DA 13.4), general governmental  
19 mitigation fees (DA 13.9) and those identified in the MPD funding agreement obligations (DA  
20 13.6 and Exhibit N). The MPD funding agreement discussed hard capital expenditures such as  
21 for the construction of roads and utilities. School mitigation fees and transportation concurrency  
22 are addressed in other parts of this recommendation. The major remaining issues are addressed  
23 here, in accordance with relevance to public testimony.

## 24 CONCERNS

25 Twenty-nine people presented written and verbal testimony. Their comments are categorized and  
26 addressed below.

1. Increased Costs to the Taxpayer. The most-referenced concern is about the possibility of  
current taxpayers and future non-MPD taxpayers paying costs associated with the development.  
According to the comments, the form of these costs would come from increased taxes, utility

1 expansions, and costs associated with new infrastructure. See Exhibits 13-a, 13-e, 3-13k, 13-y, 5,  
2 10, 62, 121, 135, 240, 242, and 253.

3 **Applicant Response:** YB responded by saying the DA assume the Master Developer will be  
4 building the necessary infrastructure to support nearly all future growth within the City, including  
5 within the MPDs. YB is required by V MPD COA 156 and LH MPD COA 160 and DA 13.4,  
6 13.6, 13.9, Exhibit N and others to finance and construct the infrastructure improvements that  
7 serve the MPDs as well as other users outside the project sites. They noted DA 11.3(B) and  
8 11.4(B) requiring the Master Developer to construct and fund a long list of on-site and off-site  
9 regional facilities. They noted they have voluntarily offered to create a general government  
10 mitigation fee to cover all the costs associated with MPD impacts for the City’s General Fund  
11 and the special revenue and utility funds. YB stated it has proposed a MPD Funding Agreement  
12 with the City to anticipate and mitigate any potential funding shortfalls in City revenues. YB is  
13 also proposing a Fire Mitigation Fund to offset the costs of increased fire services as a result of  
14 the MPD.

15 **Examiner Response:** *The DA includes a proposed Funding Agreement, Ex. N. to the DAs that  
16 assures compliance with the COA “no adverse impact” requirement. The agreement has not  
17 been executed and its terms as proposed are necessary to find that the DA has adequately  
18 implemented fiscal requirements, in particular that the increased demand for City staff services  
19 is adequately compensated. It is recommended that the DA be revised to require that the  
20 proposed funding agreement attached as DA Ex. N, or a substantially similar agreement, be  
21 executed prior to the acceptance of any implementing project applications and that no  
22 applications already received be processed further<sup>8</sup> until the Ex. N agreement is executed.*

23 *The Funding Agreements, Ex. N to the DAs, reasonably assure that the projects will not impose a  
24 financial burden on BD residents, but do give some flexibility to the City and Applicant to  
25 negotiate fiscal mitigation that fall short of preventing fiscal short falls. Section 4(a) of the  
26 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  
has room to argue that it is entitled to an agreement of inadequate fiscal solutions if no adequate  
solution is reasonably available.*

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<sup>8</sup> 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.

1 *If the flexibility identified in the preceding paragraph was not the Council’s intent, the*  
2 *Agreement can be clarified by revising the last sentence of Paragraph 4(a) as follows: “The*  
3 *City shall not approve any Phase III implementing development permits until a written*  
4 *agreement between the City and Developer is executed that reasonably assures that any build*  
5 *out fiscal deficits caused by the MPDs are completely mitigated.” The City Attorney may*  
6 *conclude that such a condition is not constitutionally supportable. In that case the agreement*  
7 *should make it abundantly clear that a reduction in density or other change in land use shall be*  
8 *one of the options considered in solving any on-going fiscal problems if other options are not*  
9 *reasonably available and that the City shall have no obligation to authorize the MPD to move*  
10 *forward if the Applicant is unwilling to agree to any changes in land use that still allow a*  
11 *reasonable use of its property*

12 2. Maintaining Level of Service for Police, Fire and Emergency Services. In Ex. 81 Alison  
13 Stern questioned whether the City would be able to maintain its level of service for police  
14 services as a result of MPD development. Mike Irrgang (Ex. 121) questioned how additional  
15 police and fire would be funded.

16 **Applicant Response:** YB stated the DA address fire, police, and emergency services in multiple  
17 ways: (i) fire mitigation fees in DA 13.4; (ii) construction of a new satellite fire station in DS  
18 13.4; (iii) general government facilities mitigation fees (including a police station) in DS 13.9;  
19 and (iv) assurance that YB will fund any city deficit created as a result of MPD-related fire,  
20 police, or emergency services staffing demands pursuant to the fiscal analysis and MPD Funding  
21 Agreement in DA 13.6 and DA Exhibit N, respectively (Ex. 209, p. 48).

22 **Examiner Response:** *The MPD COAs require the developer to maintain the City’s level of*  
23 *service for fire and police. LH MPD COA 160 states, “The proposed project shall have no*  
24 *adverse financial impact upon the city, as determined after each phase of development and at full*  
25 *build-out. The required fiscal analysis shall include the costs to the city for operating,*  
26 *maintaining and replacing public facilities required to be constructed as a condition of MPD*  
*approval or any implementing approvals related thereto. The fiscal analysis shall ensure that*  
*revenues from the project are sufficient to maintain the project’s proportionate share of adopted*  
*City staffing levels of service. The fiscal analysis shall be updated to show continued compliance*  
*with this criterion“(emphasis added). The city has adopted level of service standards for fire*  
*and police services. See Black Diamond Comprehensive Plan Policy 8.4.3 and 8.7.3. Section*  
*13.6(1)(e) of the DAs provides that the projected expenses for the City’s operating funds can be*  
*assessed through a variety of different methods, including comparisons to cities of similar size,*  
*case studies, per capita rates and level of service methodology. The methodology used is subject*  
*to the approval of the City. The Funding Agreement (DA Exhibit N) states the total revenue*  
*from the MPD are “expected to be sufficient to maintain the Villages MPD’s and Lawson Hills*  
*MPD’s proportionate share of the City’s adopted staffing levels of service and capital facility*  
*needs” (DA Exhibit N, Recital K). However, nothing in the DAs explicitly requires that the*  
*funding of the developer be the minimum necessary to maintain the City’s level of service. The*  
*failure of the DAs to require these LOS levels to be maintained leaves the very real possibility*

1 *that the expenses projected in the YB's fiscal analysis will not be sufficient to maintain police*  
2 *and fire LOS.*

3 *If the funding required of the developer falls short of maintaining LOS, the City would either fail*  
4 *to maintain its LOS or existing City residents would be required to make up the difference. Both*  
5 *results fail to comply with applicable MPD standards and conditions. As previously discussed,*  
6 *since the DAs implement MPD conditions of approval, the DA provisions must be assessed as to*  
7 *whether they comply with MPD permitting criteria. BDMC 18.98.080(A)(1) requires that an*  
8 *MPD comply with all "applicable adopted policies, standards and regulations". Those policies*  
9 *include the City's comprehensive plan, which in turn includes its level of service standards.*  
10 *Consequently, any funding arrangement that supports an LOS below that adopted in the*  
11 *comprehensive plan violates BDMC 18.98.080(A)(1). If other city taxpayers are expected to fill*  
12 *in the shortfall to maintain LOS, the DA provisions violate BDMC 18,98.080(A)(1), which*  
13 *prohibits the MPDs from having an adverse financial impact upon the City, and would also*  
14 *violate the MPD conditions that require the same.*

15 *The end result in requiring compliance with fire and police LOS is subjecting the MPDs to a*  
16 *form of concurrency for fire and police services. It could be argued that since the City's*  
17 *comprehensive plan doesn't expressly require concurrency for police and fire that it shouldn't be*  
18 *imposed. The Growth Management Act only mandates concurrency for transportation facilities,*  
19 *but it encourages concurrency for all public services and facilities. See RCW 36.70A.020(12).*  
20 *The City's comprehensive plan makes it clear that LOS standards for administrative buildings*  
21 *and services are not subject to concurrency and are listed as a helpful management tool. No*  
22 *similar qualification is provided for police and fire LOS and the police LOS even provides that*  
23 *the LOS can be reduced to 2.75 officers per 1,000 residents from 3.5 officers per thousand as the*  
24 *City grows. It is reasonable to conclude that the fire and police LOS levels are not mere*  
25 *inventory measures of current services but also a standard to which the City wishes to adhere as*  
26 *the City grows.*

1 *Even if the police and fire LOS were not binding to the MPDs, they do serve as a logical and*  
2 *practical vehicle for enforcing the no "adverse financial impact" requirement of BDMC*  
3 *18.98.080(A)(1). Financial impact cannot be assessed without setting a baseline for minimum*  
4 *service levels. In the absence of any minimum service level, the Developer can argue that any*  
5 *financial impact would not be adverse since the City would just have to lower its service levels to*  
6 *the point where no new taxpayer support is required. The police and fire LOS levels adopted*  
7 *into the comprehensive plan are a logical measure of acceptable service because that's what*  
8 *they were adopted for -- the police standard is even calibrated to future growth. The LOS*  
9 *standards serve as a practical vehicle because any change to the LOS would trigger a new*  
10 *public review process. Any amendment to the comprehensive plan, including LOS standards, is*  
11 *subject to a vigorous public participation process. See Ex. E to the DAs. Further, the DAs*  
12 *include the comprehensive plan as a vested development regulation. Consequently, if YB wishes*  
13 *to take advantage of an amendment to the comprehensive plan it has to go through the DA*  
14 *amendment process in order to do so. Given the foregoing discussion, the Council may choose*

1 to alter the DA language to clarify the level of service requirements associated with the Funding  
2 Agreement and DA 13.4, 13.6 and 13.9.

3 3. Lack of Public Funding. Several citizens want the agreement(s) to clarify what happens if the  
4 City is unable to obtain grants or other funding source for its proportionate share of regional  
5 infrastructure costs and how that money would be gained without creating new taxes or charges  
6 on the current citizens or utility users. See Edelman (Ex. 75), Proctor (Ex. 240), Bryant (Ex.  
7 253), Irrgang (Ex. 121) and Roach (Ex. 66).

8 **Applicant Response:** YB responded by noting that without growth, there is no need for  
9 mitigation. They stated both on-site and off-site regional infrastructure facilities are required to  
10 be evaluated and provided as development of the MPD occurs. The capacity of the City's  
11 existing transportation, water, sewer, stormwater and parks systems serving a particular  
12 implementing project will be evaluated during the SEPA review process in coordination with the  
13 permitting action. When an implementing project triggers a need for a regional infrastructure  
14 improvement due to a lack of existing capacity, the Master Developer will be required to pay  
15 100% of the cost of those improvements (DA 11). YB further noted, "The City's existing  
16 proportionate share of the regional infrastructure costs is zero. Grants, impact fees, or capital  
17 facility charges received by the City may be used to reduce the total cost of an infrastructure  
18 improvement; however, whether or not such monies are received, the City's share of the regional  
19 infrastructure cost is again zero" (Ex. 209, p. 37-38). With respect to schools and the King  
20 County Sewer System, YB referred to binding third party agreements.

21 **Examiner Response:** *When referring to the City's obligation, YB is referring to those specific  
22 mitigation measures identified in the MPD COA and represented in DA Tables 11-3-1, 11-3-2,  
23 11-3-3, 11-3-4, 11-4-1, 11-4-2, 11-5-1 and 11-5-2 as well as DA Q and R. Regional  
24 transportation mitigation will be subject to project level concurrency analysis. Other mitigation  
25 costs will be borne by the Developer as described in DA 13.4, 13.6, 13.9 and DA Exhibits F and  
26 N. YB is correct in noting they are providing many non-standard financial contributions through  
the fire mitigation agreement (DA 13.4), the general funding mitigation fee (DA 13.6) and the  
new MPD Financial Agreement (DA 13.6, 13.9 and DA Exhibit N). Though the Council may  
wish to seek further clarity on this issue, beyond what it has already agreed to and its  
proportional share of regional improvements it is likely YB cannot be legally compelled to  
contribute more.*

4. Conflict of interest. Concern was expressed that YB's funding of permit review staff in the  
FA creates a conflict of interest. See Exhibits 31, 37, 62, and 199.

**Examiner Response:** *Any conflict of interest would be minimal, because the Applicant's control  
over City personnel is minimal. The FA retains full authority over all personnel decisions with  
the City. The only control over personnel left to the Applicant is to withdraw funding through a  
process that involves months of advance notice. Should the Applicant withdraw funding but  
continue to submit a substantial amount of permit review work, the positions of the review*

1 *personnel would likely continue to be funded by permit fees. To further reduce the conflict, it is*  
2 *suggested that the FA contain a provision prohibiting the Applicant from threatening to withhold*  
3 *funding on the basis of City personnel/decision making issues and that if any such threat is made*  
4 *that the Applicant be required to fund the affected City staff member's position for as long as*  
5 *MPD work necessitates the position as reasonably determined by City staff.*

### 6 13.7 Noise Attenuation

7 1. Noise. Four commenters discussed noise concerns. See Peter Rimbo (Ex. 3-13e),  
8 Vicki Harp (Ex. 47), Cindy Proctor (Ex. 109) and T. Hanson (Ex. 126). Mr. Rimbo was  
9 concerned about implementation of LH MPD COA 35 and 44 with respect to best management  
10 practices, the composition of the Noise Review Committee and enforcement of noise provisions.  
11 He requested an additional noise study following partial build out to determine if mitigation  
12 measures were adequate. Mr. Rimbo also expressed concern about the construction haul road  
13 within the property. Ms. Harp expressed concern about the composition and scheduling of the  
14 noise committee. Ms. Harp, Ms. Hanson and M. Proctor would like a new noise study. Ms.  
15 Harp also requested the DA should be amended to provide more specificity with respect to when  
16 noise generating construction activities can occur and over what duration.

17 **Applicant Response:** The Applicant responded the MPD COA do not specify when the  
18 committees must be convened. The Applicant proposes commencement of the Noise Review  
19 Committee for each MPD on a date two weeks following the beginning of on-site construction.  
20 The Applicant noted on-site construction includes clearing and grading (Ex. 139). They further  
21 testified the noise attenuation mitigation language in DA 13.7 incorporates directly the language  
22 of V MPD COL 44 and LH MPD COL 42.

23 **City Response:** Steve Pilcher testified the committees will be formed once the construction is  
24 closer to beginning. Mr. Pilcher stated the Applicant was not obligated to convene the noise  
25 committee until after build-out has begun. The make-up of the committees was established in the  
26 MPD ordinances, and he noted that any individual is allowed to attend the meetings of the  
committees.

19 **Examiner Response:** *As detailed in the YB response, most of the requirements discussed above,*  
20 *in particular those addressed by Ms. Harp, are required by the COAs. The COAs do not require*  
21 *the DA to add any additional mitigation measures, so any pursued by the Council would require*  
22 *the voluntary approval of YB. The City's noise regulations already require a significant amount*  
23 *of noise protection, although as noted in the FEISs the noise generated by the projects will go on*  
24 *for an unusually long period of time. The "six months or longer" in DA 13.7 addressed by Ms.*  
25 *Harp above is somewhat ambiguous. In order to avoid abuses, the Council may wish to clarify*  
26 *that the 6 months is over any two year term or something similar. It should also be noted that*  
*the noise hotline and the noise committee are only used to assess violations of the noise*  
*reduction program outlined in the MPD conditions. The noise reduction program doesn't*  
*require compliance with the City's noise standards. It would be worthwhile for the City Council*  
*to see if YB is willing to add compliance to city/state noise standards to the hotline and to the*

1 review of the noise committee. It would also be worthwhile clarifying the DA to provide that the  
2 noise study required by V COA 44 will be completed prior to the commencement of construction.

3 *Rimbos is concerned about the MPD conditions, which the Council has already adopted.*

4 *As to the concerns of Mr. Rimbos with COA 44, the road in question appears to be entirely on*  
5 *private property and will with the limited purpose of provide a construction haul route. Mr.*  
6 *Rimbos has not provided any rationale as to why more City control over the construction of that*  
7 *street is necessary and none is evident from the record. Without further information it is difficult*  
8 *to assess whether additional control is necessary or appropriate. Any additional mitigation*  
9 *would require the voluntary compliance of YB, since the COAs do not require this issue to be*  
10 *further addressed in the LH DA.*

11 *The composition of the committee is required by the COAs. The community has a minority*  
12 *position but so does YB. Since YB and the community have an equal number of seats, the City is*  
13 *in a position to cast tie breaking votes when the community and applicant disagree. Given that*  
14 *the City is responsible for imposing the requirements of the committee onto the developer, the*  
15 *City's role in this regard is appropriate. The committee only makes recommendations to the*  
16 *Council, yet YB is allowed to decide what opinions are included in the annual reports issued by*  
17 *the committee. V COA 45 does authorize members of the community to comment on the report,*  
18 *but it leaves YB with the ultimate authority to decide what is written into the report. It is*  
19 *recommended that the Council seek agreement from YB to revise the DA to allow the community*  
20 *to write their own minority reports to accompany the annual report when necessary, so that*  
21 *opinions can be shared without restriction. As to the timing of the reports, the COAs require the*  
22 *noise committee to assess compliance with the noise requirements of the COAs. Some of those*  
23 *requirements, such as preparation of noise studies, are best reviewed prior to the commencement*  
24 *of construction. The COAs do not address when the noise committee will begin meeting and it is*  
25 *reasonable to conclude that the committee would be most effective if it was able to commence*  
26 *reviewing noise abatement proposals before construction commenced. The City Council can*  
*certainly consider seeking voluntary agreement from YB to initiate noise committee meetings*  
*earlier than planned and may even be able to argue that for the COAs impliedly require an*  
*earlier initiation period in order for the committee to fulfill their role.*

20 2. Work Hours. Three commenters expressed concern about the hours of operation and  
21 noise impacts to adjacent properties. See Peter Rimbos (Ex. 3-13e), Vicki Harp (Ex. 47), and C.  
22 Proctor (Ex. 190).

23 **City Response:** Steve Pilcher testified that there is concern by property owners over noise  
24 created by construction. YB has agreed to limit working hours on Sunday, and the City also  
25 required YB to restrict work hours even more than city code generally requires (one hour earlier  
26 on Saturday and weekdays).

**Examiner Response:** *The Development Agreement is required by the V COA 43 to identify  
work hours. Consequently, the Council can require the DA to contain work hours that are*

1 *reasonably necessary to address the unique long term construction activities of the MPDs.*  
2 *However, since the City already has adopted work hours into its code, the Council should confer*  
3 *with the City Attorney as to the limits on its authority to further restrict work hours.*

### 4 13.8 Green Valley Road

5 1. Green Valley Road. Green Valley Road has been designated under King County's  
6 Historic Heritage Corridor for its unique agricultural character. Despite the roadway's low traffic  
7 volumes, safety has historically been a concern on Green Valley Road because of its limited  
8 shoulders, curvilinear alignment, the proximity to the roadway of fences and trees, and the mix of  
9 agricultural users, non-motorized users, and other users. The FEIS predicted project-related  
10 traffic will increase the volume of traffic on Green Valley Road by as much as 300-400%. The  
11 MPD COA require the City to commission a Traffic Calming Study for SE Green Valley Road  
12 (DA Exhibit P) to include an assessment of traffic calming devices within the existing improved  
13 right-of-way and an analysis and recommended mitigation to ensure the safety and compatibility  
14 of the various uses of the road. The MPD COA further required the creation of a Green Valley  
15 Road Review Committee to review the study, and attempt to reach an agreement on whether any  
16 suggested traffic calming devices should be provided. This committee will also review the plan  
17 to prohibit or discourage use of Plass Road.

18 Fourteen persons spoke to issues surrounding project impacts to Green Valley Road (Mr.  
19 Rimbos, King County, Sierra Club, Judith Carrier, Ex. 15, 30, 57, 63, 87, 98, 117, 131, and  
20 verbal testimony from Steve Heister and Brock Deady). Of these, Judith Carrier (Ex. 130, 186  
21 and 246) and King County (Ex. 13b, 51, and 244) were the most prolific. V MPD COA 33 and  
22 34 and LH MPD COA 29 and 30 deal with the issue of Green Valley Road and eliminating a  
23 possible connection to it via Plass Road.

24 King County testified extensively on this issue (Ex. 13b, 51, 244). King County's initial concern  
25 was the impact to unincorporated rural areas (Ex. 13b). In his verbal testimony, King County's  
26 Traffic Engineering Section Manager, Matthew Nolan, asked the City to amend the DAs by  
including two new conditions (Ex. 51). The new condition, related to Green Valley Road,  
requested the monitoring of traffic volumes and the creation of trigger points after which no new  
development could occur without mitigation. King County also noted they do not agree with the  
"applicant's assertion that capacity on Southeast Green Valley Road is accurate simply by  
classifying the road as an arterial. The actual capacity has not been calculated, nor does the  
County wish to make an estimate without considerable evaluation of the roadway conditions,"  
(Ex. 244,). The County went on to list a number of factors which might reduce the roadway  
capacity.

Mr. Rimbos contended the Traffic Calming Study (DA Exhibit P) is simplistic and does not  
address the impacts to the rural nature of the road (Ex. 13d, 13e, 118, 145, 224, 226, 247, 262).  
He stated the study uses urban forms of slowing traffic. Mr. Rimbos expressed his  
dissatisfaction that the Green Valley Road Review Committee has not yet been formed. Mr.  
Rimbos also noted the DAs do not incorporate any mechanism for allowing the committee to

1 provide input beyond the Traffic Calming Study. Mr. Rimbo also requested a change in the  
2 composition of the committee to include a representative from King County.

3 Judith Carrier (Ex. 130, 186, 246) argued there should be no direct connection between the MPD  
4 and Green Valley Road. She stated she supported the King County request for additional  
5 conditions. She stated she believed the traffic calming measures in DA Exhibit P were not  
feasible, did not consider the mix of users, and failed to adequately address safety. Ms. Carrier  
also requested changes to the composition of the Green Valley Road Review Committee.

6 **Applicant Response:** YB responded by noting mitigation measures are incorporated in the  
7 Traffic Calming Study (DA Exhibit P). The Applicant contended the MPD COA do not require  
8 them to prohibit project traffic from using Green Valley Road; rather the MPD COA require  
them to study ways to discourage it from using the roadway.

9 **City Response:** The City responded by stating the Traffic Calming Study (Exhibit P) complies  
10 with the MPD COA because it analyzed the road based on the MPD COA's requirements,  
11 provided an analysis of various traffic calming measures and described which measures were  
12 most likely to discourage traffic and increase safety by reducing vehicle speeds (Ex. 257). The  
13 City's consultant traffic engineer, John Perlic, responded to the County's request for an  
additional condition by stating the County's requested condition was not supported by  
transportation engineering (Ex. 216).

14 **Examiner Response:** *The MPD conditions have set the composition of the committee and this  
15 cannot be revisited without an amendment to the MPD, which is beyond the scope of this  
16 process. The composition of the committee is set up so that if the Applicant and the community  
17 members disagree on mitigation, the City has the final decision-making authority via a tie-  
18 breaking vote on what to require of the Master Developer. Given that the City can be held  
19 legally accountable for the mitigation required of the Master Developer, the committee  
20 composition is well suited for deferred decision-making on project mitigation. The MPD  
21 conditions do not require the Green Valley Road Review Committee to be formed prior to the  
22 approval of the DAs.*

23 *The COAs do not require the DA to address Green Valley Road traffic except for the preparation  
24 of a traffic calming study and its implementation as outlined in the COAs. Consequently, any DA  
25 terms beyond the traffic study would be subject to the voluntary approval of YB. The Council is  
26 not likely to get YB to agree to King County suggestions that it cease MPD development if traffic  
is disruptive to Green Valley Road. One point the Council may acquire agreement on is a  
modest expansion to the authority of the Green Valley Road Committee. The COAs currently  
limit the authority of the committee to reviewing traffic calming measures identified in the traffic  
calming committee. This authority could be expanded to consider and make recommendations  
on other traffic calming strategies that are not identified in the report, provided that the costs of  
any alternative measures will not be more than that of the measures identified in the report.*

1           15.0    General Provisions

2                   15.1    Binding Effect and Vesting

3           1. Discretion Regarding Development Agreements. D. Bricklin (Ex. 202) stated the  
4 City has discretion as to whether to adopt a development agreement and discretion to decide its  
5 content. Mr. Bricklin also identified deficiencies in the City’s MPD regulatory framework.

6 **Examiner Response:** *The COAs require the DA to include those controls and the validity of*  
7 *those COAs cannot be contested at this level of review. However, the issue does raise the*  
8 *tangential issue of how the DA land use controls are to be enforced. The City’s project review*  
9 *criteria, such as for conditional use permits and subdivisions, require that applications comply*  
10 *with the City’s zoning ordinances. They do not require compliance with the land use controls*  
11 *adopted into the DAs. One could argue with a straight face that a permit applicant would have*  
12 *no obligation to comply with land use controls newly created in the DAs to acquire permit*  
*approvals. Compliance with what are traditionally basic zoning requirements such as the*  
*setbacks and building heights created for the DAs arguably could not be required for the*  
*issuance of implementation project approvals. Conceivably, the City would have to enforce the*  
*DA land use controls through a breach of contract action or possibly a code enforcement action*  
*(construing a DA as an MPD permit condition).*

13 *If the enforceability of the DA newly created land use controls is truly an issue, ideally the DA*  
14 *would enable the Council to adopt regulations outside of the vested development standards that*  
15 *would provide that the DA land use controls apply to implementing project applications.*  
16 *Ironically, such an adoption would undermine the City’s position that the DAs do not constitute*  
17 *development regulations. Hence the “box” argued by Mr. Bricklin. More creative ways around*  
18 *the dilemma would be to provide that the City has no obligation to issue permits that are not in*  
19 *conformance with DA standards and YB waives the right to any legal recourse if the City*  
20 *legitimately refuses to process and/or approve an application for that reason. The Examiner*  
21 *makes no recommendations or conclusions on this issue, since it is related to some of the matters*  
22 *under litigation. The issue is just brought up to ensure that the matter isn’t inadvertently*  
23 *overlooked in the approval of the DAs. It is recommended that the Council consult with the City*  
24 *Attorney on this issue.*

20                   15.2    Duties of Master Developer

21           1. Single Master Developer. In Ex. 94 Susan Harvey expressed concern that DA 15.2  
22 sentence one requires clarity because it fails to make it clear that though there may only be a  
23 single Master Developer at a given time, there may be a succession of different Master  
24 Developers Transferees over time. She also expressed concern that the clause could be  
25 interpreted to mean each MPD could have its own, separate Master Developer.

25 **Applicant Response:** The Applicant responded by noting V MPD COA 6 and LH MPD COA 5  
26 do require a single Master Developer throughout the term of the DA but that each separate MPD  
may have its own Master Developer who may or may not be the same entity.

1 **Examiner Response:** *DA 15.2 already provides that a Master Developer Transferee may take*  
2 *the place of the Master Developer, but it does not expressly limit the transferee to one. It is*  
3 *unlikely that a court would interpret DA15.2 to allow multiple transferees to operate at the same*  
4 *time, but the language can be easily clarified by modifying the parenthetical from “...(or Master*  
5 *Developer Transferee)...” to “...(or single Master Developer Transferee)...”*

6 *As to Ms. Harvey’s concern that 15.2 could be interpreted as authorizing a different Master*  
7 *Developer for each of the MPDs; that is probably the way it would be interpreted. Nothing in*  
8 *the DAs require that the Master Developers for each MPD be the same. If the intent of the*  
9 *Council is to require one Master Developer run both MPDs, the DAs should be clarified*  
10 *accordingly.*

11 **B. Findings of Fact – General Comments**

12 1. Moratoriums. C. Proctor (Ex. 191) spoke to the moratorium status of the MPD. She  
13 also expressed concern regarding potential transparency issues. Ms. Proctor noted that the public  
14 felt deceived when the Council let the moratorium on the MPDs expire by simply not extending  
15 it without any public notice. She wrote that this action in addition to the YB funding agreement  
16 will be reviewed by the State Auditor’s Office.

17 **Examiner Response:** *Ms. Proctor’s comment is outside the scope of the DA hearings.*

18 2. DA Committees. In Ex. 126, Cindy Wheeler expressed concern over the membership  
19 of the citizen committees formed by the DAs and the fact that they had not been formed prior to  
20 the DA hearings.

21 **Applicant Response:** In its response to this issue (Ex. 139), the Applicant stated the MPD COA  
22 did require them to form the committee before approval of the DA and that, with the exception of  
23 the noise committee, it intended to form the committees within 30 days of the approval of the  
24 DAs. The noise committee will be convened two weeks following the beginning of on-site  
25 construction for each MPD.

26 **Examiner Response:** *None of the COAs require the citizen committees to be formed prior to the*  
*DA hearings or have input in that process. The COAs all arguably anticipated that the*  
*committees would assist in the implementation of the DAs as opposed to their approval.*

*The Green River Valley Road Review Committee, created by V COA 30 and LH COA 33, has a*  
*mandate limited to reviewing a traffic calming study and identifying those calming measures that*  
*YB should construct. The condition arguably anticipates that the Green River committee will*  
*meet after the DA review is completed by providing that the implementation of traffic calming*  
*measures adopted by the City in its DAs shall be subject to the subsequent approval of the Green*  
*River Committee.*

1 *V COA 45 provides that the mandate of the noise review committee is to review and evaluate*  
2 *compliance with the noise conditions imposed upon the MPDs. The DA is the source of some of*  
3 *those controls. The COAs limit committee review and evaluation to conditions already adopted.*

4 *Similar to the noise review committee, LH COA 86 provides that the mandate of the water*  
5 *quality control committee is to review compliance with stormwater requirements that the City*  
6 *has already adopted into the DA or elsewhere.*

7 *The make-up of the committees is set by the COAs and could not be modified without amendment*  
8 *of the MPD approvals. If the Council wishes to provide for committee input on the DAs, it could*  
9 *provide the committees that opportunity by remanding the DAs back to the Examiner for*  
10 *consideration of committee concerns. Since DAs are not considered project permit applications,*  
11 *they are not subject to the one hearing rule of the Regulatory Reform Act, Chapter 36.70B RCW.*  
12 *However, the City Attorney would have to determine if a remand would be consistent with the*  
13 *City's regulations.*

14 3. Impartiality. Two individuals submitted testimony related to claims or perceptions of  
15 impartiality. G. Evans (Ex. 14) supported and commended the efforts of City officials and staff.  
16 J. McElroy (Ex. 15) expressed strong dissatisfaction with the City's decision making process.  
17 Dennis and Diana Boxx (Ex. 129) do not feel the City has the best interests of the residents in  
18 mind, and is favoring the developer through these hearings.

19 **Examiner Response:** *The citizen concerns above are presented for consideration by the*  
20 *Council. Related to the partiality issue too is a series of objections and responses between the*  
21 *City Attorney and David Bricklin regarding the make-up of project opposition groups and their*  
22 *motivations. The Examiner found none of the multiple objections between the attorneys to be*  
23 *relevant to his consideration of the DAs, but is allowing the exhibits to remain in the record on*  
24 *the premise that the Council may find it relevant in its exercise of discretionary matters to know*  
25 *what part of its constituency is requesting changes to the DAs and why. See, e.g., Ex. 218, 232,*  
26 *237, 238, 243, 247, 263, 265, 273.*

19 4. Natural Setting and the Comprehensive Plan. Gil Bortleson made the assertion the  
20 scale of development expected of the MPDs is inconsistent with the Comprehensive Plan goal of  
21 “. . . preservation of the quality of [the City's] natural setting, its scenery and views . . .,” (Comp  
22 Plan, p. 4-1). See exhibits 113, 209, and 269. In response, Mr. Bortleson requested an additional  
23 condition requiring the formation of a Visual, Aesthetic, and Buffer Plan which would address  
24 visual and aesthetic values, retain natural landforms and vegetation, and provide buffers,  
25 setbacks, and conservation easements transitioning to adjacent properties. Mr. Bortleson cited  
26 BDMC 18.98.140.B and 18.72.030.E as supporting this requirement.

24 **Applicant Response:** The Applicant responded to this assertion in Ex. 209, stating that  
25 imposing additional requirements was inappropriate as the adequacy of the MPD approvals and  
26 the EIS is a closed matter. Furthermore, in regards to the BDMC sections cited by Mr.

1 Bortleson, YB states that the MPDs have been found consistent with BDMC 18.98.140.B in  
2 MPD COL 53 and the requirements of BDMC 18.72.030.E are addressed by DA 5.5.

3 **Examiner Response:** *The visual and aesthetic impacts of the MPDs were addressed by the*  
4 *EISs, which found that no mitigation was required as no significant impacts would occur (V EIS*  
5 *pp. 3-65 through 3-67; LH EIS pp. 3-61 through 3-64). Mr. Bortleson has provided no new*  
6 *information beyond that considered by the EISs and the City during the consideration of the*  
7 *MPDs. Of additional consideration is the fact that the MPDs and DAs incorporate many of the*  
8 *features called for by Mr. Bortleson, including buffers and setbacks. The City's tree*  
9 *preservation ordinance requires the retention of trees. BDMC requirements for buffers between*  
10 *non-compatible land uses (BDMC 18.72.030) would apply to the MPDs. Despite all this, as an*  
11 *aesthetic standard, the Council could reasonably require additional setback/vegetative retention*  
12 *standards through its authority to add land use restriction to the DA under V COA 128.*

13 *Mr. Bortleson's made an assertion the MPD violate the intent of the Comprehensive Plan to*  
14 *preserve the quality of the City's natural setting (BDMC 18.98.140.B and 18.72.030.E). Similar*  
15 *to the Examiner responses addressing compatibility with rural character, any requirements for a*  
16 *natural setting must be construed along with the City's obligation to grow at urban densities.*  
17 *The extensive amount of open space and other design features of the MPDs preserve the natural*  
18 *setting as much as can reasonably be expected within the context the urban densities of the*  
19 *project.*

20 5. Violations of State Law. In reference to Mr. Derdowski's testimony (Ex. 40 and  
21 verbal testimony), H. Russell (Ex. 72) stated that several sections of the BD DA violate WA state  
22 law; citing specifically Sections 3.0, 7.2.1, 7.3.1, 8.2, 10.5, 11.1, 12.9.1, and 15.7 of the DA.

23 **Examiner Response:** *Mr. Russell does not identify what laws the DA sections violate, so it is not*  
24 *possible to respond to his concerns.*

25 6. Loss of Rural Character and Historical Resources. Seven parties commented on  
26 matters pertaining to Black Diamond's rural character. J. Paulsen (Ex. 3-13a) requested that the  
DA ensure urban services are provided on the urban side of the urban growth boundary. P.  
Rimbos (3-13e) stated DA 5.2.3 (C, D, and E) should not allow structural protuberances into  
sensitive areas setbacks, asserting that this will detract from the rural character of the community.  
Matthew and Tiffanie McGibney (Ex. 12) stated, "everything we value in our small town and  
moved here for is in jeopardy of being destroyed." M. Stewart (Ex. 48) expressed rural means a  
different thing to her than as conceived by Mr. Arendt. The Greater Maple Valley  
Unincorporated Area Council (Ex. 63) expressed concern about adverse impacts on the rural  
areas due to the placement of the proposed Stormwater Detention Facility outside the UGA. S.  
Davis (Ex. 107) testified she hoped to preserve the small town feel and history in Black  
Diamond. Two parties commented on potential loss of Black Diamond's historical resources (Ex.  
36 and 99).

1 **City Response:** The City noted the minimum density of the MPDs was set by the Black  
2 Diamond MPD development regulations codified at BDMC 18.98.120(E) (Ex. 202). These  
3 regulations, in turn, cross-referenced the MPD base density standard set forth in the 2009 Black  
4 Diamond Comprehensive Plan, as well as the base density standard set in all development  
5 agreements or pre-annexation ordinances. The City's Comprehensive Plan's Land Use chapter  
6 (Section 5-13) calls for densities that are "urban in nature (minimum 4 units per gross acre) ...."  
Likewise, the BDUGAA (which applies to large portions of the MPDs) calls for a base density of  
4 units per acre. These base density standards are, in large portion, responsible for the total  
dwelling unit count.

7 **Examiner Response:** *This matter has already been considered in both MPDs, see MPD COL*  
8 *27, which concludes that the minimum densities of the MPDs are legally required. As discussed*  
9 *elsewhere, V COA 131 requires all implementing project applications to propose densities of at*  
10 *least four dwelling units per acre. Unless the Council can have YB voluntarily agree to not*  
11 *develop portions of its property, this means that the Council cannot consider changing the*  
12 *density of the project without an MPD amendment. As testified by YB at the DA hearings, the*  
13 *author of 'Rural by Design' has concluded that the MPD design meets the objectives of his book.*  
14 *No one other than Mr. Rimbo has made any other suggestions on how to maintain rural*  
15 *character within the densities required for the project. The suggestions made by Mr. Rimbo can*  
16 *be required to be included in the DAs if the Council chooses. Beyond this, the Council will have*  
17 *to work within the parameters of the densities required by the COAs for the MPDs to protect*  
18 *rural character.*

19 7. Effect of Construction Activity. Vicki Harp (Ex. 3-13i) and T. Hanson (126) both  
20 testified to the effects of construction activity. Ms. Harp is concerned about the safety effects of  
21 dump trucks in the regional traffic stream. Mr. Hanson is concerned the vibration from heavy  
22 equipment will be felt at his property because his land is all sand.

23 **Examiner Response:** *Regarding Harp's concerns, there is no evidence in the record that dump*  
24 *truck traffic will be a safety issue. Regarding Hanson's concerns, he already presented his*  
25 *vibration concerns during the MPD hearings, as shown at p. 19 of the Hearing Examiner*  
26 *Recommendation for The Villages MPD (signed on May 11, 2010). However, his concerns over*  
*ground vibration from construction vehicles were not otherwise addressed in the MPD decisions.*  
*There is no evidence in the record to show that vibration impacts could create any damage and*  
*the COAs do not require that they be addressed in the DA. If the Council would like to address*  
*this issue it would need the consent of YB.*

27 8. Dust. T. Hanson (Ex. 126) requested the inclusion of dust control measures in the  
28 DA.

29 **Examiner Response:** *Regarding Hanson's concerns, he already presented his dust concerns*  
30 *during the MPD hearings, as shown at p. 19 of the Hearing Examiner Recommendation for The*  
31 *Villages MPD (signed on May 11, 2010). However, his concerns were not otherwise addressed*  
32 *in the MPD decisions. The MPD FEIS notes at 4-88 through 89 that YB will be required to*

1 *comply with the Puget Sound Clean Air Agency's (PSCAA) Regulation I, Section 9.15 requiring*  
2 *reasonable precautions to avoid dust emissions. This environmental protection may include*  
3 *application of water or other dust suppressants during dry weather. The COAs do not require*  
4 *the DAs to address dust impacts. Any further mitigation would require the voluntary consent of*  
5 *YB.*

#### VIII. Recommended Implementing Conditions

6 As a conclusion of law it is determined that the following DA revisions are necessary to  
7 implement the MPDs as required by the MPD COAs. It is further determined that with the  
8 revisions below the DAs satisfy all of the DA requirements of the COAs. The reasons why each  
9 revision recommended below are found necessary are discussed in Section VII of this decision.

10 A. Open Space Boundary Amendments. V DA 4.4.6 should be amended to require  
11 that minor amendments for changes to open space boundaries may only be used if all the  
12 prerequisites for qualifying as a minor amendment in BDMC 18.198.100(D) are met.

13 B. Land Use Plan. DA 4.4.8 should be revised to require that any changes in the  
14 approximate acreages identified in the legend of the Land Use Plan, V DA Ex. L, may not be  
15 changed by more than 5% without an MPD amendment.

16 C. Accessory Dwelling Units. VDA 4.7.3 should be clarified to provide that  
17 accessory dwelling units count towards the total number of dwelling units authorized for the  
18 MPDs.

19 D. City Enforcement of Privately Adopted Sign Standards. V DA 5.4.3 should be  
20 revised to remove the obligation for the City to enforce privately adopted sign standards.

21 E. Covington Water District. V DA 7.2 should be clarified to provide that  
22 Covington water system standards and the like shall apply within areas of the MPDs subject to  
23 the Covington Water District, to the extent required by law.

24 F. Certificates of Water Availability. V DA 7.2.1 should be eliminated. It provides  
25 that the DA shall serve in the place of certificates of water availability for the MPDs.

26 G. Baseline for Water Conservation Plan. V DA 7.2.5 sets an inaccurate baseline  
for measuring water conservation. An accurate historical figure should be used as referenced in  
Section VII.

H. Sewer Availability. V DA 7.3.1, stating that the DA provides for sewer  
availability should be stricken.

I. Stormwater Enforcement. V DA 7.4.5 shall be revised to include timelines for  
phosphorous mitigation and mechanisms for enforcement. It should be noted that Section VII  
encourages the Council to negotiate timelines and enforcement for the "no net increase" standard

1 voluntarily assumed by YB, but recognizes that YB cannot be compelled to agree to such  
2 requirements.

3 J. Fish and Wildlife Buffer. It is recommended that staff provide the Council an  
4 explanation, based upon the record, of whether the wildlife corridors comply with the City's  
5 Sensitive Areas Ordinance and that the corridor boundaries be revised as necessary if they do not  
6 before any agreement is made to the boundaries as identified in V DA 8.2.2

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

12 L. Mine Hazard Areas. The City Council should not agree to any mine hazard area  
13 delineations in 8.2.3 until revised language is added to the DAs as specified in Section VII.

14 M. Open Space Assessment. V DA 9.1 should be revised to enable the City to  
15 require that MPD-wide open space requirements be satisfied at earlier stages of development  
16 within MPD phases as discussed in Section VII.

17 N. Park Dedication Plan. V DA 9.9.1 should be revised to provide for a more global  
18 park dedication plan that prevents park dedications to be conducted on a piecemeal basis at  
19 project implementation.

20 O. Parks Standards. V DA Chapter 9 should be clarified to provide that the City's  
21 Parks and Open Space Plan will govern park design standards when stricter standards are not  
22 imposed by the DA.

23 P. High School in Commercial Area. City staff should clarify, using information in  
24 the record, if the high school is proposed for a commercially designated area. If so, the Council  
25 should specify in the DA when an updated fiscal analysis will be necessary to ensure the fiscal  
26 neutrality of the MPDs.

Q. Police and Fire LOS. The DA should be revised to provide that the fiscal  
analysis shall maintain the City's police and fire level of service standards.

R. MPD Subject to COAs. V DA 15.1 should be revised to provide that all  
development within the properties subject to the MPD approval shall be developed in  
conformance with all COAs.

S. Conceptual Site Plan. The conceptual site plan, DA Ex. A, should be removed  
from the DA.

1 T. City Approval of Traffic Reports. The DA traffic monitoring plans, DA Ex. F,  
2 should be revised to require City approval of all traffic monitoring reports.

3 U. Project Level Concurrency. The DA monitoring plans, Ex. F, should be revised  
4 to provide that the City will not approve any implementing projects unless they comply with  
GMA concurrency requirements as adopted into the City's concurrency regulations.

5 V. Land Use Plan Legend. The legend on Land Use Plan, DA Ex. L, shall be  
6 clarified to differentiate between uses as required by LH COA 151 prior to DA approval.

7 W. Funding Agreement. It is recommended that the DA be revised to require that the  
8 proposed funding agreement attached as DA Ex. N, or a substantially similar agreement, be  
9 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.

10  
11 X. Stormwater monitoring. V DA Ex. O should be clarified to provide that the  
12 Kendig stormwater monitoring plan shall be required to extend for five years beyond the  
completion of all development that discharges into the facility.

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15 ORDERED this 14<sup>th</sup> day of September, 2011.

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Phil A. Olbrechts  
18 Hearing Examiner for Black Diamond  
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