

Mr. Phil Olbrechts
Olbrechts and Associates
18833 74th St. NE
Granite Falls, WA 98252-9011

June 13, 2011

Re: City of Black Diamond Development Agreements

Dear Mr. Olbrechts:

We are in receipt of your notice that the hearings for the proposed development agreements are scheduled to begin on July 11, 2011.

At our pre-hearing conference, you stated that you would schedule the hearing at least thirty days after the release of the final draft agreement and the staff report.

We have not received the staff report, and believe that it has not been prepared. As you know, the draft development agreement and staff report are inextricably linked. We urge you to delay the scheduling of this hearing until after the staff report is available for review.

We also request that you schedule the hearing for sixty days after the receipt of the staff report. We have contacted our technical consultants and have been informed that their availability on short notice to review these voluminous documents and respond adequately is in serious doubt.

The Applicant and City staff have had unlimited time to analyze and prepare these documents. Indeed, their technical staffs researched and prepared them. To require other parties to have only thirty days to review these documents and prepare detailed written testimony puts us and our experts at a severe disadvantage.

Moreover, the ability of other agencies and jurisdictions to review and respond to these documents is also in doubt. Many of these agencies were not notified about the pre-hearing conference, and have not even received notice of the upcoming hearing. These agencies should receive notice of the hearings *and* be given at least sixty days to prepare their testimony. We would be happy to provide the names of agencies that should have been notified and should have been given an opportunity to respond.

Thank you for your consideration.

Sincerely,

Brian Derdowski
70 E. Sunset Way #254
Issaquah, WA 98027
brian@derdowski.com

On Behalf of Save Black Diamond, the Sensible Growth Alliance, and other residents of the City of Black Diamond

EXHIBIT

151

From: MIKE KENYON <MIKE@kenyondisend.com>
Sent: Monday, June 13, 2011 11:54 AM
To: Phil Olbrechts
Cc: 'Dave Bricklin'; Nancy Rogers; BOB STERBANK
Subject: RE: DEVELOPMENT AGREEMENT HEARINGS

Mr. Olbrechts:

The City of Black Diamond likewise intends to treat Mr. Bricklin's letter of today's date as a pre-hearing motion. Consistent with your verbal comments at the pre-hearing conference conducted on May 23, the City understands that its response will be due next Monday, June 20. Please advise all parties immediately if your verbal comments were otherwise.

With respect to the availability of the staff report, the assertion in Mr. Bricklin's letter is incorrect. I have just confirmed by telephone with City staff that the staff report was posted to the City's website before 4:00 p.m. this past Friday, June 10. Thank you.

Michael R. Kenyon
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The Municipal Law Firm
11 Front Street South
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>>> Nancy Rogers <NRogers@cairncross.com> 6/13/2011 10:41 AM >>>
Mr. Olbrechts,

Yarrow Bay disputes many of the assertions in this letter. We will treat this as a pre-hearing motion, which are due today anyway, and will respond in detail in due course.

However, you and Mr. Bricklin should know immediately that:

- (1) a joint staff report was also posted to the website on June 10 and is on the same page as the development agreements (<http://www.ci.blackdiamond.wa.us/Depts/CommDev/DA.html>), with a link titled "Staff Report" right above the table for the Lawson Hills Agreement;
- (2) the final development agreements themselves were posted on June 9, and each Agreement itself is slightly over 150 pages. These final versions are substantially similar to the version that was placed on the City's website in April.
- (3) 30 days notice is more than two weeks longer than City code affords for scheduling this type of hearing.

If you have any intention of not treating Mr. Bricklin's letter as a pre-hearing motion, such that you would take some action prior to the schedule set for motions at the pre-hearing conference, please notify me immediately.

Thank you.

EXHIBIT

152

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Nancy Bainbridge Rogers
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From: Dave Bricklin [mailto:bricklin@bnd-law.com]
Sent: Monday, June 13, 2011 9:54 AM
To: Phil Olbrechts
Cc: Nancy Rogers; 'MIKE KENYON (mike@kenyondisend.com)'; BOB STERBANK (BOB@kenyondisend.com)
Subject: DEVELOPMENT AGREEMENT HEARINGS

Mr. Olbrechts,

Please see the attached letter regarding the development agreements hearings. Thank you.

David Bricklin

Bricklin & Newman, LLP
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Reply to: Seattle Office

June 13, 2011

Phil Olbrechts
Olbrechts & Associates, PLLC
18833 74th Street NE
Granite Falls, WA 98252-9011

Re: Development Agreement Hearings

Dear Mr. Olbrechts:

We received notice today that the hearings for the proposed development agreements are scheduled to begin on July 11, 2011. We have three concerns regarding the proposed hearing date. We ask that you immediately address this matter and reschedule the hearing as indicated below.

First, our understanding was that you indicated that the hearing would not be set for at least 30 days following release of the Final Draft Development Agreements and the staff reports analyzing those agreements. To our knowledge, the staff reports have not yet been released. While the Final Draft Development Agreements are now posted on the City's website, there is no sign of the staff reports. Until those staff reports are issued, it is premature to schedule a hearing.

Second, now that the draft agreements and their attachments are available, it is evident that a mere 30 days is not sufficient to allow the public to prepare for these hearings. A quick count indicates that the agreements and exhibits total approximately 1,300 pages. It would be a gross miscarriage of justice to force citizens (most of whom have lives outside watch-dogging the City) to review this massive amount of information, determine the need for expert review, obtain expert review, and develop their lay and expert testimony in the next 30 days.

I recall at the pre-hearing conference you indicated that the minimum time would be 30 days and you anticipated that the actual time would be more than that given the need to coordinate schedules and the availability of the meeting room. But City staff, consistent with its desire to ram these agreements through as soon as possible with no regard to the ability of citizens to meaningfully participate in the process, has scheduled the hearings to begin 31 days after the 1,300 page documents became available. We ask you to intervene immediately to right this terrible injustice. There is no way the City is going to be able to claim that the citizens were "fully informed" this time around if City staff continues to ram through the process in this manner.

EXHIBIT

153

Phil Olbrechts
June 13, 2011
Page 2

Third, while we have only just scratched the surface of the new drafts, it is apparent that gaps still exist. For instance, it appears that the sites for the off-site schools still have not been determined. Likewise, uncertainty persists regarding location of the artificial lake to be constructed off-site for storm drainage purposes. Mitigation fees are proposed for addressing the developments' impact on the city's fire department, but the city has not yet adopted a fire mitigation fee ordinance, so there is no way to assess the adequacy of this mitigation measure. There may be other examples, too, once we have an opportunity to review the documents in detail. Until the agreements are truly complete, scheduling the hearing is premature.

In the past, you have indicated a strong desire to manage the hearing process in a fair manner. We trust that you will perceive the gross unfairness of the incredibly brief amount of time provided by staff for citizen review and modify the hearing schedule accordingly. The City and Yarrow Bay have been working on these documents for over a year. Given their length and complexity and given the importance of these issues to the community for generations to come, a minimum of 60 days (and preferably 90 days) should be provided.

Thank you for your attention to this matter.

Very truly yours,

BRICKLIN & NEWMAN, LLP



David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Bainbridge Rogers
Client

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BEFORE THE CITY OF BLACK DIAMOND

HEARING EXAMINER

IN RE: THE MATTER OF DEVELOPMENT AGREEMENT HEARINGS RELATED TO THE VILLAGES MPD APPROVED IN ORD. NO. 10-946 AND LAWSON HILLS MPD APPROVED IN ORD. NO. 10-947

MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)

I. INTRODUCTION

BD Village Partners, LP and BD Lawson Partners, LP (collectively, "Yarrow Bay") bring this motion pursuant to Hearing Examiner's verbal order during the Pre-hearing Conference dated May 23, 2011,¹ requesting that the Examiner issue a Pre-hearing Order that sets the following procedures for the upcoming hearings on the development agreements for The Villages and Lawson Hills Master Planned Developments ("MPDs").

II. DISCUSSION

A. The development agreements must be reviewed in a quasi-judicial hearing.

We have received copies of emails directed to the Examiner, and exchanged between counsel for a neighborhood opponent group called Toward Responsible Development ("TRD")

¹ On May 13, 2011, Yarrow Bay filed a motion titled "Motion to Set Hearing Procedures On May 23, 2011 Pre-Hearing Conference." This was prior to the Pre-Hearing Conference and in conformance with Hearing Examiner Rule 2.13. In response to the Hearing Examiner's verbal order during the Pre-Hearing Conference, Yarrow Bay respectfully requests this Motion supersede and replace our prior motion.

MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) - 1

CAIRNCROSS&HEPELMANN
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154
EXHIBIT

1 and counsel for the City of Black Diamond. The last email was dated May 5, 2012 from TRD's
2 attorney Mr. Bricklin. TRD argues that the Examiner hear this matter as a "legislative" rather
3 than "quasi-judicial" proceeding. However, pursuant to BDMC 18.66.020.E and BDMC
4 18.08.070, the hearing on the development agreements is required to be quasi-judicial.

5 TRD's argument is that because the MPD Approval Ordinances, Ordinance No. 10-946
6 (The Villages) and Ordinance No. 10-947 (Lawson Hills), were deemed by the Growth
7 Management Hearings Board ("GMHB" or "Board") to be development regulations that should
8 have been processed as "legislative" code amendments, the development agreements following
9 the MPD Approvals must also be "legislative." TRD's argument ignores that the Board's
10 determination as to the MPDs is not settled but, rather, has been appealed by Yarrow Bay.
11 TRD's argument also ignores that the Board has not been presented with and has made no
12 decision regarding the nature of these development agreements. Even more importantly, this
13 argument ignores Board and Court precedent consistently concluding that the GMHB has no
14 jurisdiction over development agreements.² And, finally, this argument ignores that the code of
15 the City of Black Diamond plainly requires that these development agreements be reviewed in a
16 quasi-judicial hearing.

17 Specifically, BDMC 18.08.030 provides that development agreements are Type 4 –
18 Quasi-Judicial decisions. BDMC 18.08.070(A) explains and requires that: "Type 4 decisions are
19 made by the city council following a closed record hearing based on a recommendation from the
20 hearing examiner." Thus, contrary to some of the oral and written testimony submitted during
21 the Pre-Hearing Conference, the Hearing Examiner only makes a recommendation to the City
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23
24 ² See e.g., *Sno-King v. Snohomish County* (CPSGMHB 06-3-0005, Order on Motions, May 25, 2006, p. 7-8);
25 *Hanson v. King County* (CPSGMHB 98-3-0015c, Order Granting Dispositive Motions, Sept. 28, 1998); *Petersville*
26 *Road Area Residents v. Kitsap County* (CPSGMHB 00-3-0013, Order on Motions, Oct. 23, 2000); *City of Burien v.*
City of SeaTac (CPSGMHB 98-3-0010, Aug. 10, 1998); *City of Burien v. CPSGMHB*, 113 Wn.App. 375, 386, 53
P:3d 1028 (holding that in contrast to development regulations, development agreements are individual agreements
between cities and property owners regarding the development, use, and mitigation of the development of a specific
piece of property).

1 Council – not a decision. As a result, the Hearing Examiner has no authority to control the City
2 Council’s decision-making and cannot issue an order that extends to City Council procedures.
3 Any procedures set by the Examiner that are contrary to code simply create an argument for
4 reversal on appeal. The Examiner’s Pre-hearing Order should provide that the hearing
5 procedures will be quasi-judicial.

6 **B. The scope of the hearing should be limited to confirming that the**
7 **development agreements appropriately incorporate those matters directed**
8 **and allowed to be incorporated by the MPD Approvals and State law.**

9 The development agreements for The Villages and Lawson Hills are required under
10 BDMC 18.98.090.³ The development agreements are contracts between a landowner and the
11 City of Black Diamond. *See* RCW 36.70B.170. The purpose of the MPD development
12 agreements is to ensure that the “MPD conditions of approval shall be incorporated” into a
13 development agreement that is “binding on all MPD property owners and their successors,” to
14 ensure that the MPD lands are developed “only in accordance with the terms of the MPD
15 approval.” BDMC 18.98.090. Under RCW 36.70B.170, a development agreement “shall be
16 consistent with applicable development regulations,” and “must set forth the development
17 standards and other provisions that shall apply to and govern and vest the development, use, and
18 mitigation of the development of the real property for the duration specified in the agreement.”
19 *See also*, BDMC 18.66.020.

20 Given these statutory and code directives for the content of the MPD development
21 agreements, the only issues that should be reviewed during the hearings on the development
22 agreements⁴ are: (1) whether each development agreement incorporates the conditions of each

23 ³ On June 3, 2011, the City issued a non-appealable Determination of Significance and Notice of Adoption under
24 the State Environmental Policy Act (“SEPA”) for The Villages and Lawson Hills development agreements.

25 ⁴ Contrary to some of the comments and written testimony submitted during the Pre-Hearing Conference, Yarrow
26 Bay’s three preliminary plat applications (PLN11-0001, PLN11-0008, and PLN11-0010) are not currently before the
Hearing Examiner and, as a result, the Hearing Examiner has no authority to issue any recommendation or decision
regarding these plat applications, and should not spend time hearing testimony regarding the compliance of those
plats with the City’s Code.

1 MPD Approval, as adopted in Ord. Nos. 10-946 and 10-947, (2) whether each development
2 agreement is consistent with applicable development regulations, and (3) whether the matters set
3 forth in the development agreements are within the scope of development standards and
4 provisions authorized to be included in a development agreement by RCW 36.70B.170 *et seq.*
5 and BDMC 18.66.020.

6 Accordingly, Yarrow Bay asks that the Examiner's Pre-hearing Order set the scope of
7 matters to be heard to include evidence and testimony regarding only: (1) whether each
8 development agreement incorporates the conditions of each MPD Approval, as adopted in Ord.
9 Nos. 10-946 and 10-947, (2) whether each development agreement is consistent with applicable
10 development regulations, and (3) whether the matters set forth in the development agreements
11 are within the scope of development standards and provisions authorized to be included in a
12 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020.

13 **C. Procedures for addressing "expert" testimony and evidence, if any, should be**
14 **set by the Examiner.**

15 In light of the scope for a development agreement hearing described above, including the
16 lack of any appealable SEPA determination, Yarrow Bay does not view these development
17 agreement hearings as calling for any "expert" testimony. Accordingly, at this point in time,
18 Yarrow Bay does not intend to provide expert testimony. However, to the extent testimony is
19 presented that drives Yarrow Bay or the City to present experts in rebuttal, the Examiner needs
20 to set rules about how any expert testimony is provided and whether cross-examination is
21 allowed.

22 At the pre-hearing conference, a request was made to define the difference between
23 expert and lay witness testimony. The Rules of Evidence applicable in Washington Courts are
24 instructive and at ER 701 and ER 702 provide:
25
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1 Opinion Testimony by Lay Witnesses

2 If the witness is not testifying as an expert, the witness' testimony in the form of
3 opinions or inferences is limited to those opinions or inferences which are (a)
4 rationally based on the perception of the witness, (b) helpful to a clear
5 understanding of the witness' testimony or the determination of a fact in issue,
6 and (c) not based on scientific, technical, or other specialized knowledge within
7 the scope of rule 702.

8 Testimony by Experts

9 If scientific, technical, or other specialized knowledge will assist the trier of fact
10 to understand the evidence or to determine a fact in issue, a witness qualified as
11 an expert by knowledge, skill, experience, training, or education, may testify
12 thereto in the form of an opinion or otherwise.

13 These rules should be used by the Examiner as well to define the difference between lay and
14 expert testimony.

15 If the Hearing Examiner decides to allow experts to testify orally during the development
16 agreement hearings, any expert who testifies would theoretically be subject to cross-examination
17 from the City, from Yarrow Bay, and from every member of the public who had participated in
18 the hearing, except for whatever person or party called the expert witness. Such a process is
19 unfair, inefficient, and not required by law.⁵

20 Given the limited scope of the development agreement hearings, and in order to maintain
21 control over the timing and process of the proceedings, Yarrow Bay respectfully requests that if
22 any interested person – including Yarrow Bay or the City – chooses to present expert testimony,
23 that expert testimony be presented in writing. We note that this process would simply confirm
24 and continue the process the Hearing Examiner allowed in the MPD Permit hearings. Because
25 we also recommend a sur-rebuttal procedure in this motion, there is no issue of unfair advantage
26 to any party or participating interested person. Accordingly, the Examiner's Pre-hearing Order
should indicate that while expert testimony is not anticipated given the limited scope of the
development agreement hearings, if it is delivered, it is to be delivered only in writing.

⁵ In our view, *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 861, 480 P.2d 489 (1971), stands for the much more limited proposition that parties to a proceeding who are represented by counsel may be permitted to cross-examine expert witnesses, not that every unrepresented interested person who testifies at a public hearing has a right to cross-examine expert witnesses.

1 In the alternative, Yarrow Bay requests that if the Hearing Examiner decides to allow oral
2 expert testimony, and oral testimony is provided either in addition to or in lieu of written
3 testimony, cross-examination should be conducted as follows: (i) any party or interested person
4 represented by counsel may have such counsel conduct the cross-examination; and (ii) any party
5 or interested person not represented by counsel who has questions should submit those questions
6 to the Hearing Examiner to ask of the expert. Contrary to protests heard during the Pre-Hearing
7 Conference, the Hearing Examiner is eminently qualified to ask any necessary follow-up
8 questions based on the concerns provided by an interested person to the Hearing Examiner, and
9 this procedure is often used in the land use hearings in this region. Accordingly, if the Examiner
10 decides to go this route, the Pre-hearing Order should indicate the adoption of this process to
11 assure efficiency and fairness.

12 **D. Timing and process for hearing.**

13 In addition to the items outlined above, Yarrow Bay recommends the following matters
14 be addressed in the Examiner's Pre-hearing Order:

15 1. In the interest of efficiency, the hearings on the development agreements for both
16 The Villages and Lawson Hills MPDs should be consolidated. All persons speaking to either
17 project's development agreement should be instructed to state whether their comments extend to
18 one or both projects and, if just one, which project.

19 2. On June 10, 2011, the City issued notice of the opening of the hearings on July
20 11, 2011 at 6 p.m. and continuing on multiple days thereafter. The hearings should be scheduled
21 to continue day to day until completed.

22 3. The hearings should open and proceed in the following order and with the
23 following time limits:

24 a. The City Staff gives an opening oral presentation of their written Staff
25 Report regarding the MPDs' development agreements, limited to 1.5 hours.
26

1 b. Yarrow Bay gives an opening presentation introducing the development
2 agreements, limited to 1.5 hours, and presenting any initial written statements in support
3 of the development agreements.

4 c. Public testimony shall be taken, with each person speaking provided 3
5 minutes to a maximum of 10 minutes to testify orally, and unlimited written arguments
6 and evidence. The Hearing Examiner should retain the right to limit such testimony to
7 relevant arguments and evidence. Written and oral public testimony will be closed at a
8 date and time certain, except for possible sur-rebuttal described below.

9 d. Members of the public wishing to testify may cede their time to any
10 person; provided, however, that any person ceding time must be present when the person
11 they are ceding their time to testifies. For the limited purposes of ceding time, a
12 maximum of one (1) hour is allowed for any one person testifying.

13 e. At least 48 hours (or in the event public testimony closes on the evening of
14 a weeknight, and closings can be scheduled for the morning of the following Saturday,
15 approximately 36 hours) after written and oral public testimony has closed, the City,
16 followed by Yarrow Bay, will provide their own presentations of whatever length is
17 necessary to respond to questions asked and issues raised in the public testimony. Given
18 the limited scope of the hearing, it is estimated this oral presentation will be no more than
19 three hours combined between the City and Yarrow Bay. Written rebuttal of any length
20 from Yarrow Bay and the City will also be allowed.

21 f. After the rebuttal presentations of the City and Yarrow Bay have been
22 completed, the Examiner shall allow 48 hours for any interested person who has testified
23 or submitted evidence in the hearing to submit written testimony as sur-rebuttal on a
24 specific topic. After the submittal of that sur-rebuttal, Yarrow Bay and the City shall
25 then be provided 48 hours to respond to any sur-rebuttal testimony filed. No additional
26 rounds of sur-rebuttal shall be allowed by the Hearing Examiner.

1 g. The hearing examiner may ask questions of any person presenting or
2 testifying.

3 4. An audio recording of the hearings shall be made by the City of Black Diamond.
4 In addition, Yarrow Bay shall pay the appearance fee for a court reporter to transcribe the
5 hearings. Any person desiring a copy of the court reporter's transcription is required to order the
6 transcript from the court reporter.

7 5. The City clerk shall post all exhibits on the City's website within 48 hours of
8 submittal.

9 6. On June 3, 2011, the City issued a Determination of Significance and Notice of
10 Adoption under the State Environmental Policy Act ("SEPA") for The Villages and Lawson
11 Hills development agreements. The City posted on its website, the final development agreements
12 of both The Villages and Lawson Hills MPDs on June 9, 2011. The City's Staff Report on the
13 development agreements was posted on the City's website on June 10, 2011. Notice of the public
14 hearings for the development agreements was published by the City on June 10, 2011 – more
15 than thirty (30) days prior to the start date of the scheduled hearings.⁶

16 7. Hearing Examiner Rule 2.12 regarding Expected Conduct of all persons shall be
17 quoted in full in the Prehearing Order as follows:

18 **2.12 EXPECTED CONDUCT**

19 (a) All persons appearing before the Hearing Examiner shall conduct
20 themselves with civility and courtesy to all persons involved in the hearing.

21 (b) No party or other person shall communicate with an Examiner presiding
22 over a matter or with any employee of the Hearing Examiner's Office in an
attempt to influence the outcome or to discuss the merits of that matter.

23 (c) No party or other person, other than staff when not acting as a party, shall
24 make or attempt ex parte communication with the Examiner regarding any matter
25 under pending review by the Examiner. Procedural matters may be addressed by

26 ⁶ Pursuant to BDMC 18.08.180, only fourteen days of notice are required prior to the commencement of a public hearing.

1 written correspondence, copied to all known parties. In all matters involving an
2 open record hearing, prior to and during the hearing, the Examiner may ask
County staff to submit additional information into the record.

3 (d) If a substantial prohibited ex parte communication is made, such
4 communication shall be publicly disclosed by the Examiner: any written
5 communications, and memorandums summarizing the substance and participants
of all oral communications, shall promptly be made available to the parties for
review and an opportunity to rebut those communications.

6 8. The Hearing Examiner shall begin each hearing session with an announcement of
7 these hearing procedures.

8
9 **III. CONCLUSION**

10 Yarrow Bay respectfully requests that the Hearing Examiner enter a Pre-hearing Order
11 implementing the procedures described above.

12 DATED this 13th day of June, 2011.

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14 CAIRNCROSS & HEMPELMANN, P.S.

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16 

17 Nancy Bainbridge Rogers, WSBA No. 26662
18 Andrew S. Lane, WSBA No. 26514
19 Randall P. Olsen, WSBA No. 38488
20 Attorneys for Applicants BD Lawson Partners, LP
21 and BD Village Partners, LP
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Certificate of Service

1
2 I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington
3 that on June 13, 2011, I caused a copy of the document to which this is attached to be served on
4 the following individual(s) via email:

5 Phil A. Olbrechts
6 City of Black Diamond Hearing Examiner
7 24301 Roberts Drive
8 PO Box 599
9 Black Diamond, WA 98010
10 Email: olbrechtslaw@gmail.com

11 Steve Pilcher
12 Community Development Director, City of Black Diamond
13 24301 Roberts Drive
14 PO Box 599
15 Black Diamond, WA 98010
16 Email: spilcher@ci.blackdiamond.wa.us

17 Brenda Martinez
18 Clerk, City of Black Diamond
19 24301 Roberts Drive
20 PO Box 599
21 Black Diamond, WA 98010
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23 Bob Sterbank
24 Michael R. Kenyon
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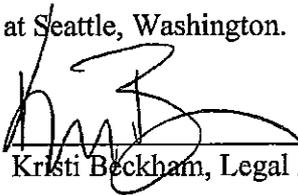
MOTION TO SET HEARING PROCEDURES FOR
DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020,
PLN10-0021, PLN11-0013, & PLN11-0014) - 10

CAIRNCROSS&HEMPELMANN
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Seattle, WA 98104
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1 Courtesy copy provided via email to:

2 David A. Bricklin
3 Bricklin & Newman, LLP
4 1001 Fourth Ave., Ste. 3303
5 Seattle, WA 98154
6 Email: bricklin@bnd-law.com

7 DATED this 13th day of June, 2011, at Seattle, Washington.

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9 _____
10 Kristi Beckham, Legal Assistant

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MOTION TO SET HEARING PROCEDURES FOR
DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020,
PLN10-0021, PLN11-0013, & PLN11-0014) - 11

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BEFORE THE CITY OF BLACK DIAMOND

HEARING EXAMINER

IN RE: THE MATTER OF DEVELOPMENT AGREEMENT HEARINGS RELATED TO THE VILLAGES MPD APPROVED IN ORD. NO. 10-946 AND LAWSON HILLS MPD APPROVED IN ORD. NO. 10-947

[PROPOSED] ORDER GRANTING MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)

The Black Diamond Hearing Examiner has reviewed Petitioners BD Lawson Partners, LP and BD Village Partners, LP's (collectively, "Yarrow Bay's") Motion to Set Hearing Procedures for Development Agreements (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014), and the response and reply briefs of the City of Black Diamond and other interested persons. The Hearing Examiner, having reviewed the file and records in this matter and considered the arguments of counsel and interested persons, deems itself fully advised.

NOW THEREFORE, the Examiner hereby ORDERS as follows:

1. The Motion to Set Hearing Procedures for Development Agreements (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) is hereby GRANTED as follows:

[PROPOSED] ORDER GRANTING MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) - 1
{01638654.DOC;2 }

CAIRNCROSS&HEMPELMANN
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

1 a) On June 3, 2011, the City issued a Determination of Significance and
2 Notice of Adoption under the State Environmental Policy Act ("SEPA") for The Villages and
3 Lawson Hills development agreements. The City posted on its website, the final development
4 agreements of both The Villages and Lawson Hills MPDs on June 9, 2011. The City's Staff
5 Report on the development agreements was posted on the City's website on June 10, 2011.
6 Notice of the public hearings for the development agreements was published by the City on June
7 10, 2011 – more than thirty (30) days prior to the start date of the scheduled hearings. The
8 Villages MPD Development Agreement and Lawson Hills MPD Development Agreement
9 hearings shall commence on July 11, 2011 as provided in the City's notices of public hearing.
10

11 b) The hearings on the development agreements for both The Villages and
12 Lawson Hills MPDs shall be consolidated.

13 c) Pursuant to BDMC 18.08.030, the hearing procedures for The Villages
14 MPD and Lawson Hills MPD Development Agreements shall be quasi-judicial.

15 d) The scope of the development agreement hearings shall be limited to
16 evidence and testimony regarding only the following : (1) whether each development agreement
17 incorporates the conditions of each MPD Approval, as adopted in Black Diamond Ord. Nos. 10-
18 946 and 10-947; (2) whether each development agreement is consistent with applicable
19 development regulations; and (3) whether the matters set forth in the development agreements
20 are within the scope of development standards and provisions authorized to be included in a
21 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020.
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23 e) While expert witness presentations are not anticipated given the limited
24 scope of The Villages MPD and Lawson Hills MPD Development Agreement hearings, if it is
25 delivered, the following distinction will be used to determine who is an expert:
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i. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

- f) If expert witness presentations are made, they shall be delivered only in writing.

[OR, IN THE ALTERNATIVE:

While expert testimony is not anticipated given the limited scope of The Villages MPD and Lawson Hills MPD Development Agreement hearings, if oral testimony is provided either in addition to or in lieu of written testimony, cross-examination shall be conducted as follows: (i) any party or interested person represented by counsel may have such counsel conduct the cross-examination; and (ii) any party or interested person not represented by counsel who has questions should submit those questions to the Hearing Examiner to ask of the expert.]

- g) On June 10, 2011, the City issued notice of the opening of the hearings on July 11, 2011 at 6 p.m. and continuing on multiple days thereafter. The hearings shall continue day-to-day until completed.

- h) The hearings shall open and proceed in the following order and with the following time limits:

- i. The City Staff gives an opening oral presentation of their written Staff Report regarding the MPDs' development agreements, limited to 1.5 hours.

1 ii. Yarrow Bay gives an opening presentation introducing the
2 development agreements, limited to 1.5 hours, and presenting any initial written statements in
3 support of the development agreements.

4 iii. Public testimony shall be taken, with each person speaking
5 provided 3 minutes to a maximum of 10 minutes to testify orally, and unlimited written
6 arguments and evidence. All persons speaking to either MPDs development agreement shall state
7 whether their comments extend to one or both MPDs and, if just one, which MPD. The Hearing
8 Examiner retains the right to limit such testimony to relevant arguments and evidence. Written
9 and oral public testimony will be closed at a date and time certain, except for possible sur-
10 rebuttal described below.

11 iv. Members of the public wishing to testify may cede their time to
12 any person; provided, however, that any person ceding time must be present when the person
13 they are ceding their time to testifies. For the limited purposes of ceding time, a maximum of one
14 (1) hour is allowed for any one person testifying.

15 v. At least 48 hours (or in the event public testimony closes on the
16 evening of a weeknight, and closings can be scheduled for the morning of the following
17 Saturday, approximately 36 hours) after written and oral public testimony has closed, the City,
18 followed by Yarrow Bay, shall provide their own presentations of whatever length is necessary
19 to respond to questions asked and issues raised in the public testimony. Given the limited scope
20 of the hearing, this oral presentation shall be limited to 3 hours combined between the City and
21 Yarrow Bay. Written rebuttal of any length from Yarrow Bay and the City shall also be allowed.

22 vi. After the rebuttal presentations of the City and Yarrow Bay have
23 been completed, any interested person who has testified or submitted evidence in the hearing
24 shall have 48 hours to submit written testimony as sur-rebuttal on a specific topic. After the
25 submittal of that sur-rebuttal, Yarrow Bay and the City shall have 48 hours to respond, in
26 writing, to any sur-rebuttal testimony filed. No additional rounds of sur-rebuttal shall be allowed.

1 vii. The Hearing Examiner may ask questions of any person presenting
2 or testifying.

3 i) An audio recording of the development agreement hearings shall be made
4 by the City of Black Diamond. In addition, Yarrow Bay shall pay the appearance fee for a court
5 reporter to transcribe the hearings. Any person desiring a copy of the court reporter's
6 transcription must order the transcript from the court reporter.

7 j) The Black Diamond City Clerk shall post all exhibits on the City's website
8 within 48 hours of submittal; provided however, that to accommodate the timeframes for the sur-
9 rebuttal procedure described in this Order, the City Clerk shall create a process to provide
10 promptly any written materials related to the sur-rebuttal process to the parties and any interested
11 person who has testified.

12 k) During the development agreement hearings, the City, Yarrow Bay, and
13 all interested persons are specifically instructed to follow Hearing Examiner Rule 2.12:

14 **2.12 EXPECTED CONDUCT**

15 (a) All persons appearing before the Hearing Examiner shall conduct
16 themselves with civility and courtesy to all persons involved in the hearing.

17 (b) No party or other person shall communicate with an Examiner presiding
18 over a matter or with any employee of the Hearing Examiner's Office in an
attempt to influence the outcome or to discuss the merits of that matter.

19 (c) No party or other person, other than staff when not acting as a party, shall
20 make or attempt ex parte communication with the Examiner regarding any matter
21 under pending review by the Examiner. Procedural matters may be addressed by
22 written correspondence, copied to all known parties. In all matters involving an
open record hearing, prior to and during the hearing, the Examiner may ask
County staff to submit additional information into the record.

23 (d) If a substantial prohibited ex parte communication is made, such
24 communication shall be publicly disclosed by the Examiner: any written
25 communications, and memorandums summarizing the substance and participants
26 of all oral communications, shall promptly be made available to the parties for
review and an opportunity to rebut those communications.

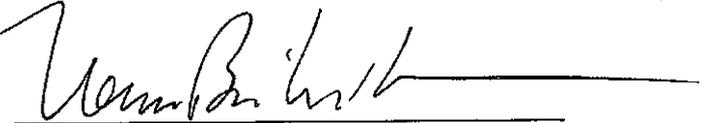
1) Each development agreement hearing session shall begin with an announcement of these hearing procedures by the Hearing Examiner.

DATED this ____ day of June, 2011.

PHIL OLBRECHTS
CITY OF BLACK DIAMOND HEARING
EXAMINER

Presented by:

CAIRNCROSS & HEMPELMANN, P.S.


Nancy Bainbridge Rogers, WSBA No. 26662
Andrew S. Lane, WSBA No. 26514
Randall P. Olsen, WSBA No. 38488
Attorneys for Respondents BD Lawson Partners,
LP and BD Village Partners, LP

[PROPOSED] ORDER GRANTING MOTION TO SET
HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 6

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CAIRNCROSS&HEMPELMANN
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Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

Certificate of Service

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2 I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington
3 that on June 13, 2011, I caused a copy of the document to which this is attached to be served on
4 the following individual(s) via email:

5 Phil A. Olbrechts
6 City of Black Diamond Hearing Examiner
7 24301 Roberts Drive
8 PO Box 599
9 Black Diamond, WA 98010
10 Email: olbrechtslaw@gmail.com

11 Steve Pilcher
12 Community Development Director, City of Black Diamond
13 24301 Roberts Drive
14 PO Box 599
15 Black Diamond, WA 98010
16 Email: spilcher@ci.blackdiamond.wa.us

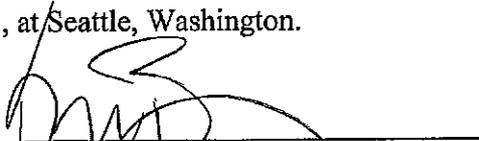
17 Brenda Martinez
18 Clerk, City of Black Diamond
19 24301 Roberts Drive
20 PO Box 599
21 Black Diamond, WA 98010
22 Email: BMartinez@ci.blackdiamond.wa.us

23 Bob Sterbank
24 Michael R. Kenyon
25 Kenyon Disend, PLLC
26 The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Email: bob@kenyondisend.com
mike@kenyondisend.com
margaret@kenyondisend.com

1 Courtesy copy provided via email to:

2 David A. Bricklin
3 Bricklin & Newman, LLP
4 1001 Fourth Ave., Ste. 3303
5 Seattle, WA 98154
6 Email: bricklin@bnd-law.com

7 DATED this 13th day of June, 2011, at Seattle, Washington.

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9 _____
10 Kristi Beckham, Legal Assistant

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[PROPOSED] ORDER GRANTING MOTION TO SET
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AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 8

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CAIRNCROSS&HEMPELMANN
ATTORNEYS AT LAW
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Before the City of Black Diamond Hearing Examiner

Motion to Revise and Set Hearing Rules and Procedures for the Yarrow Bay Development Agreement Hearings

I. Background and Introduction

The Hearing Examiner set the schedule for submittal of motions regarding rules and procedures at the pre-hearing conference of May 23, 2011. On June 10 the City posted a public announcement that hearing would begin on July 11 and posted draft development agreements, each identified as "Public Hearing Version". Presumably these are the final draft agreements to be considered by the Hearing Examiner. No staff reports were posted.

This motion is to revise procedures set by the Hearing Examiner at the pre-hearing conference and request additional rules and procedures.

II. Proposed rules and procedures

- a. **The final draft development agreement must be complete in all respects before being submitted to the public for review and comment. The Development Agreements must not have anything yet to be determined. All agreements with other agencies must be agreed to by all parties and available for review as part of the Development Agreements. There must not be any dependence on anticipated ordinances. Any provision for options such as location of facilities must be fully developed to include the effect on all other provisions of the Development Agreement for each option.**

Comprehensive review and comments on the draft development agreements cannot take place and information will be inadequate for the Hearing Examiner to make decisions if the agreements are incomplete. There should be no aspect left for future determination or passage of future legislation.

The City and the developers cannot commit to actions of other agencies without their concurrence in written agreements. The public should have the opportunity to review and analyze any such agreement referenced in the Development Agreements. For example, hearings were held on the MPDs before the tri-party agreement was completed with the Enumclaw School District. Also, Maple Valley and Covington traffic agreements were not available until after public testimony was concluded. These actions precluded public comment.

The developers and the City cannot commit to passage of future ordinances. Any dependence on future legislative action cannot be analyzed for the hearings since the form and content of that legislation will be unknown.

The Development Agreements may include optional manners of implementation or location of facilities. If the options impact other provisions of the agreements then all such impact must be included so that there will be sufficient information to assess the agreements. For example, no decision has been made at this time as to whether or not schools will be located within the MPD or outside of the Urban Growth Area. Each option has significant impact of water and sewer availability, traffic mitigation, etc. and those impacts should be detailed.

b. The final Development Agreements and staff reports shall be available for review 90 days before hearings commence.

The hearings should not be conducted until the public has had ample opportunity to review and analyze the final drafts of the development agreements. The City Staff has taken eight months to review draft agreements and discuss the drafts with Yarrow Bay.

It was originally thought that 60 days would be adequate for review. However the recent posting of the development agreement drafts is massive. There are over 1300

pages excluding reference documents. These must be weighed against the municipal code and over 160 MPD conditions. (Some of the information is the same for the two agreements but it needs to be reviewed regardless to determine if it is redundant.) It is unreasonable to expect the public to review and assess this much information in less than 90 days. It should also be noted that the review period in the public notice now encompasses a major holiday (Independence Day) during which many people take vacations and attend public events. Further, the City consistently said that there would be public meetings to introduce the development agreements after the drafts were finalized and before public notice of the open record hearings. That plan is still posted on the City's web-site at

<http://www.ci.blackdiamond.wa.us/Depts/CommDev/planning/DevAgmntFlowChart.pdf>.

As of this time there are no published staff reports as required by the Hearing Examiner so it is difficult to estimate the amount of time required to evaluate those documents once they are provided. The City has also failed to include a compliance matrix as committed. The compliance matrix is expected to be part of the staff report. Lack of the matrix further complicates review.

- c. The venue must have sufficient seating capacity to accommodate all members of the public wishing to attend and may not be at a remote location.**

Attendance by the public cannot be restricted by the size of the facility or by a remote location. If more members of the public wish to attend a hearing than are permitted by seating capacity for the facility then the hearing should be suspended until a location of sufficient capacity is located and the public is notified of the change in venue.

- d. All hearings will be in the evening from 7:00 pm to 9:00 pm with the exception that daytime hearings may be scheduled for expert testimony and testimony by outside agencies.**

Black Diamond City Council meeting and Planning Commission meetings are generally scheduled to begin at 7:00 pm to accommodate officials and attendance by the public. This allows commuters enough time to return from work and eat dinner before attending the hearings. Scheduling public hearings for an earlier hour will unnecessarily restrict public attendance. Hearings held beyond 9:00 pm will interfere with attendance by those persons who must retire at a reasonable hour before a following workday.

- e. There will be no time limit on individual public testimony or page limit on written testimony.**

Development agreement issues are extremely complex – much more so than the underlying MPDs – because the development agreements flesh out the detail and implement the MPDs. There should be no limits placed on testimony, written or oral. It is important that testimony not be curtailed and that adequate time be allowed to give detailed and clear statements. The Hearing Examiner has the discretion to rule testimony irrelevant or redundant if required.

- f. Cross examination of expert witnesses shall be through the Hearing Examiner with the opportunity for additional questions if responses are deemed inadequate.**

The public should be allowed to question expert witnesses regarding their testimony. To maintain order, questions can be submitted through the Hearing Examiner. There should be the opportunity for follow-up questions by both the Hearing Examiner and the public if the witness is non-responsive to the questions.

- g. All objections to testimony must be submitted in writing to the Hearing Examiner before the record is closed. A date will be set by the Hearing Examiner for final submittal of objections and the record will be held open for one week after that date to allow parties to respond.**

Verbal objections to testimony can be disruptive and intimidating. The Hearing Examiner should use his discretion to interrupt testimony if necessary. Further, there must be adequate time to respond to objections prior to the record being closed.

- h. The sequence for public testimony will be testimony – rebuttal – reply. Rebuttal to public testimony by the City or Yarrow Bay must be submitted and published before the record is closed. Parties shall have one week to reply before the record is closed.**

In the prior hearings, rebuttal testimony was submitted immediately prior to the record being closed. Parties were not provided any opportunity or time to reply,

- i. No change or supplement to the record is permitted after it is closed.**

This should go without saying. However, the rules apparently need to be clarified. The developers submitted land use map changes after the MPD record was closed and those changes were accepted by the City and incorporated prior to the closed record hearings. The changes were made without public knowledge.

Thank you for your consideration of this motion.

Dated June 13, 2011



Robert M. Edelman
29871 232nd Ave SE
Black Diamond, WA 98010
(360) 886-7166

From: Steve Pilcher
Sent: Thursday, June 16, 2011 5:46 PM
To: Cincity63@comcast.net
Cc: Brenda Martinez
Subject: RE: Motion to Olbrechts - Development Agreement Hearing Motions

Ms. Wheeler:

I noted your motion was sent to Mr. Olbrechts at the law firm where he formerly worked. Since last year's MPD hearings, Mr. Olbrechts left Ogden, Murphy, Wallace and opened his own practice. Hopefully, the staff at OMW forwarded your email to him. I don't know if they did, as Mr. Olbrechts has not forwarded your motion to us (if he did receive it). It also appears that no one here at the City was copied, so until you sent your message late today, we were not aware you had made a motion.

We should be able to post this to the website tomorrow.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

From: Cincity63@comcast.net [mailto:Cincity63@comcast.net]
Sent: Thursday, June 16, 2011 4:59 PM
To: Steve Pilcher
Cc: Brenda Martinez
Subject: Fwd: Motion to Olbrechts - Development Agreement Hearing Motions

Steve-

I see that you have posted SOME of the motions to the Hearing Examiner on the City website.....My motion to Olbrecht's is currently not included. Please post this with the rest of the motions.

Cindy Wheeler

----- Forwarded Message -----

From: Cincity63@comcast.net
To: "P Olbrechts" <polbrechts@omwlaw.com>
Sent: Monday, June 13, 2011 5:02:03 PM
Subject: Motion to Olbrechts - Development Agreement Hearing Motions
Mr. Olbrechts -

I did speak and provide written input at the Pre-Hearing Conference for these upcoming hearings. I did not expect to submitting motions per your deadline, but the recent production of several documents on the City's behalf prompt some additional input and emphasize the need for some other input, previously offered, to be repeated.

EXHIBIT

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In both my written and verbal comments I had stated that NO PORTIONS OF THE DEVELOPMENT AGREEMENT SHALL CONTAIN INCOMPLETE AGREEMENTS, UNDERSTANDINGS OR ITEMS THAT ARE "TBD".

Clearly it is impossible to judge the impact and effect of the development unless everything is decided, agreed upon / permitted and finalized. This is true whether it is road locations, school locations, storm water detention facilities, sewer facilities or any other required infrastructure or improvement element.

If we can not determine from the Development Agreement what the effects and impacts are, we can NOT possibly enter into a comprehensive agreement with a duration of some two decades. So no elements should be left up in the air and the "casualties" un-gauged, un-weighted and unknown for the citizens. After all this is our one and only chance to have made public comment on documents that have consequences for us for decades to come.

The simple fact that the situation is un-described and unknown to us will not keep the City from saying we have had a public process and they all got their say. Last year has proved that point already. The City and the developer frequently brag about the "vigorous public process" where the public got to testify loud and long last year.....but only on the impacts, infrastructure and expenses identified as of that time.....and that certainly left out an awful lot.

Please know that such elements DO exist in the hurriedly produced "Public Version" of the Development Agreement and Staff Report posted late Friday afternoon. (** By the way this was well after the Public Notice of a Hearing Date for the Development Agreement was published in the official paper.)

I provide you an example from the documents provided for public review below.

G. Section 7.3: King County responsibility for sewer. Although the City of Black Diamond operates its own sanitary sewer collection system, its contract with King County assigns to the County the responsibility for accepting sewage flows from the City and sending those flows on to regional treatment facilities. This will require the construction by King County of a storage facility to accommodate peak sewage flows. The location of this facility is still under discussion between the City and King County.

This is NOT acceptable for inclusion in the FINAL Development Agreement. Such "blind acceptance" would be absurd.

The people of Lake Sawyer are still actively implementing practices to assist recovery from the LAST King County Sewer "major implementation" out here....and that fiasco was an experimental design too. You will note that the letter from King County to Steve Pilcher in August of last year lists MAJOR concerns with both the design and implementation of the "experimental design" sewer collection system proposed by the City and NO agreement has been reached between King Co and Black Diamond on this topic, even though a joint task force was created 4-5 months ago!!! Clearly, we are a long way from the answer on this topic alone.

** Perhaps at some point you could hold some kind of public briefing or "explanation" meeting to help the taxpayers here who attended the Pre-Hearing Conference why and how we were issued public notice of this hearing by our City prior to you reporting the date for the hearing to commence through the schedule established by you? That

would be greatly appreciated by many. Confusion reigns here.

This leads to one of my other previously established requests. This process is intended to be for the public. For the public to get the full benefit of the process they must be able to understand the rules and procedures governing this process and then engage.

When the rules keep changing or when they are presented with tons of legalese and only through public notice, with no two way interaction, the public is effectively stifled.

Many people here also do not understand why the City has accepted TWO versions of the Development Agreements for each proposed project. This is not what the process outline indicates is standard at all. Many of us are confused to have the City post the Development Agreement with the first ever seen "Public Version" identifier placed before it. Does this indicate there is a different version for people other than the public? Is this what the letter of June 9, 2011 from Colin Lund, Yarrow Bay, to Steve Pilcher, Community Development Director Black Diamond, means when it refers to "two identical development agreement applications for each MPD"? So will the public be speaking on all four Development Agreements when we make our comments?

Again, much confusion has been generated by the change in action and direction by the City on these Hearings from what was explained at the Pre-Hearing Conference. This does not serve the Public Good.

We look to you for clarification and equality. We know you will seek to serve the true purpose of these hearings and not leave tax paying citizens with absurd commitments to unknown clauses.

Cindy Wheeler

Brenda Martinez

From: Steve Pilcher
Sent: Thursday, June 16, 2011 9:52 AM
To: Brenda Martinez
Subject: FW: FW: Motions, etc.

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Thursday, June 16, 2011 9:48 AM
To: Bob Edelman
Cc: Steve Pilcher
Subject: Re: FW: Motions, etc.

I was expecting this request. Since I'm out of state on vacation I'll respond by informal email. The response deadline for prehearing motions is extended to June 23, 2011 from June 20, 2011. The reply date is extended to June 27, 2011 from June 23, 2011.

Steve,

Please post this to the website with a link to the effect of "Examiner Order Extending Response and Reply Dates for Prehearing Motions".

On Wed, Jun 15, 2011 at 1:40 PM, Bob Edelman <BobEdelman@comcast.net> wrote:

Mr. Olbrechts,

I request that the response and reply dates be adjusted to reflect the delay in posting motions.

Thank you for your consideration.

Bob Edelman

From: Steve Pilcher [mailto:SPilcher@ci.blackdiamond.wa.us]
Sent: Wednesday, June 15, 2011 12:43 PM
To: Bob Edelman
Subject: Motions, etc.

Mr. Edelman:

Consistent with the message from the Hearing Examiner (below), we will be posting materials to the City's webpage. We will do our best to get those posted by the end of the day tomorrow.

Steve Pilcher

Community Development Director

City of Black Diamond

360-886-2560

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Wednesday, June 15, 2011 9:50 AM
To: 'Dave Bricklin'; mike@kenyondisend.com
Cc: 'Nancy Rogers'; 'Kristi Beckham'; 'MARGARET Starkey'; 'Bob Edelman'; Steve Pilcher; bob@kenyondisend.com;
bmartinez@ci.blackdiamond.wa.us
Subject: RE: In re: The Matter of Development Agreement Hearings related to The Villages and Lawson Hills

I have been receiving several emails from some of the parties to this case and I have attempted to include all of those persons in this email response. As I mentioned at the prehearing conference, I will treat the development agreement hearings as quasi-judicial unless and until I rule otherwise. To this end I will be doing what I can to avoid ex parte contacts. Unlike the SEPA appeal hearing of this case that had a limited number of parties, it is not possible to involve all the parties to the development agreement proceeding in these email communications. To answer one of Mr. Edelman's questions, as discussed at the prehearing conference, all prehearing motions and responses and replies thereto will be posted at the City's website. If someone does not have access to the internet, they were to contact staff to make alternative arrangements for receiving those documents. Mr. Bricklin's emails expressing concerns over the hearing date and the like will be treated as a prehearing motion and subject to the June 13 response and June 20 reply deadlines. In order to avoid any further ex parte communications I do ask that all parties attempt to get any information they need from staff first. If that doesn't work, they can email me and my response will be posted on the City's website. I also ask staff to post this email on its website. Thank you.

From: Dave Bricklin [mailto:bricklin@bnd-law.com]
Sent: Tuesday, June 14, 2011 7:45 AM
To: olbrechtslaw@gmail.com; mike@kenyondisend.com

Cc: Nancy Rogers; Kristi Beckham; 'MARGARET Starkey'
Subject: RE: In re: The Matter of Development Agreement Hearings related to The Villages and Lawson Hills

Mr. Olbrechts and Mr. Kenyon,

As the city's representatives in this process, I want to remind you that I don't represent the public at large in the DA process. I have a specific client which certainly has a large base of support, but we don't pretend to represent every other interest. (Moreover, it's not clear whether I will be appearing on behalf of TRD for any or all of the upcoming DA hearings.) I appreciate YB and the city providing me with copies of motions and other papers and request that they continue to do the same. But the city must recognize that serving me with those papers is not the same as providing notice to the public generally. I recommend you post all pertinent materials (e.g., everything submitted by YB) on the city's website promptly and continue to use that medium and others throughout this process to insure full and timely transmission of information to the public generally. Thank you.

David Bricklin

Bricklin & Newman, LLP

1001 Fourth Avenue, Suite 3303

Seattle, WA 98154

1-206-264-8600

1-206-264-9300 (fax)

bricklin@bnd-law.com

http://www.bnd-law.com

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

From: Kristi Beckham [mailto:KBeckham@Cairncross.com]

Sent: Monday, June 13, 2011 3:07 PM

To: 'olbrechtslaw@gmail.com'; 'Steve Pilcher'; 'bmartinez@ci.blackdiamond.wa.us'; 'bob@kenyondisend.com'; 'mike@kenyondisend.com'; 'MARGARET Starkey'; Dave Bricklin; Peggy Cahill

Cc: Nancy Rogers

Subject: In re: The Matter of Development Agreement Hearings related to The Villages and Lawson Hills

In connection with the above-referenced matter, attached please find Yarrow Bay's Motion to Set Hearing Procedures for Development Agreement Hearings and a [Proposed] Order Granting Motion to Set Hearing Procedures for Development Agreement Hearings.

If you have trouble opening either of the attached documents, please let me know.

Thank you.

CH&

Kristi Beckham

Legal Assistant

Cairncross & Hempelmann

524 Second Ave., Ste. 500

Seattle, WA 98104-2323

kbeckham@cairncross.com

Direct phone 206-254-4494

Direct fax 206-254-4594

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Rachel Pitzel

From: Steve Pilcher
Sent: Thursday, June 23, 2011 8:29 AM
To: WebMaster
Cc: Brenda Martinez
Subject: Dev. Agreement posting

Please begin a new listing on the Development Agreement page titled "Responses to Pre-hearing Motions" and list this (and future submittals) by the individual's name.

From: Jack Sperry [mailto:JackSperry@Comcast.net]
Sent: Wednesday, June 22, 2011 9:44 AM
To: Steve Pilcher
Cc: Andy Williamson; Stacey Borland; Brenda Martinez
Subject: Letter for Mr. Olbrechts

Mr. Pilcher,

Below is a letter addressed to Mr. Olbrechts in response to the motion filed by Ms. Rogers on June 13th of this year.

June 22, 2011

Mr. Olbrechts,

The following response is provided regarding specific items in Ms. Rogers' Motion dated June 13, 2011.

Applicable Motion Paragraph"

B. *"The scope of the hearing should be limited to confirming that the development agreements appropriately incorporate those matters directed and allowed to be incorporated by the MPD Approvals and State law."*

As citizens of Black Diamond we were told repeatedly when there was lack of definition in the MPDs on a topic that these were just program level documents and that the details would be covered in the Development Agreements. However, there are still many areas in the Development Agreements where detail is extremely lacking. During this hearing we should be allowed to point out those areas where there is insufficient information to judge what's being agreed to in these contracts and should be allowed to offer suggestions on what needs to be added. I have spent over 1,000 hours studying the various iterations of these Development Agreements and I have a great deal to say regarding the areas where there is inadequate definition of how the MPD Conditions will be met or how aspects of these developments will be built. The Public needs to be heard on these issues and to have the opportunity to provide testimony on all areas of the Development Agreements that have inadequate definition.

D. "Timing and process for the hearing

D.1

D.2. Thirty days from availability of the final draft of the Development Agreements is wholly inadequate for members of the public to read, analyze, and prepare testimony on documents as voluminous and complex as these Development Agreements. As noted above I have been carefully keeping up with the four versions of the Development Agreements published to date. It will be hard for me to re-read all of this material, look for changes, and adjust my planned testimony in the 30 days that are available prior to the proposed hearing start date of 11 July. No redline version has been provided to show where changes were made between the final Development Agreements and the previous versions so every word of the final version has to be read and analyzed. For a member of the public who has not devoted most of their time for the past nine months reviewing these documents there is no way they can digest all this material and be prepared to testify in anything less than a minimum of 60 to 90 days. I strongly request that for the benefit of the Public that these hearings be rescheduled to late August, or early September.

D.3. As noted above these Development Agreements are voluminous and very complex. And they will have a profound effect on the lives of Black Diamond citizens and those from surrounding cities and communities for many decades. Plus this is likely the last opportunity the public will have to give their input on how to correct or improve these 15-20 year contracts. Therefore speakers should not be held to minimal time limits like 10 minutes on something so important in their lives just for the convenience of the developer. These are once in a generation hearings and members of the public should be given at least 20 minutes if they need that amount of time with additional ceding of time in 10 minute increments from other members of the public willing to cede their allotted time. Furthermore I feel strongly that members of the Public should have the opportunity for sur-rebuttal to have the final say on rebuttal of their testimony by either the City or Yarrow Bay.

Jack C. Sperry
29051 229th Ave. SE
Black Diamond, WA 98010

Before the City of Black Diamond Hearing Examiner

Scope of the Hearing

Many of the MPD Ordinance Conditions are incomplete and countless concerns were not addressed in detail in the MPD Conditions, but were in-fact deferred to the Development Agreement as the sole implementing document. The Citizens have been waiting months to see the final document. The documents have changed *substantially* from the initial notice that went out to the general public in September 2010. Furthermore, a separate public informational meeting was to be provided to go over the Development Agreement process prior to the public notice, which did not happen.

Given the significant amount of detail and methodology for implementation left to the Development Agreement phase; the substantial changes from the first public notice to now; and the lack of communication by the City on how this very technical piece of the process works; the public informational meeting has only recently been scheduled and doesn't happen until June 28th which only gives the Hearing Examiner 1 day to finalize all motions and response prior to the informational meeting; even the initial pre-hearing conference infers NO public comment and it was only after clarification from you that the public could speak that the City corrected this misunderstanding; and now the ongoing miscommunications on the City webpage, some documents are in the Spotlight section and others you have to click through multiple hyper-links.

I respectfully ask that the Hearing Examiner allow citizens discretion to discuss the merits of the Development, and the methods of how the MPD Conditions are to be implemented.

EXHIBIT

159

Timing and Process of the Hearing

Timing

It was disappointing although not surprising that City posted the notice for the Public Hearing on the Development Agreement when the process and procedures are still under review by the Hearing Examiner. When Peter Rimboas a member of a Citizens Tactical Team, stated to Steve Pilcher on June 10, 2011, that he thought the Hearing Examiner's response would come out prior to the Public Hearing Notice, Mr. Pilcher replied that those motions deal with "*rules and procedures, not the dates.*"

This is certainly not the position that was inferred at the pre-hearing conference as one of the key issues/request that repeatedly came up was providing adequate time from the final Development Agreement release to the public hearing date. Contrary to the City's position in the very, limited and hurriedly put together staff report dated as of 4:00 of June 10, 2011, there are material changes from the third version to the Final Public Hearing version of the Development Agreement. This is further exacerbated by the fact that the City itself was never provided a red-lined version of the Final Development Agreement to assist them in comparison of the Final DA (**Exhibit 1**) to the last submitted Development Agreement. The lack of a red-line version, even for the City Staff means that every sentence on every page of the 1300 document must painstakingly be compared line by line to the last version that was provided to the citizens, an "And or an Or" in the wrong spot or ambiguity of one phrase can change the context on an entire component. Additionally, the Development Agreement needs to be viewed against the MPD conditions.

It is clear that the City on behalf of Yarrow Bay is doing everything to push the hearing dates to the point of absurdity and manipulation. These dates are the dates that Yarrow Bay requested of the City as early as April (**Exhibit 2**); the City staff knew you were going to be out of town for a long vacation with limited email access; you (Mr. Examiner) have not even made the final ruling on the process and procedures; the informational meeting has only recently been scheduled for the 28th of June and leaves a mere 13 days (including the 4th of July weekend) from the informational meeting to the City's *proposed* Public Hearing date. Citizens cannot

possibly review efficiently and prepare to make their comments relevant if they do not know the process; how do the citizens know to go to the webpage and to follow on motions? I guess they will find out on June 28th *after* all the initial deadlines have passed! All this information must be provided and rushing ahead only makes for errors in communication and process. One can certainly anticipate the City Attorney and Yarrow Bay now telling the Hearing Examiner that it is too late to cancel the hearings as the Public Notices have been made and therefore the hearings must go on, thus making a mockery of the pre-hearing conference, the first amendment and due process. Ironically, the City could not somehow pull together a public hearing process required by a 3-0 vote of the GMHB and requested six months to comply. Miraculously it was able to throw together a Public Hearing for the Development Agreement in "Break-neck speed."

I fully expect the City to say that it will cost the City money to move the dates and re-publish, however the entire FEIS/MPD and Development Agreement process has been fully funded by the Applicant under a funding agreement therefore no City funds are getting wasted, *even if* City funds were spent, shame on them for wasting the funds instead of waiting for your recommendations; if the Applicant wants to continue to push the City to move at the speed of light, then the Applicant surely cannot complain about the cost when a step in the process is not properly followed and thus we must go back to that step. Finally, how can we even prepare to review the Development Agreement when the City and Yarrow Bay are preparing multiple motions to attack the public process of which we then requires our valuable time to respond to preserve our rights to the public process.

Accordingly, I respectfully ask the Hearing Examiner to allow additional time for review of the Development Agreement and its attachments of not less than 60 days from the June 10, 2011 notice date, resulting in a new Public Hearing date no earlier than August 10, 2011 (which is only 43 days from the June 28th informational meeting).

Process

Venue: It was disappointing to see that the City of Black Diamond has chosen to move the public hearing venue site from the centrally located and sufficiently sized Black Diamond Elementary school to the Sawyer Woods Elementary school. Per the Enumclaw School District, the City did not even apply to the district office with a request for the Black Diamond Elementary school. Sawyer Woods is located approximately 2.8 miles from the ideally located BD Elementary and is within the Kent School District rather than the Enumclaw School District. (**Exhibit 3**) This is clearly a strategic plan to once again limit public participation under the guise of a large enough venue. In the audio tape of the meeting between the Hearing Examiner and City Staff, it is clear that the staff was actively trying to keep the crowds small; keep the retired seniors away; and the public in general from taking up space by actually proposing to have the hearings at the Council Chambers and piping the hearing to those standing outside; additionally, the staff complained about the incredible burden of having to break down the audio equipment and pack it to the school, and of course the staff cost. Holding the hearing at Sawyer Woods instead of Black Diamond Elementary does not resolve the City's audio or staffing issues (although the audio equipment is closer to BD Elm. than Sawyer Woods) but it does serve several strategic goals of the City and Yarrow Bay:

1. It limits the participation of the many citizens who walked to the hearings last year, especially the seniors;
2. It limits the participation of those who live in central Black Diamond and Enumclaw School District who are not familiar with where Sawyer Woods is even located; or those who race home from work stop by the post office (right next to the BD Elementary) and then pop into the conveniently located hearings. In all my years public hearings/community information have been at Council Chambers or the BD Elementary School

3. It is not as easily accessible off of HWY 169 for expert witness and those participants not familiar with the rural back road location of Sawyer Woods;
4. It allows the City to run the hearing until 11:00 at night if they want to; again this is to rush the process and declare the hearing closed if citizens waiting to speak cannot stay until 10 or 11 due to work and family.
5. It creates an additional burden regarding the ceding of time (see below); not only does Yarrow Bay want those who cede time to be on-site for every minute until their slot is called, they want them to do it 2.8 miles further away.

Therefore I respectfully ask that the Public Hearings take place at the same venue that worked for the FEIS and MPD public Hearings; the same venue that has sufficient capacity; the same venue that is centrally and conveniently located to and most easily identified; the same venue that allowed for many to walk to the hearings; that venue is the Black Diamond Elementary school.

Allowable time and Ceding of time: Yarrow Bay request that a range of time be provided from 3-10 minutes, and the ceding of time may *only* be allowed if the person ceding the time is present at the exact moment that the person they are ceding the time to is ready to speak. The time limit needs to be consistent at 10 minutes per person per project, with ceding of time allowing up to 60 minutes total per person. However, the process for the ceding of time is onerous, and clearly meant to limit public participation. Mr. Examiner, no matter how engaged the citizens are to the public process, forcing them to be in attendance every night, all night, during the summer, is clearly an attempt to make the process burdensome to even the most civic minded of the people. The ceding of time via email worked perfectly at the MPD Closed Record Hearings...there wasn't mass confusion. Ceding of time is even more imperative due to the fact the Development Agreements are very technical and the process very unclear. Yarrow Bay and City complain that some in the community are trying to stack the hearings with hundreds of citizens, each taking their 10 minutes; then Yarrow Bay and the City complain and try to restrict the ceding of time, to a person or group that they feel may articulate their concerns more efficiently and

effectively. What Yarrow Bay and the City really want is to burden the public process; they want to force the public to a unknown venue; they want to force the public to stay seated for hours, while sitting on their hands every night in the hopes that one person may not be there on the exact time another person is using their time.

Another example of who this harms is the elderly and infirmed, there are some seniors of infirmed that cannot physically attend or certainly cannot attend every night. I personally can speak for my own Mother, Vicki Harp, who is currently in a skilled nursing rehabilitation facility recovery from a traumatic car accident. Vicki Harp has been a FEIS appellant, as her home is directly impacted by the Villages noise, and is also listed on the appeal of the MPD Ordinances. Under Yarrow Bay's rule's my Mrs. Harp would not be able to cede her time via email and would lose her opportunity to participate in a public process that directly impacts her and in which she has invested significant time and money to make better. I am sure there are others such as my Mother.

There may be others who simply want to do their civic duty but due to the summer-time vacation schedule they will be unable to attend. The City certainly can understand this as documented in the declaration of Steve Pilcher, dated March 2, 2011 to the GMHB in regards to a motion to extend the compliance schedule of the GMHB decision for a public hearing in front of the Black Diamond Planning Commission. The City's reason for requesting an extension ranged from the time needed to ensure that the public had adequate notice; the need for adequate venue; and conflicts of the Planning Commissioners schedule. Whew! If the City can make these extraordinary exceptions to the public process of delaying a GMHB Public Hearing for mandated for Compliance, they certainly could allow the ceding of time of its citizens via email?! (**Exhibit 4**)

Transcripts

Yarrow Bay states that they shall pay the appearance fee for a court reporter to transcribe the hearing and any person requesting a copy must pay the court reporter. It is understood that Yarrow Bay and the City are not required to have professional transcriptions made. ***However, if Yarrow Bay wishes to use a transcript to support and defend their position and rebut the expert and public testimony at either the Open or the Closed Record Hearing they must make that transcript part of the administrative public***

record. If the transcripts are part of the public record they shall be made available to the public like all other documents that are part of the public record. Again, no one is requiring Yarrow Bay to purchase the transcripts but failure to make the transcripts part of the administrative record would clearly result in the exclusion of the transcripts for the rebuttal at the open hearing and the CRH.

Additionally, it should be noted that the City should not claim that this is too big of an expense as the City is not paying for any of these expenses; Yarrow Bay is paying for 100% of the cost related to the Development Agreement hearings. If Yarrow Bay then uses cost containment as a tool to force the City to avoid requesting or ordering a transcript or the selection of another venue to contain the hearing cost such as overtime to staff, then Yarrow Bay is in essence influencing the legal process with their funding agreement. They are in an unfair advantage to use money to force the City into what is best for Yarrow Bay not what is best for the City and the public.

Expected Conduct

It should be stated at the beginning of the hearing and reminded throughout the hearing:

1. The City Attorney cannot and will not be able to, interrupt, cross-examine, rebut during or directly after public testimony any of the general public. You stated this at the FEIS/MPD hearing, but the City Attorney ignored this and rudely interrupted and rebutted citizens. This in not to be allowed and is *intimidating*;
2. Yarrow Bay Attorney cannot cross examine or rebut public testimony during the public hearing testimony; the rules and procedures will allow them to submit formal written rebuttals at the appropriate time.

We are placing utmost hope for a clear, fair, public process, for what is essence the creation of a new city of unprecedented size in King County, into your hands Mr. Examiner.

Respectfully,
Cindy Proctor

Exhibit 1

• RE: Public Hearing Version of the Development Agreement-Red-line?

6/15

Steve Pilcher

Community Development

Steve Pilcher (SPilcher@ci.blackdiamond.wa.us)

Wed 6/15/11 8:56 AM

Cindy Proctor (proct@msn.com)

Steve,

As a reminder, I am not sure if you have been able to get the red-lined version of the Development Agreement. I have not seen it yet, and we have not had any meetings in that format.

Steve Pilcher

Community Development Director

City of Black Diamond

360-886-3560

From: Cindy Proctor [mailto:proct@msn.com]

Sent: Tuesday, June 14, 2011 7:24 PM

To: Steve Pilcher

Subject: RE: Public Hearing Version of the Development Agreement-Red-line?

Steve,

Is it possible to get a copy of the red-lined version on a CD ROM? I am sure you have a red-line and a clean version. I can come pick it up on Friday.

Thanks,

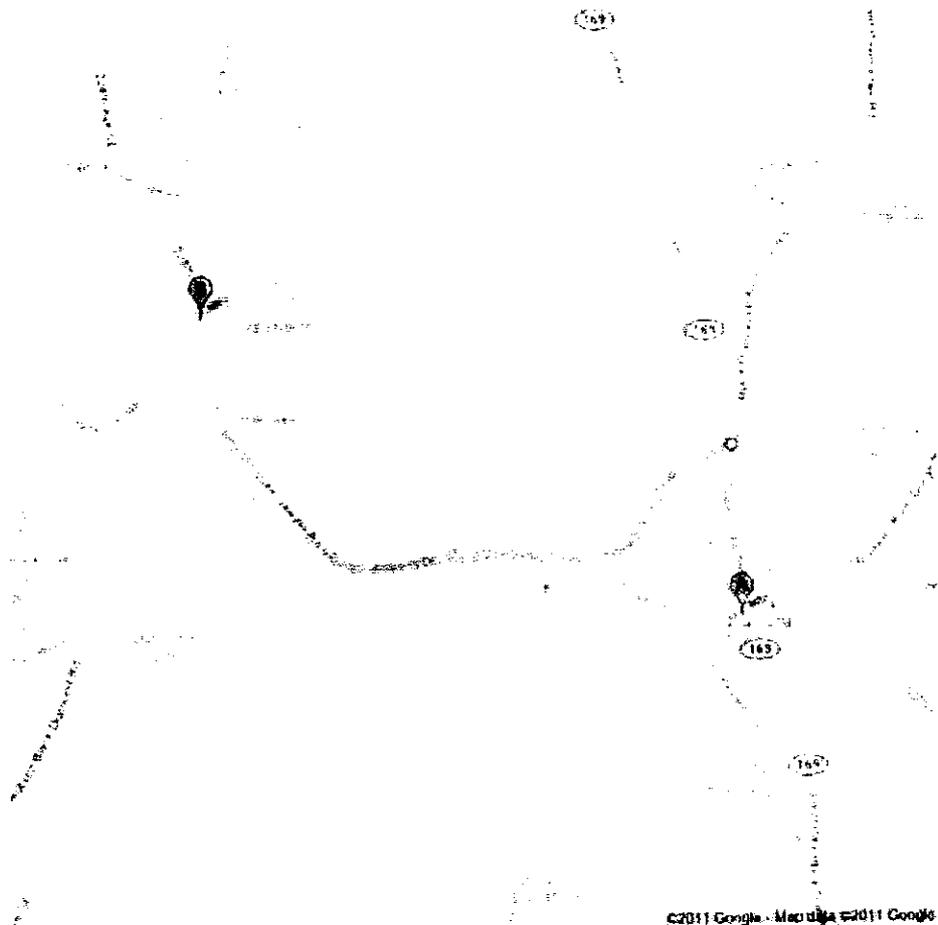
Cindy Proctor

Exhibit 2

Google

Directions to Sawyer Woods Elementary School
31135 228th Avenue Southeast, Black Diamond, WA 98010-1708 - (253) 373-7750
2.8 mi - about 7 mins

Save trees. Go green!



1. Head east on Baker St toward 3rd Ave

go 0.12 mi

2. Turn left onto 3rd Ave

go 0.8 mi

3. Sharp left onto Roberts Dr

go 1.3 mi

4. Slight right onto Lake Sawyer Rd SE

go 0.9 mi

5. Continue onto 228th Ave SE

go 151 ft



Sawyer Woods Elementary School
31135 228th Avenue Southeast, Black Diamond, WA 98010-1708 - (253)

Exhibit 3

38

Steve Pflcher

From: Steve Pflcher
Sent: Tuesday, April 19, 2011 1:36 PM
To: clund@yarrowbayholdings.com; Ryan Kohnmann
Cc: awilkinson@ci.blackdiamond.wa.us; Stacey Borland; Brenda Martinez; Rebecca Olness
Subject: D.A. Timing

Looking ahead to continued discussions and eventual hearings on the Development Agreement, I want to highlight what some of the critical benchmarks and timelines would be:

- A final draft of the negotiated D.A.s will be needed in both electronic and paper form to the City prior to scheduling a public hearing
- 15-days advertised notice is required; our deadline for sending notice to the newspaper is by 10:00 Tuesday prior to publication on Friday
- On the Friday of publication, mailed, posted and web notification will also be required. The staff report should also be completed by this date.
- An "open house" presentation to the public should occur during this required public notification period
- Assume the Hearing Examiner will take one week for oral testimony (hearings on four days)
- Assume 3 weeks after the close of oral testimony to receive the Examiner's recommendation (this also accounts for the possibility of the Examiner leaving the written record open for one week after the hearing)
- Once we receive the Examiner's recommendation, the same public notice requirements apply (i.e., approx. 3 weeks until any Council process could begin)

Also, note that City offices will be closed on both Monday July 4th (holiday) and the 5th (furlough day). That could also affect timelines, depending where things sit at that time.

In summary, it will be challenging to get the D.A. in the Council's hands during the month of July, which Colin mentioned as a desired target in our meeting yesterday.

Steve Pflcher
Community Development Director
City of Black Diamond
360-886-2560

26

Andy Williamson

From: Steve Pilcher
Sent: Monday, April 25, 2011 11:55 AM
To: Rebecca Oiness; Brenda Martinez; Andy Williamson; Stacey Borland
Subject: Hearing Examiner

I contacted Mr. Olbrechts regarding his availability for hearings. Between his schedule and the short 4th of July week, there is a one-month period that won't work. The earliest start date appears to be July 20th.

Steve

Exhibit 4

1 scheduling of hearings, preparation and presentation of staff reports, and similar
2 functions.

3 2. After receiving the Board's Order on Motions, I began investigating whether
4 the City would be physically able to conduct the proceedings necessary to comply with
5 the Board's remand by the deadline set for compliance. I contacted individual Planning
6 Commission members to determine their availability to conduct a public hearing as
7 directed by the Board's Order. The Planning Commission typically only meets once each
8 month. Several Planning Commission members advised me of schedule conflicts over
9 the next several weeks that would prevent them from promptly convening a public
10 hearing. Several members indicated that they are not available for Saturday hearings.

11 3. I also looked into the availability of the Black Diamond Elementary School
12 gymnasium, which is the only venue within the city limits that is large enough to
13 accommodate the number of members of the public who participated in the previous
14 Hearing Examiner and City Council public hearings related to Ordinance Nos. 10-946
15 and 10-947. As the Board is aware, those hearings lasted for several weeks before the
16 Examiner, and for several more weeks before the City Council. The City has no reason
17 to believe that the hearings conducted as a result of the Board's Order will be less
18 extensive. I was advised that the gymnasium is not always available for public use on
19 Saturdays, and I know from scheduling previous hearings that there are limitations on the
20 length of time the City may use the gym in the evenings during the work week. While the
21 facility might be available during the school district's spring break, that does not occur
22 until the first week in April.
23
24
25

DECLARATION OF STEVE PILCHER IN SUPPORT OF
BLACK DIAMOND'S MOTION TO EXTEND
COMPLIANCE SCHEDULE - 2

**KENYON
DISEND**

Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Staquoah, VA 99027-3820
Tel: (425) 392-7099
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4. Further complicating scheduling are my own and Associate Planner Stacy Borland's personal schedules. As the City's Planner, Ms. Borland has been fully involved in assisting me on various matters related to the MPDs at issue in Ordinance Nos. 10-946 and 10-947, and I will need her assistance in the Planning Commission hearing. Ms. Borland will be out of the office due to medical reasons beginning on March 14. We do not expect her to return to full time status until early April. I likewise will be unavailable during the last week in March.

5. In addition, a certain amount of lead time is required to provide public notice in advance of any scheduled hearing, both to meet code-required advance notice and the additional pre-publication lead time required by the City's official newspaper, which is only published on a weekly basis. For example, a hearing scheduled to commence on Saturday, March 12 would have required delivery of a public hearing notice to the official paper not later than Tuesday, February 22.

6. These scheduling challenges relate initially only to the Planning Commission's conduct of a public hearing as required by the Board's order. These same challenges are likely to repeat themselves when the City Council takes up the Planning Commission's recommendation.

7. Taken together, the scheduling difficulties outlined above prevent the City from being able to comply with the Board's 75-day compliance schedule. By Resolution No. 11-737 (a true copy of which is attached hereto as Exhibit A), the City Council has directed that the City request the Board to extend the compliance schedule in order to allow the City sufficient time to schedule and conduct any required proceedings.

DECLARATION OF STEVE PILCHER IN SUPPORT OF
BLACK DIAMOND'S MOTION TO EXTEND
COMPLIANCE SCHEDULE - 3

**KENYON
DISEND**

Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3620
Tel: (425) 392-7090
Fax: (425) 392-7071

Response to Motions regarding the city of Black Diamond Development Agreement Public Hearings

June 23, 2011

To Hearing Examiner Olbrechts and the City of Black Diamond:

- We agree with motions requesting that you schedule the hearing for at least ninety days or more after the receipt of the staff report. We agree with motions stating that during summer vacation season, and with documents plus exhibits being so voluminous and the content being so specialized, more time is essential.
 - Concerned citizens are not employed to work on these agreements (in contrast to Yarrow Bay and the city staff). It is unlikely they will have enough time (or even be available during summer vacation season) to review these voluminous documents, organize all the specialized, detailed information needed to be entered into the Development Agreement contract, and prepare oral and written presentations of that material for the hearing with only thirty days to do so.
 - As additional explanation, ordinary citizens not only need to study the agreements, they need to study the entire process and legal framework of Development Agreements. More time will benefit Yarrow Bay and the Hearing Examiner as well, because these citizens will make more legally relevant comments after they have had the extra time to learn. This will lessen the time spent by the Hearing Examiner and others sifting through irrelevant testimony.
- The applicant and city staff have had far more resources available to prepare these documents than the average citizen has. **However, the average citizens are the ones who have to live with many of the consequences in a way that the applicant, non-resident city staff, and other paid resources do not. Some of us have lived here for more than 20 years and will live here for 20 more years. Perhaps no one else working on these Development Agreements can say that.** Thus, expertise and resources that went into the current Development Agreements were directed in a different way than citizen time and resources will be. So, we agree with the motion to the effect that residents of Black Diamond and the surrounding areas, most unschooled in the technical aspects of the many facets of land development, are at a severe disadvantage with the current thirty-day timeframe to prepare what will be, for most, complex testimony crucial to their future quality of life.
- We agree with motions to allow more time for expert witnesses to prepare, and that there should be a chance to rebut Yarrow Bay's questioning of expert witnesses. As ordinary citizens who are not experts in land use or the legal framework, we most definitely want to rely on the input of experts.

EXHIBIT

160

We agree with motions stating that technical consultants' availability on current short notice is in serious doubt.

- We agree that the opportunity for other agencies and jurisdictions to review and respond thoroughly to these documents within thirty days is also unlikely. Many of these agencies were not notified about the pre-hearing conference, and have not received notice of the upcoming hearing. Adequate time is needed to notify these agencies about the hearings and give them adequate time (sixty days or more) to prepare their testimony.
- We agree with motions requesting the chance for citizens to rebut Yarrow Bay's rebuttal of any testimony. This is essential. In the city's last quasi-judicial hearing, astute citizens recognized incorrect information in Yarrow Bay's rebuttals, but had no way to enter corrections into the record.

From Save Black Diamond

and the following named individuals:

Jack Sperry 29051 229th Ave. SE, Black Diamond, WA

Sharon Veldhuis 30249 234th Ave SE, Black Diamond WA 98010

Howard & Sharon Meece 24515 SE Green Valley Rd, Auburn, WA 98092

Rick & Nanette Stocks 22450 SE 296th St, Black Diamond, WA 98010

Gwynllyn Vukich 15626 SE 352 Auburn, WA 98092

Melanie Locke, 29322 216th Ave SE, Black Diamond, WA 98010

Glenn Carrier 24305 SE Green Valley Road, Auburn, WA 98092

Judith Carrier 24305 SE Green Valley Road, Auburn, WA 98092

Curtis & Nicki Fromel 32506 Miner Ave, Black Diamond, WA 98010

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

Rebecca Lenhart, PO Box 718, 33018 Pacific Avenue, Black Diamond, Washington 98010

Yevgeniy Kolezhuk 24723 Mason St., Black Diamond, WA 98010

David Moorby 32206 Sunny Lane, Black Diamond, WA 98010

Vernon Gibson, 32800 1st Ave, Black Diamond, WA. 98010

Lisa and Steve Garvich 29625 232nd Ave SE, Black Diamond, WA 98010

Bryan Stites 32509 Mckay Lane , Black Diamond WA 98010

Sean Yuhas 22518 SE 329th St, Black Diamond, WA 98010

Before the City of Black Diamond Hearing Examiner

Response to Yarrow Bay Motion to Set Hearing Procedures for Development Agreement Hearings

I. Introduction

Yarrow Bay has moved for development agreement public hearing that attempts to limit the scope of the hearings to essentially a checklist and constrain public participation. The following is in response to that motion.

II. Discussion

a. Yarrow Bay proposes unacceptable limitations on the scope of the hearings without support.

Yarrow Bay moved that the scope of the hearing be “limited to confirming that the development agreements appropriately incorporate those matters directed and allowed to be incorporated by the MPD Approvals and State law” They maintain that the only issues that should be reviewed in the hearings are whether the development agreements incorporate MPD approval conditions and whether the agreements meet the requirements of State law and City code. This limitation on public testimony is far too narrow.

Meeting the MPD conditions and law are minimum requirements and development agreements must be rejected if the minimum requirements are not met – there is no discretion on the part of the City in that regard. However, the City and, by extension its citizens, certainly have the right to determine whether the implementation of each and every development agreement requirement is satisfactory to the community.

The development agreements are contractual agreements that will obligate Yarrow Bay (and their successors) and the City for twenty years. The public must be allowed to address the merits and adequacy of all implementation methods in the MPDs, not just their existence. There is nothing in State statutes or City code that says otherwise nor has Yarrow Bay made any argument to the contrary.

EXHIBIT

161

To claim that the public may not address the merits of a Yarrow Bay implementation approach is to say that the City must accept whatever approach is proposed. Development agreements are not permit applications – they are contractual agreements where the City has the duty to negotiate an acceptable agreement and its citizens have the right to request and expect what is best for the community. The scope of the hearings should allow discussion of approaches that are poorly or insufficiently defined. The public should also be allowed to discuss the merits of an approach where the consequences to the community are unacceptable and where there are better alternative approaches.

Yarrow Bay's attempt to limit the scope of public hearings to requirements compliance should be rejected.

b. Yarrow Bay recommends a procedure for expert testimony based on a faulty premise and an alternative procedure that limits public participation.

Yarrow Bay proposes that all expert testimony be submitted in writing based on the faulty premise that the scope of the hearings should be limited as they propose. As discussed earlier, the scope should not be limited in that manner.

If the Hearing Examiner orders that expert testimony be submitted in writing as Yarrow Bay proposes then it should be posted for the public to review, there should be adequate time to rebut the testimony, and there should be adequate time to respond to rebuttal. Expert testimony can be quite complex, particularly if submitted in written dissertations with references to published papers. Therefore, adequate time should be allowed for rebuttal and responses to rebuttal. Forty-eight hours should be allowed for review and rebuttal after expert testimony is posted and twenty-four hours should be allowed for responses to rebuttals after posting.

Because of the complexity of expert testimony, it would be far preferable to require oral testimony and allow cross-examination. The procedure recommended by Yarrow Bay for this alternative would unnecessarily limit public participation. Requiring

questions to be submitted in writing to the Hearing Examiner is workable but Yarrow Bay proposes to allow follow-up questions from the Hearing Examiner only. The public should have the opportunity to also submit additional follow-up questions in writing after oral questioning by the Hearing Examiner. Completeness and fairness to the public should not fall victim to expediency.

c. Yarrow Bay proposes a schedule that might limit public participation.

Yarrow Bay proposes scheduling hearings to “continue day to day until completed” after the initial hearing. In a conflicting statement they propose that “written and oral public testimony will be closed at a date and time certain” The latter is certainly preferable although there must be provisions for extending completion to accommodate more speakers than anticipated. Public participation should not be arbitrarily restricted.

It is unlikely that all members of the public who wish to testify will be able to attend all hearings in anticipation of when they might be able to speak. Rather than assume that a lack of speakers on a particular day indicates public testimony is concluded, the hearings should be scheduled for a set number of days with prior notice of the schedule to the public. If additional days are required to accommodate more speakers than originally expected then the schedule should be extended and adequate notice should be give to the public.

d. Yarrow Bay proposes unnecessary limits on public testimony.

Yarrow Bay proposes that oral testimony be limited to ten minutes and that ceding of time be permitted up to a maximum of one hour. They also propose that persons ceding time must be present.

There is no justification for limiting public participation in this manner. Considering the exceedingly complex nature of the draft development agreements, there should be no time limits on testimony. Most of the public will probably require a small amount

of time and the Hearing Examiner certainly has the authority to curtail any abuses should they occur.

If the Hearing Examiner orders time limits but permits ceding, no person's testimony should be further limited by the inability of someone who ceded time to attend a particular hearing session.

e. Yarrow Bay proposes an unfair process for rebuttal and sur-rebuttal.

Yarrow Bay proposes that they be given unlimited time to orally rebut public testimony and also provide written rebuttal of unrestricted length. This would be followed by written public sur-rebuttal followed by Yarrow Bay response to sur-rebuttal. So there would be public testimony, rebuttal, sur-rebuttal, and rebuttal to sur-rebuttal. This is excessive and is apparently designed to give Yarrow Bay the last word. They should be able to make sufficient arguments in their unconstrained oral and written rebuttal.

f. Yarrow Bay proposes insufficient times for public responses considering the amount of time that they would allow for posting exhibits.

Yarrow Bay proposes 48 hours for public response to written rebuttal but also proposes that the City Clerk be allowed 48 hours to post exhibits.

Any schedule for response to exhibits, including written expert testimony, other written testimony, written rebuttal, and supplementary exhibits, should allow for the time to post the exhibits. If the City is allowed 24 hours to post exhibits (which seems reasonable) and the public is allowed 48 hours to respond after the exhibits have been posted then 72 hours should be allowed from the time that the exhibits are provided to the City to when responses are due.

g. Yarrow Bay proposes provisions for additional information without provisions for analysis and comment.

Yarrow Bay proposes the following:

In all matters involving an open record hearing, prior to and during the hearing, the Examiner may ask County [sic] staff to submit additional information into the record.

As with other exhibits, the public should be given adequate time to analyze and address additional information entered into the record by City staff. That time should allow for the amount of time it takes the City to post the information.

III. Nature of the development agreement process

At the pre-hearing conference, the Hearing Examiner solicited comments on the quasi-judicial versus legislative nature of his hearings. The Examiner can certainly conduct the hearings in a quasi-judicial manner at his discretion and, to my knowledge, no party has argued for a legislative Hearing Examiner procedure. This should not be taken as agreement with Yarrow Bay's assertion that the development agreement process must be quasi-judicial. On the contrary, there is known disagreement on that issue.

Thank you for your consideration of the above response.

Dated June 23, 2011



Robert M. Edelman
29871 232nd Ave SE
Black Diamond, WA 98010
(360) 886-7166

June 23, 2011

Mr. Olbrechts,

Herein please find my response to Mr. Edelman's Motion dated June 13, 2011.

II. Proposed rules and procedures

b. The final Development Agreement and staff reports shall be available for review 90 days before hearing commence.

I strongly support Mr. Edelman's contention that the Public needs at least 90 days to review the Development Agreement documents and prepare for the Hearings.

The Public needs sufficient time to read, digest, and critically analyze the Development Agreement documents; formulate comments; and prepare Oral Testimony and Written Statements. It is almost impossible to delve into the details of complex land-use and planning issues that the MPDs in question present. The Development Agreements are very complex documents. Such documents not only represent multi-decade contracts with various jurisdictions, they are supposed to contain specific details on Who, What, Where, Why, How, and When of the MPD build-out. I've read the first three drafts for each MPD. I'm currently reading the "final" drafts, each of which contains 20 Exhibits. I don't need to give you a page count, but I would imagine you've already see for yourself that the two sets of documents and accompanying Exhibits are voluminous.

Although I have a Masters Degree in Civil Engineering, spent 24+ years at Boeing as an Engineer and Project Manager, have served on the Greater Maple Valley Unincorporated Area Council for many years, and have dealt with land-use issues for decades, I find myself behind the Eight Ball in trying to critically review these documents. I need far more time then what had been proposed leading up to the Hearings. Consequently, instead of the 30 days proposed from the release of the "final" drafts of the Development Agreements to the start of the Hearings (i.e., June 11 to July 11), I support Mr. Edelman's motion and respectfully request at least 90 days. A review period of at least 90 days would be prudent in the case of such complex documents and the importance of issues as diverse as fiscal solvency, environment, transportation, water quality, stormwater, schools, public services, vesting, taxes, etc. to members of the Public.

Please keep in mind my request is from someone who is relatively technically savvy and well versed in the issues presented here. However, what about a general member of the Public? I would suspect he or she would need even more time to delve into the issues, study the Development Agreement documents, and prepare testimonies. The oft-heard argument from YarrowBay, that the Public has had available to them multiple drafts to review over the months is empty since the "final" drafts are "clean" with no red-lining, no strikethroughs, no bolding of new text and figures. As a result, we need to read every word of every page, regardless of any of the past drafts we may have read.

I urge you to give the Public sufficient time to prepare for the Hearings by establishing a start date of no earlier than Monday, September 12.

Thank you in advance for giving my comments your deliberate consideration.

Peter Rimbo
19711 241st Ave SE
Maple Valley, WA 98038

EXHIBIT

162

June 23, 2011

Mr. Olbrechts,

Herein please find my response to Ms. Rogers' Motion on behalf of YarrowBay dated June 13, 2011.

I take direct issue with many of the points made in Ms. Rogers' Motion:

B. "The scope of the hearing should be limited to confirming that the development agreements appropriately incorporate those matters directed and allowed to be incorporated by the MPD Approvals and State law."

After having spent the last 9 months reading the various pieces of the proposed Development Agreements (since the first drafts were released in September 2010), I want to have the opportunity to discuss the glaring deficiencies contained therein. I do not want to be limited in my testimony by every legal trick a good lawyer can conjure up to stymie Public participation. Each MPD Ordinance contains over 160 Conditions. Many are very complexly worded and open to interpretation, some are vague. Just because the Development Agreements tend to parrot back Ordinance Conditions doesn't mean they answer the necessary questions of Who, What, Where, Why, How, and When? In many cases the Development Agreements lack specificity and detailed plans to respond to Ordinance Condition requirements.

Please let the Public speak to the issues, it's our only chance before you. In addition, because this is an Open-Record Hearing, by definition, any steps taken to muffle Public participation now will carry over to the Closed-Record Hearing.

D. "Timing and process for the hearing"

3. c. & d.

The Development Agreements are very complex documents and represent multi-decade contracts. The issues that are supposed to be addressed therein are very important to the Public. Consequently, we need sufficient time to speak. Public Oral Testimony should be up to 20 minutes per person with additional time allowed through a ceding system from members of the Public who wish to cede their 20 minutes. Members of the Public who cannot physically attend the Hearings due to illness, injury, or out-of-town vacation should be able to cede their time to whomever they choose.

The Public should be given sufficient time to present Oral Testimony.

3. e. & f.

"Sur-rebuttals" by the Public should not be limited to only "written testimony" as proposed by Ms. Rogers. Since Ms. Rogers proposes that the City and YarrowBay be given sufficient time to present oral rebuttal to Public testimony, the Public also should have the option of presenting oral sur-rebuttal. Finally, why do the City and YarrowBay have the last opportunity on sur-rebuttal? They have gone first by submitting the proposed Development Agreements to you. The Public then presents testimony. The City and YarrowBay then has the opportunity to rebut that testimony. Finally, the Public should have the opportunity to provide sur-rebuttal. That's it.

The Public should have the final say on sur-rebuttals.

Thank you in advance for giving my comments your deliberate consideration.

Peter Rimbo
19711 241st Ave SE
Maple Valley, WA 98038

EXHIBIT
163

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5 **BEFORE THE CITY OF BLACK DIAMOND**

6 **HEARING EXAMINER**

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9 **IN RE: THE MATTER OF DEVELOPMENT**
10 **AGREEMENT HEARINGS RELATED TO**
11 **THE VILLAGES MPD APPROVED IN ORD.**
12 **NO. 10-946 AND LAWSON HILLS MPD**
13 **APPROVED IN ORD. NO. 10-947**

YARROW BAY'S RESPONSE TO
MOTIONS REGARDING HEARING
PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020,
PLN10-0021, PLN11-0013, & PLN11-0014)

14
15 **I. INTRODUCTION**

16 BD Village Partners, LP and BD Lawson Partners, LP (collectively, "Yarrow Bay") file
17 this response to the motions filed by interested persons Bob Edelman, David Bricklin, Brian
18 Derdowski, and Cindy Wheeler.

19 **II. DISCUSSION**

20 **A. The Development Agreement Hearings Should be Held as Scheduled, Beginning**
21 **July 11, 2011.**

22 On June 10, 2011, the City issued notice that the Development Agreement hearings
23 would open on July 11, 2011 at 6 p.m. and continue for several days thereafter. Therefore, the
24 City has provided a 31-day notice of the July 11th hearings. The Black Diamond Municipal Code
25 requires only a 14-day notice for a hearing on a development agreement. BDMC 18.08.180.
26 Despite this code provision and the fact that the City is providing over two weeks of additional

YARROW BAY'S RESPONSE TO MOTIONS
REGARDING HEARING PROCEDURES FOR
DEVELOPMENT AGREEMENT HEARINGS - 1

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524 2nd Ave, Suite 500
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office 206 587 0700 fax 206 587 2308

164
EXHIBIT

1 time for hearing preparation, the motions request a 60 to 90-day notice. These requests are
2 unreasonable and unjustified for at least five reasons.

3 First, the responsibility of setting a hearing date belongs to City Staff, not the Hearing
4 Examiner. See BDMC 18.08.180 (“notice shall be provided by the [City’s Community
5 Development] Department no less than fourteen days prior to the hearing”). City staff has
6 executed its responsibility and issued a public notice 31 days prior to the hearing.¹ At the pre-
7 hearing conference, the Examiner commented that he would prefer to see at least 30 days public
8 notice provided following availability of the final versions of the development agreements and
9 the City’s staff report. The City’s notice complies with the Examiner’s suggested timing even
10 though City staff was not legally required to follow the Examiner’s preference.

11 Second, follow-up emails between Mr. Bricklin and Mr. Kenyon (attorney for the City)
12 directed to the Examiner on June 13, 2011, establish that the Staff Report was available on June
13 10, 2011. We also obtained the Staff Report from the City’s website on that date. We also note
14 that Attachment 6 to the Staff Report contains compliance matrices that correlate development
15 agreement provisions with the source of those provisions within the MPD Approval decisions.
16 Accordingly, the Staff Report does an excellent job of providing the interested parties with all
17 the tools they need to be fully prepared for the July 11th hearings.

18 Third, arguments regarding the supposed overwhelming length of the documents ignore
19 many factors. Each version of the development agreements was made available for public

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21 ¹ As the Staff Report identifies, Staff has provided public notice during the Development Agreement process
consistent with the requirements of BDMC 18.08 for a Type 4 Quasi-judicial process. Notice has included:

22 A. Notices of Application dated October 5, 2010 and April 22, 2011: published in the official City newspaper;
23 posted to City’s website; existing on-site Public Notice Boards modified; plus, mailed notice to approx. 1600
individuals. The initial drafts of the Development Agreements were posted to the City’s website, as were all
subsequent drafts, including those currently under consideration.

24 B. Notice of Open House Event: posted on City’s website; notice emailed to individuals on City Clerk’s
Council distribution list (note: this was an additional event intended to provide public notice and information
25 about the Development Agreements and related MPD Permits, and was not required by any City code).

26 C. Notice of Public Hearing: published on June 10, 2011 in the official City newspaper; posted to City’s website
on the same day; posted on Notice Boards on the same day; mailed to approx. 1,600 individuals, which includes
all participants from the MPD public hearing process.

1 review when submitted to the City: in September 2010, in December 2010, in April 2011, and
 2 now on June 10, 2011.² With regard to length, the text of the Staff Report is only 11 pages, and
 3 applies to both projects. The Lawson Hills Development Agreement is 140 pages. The Villages
 4 Development Agreement is 152 pages. The terms of both Development Agreements are
 5 substantially the same, and the text of each (with the exception of Sections 13.4, 13.6, and 13.9)
 6 is substantially the same as the text in the prior draft Development Agreements posted by the
 7 City in April 2011. Thus, by the time the July 11 hearing begins, the issues will have been
 8 available for review for at least 3 months. Furthermore, public comment at the May 23, 2011
 9 pre-hearing conference made clear that many members of the public have reviewed these
 10 documents.

11 There are a number of Exhibits to each Development Agreement, but the Exhibits are
 12 either identical to those that were provided in the April draft, substantially similar to the versions
 13 provided with the April draft, or are existing public documents. Specifically, the following list
 14 provides the status of each exhibit to the Development Agreements:

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"A" – Project Boundaries and MPD Site Plan	Provided.	Conceptual layouts for commercial and multi-family development parcels added.
"B" – Legal Description and Parcel Map	Provided.	Identical to April Version.
"C" – MPD Permit Approval	Placeholder identified this public document would be an Exhibit.	Provided. This Black Diamond ordinance is by definition a public document, widely available since September 20, 2010.
"D" – Summary of Prior Agreements	Provided.	Substantially similar to April version.

25 ² Concern was raised regarding whether the label "Public Hearing Version" for the June 2011 development
 26 agreements means that there is some other private version. The "Public Hearing Version" of the development agreements is the only version.

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"E" – City of Black Diamond Municipal Code	Placeholder identified this public document would be an Exhibit.	Provided. These are widely available public documents.
"F" – Traffic Monitoring Plan	Provided.	Substantially similar to April version with only one typo corrected.
"G" – Constraint Maps	Provided.	Identical to April Version
"H" – MPD Project Specific Design Standards and Guidelines	Provided.	Substantially similar to April version with only several typos corrected, and term "Town Center" revised to "Village Center"
"I" – High Density Residential Supplemental Design Standards and Guidelines	Provided.	Identical to April version.
"J" – Construction Waste Management Plan	Provided.	Identical to April version.
"K" – MPD Phasing Plan	Provided.	Substantially similar to April version only with redactions reflecting the MPD Approval conditions added.
"L" – Excerpts from Chapter 3 of MPD Permit Application	Provided.	Substantially similar to April version only with redactions reflecting the MPD Approval conditions added.
"M" – Mine Hazard Release Form	Provided.	Identical to April version.
"N" – MPD Funding Agreement	Provided.	Substantially similar to April, with one change made to Ex. C and some typos corrected.
"O" – Stormwater Monitoring	Provided.	Identical to April version.
"P" – Green Valley Transportation Mitigation Agreement	Provided.	Identical to April version.
"Q" – Maple Valley Transportation Mitigation Agreement	Provided.	Identical to April version.
"R" – Covington Transportation Mitigation Agreement	Provided.	Identical to April version.
"S" – Potential Expansion Areas	Provided.	Identical to April version.

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"T" – Impact Fees for Fire Protection Facilities dated 1-13-2011	Not provided.	This January 13, 2011 report was provided at the request of City Staff. This is a public document, available since January 13, 2011.

Fourth, the allegation that the hearing cannot be scheduled until the City hosts a voluntary public information meeting is without basis. There is no code requirement for a public information meeting. Nor is a representational flow chart of the proposed process—which included a public information meeting—binding on the City. The City does not need to hold the public information meeting. Nonetheless, the meeting has now been scheduled for June 28.

Fifth, allegations that the June 10, 2011 Development Agreements are not complete are simply not true. The interested persons' motions each raise this allegation but do not make a clear procedural request. Rather, the motions simply request that, prior to the hearing, the agreements be final. But their request is moot because the agreements are final. While not raising true procedural issues, we note that the motions incorrectly raise the following matters in an attempt to show that the Development Agreements are in some way incomplete.

- The School Agreement is complete and executed. The School Agreement is referenced at Section 13.3 of each Development Agreement, and it is the School Agreement that provides the process for siting schools.
- The mitigation agreements between Yarrow Bay and the Cities of Maple Valley and Covington are complete and executed and, pursuant to their terms, also are included as Exhibits Q and R to each Development Agreement.
- The precise engineered location of stormwater facilities or of certain wastewater facilities is not set in the Development Agreement, but instead will be set as Implementing Projects are processed which include much more detailed engineering. Under State law, development agreements anticipate there will be future implementing permits. For example, Yarrow Bay has submitted several preliminary plat applications to the City. Those applications include more precise locations for the stormwater facilities serving those development parcels, and the subsequent fully engineered construction drawings that will be processed after preliminary plat approval will further refine the engineered location.

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- While it is true that the City of Black Diamond does not have a fire *impact* fee ordinance adopted, that does not preclude the City from entering into a voluntary mitigation agreement with Yarrow Bay for the payment of fire *mitigation* fees. RCW 82.02.020. That voluntary agreement is found in Section 13.4 of each Development Agreement.
 - We are uncertain what the motions mean when they allege a development agreement would be incomplete if it was dependent on some future legislative action.
 - The development agreements do include “optional manners of implementation or location of facilities” which Mr. Edelman describes as being appropriate, though he further states that “all such impact must be included.” We assume this is a reference to review under the State Environmental Policy Act (“SEPA”), and note that the City has issued a determination of significance and notice of adoption of the Environmental Impact Statement (“EIS”), dated December 2009.

9 Sixth, the time period between public notice and the start of the hearing does include the
10 Fourth of July, a national holiday. Mr. Edelman’s motion complains that this disruption should
11 entitle the public to additional time for review. However, here, a 31-day period has been
12 provided, which is more than double the time required by City Code and is more than sufficient
13 for hearing preparation with regard to documents that have been largely available for several
14 months.

15 **B. The Sawyer Woods Elementary School is an Appropriate Venue for the Hearing**
16 **and the Hearing Should Not be Cancelled in the Event of a Large Crowd.**

17 The hearing is scheduled to be held in the Sawyer Woods Elementary School. That
18 venue is larger than the venue available in the Black Diamond Elementary School and, therefore,
19 is expected to be sufficient to accommodate persons interested in attending the hearing.

20 Contrary to the request of Mr. Edelman, the hearing should not be “suspended” in the event that
21 a larger crowd than expected turns out. To suspend a hearing on that basis denies Yarrow Bay,
22 as well as those interested persons who first arrived, their rights to be heard. Given the large size
23 of the venue, this issue is unlikely to arise, but in the event that it does, efforts should be made to
24 accommodate all attendees (up to fire code limits) and the Examiner should proceed with the
25 hearing, likely by taking names of persons wishing to testify, setting a subsequent date for them
26 to do so, and then requesting that they return and give testimony at that time.

1 **C. The Hearings have been Set to Begin at 6 p.m. on Weeknights and 9 a.m. on**
2 **Saturday, and this Schedule Should be Followed.**

3 The Notice of Public Hearing set the hearings to begin at 6 p.m. each evening from
4 Monday, July 11, 2011 through Thursday, July 14, 2011. A fifth hearing day is scheduled to
5 begin at 9 a.m. on Saturday, July 16, 2011. The Examiner should adhere to these start times so
6 that the material can be covered efficiently. Beginning the hearings at 7 p.m. and ending them at
7 9 p.m. has a strong probability of extending these hearings beyond the full week now scheduled.
8 In order to efficiently cover material and to avoid unnecessary delay, the hearings should begin
9 as scheduled.

10 **D. There Should be a Reasonable Limit Set on Oral Testimony.**

11 Yarrow Bay agrees that there should be no limit to the submission of relevant written
12 evidence. However, to avoid unnecessary repetitious testimony and protracted delays, public
13 testimony should be limited as described in Yarrow Bay's motion. The "unlimited" time
14 requested by Mr. Edelman invites filibuster and delay, and is contrary to the universal
15 adjudicatory policy of achieving a fair and efficient hearing, resulting in a timely decision.

16 For example, this policy is embodied in Evidence Rule 611 which directs courts to
17 "exercise reasonable control over the mode and order of...presenting evidence so as to...avoid
18 needless consumption of time." Further, Washington courts have recognized that trial courts
19 possess considerable latitude in managing their schedules to ensure the orderly and expeditious
20 disposition of cases. *Idahosa v. King County*, 113 Wn.App. 930, 937, 55 P.3d 657 (2002).
21 Lastly, courts also have held that reasonable time constraints on the presentation of evidence in
22 administrative proceedings are permissible. *Pacific Topsoil, Inc. v. Washington State Dep't of*
23 *Ecology*, 157 Wn.App. 629, 238 P.3d 1201 (2010). The Examiner should exercise his authority
24 to place reasonable time limits on the public's oral testimony so that this hearing can proceed in
25 an orderly and expeditious manner. This will comply with Hearing Examiner Rule 2.06 which
26

1 calls for hearings to be conducted “expeditiously,” and provides that “at every stage in the
2 proceedings, all parties shall make every reasonable effort to avoid delay.”

3 **E. Cross-Examination of Expert Witnesses, if Allowed, Should be Structured.**

4 Yarrow Bay agrees that cross-examination of expert witnesses, if experts testify, should
5 be structured. Overall, however, Yarrow Bay recommends the alternative approaches to expert
6 testimony and cross-examination described in the Yarrow Bay’s motion. We also note that dates
7 for expert witness disclosures and rebuttal witnesses should be set.

8 **F. Objections to Testimony and Evidence should be Contemporaneous with the
9 Submittal of the Objectionable Testimony and Evidence.**

10 Mr. Edelman’s motion argues that objections should be withheld until the close of the
11 hearing, then made in writing, and then be subject to response from the person who submitted the
12 alleged objectionable materials or information, but no reply. Mr. Edelman’s justification for this
13 approach is that objections can be “disruptive and intimidating.” In any normal adjudicatory
14 setting, objections are required to be raised in a timely manner and on specific grounds.
15 According to the Court of Appeals, Division I, “[t]o be timely, the party must make the objection
16 at the earliest possible opportunity after the basis for the objection becomes apparent.” *State v.*
17 *Gray*, 134 Wn.App 547, 557, 138 P.3d 1123 (2006).

18 There are many policy reasons for requiring objections to be contemporaneous with the
19 objectionable testimony. One very important reason is that objections made contemporaneous
20 with the submittal of materials are actually helpful to building a record containing relevant
21 information. An objection, for example, as to relevance of certain testimony allows the person
22 testifying to re-frame his or her testimony into something that is relevant. If the objection was
23 held until the end of the process, that opportunity would be lost. In the instant matter, the
24 Examiner should follow the well-established practice of allowing objections to occur
25 contemporaneous³ with submittal of the evidence.

26 ³ To the extent that written materials are not made available until several days after the hearing proceeding,
objections should be allowed at the opening of the next hearing day after which the materials were available.

1 **G. The Sequence for the Hearing Presentation must be: City, Yarrow Bay, Public**
2 **Testimony, Rebuttal by City, Rebuttal by Yarrow Bay, Together with One Round of**
3 **Sur-Rebuttal.**

4 Mr. Edelman's motion argues that interested persons should be allowed to "reply" to any
5 rebuttal presented by Yarrow Bay and the City, and that the record would then be closed. As the
6 Examiner explained in the pre-hearing conference, due process requires that the proponent of a
7 proposal be provided the last word. Generally, the proponent of a cause has the right to make the
8 first opening statement, present evidence first, and make the first and final arguments. The usual
9 justification for this ordering is that the party with the burden of proof should have the advantage
10 of making the first and last presentation. In its procedural motion, Yarrow Bay has proposed a
11 single round of "sur-rebuttal" to provide interested persons, like Mr. Edelman, an opportunity to
12 respond to the rebuttal presentations. Under that process, however, Yarrow Bay will still be
13 provided the last word and must be provided that right.

14 **H. In its Rebuttal Presentations, Yarrow Bay may Include New Conditions or Other**
15 **Provisions in Response to the Testimony of Interested Persons, and Interested**
16 **Persons can Avail themselves of the Opportunity to Comment on Yarrow Bay's**
17 **Conditions or Other Provisions.**

18 Mr. Edelman's motion argues that "no change or supplement to the record is permitted
19 after it is closed," that the "developers submitted land use map changes after the MPD record
20 was closed and those changes were accepted by the City and incorporated into the closed record
21 hearings" and that the changes were "made without public knowledge." It is unclear exactly
22 what Mr. Edelman's allegations are referencing.

23 It is true that Yarrow Bay's rebuttal presentation to the Examiner (a presentation open to
24 the public) included updated proposed revisions to MPD Conditions. In substance, Mr.
25 Edelman's motion argues that citizens should be allowed the final word in the hearings.
26 However, as discussed above, Yarrow Bay has the right to make the first and last arguments.
Finally, a rebuttal presentation that directly responds to comments made during the hearing is
exactly what this process is intended to achieve. Accordingly, Yarrow Bay's closing

1 presentation should not be limited such that Yarrow Bay cannot address citizen concerns without
2 continuously providing another opportunity for comments on Yarrow Bay's closing. Such a
3 process would never end.⁴

4 **I. The Citizen's Guide to the Hearing Examiner Process Exists to Alleviate Confusion**
5 **Regarding Hearing Procedures.**

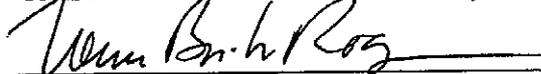
6 Some members of the public have expressed their concern about understanding the
7 process and procedure before the Hearing Examiner. We recognize that the process may be
8 foreign to many citizens. The City, however, has provided a citizen's guide to the Hearing
9 Examiner process, which can be found on the City's website.⁵ This guide demystifies the
10 process and should alleviate the vast majority of confusion. In addition, the Examiner's pre-
11 hearing order is expected to set specific procedures for this hearing.

12 **III. CONCLUSION**

13 Yarrow Bay respectfully requests that the Hearing Examiner enter a Pre-hearing Order
14 implementing the procedures described in Yarrow Bay's Motion to Set Hearing Procedures for
15 Development Agreement Hearings (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)
16 filed on June 13, 2011.

17
18 DATED this 23rd day of June, 2011.

19 CAIRNCROSS & HEMPELMANN, P.S.

20 

21 Nancy Bainbridge Rogers, WSBA No. 26662

22 Andrew S. Lane, WSBA No. 26514

23 Randall P. Olsen, WSBA No. 38488

24 Attorneys for Applicants BD Lawson Partners, LP
and BD Village Partners, LP

25 ⁴ This situation is often referred to as a feedback loop.

26 ⁵ <http://www.ci.blackdiamond.wa.us/Depts/CommDev/building/forms/Citizens%20Guide%20to%20Hearing%20Examiner%20Process.pdf>

Certificate of Service

1 I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of
2 Washington that on June 23, 2011, I caused a copy of the document to which this is attached to
3 be served on the following individual(s) via email:
4

5 Steve Pilcher
6 Community Development Director, City of Black Diamond
7 24301 Roberts Drive
8 PO Box 599
9 Black Diamond, WA 98010
10 Email: spilcher@ci.blackdiamond.wa.us

11 Brenda Martinez
12 Clerk, City of Black Diamond
13 24301 Roberts Drive
14 PO Box 599
15 Black Diamond, WA 98010
16 Email: BMartinez@ci.blackdiamond.wa.us

17 Stacy Borland
18 City of Black Diamond
19 24301 Roberts Drive
20 PO Box 599
21 Black Diamond, WA 98010
22 Email: sborland@ci.blackdiamond.wa.us

23 Andy Williamson
24 City of Black Diamond
25 24301 Roberts Drive
26 PO Box 599
Black Diamond, WA 98010
Email: awilliamson@ci.blackdiamond.wa.us

DATED this 23rd day of June, 2011, at Seattle, Washington.



Nancy Bainbridge Rogers, Attorney

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BEFORE THE HEARING EXAMINER OF THE CITY OF BLACK DIAMOND

IN RE DEVELOPMENT AGREEMENTS
RELATED TO MPD PERMIT
ORDINANCES 10-946 (VILLAGES) AND
10-947 (LAWSON HILLS)

NOS. PLN10-0020/11-0013; PLN10-
0021/11-0014

CITY'S RESPONSE TO
PREHEARING MOTIONS

I. INTRODUCTION

The City of Black Diamond submits this response to the pre-hearing motion by applicants BD Villages Partners, LP and BD Lawson Partners, LP (collectively, "Yarrow Bay"). The City also responds below to related prehearing motions submitted by David Bricklin (June 13, 2011 letter, aka "Bricklin Motion"), Bob Edelman (Motion to Revise and Set Prehearing Rules and Procedures ("Edelman Motion")), and the June 13, 2011 e-mail from Cindy Wheeler ("Wheeler Motion").

II. ANALYSIS

A. The Scope of the Hearing on the Development Agreements Must Be Limited to Whether the Development Agreements Comply With Applicable Legal Requirements.

The primary question the Examiner must resolve relates to the scope of the



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165

EXHIBIT

1 hearing.¹ Here, as Yarrow Bay understandably points out - given the express direction to
2 the Examiner set forth in the Black Diamond Municipal Code - the scope of the hearing
3 on the development agreements (“DAs”) is limited to whether the DAs comply with
4 applicable legal requirements, as set forth in BDMC Section 18.98.090 and RCW
5 36.70B.170.

6 The basic requirements for a development agreement are set out in RCW
7 36.70B.170(1), which states:

8 A development agreement must set forth the development
9 standards and other provisions that shall apply to and
10 govern and vest the development, use, and mitigation of the
11 development of the real property for the duration specified
12 in the agreement. A development agreement shall be
13 consistent with applicable development regulations adopted
14 by a local government planning under chapter 36.70A
15 RCW.

16 Thus, there are two basic statutory requirements for a development agreement: (1) it
17 must *set forth* the development standards and other provisions that apply to, govern and
18 vest the development, use and mitigation of the MPD properties; and (2) it must be
19 consistent with the applicable City of Black Diamond development regulations.

20 The City of Black Diamond development regulation requirements for a Master
21 Planned Development Permit (“MPD”) development agreement are set out in BDMC
22 Section 18.98.090:

23 The MPD conditions of approval shall be incorporated into
24 a development agreement as authorized by RCW
25 36.70B.170. This agreement shall be binding on all MPD
property owners and their successors, and shall require that
they develop the subject property only in accordance with
the terms of the MPD approval.

¹ This issue should be addressed first, because its resolution will functionally resolve all other issues raised in the Bricklin and Edelman motions.



1 Given this mandatory language, the BMDC establishes three requirements applicable to
2 an MPD development agreement: (1) the DA must incorporate the MPD Permit
3 conditions of approval; (2) the DA must be binding on all MPD property owners and
4 their successors (i.e., it must “run with the land”); and (3) the DA must require that the
5 MPD property owners develop the property only in accordance with the terms of MPD
6 Permit approval.

7
8 Taken together, there are five legal criteria for the Hearing Examiner to apply in
9 reviewing the proposed DAs. The Examiner must ask:

- 10 1. Do the DAs set forth the development standards and other provisions that
11 apply to, govern and vest the development, use and mitigation of the MPD
12 properties;
- 13 2. Are the DAs consistent with the applicable City of Black Diamond
14 development regulations;
- 15 3. Do the DAs incorporate the conditions of MPD Permit approval;
- 16 4. Are the DAs binding on all MPD property owners, and their successors; and
17 5. Do the DAs require that MPD property owners (and their successors) develop
18 the MPD property only in accordance with the conditions of MPD Permit
19 approval?

20 These requirements necessarily render narrow the scope of the Examiner’s inquiry.

21 Project opponents Bricklin and Edelman, however, advocate that the Examiner
22 take a wider view. In an e-mail to the Examiner last week, Mr. Bricklin argued that,
23 “The DAs will be used to establish the functional equivalent of a new zoning code for
24 these new land use districts” and, because the City Council struck some of the
25 Examiner’s proposed conditions of MPD Permit approval, the Examiner “will need to
address those issues anew in the DAs” E-mail from D. Bricklin to Hearing



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1 Examiner dated 6/17/2011 at 12:00:58 p.m.

2 Not surprisingly, since Mr. Bricklin is Mr. Edelman's counsel, the Edelman
3 Motion likewise hints at this position, arguing that "The Development Agreement may
4 include optional manners of implementation or location of facilities." Edelman Motion,
5 at 2. This tack appears to be primarily, if not wholly, motivated only by forum-shopping
6 concerns: the project opponents would rather appeal the DAs to the Growth Management
7 Hearings Board (where they can argue for invalidation), rather than to Superior Court
8 under LUPA. Accordingly, opponents hope to make the DAs look more like legislative
9 development regulations rather than project permit decisions. State statute and the City's
10 MPD development regulations control the scope of the Examiner's review, however – not
11 the project opponents' forum-shopping desires.

12 Further, the hearing on the DAs is not a time for opponents to re-argue or for the
13 Examiner to reconsider the conditions of the MPD Permit approvals, which have been
14 established by the City Council's unanimously-adopted ordinances. The Examiner is
15 given no jurisdiction to second-guess the wisdom of the City Council's considered
16 choices.

17 Nor is it a time to consider "optional" conditions that might otherwise be
18 considered in a development agreement unrelated to an MPD, as the Examiner
19 recognized in oral comments during the prehearing conference. The hearing on the DAs
20 is necessarily limited to consideration of whether the proposed DAs meet the legal
21 criteria specified in state and local law (RCW 36.70B.170 and BDMC 18.98.090). While
22 Jack Sperry's June 21, 2011 response letter claims that, in the hearing, members of the
23 public should be permitted to point out areas in the Development Agreements where they
24
25



1 believe detail is lacking and offer suggested revisions, this is essentially a request for
2 proposing "optional" conditions. Unless speakers are pointing to an area where the DAs
3 do not include information or detail required by the MPD Permit conditions of approval
4 or state law, Mr. Sperry's request (and similar ones made at the hearing) should be
5 denied.

6 Accordingly, the Hearing Examiner should grant Yarrow Bay's motion, and reject
7 the position advocated in the Edelman Motion and Mr. Bricklin's 6/17/2011 e-mail. The
8 Hearing Examiner's pre-hearing order should identify the statutory and city code-based
9 legal criteria (quoted above) against which the DAs are to be measured. To avoid
10 confusion (and possible backtracking by project opponents who prefer a different result),
11 the Examiner's order should also clarify that the DA hearings will *not* involve
12 reconsideration or re-argument of the issues covered in the MPD Permit or SEPA appeal
13 hearings, nor consideration of "optional" alternative conditions.

14
15 **B. The DA Hearings Must be Conducted as Quasi-Judicial Hearings.**

16 The City also concurs that the DA hearings must be conducted as quasi-judicial
17 hearings. First, BDMC Section 18.08.030 provides that development agreements are
18 reviewed using a "Type 4 – Quasi-Judicial" process. *See also* BDMC 18.08.070(C)(2)
19 (Development agreements require Type 4 process).

20 Under BDMC 18.08.070(A), a Type 4 - Quasi-Judicial" process is the same as a
21 Type 3 – Quasi-Judicial process, except that in a Type 4 process, the Hearing Examiner
22 makes a recommendation to the City Council rather than making the decision himself. In
23 a Type 4 process, the Hearing Examiner must conduct a hearing, compile a record, issue
24 written findings of fact and conclusions of law, and make recommendations to the City
25



1 Council as to whether the proposed DAs are consistent with applicable regulations and
2 policies and whether they should be approved, approved with modifications or
3 conditions, or denied. BDMC 18.08.060(C); .070(A).

4 State law further confirms that the DAs for the MPD Permits are quasi-judicial.
5 Under RCW 36.70B.200, “[i]f the development agreement relates to a project permit
6 application, the provisions of chapter 36.70C RCW [LUPA] shall apply to the appeal of
7 the decision on the development agreement.” Because LUPA governs review of quasi-
8 judicial project permit decisions (but not review of legislative decisions), a development
9 agreement that “relates to a project permit application” is necessarily quasi-judicial. See
10 also *Mercer Island Citizens for a Fair Process v. Mercer Island*, 156 Wn. App. 393 (Div.
11 I 2010) (temporary use agreement was land use decision subject to LUPA’s 21-day
12 limitations period). Here, as the Examiner can readily observe, the proposed DAs relate
13 to and govern subsequent, implementing project permits, such as subdivisions, binding
14 site plans, building permits, and the like. *See, e.g.*, Villages DA at 4 (Recital H), at 6, §
15 2.1, and at 143, §15.1; Lawson Hills DA at 4 (Recital H), at 6, §2.1, and at 130, § 15.1.
16 These DAs are reviewable under LUPA, and accordingly must be conducted under a
17 quasi-judicial process.
18

19 If the DAs were legislative, as Mr. Bricklin has previously urged, then he and all
20 members of the public would likely argue that they were entitled to contact the Examiner
21 off the record, at home, on the weekends, at the local grocery store, etc.² They would
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23 ² Mr. Bricklin, TRD, Mr. Edelman, Ms. Wheeler and others have argued in federal court and before the
24 Growth Board that members of the public have a constitutional right and a right under GMA public
25 participation requirements to contact their legislators individually and privately, off-the-record, for one-on-
one and/or small group discussions.



1 likely demand to meet with the Examiner to discuss their views on the proposed DAs,
2 whether the DAs should be approved, rejected, or approved with conditions, and if the
3 latter, what the conditions should be. Merely articulating this possibility highlights its
4 absurdity. The Examiner is a quasi-judicial official, who may not be contacted ex parte
5 by members of the public or parties to a land use decision proceeding.

6 The Examiner's review of the MPD DAs here is no different. The BDMC
7 expressly identifies development agreements as a "Type 4 – Quasi-Judicial" decision.
8 LUPA identifies development agreements as quasi-judicial land use decisions reviewable
9 exclusively under LUPA, RCW Ch. 36.70C, and applicable appellate precedent confirms
10 this identification. The Examiner must conduct the hearings on the DAs as a quasi-
11 judicial process.

12
13 C. The Requested Continuance of the Hearing Date Should be Denied.

14 The June 13 letter from David Bricklin and the Edelman Motion complain that the
15 hearing must occur at least sixty and perhaps ninety days following public release of the
16 final version of the draft DAs. Edelman Motion at 2-3; Bricklin Motion at 1-2. The
17 Bricklin Motion requests that the July 11 hearing be rescheduled. Bricklin Motion at 1.
18 This request, which is tantamount to a request for a continuance, should be denied.

19 Under Hearing Examiner Rule 2.17(a), a scheduled hearing may be continued
20 only upon a showing of good cause, as determined by the Hearing Examiner. In other
21 contexts, courts have construed the term "good cause" to require a showing of some
22 external impediment that did not result from a self-created hardship that would prevent a
23 party from complying with deadline. *State v. Johnson*, 96 Wn.App. 813, 817, 981 P.2d
24 25 (Div. III 1999), citing *State v. Tomal*, 133 Wash.2d 985, 989, 948 P.2d 833 (1997)



1 (regarding motion to dismiss appeal); *State v. Dearborne*, 125 Wash.2d 173, 883 P.2d
2 303 (1994) (regarding notice of intent to seek the death penalty); *State v. Crumpton*, 90
3 Wash.App. 297, 302, 952 P.2d 1100 (regarding inclusion of testimonial affidavits with
4 motion for new trial), review denied, 136 Wash.2d 1016, 966 P.2d 1277 (1998). Further,
5 a motion for a continuance is subject to the exercise of judicial discretion. *Coggle v.*
6 *Snow*, 56 Wn. App. 499, 504-05, 784 P.2d 554 (1990). This means that there must be
7 tenable grounds for granting the requested continuance. *Id.* at 507. In the context of a
8 summary judgment motion, a continuance may be granted only where the party seeking
9 the continuance shows a good reason for delay in having obtained evidence needed to
10 defend against the summary judgment motion, demonstrates what evidence will be
11 obtained through additional discovery, and demonstrates how that evidence will raise a
12 genuine issue of material fact. *Id.*

13
14 Here, good cause for a continuance has not been shown, because the grounds
15 offered in support of the request for the continuance are simply untenable and are flat out
16 wrong in a number of respects. First, both Edelman and Bricklin argue that staff reports
17 were not timely posted on the City's website, given that the Examiner indicated orally at
18 the prehearing conference that the hearing would not commence until at least 30 days
19 after the final draft version of the DAs and the staff report were posted on the City's
20 website. Edelman Motion at 1; Bricklin Motion at 1. This is incorrect. The joint staff
21 report was posted to the website on Friday, June 10, more than 30 days before the
22 scheduled commencement of the hearing, consistent with the Examiner's oral direction.
23 The joint staff report is located on the same webpage as the DAs
24 (<http://www.ci.blackdiamond.wa.us/Depts/CommDev/DA.html>), with a link titled
25



1 "Staff Report" right above the table for the Lawson Hills Agreement.

2 Next, the motions claim that the DAs are overly long, approximately 1300 pages.
3 Bricklin Motion at 1; Edelman Motion at 2-3. Again, this is incorrect. The two DAs are
4 identical, except for a small number of provisions in the Lawson Hills agreement that are
5 specific to that MPD Permit and site. The two DAs total approximately 150 pages each –
6 not 1,300 as claimed. Additional pages are devoted to exhibits to the Agreements. While
7 Mr. Bricklin has argued that all of the exhibits must be considered, pointing to the
8 amount of detail contained in appendices to the FEIS, those appendices themselves
9 contained newly-prepared, substantive environmental analysis; here, the attachments to
10 the DAs are (with minor exception) pre-existing, stand alone documents such as the site
11 plan, parcel boundaries and legal descriptions, and copies of the MPD Permit ordinances.
12 See Section 15.7 (exhibit list) to Villages and Lawson Hills DAs. The longest exhibit,
13 consisting of several hundred pages by itself, is nothing more than a complete copy of the
14 *existing* City code to which the Development Agreements will be vested. See, e.g.,
15 Villages DA at Exhibit E. This could have been accomplished with a simple cross-
16 reference, but to avoid any future confusion about the content of the applicable provisions
17 of City code to which these MPDs will be vested, the City simply attached them *in toto*.
18 It is unnecessary for Msrs. Bricklin and Edelman to read these entire codes or other
19 exhibits in order to prepare for the hearing. If they feel otherwise, they could have been
20 reading them over the past many months.
21

22 The Edelman Motion also claims – again, incorrectly -- that the staff report does
23 not contain a matrix indicating where each MPD Permit condition is incorporated within
24 the DAs. Edelman Motion at 3. The compliance matrix is Attachment 6 to the staff
25



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1 report, and is easily accessible via an HTML link on page 11 of the staff report. Staff
2 Report at 11, Section VIII.

3 The Bricklin motion claims that certain required information is missing. Bricklin
4 Motion at 2. For example, the Bricklin Motion claims that “mitigation fees are proposed
5 for addressing the developments’ impacts on the city’s fire department, but the city has
6 not yet adopted a fire mitigation fee ordinance, so there is no way to assess the adequacy
7 of this measure.” *Id.*

8 As the Examiner knows, however, there is no requirement to first adopt an
9 ordinance before assessing a mitigation fee; *mitigation* fees are authorized under SEPA
10 and RCW 82.02.020. *See, e.g., Federal Way v. Town & Country Real Estate, LLC*, 161
11 Wn. App. 17, 252 P.3d 382 (Div. II 2011) at *13.³ An ordinance is required only for
12 adopting a citywide *GMA impact fee*, which the City retains the right but not the
13 obligation to later adopt. RCW 82.02.060; see also *Drebick v Olympia*, 156 Wn.2d 289,
14 299-302, 126 P.3d 802 (2006). The draft DAs contain Yarrow Bay’s agreement to pay a
15 specified fire *mitigation* fee (\$1,781 per dwelling unit, and \$2.29 per square foot of
16 nonresidential construction), until such time that the City may adopt a GMA impact fee,
17 at which point Yarrow Bay will pay the adopted impact fee. Villages DA at 116. There
18 is no “gap.”

19
20 Finally, both the Bricklin and Edelman motions claim that 30 days is insufficient
21 time to prepare for the hearing. Bricklin Motion at 1; Edelman Motion at 2-3. This claim
22 stretches credulity widely, as both Mr. Edelman and Mr. Bricklin are part of a larger,
23 self-named “network of volunteers and supporters” that has been working diligently to
24

25 ³ Only the Westlaw citation to this decision is currently available.



1 oppose the two MPD projects, since at least September, 2010.⁴ The network of project
2 opponents is well-prepared and ready for the hearings; the claimed need for additional
3 time is merely an attempt to delay the project beyond the upcoming November City
4 Council elections. Such delay is inappropriate for the simple reason that the Hearing
5 Examiner Rule 2.06 requires the Examiner (and all parties) to conduct the hearing
6 expeditiously and avoid delay. Delay is additionally inappropriate, given the project
7 opponents' high degree of organization and preparedness, as illustrated shown by a few
8 key facts and documents discussed below..

9 Immediately after the City Council approved the MPD Permits in Ordinances 10-
10 946 and 10-947, the project opponents organized themselves into a number of groups.
11 First, they incorporated a non-profit corporation, Toward Responsible Development, or
12 TRD. According to records of the Secretary of State, Mr. Edelman is the registered agent
13 and chairman of TRD. See Secretary of State, Corporations Division printout, attached as
14 Exhibit A to the Declaration of Bob C. Sterbank in Support of City's Response to
15 Prehearing Motions ("Sterbank Declaration"). TRD and individuals who (on information
16 and belief) are some of its members (Mr. Edelman, Cindy Wheeler, Peter Rimpos, Cindy
17 Proctor, Joe May, Judith Carrier, and Michael Irrgang) filed a land use petition and
18 complaint for damages challenging the MPD Permit ordinances in Superior Court. The
19 LUPA proceeding and damages complaint were removed to federal court (the portion of
20 the LUPA petition based on state law claims was later remanded to superior court). TRD
21

22
23 ⁴ To identify the project opponents' organizations is *not* intended to denigrate them. A great deal of
24 Washington appellate precedents in the areas of land use and environmental law are the outgrowth of
25 disputes between non-profit organizations, on the one hand, and developers or cities and counties, on the
other. The well-meshed organization of Black Diamond-area MPD project opponents, however, bears on
the credibility of the pending requests for a continuance, unlimited time for public comment, and the like.



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1 and its members also filed a petition for review before the Growth Management Hearings
2 Board. Mr. Bricklin represents them in all three proceedings (LUPA petition, federal
3 court litigation, and Growth Board proceedings). According to Mr. Edelman's statements
4 to the Covington/Black Diamond Reporter, TRD itself does not engage in fundraising.
5 Instead, TRD relies upon Save Black Diamond and The Diamond Coalition. *See* October
6 13, 2010 article, attached as Exhibit B to Sterbank Declaration.

7 These are not groups of different individuals, however, but simply differently
8 named "shell" entities with interlocking directors and/or members. The Diamond
9 Coalition, for example, is a nonprofit corporation headed by Cindy and Bill Wheeler, and
10 Joe May. *See* Corporations Division printout, attached as Exhibit C to Sterbank
11 Declaration.

12 The other organization, "Save Black Diamond," has Mr. Irrgang's wife, Linda
13 Irrgang as a "Director," and much of the website materials for the group list Peter Rimbo
14 as the author. *See* Exhibit D to Sterbank Declaration. Save Black Diamond's website
15 identifies it as "a network of volunteers and supporters who are working together to
16 protect the Town of Black Diamond and the surrounding areas from irresponsible land
17 development." *See* Ex. E to Sterbank Declaration. The website underscores the
18 "network" relationship between SBD and TRD indicated by Mr. Edelman's statements to
19 the press; the website states that Save Black Diamond "support[s] the legal and
20 administrative appeals that have been filed" against the Yarrow Bay proposals. *Id.*

21 Of fundamental importance regarding the pending requests for more time before
22 commencement of the DA hearings, the Save Black Diamond website also documents the
23 months of preparation engaged in by project opponents. For example, in a page authored
24
25



1 in January, project opponents were already preparing for the hearing by soliciting
2 individuals to provide oral and written testimony. Peter Rimbo wrote:

3 [T]hose Development Agreements will be submitted to the
4 City's Hearing Examiner to conduct Public Hearings to
5 commence sometime in February. People are encouraged
6 to provide both Oral Testimony at and Written Statements
7 to those Public Hearings. Please contact us for more
8 details on testifying.

9 Sterbank Declaration, Exhibit E (emphasis added).

10 In addition, Mr. Rimbo heads up a "Citizens Technical Action Team (TAT)."

11 According to the SBD website, the Technical Action Team's "objective" is:

12 *[t]o understand all critical technical issues and develop a*
13 *winning strategy to exploit them. It's [sic] strategy is to*
14 *review and assess all pertinent documents including the . . .*
15 *Development Agreements. . .*

16 Exhibit E to Sterbank Declaration (emphasis added).

17 In order to implement this strategy, on December 28, 2010, members of the TAT
18 (including Mr. Rimbo, Mr. Edelman, Jack Sperry, Bob Rothschilds and Brian
19 Derdowski) met with City staff. The TAT attended the meeting only on condition that
20 Yarrow Bay representatives not be allowed to attend. On January 3, 2011, Mr. Rimbo
21 forwarded five single-spaced pages of suggested language revisions for the DAs. Staff
22 Report, Ex. 11. Subsequently, according to Mr. Rimbo, beginning in February, 2011,
23 the TAT met with two Black Diamond City Councilmembers, in a series of four meetings
24 each lasting over two hours, covering Transportation, Environment, Stormwater and
25 Flooding, Fiscal Impacts and Schools related to the MPDs. Sterbank Declaration, Ex. 5.
Each meeting resulted in multi-page conditions with supporting rationale drafted by TAT.

Id.



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1 The project opponents are hardly in the dark about the proposed DAs. Instead,
2 they have been working closely as part of a “network” of at least three nonprofit
3 corporations with interlocking directors and/or members, to raise funds, challenge the
4 MPDs administratively and in court, scrutinize the details of all documents – expressly
5 including these development agreements – and prepare and execute strategies “to exploit
6 them.”

7 While project opponents are free to organize themselves as they choose, they
8 cannot then credibly claim that a “gross miscarriage of justice” would result when they
9 are then provided yet another 30 days to prepare for the hearing. The Examiner likely
10 recalls the Project opponents’ similar protests prior to the earlier hearings on the SEPA
11 appeals and MPD Permits. In numerous e-mails and briefs, the Examiner was told that
12 the matter was proceeding “at a breakneck pace” and that they could not possibly
13 adequately prepare. At the hearings themselves, however, they called not only
14 themselves as witnesses but also multiple expert witnesses on water quality, traffic, noise,
15 and wildlife, along with expert and lay witnesses subpoenaed from King County,
16 WSDOT, and the City of Maple Valley. The SEPA appellants were simply not
17 prejudiced by proceeding with the MPD Permit hearings. Likewise, no project opponents
18 here will be prejudiced by commencing with these hearings on July 11.⁵

19
20 The requested continuance should be denied.

21 D. The Hearing Examiner Should Impose the Customary, Reasonable Limits on
22 When and How the Hearing Will be Conducted.

23 As the City requested at the prehearing conference, the Hearing Examiner should

24
25 ⁵ After all, Mr. Bricklin represents most of the individuals who control the three nonprofits. He represents Mr. Edelman, the Wheelers, Michael (and presumably Linda) Irrgang, Peter Rimbos, and Joe May.

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1 impose customary, reasonable limits on when and how the hearing will be conducted.
2 These include (1) conducting the hearing for reasonable lengths each hearing day,
3 including some times during the day only, some times during the evening only, and some
4 times during a combined day/evening setting; (2) setting reasonable limits on the length
5 any individual may address the Examiner; and (3) allowing submittal of expert testimony
6 and rebuttal testimony in writing. Each of these topics are addressed.

- 7 1. The hearing should be conducted during the day and evenings to
8 ensure completion as scheduled.

9 The scope of the hearing is narrow, as discussed above. A reasonable number of
10 hearing days have been allotted. The Examiner's own rule, Rule 2.06, requires the
11 Examiner to conduct the hearing "expeditiously," and Rule 2.11(d) expressly allows the
12 Examiner to "limit the length of testimony to expedite the proceedings and avoid the
13 necessity to continue the hearing." Accordingly, the Examiner should set times during
14 both the day and evening, to ensure that the hearing will be completed within one week,
15 as the Examiner observed (during the prehearing conference) should occur. Hearing
16 times during the day will accommodate experts, if any, as well as those members of the
17 public who have family, employment, or other evening obligations and cannot attend
18 hearings in the evening. Hearing times during the evening will, correlatively,
19 accommodate those who cannot attend during the day for family, employment, or other
20 reasons. The request to conduct the hearing only at night, and only for two hours at a
21 stretch, is unreasonable for the participants and appears to be intended only to extend the
22 time necessary to complete the hearing.
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2. Public testimony should be limited to 3 minutes per person.

Public testimony should be limited to three minutes per person, with an opportunity to additionally submit written statements of no more than 24 pages in length (not counting exhibits). As noted above, Hearing Examiner Rule 2.11(d) expressly allows the Examiner to “limit the length of testimony to expedite the proceedings and avoid the necessity to continue the hearing.” Three minutes is the customary length of time for testimony during public hearings. It is the customary length of time for testimony before the City Council. As the Examiner may recall from the MPD Permit hearings and his other experience, a great deal of testimony involves repetition of the same point by multiple speakers. Repetition, though, is irrelevant because the quasi-judicial nature of the hearing requires the Examiner to apply legal criteria to the evidence before him, and a contested fact or argument is not made more or less true because it is stated by multiple speakers. In addition, many speakers simply read from prepared letters or arguments, and then submit the written argument *in toto* into the record. A three minute provision, coupled with the ability to submit up to 24 written pages (the King County Superior Court standard for a motion for summary judgment) plus exhibits, provides more than ample ability for any speaker to fully and comprehensively make his or her point.

3. Expert witnesses should be permitted to testify and provide rebuttal in writing.

As the City has earlier noted, expert testimony at these proceedings is unwarranted. These proceedings are not a replay of the prior SEPA appeals and MPD Permit hearings. Rather, they are designed solely to determine compliance with the



1 criteria described in Section A of this brief, above. Neither the Examiner nor the City
2 Council will require “expert” assistance in that regard, and expert testimony will not meet
3 the probity, materiality and other standards in the Examiner’s own rules for admissibility.
4 See Rule 2.14.

5 To the extent that expert testimony is offered, however, it should be allowed only
6 if it meets the standards of Rule 2.14, and only if the person and testimony offered meet
7 the standards set forth in ER 702 and 703. Even then, the Examiner should allow experts
8 to testify and to provide rebuttal in writing. This process worked well at the earlier SEPA
9 appeal and MPD Permit hearings, and saves all participants substantial expense.

10 Requests by the Edelman Motion for cross-examination by members of the public
11 should be denied. Under the Hearing Examiner’s Rules, cross-examination is permitted
12 only by “parties,” who are specifically defined to include only the permit applicant and
13 property owners in this context. See Rule 2.11(a) (witnesses “subject to cross-
14 examination by the other party(s)”; 2.02(q) (“party” defined as entity that submits permit
15 application and owners of property that is subject of the permit application);⁶ 4.02
16 (“party” has the right to ask questions of those testifying at the hearing). In contrast,
17 Mssrs. Edelman, Bricklin, Sperry and others are “interested persons” as defined by
18 Hearing Examiner Rule 2.02(n); as such, they are not entitled to cross-examine expert or
19 other witnesses. If project opponents wanted the ability to cross-examine witnesses, they
20 could have sought intervention via TRD, SBD and The Diamond Coalition, which would
21 then qualify them as a “party” within the meaning of Examiner Rule 2.02(q) (“party”
22 includes “the person(s), group, organization, corporation, or other entity granted party
23
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25 ⁶ The definitions in Section 2 of the Examiner’s rules apply to “to all matters where the Hearing Examiner

**KENYON
DISEND**

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11 Front Street South
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1 status through intervention . . ."). Instead, they chose to try to proceed as individual
2 "interested persons," so as to try to claim the need to continue the hearing date and/or
3 gain additional time for public presentation, but by doing so they forfeited the ability to
4 cross-examine. They cannot have it both ways.

5 4. Any ceding of time should be regulated.

6 If individuals wish to "cede" their time to another speaker, the Examiner should
7 order that (a) any person wishing to cede time must actually be present when the speaker
8 to whom time is ceded will actually speak; (b) any person ceding time thereafter may not
9 testify or submit written material into the record; (c) no speaker may have time ceded
10 from more than six other speakers, which provides for a total of 21 minutes to speak if
11 the Examiner establishes a three minute limit (or, more than twice the time afforded for
12 argument in the Court of Appeals or Supreme Court).

13 5. Any advance sign-up should be regulated.

14 The City recommends the use of advance sign-up in the manner utilized by the
15 City Council during its deliberations regarding the MPD Permit ordinances. Allowing a
16 person to sign up for a specific day and time causes substantial inefficiency and "dead
17 time" when one or more preceding speakers either fail to show or fail to use their full
18 allotment of time. Rather than that approach, the City Council provided for a sign-up
19 sheet on which speakers could sign up in advance on a first come/first served basis. The
20 Mayor then called those names in order. If a person was not present, his or her name was
21 put to the bottom of the list. When the Mayor had completed the entire list once, she then
22 went through the list of those who had not spoken one more time only. Those who were
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25 has authority to decide or recommend the outcome." See Rule 2.01

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1 present then spoke. If a person missed his or her second opportunity to speak, he or she
2 nonetheless retained the ability to submit written comments.

3 6. Directions to City staff regarding posting to City website.

4 At the prehearing conference, the Examiner commented orally that exhibits
5 introduced at the hearing may be posted to the City website the next day. Yarrow Bay's
6 motion seeks direction that exhibits be posted within 48 hours. The City staff is small,
7 and has many, many duties to fulfill in addition to the staffing and logistics for the DA
8 hearings. Especially when hearings go well into the evening, the staff cannot commit to
9 posting exhibits the next day, or even within 48 hours, but will commit to doing so in a
10 reasonably prompt manner, taking into consideration the myriad of other municipal
11 matters requiring attention.

12 Assuming that the Examiner provides an updated Exhibit List at the conclusion of
13 each day's hearing, the staff can commit to posting that list on the City website by noon
14 of the following day.

15 7. No precondition regarding hearing venue is necessary.

16 The Edelman Motion asks the Examiner to order that attendance may not be
17 restricted by the size of the facility, and that if more members of the public attend than
18 can be accommodated, the hearing must be suspended until an alternate location can be
19 arranged. Edelman Motion at 3. Like the request for unlimited public speaking time, this
20 request appears primarily designed to unnecessarily extend these proceedings by
21 "packing the room" beyond the room's rated fire capacity.

22 The Edelman Motion offers no legal authority in support of this demand. The
23 City has made arrangements for a reasonably-sized facility in which to hold the hearing,
24
25



1 after considering the size of facilities available in the region, the convenience to the
2 public of holding the hearing in or near the City of Black Diamond itself (where facilities
3 are smaller) as compared to elsewhere, facility cost, and similar factors. If more
4 members of the public turn out than can be accommodated, the City can make alternative
5 arrangements (e.g., broadcast audio outside the hearing room; members of the public can
6 leave the hearing after testifying to make room for individuals outside who wish to speak,
7 as commonly occurs in other hearing and/or public meeting contexts when attendance
8 temporarily exceeds facility capacity; seek another facility).

9 8. The Examiner should impose reasonable rules regarding group and
10 attorney representation.

11 Ms. Wheeler's e-mail questions comments made by the City asking the Examiner
12 to clarify which individuals or groups are represented by which attorneys. The motions
13 made to date, and Ms. Wheeler's e-mail, highlight the need for the Examiner to impose
14 reasonable rules related to participation of those represented by attorneys.

15 A simple example illustrates the need for the Examiner's guidance on this point.
16 The Examiner's proposed hearing format will grant a certain block of time for the
17 applicant, Yarrow Bay, to make its presentation. If there are no limitations, Yarrow Bay
18 could present its case through Ms. Rogers and, thereafter, Ms. Rogers could claim the
19 ability to address the Examiner as an individual. After Ms. Roger's hypothetical
20 participation as an individual, additional individual Yarrow Bay principals such as Brian
21 Ross, Colin Lund, Ryan Kullhman and others would each have a turn. Each of those
22 individuals could, in turn, locate other members of the public to "cede" time to them,
23 which would provide Yarrow Bay with a potentially unlimited number of "bites at the
24
25

1 apple” to make its presentation. Needless to say, such an approach would also
2 exponentially multiply the length of the hearing.

3 To cure this problem, the Examiner should impose reasonable limits. Attorneys
4 or individuals speaking at the hearing on behalf of others should be required to identify
5 the client(s), group(s) or person(s) on behalf of whom they are speaking. Their individual
6 or group beneficiaries of such representation should not then be accorded additional time.

7 Alternatively, the Examiner could simply identify a block of time to be allocated
8 to project opponents, to be divided amongst themselves however they choose. This latter
9 approach is frequently utilized by Hearing Examiners, and helps to avoid needless
10 repetition of information. As noted above, if project opponents chose to seek to intervene
11 under their umbrella organizations, the need for Examiner guidance could be avoided
12 (again, so long as there is no attempt to “have it both ways”).

13
14 9. The Hearing format should follow Examiner Rule 4.03.

15 The Edelman Motion asks the Examiner to set a hearing format that allows the
16 “interested person” project opponents the right to what Mr. Edelman labels “reply,”
17 which is actually “sur-rebuttal.” This request should be rejected as inconsistent with the
18 Examiner’s rules.

19 Hearing Examiner Rule 4.03 states the format employed by the Examiner “shall
20 include” the following:

- 21 1. Examiner's introductory statement;
22 2. Report by the Director (including introduction of the official file,
23 reference to exhibits, and a summary of the recommendation of the
24 Department);
25 3. Testimony by the applicant or appellant;
4. Public comment in support of or in opposition to the application or
appeal;



5. Opportunity for parties and Examiner to ask questions;
6. Opportunity for presentation of additional information as rebuttal.

The opportunity for rebuttal is the opportunity for the *parties* to rebut information provided during public comment. This is obvious from the Rule's order of presentation. Public comment follows testimony by the applicant, so the public can address the applicant's testimony. Rebuttal by the parties (the applicant) then follows public comment, so that the applicant may rebut statements during public comment. There is no provision under this rule for the public "sur-rebuttal" of the applicant's rebuttal. That understanding was confirmed by the Examiner's oral indication during the prehearing conference of the hearing format he intended to follow.

Rule 4.03(b) does provide that "The Examiner may alter or modify the order of hearing if and as necessary to best provide for the presentation and understanding of information." The Edelman Motion makes no showing that alteration of this format is "necessary to provide for the presentation and understanding of information." Instead, the Edelman Motion simply seeks "the last word" for project opponents, which is something to which they are not entitled. *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1286 (9th Cir. 1990) (addition of materials to record after public comment period closed was no unlawful; public's *unviolated right was to comment on the proposed regulations, not to comment in a never-ending way*" on agency's responses to their comments). Alteration of the hearing format prescribed by the Examiner's rule is unwarranted, as requested by both the Edelman Motion and Yarrow Bay, should be rejected. To the extent that any hearing format changes are to be granted, Yarrow Bay's proposed limited approach, whereby interested persons are provided sur-rebuttal, with the applicant and the City



1 provided the opportunity for a final sur-rebuttal, is a reasonable approach.

2 III. CONCLUSION

3 As is obvious from the prehearing conference and pending motions, the
4 proceeding before the Hearing Examiner will likely be contentious. Project opponents
5 have made clear their dislike for the MPD projects' size and number of units. Project
6 opponents have (incorrectly) characterized the hearing on the DAs as their "last" chance
7 to address the MPD projects, and appear poised to "pull out all stops" in their opposition.
8 As provided by the City's code, however, the hearing on the DAs is a quasi-judicial
9 hearing with a limited focus, subject to certain legal criteria, and must be conducted
10 accordingly. Consistent with adopted Hearing Examiner rules as outlined above, the
11 Examiner should impose reasonable limitations on hearing format and testimony length
12 to expedite the hearing, set hearing times to ensure hearing completion without
13 continuances, avoid unnecessary repetition and delay, and ensure fairness to all
14 participants.
15

16 Accordingly, for the reasons set forth in detail above, the City respectfully
17 requests that the Examiner deny the Bricklin, Edelman, and Wheeler Motions.

18 DATED this 23rd day of June, 2011.

19 KENYON DISEND, PLLC

20
21 By Bob C. Sterbank
22 Michael R. Kenyon
23 WSBA No. 15802
24 Bob C. Sterbank
25 WSBA No. 19514
Attorneys for City of Black Diamond



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BEFORE THE HEARING EXAMINER OF THE CITY OF BLACK DIAMOND

IN RE DEVELOPMENT AGREEMENTS
RELATED TO MPD PERMIT
ORDINANCES 10-946 (VILLAGES) AND
10-947 (LAWSON HILLS)

NOS. PLN10-0020/11-0013; PLN10-
0021/11-0014

DECLARATION OF BOB C.
STERBANK IN SUPPORT OF
CITY'S RESPONSE TO
PREHEARING MOTIONS

BOB C. STERBANK declares and states as follows:

1. I am counsel to the City of Black Diamond in this matter. I am over the age of eighteen years, competent to testify herein, and make this declaration on personal knowledge of the facts stated.

2. Attached hereto as Exhibit A is a true and correct copy of a Secretary of State, Corporations Division printout identifying Toward Responsible Development as a non-profit corporation and Mr. Edelman as its registered agent and chairman.

3. Attached hereto as Exhibit B is a true and correct copy of an article from the Covington/Black Diamond Reporter dated October 13, 2010.



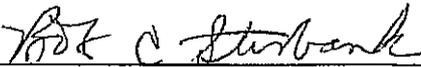
1 4. Attached hereto as Exhibit C is a true and correct copy of a Secretary of State,
2 Corporations Division printout identifying The Diamond Coalition as a non-profit
3 corporation with its officers as Cynthia and William Wheeler, and Joe May.

4 5. Attached hereto as Exhibit D is a true and correct copy of a Secretary of State,
5 Corporations Division printout identifying Save Black Diamond as a non-profit
6 corporation and identifying Linda Irrgang as one of its Directors.

7 6. Attached hereto as Exhibit E are true and correct copies of printouts from
8 Save Black Diamond's website, www.saveblackdiamond.org.

9 I declare that the foregoing is true and correct subject to the penalty of perjury
10 under the laws of the State of Washington.

11 DATED this 23rd day of June, 2011, at Issaquah, Washington.

12
13 
14 Bob C. Sterbank

Corporations Division

Corporations Home	Charities Home	Awards	Public Notices
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TOWARD RESPONSIBLE DEVELOPMENT

UBI Number: 603052737
 Category: REG
 Profit/Nonprofit: Nonprofit
 Active/Inactive: Active
 State Of Incorporation: WA
 WA Filing Date: 09/30/2010
 Expiration Date: 09/30/2011

Inactive Date

Registered Agent Information

Agent Name: Robert Edelman
 Address: 29871 232nd Ave SE
 City: Black Diamond
 State: WA
 ZIP: 98010

Special Address Information

Address:
 City:
 State:
 Zip:

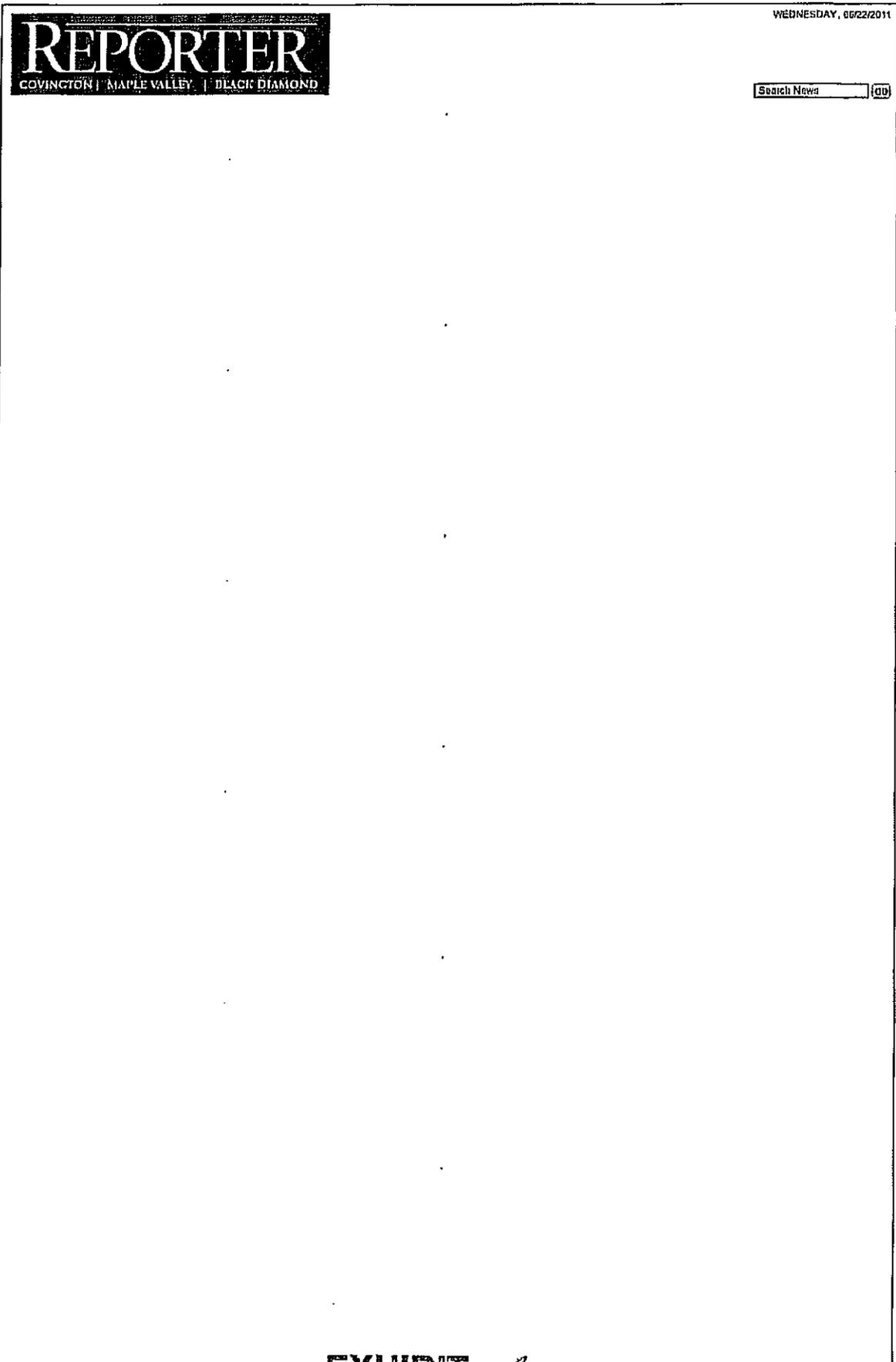
Governing Persons

Title	Name	Address
Chairman	Edelman, Robert	29871 232nd Ave SE Black Diamond, WA
Director	Edelman, Mary	29871 232nd Ave SE Black Diamond, WA

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EXHIBIT A



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5 COMMENTS EMAIL LETTER PRINT FOLLOW SHARE

Toward Responsible Development files appeal against YarrowBay developments in Black Diamond | Read Document

By DENNIS BOX
Covington Reporter Regional Editor
Oct 13 2010

Toward Responsible Development filed a land use petition act or LUPA appeal in King County Superior Court against the two YarrowBay master planned developments in Black Diamond, Lawson Hills and The Villages.

Superior court Judge Cheryl Carey has been assigned to the case. The court date for the appeal is March 21, 2011. The attorney who filed the document for the petitioners was David Bricklin of the Seattle firm Bricklin and Newman.

The petition asks for the court to invalidate the ordinances passed by the Black Diamond City Council approving the projects and remand the issue back to the city for further consideration. The appeal is also asking for the court to award "petitioners their damages and actual attorneys' fees and cost for violation of their constitutional rights pursuant to 42 U.S.C. (section) 1988."

The appeal listed a series of errors in the process the petitioners believe led to the council approving the projects. Included in the list was the city used the wrong process, quasi judicial, which "deprived the petitioners of their opportunity to communicate with their elected officials." The document also noted the ordinances violate the city's comprehensive plan calling for preserving Black Diamond's small town character.

Listed as petitioners on the court document are Cynthia and William Wheeler, Bob Edelman, Peter Rimbas, Mike Irgang, Judith Carrier, Eugene May, Vicki Harp, Cindy Proctor, and the estate of William Harp.

The Black Diamond City Council unanimously passed the ordinances approving the master planned developments Sept. 20

YarrowBay, a Kirkland development company, plans to build 4,800 residences or dwelling units on The Villages property and 1,250 in the Lawson Hills project.

Open hearings on the projects before city's hearing examiner, Phil Olbrechts, began in March and lasted more than two weeks. Olbrechts ruled the final environmental impact statements for the two projects adequate and recommended approval of the projects with conditions.

Closed record hearings before the City Council began in June and continued through September when the projects were approved.

The next step, unless court action halts the process, is the development agreements, which YarrowBay has filed with the city. Once the city approves the applications, they will be scheduled to go before the hearing examiner who will make a recommendation to the City Council on approval.

Edelman said Toward Responsible Development is a state not-for-profit corporation with about 50 members. Edelman described it as a loosely formed group that was started about two weeks ago.

He stated through the hearing process that has lasted nearly seven months he has "made friends that will last for life. There are really intelligent people involved in this."

Edelman said the only requirement to join the group is to "support what we are doing."

He stated the appeal is relying on considerable amount of volunteer efforts and funds raised by other groups. According to Edelman, Toward Responsible Development does no fundraising activities.

Edelman said groups like The Diamond Coalition and Save Black Diamond are raising funds for the effort.

Brian Ross, YarrowBay CEO, said by e-mail Wednesday. "We are still very happy with the city's approval and the progress on these projects. This appeal is a normal and typical part of the process of permitting a MPD or any large project, and YarrowBay will work through the appeal in due course."

LUPA

RELATED STORIES

- Covington & Maple Valley Reporter
 - Maple Valley opposes YarrowBay developments in Black Diamond over to the city's LUPA documents
 - Black Diamond rejects Maple Valley appeal as another LUPA document
 - County Management Board orders on YarrowBay developments in Black Diamond may jump a lot, court of appeals | Read Document
 - YarrowBay files appeal in superior court of hearing board ruling on The Villages and Lawson Hills in Black Diamond | Read Document
 - YarrowBay contends in no increase in residential from Black Diamond developments The Villages and Lawson Hills
- South King County
 - None at this time.

NEWS BLOGS

- Light A Sight
 - Police and the news from around Covington, Maple Valley, and beyond
- News Notes
 - The news and notes from around Covington, Maple Valley, and beyond.

Most Read Stories	This week Last week
Covington Reporter <ul style="list-style-type: none"> Kent Police arrest ex-University of Washington player Vasey Overton for allegedly promoting prostitution A lone shoplifter and a pair working together caught at Covington Safeway Police Blotter 	

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THE DIAMOND COALITION

UBI Number 602987012
Category REG
Profit/Nonprofit Nonprofit
Active/Inactive Active
State Of Incorporation WA
WA Filing Date 01/21/2010
Expiration Date 01/31/2012
Inactive Date
Registered Agent Information
Agent Name William Wheeler
Address 30221 234TH Ave SE
City Black Diamond
State WA
ZIP 98010

Special Address Information

Address
City
State
Zip

Governing Persons

Title	Name	Address
President	Wheeler, William	30221 234TH AVE SE 30221 234th Ave SE BLACK DIAMOND, WA
Vice President	May, Joe	29611 232nd Ave SE Black Diamond, WA
Secretary	Wheeler, Cynthia	30221 234th Ave SE Black Diamond, WA
Treasurer	Wheeler, Cynthia	30221 234th Ave SE Black Diamond, WA

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SAVE BLACK DIAMOND

UBI Number 603086038
Category REG
Profit/Nonprofit Nonprofit
Active/Inactive Active
State Of Incorporation WA
WA Filing Date 02/09/2011
Expiration Date 02/28/2012
Inactive Date
Registered Agent Information
Agent Name Vernon Gibson
Address 32800 1st Ave
City BLACK DIAMOND
State WA
ZIP 98010
Special Address Information
Address PO Box 581
City BLACK DIAMOND
State WA
Zip 98010

Governing Persons

Title	Name	Address
Director	Irgang, Linda	22505 SE 329th St BLACK DIAMOND, WA
Director	Stewart, Monica	22516 SE 300th ST BLACK DIAMOND, WA
Director	Gibson, Vernon	P.O. Box 581 BLACK DIAMOND, WA
Director	Bryant, Kristen	1006 139th PI NE Apt C-4 BELLEVUE, WA

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EXHIBIT D

Save Black Diamond



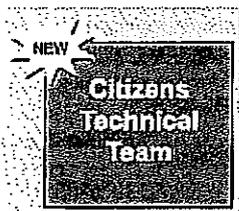
Read Letter to the Editor (from the Seattle Times)

Read November 4 article by Jean Williams from the Seattle *Examiner*.



Save Black Diamond is a network of volunteers and supporters who are working together to protect the Town of Black Diamond and the surrounding areas from irresponsible land development.

We are opposed to the massive development proposed by the Yarrow Bay Corporation. This development has been debated for many years, but only recently has the developer lobbied to get a long-term "entitlement" to build over 6,000 housing units and commercial development equivalent to ten Wal-Marts.



We support the legal and administrative appeals that have been filed against this development proposal. We are also working to monitor and hold accountable the City of Black Diamond and other government entities.

You are invited to learn more about these issues and join us in our various projects. We welcome your ideas and stand ready to assist you on the issues that are important to you.

The Yarrow Bay development proposal will have huge negative regional impacts.



What Will the New Development Look Like?

Background and Literature

A Special Message to the People of Black Diamond

Protecting Black Diamond's Historical Heritage

EXHIBIT E

State Hearings Board Rules in Our Favor February 15

Standing Room Only at City Council February 17

Development Agreement Testimony Needed

QUILT RAFFLE



State Senator Pam Roach testified at the Black Diamond City Council Meeting on February 17, describing the enormous regional impacts of the Yarrow Bay development. Senator Roach pointed out that there was no transportation funding to support this development until 2040!

Whether you live in Enumclaw, Kent, Maple Valley, Covington, Issaquah, Renton, or unincorporated King County this project will affect you!



Above: One of our groups of concerned citizens at a recent work session.

Press Room

LUPA Court Appeal

Growth Management Board Appeal

A Traffic Tutorial

Legal Update March 7

facebook

Name: Protect Black Diamond



Save Black Diamond

Outsized Master Planned Developments

by Peter Rimbos



Yarrow Bay, a major land developer in Western WA, has proposed two major MPDs comprising over 6,000 homes and over 1.1 million sq ft of commercial/business space in the City of Black Diamond. This would quintuple (not a misprint!) the current population of 4,000. These are the largest MPDs in King County history!

These MPDs would: (1) despoil 750 ac of forest and wildlife habitat, (2) add an additional 10,000 vehicles on two-lane roads throughout southeast King County, (3) impact the Rural Area outside the Urban Growth Boundary to enable urban development, and (4) set a dangerous precedent throughout the State of WA—if you can build these monstrosities in small Black Diamond, you can build them anywhere (and they will!)

Where are we in the process? FEISs were released a year ago. Hundreds of comments were received from citizens, adjacent cities, King County, and WSDOT—99+% negative! Citizens banded together to appeal those FEISs. In March 2010, those appeals were heard by the City's Hearing Examiner, who found the FEISs met the very low threshold of SEPA adequacy, but imposed over 150 conditions on the MPDs. Concurrently, the Hearing Examiner held public hearings on the MPD Applications submitted to the City by Yarrow Bay. He recommended approval of those applications, but imposed the same FEIS conditions plus more.

In the summer the City Council received the Hearing Examiner's recommendations and held Public Hearings. Hundreds of citizens attended and testified orally or in writing. Once again, adjacent cities and King County testified —99+% negative, again! When Council deliberations ended on September 20, it decided to approve the MPD Applications, but once again with over 150 conditions.

On September 21 (yes, the very next day!) Yarrow Bay submitted to the City DRAFT Development Agreements that provide the plan over the next 15 - 20 years for the design, development, and build-out of the MPDs. City Staff currently is "negotiating" with Yarrow Bay to "finalize" the Development Agreements. Once ready, those Development Agreements will be submitted to the City's Hearing Examiner to conduct Public Hearings to commence sometime in February. People are encouraged to provide both Oral Testimony at and Written Statements to those Public Hearings. Please contact US for more details on testifying.

Background and Literature

What Will the New Development Look Like?

What's the Solution?

Impact Summary

King County Historical Organizations

Home

Save Black Diamond

CITIZENS' TECHNICAL ACTION TEAM (TAT) UPDATE by Peter Rimbos, TAT Leader

A Citizens' Technical Action Team (TAT) formed shortly after the Black Diamond City Council passed the MPD Approval Ordinances in September 2010. The TAT's objective is to understand all critical technical issues and develop a winning strategy to exploit them. It's strategy is to review and assess all pertinent documents including the MPD Ordinances, Development Agreements, Preliminary Plat Agreements, etc.

In February 2011 the TAT requested meetings with BD City Council members to discuss the MPD Approval Ordinances and specific recommendations to improve the Conditions of Approval. Two members of the City Council agreed to meet with the TAT--Councilmen Goodwin and Saas. At that time the other three Council members stated they could not meet with the TAT based on what we believe is a mistaken rationale--they could not engage in dialogue with citizens involved in the Legal Appeals.

Between March 10 and 21, 2011, members of the TAT held a series of four meetings (a total of 11 hr) with Councilmen Goodwin and Saas on Transportation, Environment, Stormwater & Flooding, and Fiscal Impacts & Schools. Each meeting consisted of 2+ hour, in-depth, two-on-two discussions. The focus of these discussions were specific Ordinance Conditions the TAT recommended be revised, eliminated, or added. We believe everyone benefited from such a two-way dialogue denied citizens for the past 18+ months.

In our Transportation Conditions discussion; the following areas were addressed: Traffic Modeling, Assumptions for the Models, Sensitivity Analyses of Critical Parameters, Cost/Benefit/Risk Analyses, Internal Capture Rates, Green Valley Road, Funding Sources, etc. The result was a 21-page comprehensive set Conditions, supporting rationale, and a detailed treatise on Traffic Modeling and Validation.

In our Environment Conditions discussion, the following areas were addressed: Wildlife Habitat Preservation, Wildlife Corridors, Stream-Lake-Wetland Complexes, Groundwater Flow, Stormwater Infiltration Techniques, Mine Hazards, Geologic Hazards, Open Space, Parks & Recreation Facilities, etc. An array of detailed maps were used to augment the discussion. The result was a 6-page comprehensive set Conditions and supporting rationale.

In our Stormwater & Flooding Conditions discussion, the following areas

Background and Literature

What Will the New Development Look Like?

What's the Solution?

King County Historical Organizations

Home

were addressed: Phosphorus Loading, Stormwater Runoff, Infiltration, Monitoring, etc. The result was a set of targeted Conditions and supporting rationale.

In our Fiscal Impacts & Schools Conditions discussion, the following areas were addressed: Fiscal Impact Analyses, Community Facilities Districts (CFDs), City Solvency, Letters of Credit, Yarrow Bay Organizational Structure, Schools, Bonding, Vesting, etc. The result was a set of targeted Conditions and supporting rationale.

The TAT is exploring meetings with the other three BD City Council members. At this time none are scheduled.

Before the City of Black Diamond Hearing Examiner
Reply to Pre-hearing Motions

I. Introduction

My Motion to Revise and Set Hearing Rules and Procedures for the Yarrow Bay Development Agreement Hearings was submitted on June 13, 2011. Responses to the motion were posted on the Black Diamond web site on June 23, 2011 from Yarrow Bay and the City of Black Diamond.¹ This reply is to both responses.

II. Reply to Responses

A. The City's argument that the Hearing Examiner, and therefore the City Council, is limited to ministerial duties is unsupported by City code or State law.

The City maintains that the scope of the hearings must be limited to questions of compliance with the Black Diamond Municipal Code and State law, essentially ministerial functions. The Hearing Examiner would have no discretionary authority to examine the merits of the methods of compliance and would not be allowed to make recommendations on such to the City Council. Nor would the public be allowed to discuss the merits or make recommendations.² There is no legal basis for limiting the scope of the hearings to this extent.

First, the City asserts that the City Code restricts the scope of Hearing Examiner hearings to questions of compliance. The City stated in their response brief:

Here, as Yarrow Bay understandably points out – given the express direction to the Examiner set forth in the Black Diamond Municipal Code – the scope of the hearing on the development agreements ("DAs") is limited to whether the DAs comply with

¹ On June 24, 2011, I received a copy of supplemental evidence submitted by the City. This filing has not been posted so I will withhold comment until it is published on the City web site. Should that occur I will submit a motion to strike.

² Yarrow Bay made similar assertions in its motion to set procedures but did not address the scope issue in its response to motions.

applicable legal requirements, as set forth in BDMC Section 18.98.090 and RCW 36.70B.170. [Emphasis added]

There is no such “express direction to the Examiner” in the Black Diamond Municipal Code. In lieu of an expressed requirement the City attempts to support its position with an unreasonable interpretation of the code – that listing content required to be in a development agreement completely defines what the Examiner may consider and the City Council must accept. It is almost as if the Examiner and the public are not allowed to discuss anything more than a development agreement’s table of contents and compliance matrix. The development agreement requirements that were cited define necessary requirements to be addressed but do not define the measure of what is desirable and acceptable in a voluntary contract that will bind the City for decades. The Examiner is not bound to recommend City Council acceptance of a method of compliance in the draft Development Agreements merely because it exists.

Second, limiting the scope of the Hearing Examiner hearings and the Examiner’s discretionary authority would also limit the discretionary authority of the City Council since the hearing record and the Examiner’s recommendation will be the basis for the City Council hearings and deliberations. Such limitations are inconsistent with WAC 365-196-845. The regulation defines development agreements as “voluntary contractual agreements to govern the development of land and the issuance of project permits”. Further the purpose states

If the development regulations allow some discretion in how those regulations apply or what mitigation is necessary, the development agreement specifies how the county or city will use that discretion.

WAC 365-196-845(17)(a)(i).

Key words are “voluntary” and “discretion”. Both parties to these contracts have discretion as to how the regulations apply and what mitigation is required. The City Staff used such discretion when it spent eight months negotiating the Development Agreements with Yarrow Bay. During that period the City was obviously not constrained to accept any solution that met the minimum requirements in City code. The resulting drafts are not the end of the process. What is acceptable to City Staff is not necessarily acceptable to the public, the Hearing Examiner, or the City Council.

The MPDs and development regulations have a multitude of requirements that permit discretion. The Development Agreements specify how that discretion is used. Prime examples are the discretionary detail required to be in the Development Agreements for land uses, intensities, and zoning-like requirements.

Condition 128 of The Villages MPD ordinance requires

Approval of the design concept and land use plan (Chapter 3) shall be limited to the Land Use plan map (Figure 3-1, as updated July 8, 2010); description of categories (beginning on page 3-18); a maximum of 4,800 total residential units and 775,000 square feet of commercial space; and target densities (Table 3.2), except as modified herein. Corner store-style neighborhood commercial uses within residential land use categories shall be defined in the Development Agreement and shall only be allowed through minor amendment of the MPD. All other specifics shall be resolved through the Development Agreement process. [Emphasis added]

Condition 141 of The Villages MPD ordinance requires:

The high density residential (18-30 du/ac) supplemental design standards and guidelines (MPD application Appendix E) shall become part of the Development Agreement.

According to the City, the Hearing Examiner has no authority to recommend whether the lists of allowed uses in the draft Development Agreements are appropriate or whether some modifications should be incorporated (for example, more housing in one place and less in another; commercial in one place and not in another). Nor, according to the City, would the Examiner have authority to recommend different minimum lot sizes, setbacks, commercial use density, landscaping, street design, and a host of other draft specifications. Nor would the public be able to make their recommendations known. Rather, the City would have the Examiner constrained to ministerial functions. The City incorrectly maintains that the public and the Examiner are not allowed to comment on the wisdom of any of the multitude of discretionary decisions that are at the heart of the agreements.

In summary, the restrictions to the scope of the hearings as proposed by the City are not supported by any reasonable interpretation of the municipal code and are not consistent with State law. The hearings should not be restricted in the manner that Yarrow Bay and the City propose.

B. The time allocated for review and analysis of the Development Agreements is insufficient. Yarrow Bay and the City respond that 31 calendar days is adequate and even argue that two weeks would be sufficient.

Yarrow Bay's and the City's argument is based primarily on the premises that (1) the Hearing Examiner cannot extend the period and (2) the public has already had ample opportunity to review the agreements. Neither is true.

1. Yarrow Bay asserts that the responsibility for setting a hearing date belongs to City Staff. Quoting from their response brief they state:

First, the responsibility of setting a hearing date belongs to City Staff, not the Hearing Examiner. See BDMC 18.08.180 ("notice shall be provided by the [City's Community Development] Department no less than fourteen days prior to the hearing").

This is inaccurate. BDMC 2.30.100 requires that that the date be assigned "in coordination with the examiner". Setting the date is not a unilateral decision by City Staff.

The Examiner may be constrained to start the hearings on July 11 if he has already agreed to do so but he has the authority to continue the hearings until the public has had a reasonable amount of time to review and analyze the draft agreement. If, for some reason, the Examiner and the public are not allowed adequate time to review and analyze the draft Development Agreements then the Examiner might not have sufficient information to make a decision. This could lead to a recommendation that the draft agreements be disapproved. There is more than enough reason for a continuance.

The City cites numerous judicial cases and court rules that have no bearing on this administrative proceeding. They also cite Hearing Examiner rules that, to my knowledge, were issued for the FEIS appeal hearings and have not been generally adopted by the Examiner and published by the City. Laying that aside, there is

certainly good cause for allowing the public sufficient time to read, analyze, and prepare comments on the Development Agreement. Despite the image portrayed in the City's brief, the public is not a single entity represented by a well organized network of opponents who have continually tracked and analyzed every draft revision of the Development Agreements in depth and is well prepared to immediately enter into discussions. That is a gross fiction.³ The public is a group of individuals, many or most of whom were only recently aware that there was such a thing as a development agreement.

2. Yarrow Bay's and the City's response relating to the length of the documents and their availability for review is extremely misleading.

Yarrow Bay notes that there have been four drafts of the Development Agreements beginning in September, 2010. Each draft was an extensive revision to the previous. The public cannot be expected to review and analyze the entire documents and then review and analyze every subsequent revision.⁴ No persons other than City Staff can be expected to make a full time job out of reviewing draft submittals nor can Yarrow Bay rationally believe that having early drafts "available for review" obligates the public to perform such reviews. The fact that a few dedicated people have reviewed all drafts is not relevant – those few do not represent the public.

In their responses, Yarrow Bay and the City attempt to minimize the extent of the review task by referring only to the size of the agreements without discussing the size of the exhibits. It is inaccurate and misleading, for example, to state that "The Villages Development Agreement is 152 pages". This is not true. If it were then the "152 pages" would stand alone without the necessity to include the exhibits. The

³ This fiction is crafted from largely false representations of motivations, organizational and personal relationships, community organizations, personal motivations, and capabilities. Besides being false it is totally irrelevant to procedural issues.

⁴ I waited for the final draft rather than waste time reviewing documents that would become obsolete. As I stated at the prehearing conference, I made this decision after a meeting with City Staff where I was prepared to comment on a section of interest in the agreements and was told not to comment because the section was undergoing a complete revision.

exhibits are an integral part of the agreements and must be analyzed as part of the review process. The following is an accurate page count of posted documents:

Development Agreement	Main document	Appendices excluding E⁵	Total
Lawson Hills	155	515	670
The Villages	166	503	669
Grand Total			1339⁶

The assertion is made again that the exhibits have been available with previous drafts. Again, the public was not advised that it must review and analyze each entire preliminary draft of the Development Agreements in preparation for a review of the final drafts nor could such a requirement be levied on the public. References to exhibits being “substantially similar” or “identical” to the April draft are of little help to the vast majority of the public (including myself) who did not review the April revision.

It would have been helpful if the Yarrow Bay and the City had published a matrix showing which exhibits are identical in the two agreements. That might reduce the amount of effort to review the documents although reviewing and analyzing just one Development Agreement is a substantial challenge; it took Yarrow Bay and City Staff over eight months to develop the agreements. If the assertion is correct that the agreements are substantially similar to the April draft then it took two months just to finalize the agreements. No one should expect the public to work faster than people who have been dedicated to the effort considering that it often takes longer to analyze a provision than it takes to write it.

Yarrow Bay makes additional arguments and assertions in opposition to extending the time for review. These are addressed in the following paragraphs.

⁵ Exhibit E is a copy of the Black Diamond Municipal Code, development regulations, and other reference documents and, contrary to the City’s contention, was not included in the page count. These may require additional review depending upon how they are referenced in the agreement.

⁶ For those intimately familiar with the MPD ordinances, the total can be reduced by 354 pages since Exhibit C is copies of the ordinances. That puts it in a similar category as Exhibit E – it is a reference document.

3. Yarrow Bay and the City state that the Staff Report containing a compliance matrix was posted on the day of the hearing notice. This is technically correct. However, the time of posting did not conform to the public notice. This misled the public and caused unnecessary time and effort. The public notice stated:

The Draft Development Agreement and related documents are available for public review during normal business hours at the City offices (address above) and on the City's website (URL above). [Italics in the original, bold emphasis added.]

See Exhibit A.

This statement was incorrect when it was posted in the morning and it misled many persons, including myself. According to document properties, the Staff Report and its compliance matrix could not have been posted until after 2:45 pm, after many persons had come to the conclusion that it was missing. See Exhibit B screenshot.

Since then the document has been revised without any notification to the public.⁷ The Current document shows it was posted on or after June 17. See Exhibit C screenshot. There were apparently minor revisions made to Section VIII but no changes of any kind should be made to exhibits, minor or otherwise. At a minimum, the public should be notified of changes and what they are. I have not reviewed the other documentation posted on June 10 to determine if there were any other subsequent changes.

The public cannot be expected to check the City website hourly to determine what has changed.

4. Yarrow Bay responds that there is no requirement to hold a public meeting prior to the public hearing notice. Granted that there is no code requirement. However, the City led the public to believe that there would be a public meeting to present the

⁷ This eleven page report is void of rationale supporting the agreements and may have been hurriedly created and posted to comply with the Hearing Examiner's order.

Development Agreements before public notice was given. Publication of the process was a self-imposed obligation to the public by the Director of Community Development, the person responsible for publishing the plan and issuing the Development Agreement hearings public notices. That process description remains on the web site to this day and is included as Exhibit D. If nothing else, the City should have revised this description of the process to the public when they knew that the published process would not be followed.

5. Yarrow Bay's assertion that completeness of the Development Agreements is moot is without merit. The issue is certainly open to argument and may be argued at the hearings.⁸

The Enumclaw School District (ESD) tri-party agreement illustrated the point that all third party agreements must be completed (although not necessarily executed). The public should have the opportunity to review and analyze any such agreement referenced in the Development Agreements. The ESD agreement was part of the MPDs and yet it was not in a form for public comment prior to the closed record hearing. In fact, it was not completed until after the MPD ordinances were approved. The same is true of Maple Valley traffic mitigation. The public must have the opportunity to review and comment on such agreements before there is a commitment by the City that impacts future generations.

Yarrow Bay misunderstood the following from my motion:

The Development Agreements may include optional manners of implementation or location of facilities. If the options impact other provisions of the agreements then all such impact must be included so that there will be sufficient information to assess the agreements.

This was not a reference to review under SEPA – that is a different issue. Maybe the confusion was over the word “impact” in this context. The statement simply meant that the Development Agreements must not present option A and option B if the rest

⁸ The City responds to the issue of lack of a fire mitigation fee ordinance in the context of completeness. This is a different issue and is addressed below.

of the Development Agreement assumes that option A will be selected. Otherwise option B would not be totally defined and the agreement would not be complete.

Yarrow Bay responded that they did not understand the following:

The developers and the City cannot commit to passage of future ordinances. Any dependence on future legislative action cannot be analyzed for the hearings since the form and content of that legislation will be unknown.

This is self explanatory. If the Development Agreement does not contain any such commitments then there is no reason for Yarrow Bay to take issue with the statement.

6. The impact of the Independence Day holiday is not trivial – it is one more problem with an egregiously constrained schedule. Yarrow Bay believes that this is only one day but many people take extended holidays and vacations at that time and there are numerous community events scheduled around the holiday. Similar scheduling difficulties were expressed as a major concern by the City when it requested an extension of 178 days to the Growth Management Hearing Board compliance order. Exhibit E.
7. The City responded to a Bricklin email comment that was entered as a motion by the Examiner. The City's comment began:

The Bricklin motion claims that certain required information is missing. Bricklin Motion at 2. For example, the Bricklin Motion claims that "mitigation fees are proposed for addressing the developments' impacts on the city's fire department, but the city has not yet adopted a fire mitigation fee ordinance, so there is no way to assess the adequacy of this measure."

The City maintains that an ordinance is not required to assess fire impact fees since interim fees are included in the Development Agreements. The City is not allowed by State law to use a development agreement to impose impact fees unless expressly authorized by an applicable development regulation.

Counties and cities may not use development agreements to impose impact fees, inspection fees, or dedications, or require any other financial contribution or mitigation measures except as otherwise expressly authorized, and consistent with the applicable development regulations. [Emphasis added]

WAC 365-196-845(17)(a)(iii).

The WAC also prohibits use of development agreements to modify development regulations.

Development agreements must be consistent with applicable development regulations adopted by a county or city. Development agreements do not provide means of waiving or amending development regulations that would otherwise apply to a project.

WAC 365-196-845(17)(a)(ii).

The City failed to cite any development regulation that expressly authorizes a development agreement to impose interim fire impact fees. Therefore the alternative is to pass an ordinance which has yet to be done.

C. Yarrow Bay proposes that “the Examiner should proceed with the hearing, likely by taking names of persons wishing to testify, setting a subsequent date for them to do so, and then requesting that they return and give testimony at that time” in the event that the venue capacity is exceeded. The City proposes a similar action or that a loud speaker be set up outside of the hearing room.

No one should be turned away from a public hearing. The hearings are both by and for the public. Numerous persons may attend who do not wish to testify but wish to be informed by the City, Yarrow Bay, and public testimony.

Yarrow Bay also proposes that the fire code establish the capacity limit. This should be the upper limit if there is adequate seating.

The venue selected by the City probably has adequate capacity. There is more concern about its relatively remote and unfamiliar location.

D. Yarrow Bay and the City believe that weekday hearings should begin at 6:00 pm rather than the more convenient time of 7:00 pm as proposed in the motion.

The convenience to the public should be given heavy weight in setting the time of the hearings. The dinner hour is not an appropriate time on weekday evenings. Speculation that this might cause the hearings to be extended beyond the tight schedule now imposed is not sufficient reason – there is no rationale reason for Yarrow Bay and the City to push for an inconvenient schedule for the sake of a few days of calendar time.

The normal time for City evening meetings including City Council meetings has been 7:00 pm for good reason. This time accommodates City Staff, the City Council, and the public.

E. Yarrow Bay contends that it is unreasonable to have no time limits on oral presentations but reasonable to have no limits on written testimony. The City believes that three minutes is adequate.

I agree that the Hearing Examiner has the authority to set time limits on oral testimony. I disagree that he must or should for these public hearings.

Yarrow Bay cites ER611 as instructive. Washington Rules of Evidence are not applicable to the City's administrative procedures but the rule on control of the court is indeed instructive.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. [Emphasis added]

“Ascertainment of the truth” is seldom consistent with arbitrary constraints on the length of testimony. Trial courts do not set such arbitrary limits.

The contention that placing no time limits on oral testimony “invites filibuster and delay” is an unwarranted concern. The Hearing Examiner has the authority and the ability to control any such overt attempts. Repetition in testimony and an inability to be concise should be

expected and allowed considering that this is a public hearing and that there is no one person representing the entire public.⁹

The City proposes that oral testimony be limited to three minutes based on their perception of the scope. This is an extreme proposal. Even at City Council meetings, persons are given a total of six minutes to speak to any subject they desire. Often that is not sufficient for subjects that are of trivial complexity compared to development agreement issues. The reason given for such drastic restrictions is that there is an arbitrary goal of completing the hearings in one week.

The City proposes an alternative where the "Examiner could simply identify a block of time to be allocated to project [sic] opponents, to be divided amongst themselves however they choose". This is a reference again to a fictional entity called "project opponents". How all persons opposed to aspects of the Development Agreements could get together and allocate time to one another is beyond comprehension.

F. Yarrow Bay agrees that cross-examination of expert witnesses should be structured but recommends their own approach. The City would not allow cross examination by individual members of the public.

Yarrow Bay did not disagree with the approach proposed in my motion so apparently the Hearing Examiner is presented with alternatives to considered.

I agree with Yarrow Bay that dates for expert witnesses should be set but not for rebuttal expert witnesses. Obtaining the services of rebuttal expert witnesses and allowing time for preparation could take several days.

⁹ Yarrow Bay also cites Pacific Topsoil, Inc. v. Washington State Dep't of Ecology, which was an appeal of an administrative decision. The facts of this case involved not only time limits on testimony (which were relaxed at the hearing) but also a page limit on prehearing briefs which was exceeded. The procedure was controlled by the Administrative Procedures Act which does not apply to the City of Black Diamond since it did not elect to adopt the APA.

City asserts that members of the public who testify are not parties to the proceedings and cites Hearing Examiner rules that, to my knowledge, have not been adopted for these proceedings. The City maintains that persons who wish to be a party to the proceedings should seek intervention through one of three organizations that the City identified in their response brief. I do not understand the logic behind this proposal.

To relegate people who testify in support or opposition to a Development Agreement to the status of "interested persons" raises some questions. The Hearing Examiner should clarify this issue to all concerned.

G. Yarrow Bay argues that "objections to testimony and evidence should be contemporaneous with the submittal of the objectionable testimony and evidence".

I agree with Yarrow Bay and the procedure that they propose in their response. This is not what occurred at the MPD closed record hearings. Objections were only allowed to be raised after the hearings and no replies were admitted.

I do believe that objections should be submitted in writing to the Hearing Examiner and after testimony by a witness is complete. The Examiner could ask at that point if there are objections and that they be submitted. Otherwise, witness testimony could result in disruptive oral objections from both attorneys and the public.

H. Yarrow Bay is opposed to the public being able to reply to rebuttal testimony.

Yarrow Bay's contention is based on the fact that they and the City are the proponents of the Development Agreements. To quote from their response

Generally, the proponent of a cause has the right to make the first opening statement, present evidence first, and make the first and final arguments. The usual justification for this ordering is that the party with the burden of proof should have the advantage of making the first and last presentation. In its procedural motion, Yarrow Bay has proposed a single round of "sur-rebuttal" to provide interested persons, like Mr. Edelman, an opportunity to respond to the rebuttal presentations. Under that process, however, Yarrow Bay will still be provided the last word and must be provided that right.

I would agree under normal circumstances. However, Yarrow Bay and the City maintain that the burden of proof is on opponents to show that the draft agreements are deficient. Yarrow Bay even responded that the question of completeness was moot. If the burden is on the public then the public should have the last word. Alternatively, Yarrow Bay and the City should prove that every aspect of the agreements is valid, meets the law, and in the best interest of the community.

I. Yarrow Bay appears to support supplementing the closed record.

Yarrow Bay is seemingly perplexed by my assertion that the record of the MPD hearings was supplemented without public knowledge or the opportunity to respond.

July 8, 2010 revisions to Yarrow Bay's MPD land use maps were submitted and accepted by the City months after the record of the MPD hearings was closed on March 22, 2010. The revised maps were referenced in the ordinances by their revision date. See Exhibit F for one example from the Villages MPD ordinance, condition 131.

Supplementing the record should not be allowed without reopening the public hearings. If changes to the draft Development Agreements are introduced in closing remarks then the changes should be announced to the public and the public hearings should be reopened to permit public comment.

III. Summary

The Hearing Examiner's duty here is not just to proceed expeditiously, but to get all the information from the community to make a reasoned decision – a monumental decision that will shape this community for the next century or longer. If it takes the public several months to review and analyze these complex proposals then the time should be provided. If it takes the Examiner more than a week in hearings to get all the public input he needs on a decision that will affect our community for many generations to come then so be it.

Dated June 27, 2011

A handwritten signature in black ink, appearing to read "R M Edelman". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robert M. Edelman

29871 232nd Ave SE

Black Diamond, WA 98010

(360) 886-7166



CITY OF BLACK DIAMOND

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24301 Roberts Drive
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Fax: (360) 886-2592
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NOTICE OF PUBLIC HEARING

PROPOSED DEVELOPMENT AGREEMENT FOR THE VILLAGES MASTER PLANNED DEVELOPMENT

CITY OF BLACK DIAMOND HEARING EXAMINER

6:00 P.M., JULY 11, 12, 13 & 14, 2011

9:00 A.M., JULY 16, 2011

SAWYER WOODS ELEMENTARY SCHOOL
31135 228TH AVE SE, BLACK DIAMOND

APPLICATION: PLN10-0020 & PLN11-0013 /Development Agreement for The Villages MPD

PROPONENT: BD Village Partners, LP, 10220 NE Points Drive Suite 120, Kirkland, WA 98033

PROPERTY LOCATION: The approved "The Villages" MPD consists of two subareas. The "Main Property" is located both north and south of Auburn-Black Diamond Road in the vicinity of Lake Sawyer Road. The "North Property" is located to the west of SR 169, approximately two miles north of the Main Property and north of SE 312th Street (if extended). The "North Property" is south of and adjacent to the "North Triangle" property that is part of the approved "Lawson Hills" MPD.

DESCRIPTION OF PROPOSAL: Proposed Development Agreement for the approved "The Villages" MPD, a 1,196 acre mixed used development including 4800 dwelling units; 775,000 sq. ft. of retail, office and light industrial uses; and educational, recreational and open space uses. The Development Agreement contains the standards under which the project will be developed over the duration of the build-out period (15 years).

ENVIRONMENTAL DOCUMENTS: A Final Environmental Impact Statement (EIS) for the proposed Master Planned Development was issued on December 11, 2009. A Determination of Significance/Notice of Adoption of the FEIS for the purposes of this action was issued on June 3, 2011.

The Draft Development Agreement and related documents are available for public review during normal business hours at the City offices (address above) and on the City's website (URL above).

All interested parties may comment either in writing to the address below or by submitting written or oral testimony during the public hearing. Any person wishing to become a party of record and receive future notices, and the Hearing Examiner's recommendation must notify the Community Development Department by providing their name, mailing address and reference the application numbers PLN10-0020 & PLN11-0013. Written comments may be submitted at the Community Development Department, PO Box 599 (or in person at 24301 Roberts Drive), Black Diamond, WA 98010, prior to commencement of the hearing.

In order to maintain the right to address the Black Diamond City Council during its consideration of the Hearing Examiner's recommendation at a subsequent Closed Record Hearing, you must submit either written or oral comments at the Hearing Examiner open record public hearing.

For further information, please contact the Community Development Department at 360-886-2560.

Exhibit A

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Document Properties

Description Security Fonts Advanced

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On
 Development Permits ("MPD Permits") for (a) "The Villages," a planned mixed-use development of 1,196 acres, featuring 4,800 residential units, 775,000 sq. ft. of office, retail and light industrial uses, school sites and both passive and active open space.

start
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Exhibit B

DAStaffReportHE061011.pdf - Adobe Reader

File Edit View Document Tools Window Help

Document Properties

Description Security Fonts Advanced

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Author: chanson

Subject:

Keywords:

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Modified: 6/17/2011 11:13:37 AM

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Advanced

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Page Size: 8.50 x 11.00 in

Number of Pages: 11

Tagged PDF: No

Fast Web View: Yes

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Development Permits ("MPD Permits") for (a) "The Villages," a planned mixed-use development of 1,196 acres, featuring 4,800 residential units, 775,000 sq. ft. of office, retail and light industrial uses, school sites and both passive and active open space.

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Weather Exchange

YB Response OCR,db...

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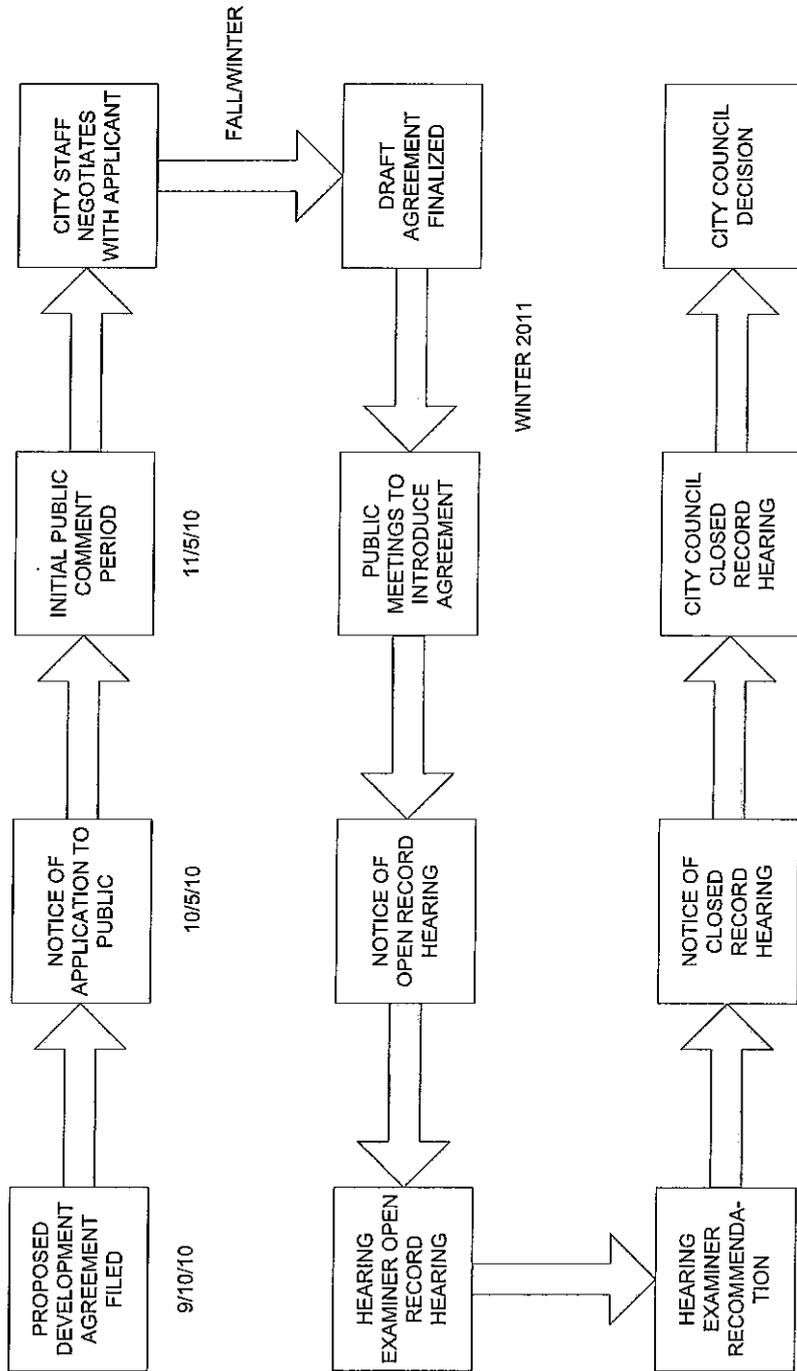
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6/24/2011

Exhibit C

MPD DEVELOPMENT AGREEMENT PROCESS



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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

TOWARD RESPONSIBLE
DEVELOPMENT, a Washington not-for-
profit corporation; CYNTHIA E. AND
WILLIAM B. WHEELER; ROBERT M.
EDELMAN; PETER RIMBOS; MICHAEL
E. IRRGANG; JUDITH CARRIER;
EUGENE J. MAY; VICKI HARP; CINDY
PROCTOR; ESTATE OF WILLIAM C.
HARP,

Petitioners,

vs.

CITY OF BLACK DIAMOND,

Respondent.

NO. 10-3-0014

CITY OF BLACK DIAMOND'S
MOTION TO EXTEND TIME TO
COMPLETE COMPLIANCE
SCHEDULE

I. RELIEF REQUESTED

The City of Black Diamond requests that the Board extend the time to complete the compliance schedule set forth in its February 15, 2011 Order on Motions ("Order"). The compliance schedule now provides Black Diamond until April 29 to comply, or 73 days after issuance of the Order. Black Diamond requests that the compliance schedule be extended until Friday, August 12, or 178 days from the date of the Order.

BLACK DIAMOND'S MOTION TO EXTEND TIME TO
COMPLETE COMPLIANCE SCHEDULE - 1



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1 This request is supported by the plain language of RCW 36.70A.300(3)(b), and by
2 the Declarations of Steve Pilcher ("Pilcher Decl.") and Michael R. Kenyon ("Kenyon
3 Decl.") filed herewith.

4 II. STATEMENT OF FACTS

5 On February 18, 2011, Yarrow Bay filed with the King County Superior Court an
6 appeal of the Board's Order. The appeal asks the Court to "set aside the Board's
7 decision" that (a) Ordinance Nos. 10-946 and 10-947 fall within the Board's jurisdiction,
8 and (b) the City's public participation program failed to comply with the GMA. Kenyon
9 Decl., at 1-2, ¶ 2.

10 Yarrow Bay additionally filed a motion to consolidate its appeal with the LUPA
11 petition previously filed by Toward Responsible Development ("TRD"). The LUPA case
12 is now pending before the Hon. Cheryl Carey. In its response to Yarrow Bay's motion to
13 consolidate, TRD agreed that, "The court should enter an order that consolidates this case
14 with the [LUPA case] and assign the consolidated cases to Judge Carey, . . ." ¹ Id. at 2, ¶
15 3.
16

17 By order of the Presiding Judge dated March 2, 2011, the motion to consolidate
18 was denied without prejudice, but the appeal was "re-assigned" to Judge Carey to make a
19 determination on consolidation. Judge Carey could rule on consolidation, and enter a
20 scheduling order on the appeal, as early as Friday, March 4. ² Id. at 2, ¶ 4.

21 On the evening of February 17, the Black Diamond City Council adopted
22

23 ¹ TRD's Opposition to Form of Proposed Order Granting Motion to Consolidate, at 1 (King County Cause
24 No. 11-2-07352-1KNT).

25 ² The City will update the Board regarding scheduling of the appeal hearing after the March 4 LUPA
Initial Hearing.

1 Resolution No. 11-737, which in part:

2 [D]irects the City's attorneys to request that the Growth
3 Board stay and/or extend the schedule for compliance set
4 forth in the Order on Motions, so as to allow sufficient time
5 as a result of the outcome of any appeals of the Growth
6 Board's Order on Motions.

7 Pilcher Declaration, at 3, ¶7, and Ex. A.

8 As set forth in the Resolution, the City Council's request is grounded in the desire
9 to avoid the unnecessary expenditure of time and money, and the potential for conflicting
10 results, in the event that the Order is reversed on appeal after the City begins or
11 completes the public participation process required by the Order.

12 In addition, given the conflicts known to exist with the schedules of certain
13 members of the Planning Commission and City staff, together with the difficulty inherent
14 in locating and reserving a meeting hall in Black Diamond large enough to accommodate
15 the large crowds and weeks-long hearings again expected to occur, first before the
16 Planning Commission and then before the City Council as a result of the Order, satisfying
17 the existing compliance schedule is a practical impossibility. *See generally, Declaration
18 of Steve Pilcher.*

19 **III. LEGAL ARGUMENT**

20 The Board's authority to set a compliance schedule is set forth within the express
21 provisions of the GMA. In particular, RCW 36.70A.300(3)(b) provides that, "The board
22 shall specify a reasonable time not in excess of one hundred eighty days, or such longer
23 period as determined by the board in cases of unusual scope or complexity, within which
24 the state agency, county, or city shall comply with the requirements of this chapter."
25

BLACK DIAMOND'S MOTION TO EXTEND TIME TO
COMPLETE COMPLIANCE SCHEDULE - 3



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1 The Board is accordingly authorized to provide for (or, in this case, extend the
2 time for compliance to) 180 days from the date of the Board's Order on Motions.³

3 Based on the facts set forth in the Kenyon Declaration and the Pilcher Declaration
4 filed together with this motion, the City requests that the Board extend the date for
5 compliance to Friday, August 12, or 178 days from the date of the Order on Motions.
6 Revising the compliance schedule in this manner will cause no known substantial
7 prejudice to any party.

8 More fundamentally, extension of the compliance deadline will likewise permit
9 the implementation of the sound policy judgment evidenced in City Council Resolution
10 No. 11-737 – namely the avoidance of potentially unnecessary expenditures of time and
11 other resources, and potentially conflicting results in the event that the Order is reversed,
12 even in part.⁴ Conversely, if the Order is affirmed on appeal, extension of the compliance
13 schedule within the statutory framework should provide the City with sufficient time to
14 meet its obligations to provide for hearings before the Planning Commission and City
15 Council.
16

17 IV. CONCLUSION

18 The Board should extend the time to complete the compliance schedule from
19 April 29 to August 12. This extension is expressly authorized by the GMA, and will best
20 effect the City Council's policy decision expressed in Resolution No. 11-737. The City
21

22 ³ A decision to grant this motion, or even to go beyond 180 days, would surely be further justified by
23 relying on the "unusual scope and complexity" provision set out in the GMA. *See, e.g.*, Amended Petition
for Review at 6, ¶ 5.3.

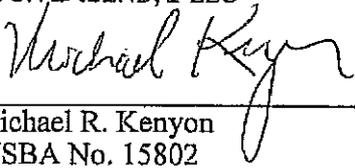
24 ⁴ Consider, for example, a situation where the Board's assertion of jurisdiction is upheld, but the Board's
25 remand for additional public participation is reversed. Granting this motion will ensure that weeks of work
that otherwise could occur before the Planning Commission and City Council are not rendered superfluous.



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Council's decision is correctly designed to save all parties time and money. In the event of a successful appeal by Yarrow Bay, the City Council's decision will also best avoid a conflict between Ordinances No. 10-946 and 10-947 and any other ordinances that the Council might have otherwise adopted pursuant to the Order. Finally, for scheduling reasons related to Planning Commissioners, City staff, and an appropriately-sized hearing venue, compliance with the existing schedule is a practical impossibility.

DATED this 3 day of March, 2011.

KENYON DISEND, PLLC
By 
Michael R. Kenyon
WSBA No. 15802
Bob C. Sterbank
WSBA No. 19514
Attorneys for City of Black Diamond



DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 3rd day of March, 2011, I served a true copy of the foregoing Motion to Extend Compliance Schedule, on the following individuals using the method of service indicated below:

Attorneys for Petitioners:
David A. Bricklin
Bricklin & Newman, LLP
1001 Fifth Avenue, Suite 3303
Seattle, WA 98154

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: bricklin@bnd-law.com

Attorneys for Intervenor Yarrow Bay:
Andrew S. Lane
Nancy Bainbridge Rogers
Cairncross & Hempelmann, P.S.
524 Second Avenue, Suite 500
Seattle, WA 98104

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: ALane@Cairncross.com
NRogers@Cairncross.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of March, 2011, at Issaquah, Washington.

Margaret C. Starkey
Margaret C. Starkey



on page 3-18); a maximum of 4,800 total residential units and 775,000 square feet of commercial space; and target densities (Table 3.2), except as modified herein. Corner store-style neighborhood commercial uses within residential land use categories shall be defined in the Development Agreement and shall only be allowed through minor amendment of the MPD. All other specifics shall be resolved through the Development Agreement process.

129. The project shall provide a mix of housing types in conformance with the MPD Design Guidelines. The Development agreement shall set targets for various types of housing for each phase of development.

130. Identification of specific areas where live/work units can be permitted shall be done as part of the Development Agreement or through an MPD minor amendment.

131. A minimum density of 4 du/per net acre for residential development shall be required for implementing projects, and shall be calculated for each development parcel using the boundaries of that parcel (or the portion thereof to be developed) as shown on the Land Use plan map (Figure 3-1, as updated July 8, 2010).

132. If the applicant requests to increase a residential category that abuts the perimeter of the MPD, it shall be processed as a Major Amendment to the MPD. Residential land use categories can otherwise be adjusted one category up or down through an administrative approval process provided they also otherwise meet the requirements for minor amendments outlined in BDMC 18.98.100.

133. The Development Agreement shall limit the frequency of proposed reclassification of development parcels to no more frequently than once per calendar year.

134. The Expansion Area process shall be clarified in the Development Agreement.

135. Project specific design standards shall be incorporated into the Development Agreement. These design guidelines must comply with the Master Planned Development Framework Design Standards and Guidelines. All MPD construction shall comply with the Master Planned Development Framework Design Standards and Guidelines, whether or not required by the Development Agreement.

136. A unit split (percentages of single family and multifamily) and commercial use split (commercial, office and industrial) shall be incorporated into the Development Agreement.

137. All commercial/office uses (other than home occupations and identified live/work areas) shall only occur on lands so designated. Additional commercial areas shall be identified on the Land Use Plan through future amendment to the MPD.

138. The project shall include a mix of housing types that contribute to the affordable housing goals of the City. The Development Agreement shall provide for a phase-by-phase analysis of affordable housing Citywide to ensure that housing is being provided at affordable

Before the City of Black Diamond Hearing Examiner

Response due June 27, 2011

City of Black Diamond Motion: Analysis

C. The Requested Continuance of the Hearing Date Should be Denied

The City bases a section of their analysis on the fact that the citizens have organized, that they are interdependent of each other and that this organization and preparedness implies that we are as *equally* as prepared as the City Staff and stable of attorneys that have had months to review the final development agreement. It also implies that a few speak for all.

Mr. Examiner, the City is incorrect in the conclusions and conjectures they have arrived at as they investigate and watch those who have voiced their concerns on the size and pace of the MPDs. Neither I nor my Mother Vicki A. Harp belongs to any organized group. We do not belong to Save Black Diamond, we do not belong to Towards Responsible Development, and we do not belong to the Diamond Coalition. Although we are sympathetic to many of their issues and share information as needed, and while we are concerned about schools and wildlife, we appealed the FEIS and appealed the MPD Ordinance primarily due to two reasons, the pending noise at 90 dBAs and placement of high-density next to single-family homes.

Under the BDMC we have the right to speak before the Hearing Examiner with our concerns regarding the MPD projects, the right to due process and the right to appeal the hearing examiner's decision without intimidation and harassment by the City. It is outlined by the City's municipal code.

Under the First Amendment of the US Constitution we have the right to speak freely without government interference and the right to gather in public to march, protest, demonstrate, carry signs and otherwise express our views in a nonviolent way. This also means people can join and associate with groups and organizations without interference and that all have the right to appeal to government in favors of or against policies that affect them or that they feel strongly about. This freedom includes the right to gather signatures in support of a cause and to lobby legislative bodies for or against legislation.

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

EXHIBIT

167

I bring these points up because many of the citizens on the City's *watch* list also have a pending First Amendment suit on hold in Federal Court. Additionally, the Growth Management Hearing Board voted 3-0 that the City followed an illegal process when it denied the public the right to lobby their legislative officials, and that the Attorney's briefs were unprofessional. **(Exhibit 1)** Finally, in the last year the City has been contacted by that State Attorney General's office regarding possible violations of the Public Disclosure Act not once, but twice. **(Exhibit 2)**

The relevancy of this in my response is due to the City's continued insistence in their responses and supplemental response to somehow blame the citizens for trying to participate in the public process, and the city's dogged efforts to actively watch and search for citizen organizations and then to call them out as something conspiratorial. The citizens need time to prepare. I personally read the first two versions of the Development Agreement and contrary to the City's positions there are substantial changes which require thoughtful review of all of the documents. Additionally, the City and the Applicant have made it abundantly clear that they want the public to stay within a fairly narrow discussion path related to the Development Agreement, yet somehow they think everyone knows that exact ins-and-outs of land-use and that they walk around with an attorney on retainer...with all due respect, we do not. What the City really wants is to limit the time to review thus limiting knowledgeable comments and limit the actual time to participate, or better yet make it so no one shows up.

All these actions are meant to intimidate people and to keep people from participating. It is working Mr. Examiner, the meeting venue was changed and/or cancelled; it is like a Kafkaesque novel and the City should be embarrassed and held accountable for submitting this type of a motion. I know that the City's actions of cyber-stalking and updating the Mayor on *who* comments at what public meeting (and exactly *what* they have to say) is scaring me and gives me pause on whether I will continue, specifically when we get to the Closed Record Hearing. **(Exhibit 3)** If the City feels this emboldened with someone watching over them such as you Mr. Examiner, I can only imagine the tactics they will take when there is no one between them and the public at the Closed Record Hearing.

In regards to the City's position that time be limited to 3 minutes, maximum 21 minutes and no written submissions allowed if you cede your time, this is egregious. Mr. Examiner as an experienced land use attorney, and law professor, would you be able to give all the relevant, intelligent, and required public comments in 3 minutes on these massive MPDs!? Some, citizens

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

need (3) minutes just to get their introductions done and I mean no offense on that, we are not all gifted speakers. I am perfectly confident that you will manage your hearing in a professional and thoughtful manner.

Finally, Mr. Examiner, I am very disturbed that we have to continue to fight for the basic right to participate. The City has assured us that the Development Agreement is complete, thorough, and meets the requirements of the law; however their continued collateral attack on the public participation process is in stark contrast to that declaration. The City assures us that the Development Agreement can stand on its own merit. Therefore they should not be concerned on whether someone has 10 minutes to speak, is ceded time up to an hour, submits written and oral comments or if the hearings are set 60 days from public notice to allow for full agency and public review. Furthermore, the City of Maple Valley has already made the same argument that the requirement to wait day-after-day waiting to be called is burdensome, which is consistent with the public position protocol for ceding time via email versus daily attendance. **(Exhibit 4)** There is no need to always settle for the minimum standards and requirements when we can do better regarding this irrevocable agreement that affects the entire South King County region. Let's please move on to a more respectful and focused process without all the conjectures.

Accordingly, I continue to respectfully request the Hearing Examiner allow additional time for review of the Development Agreement and its attachments of not less than 60 days from the June 10, 2011 notice date, resulting in a new Public Hearing date no earlier than August 10, 2011 (which is only 43 days from the June 28th informational meeting). I request the evening hearings start at 7:00 pm, I request 10 minutes per person, I request up to 60 minutes per person if time is ceded, I request that ceding of time permission can be emailed to the City Designated Official and that this will not limit written comments.

I also ask that the City's references to Save Black Diamond, the Diamond Coalition, TRD, and citizens "relationship" conjecture be stricken as non-responsive; and that the City's Supplemental Motion be stricken as untimely and non-responsive.

Audemus jura nostra defendere ~"We Dare To Defend Our Rights"

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

Exhibit 1

⁹⁷ Pursuant to RCW 36.70A.106(3)(b), expedited review may be sought before the Department of Commerce.

Concurring Opinion of Boardmembers Earling, Pageler, and Paoletta:

Because this comment does not bear on the outcome of the case, the Board writes separately to comment on the decorum of the attorneys in this matter. Generally, the Board expects and receives briefings from attorneys that are factual, straight forward, professional, and respectful of differing viewpoints expressed in a case. The current case before the Board is an exception. The sarcasm, disrespect, and foolish quotes to make points, add little to the briefing. Assuming the case continues in some fashion, the Board requests the attorneys reset their attitudes and return to the level of professionalism we are sure they expect of themselves and their counterparts.

Exhibit 2

Public Records - City of Black Diamond

From: **Ford, Tim (ATG)** (TimF@ATG.WA.GOV)
Sent: Tue 3/01/11 4:31 PM
To: Bob@kenyondisend.com
Cc: Cindy Proctor (proct@msn.com); Bob Edelman (BobEdelman@comcast.net); Ganga, Elaine (ATG) (ElaineG@ATG.WA.GOV); bmartinez@ci.blackdiamond.wa.us

Bob,

Cindy Procter and Bob Edelman contacted me with concerns regarding disclosure of public records by the City of Black Diamond. They each have specific and general concerns. Bob Edelman states he submitted a request for public records on January 3rd and that the city did not initially respond until January 13th. Cindy Proctor states she submitted a request on January 12th which is still outstanding. Their general concerns relate to several problems with the city's spam filter for emails that has prevented the city from responding to public records requests in a timely manner. Apparently the city has repeatedly encountered problems with the spam filter in December 2009, March 2010, and January 2011.

As you are aware, the courts have held that "administrative inconvenience or difficulty does not excuse strict compliance with the PDA". *Zink v. City of Mesa*, 14 Wn. App. 328, 337 (2007) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131-132 (1978)). Please contact me to explain what action the city is taking to ensure the spam filter problems don't recur.

Sincerely,

Tim Ford

Open Government Ombudsman

Assistant Attorney General for Government Accountability

Attorney General of Washington

1125 Washington St, SE

Olympia, WA 98504

(360) 586-4802

timf@atg.wa.gov

<http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx>

DISCLAIMER: This email is not intended or offered to provide legal advice or legal representation by the Office of the Attorney General to any recipient.

Exhibit 3

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

20

Rebecca Olness

From: Steve Pilcher
Sent: Wednesday, April 13, 2011 1:02 PM
To: Rebecca Olness; Brenda Martinez
Subject: Citizen comments at Planning Commission meeting last night

Mr. Rimbo, Ms. Proctor, Ms. Wheeler all addressed the Commission regarding their desire to meet with them to discuss the MPDs. They saw the Stay granted by the Superior Court as simply offering additional time for discussions, so the Commission won't be rushed.

In terms of the proposed amendment to the Subdivision Code to have appeals of Hearing Examiner decisions go directly to court, all who spoke (all of the above, plus Robbin Taylor, Erika Morgan, Melanie Gauthier and Jack Sperry) all favored retaining the existing system where appeals would go to Council. The Commission declined to render a recommendation on this issue, so it's being pulled from next week's Council agenda. Ms. Wheeler stated that should the change be made, it should not apply retroactively to preliminary plats that have already been filed. She felt that if those applicants wanted be subject to a "direct to Court" process, they should withdraw and reapply under the new rules (should those be adopted).

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

Rebecca Olness

From: Steve Pilcher
Sent: Tuesday, March 01, 2011 5:12 PM
To: bob@kenyondisend.com; mike@kenyondisend.com
Cc: Andy Williamson; Rebecca Olness; Brenda Martinez; Stacey Borland
Subject: PC Min 06.08.10
Attachments: PC Min 06.08.10.doc

Attached are the minutes at which the Commission acted on the proposed amendments to BDMC 18.08. You will note that they specifically voted to not include changing the D.A. process.

If you need any of the preceding meeting minutes, let me know.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

**BLACK DIAMOND
PLANNING COMMISSION
MINUTES OF JUNE 8, 2010 MEETING**

CALL TO ORDER

Chairman Bob Kaye called the meeting to order at 7:02 p.m. with the introduction of the role and duties of the Planning Commission.

ROLL CALL

Present: Commissioners Bob Kaye, Pam O'Brien, Ron Taylor, Sheri Roth, Greg Thesenvitz, Darryl Buss,
Absent: Keith Watson (ill)
Staff: Community Development Director Steve Pilcher

PUBLIC COMMENTS

Cindy Proctor, 2950 Sun Mountain Drive, Enumclaw, confirmed that the Commissioners had received a copy of an email she sent on June 6th. She stated that the minutes of the May 11th meeting should not be approved, as they did not include important statements, as noted in her email.

Mr. Pilcher provided the Commission with information from the website of MRSC (Municipal Research and Services Center) that indicates verbatim minutes are not required by law.

Ms. Proctor stated her opposition to the proposed amendment to Chapter 18.08 which would remove the Hearing Examiner from reviewing a proposed Development Agreement.

Chairman Kaye noted that at the public hearing, the Commission had provided ample opportunity for public comment and then had closed the hearing to further testimony. He noted that the purpose of the Public Comment portion of this meeting is for individuals to comment on issues not on the meeting agenda.

Cynthia Wheeler, 30221 234th Ave. SE, noted that three of the Planning Commission members in attendance were not present at the May 11th public meeting and therefore should not vote on whether to approve the minutes and on the proposed code changes. She asked Mr. Pilcher if a copy of the legal analysis of former Interim City Attorney had been provided to the Commission.

Mr. Pilcher declined to answer her question.

Commissioner O'Brien inquired if there was information lacking in the minutes that wasn't otherwise addressed in Ms. Proctor's email.

Ms. Wheeler stated Ms. Proctor's email included the information they feel needs to be included in the minutes.

Robert Taeschner, 30846 229th Pl. SE, advised the Commission they may not have adequate information available in order to make a decision on the proposed code amendments.

Lisa Garvich, 29625 232nd Ave SE, stated the Commission should not feel rushed to adopt the proposed amendments. She stated that staff is trying to push through too many amendments to the Municipal Code, particularly during this period while the MPDs are under consideration.

Mr. Pilcher pointed out there have been two instances in the past 6 months that the Council, in response to citizen comments, has adopted code amendments regarding the MPD process.

Sheri Miller, 23210 312th St. SE, stated it is important for the Commission to hear the concerns of citizens and be responsive to those concerns.

Robert Taeschner inquired of Mr. Pilcher whether he was a Black Diamond resident. Mr. Pilcher replied that he was not.

APPROVAL OF MINUTES

Commissioner O'Brien inquired of those Commissioners who were present at the May 11th meeting if they felt the minutes captured the "flavor" of the meeting. Commissioners Buss and Thesenvitz responded in the affirmative, as it was clear the majority of testimony was in opposition to removing the Hearing Examiner from the Development Agreement process.

Moved by Commissioner Thesenvitz, seconded by Commissioner Buss, to approve the minutes of the May 11, 2010 meeting as drafted. Passed 5-0 (Commissioner Taylor abstained).

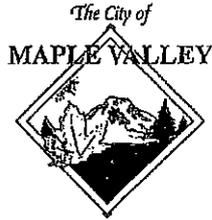
PUBLIC HEARING REGARDING POTENTIAL AMENDMENTS TO BLACK DIAMOND MUNICIPAL CODE 18.08 CONCERNING APPLICATION PROCEDURES (testimony closed)

Chairman Kaye asked the Commission what their preference was concerning the issue of the Hearing Examiner and the Development Agreement process. Consensus was to keep the language as currently in code and therefore leave the Examiner in the Development Agreement process.

Commissioner Thesenvitz asked for clarification of the proposed amendment to 18.08.050 regarding the shoreline permit process.

Mr. Pilcher noted that this section is proposed for deletion as part of a broader amendment to make all shoreline permits Type 3 decisions and therefore require a public hearing before the Hearing Examiner. The code still provides that an appeal of an Examiner's decision is to be made to the State Shorelines Hearing Board.

Exhibit 4



P.O. Box 320 • 22017 SE Wax Road • Maple Valley, WA 98038

Phone: 425-413-8800 • Fax: 425-413-4282

November 2, 2010

Mayor Rebecca Olness
City of Black Diamond
P.O. Box 599
24301 Roberts Drive
Black Diamond, WA 98010

RE: Process for Consideration of MPD development agreements

Dear Mayor Olness:

On behalf of my staff, I wish to express a concern about the way the MPD open record hearings were conducted before the Hearing Examiner last spring, as well as how the MPD closed record hearings were conducted before the Black Diamond City Council last summer.

The MPD hearings before the Examiner lasted approximately five weeks. Several of my staff were involved in that process, and, due to the way the process was structured, were compelled to be there, day after day or night after night, with no participation – simply waiting for their names to be called. The same thing occurred when the closed record hearings were held before the Black Diamond City Council, which also took several weeks to conclude. As you may suspect, it was very disruptive to Maple Valley's ongoing operations to have key staff gone for such extended periods of time.

I cannot afford to have key Maple Valley staff out of the office again, attending hearings unnecessarily, for weeks during the development agreement process. Therefore, I hope you will consider this request as a possible solution to this problem. Please discuss this request with your legal counsel and staff in an effort to address my concerns.

I ask that you, your legal counsel and staff work with the Hearing Examiner to set up a specific date(s)/time(s) for governmental agency testimony during the public hearings before the Examiner on the development agreements, and that these date(s)/time(s) be noticed *in advance*, at the time that the hearings are scheduled. This will provide certainty to governmental agencies, who can schedule the staff that are necessary for testimony. I am proposing that you do the same thing when the City Council's closed record hearings on the development agreements begin.

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

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5 **BEFORE THE CITY OF BLACK DIAMOND**

6 **HEARING EXAMINER**

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8
9 **IN RE: THE MATTER OF DEVELOPMENT**
10 **AGREEMENT HEARINGS RELATED TO**
11 **THE VILLAGES MPD APPROVED IN ORD.**
12 **NO. 10-946 AND LAWSON HILLS MPD**
13 **APPROVED IN ORD. NO. 10-947**

REPLY BRIEF IN SUPPORT OF MOTION
TO SET HEARING PROCEDURES FOR
DEVELOPMENT AGREEMENT HEARINGS
(PLN10-0020, PLN10-0021, PLN11-0013, &
PLN11-0014)

14 **I. INTRODUCTION**

15 BD Village Partners, LP and BD Lawson Partners, LP (collectively, "Yarrow Bay") files
16 this reply brief to the responses to motions filed by the City of Black Diamond, as well as
17 interested persons. Yarrow Bay requests that the Examiner issue a Pre-hearing Order setting
18 procedures for the upcoming hearings on the development agreements for The Villages and
19 Lawson Hills Master Planned Developments ("MPDs"). A revised proposed Pre-hearing Order
20 is filed together with this Reply Brief.

21 **II. DISCUSSION**

22 **A. The development agreements must be reviewed in a quasi-judicial hearing.**

23 It is undisputed that BDMC 18.08.030 provides that development agreements are Type 4
24 – Quasi-Judicial decisions. The only interested person to address this issue was Mr. Edelman,
25 who stated that the "Examiner can certainly conduct the hearings in a quasi-judicial manner at
26

REPLY BRIEF IN SUPPORT OF MOTION TO SET HEARING
PROCEDURES FOR DEVELOPMENT AGREEMENT
HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, &
PLN11-0014) - 1

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CAIRNCROSS&HEMPELMANN
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

EXHIBIT
168

1 his discretion and, to my knowledge, no party has argued for a legislative Hearing Examiner
2 procedure.” The Examiner’s Pre-hearing Order should provide that the hearing procedures will
3 be quasi-judicial.

4 **B. The scope of the hearing should be limited to confirming that the**
5 **development agreements appropriately incorporate those matters directed**
6 **and allowed to be incorporated by the MPD Approvals and State law.**

7 It is undisputed that the development agreements for The Villages and Lawson Hills are
8 required under BDMC 18.98.090, and that the development agreements are contracts between a
9 landowner and the City of Black Diamond. *See* RCW 36.70B.170. It is undisputed that the
10 purpose of the MPD development agreements is to ensure that the “MPD conditions of approval
11 shall be incorporated” into a development agreement that is “binding on all MPD property
12 owners and their successors,” to ensure that the MPD lands are developed “only in accordance
13 with the terms of the MPD approval.” BDMC 18.98.090. It is undisputed that under RCW
14 36.70B.170, a development agreement “shall be consistent with applicable development
15 regulations,” and “must set forth the development standards and other provisions that shall apply
16 to and govern and vest the development, use, and mitigation of the development of the real
17 property for the duration specified in the agreement.” *See also*, BDMC 18.66.020.

18 Given this undisputed law, the only issues that can be reviewed during the hearings on
19 the development agreements are the three issues initially stated by Yarrow Bay: (1) whether
20 each development agreement incorporates the conditions of each MPD Approval, as adopted in
21 Ord. Nos. 10-946 and 10-947, (2) whether each development agreement is consistent with
22 applicable development regulations, and (3) whether the matters set forth in the development
23 agreements are within the scope of development standards and provisions authorized to be
24 included in a development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020. The
25 City broke Yarrow Bay’s third issue into several categories, describing those items in greater
26 details as: (a) do the Development Agreements set forth the development standards and other

1 provisions that apply to, govern and vest the development, use and mitigation of the MPD
2 properties, (b) are the Development Agreements binding on all MPD property owners, and their
3 successors, and (c) do the Development Agreements require that the MPD property owners (and
4 their successors) develop the MPD property only in accordance with the conditions of the MPD
5 Permit approval. Either Yarrow Bay's three issues, or the City's more detailed set of five issues
6 are appropriate to define the limited scope of these Development Agreement hearings.

7 Various interested persons made arguments that the hearings should go well beyond this
8 scope. For example, in an email dated June 17, 2011 at 12:00 p.m. from Mr. Bricklin, it is
9 alleged that when the Black Diamond City Council approved the MPDs, the Council "stripped"
10 the Examiner's recommended conditions to eliminate bulk and use standards, that the supposedly
11 stripped language needs to be "restored" in the Development Agreements, and that the
12 Development Agreements will be used to establish the functional equivalent of a zoning code.
13 None of that is true, nor does it inform an analysis of the proper legal scope of the Examiner's
14 review of the Development Agreements.¹ We again object to the Examiner's consideration of
15 this email and the argument contained in that email. The arguments were not filed as a response
16 to motions, and were not procedural questions which staff could not answer, which was the
17 limited category of correspondence the Examiner was willing to accept by email. In addition, if
18 such arguments – or arguments like that of Ms. Proctor that the citizens should be allowed "to

19 _____
20 ¹ The City of Black Diamond adopted the MPD zoning code and MPD permit requirements in 2005, and amended
21 them in 2009, codified in BDMC Chapter 18.98. In September 2010, the City Council approved the Lawson Hills
22 and The Villages MPDs under that Code, and imposed some new conditions and modified other conditions that the
23 Examiner recommended. The City Council did not "strip" the Examiner's recommendations regarding use or bulk
24 standards – but even if the Council had done so, the Development Agreement hearings are not an opportunity to re-
25 open and re-consider the approved MPD conditions. We also emphasize that the Examiner should not confuse the
26 Development Agreement as the functional equivalent of a zoning code. It is no such thing. Under RCW
36.70B.170, a development agreement is a contract that "must set forth the development standards and other
provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the
real property for the duration specified in the agreement." Moreover, under RCW 36.70B.170, a "development
agreement shall be consistent with applicable development regulations" of the City. Thus, there are certainly
"development standards" and references to code in the Development Agreement, because that's what the
Development Agreement is required to contain. But it is not a zoning code.

1 discuss the merits” of the MPDs – are raised at the Development Agreement hearings, they will
2 engender an objection as to relevance. Whether the Development Agreement properly
3 incorporates the MPD Conditions adopted by the City Council is relevant. Whether the MPD
4 Conditions were amended from the Examiner’s recommendation and whether the MPD
5 Approval and Conditions reflect a project that has merit is not relevant. These Development
6 Agreement hearings are not a referendum on the MPD process or the resulting MPD Approvals.

7 Next, Mr. Sperry argues that there are areas in the Development Agreements where
8 “detail is extremely lacking,” such that testimony should be accepted regarding “areas where
9 there is inadequate definition of how the MPD Conditions will be met” or “how aspects of these
10 developments will be built.” Similarly, Mr. Rimbo argues that the Development Agreements
11 “lack specificity” to answer questions as to “who, what, where, why, how and when” and that
12 this is the public’s “only chance” to speak to the issues. Mr. Edelman raises the same issues
13 when he argues that the public should be allowed to comment on the “merits of a Yarrow Bay
14 implementation approach” because otherwise the City “must accept whatever approach is
15 proposed.” All of these arguments misunderstand the extensive negotiations that have already
16 occurred, as well as the purpose and role of the Development Agreements vis a vis future
17 Implementing Project applications.

18 The Development Agreements coming before the Hearing Examiner are not just Yarrow
19 Bay’s proposal. Instead, and as described at pages 3-4 of the Staff Report, both City Staff and
20 outside consultants to the City reviewed the Development Agreements. All terms were
21 considered, addressed, sometimes revised, and ultimately accepted by those Staff people and
22 consultants as well as Yarrow Bay. The Development Agreements coming before the Hearing
23 Examiner reflect an agreement between City Staff and consultants, and Yarrow Bay staff and
24 consultants.

1 Next, no development agreement details and designates where every last blade of grass
2 will be planted. Instead, by law, the point of a development agreement is to set the standards
3 which all subsequent permits issued by the City must meet.² There will be significant additional
4 public process over the next 15 to 20 years of MPD build-out as Implementing Projects are
5 applied for by Yarrow Bay and processed by the City. The distinction between what is set in the
6 Development Agreement and what is set by the future Implementing Approvals seems best
7 described by using the example of the siting of a stormwater facility.

8 The public has raised concerns about the location of various stormwater detention
9 facilities. The Villages Development Agreement, Fig. 7.4 maps proposed ponds serving the
10 basins across the site. Each pond will be finally located, engineered, designed and built to meet
11 Section 7.4.1's "availability" criterion – the test to assure that the pond is built at the time
12 necessary to serve the Implementing Project(s) which need to drain to it. As described in Section
13 7.4.2, any regional facility is required to meet those standards, too. Next, the engineered designs
14 for each pond must meet all of the goals and standards listed in Sections 7.4.3 and 7.4.4.A. The
15 engineered designs for each pond must also meet the more detailed requirements in Section
16 7.4.4.B for its specific Basin. But the specific locations and engineered designs for the pond are
17 not set in the Development Agreement. Instead, that will be set during Implementing Project
18 review of, for example, the first subdivision that will require use of the pond.

19 Boiled down to its essentials, the subdivision process includes (a) a preliminary review,
20 public hearing, and then approval of the planned layout of the lots, infrastructure, and amenities,
21 followed by (b) detailed review and approval of fully engineered plans for the infrastructure and
22

23 ² Specifically, RCW 36.70B.180 provides: "A development agreement and the development standards in the
24 agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the
25 agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or
26 a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement."

1 site grading, followed by (c) actual construction of the infrastructure and grading of the building
2 lots, followed by (d) inspections of the construction and, for some infrastructure (e.g., a water
3 main), acceptance into the City's system, and then (e) final City approval and recording in the
4 property records kept by King County of the final surveyed layout describing each and every lot
5 location.

6 None of the interested persons arguing about the scope of the Development Agreement
7 hearings – including Mr. Bricklin– cite any legal authority that would justify the Examiner using
8 the Development Agreement hearings to either reconsider the terms of the adopted MPD
9 Approvals, or to look forward in time to consider engineering details that have not yet been
10 designed. There is no such authority.

11 The Examiner's Pre-hearing Order should identify the applicable legal criteria (BDMC
12 18.98.090, BDMC Chapter 18.66, and RCW 36.70B.170 - .210) and the three (or five more
13 detailed) issues to which these Development Agreement hearings are limited: (1) whether each
14 development agreement incorporates the conditions of each MPD Approval, as adopted in Ord.
15 Nos. 10-946 and 10-947, (2) whether each development agreement is consistent with applicable
16 development regulations, and (3) whether the matters set forth in the development agreements
17 are within the scope of development standards and provisions authorized to be included in a
18 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020, meaning whether (a)
19 the Development Agreements set forth the development standards and other provisions that
20 apply to, govern and vest the development, use and mitigation of the MPD properties, (b) the
21 Development Agreements are binding on all MPD property owners, and their successors, and (c)
22 the Development Agreements require that the MPD property owners (and their successors)
23 develop the MPD property only in accordance with the conditions of the MPD Permit approval.

1 **C. Procedures for addressing “expert” testimony and evidence, if any, should be**
2 **set by the Examiner.**

3 In light of the scope for a development agreement hearing, and having read the responses
4 and motions of other interested persons, Yarrow Bay still does not view these development
5 agreement hearings as calling for any “expert” testimony. However, to the extent testimony is
6 presented that drives Yarrow Bay to present experts in rebuttal, the Examiner needs to set rules
7 about how any expert testimony is provided and whether cross-examination is allowed. As the
8 City points out, cross-examination is a right typically limited to parties, including under the
9 Hearing Examiner Rules for the City of Black Diamond. As Yarrow Bay described in our
10 motion, under the *Chrobuck* case, cross-examination is limited to parties represented by counsel.
11 In these Development Agreement hearings, the only “party” is Yarrow Bay. Thus, the Examiner
12 either should not allow cross-examination, by requiring expert testimony to be in writing, or the
13 Examiner needs to explain and justify any cross-examination procedure adopted to ensure it
14 protects Yarrow Bay’s due process rights, and does not allow the hearing process itself to
15 devolve into chaos.

16 In addition to the matters set forth in Yarrow Bay’s original motion, the Pre-hearing
17 Order should clearly address the fact that the Hearing Examiner Rules at 2.14(c) note that citizen
18 opinion testimony is discouraged, but may be admitted although it need not be given weight by
19 the Examiner. This is consistent with ER 701 and 702.

20 To the extent that interested persons intend to rely on true experts, those experts and their
21 area of expertise and expected testimony must be disclosed by Friday, July 1. This includes any
22 agency personnel that an interested person believes will attend the hearing to testify against the
23 Development Agreements. Rebuttal experts should be disclosed by Wednesday, July 6. To the
24 extent that citizens will be testifying after their own study of a particular issue, the citizens are
25 not entitled to testify to expert opinions.

1 Finally, Mr. Edelman requested, among the alternative options he presented, that the
2 Examiner force experts to testify live. Yarrow Bay has some experts who are local and some
3 who are based in other states, as far away as Randall Arendt³ on the East Coast. In the event that
4 Yarrow Bay chooses to present expert testimony, due process requires that Yarrow Bay be
5 allowed to present that testimony in writing.

6 **D. Timing and process for hearing.**

7 In addition to the items outlined above, Yarrow Bay recommends the following matters
8 be addressed in the Examiner's Pre-hearing Order:

9 1. No interested persons raised objections to Yarrow Bay's request that the hearings
10 on the development agreements for both The Villages and Lawson Hills MPDs should be
11 consolidated. All persons speaking to either project's development agreement should be
12 instructed to state whether their comments extend to one or both projects and, if just one, which
13 project.

14 2. Mr. Edelman suggested that rather than open the hearing on July 11, 2011 at 6
15 p.m. and continuing day to day until completed, that if additional days were required after July
16 16, the hearing schedule should be "extended and adequate notice should be given to the public."
17 This appears to be an attempt to simply delay the proceedings. Adequate public notice for the
18 Development Agreement hearings has already been given, and that public notice plainly includes
19 the right to submit written comment should one be unable, unwilling, or unavailable to attend
20 one of the currently scheduled hearing dates. There is no legal authority to impose a new public
21 notice requirement on a hearing that has already been noticed. The Pre-Hearing Order should
22 explain that the Examiner will open the hearing on July 11, 2011 at 6 p.m. and continue it day to
23 day until completed.

24 _____
25 ³ Randall Arendt is the author of "Rural by Design."
26

1 3. The hearings should open and proceed in the following order and with the
2 following time limits, for the following reasons:

3 a. No interested persons raised objections to the City Staff giving an opening
4 oral presentation of their written Staff Report regarding the MPDs' Development
5 Agreements, limited to 1.5 hours.

6 b. No interested persons raised objections to Yarrow Bay giving an opening
7 presentation introducing the development agreements, limited to 1.5 hours, and
8 presenting any initial written statements in support of the Development Agreements.

9 c. Most interested persons had input regarding the amount of time to be
10 provided for public testimony, some suggesting 10 minutes, and some suggesting
11 unlimited amounts of time. As the Examiner is aware, Hearing Examiner Rule 2.11(d)
12 authorizes the Examiner to "limit the length of testimony to expedite the proceedings and
13 avoid the necessity to continue the hearing." As Yarrow Bay noted during the Pre-
14 Hearing Conference, and as the City points out in its response to motions, public
15 testimony that merely repeats the same point is not relevant or helpful to the Examiner's
16 decision making process. Moreover, unlimited time invites abuse such as a filibuster.
17 Yarrow Bay again requests that the Examiner set a time limit, with each person speaking
18 provided 3 minutes (for example, if they are providing a general comment regarding a
19 term of the Development Agreement) up to a maximum of 10 minutes (for example, if
20 they wish to explain a more specific concern about how a term of the Development
21 Agreements relates to the applicable legal criteria) to testify orally, and unlimited written
22 arguments and evidence. The Hearing Examiner should retain the right to limit such
23 testimony to relevant arguments and evidence. Written and oral public testimony will be
24
25
26

1 closed at a date and time certain,⁴ so as to allow the City and Yarrow Bay to prepare their
2 rebuttal and closing statements, except for possible sur-rebuttal described below.

3 d. Most interested persons had input regarding whether time could be ceded
4 from one interested person to another to provide public testimony. Yarrow Bay again
5 requests that the Examiner allow members of the public wishing to testify to cede their
6 time to any person; provided, however, that any person ceding time must be present when
7 the person they are ceding their time to testifies. For the limited purposes of ceding time,
8 a maximum of one (1) hour is allowed for any one person testifying. Yarrow Bay
9 recognizes that not every person can attend every hearing session, and some persons are
10 ill or infirm. But persons who cannot attend have the option of submitting their concerns
11 in writing. As the Examiner knows from his experience, an allowance to cede time is not
12 often made in a public hearing but when made, it comes together with a requirement that
13 the person ceding time be present. The process for ceding time by email during the MPD
14 Closed Record hearings was different – during that process there was a set list of Parties
15 of Record who had already testified before the Examiner. That is not the case for these
16 open record hearings before the Examiner on the Development Agreements.

17 e. Other than arguing that the public should get the last word, which is an
18 issue addressed below regarding sur-rebuttal, no interested persons raised objections to
19 Yarrow Bay's proposal that at least 48 hours (or in the event public testimony closes on
20 the evening of a weeknight, and closings can be scheduled for the morning of the
21 following Saturday, approximately 36 hours) after written and oral public testimony has
22 closed, the City, followed by Yarrow Bay, will provide their own presentations of
23

24 ⁴ The purpose of this request is to avoid the situation that occurred during the Examiner's prior hearings on the
25 MPDs themselves, in which public testimony was being created and submitted at the same time that Yarrow Bay
26 and the City were delivering their rebuttal and closing presentations. That engendered an unnecessary delay to
allow additional written rebuttal to be submitted.

1 whatever length is necessary to respond to questions asked and issues raised in the public
2 testimony. Given the limited scope of the hearing, it is estimated this oral presentation
3 will be no more than three hours combined between the City and Yarrow Bay. Written
4 rebuttal of any length from Yarrow Bay and the City will also be allowed.

5 f. Most interested persons had input regarding whether there should be
6 rebuttal allowed to Yarrow Bay's closing presentation. Yarrow Bay already anticipated
7 this concern and that is why we proposed one round of sur-rebuttal in which the public
8 would get a chance to comment on Yarrow Bay's closing, followed by Yarrow Bay's
9 chance to respond. Mr. Edelman thought this was excessive, but if it was to be allowed
10 wanted a fair time to be able to prepare rebuttal after exhibits were made available. Save
11 Black Diamond felt the sur-rebuttal process was important.⁵ Mr. Rimbos felt that sur-
12 rebuttal should be oral, not written, and both Mr. Rimbos and Mr. Sperry felt that the
13 public should have the "final say."

14 There is no reason, other than delay in completion of the hearing, to require sur-
15 rebuttal to be conducted orally. Sur-rebuttal in writing already provides an opportunity
16 that is not traditionally allowed for interested persons to respond to Yarrow Bay's closing
17 presentation. However, Yarrow Bay still must have the last word. Again, as the
18 Examiner explained in the pre-hearing conference, due process requires that the
19 proponent of a proposal be provided the last word.

20 Therefore, Yarrow Bay again asks the Examiner include in the Pre-hearing Order
21 the following process. After the rebuttal presentations of the City and Yarrow Bay have
22 been completed, the Examiner shall allow 48 hours for any interested person who has
23 testified or submitted evidence in the hearing to submit written testimony as sur-rebuttal

24
25 ⁵ Yarrow Bay objects to Save Black Diamond's characterization that supposedly incorrect information was
26 contained in Yarrow Bay's rebuttal during the MPD hearings.

1 on a specific topic. After the submittal of that sur-rebuttal, Yarrow Bay and the City shall
2 then be provided 48 hours to respond to any sur-rebuttal testimony filed. No additional
3 rounds of sur-rebuttal shall be allowed by the Hearing Examiner.

4 g. No interested persons raised objections to the procedural rule that the
5 hearing examiner may ask questions of any person presenting or testifying.

6 4. No interested persons raised objections to the requirement that an audio recording
7 of the hearings shall be made by the City of Black Diamond. In addition, no one objected to the
8 requirement that Yarrow Bay shall pay the appearance fee for a court reporter to transcribe the
9 hearings or that any person desiring a copy of the court reporter's transcription is required to
10 order the transcript from the court reporter. However, Ms. Proctor appears to ask that if Yarrow
11 Bay uses any portion of a transcript in the following hearing proceedings, that Yarrow Bay be
12 required to submit that transcript as part of the public record. If any interested person or party
13 chooses to purchase a partial or complete transcript of any hearing session, it is normal practice
14 for the portion being quoted to be filed in the record. Thus, if Yarrow Bay ordered a transcript
15 from one hearing day in order to quote a particular person's statement, Yarrow Bay would
16 certainly submit the pages quoted and would expect any interested person to do so, as well.
17 However, if what Ms. Proctor was suggesting was that the decision to quote a single sentence
18 translates to an obligation to pay for the entire hearing transcript and file the entire transcript in
19 the record, Yarrow Bay objects and notes that the Examiner cannot impose such a rule because it
20 would create an undue financial burden on Yarrow Bay (or any other interested person who
21 chose to purchase part of the transcript to submit one person's testimony).

22 5. No interested persons objected to having the City clerk post all exhibits on the
23 City's website within 48 hours of submittal. However, the City noted that might not happen due
24 to other workload. The Revised Proposed Order reflects this City request.
25
26

1 6. All interested persons asserted that the beginning of the hearing should be
2 delayed.⁶ In its response to motions, Yarrow Bay briefed the many reasons why the hearing
3 should open on July 11, 2011 at 6 p.m., as previously noticed. In this reply we again note that
4 pursuant to BDMC 18.08.180, only fourteen days of notice are required prior to the
5 commencement of a public hearing, and here 31 days were provided. In addition, Yarrow Bay
6 asks the Examiner to review Exhibit A to the Declaration of Nancy Bainbridge Rogers filed
7 herewith. As plainly documented on the website of Save Black Diamond, the "Citizens'
8 Technical Action Team (TAT)" has been working on these issues for "the past nine months" and
9 after "studying" the Development Agreements is hosting a public meeting "prepared to provide
10 key information to you [the public], including reader-friendly summaries and highlights of
11 important details." This further evidences that the citizens are more than ready to begin the
12 hearing on July 11 and requests for a later start are just requests for delay.

13 7. Two interested persons sought to supplement Yarrow Bay's request that Hearing
14 Examiner Rule 2.12 regarding Expected Conduct of all persons be quoted in full in the Pre-
15 hearing Order. First, Mr. Edelman suggested that the allowance in subsection (c) for the
16 Examiner to ask City⁷ staff to submit additional information into the record be limited so that the
17 public has the opportunity to review that information. However, the other rules regarding
18 hearing proceedings will assure proper public access and review of substantive information
19 submitted. Second, Ms. Proctor argues that the Examiner should add terms preventing both the
20 City Attorney and Yarrow Bay's Attorney from cross-examining or re-butting public testimony,
21 and preventing the City Attorney from interrupting public testimony. As Yarrow Bay argued in

22 _____
23 ⁶ Ms. Proctor also requested in her response to motions that the hearing venue be re-located. The City Staff has
24 reserved Sawyer Woods Elementary School and provided all legally required public notice. That hearing location
25 may be closer to some Black Diamond residents who did not attend the prior hearings in the Black Diamond
26 Elementary School. Regardless, there is no legal authority that would allow the Examiner to force City Staff to find
a new venue, move the hearing location, and provide new public notice.

⁷ The Hearing Examiner Rules contain a typographical error in referring to "County" rather than "City" staff.

1 its response to Mr. Edelman's motion, the Examiner must follow the well-established practice of
2 allowing objections to occur contemporaneous with submittal of the evidence.

3 There appears to be no objection to quoting in full the Hearing Examiner Rule 2.12
4 regarding Expected Conduct in the Prehearing Order as follows:

5 **2.12 EXPECTED CONDUCT**

6 (a) All persons appearing before the Hearing Examiner shall conduct
7 themselves with civility and courtesy to all persons involved in the hearing.

8 (b) No party or other person shall communicate with an Examiner presiding
9 over a matter or with any employee of the Hearing Examiner's Office in an
attempt to influence the outcome or to discuss the merits of that matter..

10 (c) No party or other person, other than staff when not acting as a party, shall
11 make or attempt ex parte communication with the Examiner regarding any matter
12 under pending review by the Examiner. Procedural matters may be addressed by
13 written correspondence, copied to all known parties. In all matters involving an
open record hearing, prior to and during the hearing, the Examiner may ask
County [sic - City] staff to submit additional information into the record.

14 (d) If a substantial prohibited ex parte communication is made, such
15 communication shall be publicly disclosed by the Examiner: any written
16 communications, and memorandums summarizing the substance and participants
of all oral communications, shall promptly be made available to the parties for
review and an opportunity to rebut those communications.

17 8. The Hearing Examiner shall begin each hearing session with an announcement of
18 these hearing procedures.

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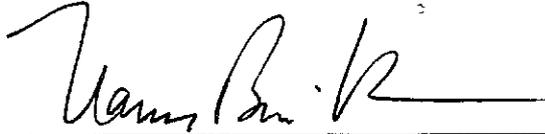
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III. CONCLUSION

Yarrow Bay respectfully requests that the Hearing Examiner enter the Revised Pre-hearing Order implementing the procedures described above.

DATED this 27th day of June, 2011.

CAIRNCROSS & HEMPELMANN, P.S.



Nancy Bainbridge Rogers, WSBA No. 26662
Andrew S. Lane, WSBA No. 26514
Randall P. Olsen, WSBA No. 38488
Attorneys for Applicants BD Lawson Partners, LP
and BD Village Partners, LP

Certificate of Service

1 I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of
2 Washington that on June 27, 2011, I caused a copy of the document to which this is attached to
3 be served on the following individual(s) via email:
4

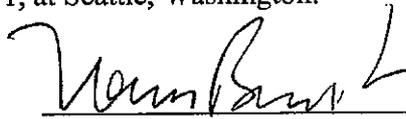
5 Steve Pilcher
6 Community Development Director, City of Black Diamond
7 24301 Roberts Drive
8 PO Box 599
9 Black Diamond, WA 98010
10 Email: spilcher@ci.blackdiamond.wa.us

11 Brenda Martinez
12 Clerk, City of Black Diamond
13 24301 Roberts Drive
14 PO Box 599
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16 Email: BMartinez@ci.blackdiamond.wa.us

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26 PO Box 599
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Email: awilliamson@ci.blackdiamond.wa.us

DATED this 27th day of June, 2011, at Seattle, Washington.



Nancy Bainbridge Rogers, Attorney

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5 **BEFORE THE CITY OF BLACK DIAMOND**

6 **HEARING EXAMINER**

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8
9 IN RE: THE MATTER OF DEVELOPMENT
10 AGREEMENT HEARINGS RELATED TO
11 THE VILLAGES MPD APPROVED IN ORD.
12 NO. 10-946 AND LAWSON HILLS MPD
13 APPROVED IN ORD. NO. 10-947

DECLARATION OF NANCY BAINBRIDGE
ROGERS IN SUPPORT OF REPLY BRIEF IN
SUPPORT OF MOTION TO SET HEARING
PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020,
PLN10-0021, PLN11-0013, & PLN11-0014)

14
15 I, Nancy Bainbridge Rogers, declare as follows:

16 1. I am one of the attorneys for Applicants, BD Lawson Partners, LP and BD Village
17 Partners, LP (collectively "Yarrow Bay"), in the above-captioned matter and give this
18 declaration on my personal knowledge.

19 2. I am over the age of eighteen (18) and I am competent to testify to the matters
20 herein.

21 3. Attached hereto as Exhibit A are true and correct copies of pages from Save Black
22 Diamond's website. These were also attached as Exhibit F to the Supplemental Declaration of
23 Bob C. Sterbank in Support of City's Response to Prehearing Motions dated June 24, 2011.

24 4. I have reviewed the factual allegations stated in the Reply Brief in Support of
25 Motion to Set Hearing Procedures for Development Agreement Hearings (PLN10-0020, PLN10-
26 0021, PLN11-0013, & PLN11-0014) filed herewith and attest to their accuracy.

DECLARATION OF NANCY BAINBRIDGE ROGERS IN
SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 1

CAIRNCROSS&HEMPELMANN
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

1 DATED this 27th day of June, 2011, in Seattle, Washington.
2
3

4 CAIRNCROSS & HEMPELMANN, P.S.

5 

6 Nancy Bainbridge Rogers, WSBA No. 26662
7 Attorneys for Applicants BD Lawson Partners, LP
8 and BD Village Partners, LP
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DECLARATION OF NANCY BAINBRIDGE ROGERS IN
SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 2
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Certificate of Service

I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of Washington that on June 27, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

Steve Pilcher
Community Development Director, City of Black Diamond
24301 Roberts Drive
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Black Diamond, WA 98010
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Clerk, City of Black Diamond
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Andy Williamson
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Black Diamond, WA 98010
Email: awilliamson@ci.blackdiamond.wa.us

DATED this 27th day of June, 2011, at Seattle, Washington.

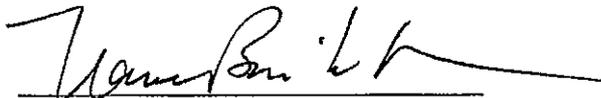

Nancy Bainbridge Rogers, Attorney

EXHIBIT A

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DECLARATION OF NANCY BAINBRIDGE ROGERS IN
SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION TO
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AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 4
{01648668.DOC;1 }

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Public Hearing Soon

Notice of Development Agreement Public Hearings

On June 10, the city of Black Diamond released the final applications for Development Agreement (DA) contracts for the Yarrow Bay-proposed Master-Planned Developments (MPDs). Also, it announced that related **Public Hearings** will commence on **Monday, July 11**. They will continue all week and there is a **full day session** scheduled for **Saturday the 16th**. The location is **Sawyer Woods Elementary**.

Please see: <http://www.ci.blackdiamond.wa.us/Depts/CommDev/DA.html>.

Your opportunity is to speak for **ten minutes** on something that could then become a **twenty year binding contract**.

The Development Agreements are supposed to contain sufficient detail on the 15-to-20-yr plan for buildout of the developments and comply with the City's MPD Ordinances passed last September, each of which contained over 180 conditions of approval.

Plan to provide Oral Testimony and/or Written Statements.

Information on how to Prepare.

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[Enter](#)[Home](#) > Preparation for Development Agreement Hearings

Preparation for Development Agreement Hearings

Monday, June 27, 7 – 9 PM

Lake Sawyer Community Club - 29006 216th AVE SE, Black Diamond, WA

If you share our concerns and have an interest in shaping the future of Southeast King County, please attend.

The Citizens' Technical Action Team (TAT) will help us all prepare for the Master Planned Development (MPD) Development Agreement Hearings which are scheduled to start on July 11.

For the past nine months, since the Black Diamond City Council inexplicably passed two Ordinances approving the two Yarrow Bay-proposed developments, the TAT has been reviewing, dissecting, critiquing, and summarizing the issues. Since the release of the Development Agreement documents ([on the city's website](#)), TAT has been studying them. TAT is now prepared to provide key information to you, including reader-friendly summaries and highlights of important details. You can use this to write your Oral Testimonies and Written Statements.

The MPD Development Agreement Hearings are of great consequence. They are the method by which the public can critique the plans and voice their opinions on the development details. **Does Yarrow Bay's plan meet all of the 160+ Conditions listed in the Ordinances? Is there a long-range plan to mitigate the immense traffic volumes expected to be generated by 6,050 homes and 1.15 million sq ft of Commercial/Business space? Will Black Diamond go bankrupt? What happens when 760 acres of in-city forest are clear-cut?** Now is your chance to weigh in. Members of TAT will explain the details, help you prepare for the hearings, and answer any of your questions.

There will be two Hearings (just like last year for the MPD application). The first Hearing is called an Open-Record Hearing before the City's Hearing Examiner, Phil Olbrechts. The second Hearing is before the city council. All "evidence" must be presented in the first hearings in order to be valid in the second hearings and thus heard by the City Council. The same Hearing Examiner conducted the city's prior hearings, so he is well-versed on the subject. The public's past testimony helped form recommendations Mr. Olbrechts provided to the City Council. Unfortunately, the City Council ignored or watered down many of those recommendations (that is one reason why this November's Black Diamond City Council election is so very critical).

If you speak at the Open-Record Hearing, you are eligible to speak at the second hearing, called a Closed-Record Hearing. This hearing before the Black Diamond City Council will be held after Mr. Olbrechts has had time to create detailed recommendations based on testimony in the Open-Record Hearings.

This is your chance to have a voice on what could shape the future of Black Diamond and surrounding communities for generations!

- The documents are complex, and in order to get certain changes into them, incorporating a knowledge of land use beyond the documents into our testimony will be necessary. The TAT is ready to arm you with whatever information you need to testify.
- Conversely, some information that is simple to you, such as where water flows on your land, what roads you

commonly drive and are concerned about, or what will preserve the special character of Black Diamond, is nearly impossible for anyone else to know unless you testify.

Note: There is a modest rental fee for the location, Lake Sawyer Community Club. We will have a donation jar available for those who wish to help offset the fee.

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Join Our Mailing List

[Home](#) > [Home](#) > Action Ideas

Action Ideas

How You Can Help

1. Testify at upcoming city Development Agreement Contract Hearings. Contact SaveBlackDiamond@gmail.com or Vern Gibson at 360-886-6974.
 2. Join Toward Responsible Development to become part of the legal appeal to the approvals. This will give you valuable, direct updates on the legal efforts that must continue. So far these efforts have resulted in at least one victory. Numerous challenges provide an exciting news weekly. Contact ResponsibleDevelopment@comcast.net.
 3. Connect with Save Black Diamond. This organization is building a community, holding educational meetings, and working on Black Diamond politics. We provide the knowledge, expert support, and peer support to take effective action to improve our future. We are coordinating action on many fronts. Contact SaveBlackDiamond@gmail.com.
 4. Watch the City of Black Diamond "In the Spotlight" section on its website. Read and provide comments to the city. Attend Black Diamond City Council Meetings (1st and 3rd Thursdays of the month at 7 PM at Black Diamond Council Chambers on Lawson St.)
 5. Voice your concerns to the Enumclaw School District –Superintendent Mike Nelson and the elected school board.
 6. Come to fundraisers for Black Diamond.
 7. Contributing to our efforts. Send contributions to Save Black Diamond, P.O. Box 581, Black Diamond, WA 98010.
 8. There is *much more* you can do. Contact Us to learn more at SaveBlackDiamond@gmail.com. We also welcome your ideas.
-

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5 **BEFORE THE CITY OF BLACK DIAMOND**

6 **HEARING EXAMINER**

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8
9 IN RE: THE MATTER OF DEVELOPMENT
10 AGREEMENT HEARINGS RELATED TO
11 THE VILLAGES MPD APPROVED IN ORD.
12 NO. 10-946 AND LAWSON HILLS MPD
13 APPROVED IN ORD. NO. 10-947

[PROPOSED] REVISED ORDER
GRANTING MOTION TO SET HEARING
PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020,
PLN10-0021, PLN11-0013, & PLN11-0014)

14 The Black Diamond Hearing Examiner has reviewed Applicants BD Lawson
15 Partners, LP and BD Village Partners, LP's (collectively, "Yarrow Bay's") Motion to Set
16 Hearing Procedures for Development Agreements (PLN10-0020, PLN10-0021, PLN11-
17 0013, & PLN11-0014), and the motions, responses and reply briefs of the City of Black
18 Diamond and other interested persons. The Hearing Examiner, having reviewed the file
19 and records in this matter and considered the arguments of counsel and interested
20 persons, deems itself fully advised.
21

22
23 NOW THEREFORE, the Examiner hereby ORDERS as follows:

24 1. The Motion to Set Hearing Procedures for Development Agreements (PLN10-
25 0020, PLN10-0021, PLN11-0013, & PLN11-0014) is hereby GRANTED as follows:
26

[PROPOSED] REVISED ORDER GRANTING MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 1

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CAIRNCROSS&HEMPELMANN
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

1 a) On June 3, 2011, the City issued a Determination of Significance and
2 Notice of Adoption under the State Environmental Policy Act ("SEPA") for The Villages and
3 Lawson Hills development agreements. The City posted on its website, the final development
4 agreements of both The Villages and Lawson Hills MPDs on June 9, 2011. The City's Staff
5 Report on the development agreements was posted on the City's website on June 10, 2011.
6 Notice of the public hearings for the development agreements was published by the City on June
7 10, 2011 -- more than thirty (30) days prior to the start date of the scheduled hearings. The
8 Villages MPD Development Agreement and Lawson Hills MPD Development Agreement
9 hearings shall commence on July 11, 2011 as provided in the City's notices of public hearing.

10 b) The hearings on the development agreements for both The Villages and
11 Lawson Hills MPDs shall be consolidated.

12 c) Pursuant to BDMC 18.08.030, the hearing procedures for The Villages
13 MPD and Lawson Hills MPD Development Agreements shall be quasi-judicial.

14 d) The scope of the development agreement hearings shall be limited to
15 evidence and testimony regarding only the following : (1) whether each development agreement
16 incorporates the conditions of each MPD Approval, as adopted in Black Diamond Ord. Nos. 10-
17 946 and 10-947; (2) whether each development agreement is consistent with applicable
18 development regulations; and (3) whether the matters set forth in the development agreements
19 are within the scope of development standards and provisions authorized to be included in a
20 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020, meaning whether (a)
21 the Development Agreements set forth the development standards and other provisions that
22 apply to, govern and vest the development, use and mitigation of the MPD properties, (b) the
23 Development Agreements are binding on all MPD property owners, and their successors, and (c)

1 the Development Agreements require that the MPD property owners (and their successors)
2 develop the MPD property only in accordance with the conditions of the MPD Permit approval.

3 e) While expert witness presentations are not anticipated given the limited
4 scope of The Villages MPD and Lawson Hills MPD Development Agreement hearings, if it is
5 delivered, the following distinction will be used to determine who is an expert:

6 i. Opinion Testimony by Lay Witnesses

7 If the witness is not testifying as an expert, the witness'
8 testimony in the form of opinions or inferences is limited to
9 those opinions or inferences which are (a) rationally based on
10 the perception of the witness, (b) helpful to a clear
11 understanding of the witness' testimony or the determination of
12 a fact in issue, and (c) not based on scientific, technical, or
13 other specialized knowledge within the scope of rule 702.

14 Testimony by Experts

15 If scientific, technical, or other specialized knowledge will
16 assist the trier of fact to understand the evidence or to
17 determine a fact in issue, a witness qualified as an expert by
18 knowledge, skill, experience, training, or education, may testify
19 thereto in the form of an opinion or otherwise.

20 Pursuant to Hearing Examiner Rule 2.14(c) opinion evidence of non-experts is
21 discouraged, but may be admitted, although it need not be given weight by the Examiner.
22 Expert disclosures, including the expert's name, public agency affiliation if from a public
23 agency, area of expertise, and expected testimony must be filed with Steve Pilcher by
24 Friday, July 1. Rebuttal expert disclosures, if any, must contain the same information and
25 are due by July 6.

26 f) If expert witness presentations are made, they shall be delivered only in
writing.

1 [OR, IN THE ALTERNATIVE:

2 *While expert testimony is not anticipated given the limited scope of*
3 *The Villages MPD and Lawson Hills MPD Development*
4 *Agreement hearings, if oral testimony is provided either in*
5 *addition to or in lieu of written testimony, cross-examination shall*
6 *be conducted as follows: (i) any party or interested person*
7 *represented by counsel may have such counsel conduct the cross-*
8 *examination; and (ii) any party or interested person not*
9 *represented by counsel who has questions should submit those*
10 *questions to the Hearing Examiner to ask of the expert.]*

11 g) On June 10, 2011, the City issued notice of the opening of the hearings on
12 July 11, 2011 at 6 p.m. and continuing on multiple days thereafter. The hearings shall continue
13 day-to-day until completed.

14 h) The hearings shall open and proceed in the following order and with the
15 following time limits:

16 i. The City Staff gives an opening oral presentation of their written
17 Staff Report regarding the MPDs' development agreements, limited to 1.5 hours.

18 ii. Yarrow Bay gives an opening presentation introducing the
19 development agreements, limited to 1.5 hours, and presenting any initial written statements in
20 support of the development agreements.

21 iii. Public testimony shall be taken, with each person speaking
22 provided 3 minutes to a maximum of 10 minutes to testify orally, and unlimited written
23 arguments and evidence. All persons speaking to either MPDs development agreement shall state
24 whether their comments extend to one or both MPDs and, if just one, which MPD. The Hearing
25 Examiner retains the right to limit such testimony to relevant arguments and evidence. Written
26 and oral public testimony will be closed at a date and time certain, except for possible sur-
rebuttal described below.

iv. Members of the public wishing to testify may cede their time to
any person; provided, however, that any person ceding time must be present when the person

1 they are ceding their time to testifies. For the limited purposes of ceding time, a maximum of one
2 (1) hour is allowed for any one person testifying.

3 v. At least 48 hours (or in the event public testimony closes on the
4 evening of a weeknight, and closings can be scheduled for the morning of the following
5 Saturday, approximately 36 hours) after written and oral public testimony has closed, the City,
6 followed by Yarrow Bay, shall provide their own presentations of whatever length is necessary
7 to respond to questions asked and issues raised in the public testimony. Given the limited scope
8 of the hearing, this oral presentation is estimated to be no more than 3 hours combined between
9 the City and Yarrow Bay. Written rebuttal of any length from Yarrow Bay and the City shall
10 also be allowed.

11 vi. After the rebuttal presentations of the City and Yarrow Bay have
12 been completed, any interested person who has testified or submitted evidence in the hearing
13 shall have 48 hours to submit written testimony as sur-rebuttal on a specific topic. After the
14 submittal of that sur-rebuttal, Yarrow Bay and the City shall have 48 hours to respond, in
15 writing, to any sur-rebuttal testimony filed. No additional rounds of sur-rebuttal shall be allowed.

16 vii. The Hearing Examiner may ask questions of any person presenting
17 or testifying.

18 i) An audio recording of the development agreement hearings shall be made
19 by the City of Black Diamond. In addition, Yarrow Bay shall pay the appearance fee for a court
20 reporter to transcribe the hearings. Any person desiring a copy of the court reporter's
21 transcription must order the transcript from the court reporter.

22 j) The Black Diamond City Clerk shall endeavor to post all exhibits on the
23 City's website within 48 hours of submittal; provided however, that to accommodate the
24 timeframes for the sur-rebuttal procedure described in this Order, the City Clerk shall create a
25 process to provide promptly any written materials related to the sur-rebuttal process to the parties
26 and any interested person who has testified.

1 k) During the development agreement hearings, the City, Yarrow Bay, and
2 all interested persons are specifically instructed to follow Hearing Examiner Rule 2.12:

3 **2.12 EXPECTED CONDUCT**

4 (a) All persons appearing before the Hearing Examiner shall conduct
5 themselves with civility and courtesy to all persons involved in the hearing.

6 (b) No party or other person shall communicate with an Examiner presiding
7 over a matter or with any employee of the Hearing Examiner's Office in an
attempt to influence the outcome or to discuss the merits of that matter.

8 (c) No party or other person, other than staff when not acting as a party, shall
9 make or attempt ex parte communication with the Examiner regarding any matter
10 under pending review by the Examiner. Procedural matters may be addressed by
11 written correspondence, copied to all known parties. In all matters involving an
open record hearing, prior to and during the hearing, the Examiner may ask
County [sic – City] staff to submit additional information into the record.

12 (d) If a substantial prohibited ex parte communication is made, such
13 communication shall be publicly disclosed by the Examiner: any written
14 communications, and memorandums summarizing the substance and participants
of all oral communications, shall promptly be made available to the parties for
15 review and an opportunity to rebut those communications.

16 l) Each development agreement hearing session shall begin with an
17 announcement of these hearing procedures by the Hearing Examiner.

18 DATED this ____ day of June, 2011.

19
20 _____
21 PHIL OLBRECHTS
22 CITY OF BLACK DIAMOND HEARING
23 EXAMINER
24
25
26

1 Presented by:

2 CAIRNCROSS & HEMPELMANN, P.S.

3 

4 Nancy Bainbridge Rogers, WSBA No. 26662

5 Andrew S. Lane, WSBA No. 26514

6 Randall P. Olsen, WSBA No. 38488

7 Attorneys for Applicants BD Lawson Partners,
LP and BD Village Partners, LP

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[PROPOSED] REVISED ORDER GRANTING MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 7

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office 206 587 0700 fax 206 587 2308

Certificate of Service

I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of Washington that on June 27, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

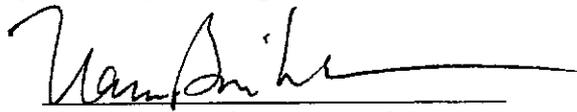
Steve Pilcher
Community Development Director, City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, WA 98010
Email: spilcher@ci.blackdiamond.wa.us

Brenda Martinez
Clerk, City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, WA 98010
Email: BMartinez@ci.blackdiamond.wa.us

Stacy Borland
City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, WA 98010
Email: sborland@ci.blackdiamond.wa.us

Andy Williamson
City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, WA 98010
Email: awilliamson@ci.blackdiamond.wa.us

DATED this 27th day of June, 2011, at Seattle, Washington.


Nancy Bainbridge Rogers, Attorney

[PROPOSED] REVISED ORDER GRANTING MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 8

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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

PRE-HEARING ORDER I

This is a partial prehearing order addressing some of the major procedural issues for the hearing on the development agreements for the Villages and Lawson Hills Master Planned Developments. This prehearing order is being issued in two parts in order to maximize advance notice to the parties. A second prehearing order will be issued Wednesday morning (when City Hall is again staffed), 7/6/11, to address the remaining issues raised in prehearing motions.

A. Hearing Date. The development agreements will commence on July 11, 2011 pursuant to the public notice issued by City staff. The hearing was scheduled as ordered by the Examiner at the prehearing conference, which was 30 days from the posting at the City's website of a final development agreement and staff report. Written comments will be accepted for two weeks following the close of the verbal testimony portion of the hearings, including expert testimony, which will give the parties at least seven weeks to review and comment upon the final documents. Although voluminous, the exhibits have remained substantially the same since they were released to the public in April, 2011. The development agreements themselves are "only" about 150 pages each. These are lengthy documents, but by the end of the hearing process the parties will have had almost two months or longer to review them.

B. Expert Witnesses. When the Examiner issued his order on the hearing date at the prehearing conference, he did not anticipate that the issue would be revisited in the prehearing motions. He had intended to issue an order for the scheduling of expert witnesses as the prehearing motions came in. When it became evident that parties were still going to address the hearing date in the prehearing motions, the Examiner had to wait until all arguments had been submitted prior to addressing scheduling. Now that the motions have all been submitted, it is too late to require the

1 submission of expert witness information in advance of the hearing. Consequently, expert testimony
2 will be scheduled for the week commencing July 18, 2011. Parties wishing to submit verbal expert
3 testimony shall supply written notice of this testimony to City staff by 5:00 pm July 8, 2011. Any
4 parties wishing to provide rebuttal expert testimony shall provide notice of the testimony by 5:00
5 pm July 13, 2011. The notices must be received by the City by the dates specified above at the City
6 address identified at Section D of this order or at the email address of Steve Pilcher at
7 SPilcher@ci.blackdiamond.wa.us. The notices shall provide the following information:

- 8 a. Dates and times of availability to testify the week of July 18, 2011.
- 9 b. Curriculum vitae of the expert.
- 10 c. A summary of the issues that will be addressed in the expert testimony. The summary
11 should be specific enough to identify what portions of the development agreements
12 are addressed and what deficiencies the expert believes exist or don't exist with those
13 provisions.
- 14 d. The amount of time the expert will need to testify (excluding cross-examination).

15 The Examiner will schedule proposed expert witnesses if they in fact qualify as expert witnesses and
16 the notices identified above have been provided as directed. An expert witness is a person that is
17 qualified by knowledge, skill, experience, training or education to provide opinions on scientific,
18 technical or other specialized issues. A person does not qualify as an expert witness due to his or
19 her residency alone in the Black Diamond Community. Persons who do not qualify as expert
20 witnesses will be allowed to testify as members of the public.

21 Expert witnesses shall not be subject to any time limit. Expert witnesses will be subject to cross
22 examination. The method of cross-examination will be addressed in the second prehearing order.

23 C. Time Limits. The general public will be subject to a time limit of ten minutes per
24 speaker. A more detailed rule on time limits is quoted from the sign-up sheet notice the Examiner
25 provided to staff as follows:

26 *Persons who wish to testify may reserve time in advance on the posted sign-up
sheets. Each person shall be allowed up to ten minutes to speak. Up to six persons
shall be assigned to each hour of hearing and those persons will speak in the order
in which they have signed up. Persons may cede their entire ten minute allocation to
another speaker, provided they are present at hearing to cede their time. Persons
who have a disability that prevents them from being present at the hearing need not
be present to cede their time. The recipients of any ceded time may schedule their
additional time on the sign-up sheets, i.e. "John Smith, using ceded time". One
additional sign up slot must be filled in for each ten minutes of time ceded, e.g. if a
person will use their time and ceded time from four others to speak, they should fill
in five speaking slots. The maximum time that any speaker may testify during the
public comment portion of the hearings is one hour total. The grantor of the ceded
time need not be identified on the sign-up sheets, but will have to be identified at the*

1 *hearing. Any unused time during the hearing will be available to others present at*
2 *the hearing who have not already spoken or ceded their time.*

3 The Applicant and staff will each have 1.5 hours each to make initial presentations and one hour
4 each to make rebuttal/closing presentations. This extra time acknowledges the fact that they must
5 explain the project to the public and respond to all public concerns.

6 Sign-up sheets will be posted at the Black Diamond Community Development Department, 24301
7 Roberts Drive, Black Diamond, commencing July 1, 2011 during regular business hours. The
8 Community Development Department will be closed July 4 and 5, 2011 due to the holiday and a
9 furlough day. The sign-up sheets will also be present at the hearings themselves and people will be
10 able to sign up any time up until the public testimony portion of the hearing is completed, which is
11 anticipated to be July 16, 2011.

12 Members of the general public (defined as those speakers other than City staff, the Applicant and
13 expert witnesses) will only be allowed to speak once and cannot reserve time for an additional
14 speaking time, unless they are cut-off due to the close of a hearing day.

15 D. Hearing Format. The hearings will commence with a presentation from the
16 Applicant and then City staff on July 11, 2011, starting at 6:00 pm after opening comments from the
17 Hearing Examiner. All testimony at evening hearings will be taken until 9:20 pm. If the Applicant
18 and staff are finished prior to 9:20 pm on July 11, members of the public will be allowed to
19 commence their testimony. A sign-up sheet will be provided and members of the public will testify
20 in order of signing up.

21 General public testimony for the hearings scheduled for July 12, 13 and 14 will all commence at
22 6:10 pm after opening comments from the Hearing Examiner. All persons signed up to speak
23 should be present at the hour they are scheduled to speak. Any unused time will be made available
24 to others who have not spoken or ceded their time. Sign-up sheets will be available at the hearings
25 for people who wish to speak during the unused time.

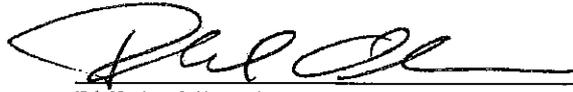
26 General public testimony on July 16, 2011 will commence at 9:10 am after opening comments from
27 the Hearing Examiner. General public testimony will be taken until 12:10 pm and from 1:10 pm to
28 2:10 pm. City staff and then the Applicant will then have one hour each to provide rebuttal and
29 closing comments. City staff and the Applicant may begin their testimony earlier than 2:10 pm if
30 there are no remaining general public comments. Additional hearing dates will be scheduled if there
31 is insufficient time to accommodate all members of the public who wish to speak.

32 Expert testimony will be scheduled once the expert witness notices required by this order have been
33 submitted. The hearings will be continued to specified dates for expert testimony, if any.

34 All testimony will be taken under oath.

1 E. Written Testimony. Written comments will be accepted for a period of two weeks
2 after the close of the verbal testimony portion of the hearing, which will include verbal expert
3 testimony. The Applicant and City shall be given one week to provide a written response to the
written comments.

4 ORDERED this 30th day of June, 2011.

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6 Phil A. Olbrechts
7 Hearing Examiner for Black Diamond
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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

PRE-HEARING ORDER II

This pre-hearing order is merged with Pre-Hearing Order I for ease of reference. A marked up version will be posted to identify additions and deletions to Pre-Hearing Order I.

I. Evidence Relied Upon

Evidence relied upon for this pre-hearing order is as follows:

- A. Testimony of pre-hearing conference held May 23, 2011.
- B. Exhibits P-1 through P-7 (admitted during pre-hearing conference.
- C. Pre-hearing motions¹ dated 6/13/11 by David Bricklin; Nancy Bainbridge; Robert Edelman and Cindy Wheeler.
- D. Responses to Pre-hearing motions filed by Jack Sperry, Cindy Proctor, Save Black Diamond, Bob Edelman, Peter Rimbos (2 of them), Yarrow Bay and City of Black Diamond.
- E. Replies submitted by Bob Edelman, Cindy Proctor and Yarrow Bay.

II. Rulings

¹ Brian Derdowski requested that his written comments dated May 23, 2011 5/23/11 (Ex. P-7) be considered a prehearing motion. Staff did not post his comments as a pre-hearing motion, but its content was replicated in other pre-hearing motions and the 5/23/11 document was fully considered by the Examiner for this pre-hearing order.

1 A. Scope. The scope of the development agreement hearings is broad and encompasses
2 permitted land uses, mitigation measures, development conditions, vesting periods and all other
3 elements identified as development standards in RCW 36.70B.180(3). The scope is broad only
4 because the issues that can be voluntarily addressed by the Applicant and the City are broad. The
5 development agreement process can only compel the Applicant to implement the conditions of
6 approval of the approved master plans. Hearing participants should understand that if they address
7 development issues beyond implementation of master plan conditions, their concerns can only be
8 addressed if the Applicant is willing to address them.

9 A major reason why the scope is relatively broad in this proceeding is because Black
10 Diamond regulations limit Council review of the agreements to closed record review. *See* BDMC
11 18.08.070. The net result is that the only opportunity for the public to provide new evidence that
12 can be considered by the Council is in the hearing in front of the Hearing Examiner. Consequently,
13 the Examiner must admit any evidence that would be relevant to Council review, even if that
14 evidence may not be relevant to the Examiner's review. As shall be discussed, the issues that
15 should be addressed by the Hearing Examiner are more narrow than those considered by the City
16 Council.

17 The Applicant and City argue that the scope of the hearing is primarily limited to
18 implementing the conditions of approval of the master plans. The Black Diamond and state
19 regulations do not support this position. BDMC 18.98.090 does provide that a development
20 agreement shall implement MPD conditions of approval. However, nothing in this provision states
21 that the development agreement shall be limited to this function. Certainly, if the Applicant came
22 forward and requested that the development agreement address other issues, the City would be hard
23 pressed to conclude that its code or any other legal authority precluded that consideration. RCW
24 36.70B.170-230, which governs development agreements, also does not limit development
25 agreements to implementing conditions of approval. Those statutes are notably silent on the scope
26 of development agreements, merely providing that "*a development agreement must set forth the
development standards and other provisions that shall apply to and govern and vest the
development, use, and mitigation of the development of the real property for the duration specified
in the agreement.*" *See* RCW 36.70B.170(1). RCW 36.70B.170(3) defines a development standard
to include development restrictions such as permitted uses, mitigation measures, development
conditions, vesting and "*any other appropriate development requirement or procedure*".

The scope of what can be included in the development agreements should not be confused
with what can be required as opposed to requested from the Applicant. As noted by the City,
BDMC 18.98.090 requires the Applicant to enter into a development agreement to implement MPD
conditions of approval. RCW 36.70B.210 provides that development agreements may not be used
to require a developer to provide for any financial contributions or mitigation measures "*except as
expressly authorized by other applicable provisions of state law.*" Since the City has made approval
of a development agreement a requirement for MPD approval, it arguably² cannot condition

26 Technically the prehearing order does not need to address what can be required as opposed to voluntarily provided
by the Applicant. Any comments made on this issue are dicta and would have no preclusive effect. The issue is

1 participation in a development agreement upon terms that the Applicant would not otherwise be
2 compelled to accept by state law. At this stage of permit review it appears that the only
3 requirements that can be imposed in the development agreements is implementation of MPD permit
4 conditions. The parties are free to identify other legal requirements that may apply at this time as
5 well.

6 Realistically, it is unlikely that the City Council will both be able and willing to provide
7 much incentive for the Applicant to agree to any mitigation beyond that required by the MPD
8 conditions of approval. Any testimony or other evidence on voluntary conditions will probably not
9 yield anything constructive and is not encouraged. Of course, the parties may incorporate evidence
10 they provided during the MPD hearings by reference if that facilitates testimony.

11 The primary and ideally exclusive focus of the development agreement hearings should be
12 on whether the terms of the agreements implement the MPD conditions of approval. In assessing
13 this issue, compliance with MPD criteria can and probably will be a central focus of concern. The
14 MPD conditions were imposed in order to satisfy the City's MPD criteria. Many of these conditions
15 of approval deferred specific compliance to the development agreements. Consequently, in order to
16 determine whether a deferred issue has been addressed as intended in a development agreement, the
17 primary inquiry should be whether the term satisfies MPD permitting criteria.

18 One issue that can't be addressed is the validity of the MPD conditions of approval. As
19 noted by the Examiner during the prehearing conference, the MPD approval and conditions are
20 perfect so far as the development agreement hearings are concerned. Obviously, the documents are
21 not actually perfect. No permit approval for a project of this complexity could be. However, the
22 development agreement process cannot be used to modify those approvals. The courts have been
23 very clear that permit decisions cannot be revisited except under a timely appeal. See *Chelan
24 County v. Nykreim*, 146 Wn.2d 904 (2002); *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005).
25 As previously discussed, requests to the Applicant to voluntarily agree to additional and/or more
26 restrictive mitigation can be made, but any arguments that the MPD approvals should be otherwise
modified are strictly beyond the scope of the MPD hearings.

19 **B. Role of Examiner.** In order to maximize fairness and equal participation to all
20 hearing participants, the Examiner will conduct himself as a quasi-judicial decision maker. This
21 may or may not be required by the law, but it is most consistent with the tasks assigned to him. The
22 tasks of an examiner generally include an objective application of law to facts and the conduct of a
23 hearing process that provides for fair and equal participation. There is also nothing illegal or
24 prejudicial in voluntarily assuming a quasi-judicial role if it's not legally mandated.

24 To make this more comprehensible to citizen participants, acting in a quasi-judicial capacity
25 means that the Examiner will conduct himself as a judge by ensuring that any information he

26 addressed only to enlighten hearing participants as to the significance of comments made on issues beyond
implementing conditions of approval, i.e. not very much unless the Applicant is willing to address them.

1 considers in making a recommendation to the City Council is made available to all hearing
2 participants and that he disclose anything that would appear to make him biased in his decision
3 making. Pursuant to these rules the Examiner will not engage in any "ex parte" communications
4 with any parties except staff on necessary procedural matters. The Examiner will not engage in
5 conversations about the project with the Applicant without project opponents present and vice-
6 versa. Any inadvertent communications will be disclosed at hearing so all other hearing participants
7 will have an opportunity to address them.

8 As a quasi-judicial decision maker the Examiner will also avoid making recommendations
9 on policy issues beyond compliance with applicable law. "Applicable law" includes the BDMC
10 18.98.090 mandate to implement the MPD conditions of approval in a development agreement.
11 Except for legal issues, the citizens of Black Diamond and in particular its elected representatives
12 are in a far better position than the Examiner to make value choices on the future development of
13 the City. Many policy choices can be evaluated as to consistency with the City's comprehensive
14 plan, a legal issue, and the Examiner will probably make comments at that level. When applicable
15 law does not compel any particular result the Examiner will most likely limit his recommendations
16 to the options legally available to the City Council.

17 C. Hearing Date. The development agreements will commence on July 11, 2011
18 pursuant to the public notice issued by City staff. The hearing was scheduled as ordered by the
19 Examiner at the May 23, 2011 pre-hearing conference, which was 30 days from the posting at the
20 City's website of a final development agreement and staff report. Written comments will be
21 accepted for two weeks following the close of the verbal testimony portion of the hearings,
22 including expert testimony, which will give the parties at least seven weeks to review and comment
23 upon the final documents. Although voluminous, the exhibits have remained substantially the same
24 since they were released to the public in April, 2011. The development agreements themselves are
25 "only" about 150 pages each. These are lengthy documents, but by the end of the hearing process
26 the parties will have had almost two months or longer to review them.

18 D. Consolidation. The Villages and Lawson Hills MPD development agreement
19 hearings are consolidated into one hearing. Any comments submitted into the hearing will be taken
20 as applying to both MPDs unless the comments direct otherwise or are clearly applicable to only one
21 specific MPD.

21 E. Rules of Procedure. The Rules of Procedure adopted during the MPD hearings will
22 remain in effect, except for minor changes to Rule 2.05. The modification to Rule 2.05 is that
23 service of all documents will be deemed complete upon the receipt of the document by the City as
24 opposed to the date the document is deposited in US mail facilities. A copy of the Rules of
25 Procedure should be posted with this prehearing order. Any order issued by the Examiner shall
26 supersede any conflicting Rule of Procedure.

25 F. Transcripts. The Applicant is not required by state or local law to have any transcript
26 prepared during the hearing. It does so for its own convenience and its election to do so does not

1 create an equitable or legal responsibility to make that service available to other parties. However,
2 the Applicant should be aware that as soon as those transcripts are provided to the City or to the
3 Examiner they are considered public documents subject to disclosure. The transcripts the Applicant
4 provided to the Examiner for the MPD hearings were of immeasurable assistance and significantly
5 reduced the time and expense the Examiner incurred in preparing a recommendation to the Council.
6 If the Applicant chooses to provide a copy of the transcripts to the Examiner for review of the
7 development agreements, the sooner those transcripts are submitted the sooner the Examiner will be
8 able to issue his recommendation.

9
10 G. Expert Witnesses. When the Examiner issued his order on the hearing date at the pre-
11 hearing conference, he did not anticipate that the issue would be revisited in the prehearing motions.
12 He had intended to issue an order for the scheduling of expert witnesses as the prehearing motions
13 came in. When it became evident that parties were still going to address the hearing date in the
14 prehearing motions, the Examiner had to wait until all arguments had been submitted prior to
15 addressing scheduling. Now that the motions have all been submitted, it is too late to require the
16 submission of expert witness information in advance of the hearing. Consequently, expert testimony
17 will be scheduled for the week commencing July 18, 2011. Parties wishing to submit verbal expert
18 testimony shall supply written notice of this testimony to City staff by 5:00 pm July 8, 2011. Any
19 parties wishing to provide rebuttal expert testimony shall provide notice of the testimony by 5:00
20 pm July 13, 2011. The notices must be received by the City by the dates specified above at the City
21 address identified at Section D of this order or at the email address of Steve Pilcher at
22 SPilcher@ci.blackdiamond.wa.us. The notices shall provide the following information:

- 23 a. Dates and times of availability to testify the week of July 18, 2011.
- 24 b. Curriculum vitae of the expert.
- 25 c. A summary of the issues that will be addressed in the expert testimony. The summary
26 should be specific enough to identify what portions of the development agreements
are addressed and what deficiencies the expert believes exist or don't exist with those
provisions.
- d. The amount of time the expert will need to testify (excluding cross-examination).

27 The Examiner will schedule proposed expert witnesses if they in fact qualify as expert witnesses and
28 the notices identified above have been provided as directed. An expert witness is a person that is
29 qualified by knowledge, skill, experience, training or education to provide opinions on scientific,
30 technical or other specialized issues. *See* ER 702. A person does not qualify as an expert witness
31 due to his or her residency alone in the Black Diamond Community. Persons who do not qualify as
32 expert witnesses will be allowed to testify as members of the public.

33 Expert witnesses shall not be subject to any time limit. Expert witnesses will be subject to cross
34 examination at the end of each of their testimony. Persons who wish to cross examine the witness
35 shall line up at the podium to ask their questions upon the completion of the expert's testimony.
36 Attorneys shall be allowed to ask questions first, followed by any other members of the public in the
order in which they've entered the line. Each person cross examining the expert witness shall only

1 be allowed to ask questions once per witness, provided that the Examiner may within his discretion
2 allow re-cross for any new information provided under redirect examination. Duplication of cross-
3 examination questions will not be allowed.

4 H. Time Limits. The general public will be subject to a time limit of ten minutes per
5 speaker. A more detailed rule on time limits is quoted from the sign-up sheet notice the Examiner
6 provided to staff as follows:

7 *Persons who wish to testify may reserve time in advance on the posted sign-up*
8 *sheets. Each person shall be allowed up to ten minutes to speak. Up to six persons*
9 *shall be assigned to each hour of hearing and those persons will speak in the order*
10 *in which they have signed up. Persons may cede their entire ten minute allocation to*
11 *another speaker, provided they are present at hearing to cede their time. Persons*
12 *who have a disability that prevents them from being present at the hearing need not*
13 *be present to cede their time. The recipients of any ceded time may schedule their*
14 *additional time on the sign-up sheets, i.e. "John Smith, using ceded time". One*
15 *additional sign up slot must be filled in for each ten minutes of time ceded, e.g. if a*
16 *person will use their time and ceded time from four others to speak, they should fill*
17 *in five speaking slots. The maximum time that any speaker may testify during the*
18 *public comment portion of the hearings is one hour total. The grantor of the ceded*
19 *time need not be identified on the sign-up sheets, but will have to be identified at the*
20 *hearing. Any unused time during the hearing will be available to others present at*
21 *the hearing who have not already spoken or ceded their time.*

22 The Applicant and staff will each have 1.5 hours each to make initial presentations and one hour
23 each to make rebuttal/closing presentations. This extra time acknowledges the fact that they must
24 explain the project to the public and respond to all public concerns.

25 Sign-up sheets will be posted at the Black Diamond Community Development Department, 24301
26 Roberts Drive, Black Diamond, commencing July 1, 2011 during regular business hours. The
Community Development Department will be closed July 4 and 5, 2011 due to the holiday and a
furlough day. The sign-up sheets will also be present at the hearings themselves and people will be
able to reserve time through 2:10 pm on July 16, 2011.

Members of the general public (defined as those speakers other than City staff, the Applicant and
expert witnesses) will only be allowed to speak once and cannot reserve time for an additional
speaking time, unless they are cut-off due to the close of a hearing day.

The rights of the public to speak will not be modified because they happen to belong to an
organization. If someone makes the effort to appear (unless disabled, as previously discussed) they
will have the same right to speak for ten minutes as any other member of the public.

1 I. Hearing Format. The hearings will commence with a presentation from the
2 Applicant and then City staff on July 11, 2011, starting at 6:00 pm after opening comments from the
3 Hearing Examiner. All testimony at evening hearings will be taken until 9:20 pm. If the Applicant
4 and staff are finished prior to 9:20 pm on July 11, members of the public will be allowed to
commence their testimony. A sign-up sheet will be provided and members of the public will testify
in order of signing up.

5 General public testimony for the hearings scheduled for July 12, 13 and 14 will all commence at
6 6:10 pm after opening comments from the Hearing Examiner. All persons signed up to speak
7 should be present at the hour they are scheduled to speak. Any unused time will be made available
8 to others who have not spoken or ceded their time. Sign-up sheets will be available at the hearings
for people who wish to speak during the unused time.

9 General public testimony on July 16, 2011 will commence at 9:10 am after opening comments from
10 the Hearing Examiner. Sign-up sheets will be available at the hearing for the first hour (until 10:00
11 am). General public testimony will be taken until 12:10 pm and from 1:10 pm to 2:10 pm. If this
12 does not provide sufficient time to accommodate all those who signed up to speak, additional
13 hearing date(s) will be scheduled as needed. Only those persons who signed up prior to 10:00 am,
14 including signing up through the reserve sign-up sheets posted at City Hall pursuant to subsection C
15 herein, will be allowed to speak. Upon the completion of all general public testimony, City staff
and then the Applicant will then have one hour each to provide rebuttal and closing comments.
Expert testimony will be scheduled once the expert witness notices required by this order have been
submitted. The hearings will be continued to specified dates for expert testimony, if any. When
possible, expert rebuttal witnesses will be scheduled for the same day as the expert rebutted.

16 All testimony will be taken under oath.

17 Written comments will be accepted from all parties for a period of two weeks after the close
18 of the verbal testimony portion of the hearing, which will include verbal expert testimony. All
19 parties shall then be given one week to provide a written response to all written comments
20 submitted at any time during the hearing and the verbal testimony submitted during the last two days
of verbal testimony. All parties shall then have two business days to provide a written reply to all
written responses. Specific dates will be given at the close of verbal testimony.

21 J. Completeness. Some hearing participants have asserted that the development
22 agreement is not complete enough for review. Completeness as a prerequisite to scheduling a
23 hearing is traditionally governed during prehearing review by staff. *See, e.g.,* RCW 36.70B.170.
24 Once an application is presented to the Examiner completeness becomes an issue for approval or
denial. Applications that do not contain sufficient information to assess compliance with applicable
law will be recommended for denial or conditions that bring the project into compliance³.

25 ³ Projects are sometimes conditioned for further staff level analysis and mitigation. There is little or no legal
26 authority on what degree of "delegation" in this manner is appropriate. Should these types of conditions become an
issue in this case, the Examiner would like to hear argument from the parties prior to addressing their validity.

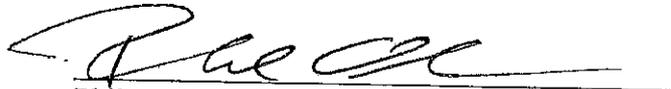
1
2 K. Miscellaneous. Venue at Sawyer Woods Elementary School is appropriate. It is the
3 largest more reasonably available venue in the area. It does not appear that there is any larger venue
4 reasonably available, but the Examiner needs more information on this issue should it arise. If the
5 venue is not sufficient to accommodate the public and there is no larger venue reasonably available
6 the most likely solution will be to take the testimony of those who can be accommodated and make
7 audio recordings of the testimony available to those who cannot be accommodated. Of course, all
8 persons who wish to testify that evening but cannot be accommodated will be given an opportunity
9 to testify at another time.

10 All hearing participants will be allowed to object to evidence when it is submitted. Failure
11 to do so will be considered a waiver of objection.

12 Non-expert witnesses will not be subject to cross-examination. Requests for clarification
13 can be made through the hearing examiner.

14 "Party" as used in this order refers to all hearing participants.

15 ORDERED this 6th day of July, 2011.

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Phil A. Olbrechts
Hearing Examiner for Black Diamond

Rachel Pitzel

From: Brenda Martinez
Sent: Monday, July 11, 2011 11:23 AM
To: Rachel Pitzel
Subject: FW: Expert witnesses - (same email just sent to Steve Pilcher)

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Monday, July 11, 2011 9:34 AM
To: Brenda Martinez
Cc: Stacey Borland; Steve Pilcher; Andy Williamson
Subject: Expert witnesses - (same email just sent to Steve Pilcher)

Please post this email.

The following witnesses submitted by Save Our Black Diamond qualify as expert witnesses: Llyn Doremus, Sarah Cook and Chris Breeds. Anyone wishing to present rebuttal testimony should provide dates of availability for their witnesses for the week of July 18 and the other information as outlined on Page 5 of Pre-Hearing Order II. Scheduling a rebuttal expert on the same date as the witness rebutted is preferred.

Please advise King County that it has not provided curriculum vitae as required by the prehearing order. King County has until 5:00 pm tomorrow to provide that information. The curriculum vitae can simply be a couple sentences describing the witnesses' education and experience. Anyone who would like to submit rebuttal testimony to the witnesses proposed by King County should consider it likely that the Examiner will find them qualified to testify as experts. The deadline for submitting rebuttal expert witness information will remain July 13, 2011 as outlined on page 5 of Pre-Hearing Order II.

The use of expert witnesses to rebut non-expert testimony was not addressed in the prehearing order. From a scheduling standpoint it would be easiest to incorporate this testimony into the record in writing as part of the two week written comment period that extends beyond the close of verbal testimony. Persons who wish to comment on this issue should do so by email to Mr. Pilcher, SPilcher@ci.blackdiamond.wa.us, by 5:00 pm tomorrow (July 12, 2011). The Examiner will rule on the issue at the beginning of the hearing tomorrow (July 12, 2011).

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Wednesday, July 06, 2011 2:21 PM
To: 'Brenda Martinez' (BMartinez@ci.blackdiamond.wa.us)
Cc: 'Stacey Borland'; 'Steve Pilcher'; Andy Williamson (AWilliamson@ci.blackdiamond.wa.us)
Subject: FW: Pre-Hearing Order II pdf

Got a message that this didn't get through. Hopefully it will this time.

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Wednesday, July 06, 2011 10:14 AM
To: 'Stacey Borland'
Cc: 'Brenda Martinez'; 'Steve Pilcher'; 'Andy Williamson'
Subject: RE: Pre-Hearing Order II pdf

Attached.

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Wednesday, July 06, 2011 9:24 AM
To: 'Stacey Borland'
Cc: 'Brenda Martinez'; 'Steve Pilcher'; 'Andy Williamson'
Subject: RE: Pre-Hearing Order PDF, ready for posting

Attached is the mark up for the Prehearing Order II as well as the procedural rules. Please post both. I will be sending over a final draft signed Prehearing Order II as well. As I noted in the Order, Pre-Hearing Order II is merged with Pre-Hearing Order I for ease of reference. The mark up identifies the changes made to Pre-Hearing Order I to make Pre-Hearing Order II.

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Thursday, June 30, 2011 3:52 PM
To: 'Stacey Borland'
Cc: 'Brenda Martinez'; 'Steve Pilcher'; 'Andy Williamson'
Subject: Pre-Hearing Order PDF, ready for posting

Attached.

From: Stacey Borland [<mailto:SBorland@ci.blackdiamond.wa.us>]
Sent: Thursday, June 30, 2011 1:50 PM
To: Phil Olbrechts
Cc: Brenda Martinez; Steve Pilcher; Andy Williamson
Subject: RE: Pre-hearing motion

We have to be out of the school by 10:00 during the week nights. Is it acceptable if we have the last speaker sign-up at 9:20pm, then schedule Hearing Examiner nightly closing comments at 9:30? This would then give everyone 15-20 minutes to vacate the building so we are all out by 10:00pm.

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Thursday, June 30, 2011 1:31 PM
To: Stacey Borland
Cc: Brenda Martinez; Steve Pilcher; Andy Williamson
Subject: RE: Pre-hearing motion

Great, we'll need six slots per hour starting the second night of hearing (i.e. 7/12, 7/13, 7/14) from 6:00 pm to 10:00 pm. The slots should identify the time, e.g. 6:10, 6:20, 6:30 etc. The first slot at 6:00 pm should be reserved for "Examiner Comments". We'll also need six slots per hour starting at 9:00 am on 7/16 from 9-12 and 1-3 pm. The sheets (or notice accompanying the sheets) should state as follows:

"Persons who wish to testify may reserve a ten minute slot in advance by reserving a time on the posted sign-up sheets. Each person shall be allowed up to ten minutes to speak. Persons may cede their entire ten minute allocation to another speaker, provided they are present at hearing to cede their time. Persons who have a disability that prevents them from being present at the hearing need not be present to cede their time. The recipients of any ceded time may schedule their additional time on the sign-up sheets, i.e. "John Smith, using ceded time". The maximum time that any speaker may testify during the public comment portion of the hearings is one hour total. The grantor of the ceded time need not be identified on the sign-up sheets, but will have to be identified at the hearing. Any unused time during the hearing will be available to others present at the hearing who have not already spoken or ceded their time"

From: Stacey Borland [<mailto:SBorland@ci.blackdiamond.wa.us>]
Sent: Thursday, June 30, 2011 1:07 PM
To: Phil Olbrechts

Cc: Brenda Martinez; Steve Pilcher; Andy Williamson
Subject: Pre-hearing motion

We could post sign-up sheets at our Community Development building tomorrow morning. They would be available for people to sign up during business hours 8:30-5:00 Monday-Friday excluding the holiday and furlough day (July 4 & 5). Unfortunately, the City does not have a secure area to post the sheets for after hour sign ups. We suggest having the sign-up sheets available each night of the hearing for those people who couldn't make it in prior to the start. Please provide us with specifics for the sign-up sheets (i.e. do you want just a list of names or something more specific). Please send your correspondence to these addresses (we've requested that the public do so as well):

spilcher@ci.blackdiamond.wa.us
sborland@ci.blackdiamond.wa.us
awilliamson@ci.blackdiamond.wa.us
bmartinez@ci.blackdiamond.wa.us

Thank you

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Thursday, June 30, 2011 11:38 AM
To: Stacey Borland
Subject: RE: Omitted pre-hearing motion

Thanks. I'm going to have sign up procedure outlined in the order for public testimony. How soon can you post sign-up sheets and how would you like to make them available to the public? I was thinking you could post them at City Hall or outside Council chambers. Whatever is most accessible and (preferably) available after hours.

Rachel Pitzel

From: Brenda Martinez
Sent: Tuesday, July 12, 2011 2:04 PM
To: Rachel Pitzel
Subject: FW: Expert witnesses - (same email just sent to Steve Pilcher)

-----Original Message-----

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Tuesday, July 12, 2011 1:06 PM
To: Steve Pilcher; Brenda Martinez
Subject: RE: Expert witnesses - (same email just sent to Steve Pilcher)

Thank you. Please post this email.

Paul Reitenbach and Matthew Nolan qualify as expert witnesses. Anyone wishing to present rebuttal testimony should provide dates of availability for their witnesses for the week of July 18 and the other information as outlined on Page 5 of Pre-Hearing Order II. Scheduling a rebuttal expert on the same date as the witness rebutted is preferred.

-----Original Message-----

From: Steve Pilcher [<mailto:SPilcher@ci.blackdiamond.wa.us>]
Sent: Tuesday, July 12, 2011 10:47 AM
To: olbrechtslaw@gmail.com
Subject: FW: Expert witnesses - (same email just sent to Steve Pilcher)

Below is King County's response to your request for further information regarding their proposed expert witnesses.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

From: Smith, Lauren [<mailto:Lauren.Smith@kingcounty.gov>]
Sent: Tuesday, July 12, 2011 10:46 AM
To: Steve Pilcher
Cc: Reitenbach, Paul; Nolan, Matthew
Subject: RE: Expert witnesses - (same email just sent to Steve Pilcher)

Thanks Steve. Please see CVs for Paul Reitenbach and Matthew Nolan:

Paul Reitenbach, Senior Policy Analyst

Mr. Reitenbach has 32 years' experience in land use and community planning for King County. He managed King County's planning efforts for the master planned communities in the Bear Creek and Snoqualmie Ridge areas. His current responsibilities include managing the updates of the King County Comprehensive Plan and working on the update of the Countywide Planning Policies. He has a B.A in Geography (1972) and an M.A. in Urban Studies (1977) from the University of Akron, Ohio.

Matthew Nolan, P.E.

Mr. Nolan currently serves as King County Traffic Engineer and Manager of the King County Traffic Engineering Section, positions he has held for the last five years of his more than 18 years' of service with King County Department of

Transportation's Road Services Division. A graduate of Oregon State University with a Bachelors of Science in Civil Engineering, Mr. Nolan has 25 years of engineering and management experience and is a registered Professional Engineer in the State of Washington.

From: Steve Pilcher
[\[mailto:SPilcher@ci.blackdiamond.wa.us\]](mailto:SPilcher@ci.blackdiamond.wa.us)<[mailto:\[mailto:SPilcher@ci.blackdiamond.wa.us\]](mailto:[mailto:SPilcher@ci.blackdiamond.wa.us])>
Sent: Monday, July 11, 2011 11:39 AM
To: Smith, Lauren
Subject: FW: Expert witnesses - (same email just sent to Steve Pilcher)

Please note paragraph #2 in the Examiner's email, below.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

From: Phil Olbrechts
Sent: Monday, July 11, 2011 9:34 AM
To: Brenda Martinez
Cc: Stacey Borland; Steve Pilcher; Andy Williamson
Subject: Expert witnesses - (same email just sent to Steve Pilcher)

Please post this email.

The following witnesses submitted by Save Our Black Diamond qualify as expert witnesses: Llyn Doremus, Sarah Cook and Chris Breeds. Anyone wishing to present rebuttal testimony should provide dates of availability for their witnesses for the week of July 18 and the other information as outlined on Page 5 of Pre-Hearing Order II. Scheduling a rebuttal expert on the same date as the witness rebutted is preferred.

Please advise King County that it has not provided curriculum vitae as required by the prehearing order. King County has until 5:00 pm tomorrow to provide that information. The curriculum vitae can simply be a couple sentences describing the witnesses' education and experience. Anyone who would like to submit rebuttal testimony to the witnesses proposed by King County should consider it likely that the Examiner will find them qualified to testify as experts. The deadline for submitting rebuttal expert witness information will remain July 13, 2011 as outlined on page 5 of Pre-Hearing Order II.

The use of expert witnesses to rebut non-expert testimony was not addressed in the prehearing order. From a scheduling standpoint it would be easiest to incorporate this testimony into the record in writing as part of the two week written comment period that extends beyond the close of verbal testimony. Persons who wish to comment on this issue should do so by email to Mr. Pilcher, SPilcher@ci.blackdiamond.wa.us<<mailto:SPilcher@ci.blackdiamond.wa.us>>, by 5:00 pm tomorrow (July 12, 2011). The Examiner will rule on the issue at the beginning of the hearing tomorrow (July 12, 2011).

Rachel Pitzel

From: Rebecca Olness
Sent: Tuesday, July 12, 2011 2:32 PM
To: Rachel Pitzel
Subject: FW: Development Agreement hearings

-----Original Message-----

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Tuesday, July 12, 2011 2:28 PM
To: Steve Pilcher
Cc: Rebecca Olness; Brenda Martinez; Stacey Borland
Subject: RE: Development Agreement hearings

Please post this email.

It is a little surprising that we appear to be seeing less participation during the hearing than at the prehearing conference. As to why so many people have scheduled their presentations at the end of the week, one plausible reason is that they're simply maximizing the time they have to prepare. The hearings were scheduled just days after the reply briefs on the prehearing motions were due, giving people little time to incorporate the rulings on the motions into their presentation strategy. From the written materials I've received so far (especially those from the technical citizen's committee) and some of the testimony, it's clear that some people are investing a tremendous amount of time in their comments and they need a reasonable amount of time to prepare them. Given the somewhat compressed time frame in which we're working, I am a little reluctant to change the rules in mid-stream on hearing participants. I also recognize that every minute of testimony comes at a tremendous cost to the City and/or Applicant, not just in terms of room rental time but also including the numerous staff and consultants that are necessary to run the meetings.

Here is how I will address the situation:

1. Obviously, if there are any "dead" periods I will ask persons scheduled to speak later that evening to do so earlier. Unfortunately, I can't expect this of people who aren't at the hearing room yet because it's not yet their speaking time. One of the main reasons for the hearing reservations was to enable people to not have to be at the hearing room at an earlier time. We also can't expect hearing participants to be monitoring the City's web site each day to ensure that they're reserved time is still valid. If I change the rules on the sign-in sheets, we will probably end up having people show up for their reserved time with the hearing long over for that day.
2. I would try to remove gaps for future sign ups by filling in the undesirable slots with "reserved until open slots filled". If staff has any available time, and I know that's unlikely, you may want to call up some of the people who signed up and ask if they'd be willing to be rescheduled. From what I recall there was one person signed up for 9:00 pm this evening and that person would be an ideal person to call.
3. The prehearing order states that all persons who wish to speak must sign up by 10:00 am on July 16. In a worst case scenario, that gives sufficient time to hear 45 people if we don't hear the rebuttal from the City and Applicant and that's if each person takes up the full ten minutes.

As noted in the prehearing order, people have to be present on Saturday to testify or they are removed from the sign up list. If anyone is left after going through that list, I would be comfortable with finishing the remaining (likely few) participants in the City Council chambers while we do the expert testimony the following week. If the Council Chambers aren't big enough, we fill the room with what's safe and post the audio of the testimony. People will have their two week written response time to comment on the audio if they weren't able to participate in the hearing room. Given that the Sawyer Woods facility was available for testimony for a week and few people took advantage of it, I doubt that a reviewing court will have any problem with the City's use of a smaller facility to finish off the tail end of the testimony.

4. I had planned on asking if the City and Applicant would prefer to finish their rebuttal time at the conclusion of the expert testimony so they could address that in their rebuttal as well. That would have been both for the benefit of staff and applicant (who arguably have a due process right to provide a verbal rebuttal at the conclusion of all verbal testimony) as well as giving me the opportunity to compile some questions. If there is no time on Saturday for rebuttal that would be easy to accommodate, perhaps by even doing it at the end of expert testimony at the same venue. If not held at Sawyer Woods, the audio would be posted and people would be encouraged to submit questions of staff and the applicant in advance in writing in case they could not make the rebuttal time.

The accommodations identified above may be enough to address the City's concerns without necessitating any significant revision to the prehearing order. If that is insufficient I will be happy to discuss it further this evening at the hearing.

-----Original Message-----

From: Steve Pilcher [mailto:SPilcher@ci.blackdiamond.wa.us]
Sent: Tuesday, July 12, 2011 10:44 AM
To: olbrechtswlaw@gmail.com
Cc: Rebecca Olness; Brenda Martinez; Stacey Borland
Subject: Development Agreement hearings

Mr. Olbrechts:

As of this morning, there are 6 ten minute time slots filled for tonight, 7 slots on Wednesday, 10 on Thursday and 3 on Saturday. (The actual number of speakers is less, as some indicate they will be using "ceded" time from others). No new names are on the "rolling" sign-up sheet. (Some of the people who spoke last night had signed up for specific time slots, but took advantage of the available time last evening to testify). We have expected that more individuals would wish to speak than we are seeing so far.

In the interest of both efficiency and avoiding a potential continuation of public testimony beyond Saturday, we suggest:

1. Announcing that, given the hours of open time that remains available for testimony through Saturday, that you rule that Saturday will be the conclusion of open public testimony. (Expert testimony can still occur next week).
2. After opening the hearing each evening, announcing that any individual who signed up to speak that particular evening may be directed to speak earlier than scheduled if no one else from the audience comes forward. This will avoid "dead time" where everyone sits around waiting (for perhaps half an hour or more) to hear one or two other individuals testify.

We have use of Sawyer Woods Elementary School through Saturday. The Kent School District charges for use of the building for the full duration of scheduled time, regardless of whether the hearings are going on or not, another reason it is our hope that testimony can be concluded this week, as originally planned.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

Rachel Pitzel

From: Brenda Martinez
Sent: Tuesday, July 12, 2011 8:15 PM
To: Rachel Pitzel
Subject: FW: DA Hearings - Response regarding Expert Disclosures

-----Original Message-----

From: phil olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Tuesday, July 12, 2011 4:53 PM
To: Brenda Martinez
Cc: Steve Pilcher
Subject: FW: DA Hearings - Response regarding Expert Disclosures

Please post.

-----Original Message-----

From: phil olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Tuesday, July 12, 2011 4:47 PM
To: 'Steve Pilcher'
Subject: RE: DA Hearings - Response regarding Expert Disclosures

Please forward this email and the Applicant's objections to King County, SAVE and the Applicant. I will rule by Noon Thursday and will consider any written response emailed by SAVE or King County by 5:00 pm on Wednesday, 7/13 and any written reply from the Applicant by noon on Thursday. The written responses can be emailed directly to me at olbrechtslaw@gmail.com if it is also cc'd to you (Steve Pilcher). The parties to this email may find it useful to refer to Pre-Hearing Order II of this case to see my standing ruling on the scope of the development agreement hearings. I am open to the consideration that expert testimony can be held to a higher standard of relevance than citizen testimony. To a certain extent I have liberally applied relevance for the public in order to ensure that the land use process remains accessible and concerned citizens aren't forced to hire an attorney to express their concerns or determine how they can participate.

Expert testimony consumes far more public participation resources than citizen testimony and it is arguably fair to expect persons who can provide expert testimony to have a more detailed understanding of relevancy and how to participate.

-----Original Message-----

From: Steve Pilcher [<mailto:SPilcher@ci.blackdiamond.wa.us>]
Sent: Tuesday, July 12, 2011 4:12 PM
To: olbrechtslaw@gmail.com
Subject: FW: DA Hearings - Response regarding Expert Disclosures

Please see the attached, received from Ms. Rogers.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

From: Nancy Rogers [<mailto:NRogers@Cairncross.com>]
Sent: Tuesday, July 12, 2011 3:57 PM
To: Steve Pilcher
Cc: Stacey Borland; Brenda Martinez; Andy Williamson
Subject: DA Hearings - Response regarding Expert Disclosures

Please see attached.

CH&
Nancy Bainbridge Rogers
Attorney
Cairncross & Hempelmann
524 Second Ave., Ste. 500
Seattle, WA 98104-2323
nrogers@cairncross.com<<mailto:nrogers@cairncross.com>>
Direct phone 206-254-4417
Office fax 206-587-2308

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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

Order on Expert Testimony

As discussed more detail below, expert testimony from Save Black Diamond and King County will be allowed. However the total time for King County will be limited to one hour and the time for Save Black Diamond will be limited to two hours. Significant restrictions will apply to the testimony of both parties as outlined below. The hearings will be held on July 21, 2011 if hearing facilities are available.

Clarification

The Examiner Rules of Procedure and Pre-Hearing Order II do not prohibit expert testimony from being presented in writing. The restrictions on relevancy of this order are limited to verbal testimony. As discussed in more detail below, verbal expert testimony consumes a significant amount of public participation resources. That factor is not as significant for written expert testimony, since written input takes much less staff and attorneys to process than verbal. Further, written expert testimony will create no need to further delay the completion of the hearings. Save Black Diamond and King County both are free to supplement their verbal testimony with written comments on issues that are precluded from verbal testimony from this order. Of course, the Applicant may supply all of its expert testimony in writing as well. Requests for and evidence supporting supplemental conditions will be considered if submitted in writing.

The right of cross examination in Pre-Hearing Order II only applies to verbal testimony. The Order was not intended or worded to create a right of cross examination of written testimony, as indicated in the language of the Order that provides that expert witnesses shall be subject to cross-examination "at the end of each of their testimony". Professional reports such as geotechnical

1 reports, biological assessments and habitat management plans are routinely submitted in land use
2 hearings without the presence of the author and it would be highly disruptive and costly to require
3 the presence of the expert for every hearing. The courts have ruled there is a due process right to
4 cross examination, but the only time that issue has been addressed was when the expert "testified on
5 behalf of parties at hearing". Chrobuck v. Snohomish County, 78 Wn.2d 858 (1971). Further, in
6 this case the parties will have ample opportunity to respond in writing to any written expert
7 opinions.

8 **Definitions**

9 Reference is made at various points to "supplemental conditions". Supplemental conditions are
10 defined as conditions that can be added to the development agreements to address project impacts
11 but that are not necessary to implement MPD conditions of approval.

12 "MPDs" are the Lawson Hills and Villages Master Plan Developments.

13 "Development Agreement(s)" are the Lawson Hills and Villages development agreements.

14 **Background**

15 Given the public interest expressed at hearing on the procedural background of this ruling, this
16 Order may be revised as time permits to provide more specific dates for the submissions that lead to
17 this Order. As required by Pre-Hearing Order II, King County and Save Black Diamond submitted
18 disclosures of their proposed expert witnesses to the City of Black Diamond. The Hearing
19 Examiner determined that these witnesses qualified as expert witnesses and this determination was
20 posted on the City's website. King County's determination was posted later than that of Save Black
21 Diamond because King County did not initially supply all the expert witness information required in
22 Pre-Hearing Order II. The Applicant then submitted written objections to the witnesses on the
23 grounds of relevancy. Pre-Hearing Order II did not address how to voice objections over proposed
24 expert witnesses. The Applicant's objections were forwarded to the parties proposing the experts
25 for a response. The Examiner reviewed and ruled upon the Applicant's objections in order to
26 provide King County and Save Black Diamond time to prepare a response to the objection and to
prepare testimony in accordance to the ruling on the objection. As the Examiner has previously
ruled, participation in arguments for objections to witness testimony are limited to the objector and
the witness (and/or the witnesses representative).

27 **Distinguishing Expert from Lay Testimony**

28 Expert witnesses are treated differently than lay witnesses in this hearing for a number of reasons
29 and they will be held to a higher standard of relevancy. There are a number of reasons for this
30 disparate treatment. First, as previously discussed the courts have ruled that parties to a land use
31 hearing have a right to cross-examine expert witnesses. By contrast, cross-examination of law
32 witness testimony is usually discouraged or prohibited by local decision makers because it can

1 intimidate persons from testifying. Second, from a practical standpoint expert testimony generally
2 takes more time to present than lay person testimony because the testimony often addresses complex
3 issues that need to be laid out in detail in order to identify the grounds upon which opinions are
4 based. Third, expert testimony will often be given more weight and credibility than lay person
5 testimony on a given subject because it is based upon training and expertise. Finally, parties who
6 have the resources and expertise to provide expert testimony can generally be reasonably expected
7 to have a more detailed understanding of land use hearing procedures than the general public.

8 For the reasons stated above, experts in this proceeding are given more time to present their case
9 than lay persons. For the same reasons, experts will be held to a higher standard of relevancy for
10 their testimony to be admissible. As discussed in Pre-Hearing Order II, relevancy for development
11 agreements can be broadly construed because development agreements can include conditions that
12 supplement conditions that are necessary to implement the MPD approvals. In order to provide for
13 a process that is comprehensible to the general public, lay persons should be able to share any
14 concerns that could be potentially addressed in the development agreement, even for topics where
15 there is little likelihood that the Council will act upon them. To be much more particular than that
16 could extend the length of the hearings by triggering repeated and prolonged arguments on
17 relevancy. More likely than not, such arguments would create confusion, resentment and
18 intimidation, all inimical to an efficient and effective hearing process.

19 The considerations involved in assessing relevancy for expert testimony are markedly
20 distinguishable from lay person testimony. Expert testimony takes up considerably more public and
21 private resources than lay person testimony due to both the extended time to testify and the need to
22 use attorneys to both present and challenge the testimony. As previously mentioned, experts can
23 also be expected to have a more detailed understanding of land use procedures than the lay public.
24 In the interests of conducting an expeditious hearing as required by Examiner Procedural Rule 2.06,
25 expert testimony will only be admissible if it addresses conditions or terms necessary to implement
26 the MPD approvals or it is information that could be reasonably anticipated as of interest to the City
Council in negotiating supplemental conditions. Testimony that just duplicates information already
provided in the MPD hearings (including the EIS portion) is not reasonably anticipated as being of
any interest to the Council.

Restrictions on Testimony

21 Both Paul Reitenbach and Matthew Nolan have already testified at the MPD hearings on the same
22 subjects they would like to address in this hearing. None of that testimony may be repeated. Their
23 verbal testimony, if any remains, is limited to any new issues created by the proposed terms and
24 conditions of the development agreement or rural issues that were not addressed in their MPD
25 testimony. As to the latter testimony, impacts to rural areas are a significant consideration under the
26 Washington State Growth Management Act and are of significance to intergovernmental
coordination and relations between King County and the City of Black Diamond. For these reasons,
it is reasonably likely that the Council may find additional information useful in assessing the need
for supplemental conditions. The Examiner's recommendation on the MPDs identifies the

1 transcript pages of the testimony for Mr. Reitenbach and Mr. Nolan. The Applicant is requested
2 (but not required) to provide copies of these transcript pages to the expert witnesses and the
3 Examiner so that redundant testimony can be more easily identified during the hearing.

4 Sarah Cook and Llyn Doremus propose to provide testimony on sensitive area issues and
5 stormwater issues that have largely been comprehensively addressed in review of the MPD
6 applications and are also comprehensively addressed in the City's Sensitive Areas Ordinance and
7 stormwater regulations. Their verbal testimony will be limited to the issues disclosed in the 7/8/11
8 expert disclosure statement supplied by Save Black Diamond in addition to the following
9 restrictions:

- 10 1. Testimony shall be limited to the issue of whether the Development Agreement terms and
11 conditions adequately implement the MPD conditions of approval.
- 12 2. Supplemental conditions will not be addressed.
- 13 3. The adequacy of MPD and FEIS conditions of approval, findings and conclusions will not
14 be revisited.
- 15 4. The adequacy of City of Black Diamond development regulations, including its stormwater
16 and sensitive area regulations will not be addressed.
- 17 5. If sensitive area boundaries have been "agreed to" as contemplated in Condition 155 of the
18 Villages MPD and Condition 159 of the Lawson Hills MPD the witnesses may not revisit or
19 challenge the boundaries "agreed to".

20 Chris Breeds will have more latitude in his verbal testimony. It can be reasonably anticipated that
21 the City Council might be interested in negotiating some supplemental conditions that address the
22 fact that the boundaries to mine hazard areas are set by the development agreements and cannot be
23 changed even if additional severe mining hazards are identified. As noted in EIS testimony
24 submitted by the Applicant, the ability to identify mine hazards is somewhat speculative and
25 difficult. Further, it's likely that at least severe mine hazards can pose a significant threat to public
26 safety. It is plausible that over the 15+ year build out of the MPDs that the appearance of sink holes
or similar events could expose the existence of more mine hazards than those currently identified. It
may be a matter of concern to the Council that the City could become aware of newly discovered
severe mine hazard areas where single-family homes or other buildings could be built and have no
authority to address the issue. In addition to the issues that Sarah Cook and Llyn Doremus may
address, Mr. Breeds may suggest supplemental conditions addressing mine hazard areas and explain
why he believes such supplemental conditions are necessary.

23 **Time Limits**

24 Since the verbal expert testimony appears to be largely, if not entirely, composed of suggestions for
25 supplemental conditions, time limits shall be imposed as follows:

26 King County shall have a total of one hour for its expert testimony.

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Save Black Diamond shall have a total of two hours for its expert testimony.

Time for addressing objections and cross-examination, including redirect, shall not apply to the time allotments above.

Hearing Date

There is no single date available for all of the proposed expert witnesses. At this point it appears the date best suited to meet everyone's needs is July 21, 2011. Save Black Diamond Experts can commence testimony at 10:00 am with objections and cross (hopefully) not extending the time period past 1:00 pm. King County testimony can be scheduled for 2:00 pm on that day.

ORDERED this 14th day of July, 2011.



Phil A. Olbrechts
Hearing Examiner for Black Diamond

7-17-2011

Mr. Examiner,

I tried to ask a clarification question early Saturday afternoon regarding future changes to the DAs, but was told to submit my question in writing. Here's what I was going to ask:

Background: During Mr. Pilcher's closing remarks he stated that the City anticipated coming to some form of future agreement with the Covington Water District, with new language to be added to the Villages Development Agreement, regarding the current conflict between the Villages MPD plan to build the entire Water System in the Villages and the fact that 98 acres inside the west boundary of the Villages MPD is within the jurisdictional boundary of the Covington Water District. As testified by Ms. Gwenn Maxfield, General Manager of Covington Water District, their district wants to serve that discrete area within their jurisdictional boundary, or even the entire Villages MPD.

Questions of Clarification: If the City plans to make any additional changes to the DAs, when will the Public be able to review those changes and have sufficient time to analyze and prepare testimony, and to present it orally for the record? How can the DAs keep being changed after the period of Public oral testimony has been closed? How can the Public be assured it has seen the "Final" Development Agreements?

Comment: If there are any changes to the Development Agreements since their posting on June 10, 2011 the Public should be offered additional time for review and both oral and written testimony.

Jack Sperry
29051 229th Ave. SE
Black Diamond, WA 98010

EXHIBIT

176

Rachel Pitzel

From: Steve Pilcher
Sent: Tuesday, July 19, 2011 4:38 PM
To: WebMaster
Subject: FW: Objection for the Hearing Examiner

Please post in conjunction with last ruling from the Examiner.

From: Cindy Proctor [<mailto:proct@msn.com>]
Sent: Sunday, July 17, 2011 3:57 PM
To: Steve Pilcher; Brenda Martinez; Stacey Borland
Subject: Objection for the Hearing Examiner

Steve please forward to Mr. Olbrechts.- Cindy Proctor

Mr. Examiner,

I would like to raise an *objection* to the inclusion of any new language to the Villages and/or Lawson Development Agreement as presented by Mr. Pilcher on Saturday July 16 2011, specifically regarding the Covington Water Agreement and from a blanket objection standpoint to any and all revised language the City and/or Applicant may propose.

The Applicant and City are certainly in a position to pull their Development Agreements until they have completed them and re-submit for a new public hearing; however adding new language after the close of Public Oral testimony does not serve the public interest. This issue goes to the heart of the public comments regarding one of the fundamental flaws of the Development Agreements; that they are incomplete.

Cindy Proctor

Rachel Pitzel

From: Steve Pilcher
Sent: Tuesday, July 19, 2011 4:25 PM
To: WebMaster
Subject: FW: DA Hearings - YB Response to Proctor/Sperry Objections

Please post.

-----Original Message-----

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Tuesday, July 19, 2011 4:23 PM
To: Steve Pilcher
Subject: RE: DA Hearings - YB Response to Proctor/Sperry Objections

Thank you. Please post this email along with the objections from Mr. Sperry and Ms. Proctor.

The Covington Water District revision specifically identified in Mr. Sperry's objection will be allowed so long as it is submitted prior to the close of the initial two week comment period. No revisions will be accepted after the close of the initial two week written comment period.

Development Agreement revisions in response to public comment are encouraged. However, the public must also have an opportunity to respond to those revisions. This right arises from the inherent meaning of local and state requirements for the public hearing in this proceeding (similar to the origins of the appearance of fairness doctrine in *Smith v. Skagit County*) as well as due process. To maximize the utility of this hearing in light of potential rulings from the various appeals under review (as well as additional appeals to the agreements themselves), it is also prudent to subject this hearing process to RCW 36.70A.035, which requires additional public comments to any revisions to development standards that are outside the range of alternatives that have already been subject to public comment.

Of course, the Examiner may very well recommend some revisions that are beyond those discussed during the hearing. As to those revisions, the City Council can determine whether additional public testimony is necessary.

Given the considerations in the previous paragraph, the City and Applicant will generally be allowed to present revisions in response to comments made at the hearing. Those revisions must be submitted prior to the close of the initial two week comment period, so that the public can use the one week response period to respond. If a proposed revision is significant, the Examiner may extend the response period exclusively for the revision to provide a reasonable opportunity to respond. If a proposed revision substantially alters the development agreement, the revision will not be accepted.

The written comment periods referenced in this order are those set by Pre-Hearing Order II. The "initial two week comment period" is the written comment period that commences upon the close of verbal testimony.

-----Original Message-----

From: Steve Pilcher [mailto:SPilcher@ci.blackdiamond.wa.us]
Sent: Tuesday, July 19, 2011 2:50 PM
To: Phil Olbrechts
Subject: RE: DA Hearings - YB Response to Proctor/Sperry Objections

No, we do not, as we share the concern as outlined by Ms. Rogers. Please proceed with making your ruling.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

-----Original Message-----

From: Phil Olbrechts [mailto:olbrechtslaw@gmail.com]
Sent: Tuesday, July 19, 2011 2:31 PM
To: Steve Pilcher
Subject: RE: DA Hearings - YB Response to Proctor/Sperry Objections

Does the City wish to respond to the objections addressed below? If not I can rule on them today.

-----Original Message-----

From: Steve Pilcher [mailto:SPilcher@ci.blackdiamond.wa.us]
Sent: Tuesday, July 19, 2011 1:13 PM
To: olbrechtslaw@gmail.com
Subject: FW: DA Hearings - YB Response to Proctor/Sperry Objections

See below.

Steve Pilcher

From: Nancy Rogers [mailto:NRogers@Cairncross.com]
Sent: Tuesday, July 19, 2011 1:05 PM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; Michael R. Kenyon (Mike@KenyonDisend.com); Bob Sterbank (Bob@kenyondisend.com)
Subject: DA Hearings - YB Response to Proctor/Sperry Objections

Mr. Pilcher,

Please forward this response to Examiner Olbrechts. Since these objections also extended to the City, I have included Mr. Kenyon and Mr. Sterbank on this email.

Yarrow Bay has been notified of two objections/clarifying questions raised by Ms. Proctor and Mr. Sperry. Ms. Proctor and Mr. Sperry object and/or ask about a procedure in which Yarrow Bay or the City offer any revisions to the proposed Development Agreement text in response to public comment, specifically regarding the comments raised by Covington Water District. We assume their objection/clarifying question also extends to any other proposed revisions.

As the Examiner knows, this is a public hearing regarding a negotiated agreement. As the Examiner has stated several times, the Examiner has allowed public testimony regarding how the Development Agreements implement the MPD Approval conditions, as well as testimony that extended to the public's desired "supplemental conditions" which go beyond implementing the MPD Approval Conditions. That testimony has expressly and implicitly requested revisions to the Development Agreement text. As the Examiner's Pre-hearing Order makes clear, there remains an extensive written testimony, rebuttal and reply period prior to the record being closed.

There is no basis in the law or common sense to preclude Yarrow Bay or the City from proposing revised Agreement language during this hearing process.

Such revisions can be proposed during the written testimony portion of the Examiner's open-record hearing. In addition, such revisions can also be proposed in response to legal arguments raised in the Council's later closed-record hearings. The only matter that is precluded by law in the closed-record hearing is the submittal of new factual evidence (e.g., a new traffic report).

Finally, we note that public hearings would essentially be useless if the subject of the hearing could NOT be changed based on information and comments provided during those hearings, and that the public should welcome changes that are proposed to address and alleviate the very concerns they have raised.

CH&
Nancy Bainbridge Rogers
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Cairncross & Hempelmann
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Rachel Pitzel

From: Steve Pilcher
Sent: Tuesday, July 19, 2011 5:05 PM
To: WebMaster
Subject: FW: Development Agreement Objection
Attachments: EdlemanDerdowskiObjections.pdf

Please post this message together with the attachment.

-----Original Message-----

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Tuesday, July 19, 2011 4:50 PM
To: Steve Pilcher
Subject: RE: Development Agreement Objection

Please post along with the objections from Mr. Derdowski and Mr. Edelman.

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

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

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

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

City of Black Diamond
25510 Lawson St.
Black Diamond, Washington

July 13, 2011

Mr. Phil Olbrechts, Hearing Examiner

C/o Mr. Steve Pilcher

Re: Development Agreement Hearing

We wish to enter our objection to the inclusion of the exhibit entitled:
"The Villages and Lawson Hills
*Guide to MPD Design and Build-Out as Envisioned
by the Development Agreements.*"

This document was entered into the record as evidence at the hearing by the Applicant's counsel. The Applicant's counsel was not under oath when the document was submitted on July 11, but after we entered our objection on July 12, the Applicant's attorney was sworn in and affirmed that her comments on the previous day were also under oath. However, it is not clear that the document that was submitted is also covered in its entirety by that affirmation.

The Applicant's Guide purports to describe the development "as envisioned" by the Development Agreement. "As envisioned" is an interesting and troubling choice of words. Does this Guide detail the Applicant's *understanding* as to the terms of the Development Agreement? Is this document a *codicil* to the Development Agreement Contract? Is this document part of the Applicant's application?

The public and Council need to know whether this Guide and its representations are contractual in nature. At some future point, may the parties to the Agreement refer to the Guide and enforce its content?

If the Guide is not a contractual representation, and if it does not describe the Applicant's understanding as to its rights and obligations under the contract, then its purpose may simply be to "spin" the Applicant's intentions. The danger to the public interest here is that the Council may well rely on the Guide for its decision making rather than the actual

Development Agreement. At the very least, the Guide should be accompanied with a clear statement from the Applicant whether the Guide is a contractual commitment or merely a puff piece that may contain inaccuracies and misrepresentations.

Additional basis for our objection is that portions of the document are, in fact, misleading or inaccurate as follows:

The stated housing unit count differs significantly from that which is included in the Development Agreement.

The estimate of jobs has no foundation in the MPD approval or the Development Agreement.

The various photographs of housing examples are not related to the design criteria in the MPD approval or the Development Agreement, and in some cases actually conflict with that criteria.

The site plans, "bird's eye views", and graphics are speculative in nature, are not addressed in the MPD approval or Development Agreement, and in some cases actually conflict with that criteria. Park and open space areas are exaggerated well beyond the requirements of the MPD approval or Development Agreement. Hedge words such as "the drawing is less precise" and "represents possible development areas", "representative", "conceptual", are found throughout the document.

The reference to the Applicant's web site on its Transportation Map should be deleted since the website will be changed over time and may include information that is not part of the record. Also, the list of projects does not track directly with the MPD approval and Development Agreement.

The estimate of wetland alteration, and speculative avoidance 'promises' are not consistent with the terms of the MPD approval and Development Agreement.

The statement regarding the Lake Sawyer weir is not accurate or consistent with the terms of the MPD approval and Development Agreement.

The open space acres and percentages are not consistent with the terms of the MPD approval and Development Agreement.

Thank you for considering my comments, and for your service to the Public.

Sincerely,

Brian Derdowski
70 E. Sunset Way #254
Issaquah, Washington 98027

On behalf of "Save Black Diamond", "The Sensible Growth Alliance"
and several individuals who reside in and around the City of Black
Diamond

Steve Pilcher

From: Bob Edelman <BobEdelman@comcast.net>
Sent: Wednesday, July 13, 2011 3:40 PM
To: Steve Pilcher
Cc: Stacey Borland; Andy Williamson; Brenda Martinez
Subject: Motion to the Examiner

Please forward the following to Mr. Olbrechts.

.....
Before the City of Black Diamond Hearing Examiner

I object to entry of the *Guide to MPD Design and Build-Out as Envisioned by the Development Agreements* ("Guide") into the record as presented by the applicant.

The Guide was characterized as a summary of the MPDs. A cursory examination shows that there is a considerable amount of speculative and unsupported data that was not contained in the MPD ordinances. There are also erroneous statements. Some of those may be addressed in later testimony as the document is reviewed. However, it should not be necessary to refute as evidence. The following are a few of the problems with the document if it is to be considered a summary of the MPDs.

1. The Guide states on page 38 that the projects are 64% Open Space. This does not agree with information in the MPD approval ordinances. Further, the applicant stated in opening comments that the 50% open space requirement was not being met.
2. The Guide states on page 49:

In the new funding agreement, the building permit surcharge would only apply to building permits issued for new constructions within The Villages and Lawson Hills MPDs only and, most importantly, if and only if the City Council adopts another resolution (after the Development Agreements are approved) authorizing such a surcharge. [Emphasis added.]

This statement is incorrect and misleading. The actual condition is "only to the extent permitted by law or other agreement between Developer and its purchasers and only then if the City Council adopts a resolution".

3. There are numerous illustrations and photographs that are not in the MPD ordinances. They cannot be considered to be a summary of MPD information by any stretch.
4. Information is provided as factual which is purely speculative. For example, on page 47 there are tables which purport to show what the annual surplus to the City will be at buildout.
5. Information is provided that is not contained in the MPD ordinances and may or may not be factual. For example, page 27 contains information purporting to describe why roundabouts work but may or may not be applicable to roundabouts contemplated for the MPDs.

Respectfully submitted,

Robert Edelman
29871 232nd Ave SE
Black Diamond, WA 98010

Rachel Pitzel

From: Brenda Martinez
Sent: Wednesday, July 20, 2011 4:52 PM
To: Rachel Pitzel
Subject: FW: Exhibit List
Attachments: Black Diamond Exhibit List July 16, 2011.doc

From: Phil Olbrechts [<mailto:olbrechtslaw@gmail.com>]
Sent: Wednesday, July 20, 2011 2:17 PM
To: Brenda Martinez
Cc: Steve Pilcher
Subject: RE: Exhibit List

Hi Brenda,

Please post this email along with the exhibit list.

As explained at the header of the exhibit list, the list only includes documents admitted into evidence during the verbal portion of the hearing at this point. I decided not to yet add exhibits submitted outside the verbal hearing because it would get too confusing for the public to work with a list that had some documents that were admitted mixed with some that were not. My only other alternative was to set up a separate exhibit list for documents submitted outside the verbal portion of the hearing, which then creates some confusion upon judicial review. Once all documents from the verbal portion of the hearing have been entered the remainder of the list can be devoted to documents submitted outside the verbal portion and I can simply identify all exhibits from Exhibit x on up as those still subject to objection.