

Stacey Borland

From: BOB STERBANK <BOB@kenyondisend.com>
Sent: Friday, August 19, 2011 6:47 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; MARGARET Starkey; MIKE KENYON
Subject: City's Reply Comments
Attachments: PLD - Perlic Reply Declaration signed.pdf

Good morning, Steve:

Attached please find the Declaration of John Perlic in Support of the City's Reply to Responses Regarding Written and Verbal Testimony. The City's Reply, and an additional supporting declaration, will be forwarded via separate e-mail.

Regards,

Bob Sterbank

Bob C. Sterbank
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Direct Tel: (425) 988-2208
Main Tel: (425) 392-7090
Fax: (425) 392-7071
bob@kenyondisend.com
www.kenyondisend.com

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

EXHIBIT 257

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 JOHN PERLIC
IN SUPPORT OF CITY'S REPLY TO
RESPONSES REGARDING
WRITTEN AND VERBAL
TESTIMONY

JOHN PERLIC declares and states as follows:

1. I am a consulting transportation engineer 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. My expert credentials are outlined in Exhibit A to my initial declaration, dated August 12, 2011.

2. At the City's attorneys' request, I reviewed the written responses of Judith Carrier (Ex. 187) and Lisa Schmidt (Ex. 197) that respond to the written responses and verbal testimony of other parties. In reply, I provide the opinion below.



1 3. Ms. Carrier and Ms. Schmidt claim that the proposed Development
2 Agreements do not comply with Condition No. 33(a) of The Villages MPD Permit
3 ordinance (Ordinance No. 10-946). This is so, they argue, because the SE Green Valley
4 Road Traffic Calming Strategies Report (Exhibit 30, as well as Exhibit B to my initial,
5 August 12 Declaration), does not “differentiate use by current residents and those of the
6 MPD,” (Schmid at page 9, Section 13.8), or “ensure safety and compatibility of the
7 various uses of the road” (Schmid, same) or include “analyses of any safety issues
8 specific to GVR of the many referred to during previous hearings” such as bicycles.
9 Carrier, Ex. 187 at 2. Both Ms. Carrier’s and Ms. Schmidt’s written responses
10 misunderstand what was required by Condition 33(a), and misunderstand the Green
11 Valley Road Traffic Calming Strategies Report.

12 4. Condition 33(a) was based on Finding of Fact 6.C, which states in part as
13 follows:
14

15 Green Valley Road currently has very low traffic volumes, and
16 although the anticipated increase in traffic volumes resulting from the
17 project will not exceed Green Valley Road’s capacity, increased traffic
18 may result in safety concerns. Green Valley Road has limited or no
19 roadway shoulders, trees and fences in very near proximity to the
20 roadway, and very curvilinear alignment. Additionally, some
21 witnesses testified that Green Valley Road has a high number of large
22 animals that regularly cross the road, as well as a high volume of
23 bicyclists, hikers, joggers, tubers, swimmers, outdoor groups, and
24 fishermen using the shoulder of the road. *These factors justify a study
25 of traffic impacts and recommended mitigation to provide for safety
and compatibility between the varied uses of Green Valley Road. The
study should include an analysis of measures designed to discourage
and/or prevent MPD traffic from utilizing the road, such as the
installation of traffic calming devices, while ensuring that such
measures can be designed in a manner consistent with the road’s
designated status.*

1 Italics added. Based on this Finding, Condition 33(a) required:

2 The City shall commission a study, at the Applicant's expense, on how
3 to limit MPD traffic from using Green Valley Road, and which shall
4 include an assessment of traffic calming devices within the existing
5 improved right-of-way. The study shall also include an analysis and
6 recommended mitigation ensuring safety and compatibility of the
7 various uses of the road. All reasonable measures identified in the study
8 shall be incorporated into the Development Agreement.

9 5. I was asked by the City to prepare the study referred to in Condition 33(a). It
10 is important to note that Finding 6.C focuses on identification of potential traffic
11 prevention / calming measures, provided that such measures "*can be designed in a*
12 *manner consistent with the road's designated status.*" As explained in Condition 33(a),
13 this necessarily limited the potential mitigation to "traffic calming devices within the
14 existing improved right-of-way." (Underscore added). Traffic calming or safety
15 measures, such as widening the right-of-way to provide for vehicle / bicycle / pedestrian
16 separation, through designated bicycle lanes, sidewalks, raised pathways or the like, was
17 not a viable option given the City Council's language in Condition 33(a). While grade
18 issues may have had made such mitigation more difficult in certain specific locations
19 along Green Valley Road, the physical condition of the roadway would not (in and of
20 itself) have eliminated such measures from consideration. Instead, measures that
21 required widening of the right-of-way were eliminated from consideration by the City
22 Council, at the demand of Green Valley Road residents, on the grounds that widening
23 was incompatible with the road's "designated status" under King County's Historic
24 Heritage Corridor. Green Valley Road residents insisted on this limitation in their
25 testimony to the Hearing Examiner, as the Examiner will no doubt recall, even though
King County's Traffic Engineer, Matt Nolan, admitted during his testimony that the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

road's designated status had no legal effect on whether road improvements (such as widening) could permissibly be installed on it.

6. Consequently, when I prepared the Traffic Calming Strategies Report, I analyzed whether the mitigation identified would reduce traffic volumes, thereby "discouraging MPD traffic from utilizing the road," as outlined in Finding 6.C. This is explained on page 12 and Exhibit 9 of the Report. I also evaluated whether the increase would reduce vehicle speeds, and thereby improve safety. This is also explained on pages 12, 16, and 17 of the Report. I concluded that the traffic calming strategies would reduce speed and improve safety, because it would decrease vehicle speeds. I also analyzed whether particular traffic calming measures would be compatible with all of the types of vehicles that travel on the road, such as farm equipment, heavy machinery or school buses or fire equipment. Some potential calming measures were disfavored because they would not be compatible with this type of traffic, and/or would likely be opposed by Green Valley Road residents. As the Report explains at page 15:

As described above, the majority of the SE Green Valley Road corridor has agricultural land uses adjacent to the roadway and heavy machinery and farming equipment use portions of the roadway. These larger vehicles may be unable to use the roadway if some of the traffic calming strategies listed above narrow the roadway and/or introduce sharper turning radii, such as traffic circles, curb extension/chokers, chicanes, diverters, and curb bulb outs.

Other larger vehicles, such as school buses and fire trucks, may also be affected by strategies that tighten turning radii or narrow travel lane widths.



1 7. In light of the foregoing, Ms. Carrier's and Ms. Schmidt's contention, that
2 the Traffic Calming Strategies Report did not comply with Condition 33(a) because it did
3 not further analyze bicycle safety or analyze compatibility of bicycle traffic with vehicle
4 traffic, simply misunderstands Condition 33(a)'s context or what it required. The ability
5 to consider installation of bicycle-oriented measures, such as designated bicycle lanes, or
6 bicycle pathways or trails separated from the vehicle travel lanes, was eliminated by the
7 language of Condition 33(a) itself at the request of Green Valley Road residents, who
8 insisted that potential mitigation to be analyzed could be installed "within the existing
9 improved right-of-way," so as to pose no potential inconsistency to the road's designated
10 historic status. Meanwhile, it bears noting that all of the mitigation measures discussed in
11 Exhibit 9 are compatible with bicycles as well as vehicles; the Report simply calls out
12 those specific types (traffic circles, curb extension/chokers, chicanes, diverters, and curb
13 bulb outs) that are incompatible with certain types of vehicle traffic (farm equipment)
14 known to use the road. Furthermore, the Traffic Calming Strategies Report clearly notes
15 that all traffic calming strategies would likely reduce travel speeds where implemented
16 (p. 13) and also have the potential to reduce traffic volumes on SE Green Valley Road (p.
17 12). Traffic calming strategies that reduce speed and/or volume also improve safety and
18 compatibility for bicycle traffic on SE Green Valley Road.

19
20 8. In addition, as I explained during my testimony on the MPD Permits, no
21 separate analysis of bicycle traffic is warranted. There are no high vehicle-vehicle or
22 vehicle-bicycle accident locations along Green Valley Road. Without such locations to
23 serve as a guide, it would be difficult to prepare a separate analysis of bicycle safety.
24
25

1 9. At the City Attorney's request, I also reviewed the "Response" to Yarrow
2 Bay's 8/4/11 Written Comments and Oral Testimony Regarding Transportation Issues by
3 Peter Rimbos (Exh. 224). This document responds to the written responses and verbal
4 testimony of other parties. On p. 17 of Mr. Rimbos' response, he questions why impacts
5 to the SE Black Diamond-Ravensdale Road/Landsburg Road SE/Issaquah-Hobart Road
6 SE corridor have "never been analyzed". This statement is not correct because the
7 Landsburg Road SE/SE Kent-Kangley Road (SR-516) intersection was included in the
8 FEIS transportation analysis and, in fact, an improvement to mitigate project impacts was
9 identified. To mitigate project impacts at this intersection, the addition of a southbound
10 left turn pocket and providing a refuge area on the westbound approach for vehicles
11 making the southbound left turn movement was recommended. North of this
12 intersection, professional judgment was used to determine where project traffic impacts
13 become so low that detailed impact and intersection level of service analysis is no longer
14 required. In this case, project generated traffic is expected to be 5% of the total trips
15 generated by the project at the Landsburg Road SE/SE Kent-Kangley Road (SR-516).
16 North of this intersection, project-generated traffic volumes and impacts would
17 progressively decrease from a high of 5% to 0%. Based on this analysis, we determined
18 that the project traffic impacts on Landsburg Road SE and Issaquah-Hobart Road north of
19 the Landsburg Road SE/SE Kent-Kangley Road (SR-516) intersection would not rise to a
20 level of significance requiring specific detailed analysis in the FEIS.
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

10. During scoping for the EIS's, we held two separate meetings with all adjacent jurisdictions (Maple Valley, Covington, Enumclaw, Auburn, King County, and WSDOT) to discuss the study area boundaries, analysis methodology, and other assumptions related to the traffic impact analysis. At these meetings, there was extensive discussion regarding the impact analysis study area boundaries based on the anticipated trip assignment from the MPD's, and impacts to Issaquah-Hobart Road were never raised as a specific concern. Furthermore, after publishing the Draft EIS, we did not receive any comments regarding concerns about impacts to Issaquah-Hobart Road. We concluded from the lack of specific comments related to Issaquah-Hobart Road during scoping and on the Draft EIS that this was not a concern for others as well.

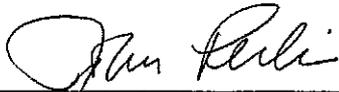


1 11. In response to Mr. Rimbos' statement repeating a portion of King
2 County's DEIS/FEIS comments, "Since safety-related improvements are permitted, and
3 'capacity' improvements are expressly prohibited in the Rural Area, a detailed evaluation
4 of existing conditions of the roadways impacted by The Villages and Lawson Hills
5 projects should be made,...". The Development Agreement already incorporates
6 information on existing conditions and other strategies. In addition, capacity
7 improvements are not "expressly prohibited in the Rural Area," as Mr. Rimbos contends.
8 The King County Comprehensive Plan, at Policy T 203, states that "King County shall
9 not construct and shall oppose the construction by other agencies of any new arterials or
10 highway or any additional arterial or highway capacity in the Rural Area or natural
11 resource lands except for segments of certain arterials that pass through rural lands to
12 serve the needs of urban areas." (Emphasis added). This provision does not state that
13 capacity improvements are "prohibited," it simply expresses the County's policy choice,
14 as a general matter, to oppose such improvements. Second, it affirmatively allows
15 capacity improvements on "segments of arterials that pass through rural lands to serve the
16 needs of urban areas." SR 169 and SR 516, the arterials primarily addressed in Mr.
17 Rimbos' comments, qualify as such arterials given that both pass through rural lands and
18 serve the needs of such urban areas as the Cities of Black Diamond, Maple Valley and
19 Covington. Given this, capacity improvements on SR 169 and SR 516 are consistent
20 with the County's Comprehensive Plan, contrary to Mr. Rimbos' argument.
21

22
23 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
24 OF THE STATE OF WASHINGTON THAT THE FOREGOING IS
25 TRUE AND CORRECT.

DATED this 17th day of August, 2011, at Bellevue, Washington.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



John Perlic



Stacey Borland

From: BOB STERBANK <BOB@kenyondisend.com>
Sent: Friday, August 19, 2011 6:50 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; MARGARET Starkey; MIKE KENYON
Subject: Good morning, Steve:
Attachments: Ervin Reply Decl signed.pdf

Good morning, Steve:

Attached please find the Declaration of Daniel R. Ervin in Support of the City's Reply to Responses Regarding Written Comments and Oral Testimony. The City's Reply will be forwarded via separate e-mail. This is the second of three submissions.

Regards,

Bob Sterbank

Bob C. Sterbank
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Direct Tel: (425) 988-2208
Main Tel: (425) 392-7090
Fax: (425) 392-7071
bob@kenyondisend.com
www.kenyondisend.com

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

EXHIBIT 258

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 DANIEL R.
ERVIN IN SUPPORT OF CITY'S
REPLY TO RESPONSES
REGARDING WRITTEN
COMMENTS AND ORAL
TESTIMONY

DANIEL R. ERVIN declares and states as follows:

1. I am an engineering consultant 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. My credentials and expert experience related to Master Planned Developments is summarized in Paragraphs 2 and 3 of my Declaration in Support of City's Responses to Written Comments and Verbal Testimony.

2. At the request of the City's attorneys, I have reviewed the written responses to comments authored by Jack Sperry (Exhibit 198). Mr. Sperry's responses in Exhibit 198 respond to the analysis and written comments by Al Fure of Triad



1 Engineering (Attachment 9 to Exhibit 139) concerning the potential effect of The
2 Villages and Lawson Hills Master Planned Developments (MPDs) on the water level of
3 Lake Sawyer. For the reasons discussed in more detail below, my expert opinion
4 continues to be that Triad's method and conclusions regarding the calculation of Lake
5 Sawyer outflow, and the relative increase in lake level attributable to The Villages and
6 Lawson Hills Master Planned Developments are reasonable and valid, while Mr. Sperry's
7 method and conclusions are not.

8 3. Mr. Sperry's response comments begin by pointing out the apparent
9 discrepancy between the acreage of contributing watershed utilized in Mr. Fure's January
10 10, 2011 report, as compared to the acreage of contributing watershed used in Mr. Fure's
11 August 4, 2011 report contained in Attachment 9 to Exhibit 139. The explanation for the
12 difference appears to be the same explanation for the difference between Mr. Sperry's
13 assumed contributing watershed acreage in Exhibit 67, on the one hand, and the acreage
14 of contributing watershed in Att. 9 to Exhibit 139, as explained in my initial declaration.
15 That is, the difference is largely due to an assumption about infiltration and how much
16 stormwater can be infiltrated.
17

18 4. For example, Mr. Sperry based his calculations in Exhibit 67 on the
19 assumption that there would be an additional 615 acre-feet of water due to the MPD
20 developments. While this total would be correct if one assumed that the total amount of
21 surface generated by the MPDs will wind up in the Lake either via direct flow or tributary
22 streams, Mr. Fure's August 4, 2011 report indicates that a large portion of this surface
23 water will be infiltrated as opposed to being sent directly to Lake Sawyer or a tributary.
24 Mr. Sperry's approach assumes that **none** of the stormwater generated by the MPDs will
25



1 infiltrate, and assumes that 100% of the MPD stormwater generated within the Lake's
2 basin will drain to the Lake, thus overstating the volume of water potentially available to
3 contribute to increased lake levels (615 acre-feet vs. 372 acre-feet). I have also reviewed
4 Triad's January 10, 2011 report referred to by Mr. Sperry, and note that for potential
5 phosphorus contribution purposes it likewise assumed no infiltration of MPD-generated
6 stormwater. Mr. Sperry's comments in Exhibit 198, pointing out that Triad's
7 assumptions about the volume of water that will drain to Lake Sawyer are 2/3 less than
8 Triad assumed in its January, 2011 report (as well as being 2/3 less than his own), are
9 simply observing the obvious consequence of assuming zero infiltration.

10 5. I have also reviewed Triad's assumptions about the amount of MPD
11 stormwater that is proposed to be infiltrated. These assumptions are consistent with the
12 Stormwater Section of the Development Agreement, are a part of the design criteria for
13 the basin, and are reasonable. I note that Mr. Sperry does not discuss the role of
14 infiltration in reducing the amount of stormwater that will travel to the lake, nor does he
15 contest the reasonableness of Triad's infiltration assumptions in the August, 2011 Att. 9
16 to Ex. 139.

18 6. Even if one assumes that all stormwater generated by the MPDs within the
19 Lake basin will drain to it, and even if one assumes that all of it will travel to the lake as
20 surface water, then it will increase the lake level rise calculations by roughly 33%, which
21 equals approximately 0.3 inches of additional lake rise (from 0.69 inches to 0.99 inches).
22 Consequently, even assuming a worst case scenario of zero infiltration and 100%
23 stormwater drainage to Lake Sawyer, the rise in lake level attributable to the MPDs will
24 remain minimal.



1 7. I have also reviewed Mr. Sperry's references on pages 3-5 of Exhibit 198
2 to some calculations from pages 14 and 15 of the Triad report. Mr. Sperry discusses the
3 Triad report's statements about water elevations, and then concludes that based on his
4 personal observations, the Triad calculations must be incorrect and that there must be an
5 unknown, unidentified constriction in Covington Creek. Mr. Sperry has made an
6 incorrect assumption about the datum and location of the Triad measurements referred to
7 on pages 14-15 of Att. 9 to Ex. 139. The Triad report uses these measurements to
8 calculate the water level below the culverts, not upstream of the culverts. Mr. Sperry has
9 incorrectly identified the calculated elevation as being upstream of the culverts, however.
10 Based on my interpretation of the Triad report, the measurements and calculations set out
11 on pages 14-15 calculate the water level downstream of the culverts to determine whether
12 the culvert is under outlet control conditions. The significance of this calculation is that it
13 is used in computing the outflow of the lake (*i.e.* the size of the "drain in the bathtub"),
14 not the effect of the downstream hydraulic gradeline on the upstream lake level. Triad
15 goes on to use this calculation to determine the amount of water that is leaving the lake
16 while water is entering the lake, which allows Triad to calculate the additional rise in lake
17 level due to the project. The calculation to which Mr. Sperry's Ex. 198 points is not
18 significant in calculating the elevation of water in the lake from sources other than the
19 MPD, and Mr. Sperry has committed a significant analytical error in using it for that
20 purpose on pages 4-5 of Exhibit 198. As a result, his conclusion that there must
21 somehow be a constriction in Covington Creek flow levels downstream of the culverts,
22 which he does not identify or substantiate, is erroneous and invalid.
23
24
25



1 8. Even if there is some constriction of flows downstream from the culverts,
2 this does not equate to a zero discharge from the lake during high water events, for the
3 reasons explained in my initial declaration. Mr. Sperry's calculations continue to assume
4 that water completely ceases to flow out from the lake for an entire two month period.
5 Even assuming a downstream constriction during storm events, water continues to flow
6 out of the lake. This is provable because water levels in the lake and creek have been
7 observed to recede rapidly at the conclusion of storm events. If there was no outflow at
8 all, as Mr. Sperry contends, this would not occur. Outflow continues to occur even
9 during high flows; it may simply appear to be moving more slowly from the surface.

10 9. At the bottom of page 5 of Ex. 198, Mr. Sperry repeats his concluding
11 question from Exhibit 67, questioning why Lake Sawyer should have to "function as a
12 retention pond of last resort . . . ?" As previously noted, Lake Sawyer **already** functions
13 as a retention pond because its outflow is constricted by a dam and weir designed to
14 artificially elevate lake levels during summer months, which means that more water is
15 present in the lake when the fall and winter rains arrive. Whether or not stormwater
16 drains from MPDs to Lake Sawyer will not affect the Lake's current, retention functions.

17 10. Mr. Sperry's Ex. 198 concludes by reiterating his request for a
18 Development Agreement condition that would require that no greater volume of
19 stormwater be added following development of the MPDs to the tributaries of Lake
20 Sawyer than currently flow there in the pre-developed state. Mr. Sperry asserts that such
21 a condition is justified by RCW 36.70B.170, which requires that a Development
22 Agreement "reserve authority to impose new or different regulations to the extent
23 required by a serious threat to public health or safety." Because the potential lake level
24
25



1 rise attributable to the MPDs is minor, it is my opinion that such a condition is not
2 warranted by concern for a serious threat to public health or safety.. In addition, if lake
3 front owners wish, there are actions they can take in their own management of the weir
4 and dam that would provide greater control over rises in lake levels.

5 11. I have also reviewed the August 12, 2011 response comment letter from
6 Kristen Bryant (Exhibit 214), and its attached Powerpoint presentation from Sarah
7 Cooke. Ms. Bryant refers to Yarrow Bay's statements comparing language in the Black
8 Diamond MPD Development Agreements concerning fixing the boundaries of critical
9 areas to language in the Issaquah-Highlands Development Agreements that likewise fixed
10 the boundaries of critical areas. Ms. Bryant then alleges that wetland protection in
11 Issaquah-Highlands was a failure, and concludes that wetland protection in the Black
12 Diamond MPD critical areas will therefore also fail. She states: "it is very clear that the
13 city of Black Diamond must include remedies for wetland protection failure or it will fail
14 in its legal duty to protect wetlands. The protection of wetlands is required by federal
15 and state law. It is relevant because it shows that the applicant's statement that the
16 wetland areas will be protected is not necessarily true." Ms. Bryant's conclusion is
17 erroneous, first, because the remedies sought in the Powerpoint presentation are not the
18 result of fixing the wetland boundaries, and second, because of significant differences in
19 the wetland protections offered by the Issaquah and Black Diamond Development
20 Agreements.
21

22 12. First, the issues discussed in Ms. Bryant's letter, and the attached Sarah
23 Cooke Powerpoint, concerned the number of trees within the sensitive areas in Issaquah
24 Highlands that were falling due to wind. The fact that trees were coming down in
25



1 windstorms had nothing to do with the fact that the wetland buffers were fixed by the
2 Development Agreement. (As the Examiner may recall from my initial declaration, I am
3 the Project Engineer for the Issaquah Highlands MPD, and therefore am familiar with the
4 situation described in Ms. Cooke's Powerpoint). Given this, the fact that wetland and
5 other critical areas in The Villages and Lawson Hills MPDs are also fixed by the DA,
6 based on existing field and survey work, does not diminish the likelihood that those areas
7 will remain protected by the provisions of the MPD Permits, the DAs, and/or the City of
8 Black Diamond critical areas ordinance in Chapter 19.10 of the Black Diamond
9 Municipal Code.

10 13. Second, the context surrounding the Cooke Powerpoint is important. The
11 protections applied to the wetland critical areas areas subject to the Issaquah-Highlands
12 Development Agreements was determined based on a mitigation program that included
13 preservation of large tracts of open-space not a surveyed delineation based on sensitive
14 area biological characteristics. As noted in Ms. Cooke's Powerpoint, the developer and
15 City were in the process of re-planting an extensive number of trees in the impacted
16 wetland and buffer areas. The reason for Ms. Cooke's presentation to the City Council
17 was to brief them on restoration activities within the wetland itself; and to seek City
18 approval to do so. Thus, Ms. Cooke's Powerpoint (attached to Ms. Bryant's Exhibit
19 214), which advocated for approval of the restoration plantings. The City approved the
20 restoration plan, and the trees have been replanted and are thriving, as even Ms. Cooke
21 has acknowledged. In contrast, under the Black Diamond Sensitive Areas code
22 provisions, wetland protection is required to maintain biological and hydrologic function,
23 and restoration is permitted subject to approval by the Mayor or designee under BDMC
24
25



1 19.10.060(C)(8). If wind-downed trees prove to be a problem in Black Diamond, the
2 Mayor already has authority to require replanting as mitigation as a condition of
3 Implementing Approvals, and to approve permits for it.

4 14. In addition, because the Issaquah-Highlands sensitive areas are governed
5 only by the DA, and not by the underlying code, they lack the protections that the Black
6 Diamond MPD wetlands and buffers will have. In the Black Diamond MPDs, Section
7 8.1 is clear that "All Development within The Villages MPD [or Lawson Hills, as
8 applicable] shall be subject to the standards, requirements and processes of the Sensitive
9 Area Ordinance." These standards include a requirement for mitigation that "achieves
10 equivalent or greater biologic functions" for "all proposed wetland alterations or to
11 mitigate unavoidable adverse impacts to the wetland functions and values resulting from
12 a proposed action." This protection exceeds that offered by the Issaquah-Highlands DA,
13 which further illustrates why Ms. Bryant's argument, that Black Diamond wetlands will
14 not be protected if their boundaries are fixed in the DA, is erroneous.
15

16 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
17 OF THE STATE OF WASHINGTON THAT THE FOREGOING IS
18 TRUE AND CORRECT.

19 DATED this 17 day of August, 2011, at ISSAQUAH, Washington.

20 

21 Daniel R. Ervin



Stacey Borland

From: Tom <TDCarp@comcast.net>
Sent: Friday, August 19, 2011 6:51 AM
To: Dow Constantine; Reagan Dunn (KC); Steve Pilcher
Cc: Christie True; Harold Taniguchi; John Starbard; Kathy Lambert; Nancy Stafford; Paul Reitenbach; Pete Eberle; Steve Hiester
Subject: Reply to Yarrow Bay Response to Joint UAC letter
Attachments: Joint UAC Reply to YB Responses_letter.pdf

Attached is a letter from the Upper Bear Creek, Four Creeks, and Greater Maple Valley Area Councils replying to responses made by Yarrow Bay to our comment letter.

Steve, please make sure the Hearing Examiner gets a copy.

Tom Carpenter
For GMVAC, FCUAC, UBCUAC Presidents

EXHIBIT 259

19 August 2011

To: Dow Constantine, King County Executive
Reagan Dunn, King County Council Member, District 9
Phil Olbrechts, Hearing Examiner, Black Diamond
Olbrechts and Associates, 18833 74th St. NE Granite Falls, WA 98252-9011
Steve Pilcher, Director, Black Diamond Community Development

cc: Kathy Lambert, King County Council Member, District 3
Paul Reitenbach, Senior Policy Analyst, King County DDES
Christie True, Director, King County DNRP
John Starbard, Director, King County DDES
Harold Taniguchi, Director King County DOT

From: The Greater Maple Valley, Four Creeks, and Upper Bear Creek Unincorporated Area Councils (UAC)

Joint UAC Reply to Yarrow Bay Response (Exhibit #209) to GMVUAC (Exhibit #63) and Joint UAC (Exhibit #115) Written Statements

Yarrow Bay Response (pp 41-42)

G. Rural School Sites. The authors of (Exhibits 63 and) Exhibit 115 object to the unincorporated King County school sites shown in the Comprehensive School Mitigation Agreement. This School Agreement is incorporated by reference in Section 13.3 of the Development Agreements. **If, in the future, the Enumclaw School District determines it is unable to get permits for the construction of schools on these sites, the Comprehensive School Mitigation Agreement includes alternative site identification processes to ensure that school sites are ultimately provided. There is no reason or basis to revise the Development Agreements based on this written testimony.**

Joint UAC reply:

Having only a "process" to ensure that school sites are ultimately provided in the Comprehensive School Mitigation Agreement (CSMA) postpones school mitigation. An "agreement" on a "process" may be valuable but it does not constitute a mitigation "plan", instead providing only a "plan for a plan".

The Development Agreement is incomplete without specifying where all school mitigation is to occur particularly considering the permanent negative impacts urban-serving schools have on the rural area.

We join Paul Reitenbach (King County Senior Policy Analyst) in his Expert Testimony recommending the Development Agreement plan to locate all urban-serving schools inside the Urban Growth Area.

Yarrow Bay Response

H. Regional Stormwater Facility. In Exhibit 115, the author states that "[l]ocating an urban-serving retention/detention facility outside the UGA is certainly inappropriate because of the loss of rural or resource lands." **In Attachment 3 attached hereto, Al Fure of Triad Associates, addresses why the proposed unincorporated King County site for the regional stormwater facility makes sense based on topographic, geographic, geologic, hydrologic and economic considerations. There is no reason or basis to revise the Development Agreements on the basis of this written testimony.**

Joint UAC reply:

Determining the site for a regional stormwater facility based on "topographic, geographic, geologic, hydrologic and economic considerations" is appropriate. However, these facilities have impacts beyond

those considerations. It would be inappropriate to exclude these considerations from the Development Agreement.

The rural area is not in need of additional stormwater facilities.

Instead of being a facility specifically sized and located for the proposed MPDs, it is being described as "regional" stormwater facility which begs questions about its longer-term intent.

Adding the probability the stormwater facility will be maintained by a city as an urban service, there is serious question about alignment to the legislative intent in the Growth Management Act to "protect the rural area".

Not unlike sewer extensions, once created this facility can be used as mitigation during future development thus becoming an epicenter for converting rural to urban uses. Recognizing this, the Legislature, the Supreme Court, and the Growth Management Hearing Board have all been definitively opposed to locating urban-serving facilities outside the Urban Growth Area. Once created, they inevitably lead to the urge to urbanize.

Conclusion

School and the stormwater mitigations are in direct response to the proposed development which makes them urban-serving.

The Development Agreement is an appropriate place to assure mitigation is not being postponed and to address the threat to the rural area created by planning to locate urban-serving facilities outside the Urban Growth Area.

Thank you.

*Steve Hiestler, Chair Greater Maple Valley Unincorporated Area Council
Pete Eberle, President, Four Creeks Unincorporated Area Council
Nancy Stafford, Chair, Upper Bear Creek Unincorporated Area Council*

Stacey Borland

From: William Wheeler <wbwheeler50@comcast.net>
Sent: Friday, August 19, 2011 7:12 AM
To: Steve Pilcher
Cc: Stacey Borland; Andy Williamson; Brenda Martinez
Subject: response to Yarrow Bay reply ex 208
Attachments: Wheeler reply-word-4.doc; ATT00001..htm

Mr. Pilcher,

Please forward to the Hearing Examiner.

Thank You,

William Wheeler

EXHIBIT 260

IN THE MATTER OF THE
DEVELOPMENT AGREEMENT HEARINGS
WHEELER REPLY
TO
RYAN KOHLMAN RESPONSE
TO
WHEELER WRITTEN STATEMENT (EXHIBIT 108)

Exhibit 209
Page 17

Yarrow Bay Response: MPD Condition of Approval Nos. 94 (Lawson Hills) and 92 (The Villages) provide: "The details regarding the timing of construction and option off-site construction or payment of fee in lieu of construction included in Table 5.2 of the MPD application (Recreation Facilities) shall be specified in the Development Agreement." Contrary to Mr. Wheeler's assertion, neither the condition's language nor the BDMC requires a public hearing prior to the City accepting a lump sum payment in lieu of the Master Developer constructing any of the individual Recreational Facilities listed in Table 9-5. Conditions of Approval Nos. 94 (Lawson Hills) and 92 (The Villages) required the specification of "details" for the payment of fees in lieu. Subsection 9.5.3 of the Development Agreements does just that. There is no reason or basis to revise this subsection.

Mr. Kohlman's response follows the all too frequent pattern utilized by Yarrow Bay in addressing citizen comments throughout these proceedings to date. He either misunderstands or mis-states the information provided by the citizen input and thus pleads that it should be dismissed and ignored in its entirety.

It is incredibly ironic in light of Yarrow Bay's oft repeated "commitment" to working with the members of the community to shape and define the growth of our community that the applicant now consistently rejects the citizens' input to this Agreement, heretofore ONLY shaped by their own input and the input of City Staff, whose salaries the applicant pays. Colin Lund says in emails submitted and entered as Exhibit 37 "It continues to be our goal to listen, communicate and work with interested citizens." That is certainly NOT reflected by their failure to accept citizen's ideas on how this Development Agreement can be improved to serve the community. Nor is it demonstrated by the constant rejection of any proposed conditions from the public for

consideration by the City Council, whose authority to address these issues are significantly different from yours, Mr. Examiner.

This is the first opportunity the people have had to read the "Final" Development Agreements and give their opinion on improvement for greater environmental protection, fiscal success and a whole myriad of aspects that will affect OUR lives for generations to come.

Yarrow Bay is the first to defend the existence of onerous and absurd portions of the codes, regulations and other guiding documents to this process by saying "The public never objected so it must be accepted." Now that we **are** objecting to what is being presented, in a most timely fashion, they say we should be ignored and the conditions crafted by them and their paid counter parts on the City Staff should prevail.

I did not assert that a Public Hearing is currently required to allow the City to accept cash in lieu of the promised Parks or Recreation Facilities, **I suggested that a new condition be created by the City Council** in their final version of the Development Agreements. The requested condition I described for consideration simply said that *if* promised Parks or Recreation Facilities are to sacrificed and a financial remuneration to the City be accepted in its stead that such a decision should be made by the City Council seated at the time of each "substitution" and that a Public Hearing be required prior to the council consideration of such a "swap".

Respectfully submitted - William Wheeler

Stacey Borland

From: Megan Nelson <mnelson@yarrowbayholdings.com>
Sent: Friday, August 19, 2011 7:20 AM
To: Steve Pilcher
Cc: Brenda Martinez; Andy Williamson; Stacey Borland
Subject: Attachment 7 to YarrowBay Reply Documents
Attachments: Attachment 7 - Second Declaration of Kevin Thomas.pdf

Attached for the Black Diamond Hearing Examiner is Attachment #7 to YarrowBay's Reply Testimony (YB Reply 08182011).

Thank you.

Megan Nelson
Director of Legal Affairs
YarrowBay Holdings
10220 NE Points Drive, Suite 310
Kirkland, WA 98033
mnelson@yarrowbayholdings.com
Office: 425-898-2100
Direct: 425-898-2104
Mobile: 425-894-1357

EXHIBIT 261

1
2
3
4
5
6

**BEFORE THE CITY OF BLACK DIAMOND
HEARING EXAMINER**

7
8
9
10

IN RE: THE MATTER OF DEVELOPMENT
AGREEMENT HEARINGS
LAWSON HILLS PLN10-0021; PLN11-0014
THE VILLAGES PLN10-0020; PLN11-0013

**SECOND DECLARATION OF KEVIN
THOMAS**

11
12

I, Kevin Thomas, declare as follows:

13
14
15

1. I am the Senior Site Designer for Yarrow Bay Holdings LLC, a wholly owned subsidiary of BRNW, Inc., a member of Yarrow Bay Development, LLC, which is the General Partner of both BD Lawson Partners, LP and BD Village Partners, LP.

16
17

2. I am over the age of 18, am competent to be a witness, and all statements made herein are of my own personal knowledge.

18
19

3. I make the following statement for Respondents, BD Lawson Partners, LP, and BD Village Partners, LP.

20
21
22
23
24
25
26

4. Attached hereto is a true and correct copy of an exhibit I created showing representative photographs of single family attached housing products that could be built in The Villages and Lawson Hills MPDs consistent with the City of Black Diamond's MPD Framework Design Standards and Guidelines and the MPD Project Specific Design Standards and Guidelines, which are contained in Exhibit "H" of The Villages and Lawson Hills Development Agreements.

1 5. I provide the following information regarding the representative photographs on
2 the attached exhibit:

3 A. Row A

4 • Left Photo

5 *Description:* Green and white Single Family Attached Home

6 *Location:* Intersection SW 97th St and 7th Avenue SW, Seattle, WA

7 *Photo taken by:* Lauri Fehlberg

8 *Photo taken on:* February 2, 2011

9 • Middle Photo

10 *Description:* Blue and Grey Single Family Attached Home

11 *Location:* 9800 Block 9th Pl SW, Seattle, WA

12 *Photo taken by:* Lauri Fehlberg

13 *Photo taken on:* February 2, 2011

14 • Right Photo

15 *Description:* Lime Green and Grey Single Family Attached Home

16 *Location:* Intersection 156th Ave NE and 106th St., Redmond, WA

17 *Photo taken by:* Kevin Thomas

18 *Photo taken on:* June 21, 2011

19 B. Row B

20 • Left Photo

21 *Description:* Rust and beige Attached Single Family Home

22 *Location:* 14806 9th Drive SE, Mill Creek, WA

23 *Photo taken by:* Kevin Thomas

24 *Photo taken on:* January 28, 2011

25 • Middle Photo

26 *Description:* Rust and grey Attached Single Family Home

Location: 5915 31st Avenue SW, Seattle, WA

Photo taken by: Lauri Fehlberg

Photo taken on: February 2, 2011

 • Right Photo

Description: Grey and Brown Attached Single Family Home

Location: 14814 9th Drive SW, Mill Creek, WA

Photo taken by: Kevin Thomas

1 Photo taken on: January 28, 2011

2 C. Row C

3 • Left Photo

4 *Description:* Green and Beige Attached Single Family Home

5 *Location:* 2900 Block SW Raymond Street, Seattle, WA

6 *Photo taken by:* Kevin Thomas

7 *Photo taken on:* February 2, 2011

8 • Middle Photo

9 *Description:* Red Brick Attached Single Family Home

10 *Location:* 2598 NE Park Drive, Issaquah, WA

11 *Photo taken by:* Lauri Fehlberg

12 *Photo taken on:* February 2, 2011

13 • Right Photo

14 *Description:* Rust and beige Attached Single Family Home

15 *Location:* 9800 Block 9th Avenue SW, Seattle, WA

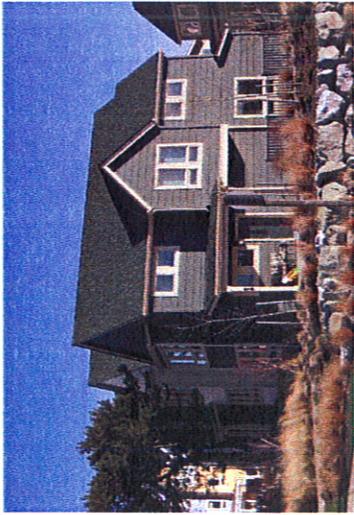
16 *Photo taken by:* Lauri Fehlberg

17 *Photo taken on:* February 2, 2011

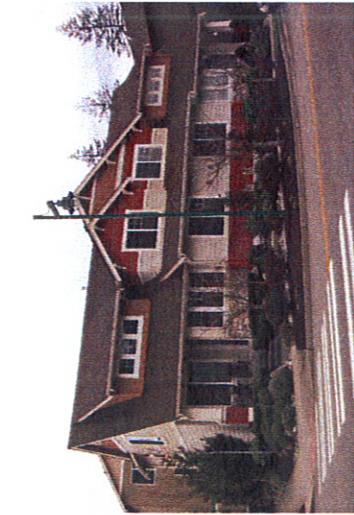
18 I DECLARE UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE
19 STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

20 DATED this 19th day of August, 2011, in Kirkland, Washington.

21 
22 Kevin Thomas



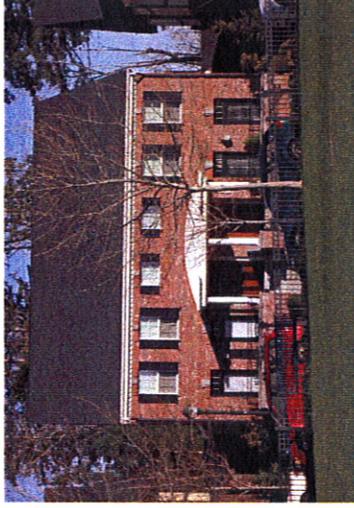
A



B



C



The Villages and Lawson Hills - Single Family Attached Product



Stacey Borland

From: Peter Rimbo <primbos@comcast.net>
Sent: Friday, August 19, 2011 7:45 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland
Subject: REPLY TO YB RESPONSE TO RIMBOS W.S.
Attachments: REPLY_to_YB_Resp_to_PGR_Transp_WS.doc; ATT00001..htm

Importance: High

Steve,

Hi. Attached is my REPLY to YarrowBay's Response (Exhibit #208) to my Written Statement (Exhibit #118).

Please acknowledge receipt.

Thank you.

EXHIBIT 262

**Black Diamond
Master Planned Developments
DEVELOPMENT AGREEMENT
OPEN-RECORD HEARINGS**

July/August 2011

***“REPLY” to
YarrowBay’s 8/15/11 Response (Exh. #208)
to Written Statement (Exh. #118)
Regarding***

Transportation Issues

by

Peter Rimbos

Presented to

Hearing Examiner Phil Obrechts

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

TABLE OF CONTENTS

What This “REPLY” Contains	2
AN OPENING THOUGHT	2
GLOSSARY	2
I. INTRODUCTION	2
II. OVERVIEW/SUMMARY	2
“Stop-Light” Assessment	2
A. MPD Ordinances	2
B. Black Diamond Municipal Code	2
C. Black Diamond Comprehensive Plan	2
D. King County Code	2
III. TECHNICAL DEFICIENCIES	2
IV. NON-COMPLIANCE WITH MPD ORDINANCES	2
Exhibit B--Conclusions of Law	2
Exhibit C--Conditions of Approval	2
V. DEVELOPMENT AGREEMENTS	2
4.0 LAND USE AND PROJECT ELEMENTS	2
11.0 PROJECT PHASING	2
12.0 DEVELOPMENT REVIEW PROCESS	2
EXHIBIT F – TRAFFIC MONITORING PLAN	2
EXHIBIT P – GREEN VALLEY ROAD MEASURES	2
EXHIBITS Q and R – TRANSPORTATION MITIGATION AGREEMENTS	2
VI. PROPOSED “NEW” CONDITIONS	2
“New” Condition 12 a.	2
“New” Condition 14 a.	2
“New” Condition 14 b.	2
“New” Condition 29 a.	2
“New” Condition 33 c.	2

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

*“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)*

VII. CHRONOLOGY AND REMAINING CONCERNS	3
VIII. CONCLUSIONS	3
IX. RECOMMENDATIONS	3
X. FOR THE CITY COUNCIL	3

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

What This “REPLY” Contains

This is a **REPLY** to YarrowBay’s 8/15/11 Response (Exhibit #208) to my Written Statement on Transportation (Exhibit #118). While meant to be comprehensive, it does not preclude other members of the Public or Organizations and Government Jurisdictions from submitting separate Replies. Please note that Exhibit #208 represents YarrowBay’s response to all Written Statements dealing with Transportation issues. However, YarrowBay explains that it largely addresses my Written Statement (Exhibit #118) and, in fact, follows my section headings, etc. Consequently, there could be other **REPLIES** to Exhibit #208 submitted.

Unfortunately, YarrowBay’s response itself is not comprehensive in that it selectively responds to some of my 103-page Written Statement.

To make review and assessment as easy as possible for your Honor I have put everything in one place using the following format:

My Written Statement -- *YarrowBay’s Response* -- My **REPLY**

with these three elements interspersed by Section, Subsection, or Item depending on what is easiest to follow.

Below is a description of each element and how it is presented:

1. My **Written Statement** (Exhibit #118)--in black in its original 1 1/2 spacing.

In my Written Statement (as submitted originally) I used purple lettering on all my commentary in **Section IV. NON-COMPLIANCE WITH MPD ORDINANCES**; **Section V. DEVELOPMENT AGREEMENTS**; and **Section VI. PROPOSED “NEW” CONDITIONS**. I have changed all such commentary to black in this **REPLY** document to distinguish from purple lettering I use in my **REPLIES** to *YarrowBay’s Responses* herein. I thought it was best to do it in this way, rather than use three different colors.

I also have made a similar change in my “Stop-Light Assessment Table” found in **Section II. OVERVIEW/SUMMARY**, which originally had purple lettering in the “Assessment of DAs” column.

Finally, I have put quotation marks (they were not in the as-submitted original) around all actual Condition language in **Section IV. NON-COMPLIANCE WITH MPD ORDINANCES** and actual Development Agreement language in **Section V. DEVELOPMENT AGREEMENTS** so as to avoid any confusion.

I mention these simply for completeness sake. Other than these three changes for clarity, I have kept everything in my Written Statement the same as it originally was submitted. Most importantly, to your Honor, the “content” is identical.

2. **YarrowBay’s Response** (Exhibit #208) to my Written Statement (Exhibit #118) copied and pasted *verbatim* herein--shown in black *italics* single-spaced.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Each time it is clearly labeled: “YarrowBay Response:”

Where YarrowBay provided no Response, I state so for completeness and to aid in your Honor’s review.

3. My **REPLY** to YarrowBay’s Response (Exhibit #208)--shown in purple single-spaced.

I believe I have taken great care to provide sufficient labeling (plus the same single spacing used in all YarrowBay Responses herein) to allow your Honor to distinguish between the various pieces of this **REPLY** document.

One last point, I have included specific **REPLY** to YarrowBay’s “Traffic Signal Assessment Table”--apparently the YarrowBay Response to my “Stop-Light Assessment Table” (a part of Exhibit #118; after noticing an Apple Pages / Microsoft Word conversion problem, I reformatted it and submitted it as a stand-alone Supplementary Exhibit #145; the Tables in both Exhibits are identical in content).

However, since my “Stop-Light Assessment Table” was simply meant to be a handy Summary of my Written Statement, it contains information taken from throughout my Written Statement. Because YarrowBay chose, in many cases, to provide Response to the Table, I have had to place such YarrowBay Response and my **REPLY** in those particular sections to which they apply (e.g., **Section IV -- NON-COMPLIANCE WITH MPD ORDINANCES**, Exhibit C -- Conditions of Approval). Nevertheless, I believe I have addressed all YarrowBay Response points made in its “Traffic Signal Assessment Table” within this **REPLY** document.

Although this probably sounds very convoluted (it did as I wrote it), I believe as your Honor begins to read this **REPLY** document, he will find that, though long, it is relatively easy to follow. *Bon chance!*

What follows in the next few pages is YarrowBay’s Response Introduction with my **REPLY** (I didn’t know where else to put this):

YARROWBAY’S RESPONSE INTRODUCTION AND DESCRIPTION OF HOW THE MPD CONDITIONS RESULT IN COMPREHENSIVE AND PRO-ACTIVE MITIGATION OF TRANSPORTATION IMPACTS.

YarrowBay Response:

YarrowBay provides this response to the following written testimony regarding transportation issues: Rimbo (Ex. 118, and Ex. 145), Bryant (Ex. 123), Irrgang (Ex. 137), Kemman (Ex. 59), Roach (Ex. 66), Edelman (Ex. 75), Earley (Ex. 87), GMVUAC (Ex. 63), Vukich/Ray (Ex. 131), Carrier (Ex. 130), and Vukich (Ex. 141). Collectively, these Exhibits are referenced as the “Citizen Transportation Exhibits.” Many of the comments made in the Citizen Transportation Exhibits are repetitive. Below, we provide a response to the comments, tied to at least one of the Citizen Transportation Exhibits. We did not cite each and every exhibit that made similar comments.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: That “one citizen” apparently is me, as virtually all YarrowBay Response is to my Written Statement (Exhibit #118).

YarrowBay Response:

Many of the opinions, assertions, and comments stated in the Citizen Transportation Exhibits demonstrate an unfortunate and fundamental misunderstanding of the transportation conditions that were imposed in the MPD Permit Approvals. YarrowBay provided an explanation of the transportation mitigation in the Guide to the Development Agreements, Exhibit 8. Here, we repeat some of that summary and add to it in another attempt to describe the comprehensive and pro-active protections imposed in Conditions of Approval 10 34. For ease of reference, this response uses The Villages Condition Numbers (unless specifically noted otherwise).

REPLY: Notwithstanding the professional slight on my experience as a long-time Boeing Principal Engineer and Project Manager, it should be made clear that the MPD Ordinance Conditions of Approval are sometimes vague and, thus, open to interpretation, especially from a technical point of view.

As I intend to show in this REPLY the fault lies not with members of the Public, Organizations, or Government Jurisdictions--all of whom have participated in this process, but with a set of Development Agreements which are sorely lacking in sufficient information for projects of this size, scope, and cost.

YarrowBay Response:

The Villages and Lawson Hills MPDs are required to construct or fund the MPDs share of numerous local and regional transportation improvements so as to maintain applicable standards (Conditions of Approval Nos. 10 and 15). The term "applicable standards" means the Level of Service standards set by the governing jurisdiction for any particular road or intersection project; e.g., the City Black Diamond's adopted Level of Service standards apply to any transportation improvements inside the City of Black Diamond. The mitigation projects range from improvements at existing intersections, to adding lanes to existing roadways, to the construction of brand new intersections and brand new roadways. Where feasible, intersection improvements in the City of Black Diamond will include the construction of roundabouts (Condition of Approval No. 19). The list of mitigation projects is far beyond the list that resulted from the FEISs, because following negotiations with both the Cities of Maple Valley and Covington, separate mitigation agreements were entered into pursuant to which YarrowBay voluntarily agreed to provide additional mitigation in those Cities (Exhibits "Q" and "R" to the Development Agreements). In total, there are over 50 improvements in the area. Those projects were graphically depicted on a color map following page 28 of the Guide (Exhibit 8).

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: This repeats a “theme” that is woven throughout YarrowBay's Response that the FEISs were found adequate including its “supporting” traffic analyses, therefore everything is OK by definition. However, as your Honor recalls and I presented in my Written Statement in great detail, very strong Transportation Conditions were imposed on the MPD Applications, but not the FEISs. As a result, YB has been able to perpetuate the fiction that their proposed traffic “mitigations:” go “far beyond” what came out of the FEISs.

I will not bore your Honor by going over this ground for a third time. Suffice it to say, in general, your Honor, myself, the City of Maple Valley, King County Department of Transportation (DOT), and WSDOT (the only exception being YarrowBay and the Black Diamond City Council) strongly believe the *original* Traffic Demand Model and the subsequent traffic analyses--upon which the FEISs and MPD Applications are based--were inadequate in depth, breadth, and assumptions used. That notwithstanding, I still intend to make the case in this REPLY that the Development Agreements are grossly deficient and require major revision.

YarrowBay Response:

In addition to the 50-plus mitigation projects, the City will periodically evaluate the MPD development to identify potential traffic impacts and, if necessary, to impose requirements to provide additional transportation improvements beyond those already identified in the MPD Conditions (Condition of Approval No. 17). These evaluations are called Periodic Review, and require that the City use a new transportation model to estimate MPD trip patterns and forecast future traffic volumes (Conditions of Approval Nos. 11, 12, 13, 14 and 17). The first Periodic Review will occur when there is enough completed MPD development such that traffic forecasting can rely less on assumptions and more on actual MPD characteristics. This threshold was set by the City Council for the time when building permits are issued for 850 dwelling units (Condition of Approval 17.a). Waiting to re-evaluate the transportation mitigation until there was actual data available from the MPDs, was never just YarrowBay's idea. In fact, the idea was supported by King County when Matt Nolan, the King County Traffic Engineer and Manager of the King County Traffic Engineering Section, told the City Council on July 6, 2010:

King County is supportive of an idea that would be in that 1,000 to 2,000 unit range where you would be looking to see what the actual numbers are generated by the development. As you do that development and you get some of it built and you start to look at the traffic again, the King County would push that - under that modelling [sic], the hearing examiner in his Condition 12 has recommended that unfunded projects be looked at, and we would concur that that makes a lot of sense.

After the first Periodic Review is conducted at 850 dwelling units, the City Council determines the next phase or interval at which Periodic Review will be conducted (Condition 17.a.).

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

REPLY: Unfortunately, this takes KCDOT’s Matthew Nolan’s prior testimony out of context. I have reviewed all, of Mr. Nolan’s testimony and spoken to him, as well. The original (2010) Yarrow Bay-proposed and clearly less-than-inadequate *stand-alone* “Midpoint Review” (i.e., 3,000 homes) was rejected outright by everyone (in fact, your Honor in his MPD Application Hearings Recommendations and the Public in multiple Oral Testimonies and Written Statements proposed a new evaluation of Traffic distribution, volume, and throughput at zero “0” homes). Waiting for 3,000 (or even a lesser number) of homes to be built before even looking at traffic models and analyses of traffic patterns, traffic volumes, travel times, queuing, peak-hour factors, etc. was considered a foolhardy gamble. Mr. Nolan’s testimony refuted that a “Midpoint Review” was adequate. In fact, Mr. Nolan’ testimony focussed on just four of the numerous conditions recommended by your Honor--Conditions 11, 12, 15, and 34, all of which had been proposed to be changed by the YarrowBay. Here is part of that July 6, 2010, testimony from which YarrowBay cited only a portion:

“We are willing to work collaboratively with the applicant and the City on the modeling. The hearing examiner has made a number of conditions and suggestions to you as a council to adopt. I would just point out the first thing he suggested is that you do that modeling right away. There have been a number of questions about if you should do a quarter-point review or a third-point review. King County is supportive of the idea if you would look at 1000-2000 units to see what actual numbers are generated by the development.”

Looking at the first part of Mr. Nolan’s statement: *“The first thing he suggested is you do that modeling right away.”* Mr. Nolan was agreeing with your Honor’s recommendation for new modeling for the Development Agreement process.

Looking at the second part of Mr. Nolan’s statement: *“There have been a number of questions about if you should do a quarter-point review or a third-point review. King County is supportive of the idea if you would look at 1000-2000 units to see what actual numbers are generated by the development.”* Here Mr. Nolan was suggesting that periodic reviews be conducted to check actual conditions such as actual trip internalization information. This, of course, is technically prudent and makes tremendous sense. In addition, the County recommended tying residential development thresholds to commercial/retail/employment opportunity thresholds, minimizing (future) MPD residents’ potential of developing employment and shopping trip patterns well-outside the MPD boundaries. The County felt such an approach would more closely mimic modeling results of the initial traffic impact analyses. This also is a technically prudent approach.

Unfortunately, YarrowBay selectively cited one quote out of context from Mr. Nolan’s testimony. YarrowBay also chose not to cite salient portions of Mr. Nolan’s testimonies related to concerns over use of the ITE Manuals, Internal Capture Rates, data and lessons learned from other MPDs in Western WA, etc. Mr. Nolan also testified that Alternate #3 should have been looked at in more detail, especially in terms of the traffic analyses. In fact, YarrowBay fails to mention that Mr. Nolan testified that the County

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

“greatly discourages” any “capacity improvements” on Rural Area roads including Green Valley Road.

YarrowBay Response:

In addition to the Periodic Reviews, before and in the middle of each phase of the MPDs, a Traffic Monitoring Plan (Condition of Approval No. 20) will monitor conditions where traffic impacts are anticipated and improvements required. The Traffic Monitoring Plan is designed to be proactive. Potential traffic impacts of an entire phase of development will be evaluated before any land use applications for that phase are submitted (Condition of Approval No. 25). Likewise, the Traffic Monitoring Plan will establish the timing of necessary transportation improvements before land use applications are submitted (Condition of Approval No. 25).

REPLY: Unfortunately, MPD Ordinance Condition 25 possesses some conflicts with Conditions 11 and 17 on timing of validation of the Traffic Demand Model. In fact, the Development Agreements are not clear on how and when modeling of traffic impacts will be done. Further, as described in my Written Statement (and not responded to by YarrowBay in its Response), the wording of Condition 25 implies such modeling, analyses, and mitigation identification be completed before entering into the Development Agreement or, at least, prior to “submitting land-use applications” for any particular phase. None of this is specifically addressed in the Development Agreements.

YarrowBay Response:

A new model is required to be created by the City at YarrowBay's expense (Condition No. 11). Both the Periodic Reviews and all runs of the Traffic Monitoring Plan that occur after model creation and validation will use that new model (Condition No. 17.a. and Exhibit "F"). The new model includes a number of parameters requested during the extensive hearings on the MPD Permits, such as additional roadways, peak hour factors, funded and unfunded future projects, and assessment of internal capture rates (Condition Nos. 11, 12, 13 and 14).

REPLY: This simply repeats some of the MPD Ordinance Conditions of Approval. However, the Development Agreements present very little detail on how any of this will be done. Incredibly, YarrowBay contends throughout its Response that the Development Agreements need only address those items *specifically* called out in the Conditions to be included therein. If true, then the Development Agreements would provide the City of Black Diamond and its citizens little to no detailed plans to fall back on when it tries to enforce thread-bare Development Agreements.

YarrowBay Response:

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

YarrowBay is also required to work in good faith with the City, King County and Plass Road residents to develop a plan to prohibit or discourage the use of Plass Road as a connection to SE Green Valley Road and to vacate a portion of this road provided stakeholders support such vacation (Condition of Approval No. 34). The Green Valley Road committee will review whether traffic calming measures along Green Valley Road should be built (Condition 33). Other conditions require project design to foster a connecting grid of roadways, assure maintenance of roadways and street side landscaping within the MPDs, allow traffic calming measures, provide for a future park and ride lot, assure fire safety via provisions for secondary access, and assure implementation of infrastructure projects is timed to keep pace with development (Condition Nos. 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31). Substantial sidewalk connections from the MPDs to existing developed areas in the City also are anticipated (Condition No. 32).

REPLY: I have fully covered the so-called “Traffic Calming Measures” and the simplistic study that produced them in detail in my Written Statement. This “take-it-or-leave” approach thrust on the citizens of Green Valley Road speaks for itself.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

AN OPENING THOUGHT

Issaquah Highlands MPD:

*~3,000 residences and ~900,000 sq ft of commercial/retail space
situated near an 8-lane divided interstate superhighway, I-90,
served by 3-lane (one-way) dedicated ingress/egress ramps
~10 miles from one of the world’s greatest high-tech employment centers.*

Snoqualmie Ridge MPD:

*~2,000 residences and ~800,000 sq ft of commercial/retail space
situated near an 8-lane divided interstate superhighway, I-90,
served by dedicated ingress/egress ramps
~15 miles from one of the world’s greatest high-tech employment centers.*

Black Diamond Villages and Lawson Hills MPDs:

*~6,000 residences and ~1,200,000 sq ft of commercial/retail space
situated near a 2-lane undivided state road, SR-169,
served by many non-signalized intersections
~30 miles from major employment centers.*

YarrowBay Response:

None.

REPLY: Interestingly, YarrowBay provided no response here.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

GLOSSARY

This Glossary contains phrases used within this Written Statement. It is presented as a reference to provide clear definitions of Traffic Analyses or Transportation Plans identified. For example, while the Development Agreements discuss cost-share splits, they do not provide the details of a credible and executable finance plan as listed below under Financial Plan and required by the MPD Ordinance Conditions of Approval.

--C--

Cost-Benefit-Risk Analysis -- An assessment of costs, benefits, and risks associated with potential traffic mitigations to inform major decision points and identify problems before they become insurmountable.

--F--

Financial Plan (Traffic Mitigation Funding Plan) -- A finance plan that provides cost-share splits, funding sources, and risks and timing associated with securing needed funds, as well as contingencies.

--T--

Traffic Analysis Plan -- A plan that provides a methodology to determine, analyze, and mitigate future traffic scenarios and includes model assumptions, sensitivity analyses, and assessment of results.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Traffic Model Validation Plan -- A plan that provides a methodology to validate and re-validate (as necessary) the traffic model against actual data to ensure the model accurately replicates real-world situations for various scenarios.

Transportation Concurrency Plan -- A plan that details how Transportation Concurrency testing will be done and provides a methodology to address when and how required adjustments in funding, timing, moratoriums, etc. should be made if a particular mitigation improvement fail the Transportation Concurrency test.

Transportation Monitoring Plan -- A plan to regularly and pro-actively monitor actual traffic to bring mitigation projects into service before the Level of Service is degraded.

Transportation Plan-- An overarching plan that contains and integrates the Financial Plan, Traffic Analysis Plan, Transportation Concurrency Plan, and Transportation Monitoring Plan and includes Needs, Tasks, Schedules, Costs Estimates, Funding Sources, Risks, and potential Impacts related to each Risk Factor. Such a plan must include the design, construction, maintenance, and operation of the vast transportation infrastructure the MPDs will require.

--V--

Vehicle-Trip Reduction Plan -- A plan that provides potential strategies to reduce vehicle trips generated into and out of the MPDs, details how the most promising concepts will be implemented, periodically monitors their performance over time, and recommends adjustments. Part and parcel of such a plan is to establish a baseline and targets to achieve over time.

YarrowBay’s Response:

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Mr. Rimbos introduces a list of defined terms in a glossary (pages 5 and 6). Mr. Rimbos's definition of such terms are not used by professionals in the transportation planning industry and simply reflect Mr. Rimbos' own opinion of what his self-defined analyses or plans should accomplish. YarrowBay recognizes that Mr. Rimbos's requests for these items are generated by a sincere concern and a sincere belief that they are necessary, but we ask that the Examiner acknowledge that none of Mr. Rimbos's desired plans and analyses are within the realm of what is normally required of development projects, and that none of his desired plans and analyses are required by the MPD Conditions of Approval.

REPLY: The Glossary was meant to aid your Honor and any other reader in understanding terms/phrases I use throughout my Written Statement. While they were not pulled out of any handbooks, etc., they do represent common-sense descriptions of what I describe in my Written Statement. It is surprising that YarrowBay fails to acknowledge that something as basic as Transportation Planning and the other terminology I use are not *"within the realm of what is normally required of development projects."* Unfortunately, YarrowBay would have everyone believe the only thing required is to mimic back the MPD Ordinance Conditions and include discussion only of those items specifically called out to be addressed in the Development Agreements. How can the City control the Master Developer and protect its citizens and business as build-out proceeds, if there is not a detailed plan of what is to be done, how it is to be done, when it is to be done, etc.?

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

I. INTRODUCTION

Your Honor. My name is Peter Rimbos. I reside at 19711 241st Ave SE, Maple Valley , WA 98038. As a resident of the Unincorporated Rural Area, I have been following these MPDs in depth for nearly two years because I have major concerns with the impacts on southeast King County’s fragile and already inadequate Transportation Infrastructure. These proposed MPDs are a regional issue of the first order.

Herein I discuss the gross deficiencies of the Development Agreements in meeting the Transportation Conditions in the *MPD Application Ordinances (10-946 & 10-947), Exhibit C--Conditions of Approval*; the Transportation requirements in the *Black Diamond Municipal Code*; the Transportation policies in the *Black Diamond Comprehensive Plan*; and the Transportation requirements in the *King County Code*.

With regards to the Development Agreements before you, my argument is structured as follows: Overview/Summary; Technical Deficiencies; Non-Compliance with MPD Approval Ordinance Conditions; Detailed Comments by Development Agreement Chapter, Section, and Exhibit; Proposed “New” Conditions to be forwarded to the Black Diamond City Council; Chronology and Remaining Concerns; Conclusions; Recommendations; and Discussion to be forwarded to the Black Diamond City Council.

Although your Honor cannot take this into account in rendering his Recommendations, for context, it must be pointed out the MPD Application Ordinance Conditions of Approval do not cover some of the most critical aspects of your Honor’s FEIS Appeals Decision and specific MPD Application Recommendations.

The MPD Application Ordinances Transportation Conditions (#10 - #34 for The Villages) are relatively weak. They directly contradict your Honor’s recommended Conditions on timing of Traffic Model Validation, Required Traffic Analyses, and Development and Assessment of New Traffic Mitigations. Although these Conditions make my argument more difficult to present, I believe this Written Statement provides an in-depth review of all Transportation aspects related to the MPDs and an

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

assessment against all requirements. It presents the case to reject and rewrite the Development Agreements.

There are several aspects to consider. Incredibly, Traffic Model Validation is pushed out to ~2016, a time when the threshold of 850 building permits may be issued. Required Traffic Analyses will not be accomplished upfront to ascertain the severity of future traffic distribution and volumes based on the new Traffic Demand Model. Development and Assessment of “new” Traffic Mitigations is pushed far into the future resulting in a completely “re-active” strategy, rather than a “pro-active” evaluation mandated by the Growth Management Act’s Transportation Concurrency rules. The Development Agreements don’t specify what steps will be taken to implement additional mitigation should analyses show planned mitigation is inadequate--a potential Fatal Flaw.

Unfortunately, with respect to the new Traffic Model, your Honor’s recommended Conditions #16 & #17 were eliminated. This should to be rectified either through the subsequent Closed-Record Hearings before the Black Diamond City Council or Amendments to the Ordinances. By eliminating these two conditions there will be no evaluation of impacts and mitigations prior to entering into the Development Agreements and no Transportation Monitoring Plan to bring mitigation projects online before the Level of Service is degraded. This is very risky and does not protect the City, its businesses, and its citizens. Why would this even be contemplated?

Each of these aspects are covered in “new” Conditions detailed in Section VI. *Proposed “New” Conditions* of this Written Statement.

Please note that throughout this Written Statement The Villages Conditions numbering scheme is followed. The transportation issues are global and shared, consequently there really is no distinction between the two MPDs--Lawson Hills and The Villages is this regard.

YarrowBay Response:
None.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

REPLY: YarrowBay provided no response to this entire section.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

II. OVERVIEW/SUMMARY

There are many issues being addressed during these Hearings. We have before us two 15 - 20 year plans. They are called **Development Agreements**, which could constitute long-term contracts between the City of Black Diamond and YarrowBay or its successors. Consequently, this is a major decision. One which will directly or indirectly affect most everyone who lives or owns a business in southeast King County.

The groundrules are clear. These Development Agreements must meet all MPD Ordinance Conditions of Approval and all applicable State, County, and City laws and codes. They also must fall within the local framework of the *Black Diamond Comprehensive Plan*, as well as the global policy framework of the *King County Comprehensive Plan* and the Growth Management Planning Council’s overarching *County-Wide Planning Policies*. Finally, they must provide benefits to the City and its citizens and businesses, while not burdening them with adverse impacts. This extends to the greater region where Southeast King County citizens and businesses also should not be burdened with adverse impacts.

Throughout these proceedings your Honor has heard a very clear message from the citizens. That message is one of horror at what is being considered here:

1. Quintupling the population of a small town on the Rural/Suburban fringe of the King County Urban Growth Boundary.
2. Adding over 10,000 additional commuters on windy, narrow 2-lane roads creating nightmare commutes and multiple consecutive queued intersections.
3. Clearcutting over 750 acres of prime forest habitat displacing native fish and wildlife.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

4. Massive cutting and grading of natural land contours creating an untold number of Stormwater runoff and erosion issues.

5. Fiscal impacts (largely unknown) and far too dependent on whose assumptions one uses and future agreements. The contractual issues alone boggle the mind.

6. Blatant exploitation of the adjacent Unincorporated Rural Areas by placing urban infrastructure such as needed Schools and Stormwater Detention Facilities outside the Urban Growth Area on cheaper land to save money without regard to the adverse impacts on rural residents of which I am one of many.

“Stop-Light” Assessment

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

Specifically, the following *minimum* transportation requirements have not been met in the Development Agreements (please note: The basic elements of all “Plans” discussed herein are described in the **GLOSSARY**):

(1) A **Traffic Analysis Plan** that provides sufficient detail to determine, analyze, and mitigate future traffic scenarios.

(2) Any specificity on needed **Transportation Mitigation** costs, schedules, risks, and funding mechanisms.

(3) No real **Transportation Plan** to address future traffic loads, develop and finance needed mitigations, and provide contingencies.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

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

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

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

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

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

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subject.	Citation	Assessment of DAs	Gr.
MPD Ordinance	# 10	Transportation Planning	...construct any new roadway alignment or intersection improvement....specify for which projects...eligible for either credits or cost recovery and by what mechanisms....	<input type="checkbox"/> No Transportation Plan detailing tasks and schedule. <input type="checkbox"/> No <u>details</u> on Credit or Cost Recovery mechanisms.	
Exhibit C-- Conditions of Approval	# 11	Traffic Demand Model	The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation.	<input type="checkbox"/> No Model Validation Plan to validate and re-validate the model leading to identification and evaluation of additional mitigation.	
	# 12	Model Assumptions & Analyses	The model must be run with currently funded transportation projects...shown in the applicable 6-yr & (unfunded) 20-yr TIPs.	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	
	# 14	Model Internal Capture Rate (ICR)	The new model must include a reasonable ICR assumption. The assumed ICR must be based upon and justified by an analysis....	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	
	# 15	Outside BD Mitigation	Any agreement so incorporated supersedes all other conditions and processes that may set mitigation measures and that are contained in the MPD Conditions or DAs.	[White, because the Condition isn't violated. Poorly worded Condition allows Outside Mitigation Agreements that <u>cannot</u> be changed.]	

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subject.	Citation	Assessment of DAs	Gr.
	# 17a. thru j.	Trans- portation Analysis [most critical Transp. Condi- tion]	[Three pages long.] 17f.: Proposed conditions & mitigations ...shall be revised if...the conditions or mitigation measures...have resulted in an unsatisfactory level of mitigation....	<input type="checkbox"/> No Traffic Analysis Plan describing what will be done with results and how they will be used to inform needed mitigations. No [post-850-building- permit] Traffic Analysis Plan.	
	# 18	Funding Responsi- bility & Pro-Rata Shares	The responsibilities and pro- rata shares of the cumulative transportation mitigation projects shall be established...which must cover the complete mitigation list.	<input type="checkbox"/> No Financial Plan that provides assurance obligations can be met, nor provides a process to evaluate pro-rata shares amongst jurisdictions.	
	# 20	Trans- portation Monitor- ing Plan	The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....	<input type="checkbox"/> Transportation Monitoring Plan is re- active, not pro-active; does not identify proper “trigger mechanisms” that can be measured and assessed.	
	# 25	Pre- Phase Modeling	...model...traffic impacts of a...phase before submitting land use applications...to determine at what point a ...(facility)...is likely to drop below...adopted LOS....	<input type="checkbox"/> No Traffic Analysis Plan [Also, Condition <u>conflicts</u> with provisions of Conditions 11 and 17 on timing.]	
	# 29	Regional Infra- structure Implemen- -tation Schedule	Prior to the first implementing project...being approved, a more detailed implementation schedule of the regional infrastructure projects...shall be submitted for approval.	<input type="checkbox"/> No Transportation Plan that includes a detailed implementation schedule (i.e., What information will inform such a Schedule and How will it be vetted?).	

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subject.	Citation	Assessment of DAs	Gr.
	# 33a	Limiting Green Valley Rd Traffic	...a description of the process and timing required for the Applicant to seek permits from King County should King County allow installation of the (calming) improvements....	<input type="checkbox"/> The “process” simply states the Master Developer will submit permit applications. No description of a process whereby the Master Developer, GVR residents & KCDOT develop mutually agreeable solutions. [Traffic Calming Study was simplistic.]	
	# 33b	Green Valley Rd Review Committee	A Green Valley Rd Review Committee shall be formed....The Committee...specifically shall meet to review the study required by Condition 33(a) and attempt to reach agreement on whether any suggested traffic calming devices should be provided....	<input type="checkbox"/> No Committee has been formed. [MPD Ordinance constrained Committee to only 2 residents (of 5 members), didn’t include KCDOT, and mandated a “take-it-or-leave-it” approach.]	
	# 34a	Project Responsibility Split	...address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery.	<input type="checkbox"/> No Financial Plan that provides cost estimates, timing, funding sources, contingencies, or risks. <input type="checkbox"/> No Cost-Benefit-Risk Plan .	
BD Municipal	18/98.010 (H); [COL 11]	---	Provide environmentally sustainable dvmt. (COL 11 implies this includes Vehicle Trip Reduction)	<input type="checkbox"/> No Vehicle Trip Reduction Plan .	
Code	18.98.010 (I); [COL 12]	---	Provide needed...facilities in an orderly, fiscally responsible manner.	<input type="checkbox"/> No Transportation Plan <input type="checkbox"/> Insufficient detail	
	18.98.020 (G); [COL 23]	---	Timely provision of all necessary facilities, infrastructure....	<input type="checkbox"/> No Transportation Plan detailing tasks & schedule.	

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
	18.98.080 (A)(4a); [COL 30]	---	...Prior to or concurrent with final plat approval...improvements have been constructed ...to have concurrency at full build-out...for...transportation improvements to serve the project....	<input type="checkbox"/> No Transportation Plan including process whereby mitigations may change to as issues develop. <input type="checkbox"/> No Transportation Concurrency Plan . <input type="checkbox"/> No enfrcm't mechn'sms	
BD Comp. Plan	7.2.2	LOS & Concur- rency	...To ensure...future dvmt. will not cause City's transp. system performance to fall below the adopted LOS, the jurisdiction must do one or a combination of...: modifying...land use element, limiting or "phasing" dvmt., req'g appr. mitigation, or changing...adopted std.	<input type="checkbox"/> No Transportation Concurrency Plan .	
	7.6	Travel Forecasts	A 1.0% annual growth rate...along SR 516, and a 1.5% annual growth rate...for all other intersections within the study area.	<input type="checkbox"/> The MPDs, as described, will vastly exceed these forecasts.	
	7.6.1	Future Land Uses/Tra nsp. Concepts	The City intends for the...Transportation and Land Use Elements work together to maintain the City's "small town" character....	<input type="checkbox"/> The MPDs, as described, will not meet this policy.	
	7.7.2 Road	Table 7-8 Inter- sections	[Much detail on Intersection LOS and Time Delays including potential mitigations]	<input type="checkbox"/> With mitigations planned it's improbable times cited in this policy can be met.	
	Condi- tions-- 2016	Table 7-9: Improve- ments	SR 169---Widen to 4 lanes from SE 288th St to Roberts Dr---Provides add'l capacity....	<input type="checkbox"/> No Transportation Plan or Financial Plan to make this happen.	
	7.8 Funding Strategy	Table 7- 11: Sources	Impact Fees...Developer Contributions...the potential for immediate concurrency....	<input type="checkbox"/> No Financial Plan showing <u>details</u> to meet.	

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subject.	Citation	Assessment of DAs	Gr.
	7.9.2	Concur- rency	...imprvmnts...are in place at... dvmt., or a financial commitmnt is in place...to complete... improvements...within 6 yrs....	<input type="checkbox"/> No Transportation Concurrency Plan.	●
	7.11.1 Transp.	T-13-- Concur- rency	...transp. improvements...are constructed or financed concurrent with development.	<input type="checkbox"/> No Transportation Concurrency Plan.	●
	Goals/Po licy	T-14-- Sources	Secure adequate long-term funding sources...through all feasible...methods.	<input type="checkbox"/> No Financial Plan. <input type="checkbox"/> Encourages City seek Grants & lobby for CFDs!	●
		T-15-- Mitigation	Require developers to contribute (to) transp. imprvmts ...to meet the LOS stds.	<input type="checkbox"/> No Financial Plan. <input type="checkbox"/> No Vehicle Trip- Reduction Plan.	●
King County Code	TITLE 14- ROADS	14.46 Public & Private Utilities	[This pertains to siting and permitting Utilities on King County real property]	<input type="checkbox"/> Stormwater Detention Facility <u>outside</u> UGA does not meet guidelines.	●
	AND BRIDGES	14.65 Integr'd Tranps. Program	Transportation Concurrency Management, Mitigation Payment System, & Intersection Standards.	<input type="checkbox"/> The Development Agreements do not meet permitting guidelines.	●
		14.70 Transp. Conc. Mgmt.	Permitting "...based on adequate transportation improvements needed to maintain LOS."	<input type="checkbox"/> Schools sited outside UGA do not meet permitting guidelines.	●
		14.75 Mitigation Payment System	"...applies transportation impact fees to new development for ...improvement(s)... needed...."	<input type="checkbox"/> The Development Agreements do not meet permitting guidelines.	●
		14.80 Intersec- tion Stds.	"...to assure...improvements to mitigate...impacts...are completed...."	<input type="checkbox"/> The Development Agreements do not meet permitting guidelines.	●

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Stop-Light Assessment Table					
Docum.	Sect./No.	Subsect.	Citation	Assessment of DAs	Gr.
Overa ll Grade : Meeti ng Ordin ance Condi tions or <u>BC</u> <u>Munic</u> <u>ipal</u> <u>Code</u>					
Overa ll Grade : Meeti ng Provi sions of <u>BD</u> <u>Comp</u> <u>rehen</u> <u>sive</u> <u>Plan</u> or <u>KC</u> <u>Code</u>					

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

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

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

The following subsections expand upon this and describe specific problems with the Development Agreements in terms of: **A. MPD Ordinances; B. Black Diamond Municipal Code; C. Black Diamond Comprehensive Plan; and D. King County Code.**

Please note a similar assessment against the *King County Comprehensive Plan* also was done, but is not included. Although it could be informative, it was felt that the Black Diamond City Council would ignore it.

Also, not included is an assessment against the Growth Management Planning Council’s *County-Wide Planning Policies (C-WPPs)*. These are a series of policies that address growth management issues in King County. They provide “*direction at the county and jurisdiction level with appropriate specificity and detail needed to guide consistent and useable local comprehensive plans and regulations.*” Those comprehensive plans must be consistent with the future vision of King County.

It is troubling the City of Black Diamond appears to be ignoring several tenets of the C-WPPs, as well as rejecting the Puget Sound Regional Council’s *VISION 2040* growth targets for “*Net New Units between 2006–2031*” for the City of 1,900 residences. In fact, the Regional Growth Strategy contained in *VISION 2040* calls for decreasing the amount of growth targeted to Small Cities--a list which includes Black Diamond.

YarrowBay’s Response:

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Mr. Rimbo summarizes his position in a "Stop-Light Assessment Table," which is separately filed as Exhibit 145. Within the City of Black Diamond, any request for a new traffic signal must first be examined to determine if a round-a-bout is feasible, rather than a signal. Thus, the "stop light" analogy is not particularly apt. However, Yarrow Bay has reviewed each item in that table and the text of Mr. Rimbo's statement to create Attachment A, "YarrowBay's Traffic Signal Assessment Table Response to Ex. 118 and Ex. 145." Each item raised by Mr. Rimbo receives a Revised Grade based on YarrowBay's response. Perhaps not surprisingly, while Mr. Rimbo's assigned Grades were Yellow and Red Lights, YarrowBay's are all Green lights. Every issue raised by Mr. Rimbo is either addressed in the Development Agreements, or does not need to be addressed in the Development Agreements.

REPLY: Notwithstanding YarrowBay's confusion of linking a "Stop-Light Assessment Table" with traffic signals and roundabouts ("stop-light" assessments are typical in Engineering practice, there is no particular connection to just Traffic Engineering), the intent is to use a standard technical assessment tool to illustrate key issues, how they are or are not addressed, and assign a Grade with supporting rationale. In this way a reviewer--your Honor or any reader--can see in one place an assessment cogent to the entire Written Statement. I would hope your Honor found this Table helpful in my Written Statement and a good resource to continually tie back to as he waded through 103 pages of text.

Also, to be clear, the Table that constitutes Exhibit #145 is identical to the table contained in the my Written Statement (Exhibit #118). The former Supplement only was submitted after I found that the formatting of the Table had changed when I converted it from Apple Pages to Microsoft Word.

In this REPLY document I provide a line-by-line REPLY to YarrowBay's "Traffic Signal Assessment Table." I believe the differences with my "Stop-Light Assessment Table" and, thus, the Grades assigned therein, can be explained (as is done in several Sections of this REPLY document) in what level of detail of plans (if any!) should be provided, explained, and justified in the Development Agreements. Not to be simplistic, but YarrowBay has made it clear in their Response to my Written Statement (and probably to others) that it believes little to no detail is required other than mimicking back the MPD Ordinance Conditions with some description thrown in for those items specifically called out to be addressed in the Development Agreements. I, on the other hand, believe the Development Agreements are to be used by both the City and the Master Developer to define what, how, why, when, where, etc. is to be done and to reach a mutual agreement of same. Consequently, my "Stop-Light Assessment Table" points out where certain details are required to be addressed, if they were addressed, and how well they were addressed. Using this technically prudent method the Development Agreements are found wanting in many respects.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

A. MPD Ordinances

Among many critical omissions in the Development Agreements with respect to the stipulations of the MPD Ordinances, the following are most glaring:

1. There is no **Transportation Concurrency Plan**. For any mitigation plan to succeed, at a minimum, Transportation Concurrency must be met. The MPD Ordinances’ *Exhibit B--Conclusions of Law, para. 30* mentions ensuring “concurrency at full build-out.” Transportation Concurrency testing also is called out in the *Black Diamond Comprehensive Plan* in sections 7.2.2, 7.9.2, and 7.11.1. There is no mention of how Transportation Concurrency testing will be done or if it will be done. Further, there is no **Transportation Concurrency Plan** to be put in place should concurrency not be met. Such a plan, when added, should detail needed adjustments--such as funding, timing, moratoriums, etc.--to be made should a particular improvement fail the Transportation Concurrency Test. A viable and executable Transportation Concurrency Plan must be provided in the Development Agreements.

YarrowBay Response:

1. *Mr. Rimbo asserts that Conclusion of Law 30 requires his definition of a transportation concurrency plan. In fact, Conclusion of Law 30 does not mention "ensuring concurrency at full build out;" that quote is from the text of BDMC 18.98.080(A)(4). Regardless of the source of the quote, as to transportation, the MPDs provide MORE protection to the City than a standard transportation concurrency plan. See Ex. 139, Attachment 6.*

REPLY: There is nothing to be found in the Development Agreements that supports YarrowBay's claim of providing "MORE protection to the City than a standard transportation concurrency plan." In my 8/12/11 Response (Exhibit #224) to YarrowBay's 8/4/11 Written Comments (Exhibit #139) I provided extensive commentary on Attachment 6. While I refer your Honor to that Response, I include just few points below.

1. The timing required to meet Concurrency is not adequate. This is especially the case, as identified earlier, in how *Exhibit F, Part D* addresses mitigation "within the State right-of-way" and "outside the City of Black Diamond City."

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

2. A viable and executable Transportation Concurrency Plan is not provided in the Development Agreements.
3. When it comes to Transportation Concurrency testing there is no mention in the Development Agreements of how it will be done, when it will be done, or if it will be done.

2. There is no Traffic Demand **Model Validation Plan**. This is required by *MPD Ordinance Condition 17*. How will the model results be verified? How will the model be validated to show it provides reproducible results in a variety of a situations? What analyses will be performed on key input parameters (in fact, what are they?) to understand the sensitivity of variations in results? **Model Validation Plans** that address these concerns and provide a clear methodology to be used must be required in the Development Agreements.

YarrowBay Response:

2. *Mr. Rimbos asserts that there is no traffic demand model validation "plan" as required by Condition of Approval No. 17. In fact, Condition of Approval No. 17(a) required that "the City validate and calibrate the new transportation demand model" when building permits have been issued for 850 dwelling units, and then at subsequent periodic reviews, which review timeframes shall be set by the Council. There simply is no requirement in Condition of Approval No. 17 to disclose a "plan" for conducting validation and calibration in the Development Agreement. Nor is there any need to do so. The parameters of the model are set forth in great detail by the MPD Conditions of Approval, and model validation and calibration are standard procedures followed by transportation engineers who are preparing and using models.*

REPLY: Unfortunately, when given the opportunity to provide a plan to validate the new regional Transportation Demand Model, a critical milestone to ensuring these proposed Development Agreements provide adequate and timely transportation infrastructure mitigation, the “non-response” above is given.

3. There is no **Transportation Plan** to “maintain the City’s...LOS.” This is required by *MPD Ordinance Condition 10*. The proposed Transportation Monitoring Plan, as mentioned earlier, is re-active and, thus, cannot by definition “maintain the City’s...LOS.” So, where is the **Transportation Plan** to ensure Level of Service

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

(LOS) standards and timing are met? **Transportation Plans** that address, at a minimum, the transportation needs, routes, schedule, estimates, funding sources, risks, cost-benefit-risk analyses (continually revisited throughout the life of the projects), and potential impacts related to each risk factor must be included in the Development Agreements.

YarrowBay Response:

3. Mr. Rimbo asserts that there is no transportation plan to "maintain the City's ... LOS" as required by Condition of Approval No. 10. In fact, Condition No. 10 requires that the Master Developer construct all City of Black Diamond "roadway alignment[s] or intersection improvement[s] ... depicted in the City's Comprehensive Plan" ... "necessary to maintain the City's then-applicable, adopted levels of service." Those projects are listed in Table 11-5-2 of the Development Agreement. The timing for construction is set by Exhibit "F," the Traffic Monitoring Plan. As described in detail above in response to Citizen Transportation Exhibit comments on the Development Agreement, Exhibit "F", the Traffic Monitoring Plan is pro-active, not re-active, and is specifically designed to ensure that the City's applicable, adopted levels of service, are maintained.

REPLY: As detailed in my Written Statement, there is no Transportation Plan in the Development Agreements that addresses the transportation needs, routes, schedule, estimates, funding sources, risks, cost-benefit-risk analyses, and potential impacts related to each risk factor. YarrowBay's reasoning for this (espoused above) is that it is not required.

4. There is no **Transportation Plan once 850 building permits are issued**. This is required by *MPD Ordinance Condition 17*. Once the model is "validated" after 850 building permits are issued, what is the plan that will be put in place to repeatedly run and adjust the model to determine the level and timing of needed mitigation? [Alarmingly, *MPD Ordinance Condition 15* states the Maple Valley and Covington Transportation Mitigation Agreements "supersede" the MPD Conditions of Approval and, thus, are not subject to any new traffic modeling based on the new Traffic Demand Model. This inexplicable blunder is addressed, herein, in Section VI. *Proposed New Conditions*.]

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

YarrowBay Response:

4. Next, Mr. Rimbo asserts that after 850 building permits are issued, there is no "plan ... in place to repeatedly run and adjust the model to determine the level and timing of mitigation." Again, Mr. Rimbo appears to misunderstand how the transportation conditions work together to ensure continued Periodic Review and updating of the transportation mitigation projects. See Condition No. 17, and the Introduction to this Memorandum, describing how the MPD conditions result in comprehensive and pro-active mitigation of transportation impacts.

REPLY: I do not "misunderstand how the transportation conditions work together," as YarrowBay asserts. I am not even talking about those Conditions. Rather, I am stating the Development Agreements do not contain a plan to be put in place once the new regional Traffic Demand Model is validated to use the model coupled with detailed intersection analyses to determine the level and type of mitigation needed. To provide meaningful documentation and commitment on the part of all parties the Development Agreements must not simply parrot back the MPD Ordinance Conditions. If that fiction were true, as YarrowBay seems to repeatedly assert, then why hold any Hearings whatsoever?

5. There is no **Traffic Mitigation Plan that addresses inadequate or failed mitigations**. This is required by *MPD Ordinance Exhibit B, Conclusions of Law, para. 30F* and *Black Diamond Municipal Code (BDMC) 18.98.080(A)(4)*. Invariably, some traffic mitigations planned years ahead of time will be deficient in some aspects. Where is the plan to address such deficiencies and outright failures? How will this affect the Phasing schedule? Who pays for augmented mitigation? When does it go in? All of these critical issues must be addressed in the Development Agreements.

YarrowBay Response:

5. Mr. Rimbo asserts that *Conclusion of Law 30F* requires a "plan to address deficiencies and outright failures" that Mr. Rimbo assumes will develop in some traffic mitigations planned years ahead of time. It is comforting that Mr. Rimbo recognizes that there is a substantial list of traffic mitigation required by the MPD Permit Approvals, and referenced in the Development Agreements to address future needs. However, *Conclusion of Law 30F* does not require any sort of "plan to address deficiencies and

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

outright failures,” of previously constructed mitigation. Conclusion of Law 30F references the Traffic Monitoring Plan imposed by Condition of Approval No. 25, and then states that the Traffic Monitoring Plan must require the Master Developer to “analyze the traffic impact of a pending phase of development before the start of that phase to determine when a street or intersection is likely to drop below the adopted level of service. Transportation mitigation projects should then be implemented to prevent LOS failure. Traffic mitigation projects may change or additional projects be added to address the traffic issues as they actually develop.” Thus, the Conclusion of Law calls for exactly what is contained in Exhibit “F:” a monitoring plan that looks forward in time to predict when a street or intersection is likely to drop below the adopted level of service, so that transportation mitigation projects can be timely implemented.

REPLY: Unfortunately, the Development Agreements simply do not address how inadequate or failed mitigations will be handled, how they will be accommodated in the Phasing Schedule, and who is liable and for how much.

Of possibly greater concern is that YarrowBay above states that not only is there no plan to address mitigation deficiencies and outright failures in the development Agreements, it believes it is not required to address them at all! I caution your Honor and the City Council to read these words very carefully.

6. There is no **Traffic Mitigation Funding Plan (Financial Plan)**. This is required by *MPD Ordinance Condition 10* and implied in **Condition 17**. Although both the *MPD Ordinance Conditions* and the Development Agreements list some projects and some cost-share splits, there is a scarcity of credible information on funding sources, the risks of those sources materializing, and the timing associated with securing needed funds. Such a Traffic Mitigation Funding Plan should be part of the overall Transportation Plan mentioned earlier under 3.

YarrowBay Response:

6. *Mr. Rimbo asserts that a traffic mitigation funding plan or financing plan is “required by MPD Ordinance Condition 10 and implied in Condition 17” and that the Development Agreements include only a “scarcity of credible information on funding.” In fact, MPD Condition of Approval No. 10 and No. 17 provide for no such thing. There is no requirement that specific funding sources for any mitigation project be identified. Essentially, Mr. Rimbo asks for new conditions that were not in the MPD Conditions of Approval. Not only is that outside the authority and jurisdiction of the Hearing Examiner,*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

but it is also not necessary because if funding is not available, and mitigation is not built, then development will not proceed due to the myriad protections included in the MPD Conditions of Approval and Section 11 of the Development Agreements.

REPLY: MPD Ordinance Condition 10 calls for the following:

1. *“...construct any new roadway alignment or intersection improvement that is: (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan...”*
2. *“The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur.”*

Incredibly, the Development Agreements do not include any Traffic Mitigation Funding Plan (or Financial Plan), yet YarrowBay claims it will meet Condition 10 to “construct” the mitigation improvements and somehow “specify” which projects are eligible for cost recovery and how that will occur. Once again, YarrowBay asserts the fiction that the Development Agreements are not the place to put any detail it could be held to in the future.

[Aside: While your Honor is much more familiar with Development Agreements than I am, I can’t help but wonder why a City would even contemplate signing documents such as these riddled with so many holes and unanswered questions.]

7. There is no **Vehicle-Trip Reduction Plan**. This is called out in *MPD Ordinance Exhibit B, para. 11C* and implied in *BDMC 18.98.010(H)*. There is insufficient information to provide any confidence in the success of any **Vehicle Trip Reduction Plan** to be put in place, nor its timing.

YarrowBay Response:

7. *Mr. Rimbo asserts that MPD Conclusion of Law 11C requires a vehicle trip reduction plan, and that a vehicle trip reduction plan is implied in BDMC 18.98.090(H). There is no such requirement or implication. Conclusion of Law 11C describes features of the Villages Project that achieve vehicle trip reduction, including: “trails and bike lanes, inclusion of schools within walkable distances to residential areas” that will “facilitate non-motorized travel within the Main Property.” Conclusion of Law 11C also describes how it is “possible that some vehicle trips would be reduced especially given the proximity of commercial uses to the residential component of Parcel B and the Main Property’s Town Center.” BDMC 18.98.090(H) states only “Provide environmentally sustainable development.” It appears that Mr. Rimbo’s real complaint is that there is very little transit serving the current City of Black Diamond. As such, Mr. Rimbo’s complaint overlooks that the MPDs were evaluated and mitigation was designed for*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

impacts assuming the worst-case scenario of no transit. Assuming that worst-case scenario assures that the most traffic mitigation is required. In addition, transit service itself is supported by housing density and sheer population. The approved MPDs will add a number of households to Black Diamond, which will help support bringing more transit to the area.

REPLY: No, my “real complaint” is not that “there is very little transit serving the current City of Black Diamond,” although, that is an important point. It is up to your Honor to interpret MPD Conclusion of Law 11C and BDMC 18.98.090(H). Also, Black Diamond Comprehensive Plan (BDGP) Policy T-15: Financial Impact Mitigation Policy--Item 33 states: “Encouraging developers to design projects that generate less vehicular traffic.”

That said, the issue is with the magnitude of the potential traffic volumes to be generated by the proposed MPDs, vehicle-trip reduction schemes are a must to the success of the projects. The Development Agreements barely give such schemes lip service and, thus, provide no basis to determine what could work and how much it would reduce traffic volumes and/or travel times if employed.

Further, to “provide environmentally sustainable development,” means far more than using environmentally friendly design materials, reclaiming water, etc. (all of which I fully support). It also means ensuring that MPDs truly are “master-planned” and provide residents and businesses alike a focussed core (or cores) that enable readily assessable access to work, shopping, worship, and recreation. A Vehicle Trip Reduction Plan is an important part of that framework and vision.

8. Although there is a **Transportation Monitoring Plan**, it is insufficient for the task at hand. Transportation Monitoring must be pro-active, not re-active, as testified to by WSDOT in last year’s FEIS Appeals Hearings. “Monitoring” can be used to assess the *adequacy* of built mitigations, but it cannot be the foundation of a mitigation identification process, as those mitigations would never be built in time to address the failure in traffic flow rates they are supposed to address.

YarrowBay Response:

8. Mr. Rimbo asserts that the Traffic Monitoring Plan included at Exhibit "F" is insufficient because it is re-active instead of pro-active. Mr. Rimbo raises this issue several times, and YarrowBay has responded, above, in response to comments on Exhibit "F" to the Development Agreement.

REPLY: I have respond to this assertion multiple times herein and refer your Honor accordingly.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

B. Black Diamond Municipal Code

YarrowBay Response to entire subsection B. Black Diamond Municipal Code:

Mr. Rimbo alleges a number of violations of the MPD Provisions found in ch. 18.98 BDMC. As Yarrow Bay argued in Ex. 139, these provisions were already deemed met by the approval of the MPDs and are not open to re-assessment in the Development Agreement process. We continue to object to the Examiner's consideration of these arguments, but in the event the Examiner does consider these issues, we respond to the items alleged by Mr. Rimbo, none of which are true. See Attachment A, YarrowBay's Traffic Signal Assessment Table Response to Ex. 118 and Ex. 145, for a response to each code section raised.

REPLY: Unfortunately, YarrowBay uses the argument that since the MPD Ordinances were passed, therefore the Development Agreements do not need to explain how all applicable provisions of the Black Diamond Municipal Code will be met.

Once again, we have a different interpretation for what is to be contained in credible Development Agreements. I am looking not only for some semblance of planning, but for details contained in those plans. Unfortunately, both are either missing or are insufficient to the task at hand, thus making a reasonable assessment of what is to be done, how it is to be done, and when it is to be done nearly impossible.

YarrowBay continues to insist that since the MPD Ordinance Conditions say “do ‘A’ ” that simply parroting back that “ ‘A’ will be done” is sufficient--it is not! The Development Agreements must provide the details of how those Conditions will be met, otherwise they do not spell out what is being agreed to between the City and the Master Developer. This could result, invariably, with the City and the Master Developer in court repeatedly to resolve differences that were never clearly identified or understood at the outset.

I have typed (since I could not copy and paste them as I could the rest of its Response) the major points of YarrowBay’s Response from its Traffic Signal Assessment Table below under each Code Section. For each Code Section your Honor will first see the text of the Code Section and my commentary--all from my Written Statement, followed by excerpts from YarrowBay’s Traffic Signal Assessment Table, followed by my REPLY. Please accept my apologies ahead of time for this was painstaking piecemeal work.

1. **Code Section 18.98.010** states the purposes for an MPD and includes under *Paragraph H: “Provide environmentally sustainable development.”*

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

This, among many things, implies a **Vehicle Trip Reduction Plan**, as is discussed in *MPD Ordinances’ Exhibit B--Conclusions of Law, para. 11*. There is no Vehicle Trip Reduction Plan in the Development Agreements. This code provision is not met in the Development Agreements.

YarrowBay Response (from Attachment A):

“The plain language of BDMC 18.98.010(H) does not require a ‘vehicle trip reduction plan’ and, therefore, Mr. Rimbo’s assertion that the Development Agreement must include such a plan is incorrect.”

REPLY: BDMC 18.98.010(H) clearly states *“Provide environmentally sustainable development.”* Conclusion of Law 11 states the following: *“BDMC 18.98.010(H): Provide environmentally sustainable development; C. Vehicle Trip Reduction.”* The YarrowBay “plan” which mentions bike paths, a park-and-ride lot, and “walkable” distances to schools does not constitute a serious Vehicle Trip Reduction Plan, nor will these “features” make a dent in the 10,000+ vehicles per day that will be thrust onto an already over-burdened transportation infrastructure.

2. **Code Section 18.98.010** states the purposes for an MPD and includes under *Paragraph I: “Provide needed services and facilities in an orderly, fiscally responsible manner.”*

This means that all transportation-related improvements must be provided *“in an orderly, fiscally responsible manner.”* There is no **Transportation Plan** or sufficient detail provided. This code provision is not met in the Development Agreements.

YarrowBay Response (from Attachment A):

“Mr. Rimbo’s assertion that the Development Agreements do not describe how infrastructure will be provided is incorrect. Many Conditions (which are incorporated into the development Agreement in Exhibit ‘C’) address the timely and fiscally responsible nature of required infrastructure....”

REPLY: BDMC 18.98.010(I) clearly states: *“Provide needed services and facilities in an orderly, fiscally responsible manner.”* There is no Transportation Plan or sufficient detail

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

provided in the Development Agreements to see how this provision can or will be met. Just because the Conditions state to do something in a timely and fiscally responsible manner, doesn't exonerate the Development Agreements from describing what will be done, how it will be done, and when it will be done. Without a Transportation Plan and a Financial Plan that would provide such information, how can any of this be assessed in a responsible manner?

3. **Code Section 18.98.020** states, in part, the Public Benefits to be derived and includes under *Paragraph G*: *“Timely provision of all necessary ... infrastructure ... equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops.”*

This means all transportation-related infrastructure must be provided in a “timely” matter. There is no **Transportation Plan** detailing tasks & schedule. This code provision is not met in the Development Agreements.

YarrowBay Response (from Attachment A):

“Mr. Rimbo’s assertion that the Development Agreements do not describe how infrastructure will be provided is incorrect. Many Conditions (which are incorporated into the development Agreement in Exhibit ‘C’) address the timely and fiscally responsible nature of required infrastructure....”

REPLY: BDMC 18.98.020(G) clearly states: *“Timely provision of all necessary ... infrastructure ... equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops.”* There is no Transportation Plan providing, at a minimum, tasks and schedule, or sufficient detail provided in the Development Agreements to see how this provision can or will be met. Again, just because the Conditions state to do something in a timely and fiscally responsible manner, doesn't exonerate the Development Agreements from describing what will be done, how it will be done, and when it will be done. Without such information, how can any of this be assessed in a responsible manner?

4. **Code Section 18.98.080** states, in part, as conditions of approval of any future MPD permits under *Paragraph A.4.a* that there be a: *“...phasing plan and timeline*

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

for the construction of improvements ... so that: Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted” So, looking ahead, the required transportation improvements must be in place, at least, at final plat approval. However, the City’s current *Six-Year Transportation Improvement Plan (TIP)* contains projects that clearly will not mitigate the immense impacts of the MPDs and do not have real funding sources or risks identified with financing, securing Right-of-Ways, nor construction. This effectively lets the Master Developer’s responsibility wane for funding such expensive and time-critical mitigations and places the burden directly on current and future taxpayers.

There is no **Transportation Plan** providing detailed tasks and schedules or process whereby traffic mitigations may change to address issues as they develop over time. There is no **Transportation Concurrency Plan** defining the timing and conduct of Transportation Concurrency Testing. [Further, it appears the City has no enforcement mechanisms in place.]

This code provision is not met in the Development Agreements.

YarrowBay Response (from Attachment A):

“Mr. Rimbo’s assertion that infrastructure will not be provided concurrent with development is incorrect. Many Conditions (which are incorporated into the development Agreement in Exhibit ‘C’) address the timely and fiscally responsible nature of required infrastructure....” “Mr. Rimbo’s concerns about transportation concurrency are especially misplaced.”

REPLY: BDMC 18.98.080(A.4.a) clearly states that a: *“...phasing plan and timeline for the construction of improvements ... so that: Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted”* There is no Transportation Plan including a process whereby mitigation may change as issues develop, or sufficient detail provided in the Development Agreements to see how this provision will be met. Again, just because the Conditions state to do something in a timely and fiscally responsible manner, doesn’t exonerate the Development Agreements from describing what will be done, how it will be done, and when it will be done. Without such information, how can any of this be assessed in a responsible manner?

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

I provided an extensive line-by-line Response to the *Transpo Group Response Brief* (Attachment #6) in my 28-pg Response (Exhibit #224) to YarrowBay’s 8/4/11 Written Comments. Sixteen pages of that Response are exclusively devoted to the *Transpo Group Response Brief*. With my apologies, I direct your Honor to my Response (Exhibit #224).

5. **Code Section 18.98.090** states, in part: *“The MPD conditions of approval shall be incorporated into a development agreement as authorized by RCW 36.70B.170.”* This means that all *MPD Ordinance, Exhibit C--Conditions of Approval*, are to be addressed in the Development Agreements This general overarching concern is not listed in the “Stop-Light Assessment Table,” but is addressed throughout this Written Statement where specific examples are cited to show where the Development Agreements have not met this code provision.

REPLY: There is one MPD-overarching BDMC provision that I did not include in my *“Stop-Light Assessment Table,”* namely BDMC 18.98.090 which states, in part: *“The MPD conditions of approval shall be incorporated into a development agreement as authorized by RCW 36.70B.170.”* This means that all *MPD Ordinance, Exhibit C--Conditions of Approval*, are to be addressed (i.e., not simply parroted back) in the Development Agreements. I considered this to be such an overarching concern that I addressed it throughout my Written Statement providing specifics where the Development Agreements fall short or miss the mark completely.

C. Black Diamond Comprehensive Plan

YarrowBay Response to entire subsection C. Black Diamond Comprehensive Plan:

Mr. Rimbos alleges a number of inconsistencies between the MPDs and the Black Diamond Comprehensive Plan. The MPDs were approved in September 2010, and that approval constitutes the City’s determination of consistency with the Comprehensive Plan. These issues are not open to re-assessment in the Development Agreement process. We object to the Examiner’s consideration of these arguments, but in the event the Examiner does consider these issues, we also respond to the items alleged by Mr. Rimbos. See Attachment A, YarrowBay’s Traffic Signal Assessment Table Response to Ex. 118 and Ex. 145, for a response to each Comprehensive Plan section raised.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: Once again, YarrowBay uses the argument that since the MPD Ordinances were passed, therefore the Development Agreements do not need to explain how all applicable provisions of the Black Diamond Comprehensive Plan will be met.

YarrowBay embedded its Response to this subsection (and some other subsections) in their “Traffic Signal Assessment Table.” I have typed (since I could not copy and paste them as I could the rest of its Response) the major points of YarrowBay’s Response from its “Traffic Signal Assessment Table” below under each Comprehensive Plan provision. For each Comprehensive Plan provision your Honor will first see the text from the Comprehensive Plan and my commentary--all from my Written Statement, followed by excerpts from YarrowBay’s “Traffic Signal Assessment Table,” followed by my REPLY. Please accept my apologies ahead of time for this was painstaking piecemeal work.

REPLY: Your Honor I inexplicably left out BDCP 7.2.2 Level of Service and Concurrency in this portion of my Written Statement. Fortunately, I did include how the Development Agreements fail to meet its provisions in my “*Stop-Light Assessment Table.*” To YarrowBay’s credit, they provided a Response to it in their “Traffic Signal Assessment Table.” That *YarrowBay Response-REPLY* discussion follows below:

YarrowBay Response (from Attachment A):

“Similar to the City’s Concurrency Management System (CMS), the MPD Conditions and Development Agreements require that adequate transportation facilities are in place concurrent with the development of the MPDs.” “In contrast, the requirement in the MPD Conditions of Approval and Development Agreements is far more stringent.”

REPLY: BDMC 7.2.2 states, in part: “...To ensure...future development will not cause City’s transportation system performance to fall below the adopted LOS, the jurisdiction must do one or a combination of...modifying...land use element, limiting or “phasing” development, requiring appropriate mitigation, or changing...adopted standard.” With no Transportation Concurrency Plan provided in the Development Agreements, it is not possible to assess how this Code provision will be met. The Conditions of Approval describe what should be done, the Development Agreements do not describe what will be done, how it will be done, or when it will be done.

1. **Plan Section 7.6 Travel Forecasts** states: “A 1.0% annual growth rate was assumed for the Covington area along SR 516, and a 1.5% annual growth rate was assumed for all other intersections within the study area.” The MPDs

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

described in the Development Agreements vastly will exceed these forecasts.
The Black Diamond Comprehensive Plan Travel Forecasts are in urgent need of
updating.

YarrowBay Response (from Attachment A):

“The City’s forecast of future traffic volumes applied annual growth rates to existing volumes to estimate growth in background traffic....The City’s travel forecasts are not in urgent need of updating as these forecasts do incorporate MPF traffic as well as account for increase in background traffic volumes.”

REPLY: BDCP 7.6 Travel Forecasts states: “A 1.0% annual growth rate was assumed for the Covington area along SR 516, and a 1.5% annual growth rate was assumed for all other intersections within the study area.” Were they “assumed,” as stated, or were they numerically estimated? Either way, without actually seeing the data, it is hard to believe that the addition of 10,000+ vehicles to the already overburdened transportation infrastructure in and around the City of Black Diamond results in only a 1 to 1.5% annual growth rate! Your Honor, I do not have the data and I cannot analytically disprove this, but in Engineering, when presented with test or analytical results to review, one always first performs the “smell” test (i.e., do the results make any sense?), and this certainly does not pass that test. Using the “Rule of 72” (i.e., Growth Rate times Number of Years to Double) and these annual growth rates, it would take between 48 and 72 years for traffic to double! We sometimes see “doubling” in less than 15 to 20 years!

- 2. Plan Section 7.6.1 Future Land Uses & Transportation Concepts** states: “*The City intends for the Black Diamond Comprehensive Plan Transportation and Land Use Elements work together to maintain the City’s “small town” character in the face of increasing regional traffic-related impacts.*” The MPDs described in the Development Agreements do not make it possible to meet this policy in the near or short term.

YarrowBay Response (from Attachment A):

“The City’s transportation policies are described in Section 7.11.1 (‘Transportation Goals and Policies’), not Section 7.6.1. That being said, the City’s ‘Small Town’

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

*Character Policy (Policy T-10) is intended to enhance this ‘small town’ character....”
“Each element of this policy can be achieved in the near- or short-term with the MPDs.”*

REPLY: Under Item 2. in this subsection I am talking about BDCP 7.6.1 Future Land Uses & Transportation Concepts, not BDCP 7.11.1, as YarrowBay insinuates. [I discuss BDCP 7.11.1 under Item 6. further down in this subsection.]

BDCP 7.6.1 states: *“The City intends for the Black Diamond Comprehensive Plan Transportation and Land Use Elements work together to maintain the City’s ‘small town’ character in the face of increasing regional traffic-related impacts.”* With the Development Agreements devoid of any Transportation Plan, it is hard to believe that the addition of 10,000+ vehicles to the already overburdened transportation infrastructure will not devastate the City’s “small town” character. Your Honor, this also certainly does not pass the Engineering “smell” test.

- 3. Plan Section 7.7.2 Roadway Conditions – 2016 [plus Table 7-8: Future Intersection LOS Summary (2016)]** states: *“Black Diamond Ravensdale Road/SR 169---Signal---LOS=D---Delay=54.5 sec and Roberts Drive/SR 169---Signal---LOS=F---Delay=200 sec: This intersection could be mitigated to acceptable conditions by constructing three additional turn lanes; however, these channelization improvements are not included in the long-term list of projects identified for the 2017 to 2025 timeframe and would not be necessary with construction of the 2025 improvements. Alternatively, full construction of the 2025 improvements by 2016, which includes additional through lanes on SR 169, would improve operations to acceptable conditions.”* It is very difficult to read such a policy that includes *“three additional turn lanes”* at today’s single-lane intersections and describe what it means in the real world, except to call it what it is: *“less than realistic.”* Even with mitigations planned during buildout of the MPDs, it will be impossible, both time-wise, and fiscally--to even approach meeting this policy.

Table 7-9: Transportation Improvements (2017 to 2025) includes the following line item: *“SR 169 Improvements---Widen to 4 lanes from SE 288th St to Roberts Dr---Provides additional capacity/improves operations. Note: New*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

development, which necessitates the new roads, will contribute to the new roads.” Although Table 11-5-2 in the Development Agreements mentions this as part of Phase 3, it provides no Transportation Plan to accomplish this, nor an accompanying Financial Plan to make it happen.

YarrowBay Response (from Attachment A):

“Again, the City’s transportation policies are described in Section 7.11.1 (‘Transportation Goals and Policies’), not Section 7.7.2. [WRT Table 7-8] Constructing three additional turn lanes at SR 169/Roberts Drive is simply not a City policy.” [WRT Table 7-9] “MPD Condition #10 requires that YarrowBay ‘construct any new roadway alignment of [sic--“or” ?] intersection improvement that is (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan...’ ”

REPLY: Under Item 3. in this subsection I am talking about BDCP 7.7.2 Roadway Conditions – 2016, not BDCP 7.11.1, as YarrowBay insinuates. [I discuss BDCP 7.11.1 under Item 6. further down in this subsection.]

In discussing Table 7-8: Future Intersection LOS Summary (2016) YarrowBay is correct, BDCP 7.7.2 does not state “*constructing three additional turn lanes at SR 169/Roberts Drive*” as policy. It does however state: “*This intersection could be mitigated to acceptable conditions by constructing three additional turn lanes....*” So, is it going to be mitigated to “*acceptable conditions*” or not? With no Traffic Mitigation Plan in the Development Agreements, no one can tell.

Table 7-9: Transportation Improvements (2017 to 2025) includes: “*SR 169 Improvements---Widen to 4 lanes from SE 288th St to Roberts Dr---Provides additional capacity/improves operations.* The Development Agreements provide no Transportation Plan or Financial Plan to make it happen.

The MPDs, as proposed, most likely will cause the City to update its Comprehensive Plan and downgrade many provisions and goals. That defeats one of the purposes of a sound Comprehensive Plan.

4. **Plan Section 7.8 Funding Strategies** states: “*Historically, the City has relied on general fund monies and contributions from land developers to construct roadway improvements. Strategies: To provide a more consistent strategy for funding roadway improvements, the City should consider a more proactive strategy for transportation funding. **Impact Fees**---The most popular way determines the traffic generated by the proposed development and applies a per-*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

*trip fee. The City directly receives the funds, marked for specific transportation improvements, directly from the source of traffic generation—the developer. **Developer Contributions**---The use of developer contributions requires careful review of traffic studies and proposed mitigation measures by City staff. The primary benefit is the potential for immediate concurrency of the traffic impacts created by the development.”*

Table 7-11. Summary of Possible Local Funding Sources for Transportation Improvements provides a rather bleak assessment of “realistic acceptance” of potential sources of funding.

The Development Agreements do not describe a plan which is consistent with both the intent and letter of these policies.

YarrowBay Response (from Attachment A):

“It is misleading to describe the City’s Comprehensive Plan as ‘rather bleak.’ The ‘realistic acceptance’ of the possible funding sources provided in the Plan includes....”

REPLY: YarrowBay simply restates what is contained in BDCP 7.8 Funding Strategy, Table 7-11: *Summary of Possible Local Funding Sources for Transportation Improvements*:

“The ‘realistic acceptance’ of the possible funding sources provided in the Plan includes both local motor vehicle fuel taxes and developer contributions (‘in-place’); impact fees (‘good’); bond financing (‘moderate’); and state and federal grants (‘fair’...). Local option sales taxes and local improvement districts are the only funding sources described as ‘difficult’ with respect to ‘realistic acceptance.’
“

Unfortunately, the Development Agreements provide no plan showing each of these potential sources in the financial funding landscape, nor what percentage of each category is being assumed to fund proposed mitigations. The Development Agreements provide no Financial Plan to make this happen. they simply encourage the City to apply for Grants and lobby the State to allow Community Facility Districts (CFDs) to be established. I cannot emphasize too much that this is not a plan! Suffice it to say, the Development Agreements provide no Financial Plan which is consistent with both the intent and letter of BDCP 7.8 Funding Strategies.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

5. **Plan Section 7.9.2. Concurrency** states: *“The GMA requires that each city and county incorporate a Concurrency Management System (CMS) into their CP transportation element. A CMS is a policy to determine whether adequate public facilities are available to serve new developments. ... The term “concurrent with the development is defined to mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within 6 years of development....”*

The Development Agreements do not describe a Transportation Concurrency Plan that provides for Transportation Concurrency testing that meets this policy.

YarrowBay Response (from Attachment A):

“Similar to the City’s Concurrency Management System (CMS), the MPD Conditions and Development Agreements require that adequate transportation facilities are in place concurrent with the development of the MPDs.” “In contrast, the requirement in the MPD Conditions of Approval and Development Agreements is far more stringent.”

REPLY: 7.9.2. Concurrency states: *“The GMA requires ... a Concurrency Management System (CMS) ... to determine whether adequate public facilities are available to serve new developments.... The Development Agreements provide no Transportation Concurrency Plan describing Transportation Concurrency Testing to meet this policy.*

6. Plan Section 7.11.1 Transportation Goals and Policies--

Policy T-13 Concurrency Policy states: *“Ensure that transportation improvements or strategies are constructed or financed concurrent with development. This also includes concurrency with plans of other transportation agencies. The City requires either a construction or financial commitment for necessary transportation improvements from the private or public sector within 6 years of development. To monitor these commitments, the City’s Concurrency Management System includes the following: 21. Adopting a traffic impact fee program; 22. Assessing level of service; 23. Determining compliance with the*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

adopted level of service standards; 24. Identifying facility deficiencies; and, 25. Making appropriate revisions to the Six-Year TIP.”

The Development Agreements do not describe a Transportation Concurrency Plan to meet this policy and show measurable results as described in Comprehensive Plan Section 7.9.2 Concurrency.

YarrowBay Response (from Attachment A):

“Similar to the City’s Concurrency Management System (CMS), the MPD Conditions and Development Agreements require that adequate transportation facilities are in place concurrent with the development of the MPDs.” “In contrast, the requirement in the MPD Conditions of Approval and Development Agreements is far more stringent.”

REPLY: Policy T-13 Concurrency Policy states: *“Ensure that transportation improvements or strategies are constructed or financed concurrent with development. This also includes concurrency with plans of other transportation agencies.”* Again, the Development Agreements provide no Transportation Concurrency Plan describing Transportation Concurrency Testing to meet this policy.

Policy T-14 Funding Sources Policy states: *“Secure adequate long-term funding sources for transportation through all feasible and available methods. These methods may include: 26. Taking advantage of state funds, such as the Transportation Improvement Account, and the Public Works Trust Fund; 27. Encouraging WSDOT improvements on the state highway system; 28. Encouraging the use of Local Improvement Districts by property owners to upgrade roads to meet City road standards; 29. Requiring impact mitigation for projects as guided by this Plan. Impact mitigation payments and/or seeking voluntary contributions from developers ... ; and 30. Seeking funding from federal and other available grant sources. 31. Traffic impact fees may also be pursued for selected projects.”*

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

The Development Agreements provide no Financial Plan to make this happen except to encourage the City to apply for Grants and lobby the State to allow Community Facility Districts (CFDs) to be established.

YarrowBay Response (from Attachment A):

“YarrowBay is not obligated to provide a Financial Plan as defined by Mr. Rimbos.”

REPLY: Policy T-14 Funding Sources Policy states, in part: *“Secure adequate long-term funding sources for transportation through all feasible and available methods.”* The Development Agreements provide no Financial Plan (however it’s defined and whomever defines it) to make this happen. YarrowBay simply encourages the City to apply for Grants and lobby the State to allow Community Facility Districts (CFDs) to be established. I’m surprised that is even in the Development Agreement language.

Policy T-15 Financial Impact Mitigation Policy states: *“Require developers to contribute their fair share towards the transportation improvements required to meet the LOS standards. Impact mitigation efforts may include: 32. Requiring developers to assist in providing additional transportation facilities and services in proportion to the impacts and needs generated by development; and 33. Encouraging developers to design projects that generate less vehicular traffic.”*

In reading the Development Agreements it is questionable, at best, that the Master Developer is providing needed improvements “in proportion to” the massive impacts the MPDs will generate. The Development Agreements provide no Vehicle-Trip Reduction Plan to meet Item 33.

YarrowBay Response (from Attachment A):

“It was determined that the mitigation measures identified in the MPD Conditions will offset potential impacts and ‘meet the LOS standards.’ “ “Policy T-15 does not require a Vehicle-Trip Reduction Plan...it simply states ‘impact mitigation efforts may include...encouraging developers to design projects that generate less vehicular traffic’....“That being said, the mix of MPD land uses...results in less vehicular traffic than would be generated otherwise....”

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

REPLY: *Policy T-15 Financial Impact Mitigation Policy* states, in part: “Require developers to contribute their fair share towards the transportation improvements required to meet the LOS standards.” With the dearth of sufficient detail in the Development Agreements it is questionable the Master Developer is providing needed improvements “in proportion to” potential MPD impacts.

While YarrowBay is correct that Policy T-15 does not “require a Vehicle-Trip Reduction Plan,” its response is disingenuous, since no one else is planning on building 6,050 homes and 1.15 million square feet of commercial/business space in the small rural town of Black Diamond. So, what does YarrowBay mean by “otherwise”?

D. King County Code

The Development Agreements do not address the following permitting guidelines of King County Code TITLE 14 -- ROADS & BRIDGES:

1. **Chapter 14.46--Public and Private Utilities on King County Real Property: 14.46.020 Permit--Required - Exceptions.** This pertains to the siting and permitting of the large Stormwater Detention Facility in the Rural Area outside the Black Diamond Urban Growth Area. The Development Agreements contain conflicting maps and text on the location of the large Stormwater Detention Facility.
2. **Chapter 14.65--Integrated Transportation Program: 14.65.010 Components of the integrated transportation program.** This pertains to all affected King County road infrastructure and includes three components: Transportation Concurrency Management to regulate new development based on adequate transportation improvements needed to maintain level of service standards; Mitigation Payment System to apply transportation impact fees to new development for collecting a fair and equitable share of transportation improvement costs; and Intersection Standards to evaluate intersections affected by new development to assure safe and efficient operation and that

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

improvements to mitigate the adverse impacts of such developments are completed. Meeting the provisions of this Code Chapter is not discussed in the Development Agreements.

3. **Chapter 14.70 -- Transportation Concurrency Management: 14.70.230 Concurrency analysis and test; 14.70.240 Requirement for concurrency; 14.70.285 Minor developments and certain public and educational facilities; 14.70.290 Intergovernmental coordination.** This pertains to Transportation Concurrency Testing for each identified Travel Shed containing King County road infrastructure affected by siting of any Schools in the Rural Area outside the Black Diamond Urban Growth Area. King County regulates new development based on adequate transportation improvements needed to maintain level of service standards, in accordance with *RCW 36.70A.070(6)* and the *King County Comprehensive Plan*. King County will accept applications for a development approval only for development in areas that pass the Transportation Concurrency Test. Meeting the provisions of this Code Chapter is not discussed in the Development Agreements.

4. **Chapter 14.75 -- Mitigation Payment System: 14.75.010 Authority and purpose.** This pertains to all affected King County road infrastructure. King County applies transportation impact fees to new development for collecting a fair and equitable share of transportation improvement costs that are needed in accordance with *RCW chapter 82.02* and the *King County Comprehensive Plan*. The purpose here is to ensure financial commitments are in place so that adequate transportation facilities are available to serve new growth and development. Meeting the provisions of this Code Chapter is not discussed in the Development Agreements.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

5. **Chapter 14.80 -- Intersection Standards: 14.80.010 Authority and purpose; 14.80.030 Significant adverse impacts; 14.80.040 Mitigation and payment of costs; 14.80.050 Inter-jurisdictional agreements; 14.80.060 Relation to other permit authority.** This pertains to all affected King County road infrastructure. King County evaluates intersections affected by new development to assure safe and efficient operation and that improvements to mitigate the adverse impacts of such developments are completed, in accordance with the State Environmental Policy Act (SEPA), K.C.C. 20.44.080 and the King County Comprehensive Plan. King County can deny or to approve with conditions any zone reclassification request, based on its expected traffic impacts or any proposed development or zone reclassification if it determines that a hazard to safety would result from its direct traffic impacts without roadway or intersection improvements, regardless of level of service standards. Meeting the provisions of this Code Chapter is not discussed in the Development Agreements

YarrowBay Response to entire subsection D. King County Code:

YarrowBay Response:

Mr. Rimbo asserts that the "Development Agreements do not address the following permitting guidelines of King County Code TITLE 14- ROADS AND BRIDGES." The City of Black Diamond is an incorporated city. Development projects like The Villages and Lawson Hills are subject to the Black Diamond Municipal Code for permitting. The King County Code is not legally relevant or applicable. It is true that there are traffic mitigation projects, and an off-site stormwater facility that when proposed by the Master Developer will be within King County's permitting jurisdiction.

REPLY: King County Code is applicable for any off-site (i.e., outside the UGA) facility planned, as it is the primary permitting agency. It would be prudent for the Development Agreements to address the applicable King County Code provisions (identified and discussed in my Written Statement), assess likelihood of obtaining required permits, and provide contingency plans in the case such permits cannot be secured.

YarrowBay Response:

Similarly, pursuant to the Comprehensive School Mitigation Agreement, the Enumclaw School District may seek permits from King County for school construction.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Mr. Rimbo does not point to any requirement that such information be included in the Development Agreements, because there is no such requirement anywhere in State law, City Code or the MPD Conditions of Approval. Moreover, because the permit applications have not yet been filed, there is no way to know what the applicable King County Code provisions will be and, therefore, no way to evaluate the potential permit applications against any such County Code provisions. See Attachment A, YarrowBay's Traffic Signal Assessment Table Response to Ex. 118 and Ex. 145.

REPLY: King County Code is applicable for any off-site (i.e., outside the UGA) Schools and the infrastructure to serve them. Once again, it would be prudent for the Development Agreements to address the applicable King County Code provisions (identified and discussed in my Written Statement), assess likelihood of obtaining required permits, and provide contingency plans in the case such permits cannot be secured.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

III. TECHNICAL DEFICIENCIES

___In 2010 the Public participated in FEIS Appeals Hearings and two MPD Application Hearings. During the conduct of those Hearings we were repeatedly told by the City and YarrowBay that these were simply "Programmatic-Level" Hearings. We were told the details would come later. That "later" has come, as the Public has now been able to review the **Development Agreements**, which are supposed to contain all those missing details. Unfortunately, they are very sorely lacking in many pertinent details related to the MPDs and the mitigations required by the MPD Ordinance Conditions of Approval. In general, a review of the the **Development Agreements** finds the following:

1. In some areas they simply parrot back the MPD Ordinance Conditions: *"Establish a Committee..." "We will establish a Committee..."* That is unacceptable! To meet the Conditions, for example, on establishing Committees, at a minimum, a plan for timing, scope, decision points, and sunset provisions must be provided to be credible and useful going forward.

2. Many implementation plans provide minimal information without answering many of the seven "W's" of Who? What? Where? Why? When? How? Which? This is especially true on traffic analyses and mitigation following the issuance of 850 building permits--a major Trigger Point in the MPD Ordinance *Exhibit C--Conditions of Approval*. Some plans are simply not there and, thus, to be determined at some later date. That is unacceptable! Without detailed plans providing key information to allow decision-makers and the Public to track what is to be done, when it is to be executed, and how results will be assessed, the Conditions are not met.

3. Some accompanying Agreements are either incomplete or just open-ended. The Tri-Party School Agreement is an excellent example. In addition, the Maple Valley and Covington Transportation Mitigation Agreements are based on Traffic Demand

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Models, traffic flow analyses, and conceptual mitigations rejected by you your Honor. That is unacceptable! Most *egregious* is that the Maple Valley and Covington Transportation Mitigation Agreements are *final* even though none were ever subject to a Public process and “*supersede*” the *MPD Ordinances*!

4. The Development Agreements are completely devoid of any plans to conduct the necessary **Cost-Benefit-Risk Analyses** to inform major decision points and identify problems before they start to become insurmountable--technically or fiscally. That is unacceptable! Projects one tenth this size need such detailed analyses. Folly is not strong enough a word to describe this omission. A “contract” of this size, cost, and risk must be subject to such analyses to head off technical, schedule, and/or fiscal disaster. This should go without saying.

These flaws were enumerated in Oral Testimonies and, most likely, are addressed in many Public Written Statements. Expert Testimony, though somewhat, but understandably, constrained, supported and augmented some of these arguments further. Your Honor, you astutely and fairly handled two major Hearings on these MPDs in 2010. You provided an excellent set of comprehensive Conditions to be imposed on the MPD Applications, though the City Council chose not to adopt some of the most critical ones, especially on Transportation. That notwithstanding, I believe the Public has confidence you will again do a thorough review of all the evidence before you during these Hearings. I thank you in advance.

YarrowBay Response:

Mr. Rimbo alleges that the Development Agreements fail to contain a number of details. However, Mr. Rimbo points to no authority that mandates inclusion of any of the "details" he raises. As the Examiner is well aware, the Development Agreements are required, by State law and City Code, to incorporate the MPD Conditions of Approval, other applicable development standards, and to address those items called out in the MPD Conditions of Approval. The "details" desired by Mr. Rimbo are not among those requirements. In addition, some of the "details" requested are plainly

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208) to Written Statement: Transportation (Exh. #118)

disclosed in the Development Agreement or MPD Permit Approvals. YarrowBay's response to each of the alleged "specific deficiencies" follows.

REPLY: If we were to buy into the YarrowBay assertions on Development Agreements, we would have the following documents all of which possess insufficient detail: DEISs, FEISs, MPD Applications, and Development Agreements. As we move further down this “slippery slope,” when do we get to the details of what is to be done, how it is to be done; and when it is to be done?

Surprisingly, YarrowBay chose not to respond to the four major deficiencies I listed in my Written Statement:

- 1. “In some areas they simply parrot back the MPD Ordinance Conditions.”*
- 2. “Many implementation plans provide minimal information without answering many of the seven “W’s” of Who? What? Where? Why? When? How? Which?”*
- 3. “Some accompanying Agreements are either incomplete or just open-ended. The Tri-Party School Agreement is an excellent example.”*
- 4. “The Development Agreements are completely devoid of any plans to conduct the necessary Cost-Benefit-Risk Analyses to inform major decision points and identify problems before they start to become insurmountable--technically or fiscally.”*

Below are specific deficiencies in the Development Agreements in the area of Transportation--clearly a major tent-pole for the success or failure of these MPDs:

A. Model

There is no validated **Baseline Traffic Model** to provide predictions, reduce risk, and lend some certainty to understanding impacts on the City's and Region's Transportation infrastructure. Consequently, there is a complete lack of reliable forecasts of what future traffic scenarios could look like and what road and intersection mitigations might even work.

YarrowBay Response:

Mr. Rimbos believes there is "no validated Baseline Traffic Model" and, therefore, a "complete lack of reliable forecasts of what future traffic scenarios could look like and what road and intersection mitigations might work." That is not true. The FEISs for the MPDs were deemed adequate. The FEISs included an extensive list of traffic mitigation based on the running of a regional transportation model conducted by the City's

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208) to Written Statement: Transportation (Exh. #118)

consultant Parametrix. During the appeal hearings regarding the FEISs, the City of Maple Valley made a number of assertions about the adequacy of the Parametrix model. In addition to the mitigation that resulted from the Parametrix model in the FEIS, YarrowBay and Maple Valley negotiated an agreement in which YarrowBay voluntarily agreed to many more mitigation projects that Maple Valley desired. Future traffic scenarios have been modeled, and mitigation for those impacts is reflected in the Development Agreements at Exhibit "C," Condition of Approval Nos. 10 (roadway improvements inside the City of Black Diamond), 15 (list of improvements in Black Diamond, King County, Maple Valley and Covington), as well as all of the mitigation provided for in agreements with the City of Maple Valley and the City of Covington, Exhibits "Q" and "R."

REPLY: Simply repeating *ad infinitum* that the “FEISs were found adequate” does not make your Honor’s clear recommended Conditions for the MPD Applications go away, nor negate the following with regards to the The Traffic Demand Model used to support the FEIS and MPD Applications:

1. It was found inadequate in its regional coverage.
2. It was found to use inadequate assumptions.
3. It, coupled with traffic analyses, helped to identify inadequate mitigations.

Your Honor recognized all this and formulated his Recommendations accordingly.

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

B. Validation

Since there is no validated model, what model will be used until validation is accomplished? How will it be validated? None of this is addressed in the Development Agreements. The easiest and most prudent solution is that the new Traffic Model must be validated now using existing traffic data, not a point at which 850 building permits have been issued (a ~50% increase in Black Diamond’s population!). Putting the new Traffic Model on the shelf and not validating it now provides no value to anyone and, in fact, will preclude the conduct of any **Transportation Analyses** until possibly 2016 or beyond.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

YarrowBay Response:

Mr. Rimbos asserts that (1) there is no validated model, and (2) because there is no validated model, it is not known "what model will be used" or how it will be validated. As described above, the model used to develop transportation mitigation for the MPDs is the model that was used in the FEISs which have been deemed adequate, together with the Maple Valley model used to create the Maple Valley mitigation agreement, and the City of Covington's own analysis used to create the Covington mitigation agreement. Mr. Rimbos's real complaint is that the "new model" called for in Condition of Approval No. 17 is not being run up-front, but rather will be run after 850 building permits have been issued. But as described in the Introduction to this Memorandum, the purpose of first running the "new model" at the time that 850 dwelling units have been permitted, and then periodically thereafter at times set by the City Council is to reevaluate, confirm and/or revise the transportation mitigation projects to be imposed on the MPDs, by running a model that can include not only all of the model parameters included in the Conditions of Approval, but also model inputs consisting of real data from the MPD developments.

REPLY: The Reply to A. Model above also is applicable here with the following additional point: Prior to the 850 threshold being reached--a~50% increase in Black Diamond’s population, all traffic analyses will be based on either the “old” flawed model or the “new” non-validated model. Neither case is acceptable, nor technically advisable from an Engineering point of view!

The specious argument about *waiting* to use “real data” ignores the fact that real data can be used whenever it is available. If one were to take YarrowBay’s argument back to its logical genesis, one would conclude that all analyses used to support the FEISs and MPD Applications were worthless because no “real data” was used.

C. Analyses

Transportation Analyses must address specific assumptions and parameters such as Internal Capture Rates (ICRs), Peak-Hour Factors (PHFs), and Intersection Queueing. Sensitivity analyses should be performed to understand how much and how fast key assumptions and parameters change under various traffic scenarios. Further, a new set of **Traffic Analyses** must be done before the Development Agreement to better inform the City and the region of potential mitigations required.

YarrowBay Response:

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Next, Mr. Rimbo asserts that the Development Agreements need "transportation analyses" to be conducted that addresses specific assumptions and parameters such as Internal Capture Rates, Peak Hour Factors, and Intersection Queuing. In addition, he asserts "sensitivity analyses" should be performed to "understand how much and how fast key assumptions and parameters change under various traffic scenarios." Again, Mr. Rimbo fails to understand the purpose of transportation demand modeling.

REPLY: Notwithstanding yet another insult to my intelligence, I fully understand that Traffic Demand Modeling, using a “network-type” model informed with key assumptions, provides “global” traffic demand volumes and “global” traffic distribution patterns over a particular road grid structure. Such Traffic Demand Modeling results, coupled with “local” Intersection Analyses, provide traffic predictions of lane throughput and assessments of turning movements. Such predictions lead to a better understanding of needed mitigation and its performance efficiency. Cycling such modeling and analyses, progressively allows improvement to mitigation concepts. A parameter can be varied at any stage of the analysis process to ascertain its sensitivity to changing inputs or other parameters, as well as determine any discernible impacts on mitigation concepts.

YarrowBay Response:

Conditions of Approval Nos. 14 and 17(a) address internal trip capture rates. Similarly, Condition of Approval No. 17(b) addresses peak hour factors. Therefore, there is no reason to include supplemental conditions regarding internal trip capture rates or peak hour factors in the Development Agreements. Such issues have already been addressed.

REPLY: Just because MPD Ordinance Conditions 14, 17 a. and 17 b. address ICRs and PHFs doesn't exonerate the Development Agreements from discussing how such parameters will be assumed and/or computed and, finally, evaluated. In fact there was specific Expert Testimony during the FEIS Appeals Hearings from WSDOT, KCDOT, Maple Valley's Traffic Consultant, and the Public's Traffic Consultant all calling for more reasonable ICRs and better definition and use of PHRs. Your Honor recognized this and formulated his recommended Conditions accordingly.

YarrowBay Response:

None of the MPDs' Conditions of Approval address vehicle queue lengths as part of the new transportation demand model. However, this exclusion is appropriate. The Hearing Examiner's Decision on the EIS Appeals of The Villages and Lawson Hills MPDs (at Conclusion of Law No. 11) recognized: "Such [queuing] analysis should be done when looking at specific improvements in the construction phase, so that determinations of significant adverse impacts can occur in conjunction with construction, rather than trying to guess what will happen 15 years from now." The analysis of queue

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

lengths, as the Hearing Examiner concurred, should occur at the specific traffic improvement stage and not in conjunction with the new transportation model.

REPLY: During the FEIS Appeals Hearings WSDOT Expert Witness Ramin Pazooki testified that *“Traffic queuing analyses must be added to the EISs, not just evaluation of intersection LOS. This should be done in the EIS stage.”* Transportation Planning Consultant Expert Witness Ross Tighman testified that: *“LOS analysis can assess the queue length at intersections, but it was not reported here for the signalized intersections. WSDOT asked for queuing analyses to be done, but that DEIS comment was not responded to, nor was it provided in the FEISs.”* Mr. Tighman also testified that: *“There are deficiencies in the FEIS...lack of Queue Analyses...even for “Programmatic” EISs you still do the analyses, so that when you find a problem you can flag it.”* Even the City’s Expert Witness, Parametrix’ John Perlic stated that: *“Some Queue Lengths exceed road lane capacity and can be longer.”*

Your Honor concluded in his FEIS Appeals Hearing Decision: *“As is evident from the findings above, the EIS traffic analysis is adequate but in several instances there are more accurate methodologies and assumptions available to ensure more complete mitigation. The Examiner will recommend conditions on the MPD that incorporate the better methodologies and assumptions.”* That is exactly what your Honor did only to have many of your Honor’s most critical transportation Conditions unfortunately eviscerated, at YarrowBay’s request, by the Black Diamond City Council in their MPD Ordinance Conditions.

D. Mitigation

Mitigation Agreements with outside jurisdictions include Transportation mitigations your Honor believed were not technically defensible, let alone adequate. Consequently, those now-completed negotiations had no common database with which to work and, thus, the mitigations listed therein are suspect, at best, and inadequate, at worst. Such Mitigation Agreements also are cast in stone and *“supersede”* the MPD Ordinances, regardless of what is learned when the new “regional” Traffic Demand Model, currently under development, is finally used.

YarrowBay Response:

Next, Mr. Rimbos asserts that the Mitigation Agreements with Maple Valley and the City of Covington include mitigations that are “not technically defensible, let alone adequate,” and that the mitigation agreements supersede any other mitigation that may result from running the “new model.” Mr. Rimbos cites no basis, and there is no basis

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

for the assumption that the Maple Valley and Covington mitigations developed through negotiated agreements are "not technically defensible, let alone adequate." Both the City of Maple Valley and the City of Covington have their own transportation experts. Mr. Rimbos himself relied heavily upon and supported Maple Valley's transportation experts during the hearings on the MPDs and FEISs. Those experts are paid to ensure that the City of Maple Valley and the City of Covington receive as much mitigation as possible and that the mitigation will work. The mitigation contained in each agreement is technically defensible and adequate.

REPLY: I do not want to belabor this point again. Suffice it to say the Maple Valley and the Covington Traffic Mitigation Agreements primarily are based on a flawed model. I would expect that Maple Valley also conducted analyses with their model, then a “compromise” agreement was reached. And yes, I agree that “*Those experts are paid to ensure that the City of Maple Valley and the City of Covington receive as much mitigation as possible and that the mitigation will work.*” However, the final language in the Mitigation Agreements was surely negotiated by Legal Counsel, not Traffic Engineers. Finally, I did not rely “*heavily upon and supported Maple Valley's transportation experts during the hearings on the MPDs and FEISs,*” I cannot even spell or pronounce Jana’s name!

YarrowBay Response:

The MPD Conditions of Approval No. 15 states, in part: "Intersection improvements outside the City limits may be mitigated through measures set forth in an agreement between the developer and the applicable agency. Where agreement is possible, ... the agreement shall be incorporated as part of the Development Agreement..... Any agreement so incorporated supersedes all other conditions and processes that may set mitigation measures and that are contained in the MPD Conditions or Development Agreement." As the Examiner has stated over and over again, the terms of the MPD Conditions of Approval are not subject to review or revision in the Development Agreement process.

REPLY: I understand your Honor’s Hearing orders regarding consideration of “new” Conditions. I was simply stating that “*the mitigations listed therein [Traffic Mitigation Agreements] are suspect, at best, and inadequate, at worst. Such Mitigation Agreements also are cast in stone and “supersede” the MPD Ordinances, regardless of what is learned when the new “regional” Traffic Demand Model, currently under development, is finally used.*” Any “new” Conditions I proposed, as your Honor has allowed, were placed in a separate section at the tail end of my Written Statement.

E. Vesting

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

The Developer is effectively vested on all transportation-related standards and requirements through full build-out! In contrast, Noise and Stormwater are not vested (nor should they be), and neither should a critical and far-reaching aspect of the MPDs such as Transportation be vested. Such standards and requirements protect the Developer, not the City, its citizens, and the region. They will unduly handcuff future City Councils by putting the burden of proof on the City to substantiate that the MPDs are causing future traffic problems--a recipe for future lawsuits and further gridlock.

YarrowBay Response:

Mr. Rimbo asserts that the Master Developer is "effectively vested on all transportation related standards and requirements through full build-out!" It appears that Mr. Rimbo believes that none of the transportation mitigation is subject to change; if so, there is no basis for this complaint. As described in the Introduction to this Memorandum, under Condition of Approval No. 17, Periodic Review will be conducted, first when building permits for 850 dwelling units have been issued, and thereafter at intervals set by the City Council. Condition of Approval No. 17(f) states, explicitly, that "[n]ew permit conditions and mitigations" can be "imposed for cumulative impacts through the periodic review process."

REPLY: YarrowBay is fully vested with regards to its traffic mitigation for the first 850 units--a 50% increase in the City’s population. Beyond that the burden of proof is on the City to substantiate that the MPDs are causing future traffic problems. As stated in my Written Statement this is “a recipe for future lawsuits and further gridlock.” The former burdens the City and its taxpayers, while the latter burdens all of us.

F. Feasibility

The mitigations needed to be made to the region’s **Transportation Infrastructure** due to total size of the MPDs--over 6,000 homes and over 1.1 million sq ft commercial footprint--are not likely to be feasibly or economically possible. The region’s Transportation infrastructure could suffer gridlock for several decades.

YarrowBay Response:

Again, without citation to any authority supporting his lay opinion, Mr. Rimbo argues that the sheer amount of transportation mitigation required is not economically possible

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

such that gridlock will result. YarrowBay is a sophisticated land developer. YarrowBay understands how to finance transportation mitigation. Most importantly, the MPD build-out cannot occur unless the transportation mitigation is also provided. Thus, what is not possible or feasible is for Mr. Rimbo’s fear to come to fruition that MPD build-out would occur without transportation mitigation.

REPLY: If only this were true. I understand that “YarrowBay is a sophisticated land developer.” Maybe that’s what worries me. Just because YarrowBay “understands how to finance transportation mitigation” doesn’t necessarily mean that such financing--whatever those sources are--will be available. In addition, given the amount of mitigation proposed and the amount probably *really* needed, the sums that will need to be financed are enormous. We simply do not know how enormous, nor from where such monies will come.

G. Funding

The Developer proposes **Funding Sources** that rely primarily on other people’s money to build needed infrastructure, as well as monies that do not exist on any City, County, State, or Federal budget. The State and King County have precious little funds to allocate in southeast King County. Here is a quote from the City of Maple Valley Mayor Noel Gherkin which appeared in the May 30, 2011 edition of the *Voice of the Valley* (p. 5): “With 18,000 new residents planned in Black Diamond and no money for state highway improvements or increased transit, we think it makes sense to put jobs in SE King County and not just more houses.” [underlining added]

The Alaskan Way Viaduct Replacement and 520 Bridge Replacement projects will drain State funding coffers for a very, very long time. State-elected officials, WSDOT, KCDOT, and the Puget Sound Regional Council (e.g., PSRC’s *Transportation 2040*) have repeatedly made these points abundantly clear, including during Expert testimony in the 2010 Hearings.

Funding--levels, lack thereof, and timing--is possibly where risks could be the greatest!

YarrowBay Response:

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Mr. Rimbo asserts that YarrowBay proposes funding sources that rely on other people's money and that such money is not available. Funding responsibility for all projects listed in Tables 11-5-1 and 11-5-2 is plainly stated to be the Master Developer, not "other people's money," or any other assignment or list of funding sources that would equate to "other people's money." Likewise, the City of Maple Valley and the City of Covington mitigation agreements require YarrowBay--not someone else--to "pay" for transportation improvements.

REPLY: Just because Tables 11-5-1 and 11-5-2 in the Development Agreements list the “Master Developer” many times in the “Funding Responsibility” column doesn’t mean that YarrowBay will be providing those monies. YarrowBay has heavily lobbied the State Legislature for the creation of Community Facilities Districts (CFDs) and is encouraging the City to seek grant monies. Given what YarrowBay has stated publicly and given the fact that there are very few available transportation dollars out there, I don’t see how the transportation mitigations proposed can be adequately financed. I guess this should make me happy, but it doesn’t--it scares me.

H. Cost-Benefit-Risk Analyses

Cost-Benefit-Risk Analyses need to be conducted to identify critical trade-offs and inform the City’s decision-making process. Analyses must also provide assessments of acceptable levels of **Cost Risk, Schedule Risk, and Technical Risk** associated with various levels of Traffic Mitigations. This affects not only the City of Black Diamond, but adjoining jurisdictions of Maple Valley, Covington, Enumclaw, Auburn, and Unincorporated King County.

YarrowBay Response:

Here, Mr. Rimbo states his opinion that a "cost-benefit-risk analyses" must be conducted to "identify critical trade-offs and inform the City's decision-making process." He asserts these analyses must include levels of cost risk, schedule risk, and technical risk. These may be items that are included and analyzed when designing something as complex as a new airplane wing, but there is no legal requirement for any sort of cost-benefit-risk analysis for mitigation projects that ameliorate the impacts of development. Moreover, all cost, schedule, and technical risk is borne by YarrowBay, and is directly tied to YarrowBay's ability to build-out the MPDs. There is no requirement for the analysis desired by Mr. Rimbo in State law, City Code or the MPD Conditions of Approval, and as YarrowBay pointed out in Exhibit 139, SEPA expressly excludes cost-benefit analysis for mitigations.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

REPLY: I fully understand that “SEPA expressly excludes cost-benefit analysis for mitigations” (ref. WAC 197-11-450 Cost-benefit analysis). All my commentary on Cost-Benefit-Risk Analyses relates to *Project* planning decisions, not SEPA environmental decisions. I provided an extensive commentary on Cost-Benefit-Risk Analyses as they relate to *Project* planning decisions on pp. 11 and 12 of my “Response” to YarrowBay’s 8/4/11 Written Comments: Transportation (Exhibit #224).

YarrowBay Response:

In addition, we note that the Courts have held that a discussion of the cost and effectiveness of mitigation measures is not necessary. Solid Waste Alternative Proponents v. Okanogan County, 66 Wn. App 439, 832 P.2d 503 (1992) (holding that SEPA requires only a discussion of reasonable alternatives to the project action proposed in the EIS, and that a general discussion of mitigation measures was not invalid for failure to include cost and effectiveness of measures.)

REPLY: We’re not talking about the EIS here, we’re talking about Development Agreements which essentially represent 15-20-year “contracts.”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

IV. NON-COMPLIANCE WITH MPD ORDINANCES

In the *Staff Report* (ref.: *Joint Staff Report--Development Agreements for The Villages MPD and Lawson Hills MPD*) accompanying the Development Agreements under **Section III. WHAT IS A DEVELOPMENT AGREEMENT?** it states:

“A development agreement is a contract between a local jurisdiction and a person who has ownership or control of property within that jurisdiction. The purpose of the agreement is to specify the standards and conditions that will govern development of the property. Development agreements should also benefit the local jurisdiction. The city or county may include conditions (mitigation measures) that must be met to assure that a project at a specific location does not have unacceptable impacts on neighboring properties or community infrastructure.”

Unfortunately, the Development Agreements clearly do not “benefit” the City, its citizens and businesses, nor the greater region, of which I am a part. They do not “assure” that the MPDs will “*not have unacceptable impacts on neighboring properties or community infrastructure*.” Given the path we’ve taken to reach this point, it is still surprising to see the Development Agreements do not meet so many of the requirements:

1. Although we’ve gone through an extensive **Public process**, it was declared flawed by the Growth Management Hearings Board, because the Public was not allowed to talk with their elected representatives.
2. The **FEISs** were appealed and subsequently found “adequate.” The **MPD Applications** also were subjected to Hearings and over 160 Conditions were recommended to be placed on them--thanks to your Honor.
3. **The Black Diamond City Council** went through a months-long process before passing **Ordinances** approving the MPD Applications. Unfortunately, during that process, it inexplicably removed your Honor’s most critical Transportation

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Conditions. Though only “recommendations,” they were carefully thought-out, well-researched, technically sound, and clearly written. The Black Diamond City Council severely erred then.

4. Now, during these **Development Agreement Hearings**, the citizens once again have done painstaking research to ensure the Black Diamond City Council has all the facts before them. We hope all these efforts will ensure the City Council doesn’t severely err again.

I preface this discussion with the following:

“Black Diamond and Maple Valley each made very compelling arguments that the traffic model of the other was deficient. The record is clear that neither model is optimally suited to predict traffic impacts for the Black Diamond community. The MPD, when completed, will have the effect of introducing the traffic of a new, small city to south King County. This scale of development justifies the creation of a project specific transportation demand model that accounts for all existing and planned local land uses, is validated for local traffic, contains an appropriately fine grained transportation analysis zone network, considers existing peak hour factors, considers both funded and unfunded transportation improvements that coincide with the build out timeframe for the project, considers safety concerns, attempts to preserve the rural Heritage Corridor, provides a realistic mode split analysis for both transit and non-motorized uses and determines a reasonably accurate internal trip capture rate. Therefore, the project applicant will be required to create a new transportation model that incorporates all the controls identified above and subject that model to peer review and periodic updates. For both traffic and noise, the Examiner recommends that added mitigation be added to the project either through the development agreement or processed as a major amendment to the MPD. Traffic and noise mitigation should go through one of those processes to provide the public an opportunity to comment on the new mitigation.”

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Those words eloquently elucidate the key issues very well and were written by your Honor (ref.: p. 124, *Hearing Examiner MPD Application Recommendations*). They were the backbone of your recommendations on the MPD Applications and provide the foundation for some of the *new* Conditions proposed in **Section VI. PROPOSED “NEW” CONDITIONS**. Although your recommendations on the Development Agreement cannot be based on these proposed “new” Conditions, these recommendations would have served the City and the greater region well, if followed by the Black Diamond City Council.

YarrowBay Response:

Here, Mr. Rimbos opens by attacking the City Council for amending the Hearing Examiner's recommended conditions to provide more opportunities for periodic review. As described in the Introduction to this Memorandum, the revisions to the Examiner's recommended conditions result in thorough and regular review of the transportation mitigation required for the MPDs.

REPLY: My alleged “attack” on the City Council was a reasoned discussion of where I determined it erred in rejecting many of your Honor’s “carefully thought-out, well-researched, technically sound, and clearly written” Conditions on Transportation, while accepting YarrowBay’s revised versions. To purport that those latter Conditions, adopted by the City Council, “provide more opportunities for periodic review” whitewashes the blatant removal of your Honor’s most critical Recommendation: “Therefore, the project applicant will be required to create a new transportation model that incorporates all the controls identified above and subject that model to peer review and periodic updates. For both traffic and noise, the Examiner recommends that added mitigation be added to the project either through the development agreement or processed as a major amendment to the MPD. Traffic and noise mitigation should go through one of those processes to provide the public an opportunity to comment on the new mitigation” (ref.: p. 124, *Hearing Examiner MPD Application Recommendations*).

YarrowBay Response:

In reviewing the Staff Report, it is troubling to see the Compliance Matrix (ref.: “*The Villages MPD Conditions Affecting the Development Agreement - Based on City of Black Diamond Ordinance No. 10-946*”) does not list the following twelve Transportation

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Conditions of Approval: 11, 12, 13, 14, 16, 17, 19, 24, 26, 27, 29, and 30. All Conditions of Approval must be addressed in the Development Agreements.

YarrowBay Response:

Next, Mr. Rimbo attacks the Staff Report's Compliance Matrix for not listing a number of the Conditions of Approval regarding transportation. The Compliance Matrix includes those conditions that required some language to be included in the Development Agreement. The remainder of the Conditions are incorporated into the Development Agreement via inclusion in Exhibit "C."

REPLY: My alleged “attack” on the Staff Report's Compliance Matrix merely pointed out the obvious omission of 12 of the 25 MPD Ordinance Transportation Conditions. YarrowBay continues to perpetuate the myth that the Development Agreements need only address (and, minimally, for that matter) those Conditions whereby there is a specific call out for inclusion in the Development Agreements. All MPD Ordinance Conditions of Approval must be addressed in the Development Agreements and in sufficient detail to clearly define what is to be done, how it is to be done, and when it is to be done.

In the two subsections that follow discussion in **purple** [YOU HONOR I HAVE CHANGED THESE TO BLACK FOR CLARITY IN THIS REPLY DOCUMENT AS EXPLAINED IN THE “WHAT THIS ‘REPLY’ CONTAINS” SECTION.] addresses which parts of the *MPD Ordinances Exhibits B and C* are not met by the Development Agreements.

Exhibit B--Conclusions of Law

11. BDMC 18.98.010(H): *“Provide environmentally sustainable development.”*

C. Vehicle Trip Reduction.

There is no **Vehicle Trip Reduction Plan** in the Development Agreements. Such a plan, when developed, must include, at a minimum, specific mechanisms to further “*vehicle trip reduction.*” Simply providing some laudable design features such as

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

trails and bike lanes that will facilitate non-motorized travel does not constitute a credible a **Vehicle Trip Reduction Plan** that can be implemented to see measurable results. Although there will be some mixed areas with housing and shopping, the vast majority of trips will be outside the MPDs to work, shop, worship, and recreate.

12. BDMC 18.98.010(I): *“Provide needed services and facilities in an orderly, fiscally responsible manner.”*

The Development Agreements lack sufficient detail to satisfy *BDMC 18.98.010(1)* to provide *“needed services and facilities in an orderly, fiscally responsible manner.”* This is specifically true as it relates to transportation-related infrastructure.

The Development Agreements discuss a **Transportation Monitoring Plan** which is re-active and by definition not *“timely;”* lack a comprehensive Transportation Plan that addresses how mitigations will be altered as new information is garnered from the new **Traffic Demand Model** and traffic monitoring; and contain “locked-in” mitigations (Maple Valley) or monies (Covington) in the *Exhibit Q and R Transportation Mitigation Agreements*, respectively.

23. BDMC 18.98.020(G): *“Timely provision of all necessary facilities, infrastructure and public services, equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops.”*

The Development Agreements do not *“satisfy” BDMC 18.98.020(G)* to provide *“all necessary facilities, infrastructure and public services”* in a *“timely”* manner?

Although a new **Transportation Demand Model** is under development (under a City contract with Parametrix), there is no detailed **Traffic Analysis Plan** provided in the Development Agreements to use that model at specified points in the future to periodically predict and assess traffic impacts of the MPDs as they develop and identify additional mitigation, as necessary, to meet levels of service for successive phases of development.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

The Development Agreements do not describe when the “*transportation demand model*” will be adjusted, how model input assumptions will be improved based on increased knowledge up the learning curve, and new traffic analyses conducted (using the newly adjusted model and assumptions) to evaluate future scenarios. Incredibly, there are no **Sensitivity Analyses** of key parameters that would help inform such tasks.

There also is no overarching **Transportation Plan** that provides the major tasks and schedule to plan, design, build, maintain, and operate the vast Transportation infrastructure required to accommodate an additional 10,000+ vehicles daily.

30. BDMC 18.98.080(A)(4): *“An MPD permit shall not be approved unless it is found to meet the intent of the following criteria or that appropriate conditions are imposed so that the objectives of the criteria are met: A phasing plan and timeline for the construction of improvements and the setting aside of open space so that:*

a. Prior to or concurrent with final plat approval or the occupancy of any residential or commercial structure, whichever occurs first, the improvements have been constructed and accepted and the lands dedicated that are necessary to have concurrency at full build-out of that project for all utilities, parks, trails, recreational amenities, open space, stormwater and transportation improvements to serve the project, and to provide for connectivity of the roads, trails and other open space systems to other adjacent developed projects within the MPD and MPD boundaries; provided that, the city may allow the posting of financial surety for all required improvements except roads and utility improvements if determined to not be in conflict with the public interest.”

The Development Agreements do not describe how **Transportation Concurrency Testing** will be accomplished to ensure “*concurrency at full build-out*” and how adjustments (i.e., funding, timing, moratoriums, etc.) will be made should a particular improvement fail the Concurrent test.

The Development Agreements do not describe the enforcement mechanisms for provisions for *BDMC 18.98.080(A)(4)a*.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

The Development Agreements do not describe the process whereby traffic mitigation projects may (and most likely will) change and additional projects required to be added to address the traffic issues as they develop.

The Development Agreements do not describe a pro-active approach to traffic mitigation to ensure that “*prior to or concurrent with final plat approval or the occupancy of any residential or commercial structure, whichever occurs first, the improvements have been constructed*”. Rather the Development Agreements describe a reactive approach to traffic mitigation, which is the *antithesis* of the goals of Transportation Concurrency policies.

As traffic impacts are analyzed for a pending phase of development to determine when a road or intersection is likely to drop below level-of-service (LOS) requirements, planned traffic mitigations will have to be adjusted and new mitigation concepts designed, planned, funded, and executed. The Development Agreements do not describe how and when this will be done to ensure timely implementation of mitigation projects to prevent LOS failure.

YarrowBay Response to entire subsection on Exhibit B--Conclusions of Law:

Mr. Rimbos then repeats and expands his allegations of non-compliance with sections of ch. 18.98 BDMC, attacking them as they appear in the headings to the Conclusions of Law contained in the MPD Permit Approval Ordinances. As described above, YarrowBay objects to these allegations as not legally relevant in the Development Agreement hearings, and repeats that that objection in Attachment A, YarrowBay's Traffic Signal Assessment Table -- Response to Ex. 118 and Ex. 145, together with providing a response to Mr. Rimbos's mis-interpretations about those code provisions.

REPLY: The MPD Ordinance Exhibit B--Conclusions of Law list many items including BDMC provisions. I conducted a thorough check of the Development Agreements to ascertain how they met or fell short of meeting these provisions. It is up to your Honor to decide if YarrowBay’s objections to this are “*legally relevant.*” Nevertheless, a complete discussion of applicable BDMC provisions (following the format of this **REPLY** ,i.e, Written Statement -- YarrowBay Response -- **REPLY**) is contained in *Section II. OVERVIEW/SUMMARY, B. Black Diamond Municipal Code.*

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Exhibit C--Conditions of Approval

Below is a detailed discussion of each of the MPD Ordinance Conditions of Approval on Transportation and how the Development Agreements either meet, partially meet, or completely ignore stipulations of each Condition. Please note that quoted language from the Conditions shown in ***bold italic*** calls out specifics to be included in the Development Agreements.

YarrowBay Response to entire subsection on Exhibit C--Conditions of Approval:

Mr. Rimbo then turns to his allegations that a number of the MPD Permit Conditions of Approval are not met. YarrowBay responds to these allegations in Attachment A, YarrowBay's Traffic Signal Assessment Table -- Response to Ex. 118 and Ex. 145.

REPLY: My Written Statement contained 20-odd pages of detailed technical discussion of each of the MPD Ordinance Conditions of Approval on Transportation and how the Development Agreements either meet, partially meet, or completely ignore stipulations of each Condition. Amazingly, YarrowBay’s entire response to that detailed discussion was squeezed into their “Traffic Signal Assessment Table.” I am disappointed, because I would have expected a detailed technical response, rather than one which is so compressed and even in that repeats objection after objection.

Nevertheless, I have typed (since I could not copy and paste them as I could the rest of its Response) the major points of YarrowBay’s Response from its Traffic Signal Assessment Table below under each Condition. For each Condition your Honor will first see the text of the Condition and my commentary--all from my Written Statement, followed by excerpts from YarrowBay’s Traffic Signal Assessment Table, followed by my REPLY. Please accept my apologies ahead of time for this was painstaking piecemeal work.

Condition 10

“Over the course of project build out, construct any new roadway alignment or intersection improvement that is: (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan and in the City's reasonable discretion is (i) necessary to maintain the City's then-applicable, adopted levels of service to the extent

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

*that project traffic would cause or contribute to any level of service deficiency as determined by the City's adopted level of service standard, or (ii) to provide access to or circulation within the project; (b) functionally equivalent to any said alignment or improvement; or (c) otherwise necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service failure as determined by the City's adopted level of service standard, or to provide access to or circulation within the project, as determined by the City in its reasonable discretion based on the monitoring and modeling provided for in Conditions 25 and 20 below. **The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur.** Any "functionally equivalent" realignment that results in a connection of MPD roads to Green Valley Road shall be processed as a major amendment to the MPD.”*

The requirement to plan and construct Black Diamond Comprehensive Plan (BDGP) 2025 Transportation Element improvements is not detailed in the Development Agreements. There is no overarching **Transportation Plan** detailing tasks and schedule. Such a plan should include the following: **Financial Plan** (costs estimates, funding sources, funding risks); **Traffic Analysis Plan**; **Transportation Concurrency Plan**; **Transportation Monitoring Plan** (a credible one); and a clear definition of Construction needs, tasks, schedules, risks, and potential impacts.

There are no details on Credit or Cost Recovery mechanisms in the Development Agreements, except for a brief listing of potential mechanisms in *Exhibit K--MPD Phasing Plan*. The Condition calls for each eligible project to be identified and specific cost recovery mechanisms be associated with it. The Development Agreements do not provide this information as required.

YarrowBay Response (from Att. A)

“It appears that Mr. Rimbos seeks an itemized list of construction costs and cost recovery mechanisms for each listed project.”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: No, my Written Statement clearly called for an overarching Transportation Plan detailing tasks and schedule. Such a plan should include the following:

1. Financial Plan (costs estimates, funding sources, funding risks).
2. Traffic Analysis Plan.
3. Transportation Concurrency Plan.
4. Transportation Monitoring Plan (a credible one).

There should be a clear definition of construction needs, tasks, schedules, risks, and potential impacts. This is the basic information City Planners and Managers need.

With regards to Credit or Cost Recovery Mechanisms Condition 10 clearly calls for each eligible project to be identified and specific cost recovery mechanisms be associated with it--not the brief listing of potential mechanisms in *Exhibit K--MPD Phasing Plan*.

Condition 11

“The City shall create, at the expense of the Applicant, a new transportation demand model for this project for use in validating the distribution of project traffic at the intervals specified in Condition No. 17.... The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation.”

Although the **Traffic Demand Model** will be validated, it will not be validated until 850 building permits have been issued (per **Condition 17 a.**), possibly as late as 2016 (ref.: Parametrix’ Traffic expert John Perlic, 4/18/11 Meeting with Steve Pilcher, Andy Williamson, Mike Irrgang, and Peter Rimbos). In addition, such validation will only be on a model of the existing Transportation Infrastructure, not what will be needed to service the partial or full buildout of the MPDs. From an engineering perspective, to be useful and provide confidence, the *“new transportation demand model”* must be validated, used to conduct various road and intersection analyses, and subsequently re-validated. Finally, since this will constitute a new traffic “baseline,” how will this be used to address additional mitigation? None of this is specifically addressed in the Development Agreements.

Confidence in the model and the results it generates is important. Lack of confidence in the proposed mitigations should give the Black Diamond City Council

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

(BDCC) pause. During the FEIS Appeals Hearings your Honor ruled there was no current valid Traffic Demand Model with which to analyze the distribution of traffic locally or regionally, nor one from which mitigations could be analyzed and optimized for selection. That ruling was correct then and nothing has changed now.

Evaluation of those future scenarios would essentially require an expanded and detailed model that in itself would require validation. So, in order to evaluate “*the distribution of project traffic at the intervals specified in **Condition No. 17***” called for in **Condition 11**, the “new” expanded and detailed model (that addresses future scenarios) would in itself require validation. None of this is addressed in the Development Agreements and, thus **Condition 17**, as written and intended, cannot be accomplished!

It must be specified as to when and how often the model shall be used to provide detailed traffic flows and determine project-specific levels of service. Required time periods must be identified as to when the new traffic mitigations based on the “*new transportation demand model*” will be developed.

Finally, the proposed off-site Schools must be included in any Traffic Analyses. John Perlic of Parametrix testified that this had not been done as they were “*...not aware of those (school) sites.*” (ref.: Parametrix’ Traffic expert John Perlic, 4/18/11 Meeting with Steve Pilcher, Andy Williamson, Mike Irrgang, and Peter Rimbo). This is a deficiency that could have a profound effect on the AM commute. None of this is specifically addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“Mr. Rimbo argues that Condition #11 fails to assure that the model will be validated and re-validated, such that ‘validation will only be on a model of the existing transportation infrastructure,’ and nothing more. Mr. Rimbo is incorrect.”

REPLY: Since the Development Agreements do not provide a Model Validation Plan (which I call for), it is difficult to ascertain what is planned. I did state that “*validation will only be on a model of the existing transportation infrastructure.*” This is based on the following:

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

1. A new expanded more regional model is currently under development--I’ve been told that it is ~80% complete (but that does not include validation).
2. That model will be put on the shelf for several years before validation begins.
3. When the validation process finally is started, the transportation infrastructure road gridwork contained in that model will be the one created today, not the one needed at full build-out of the MPDs.
4. So, the first validation will be on that sparse model. Let’s be clear on what validation entails, since the Developments Agreements do not describe any process. The model gridwork coupled with a series of assumptions (all models have assumptions) will be exercised (i.e., run) to see how accurately it can predict known existing traffic patterns (i.e., distribution). This is an iterative process of convergence that culminates in an adjusted model and assumptions that best predicts existing patterns.

What needs to be done after this initial validation process is to begin to expand the model in both breadth and depth by adding in each MPD Phase’s perceived road and intersection needs (please note that a Traffic Demand Model does not include detailed modeling/analyses of intersections--such as different lane geometries, etc.). As this process moves forward and the model’s road gridwork expands in detail, future traffic patterns and volumes can be assessed and potential mitigations evaluated (of course, this must be coupled with detailed intersection traffic analyses. This is what would form the basis of both a Model Validation Plan and a Traffic Analysis Plan. Your Honor has just read more about Traffic Modeling and Analyses than he has read in the Development Agreements and all of YarrowBay’s Exhibits. Needless to say, none of this is described in the Development Agreements. They simply state they will do Condition #11.

YarrowBay Response (from Att. A)

“Mr. Rimbo also asserts, based on hearsay that appears to have been misinterpreted or taken out of context, that the new model does not include rural school sites.”

REPLY: The supposed “hearsay” came from Parametrix’ John Perlic when I asked him a simple question *“Are the school sites addressed in the model?”* and he gave me a simple answer: *“...not aware of those (school) sites.”* Both Mr. Perlic and I are Engineers. We do not work with or provide *“hearsay.”*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Condition 12

“The new demand model must take into account recent traffic counts, current and proposed land uses as defined in the applicable Comprehensive Plans areas covered in the study area, and existing speed limits on all roadway links included in the model's roadway network. The model must be run with currently funded transportation projects for each affected jurisdiction as shown in the applicable 6-year Transportation Improvement Plans and with transportation projects shown in the applicable 20-year Transportation Improvement Plans which projects are not funded but are determined to have a reasonable likelihood of obtaining funding based on consultation with each jurisdiction.”

How will these determinations be made? Will there be **Cost-Benefit-Risk Analyses** performed? If so, will they be used in a timely manner to inform the decision process? The costs, along with cost estimation and schedule risks, potentially are enormous; as are the uncertainties in any projections associated with each. This represents a tremendous long-term commitment that could possibly “bet the city’s future.” Cost Risks must be addressed as desired funding levels may be unattainable and adequate funding sources unavailable. As of now such level and funding sources are not identified, nor apparently *available* out several decades. Schedule Risks also are high, as is the case with any major transportation project. None of this is specifically addressed in the Development Agreements.

Where is the **Traffic Analysis Plan**? How will the “*new demand model*” results be used to inform the needed mitigation project lists? Without a continuous cycle of validation and re-validation, model results might not be credible in forecasting future traffic scenarios. None of this is specifically addressed in the Development Agreements.

Peak-Hour Factors (PHFs) should be addressed in the Traffic Analyses. This omission must be rectified. Also, PHF sensitivity analyses should be performed to understand the validity of the assumed rates, impacts on the road grid and

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

intersections, and needed mitigation. PHFs are used to evaluate capacity as they represent the highest traffic volume flow in any hour. Level of Service (LOS), the typical “measuring stick” to evaluate roads and intersections, often is based on peak rates of traffic flow. Using high PHFs (e.g., >0.95) *understates* the intersection LOS and yields the most *optimistic* results. Please note that approaching a PHF=1.0, while showing *uniform* flow, also indicates congestion. In fact, it shows there is adequate capacity on the roads to handle these projects when actually there is *inadequate* capacity. None of this is addressed in the Development Agreements.

As testified by WSDOT (2010, FEIS Appeals Hearings, Ramin Pazooki), Volume/Capacity (v/c) Ratios reveal problems with certain “legs” (e.g., lanes) of an intersection with v/c ratios of less than or equal to 1.0 a necessity. Once a certain intersection reaches capacity (v/c > 1.0) the LOS value is no longer effective, especially for major corridors. SYNCHRO analyses could be conducted for specific intersection legs to inform the overall Traffic Model. SYNCHRO is an LOS analysis software tool, which provides additional insight as to how well an intersection is functioning and how much *extra* capacity is available to handle future growth, traffic fluctuation, and incidents. The City will need to have the correct information to make decisions. None of this is specifically addressed in the Development Agreements.

Traffic Queueing Analyses was not addressed in the FEIS and MPD Application analyses and still is not addressed! One might ask, “If not now, when?” Many intersections in the project-affected areas are relatively close to each other and, thus, Queueing will be a critical factor in maintaining adequate traffic flows. For example, some existing intersections already reflect Queueing problems during the AM and PM commutes (e.g, SR-169 and SE 231st near SR-18 in Maple Valley--no Traffic Monitoring necessary, I personally experience that one everyday!). None of this is specifically addressed in the Development Agreements.

There is no description of Level of Service (LOS) Analyses for roads and intersections. Such analyses are critical for evaluating existing conditions and predicting future traffic flows and impacts. LOS analyses should look at each

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

individual lane. None of this is specifically addressed in the Development Agreements.

There is no description of Travel Time Analyses, which are important to a decision-maker for very large projects with long transportation corridors which would be affected--exactly the type of dilemma these MPDs present here.

Where are the discussions of Environmental Assessments, Permit Issues, Funding Problems, and Private Property Conflicts. All these directly affect the suite of Traffic Mitigations to be proposed and analyzed. None of this is addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“...none of these items were required by Condition #12 nor were any required to be included in the Development Agreement, because they are already included in the MPD Conditions of Approval.”

REPLY: This is the same repeated argument from YarrowBay, if I can paraphrase: *“If the Condition #12 says: ‘The new demand model must take into account recent traffic counts, current and proposed land uses...,’ then the Development Agreements do not need to include any detail on how that is to be done.”* The Development Agreements are not meant to simply parrot back the Conditions. If they were, why prepare them in the first place? Why subject them to Public Hearings? At a minimum, the Development Agreements should provide basic plans on how the tasks identified in the Conditions are to be done.

Condition 14

“The new model must include a reasonable internal trip capture rate assumption. The assumed internal trip capture rate must be based upon and justified by an analysis of the internal trip capture rates suggested by the currently applicable ITE publication as well as information concerning actual internal trip capture rates in other master planned

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

developments with similar land use mixes in W. Washington. Any subsequent revisions to the model should include the realized trip capture rates for the project, if available.”

How will the methodology for choosing the final Internal Capture Rates (ICRs) be justified? At what intervals will ICRs be recomputed/reassessed and fed into the model? How will the expected differences between Institute of Transportation Engineers (ITE) ICR categories (e.g., “residential”) and *actual* ICR data from other MPDs in “W. Washington” be weighed and subsequently resolved?

ICRs are extremely important assumptions used in the traffic models. The Developer can mask the impact of their MPDs outside Black Diamond by assuming an unjustifiably high ICR [your Honor recognized this during the 2010 Hearings and made recommendations accordingly]. This would be equivalent to assuming a large number of “new” Black Diamond residents will be working at many “new” large Black Diamond-based destination employers.

Reference to the *ITE Trip Generation Handbook* may not be appropriate, as there are several ITE scenarios from which to choose, none of which may be applicable in this case. The Master Developer chose ICRs for “residential development.” This is a composite of urban and suburban communities throughout the country. However, Black Diamond and parts of southeast King County are not typical of many urban and suburban settings, but rather sit on the rural/suburban fringe where ICRs would be expected to be much lower and, thus, AM and PM commuting traffic in and out of Black Diamond much worse than predicted.

KCDOT’s Matthew Nolan testified during the 2010 Hearings that Trip Generation Rates from other MPDs in Western WA may be more applicable than the ITE Handbook methodology provides and that “...*such methodology is not necessarily used for large projects of this kind.*” This is not addressed, let alone acknowledged, in the Development Agreements.

In the supporting **Traffic Analyses** the ICRs used (based on the ITE Handbook Codes 210--Residential and 220--Apartment for average US urban areas, which Black Diamond is not) are too low! For example, John Perlic of Parametrix stated

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

The Villages MPD will generate 6,019 total new PM peak-hour vehicle trips, then after applying reductions based on pass-by and diverted-link trips, estimated 5,152 net new PM peak-hour trips. This is for an MPD with 4,800 dwellings and 775,000 sq ft of Commercial and Business space. That defies logic! This undoubtedly was one of the reasons your Honor recommended “reasonable ICRs” be used.

Any methodology for choosing the final ICRs must be justified and validated. ICR assumptions must be vetted through a comprehensive validation of the model. Such validation must show that the ICR assumptions are realistic and results are reproducible and compare to those experienced with other MPDs with similar land use mixes in W. Washington. ICRs should be recomputed/reassessed and fed into the model at periodic intervals, possibly before, midway, and at the end of each phase. ICR Sensitivity Analyses must be performed to determine how small changes in assumed ICRs affect overall traffic flows and key intersection LOSs. None of this is specifically addressed in the Development Agreements.

There are no **Sensitivity Analyses** discussed. Sensitivity Analyses are needed to gage the adequacy of the ICR assumptions. Such sensitivity analyses must assess the risks associated with assuming different ICRs. Without such analyses it will be impossible to ascertain what and by how much key parameters affect overall traffic distribution and flow. Consequently, adequate traffic mitigations cannot be crafted and properly implemented. None of this is addressed in the Development Agreements.

The resulting project impacts and mitigations from the **Traffic Analyses** must be integrated into the Development Agreement or processed as a major amendment to the MPD prior to City approval of any implementing projects. Transportation Concurrency testing must be periodically conducted (preferably at the beginning, midpoint, and end of each Phase) to ensure concurrency at full build-out. None of this is specifically addressed in the Development Agreements.

The intersections needing mitigation as identified in the **Traffic Analyses** must be monitored under the **Transportation Monitoring Plan** included in the

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Development Agreements. The Monitoring Plan must provide real-time data, coupled with Traffic Analyses, to inform decision-makers of what problems exist now so that improvements can be designed and constructed with development to bring mitigation projects into service before the Level of Service is degraded below the City’s standard. None of this is specifically addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“The MPD Conditions of Approval are independently effective and are incorporated into the Development Agreements by virtue of being referenced and included in Exhibit ‘C’ ”

REPLY: Again, at a minimum, the Development Agreements should provide basic plans on how the tasks identified in the Conditions are to be done.

Condition 15

*“Intersection improvements outside the City limits may be mitigated through measures set forth in an agreement between the developer and the applicable agency. **Where agreement is possible, the developer shall enter into traffic mitigation agreements with impacted agencies outside the city that have projects under their jurisdiction in the list below, and the agreement shall be incorporated as part of the Development Agreement, or as an addendum to an adopted Development Agreement. Any agreement so incorporated supersedes all other conditions and processes that may set mitigation measures and that are contained in the MPD Conditions or Development Agreement. If an agreement is not reached, the projects identified below shall be added to the regional project list and included as part of the Development Agreement, and the developer and the***

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

City shall agree on reasonable time frames for construction (for projects located within the City of Black Diamond and subject to Condition No. 10), or Applicant payment of its proportional costs toward construction of projects located outside of the City of Black Diamond.”

How could such “agreements” with “applicable agencies” be reached before the Development Agreement without first developing a “new transportation demand model,” then validating it with existing data, and finally using it to analyze future scenarios to identify potential mitigations to be implemented? What happens after the 850-building permit “trigger” is reached and a new traffic assessment finds the Mitigation Agreements to be inadequate? Will the Mitigation Agreements be re-opened and re-negotiated? What process will be followed? None of this is specifically addressed in the Development Agreements.

Although Maple Valley and the Master Developer have reached an agreement, great risks remain, including possible litigation in the future. Maple Valley possibly compromised and took what they could get, since they have existing traffic problems that need fixing now. Maple Valley has a tremendous stake in all of this and will not go away, as it is the conduit for the majority of the traffic to be generated by the MPDs.

YarrowBay Response (from Att. A)

“Here Mr. Rimbo concedes directly that his complaint is with the language of Condition #15”

REPLY: YarrowBay is correct. However, should future traffic analyses find the Mitigation Agreements to be inadequate, what will happen? Will the Mitigation Agreements be re-opened and re-negotiated? What process will be followed? No contingency planning whatsoever is addressed in the Development Agreements.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Condition 17

This Condition (comprised of sections a. through j.) is possibly the most critical (and certainly the most detailed) Transportation Condition of the MPD Ordinances. Although I vehemently disagree with the 850 building-permit threshold for validation of the **Traffic Demand Model** (rather I subscribe and agree with your Honor’s *MPD Application Recommendation* of a threshold of zero permits to validate the new regional Traffic Demand Model), this Condition has many valuable aspects. Unfortunately, the Development Agreements do not respond to many of its details, as discussed below. [Also see previous comments under related **Condition 11.**]

Condition 17. a. thru c.

(Not reprinted below due to length, but all deal with model and analysis efforts)

These Condition subsections contain many requirements related to **Traffic Modeling** and **Traffic Analyses** Yet, the Development Agreements barely address how any of this will be done. For example **Condition 17 a.** states, in part: “...*validate and calibrate the new transportation demand model.... run the model to estimate the trip distribution percentages that will result from the next upcoming phase or interval of MPD development....*” In addition, **Condition 17 b.** states, in part: “*If the findings and conclusions determine that failure to meet adopted transportation LOS will not be adequately mitigated, they shall also recommend such additional measures necessary to adequately mitigate the impacts reasonably attributable to the MPD projects’ failure to meet the adopted LOS.*” Finally, **Condition 17 c.** states, in part, “*The review identified in subsections (a) and (b) above, may be performed concurrent with a preliminary plat application held on either the Villages or Lawson Hills implementing plat, and the City review may incorporate relevant portions of any*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

SEPA documents prepared for the implementing plat which analyze cumulative MPD impacts.”

However, for each of these areas in **Conditions 17 a., b., and c.** the Development Agreements present no process for how and when any of this will be done, what will be done with the results, nor how those results will inform the formulation of “additional measures necessary to adequately mitigate the impacts.” And there is insufficient information provided on what will inform Preliminary Plat Application decisions (*ref.: Condition 17 c.*). Once again, there is no Traffic Analysis Plan presented in the Development Agreements.

Also, timing is the key factor that threads through all the **Traffic Analyses** tasks. The proposed MPDs will have a profound impact on the transportation infrastructure of southeast King County for decades to come. Consequently, a process must be developed to evaluate major problems identified by outside jurisdictions and agencies. Remedies need to be identified and evaluated. A process must be put in place to ascertain the level of funding in the cost-share splits among jurisdictions for such remedies. The impacted agencies, such as WSDOT and KCDOT, and cities-- Auburn, Covington, Enumclaw, and Maple Valley--all must agree with any overarching decision, scheduling, and implementation process. Yet there is no overarching Transportation Plan described in the Development Agreements.

There is insufficient detail in the Development Agreements to ascertain what these processes are and how and when they will be implemented. As detailed in these Condition sections, the City will be funding a lot of work, but the Development Agreements fail to explain what will be done with the information generated and how it will inform needed Transportation mitigations.

A major concern is that the provisions of **Condition 17 b.** on Peak-Hour Factors (PHFs) and PHF Sensitivity Analyses (as discussed earlier in detailed comments on **Condition 12**), which discuss **Condition 15** projects, are negated by the the **Maple Valley Transportation Mitigation Agreement**, which having been negotiated and signed, *“supersedes all other conditions and processes that may set mitigation*

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

measures and that are contained in the MPD Conditions or Development Agreement” (ref.: **Condition 15**) anything in the MPD Ordinance Conditions of Approval and is now frozen in time (as discussed earlier in detailed comments on **Condition 15**).

Condition 17. d.

“When the review thresholds identified in subparagraph a. above have been reached, the City shall issue written notice to the Master Developer(s) to each submit within 90 days review documentation summarizing their respective project impacts and compliance with mitigations and conditions to date....”

This appears to imply this will be done once the 850-building-permit-issued threshold is reached, so it can be used in the **Traffic Model Validation** process. However, the Development Agreement does not explain what information will be provided and the level of accuracy and confidence associated with that information. For example, will *“project impacts”* and *“compliance with mitigations and conditions”* information be described using travel times, intersection LOSs, failed turning movements, etc? This must be described in the Development Agreements to ascertain the validity of the process.

Condition 17. e.

“Not later than 90 days following the City's completion of the validation/calibration/operations analysis, the City Director of Community Development shall consult with other affected jurisdictions....” “... the City shall meet with the Master Developer(s) to review the proposed findings, conclusions and recommendation and identify what improvements the Master Developer(s) plans to construct.”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

How can such “*consultation with other affected jurisdictions*” wait until possibly 2016 when “*validation/calibration/operations analysis*” is to commence? What process to rectify issues will be used when a major problem is identified in “*affected jurisdictions*”? Who “*identifies*” what must be done--the City, Master Developer, affected Jurisdiction, some combination thereof? How will remedies be identified and evaluated? What process will be used to determine cost-share splits for such remedies? What is the overarching decision process that will be used and how will it be negotiated with “*affected jurisdictions*”? What say will the grossly impacted agencies of WSDOT and KCDOT, as well as the cities of Auburn, Covington, Enumclaw, and Maple Valley have in any of this? How will such “*consultation with other affected jurisdictions*” address already signed **Transportation Mitigation Agreements** with Covington and Maple Valley? None of this is specifically addressed in the Development Agreements.

Condition 17. f.

*“The City’s demand model validation and calibration ... shall result in written findings and conclusions plus a recommendation for new future permit conditions and mitigations for the Villages and/or Lawson Hills, as required. **Proposed conditions and mitigations applicable to future permits and associated mitigation within either or both projects shall be revised if the City finds that the conditions or mitigation measures imposed pursuant to the City’s standards in effect at the time of MPD approval have resulted in an unsatisfactory level of mitigation, either because the degree of mitigation is inadequate or the quantity of impact demonstrated to be attributable to MPD development exceeds levels predicted.**”*

Who defines what “*an unsatisfactory level of mitigation*” is? What process will be used to “*revise*” “*an unsatisfactory level of mitigation*” once identified? This is not specifically addressed in the Development Agreements.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

What analysis methodology (i.e., technical, cost, and risk) will be used to develop “new” mitigation measures to “revise” “an unsatisfactory level of mitigation”? None of this is addressed in the Development Agreements.

Where is the Schedule and what are the key decision points that addresses “future permits and associated mitigation”? This is not provided in the Development Agreements.

“New permit conditions and mitigations imposed for cumulative impacts through the periodic review process shall comply with the following standards and limitations:...” (enumerated under Condition 17.f. subparagraphs--i thru v.)

What process will be used to show “compliance” with these “standards and limitations”? Why is the burden of proof on the City and not the Master Developer? None of this is specifically addressed in the Development Agreements.

YarrowBay Response for all subsections of Condition #17 (from Att. A)

“Condition #17 did not require any additional details to be set forth in the Development Agreements.”

REPLY: It could be said that Condition #17 is the heart of all 25 Transportation Conditions and, possibly, what will determine the success or failure of the proposed MPD projects. Yet, YarrowBay continues to state that no “additional details” are needed “to be set forth in the Development Agreements.” If not now, when? Again, at a minimum, the Development Agreements should provide basic plans on how the tasks identified in the Conditions are to be done.

YarrowBay’s scant Response above to my detailed concerns on the execution of Condition #17 helps make my case.

Condition 18

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

“The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established in the two Development Agreements, which must cover the complete mitigation list and be consistent with one another.” (Traffic impacts were studied based on the cumulative impacts of The Villages and the Lawson Hills MPDs. These various projects have a mutual benefit and need crossing over between them.)

The Master Developer states in subsection 11.5 B that it may recover costs in excess of its proportionate share including grant funding and mitigation payments received by the City. While this may be legal, how does it ensure the City, the region, and the taxpayers that all obligations can and will be met? None of this is specifically addressed in the Development Agreements.

What process will be used to determine, let alone, evaluate pro-rata traffic shares amongst various sources (e.g., jurisdictions, developments, etc.)? None of this is specifically addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“Mr. Rimbos does not cite the last two sentences of Condition #18, and for that reason, perhaps misunderstands the purpose of the Condition.”

REPLY: I've included all 3 sentences of Condition #18 above.

How can one “misunderstand”: *“The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established in the two Development Agreements, which must cover the complete mitigation list and be consistent with one another.”* ? Where in the Development Agreements is the Financial Plan?

Condition 20

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

“A transportation monitoring plan shall be established as part of the Development Agreement....The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....”

How can a **Transportation Monitoring Plan** which collect real-time traffic data “ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....” ? Such data must be used in conjunction with **Traffic Analyses** to identify problems. None of this is specifically addressed in the Development Agreements.

There are no details on how improvements (and timing) will be identified using a clear set of trigger mechanisms that can be routinely measured and assessed. In addition, all major arterials in the **Traffic Demand Model** both inside and outside the City must be assessed in the **Transportation Monitoring Plan**.

[See specific comments on *Exhibit F--Transportation Monitoring Plan*.]

YarrowBay Response (from Att. A)

There is a Traffic Monitoring Plan. [Please note: This is my paraphrasing, not a quote, thus no quotation marks.]

REPLY: I explain in great detail under discussion of *Exhibit F--Traffic Monitoring Plan* herein, my concerns with both the real-time monitoring coupled with the “modeling element” which together comprise the Traffic Monitoring Plan. Without a Traffic Analysis Plan, the merits of such a Traffic Monitoring Plan cannot be assessed. In addition, the Plan must identify proper “trigger mechanisms” that can be both measured and assessed.

Condition 25

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

“The monitoring plan required by these conditions shall require the applicant to model the traffic impacts of a development phase before submitting land use applications for that phase, in order to determine at what point a street or intersection is likely to drop below the City's adopted level of service....”

Notwithstanding that MPD Ordinance **Condition 25** conflicts with **Conditions 11 and 17** on timing of validation of the **Traffic Demand Model**, how and when will this be done? In fact, the wording of **Condition 25** implies such modeling, analyses, and mitigation identification be completed before entering into the Development Agreement or, at least, prior to “submitting land-use applications” for any particular phase. None of this is specifically addressed in the Development Agreements. [See specific comments on *Exhibit F--Transportation Monitoring Plan.*]

YarrowBay Response (from Att. A)

“There is nothing in Condition #25 that limits the pre-phase modeling to use of the ‘new’ model. As described in Section A of exhibit ‘F,’ the Traffic Monitoring Plan,” when the City has completed its regional transportation model, all subsequent modeling shall be done with that regional model.”

REPLY: I refer your Honor to my detailed commentary under *Exhibit F--Traffic Monitoring Plan* herein. My concerns with the Development Agreements here are that they contain no Traffic Analysis Plan. Another concern is that Exhibit F, Section A states (as YarrowBay quotes above): “...when the City has completed its regional transportation model, all subsequent modeling shall be done with that regional model.” That means that if the City completes their model now, but does not validate for say 5 or so years (i.e., the point at which 850 building permits are issued), they intend to run a non-validated model. I hope that is not what they intend to do, but I can see no other way to interpret the quote above without seeing a Model Validation Plan and a Traffic Analysis Plan--none of which are included in the Development Agreements.

Condition 29

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

“Prior to the first implementing project of any one phase being approved, a more detailed implementation schedule of the regional infrastructure projects supporting that phase shall be submitted for approval. The timing of the projects should be tied to the number of residential units and/or square feet of commercial projects.”

There is no plan detailing how such an “implementation schedule” will be developed and vetted.

How will the Master Developer comply with **BD Municipal Code 18.98.010** to *“Provide needed services and facilities in an orderly, fiscally responsible manner.”*; **18.98.020** *“Timely provision of all necessary ... infrastructure ...”*; and **18.98.080** *“...phasing plan and timeline for the construction of improvements ... so that: Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted”*?

A complete set of **Transportation Plans** must be provided that include, at a minimum, project descriptions, project impacts, mitigations proposed, estimated costs, cost shares, identified funding mechanisms, and risks of potential revenue sources for both route and intersection improvements to fully mitigate all transportation-related impacts on all geographic areas studied before each Phase begins.

Cost-Benefit-Risk Analyses must be included for each mitigation proposed that provide specific details for decision-makers and assess potential impacts associated with slips in schedule, not securing adequate funding, and traffic pattern changes. Such Plans should be continually updated, as required, and submitted to the City for review and approval an adequate time (possibly 180 days) before a Phase is scheduled to begin. None of this is specifically addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“Here Mr. Rimbo’s opinion is that more detail than Condition #29 calls for, should be provided in the Development Agreement.”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: No, I simply want to see in the Development Agreements a Transportation Plan detailing how an implementation schedule will be developed and vetted. Unfortunately, all we see is verbiage that Condition #29 will be done. What? How? When?

Condition 33 a.

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

There is no “description of the process and timing required for the Applicant to seek permits from King County should King County allow installation of the improvements.”

This is inadequately addressed in the Development Agreements. At best, a simplistic *Traffic Calming Study* was done. “Basic” traffic calming measures were identified. However, none of these measures will truly “calm” the massive traffic volumes anticipated to be generated by the MPDs along Green Valley Road.

The use of “*traffic calming devices*” would impose a serious negative impact on the life and livelihood of the residents of the area. These could damage resident’s vehicles and impede their normal lifestyle. The residents should not have to pay such a price in the Rural Area on an Historic Corridor in an Agricultural Production

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

District for an improperly planned massive urban development adjacent to them in another jurisdiction. Further, the use of “*traffic calming devices*” is predicated on the assumption these would provide meaningful mitigation. That is questionable at best.

A Public Hearing should be held to provide the residents of Green Valley Road the opportunity to voice their opinions on the results of the study. King County must agree to any proposed changes to Green Valley Road. Traffic volumes on Green Valley Road should be re-assessed in conjunction with King County on at least a semi-annual basis to determine what changes need to be considered and implemented to minimize MPD traffic. None of this is addressed in the Development Agreements.

YarrowBay Response (from Att. A)

“Mr. Rimbo asserts that the Development Agreements do not contain a description of the process and timing for YarrowBay to seek permits from King County. That is incorrect. The process and timing is described in Exhibit ‘P’ Section 2, titled ‘Permit Process and Timing.’ ”

REPLY: The Development Agreements in *Exhibit P - Green Valley Road Measures* (sect. 2C) simply state the Master Developer will “*submit permit applications.*” There is no description of a process whereby the Master Developer, the residents along Green Valley Road, and King County Department of Transportation will develop solutions that are mutually agreeable.

Condition 33 b.

“A Green Valley Road Review Committee shall be formed. The committee shall consist of two representatives of the Applicant, one representative of the City, and two representatives of the community. If additional community members or representatives of King County desire to participate, they may do so, but only two community members shall have a vote on the committee regarding any matter. The Committee shall meet

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

as needed, and specifically shall meet to review the study required by Condition 33(a) and attempt to reach agreement on whether any suggested traffic calming devices should be provided....”

This has not been done. No Committee has been formed. That notwithstanding, this represents a *take-it-or-leave-it* approach. Either the residents and businesses along Green Valley Road accept some of the rudimentary and wholly inadequate “*traffic calming measures,*” or nothing will be done to alleviate the massive increases in future traffic loads caused by an adjacent City in Rural Unincorporated King County. If the “*traffic calming devices*” study is rejected, then all other means must be explored to ensure King County’s prediction of a “*300 - 400% increase*” (as testified to by KCDOT’s Matthew Nolan during the FEIS Appeals Hearings) in traffic on Green Valley Road does not occur.

King County has stated in their multiple comment submittals (both for the DEISs and FEISs) that:

“SE Green Valley Road will be significantly impacted, even without a proposed direct connection from the project, by project trips - between SR 169 and the SR-164 intersection near SR 18. This roadway has limited/no roadway shoulders, has fixed objects (trees, fences, etc.) in proximity to the roadway travelled-way, & a very curvilinear alignment. These existing conditions are tolerable given the relatively low (50+/-) peak hour volumes noted in the reports, however, the projected increase attributable to the proposed projects (on the order of magnitude of 400%) over existing, and still significant over 2025 baseline conditions, suggests that motorist safety will be adversely impacted without improvements....Black Diamond-Ravensdale Road, between the City and the Kent-Kangley Road/Landsburg Road/SE Ravensdale Way intersection, will be impacted by nearly identical (as compared to SE Green Valley Road) levels of traffic from the projects under the proposed access/network configuration. Since there are no meaningful trip destinations for these two projects between the Kent-Kangley Rd

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

intersection and SR 18, the same impacts would occur northerly up to the State Route – and, most likely, into Issaquah along the Issaquah-Hobart Road.”

None of this has ever been addressed, nor is it addressed in the Development Agreements. In fact, King County has warned in their comments (both for the DEISs and FEISs) that:

“Since ‘safety’-related improvements are permitted, and ‘capacity’ improvements are expressly prohibited in the Rural Area, a detailed evaluation of existing conditions of the roadways impacted by The Villages & Lawson Hills projects should be made, and mitigation identified to address the “appropriate provisions” requirement in the RCWs.”

None of this has ever been addressed, nor is it addressed in the Development Agreements.

Since the makeup of the Green Valley Road Review Committee is weighted, at best, 3-2 against the residents of the community to be impacted, it is not representative. A King County representative should replace the City’s representative as a voting member. The City still could attend the meetings, but not as a voting member. King County as the owner, operator, and maintainer of Green Valley Road must have a direct say in the Committee’s decisions. This is discussed as proposed “New” Condition 33 c. in Section VI. *Proposed “New” Conditions.*

YarrowBay Response (from Att. A)

“Nothing in Condition #33.b. requires that this committee be formed prior to the development Agreement being approved. The remainder of Mr. Rimbo’s comment on this Condition includes requests for a different Condition.”

REPLY: YarrowBay is correct. As stated, my major concerns deal with the Condition language itself, which provides the Green Valley Road citizens and businesses a minority voice on the Committee and presents them with a “take-it-or-leave-it” approach on traffic calming devices. I made it very clear in my Written Statement that I would be proposing a “new” Condition (33 c.) later in that document, which I did.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Condition 34 a.

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

There is insufficient information in the Development Agreements to address this. Although there are Tables in subsections 11.3 and 11.5 that list potential Transportation projects and responsible parties, there are no cost estimates, no obligations, no timing, and no risk assessments. Discussion on “*cost recovery*” is vague at best, as discussed in the critique under **Condition 10**. How will such an assessment be accomplished and on what will it be based?

Cost-Benefit-Risk Analyses of each traffic project must be conducted. These analyses, at a minimum, must address project impacts, estimated costs, cost risks, detailed schedule, schedule risks, and contingency plans. Yet, such parameters and analyses are never mentioned in the Development Agreements. This is discussed in more detail under “new” **Condition 29 a.** in Section VI. *Proposed “New” Conditions.*

YarrowBay Response (from Att. A)

“Every item mentioned in Condition #34.a. is addressed in the Development Agreement.”

REPLY: Actually, every item mentioned in Condition #34.a. is mentioned in the Development Agreement, but not “*addressed*.” There is no Financial Plan providing cost estimates, funding sources, obligations, timing, contingencies, and risk assessments. There is nothing but a column in a table that says “Master Developer.” Such is not a Plan that can be used, let alone assessed.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

V. DEVELOPMENT AGREEMENTS

In this section each Development Agreement Section/Subsection and Exhibit--directly or indirectly dealing with Transportation--is assessed. Specific comments in **purple** [YOU HONOR I HAVE CHANGED THESE TO BLACK FOR CLARITY IN THIS REPLY DOCUMENT AS EXPLAINED IN THE “WHAT THIS ‘REPLY’ CONTAINS” SECTION.] discuss whether the Development Agreements either meet, partially meet, or completely ignore stipulations of each MPD Ordinance Condition of Approval.

YarrowBay Response:

Provided below is a section by section response to comments regarding specific Development Agreement sections raised in the Citizen Transportation Exhibits. Because the Citizen Transportation Exhibits include a fair amount of overlap and repetition, we do not necessarily include every person who raised the same comment. While some items are repeated from the responses YarrowBay provided in Exhibit 139, the following list does not substitute or replace the responses contained in Exhibit 139. Again, all references are to the Villages, but apply to the mirror sections in the Lawson Hills Development Agreement.

REPLY: By the same token, on August 12, I provided an extensive Response to YarrowBay’s Exhibit #139 and the following REPLIES do not substitute or replace anything in that Response.

4.0 LAND USE AND PROJECT ELEMENTS

4.10 DEVELOPER IMPROVEMENTS

“The parties agree that the MPD design and mitigation measures described in this Agreement, including the MPD Approval and conditions in Exhibit “C”, result in the mitigation of any probable significant adverse environmental impact directly identified as a consequence of The Villages MPD. Additionally, the parties acknowledge that some

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

elements of the MPD and mitigation measures include provisions relating to system improvements identified in the City’s Comprehensive Plan dated June 2009, for which the City might adopt impact fees under RCW 82.02.050 et seq. The parties agree that as designed and with full implementation of all the mitigation measures, The Villages MPD build-out will fully and adequately mitigate the probable significant adverse environmental impacts of The Villages MPD and, that through such mitigation measures, provisions will be made for: (i) the facilities needed to serve new growth as a result of the MPD within the City; and (ii) to construct or pay a proportionate share of the cost of completing certain system improvements. Unless otherwise provided elsewhere in this Agreement, the parties agree that the mitigation measures listed in this Agreement and in Exhibit “C” are in lieu of the payment of any impact fees that the City has the authority to impose pursuant to RCW 82.02.050 et seq., including any amendments thereto, such that no impact fees shall be imposed on any MPD Implementing Project during the term of this Agreement except for those fees explicitly set forth in this Agreement.”

This effectively means that regardless of any future traffic modeling and analysis, all necessary mitigations have already been accounted for. It also states that no additional cost can be levied on the Master Developer. This is a fiscally irresponsible “clause” in the Development Agreement “contract.” This ties the hands of future City Councils and ensures critical decisions on mitigations needed or unfinished will be settled in Court. It is doubtful this was the intent of the City Council for this Condition when approving the MPD Ordinances.

For projects of this massive size in an area with poor infrastructure to begin with, there will be major Change Orders over a 15- to 20-year build-out. This is especially true when it comes to traffic mitigation projects, which historically are fraught with long lead times, technical risks, schedule slips, surprise costs, and ever-changing traffic demand circumstances.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208) to Written Statement: Transportation (Exh. #118)

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos asserts this section means that all mitigation has already been decided and that no additional mitigation can be imposed in the future.

YarrowBay Response:

Section 4.10 references the "design and mitigation measures described in this Agreement, including the MPD Permit Approval and its Conditions of Approval." As such, the mitigation described in Section 4.10 expressly includes Periodic Review as described in Condition of Approval No. 17. Periodic Review and the additional mitigation that may result from it is described in full (sic, "full" ?) in Condition No. 17, and is described in the Introduction section of this Memorandum. There is no need or basis to revise this section of the Development Agreements.

REPLY: Here is what Section 4.10 states: *"The parties agree that the MPD design and mitigation measures described in this Agreement ... result in the mitigation of any probable significant adverse environmental impact directly identified as a consequence of The Villages MPD. ... The parties agree that as designed and with full implementation of all the mitigation measures, The Villages MPD build-out will fully and adequately mitigate the probable significant adverse environmental impacts of The Villages MPD Unless otherwise provided elsewhere in this Agreement, the parties agree that the mitigation measures listed in this Agreement and in Exhibit "C" are in lieu of the payment of any impact fees that the City has the authority to impose" I stand by my Written Statement that "(T)his effectively means that regardless of any future traffic modeling and analysis, all necessary mitigations have already been accounted for." In addition, the "Periodic Reviews" do not include the vast majority of the proposed traffic mitigation--that contained in the Maple Valley Traffic Mitigation Agreement.*

11.0 PROJECT PHASING

11.2 PHASING OF IMPROVEMENTS

"Phases may ultimately be built simultaneously. Accordingly, infrastructure and timing of Development different from the MPD Phasing Plan (Exhibit "K") may be proposed by the Master Developer, without an amendment to the MPD Permit Approval

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

or this Agreement, based on the needs and timing of specific Implementing Projects and technological advancements.”

Transportation “*infrastructure and timing*” are the cornerstones determining viability of these MPDs. As such, any changes to the definition of either must be put forth as Amendments to either the MPD Permit Approval or the Development Agreements. Such language, as espoused in section 11.2 above, is not contained in the MPD Ordinances’ *Exhibit C--Conditions of Approval*.

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos describes infrastructure and timing as the “cornerstones determining validity of these MPDs,” and suggests that any changes from the MPD Phasing Plan in Exhibit K needs to be processed as an amendment to either the MPD Permit Approval or the Development Agreements.

YarrowBay Response:

The MPD Phasing Plan, Exhibit “K” was approved in Condition of Approval No. 3. As stated in the approved Phasing Plan, phases can proceed concurrently. Obviously, that will affect the timing of the infrastructure for each phase. Indeed, as stated on the approved phasing plans, at p. 9-1 (and cited in Section 11.1), the approved phasing plan is subject to change. The real issue is ensuring that the infrastructure necessary to serve development gets built. The implementation schedules required by Condition Nos. 29 and 164 and referenced in Section 11.2 accomplish that goal. The findings required by Section 11.7 in any staff report for an Implementing Project further confirm that goal will be met. There is no need or basis to revise this section of the Development Agreements.

REPLY: Although Condition 3 does implement the Phasing Plan (Exhibit K), it does not state that “...infrastructure and timing of Development different from the MPD Phasing Plan (Exhibit “K”) may be proposed by the Master Developer, without an amendment to the MPD Permit Approval or this Agreement...” as alleged by YarrowBay in Section 11.2 of the Development Agreements.

11.3 PHASING AND CONSTRUCTION OF ON-SITE REGIONAL FACILITIES

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

B. Construction and Funding.

“Except as provided in the WSFFA and Municipality of Metropolitan Seattle City of Black Diamond Agreement for Sewage Disposal dated September 12, 1990, the Master Developer shall design and Construct (or cause to be Constructed) the onsite Regional Facilities identified in Tables 11.3.1, 11.3.2, 11.3.3, and 11.3.4 below....

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

Notwithstanding anything to the contrary above, the City shall work in good faith and use reasonable best efforts to: (i) apply for grants and use funds awarded under such grants; and (ii) seek mitigation payments for impacts associated with growth occurring outside the City boundaries pursuant to the State Environmental Policy Act (“SEPA”), to reimburse the Master Developer for the on-site Regional Facilities construction costs it incurs in excess of its proportionate share.”

The Master Developer primarily is relying on other people's money to build identified traffic mitigations. In addition, the phrase *"or cause to be constructed."* is troubling--what does it mean? It seems to imply unknown-sourced outside funding. If so, that does not constitute an element of a credible **Financial Plan**.

The phrase *"proportionate share"* often is mentioned, but such cost splits are not provided, except in Tables 11.3.1 - 11.3.4, which show the Master Developer as being *"responsible"* for the infrastructure, thus implying a 100% share. [Note: the first

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

three Tables list Transportation infrastructure, while the fourth Table, while not listing specific Transportation infrastructure, it is implied, because there will have to ingress and egress to the Wastewater and Stormwater facilities listed.] Yet, the overall transportation infrastructure needs must be in excess of several \$100,000,000 (hard to tell with no cost estimates of any kind are provided!).

Where will the Master Developer get such sums of money? One could assume the Master Developer is planning on borrowing against their land value at municipal bond rates through the mechanism of Community Facility Districts (CFDs). Then passing the CFD charge onto homebuyers, commercial/business owners; etc. through a special assessment. Those special assessments most likely will be used to pay back the bondholders. But this is all speculation on my part because nowhere in the Development Agreements is a **Financial Plan** detailed. What happens if CFDs are not available to the Master Developer? What is the Back-up Plan? These are all potential Fatal Flaws! Plus, where are the risks identified? Finally, and possibly most important, on whom are those risks imposed and for how long?

Although MPD Ordinance **Condition 10** (and, similarly, **Condition 34 a.**) stipulates: *“The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur,”* the Master Developer simply states that it *“may recover costs...using methods approved and allowed...”* This does not constitute identifying *“cost recovery mechanisms.”*

The Bottom Line: There is no detailed Transportation **Financial Plan**. No one knows how much they are signing up for in the future. No one knows who the risks will fall upon and when. Without this type of critical information, how can a long-term commitment be made on the part of the City, its current citizens, its future citizens, and the region in the form of 15-20-year “contracts”--the Development Agreements?

Comments:

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Peter Rimbo (August 4, 2011, Exhibit 118): Mr. Rimbo argues that this section means that YarrowBay is relying on other people's money to build infrastructure, that such money might not be available, and that presents some risk to the City. Mr. Rimbo demands a "Financial Plan" that meets his definition.

YarrowBay Response:

There is no requirement in State law, City Code or the MPD Conditions of Approval for the type of "Financial Plan" that Mr. Rimbo seeks. Practically speaking, the plan Mr. Rimbo seeks would require cost estimates today for infrastructure that might not be built for another 10 years and, therefore, would not be likely to satisfy Mr. Rimbo. More importantly, there is absolutely no risk to the City in not having Mr. Rimbo's desired plan. If YarrowBay cannot find a way to finance infrastructure necessary to serve a portion of the MPD development, then YarrowBay will not be able to proceed under the myriad protections throughout Section 11 that require infrastructure to be built to serve development. There is no need or basis to revise this section of the Development Agreements.

REPLY: Somehow YarrowBay boiled down my extensive discussion on lack of financial estimates, over-reliance on CFDs, no risks identified, and no contingency planning to the type of “Financial Plan” I seek is not required, nor is it possible from a practical standpoint. Such Financial Plans are developed everyday for small and large projects. They protect all parties involved. Of course, estimates can change, but with none to begin with, there is no program to manage, no costs to contain, and no risk management of funding sources. I stand by my contention that there is no credible Financial Plan.

**11.4 PHASING AND CONSTRUCTION OF OFF-SITE REGIONAL
INFRASTRUCTURE IMPROVEMENTS**

A. Phasing.

“Occupancy of an Implementing Project that exceeds the construction threshold is allowed after the necessary Regional Facility has been permitted. This ensures that necessary off-site Regional Facilities are provided to serve Implementing Projects as they occur.”

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

This does not ensure “that necessary off-site Regional Facilities are provided to serve Implementing Projects as they occur.” Allowing “occupancy” to exceed “thresholds” simply based on issuance of permits for necessary infrastructure doesn’t make sense and harms the City and its new residents.

Comments on this subsection only are provided because, while no specific Transportation infrastructure is listed, it is implied, as there will have to ingress and egress to any off-site regional Wastewater and Stormwater facilities listed as “Regional Facilities.” Actually, no Stormwater facilities are listed, but the off-site major Stormwater Detention Facility is shown in *Exhibit K--MPD Phasing Plan (Phase 3: fig. 9-5, Project III-13)*, so there appears to be yet another conflict within the Development Agreements.

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos's comments on this section "only are provided because, while no specific transportation infrastructure is listed, it is implied, as there will have to (“be”, my typo) ingress and egress to any ... Regional Facilities."

Yarrow Bay Response:

Any necessary access roads to a Regional Facility will need to be addressed during permit review for that Regional Facility. There is no requirement for that proposition to be included in the Development Agreements. There is no need or basis to revise this section of the Development Agreements.

REPLY: I’ll stand by my words, which are not refuted by YarrowBay above: “no Stormwater facilities are listed, but the off-site major Stormwater Detention Facility is shown in *Exhibit K--MPD Phasing Plan (Phase 3: fig. 9-5, Project III-13)*, so there appears to be yet another conflict within the Development Agreements.”

B. Construction and Funding.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

[This section 11.4.B has similar language to that quoted above for 11.3.B, so it is not repeated here.]

[Note: Applicable discussion of deficiencies are given above under 11.4.A.]

Comments:

Peter Riinbos (August 4, 2011, Exhibit 118): Mr. Rimbo's cross references his concerns under Sections 11.3.B and 11.4.A.

YarrowBay Response:

YarrowBay cross references its response to Sections 11.3.B and 11.4.A. There is no need or basis to revise this section of the Development Agreements.

REPLY: As provided under Section 11.3B.

11.5 TRANSPORTATION REGIONAL FACILITIES

A. Timing

“Pursuant to Conditions of Approval Nos. 10, 18, and 34 of the MPD Permit Approval, the timing associated with the construction of the transportation improvements outlined in Tables 11□5□1 and 11□5□2 is subject to the Traffic Monitoring Plan set forth in Exhibit “F”. While some of these transportation improvements are shown on the figures associated with Phases contained in Exhibit “K,” the timing shown is only approximate. Pursuant to Condition of Approval No. 20 of the MPD Permit Approval, the actual timing of construction of the transportation improvements outlined in Tables 11□5□1 and 11□5□2 shall be governed by the Traffic Monitoring Plan.”

It can't be emphasized enough that the whole premise of just “monitoring” is reactive, not pro-active. “Re-activity” identifies a traffic problem through “monitoring”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

and then a process (undefined in the Development Agreements) is put into place to design, finance, and build a particular transportation improvement to mitigate what the “monitoring” identified as a problem. This is not a credible plan for success!

The “Funding Responsibility” column in Tables 11.5.1 and 11.5.2 refers back to verbiage of subsections 11.3 B and 11.4 B, which simply discuss “reimbursement for on-site (off-site, respectively) Regional Facility construction costs in excess of its proportionate share....” This does not meet the requirement in **Condition 10** that each eligible project and associated specific “cost recovery mechanisms” be identified.

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos cross references his concerns about Condition No. 10 and about Exhibit “F,” the traffic monitoring plan.

YarrowBay Response:

YarrowBay directs the Examiner to our response to Condition No. 10 shown on the “Traffic Signal Assessment Table Response to Ex. 118 and Ex. 145” that accompanies this Memorandum, and to the response to Exhibit “F,” below. There is no need or basis to revise this section of the Development Agreements.

REPLY: This is the first instance where YarrowBay states that the Traffic Monitoring Plan is “pro-active,” while at the same time insinuating I do not comprehend that it contains a “modeling element” [actually, to be clear, YarrowBay should call this a “modeling and analysis element”] So, I will try to respond to YarrowBay’s false contention here and be done with it.

I fully understand the Traffic Monitoring Plan contains a “modeling element” that will be used to predict traffic scenarios going forward. The reason I call the Traffic Monitoring Plan “re-active” is because that “modeling element” contains several fatal flaws enumerated throughout my Written Statement:

1. The timing of what pedigree of model (old or “new” regional) to use is flawed.
2. The old model used to develop the traffic distribution loads and inform the subsequent analyses that supported the FEISs and MPD Applications is flawed.
3. The validation process for the “new” model does not even start until the City has increased it’s population by ~50%.

Unfortunately, while wisely including a “modeling element” in the Traffic Monitoring Plan, the Development Agreements do not meet the need to truly understand traffic distribution and throughput.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

In addition, the Traffic Monitoring Plan is “re-active” because the Development Agreements that present such a Plan do not provide any process to define what mitigations might be suitable, analyze those mitigations, and put in place a plan to design/finance/build a particular transportation improvement to mitigate what the “monitoring” has identified as potential problems.

B. Construction and Funding

“The transportation impacts of the Villages MPD were assessed based on the cumulative impacts of The Villages MPD and the Lawson Hills MPD in the EIS. During any time period in which The Villages MPD proceeds before the Lawson Hills MPD or vice versa, the transportation mitigation obligations shown in Tables 11□5□1 and 11□5□2 and triggered by the Traffic Monitoring Plan shall be borne by the MPD that is proceeding alone. During any time period in which both MPDs are proceeding, the transportation mitigation obligations outlined in Tables 11□5□1 and 11□5□2 will be shared by The Villages and the Lawson Hills MPDs on a proportionate share basis. Pursuant to Condition of Approval No. 19 of the MPD Permit Approval, for each potential signal listed below, the Master Developer shall first consider and present a conceptual design for a roundabout as the City’s preferred method of intersection control.”

It is not clear where all the monies will come from to fund the list of “Transportation Regional Facilities” listed in Tables 11-5-1 thru 11.5-2. The tables list “Master Developer,” but do not specify what funding sources and/or mechanisms the “Master Developer” will employ. Also, there is no identification of “cost recovery mechanisms” as required by **Conditions 10** and **34 a**. Once again, there is only minimal listing of potential “cost recovery mechanisms” in *Exhibit K--MPD Phasing Plan*. [Note: The discussion of deficiencies related to 11.3 provided earlier, also is applicable here.]

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Comments:

Peter Rimbo (August 4, 2011, Exhibit 118): Mr. Rimbo cross references his concerns about Condition Nos. 10 and 34a, as well as Section 11.3.

YarrowBay Response:

YarrowBay directs the Examiner to our response to Condition Nos. 10 and 34a, shown on the "Traffic Signal Assessment Table - Response to Ex. 118 and Ex. 145" that accompanies this Memorandum, and to the response to Section 11.3, above. There is no need or basis to revise this section of the Development Agreements.

REPLY: YarrowBay chose not to respond to the two specific issues I raised:

1. The “Transportation Regional Facilities” Tables 11-5-1 thru 11-5-2 list “Master Developer” under the “Funding Responsibility” column, but do not specify what funding sources and/or mechanisms the “Master Developer” will employ.
2. There is no identification of “cost recovery mechanisms” as required by MPD Ordinance Conditions 10 and 34 a. and only a minimal listing of potential “cost recovery mechanisms” in Exhibit K--MPD Phasing Plan.

YarrowBay’s “Traffic Signal Assessment” Table directs your Honor to a Table 11-5.2 footnote for “possible cost recovery” and also states that a “list of potential mechanisms for cost recovery is all that is reasonably required by the terms of Condition #10.” However, Condition 10 states: “The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur.” Condition 10 clearly calls for each eligible project to be identified and specific cost recovery mechanisms be associated with it. The Development Agreements do not provide this information as required by Condition 10.

C. “Pursuant to Condition of Approval No. 15 of the MPD Permit Approval, transportation facilities to be constructed within the Cities of Maple Valley and Covington will be provided pursuant to the terms of Exhibits “Q” and “R”.”

The **Maple Valley Transportation Mitigation Agreement** and the **Covington Transportation Mitigation Agreement** were based on the questionable results, as determined by your Honor, of an inadequate, insufficiently detailed, non-regional Traffic Demand Model and subsequent traffic analyses employing several suspect

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

input variables. Consequently, there is a total lack of confidence in the output of the *existing* model (i.e., currently defined traffic mitigations). Therefore, the mitigations proposed to Black Diamond and Maple Valley by the Master Developer may be, and most probably are, wholly inadequate. In Section VI. *Proposed “New” Conditions*, two “new” conditions are offered: **“New” Conditions 14 a.** and **14 b.** to try to rectify this potentially Fatal Flaw in the process.

These Transportation Mitigation Agreements appear to be static. If so, what happens after 850 building permits have been issued and the Traffic Demand Model is validated and then used to conduct traffic flow and volume analyses? If additional mitigation is identified at that time and required, will the Mitigation Agreements be re-opened and amended? Who pays for additional mitigation? How does additional mitigation affect the build-out costs, schedule, and phasing of the MPDs?

Further, only responsibility splits are shown in the **Maple Valley Transportation Mitigation Agreement**. As stated earlier in comments concerning Development Agreement sect. 11.3, the sums of money involved in building such transportation infrastructure could be enormous.

Finally, the schedule for mitigations in the **Maple Valley Transportation Mitigation Agreement** is all predicated on Phasing and Trigger Points (i.e., # of homes), so a jurisdiction will be unable to do any real capital planning for such infrastructure [see discussion under *Exhibits Q and R*].

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos re-iterates and cross-references his concerns about Exhibits "Q" and "R."

YarrowBay Response:

YarrowBay directs the Examiner to our response to comments on Exhibits "Q" and "R," below. There is no need or basis to revise this section of the Development Agreements.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: For ease of following the argument path your Honor is directed to my REPLY statements to be found under *Exhibits "Q" and "R"* herein.

12.0 DEVELOPMENT REVIEW PROCESS

12.10 MAPLE VALLEY TRANSPORTATION MITIGATION AGREEMENT

12.10.1 Maple Valley Transportation Mitigation Agreement Effect

“...Conditions of Approval 10 through 14, and 16 through 34 within Exhibit C of the Villages MPD, Ordinance No. 10□946, are superseded by the Maple Valley Transportation Mitigation Agreement in regards to any potential transportation improvements within the City of Maple Valley.”

The Maple Valley Transportation Mitigation Agreement has never been subjected to a Public process, so how can it “supersede” MPD Ordinance Conditions? [also see discussion concerning Development Agreement sect. 11.5, para. C. above]

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos asserts that because the Maple Valley Mitigation Agreement was never subjected to a "public process," it cannot supersede the MPD Conditions of Approval.

YarrowBay Response:

The MPD Conditions of Approval were subject to an extensive public process. It is MPD Condition of Approval No. 15 that states that any mitigation agreement reached with an outside jurisdiction supersedes the other conditions and processes for mitigation. There is no need or basis to revise this section of the Development Agreements.

REPLY: YarrowBay is correct in that it is following MPD Ordinance Condition 15. My argument here is with the City of Black Diamond for imposing such mega-developments

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

on its sister city of Maple Valley and essentially compelling it to come to an agreement on potential mitigations.

12.11 COVINGTON TRANSPORTATION MITIGATION AGREEMENT

“...Conditions of Approval 10 through 14, and 16 through 34 within Exhibit C of the Villages MPD, Ordinance No. 10□946, are superseded by the Covington Transportation Mitigation Agreement in regards to any potential transportation improvements within the City of Covington.”

The Covington Transportation Mitigation Agreement has never been subjected to a Public process, so how can it “supersede” MPD Ordinance Conditions? [also see discussion concerning Development Agreement sect. 11.5, para. C. above]

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos asserts that because the Covington Mitigation Agreement was never subjected to a “public process,” it cannot supersede the MPD Conditions of Approval.

YarrowBay Response:

The MPD Conditions of Approval were subject to an extensive public process. It is MPD Condition of Approval No. 15 that states that any mitigation agreement reached with an outside jurisdiction supersedes the other conditions and processes for mitigation. There is no need or basis to revise this section of the Development Agreements.

REPLY: YarrowBay is correct in that it is following MPD Ordinance Condition 15. My argument here is with the City of Black Diamond for imposing such mega-developments on its sister city of Covington and essentially compelling it to come to an agreement . However, in Covington’s case, the city chose to accept cash payments in lieu of potential mitigations. One can only assume that this was the case due to Covington determining, at the time, that no mitigation would help alleviate the coming traffic nightmare.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

[YOUR HONOR: WHILE MY WRITTEN STATEMENT DID NOT ADDRESS SECTION 13.8 GREEN VALLEY ROAD, APPARENTLY MRS. CARRIER’S DID. YARROWBAY PROVIDED A RESPONSE TO MRS. CARRIER (SEE BELOW). I ADD MY REPLY BELOW THAT.]

Comments:

Judy Carrier (Written Testimony dated August 4, 2011, Exhibit 130): Ms. Carrier supports the request of Matt Nolan to limit traffic on Green Valley Road by excluding traffic and requests revisions to the form of the Green Valley Road committee.

YarrowBay Response:

YarrowBay incorporates by reference the statement provided in Exhibit 139 regarding Section 13.8. We also reiterate that Green Valley Road has capacity to accommodate MPD traffic. See Exhibit 30 at pages 9-10, concluding that "with the build out of both MPDs all east-west routes [including Green Valley Road] would still have available capacity in 2035." As is also shown on those pages, the Green Valley Road Study used the traffic volumes predicted for Green Valley Road that were included in the TTRs for the FEISs, meaning that the volumes assigned to Green Valley Road were assigned assuming that the South Connector Roadway was built to intersect with SR 169. There is no need or basis to revise this section of the Development Agreements.

REPLY: While I would imagine Ms. Carrier could and might supply her own Reply here, I will offer my Reply.

KCDOT’s Matthew Nolan did not assert that Green Valley Rd. has adequate capacity to handle the increased traffic expected to be generated by the MPDs. However, Mr. Nolan did testify that KCDOT looks at safety issues along such roads and that the County “greatly discourages” any “capacity improvements” on Rural Area roads such as Green Valley Road.

In the ongoing Hearings, on July 21, 2011, Mr. Nolan provided testimony about Development Agreement Section 13.8 Green Valley Road, and Exhibit P -- Green Valley Road Measures. He recommended a “new” condition to try to address some of the concerns of the rural community regarding the impacts of MPD growth on this heritage corridor:

“The Applicant shall monitor traffic volumes at two locations along Southeast Green Valley Road every three (3) months, i.e. quarterly, through the life of the proposed MPDs. The Applicant shall provide a current baseline count at locations to be determined by King County, against which future traffic increases may be measured and compared. If the traffic volumes along Southeast Green Valley Road exceed a 50 percent increase of the current (2011-2012) traffic volumes, no additional lots may be recorded until identifying additional mitigation which can be shown to decrease traffic volumes along Southeast Green Valley Road to below the threshold values. If the mitigation requires construction of road

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

improvements, no additional lots may be recorded until the design for these improvements is approved by the local jurisdiction, the improvements are bonded, and a construction schedule is established. Once construction is substantially complete on the identified improvement, recording of lots may begin.”

EXHIBIT F – TRAFFIC MONITORING PLAN

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos asserts that Exhibit "F" is not proactive, and itemizes a list of alleged problems with the Traffic Monitoring Plan.

YarrowBay Response:

As stated in Exhibit 139 these allegations are incorrect:

The Traffic Monitoring Plan proposed in Exhibit "F" of both Development Agreements is in fact proactive because it ensures that transportation mitigations are in place and/or constructed prior to experiencing a significant adverse impact on the particular road segment or intersection. In order to further explain the proactive nature of its Traffic Monitoring Plan, YarrowBay asked its transportation consultant, Kevin Jones at Transpo Group, to prepare a more detailed response. His declaration and brief are attached hereto as Attachment 6. There is no need or basis to revise the Traffic Monitoring Plan contained in the Development Agreements.

REPLY: I provided an extensive line-by-line Response to the *Transpo Group Response Brief* (Attachment #6) in my 28-pg Response to YarrowBay’s 8/4/11 Written Comments (Exhibit #224). Sixteen pages of that response are exclusively devoted to the *Transpo Group Response Brief*. With my apologies, I direct your Honor to my Response.

A. Required Timing for Modeling and Monitoring

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

“Before submitting land use applications for each Phase of the combined MPDs, and in the middle of each Phase, the Master Developer shall model and monitor traffic to identify the expected traffic impacts of that Phase.”

What “*model*” is going to be used “*before submitting land use applications for each Phase*” and in the “*middle of each Phase*” and how will that “*model*” be validated? This is especially of a concern prior to 850 building permits being issued as called for in MPD Ordinance **Condition 17a**. It should without saying that the confidence level associated with results generated using an un-validated model is unknown. There is no clarity at all in the Development Agreements on what will happen prior to the 850 threshold.

I preface this discussion with some background. Although I do not purport to be a Traffic Modeling expert, I do have over 24 years of experience at Boeing in modeling and analyzing complex aerospace and aircraft structure under disparate conditions to meet a variety of life, structural, environmental, and thermal requirements. As such, I believe I can discuss the potential concerns associated with complex modeling, validation and re-validation, critical analyses, and prudent evaluation of results. Such “*Modeling*” is a tool that helps to predict future traffic loads and distribution patterns over certain time periods.

“*Monitoring*” is a tool to gage current traffic loads and distribution patterns in real time. Consequently, “*monitoring*” cannot supplant good predictive modeling techniques, but can be used to aid invalidating a “*model*” to determine how close and repetitively it predicts current conditions. As more “*monitoring*” is done over time, the “*model*” will become more accurate in its predictions--that is good; however, it must be understood that “*monitoring*” in itself is reactive at best and one will never “catch up” until after full build-out of the MPDs is reached. “*Monitoring*” will always be “chasing” the next needed mitigation improvement, such that the transportation infrastructure--intersections and intervening road spans--always will be on the precipice of failure or outright in failure. This is not a credible plan.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

YarrowBay Response:

Mr. Rimbo acknowledges he is not a traffic modeling expert yet questions how the Traffic Monitoring Plan will model future conditions. He also suggests that the Plan is reactive and not credible.

REPLY: I will not be drawn into an argument over expertise. However, I certainly possess the expertise and experience to question “*how the Traffic Monitoring Plan will model future conditions.*” My 24 years of experience at Boeing in modeling and analyzing complex aerospace and aircraft structure and my Masters Degree in Civil Engineering certainly give me ample capability to question the Traffic Monitoring Plan. In fact, one need not have my particular technical and managerial background to see the many flaws in the Plan.

For the Traffic Monitoring Plan to be credible it must present a process in which “modeling” of future traffic loads and distribution patterns is coupled with “monitoring” of existing traffic loads and distribution patterns. That process must then present a way to synthesize such data in order to determine what mitigations will work, how well they will work, and when they are needed. Unfortunately, the Development Agreements fall far short on defining that process.

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

The “*model*” cannot be static, rather it must be ever evolving so its predictive capabilities are improving through periodic “*monitoring*” and subsequent validation cycles. Yes, “re-validation” of such a model often is required, especially if the original conditions under which it was validated change substantially, such as much higher traffic loads, major changes in traffic distribution, new intersections, road widening, employment center growth or movement, etc.

Should the model not undergo such re-validation, it might not be sensitive enough to capture significant traffic distribution changes with time. Consequently, there is insufficient information here to determine whether or not this meets MPD Ordinance **Conditions 11** and **17** [see previous comments under **Conditions 11** and **17**].

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

YarrowBay Response:

The Plan clearly states that once the City has completed its transportation model, all subsequent estimates of MPD trip patterns and traffic volume forecasts shall be completed using that model. In the meantime, prior to the 850-unit threshold, EIS assumptions will be used to estimate distribution patterns and project future traffic volumes. Intersections requiring mitigation within this time-frame can be reasonably predicted given existing traffic operations and applicable standards. Adequate transportation mitigation for the first 850 dwelling units is identified in the Jones Declaration dated August 3, 2011, Exhibit 139, Attachment 6.

REPLY: Once again, your Honor please accept my apologies, as I direct you to my extensive line-by-line Response to the *Transpo Group Response Brief* (Attachment #6) in my 28-pg Response to YarrowBay’s 8/4/11 Written Comments (Exhibit #224). Sixteen pages of that response are exclusively devoted to the *Transpo Group Response Brief*.

YarrowBay Response:

The intent of monitoring is to understand current conditions and how conditions are changing as a way to better anticipate, through modeling, when standards may no longer be met so that improvements can be completed prior to the impact. This is a proactive approach. Mr. Rimbo’s fear that needed improvements will not be known until monitoring exposes the need is unfounded. Mr. Rimbo’s fear suggests that he believes the Traffic Monitoring Plan is limited to monitoring after-the-fact and has no predictive component (a predictive component forecasts future conditions). As explained above the Traffic Monitoring Plan absolutely includes a predictive component.

REPLY: I refer your Honor to my REPLY under 11.5A where this was first brought up by YarrowBay. For your Honor’s ease of review I see no reason to repeat my REPLY each time YarrowBay makes the same Response accusation.

YarrowBay Response:

Mr. Rimbo also asserts that the new transportation model cannot be static and model validation cannot occur once. We agree. The City’s transportation model will not be “static.” Model validation will occur multiple times on regular intervals. In fact, following the original validation, Condition of Approval No. 17.a. requires that the City validate the model “at such phase or interval determined by the City Council.”

REPLY: It is good to finally see YarrowBay state the model will undergo re-validation, as is required with any predictive model as it evolves. Unfortunately, this is not discussed in the Development Agreements, nor is the process for re-validation presented therein.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

[I feel compelled to state here that I continue to be amazed YarrowBay believes it need not even *present* its Plans, Processes, and Evaluation Methodology in the Development Agreements. Without this type of information even being *discussed*, how can the City make long-term commitments--such as these proposed MPDs--to its citizens and the region?]

B. Report Requirements

“The results of the traffic modeling and monitoring shall be presented to the City in a written report. The traffic monitoring report shall be prepared by a registered professional engineer chosen by the Master Developer and licensed to practice in the State of Washington with experience in traffic engineering and transportation planning. The written report shall document the findings including an evaluation of the existing conditions, and a forecast of future traffic volumes based on the next Phase’s (or the remaining portion of the Phase’s) projected level of development.”

Details are needed on how will such “forecasts” be made and used to adjust the model and/or the speed and breadth of needed mitigations and further build-out of the MPDs. There is insufficient detail in the Development Agreements to determine whether this satisfies the stipulations of **Conditions 11 and 17**, which call for such methodology to be used.

YarrowBay Response:

Mr. Rimbo seeks more detail with respect to, again, how the Traffic Monitoring Plan will model future conditions, the frequency of traffic counts, and asserts that the model must also evaluate future traffic generated by other Black Diamond development. As stated earlier, traffic volume forecasts will be made based on EIS assumptions prior to the 850-unit threshold and using the City's transportation model thereafter. With respect to the frequency of traffic counts, existing traffic counts will be collected no more than two years prior to the report date. Based on industry standards, traffic counts collected within this time frame are reasonably representative of existing conditions and this is the

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

same time period required in Condition of Approval No. 11. And to include other Black Diamond development without likewise including the mitigation necessary for these same developments could potentially assign mitigation responsibility to YarrowBay for non-MPD impacts. This is simply illegal.

REPLY: Unfortunately YarrowBay misses the point: The Development Agreements lack sufficient detail. A process has not been presented (does it even exist?) that describes how “forecasts” will be made and used to adjust the model and/or the speed and breadth of needed mitigations and further build-out of the MPDs. Without this type of information how can your Honor, or anyone, determine whether this satisfies the stipulations of Conditions 11 and 17, which call for such methodology to be used?

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

This is good, but the frequency of such traffic counts and level-of-service (LOS) computations must be provided to determine whether and when these counts will be of practical use.

“Evaluation of potential future traffic volumes from other Black Diamond development shall not be required because the City will independently require other projects to evaluate and mitigate their own impacts. However, infill traffic growth

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

(exempt from SEPA) and background traffic growth from outside of Black Diamond (also exempt from SEPA) shall be included in modeling.”

What validity will be associated with these “forecasts” of “future traffic volumes”? The **Traffic Demand Model** must include all traffic regardless of how it is generated, otherwise true traffic distribution patterns and throughput timing will not be fully understood. Everyone uses the same transportation infrastructure. These MPDs will dominate the traffic generation throughout the region. How can one discern what non-MPD-generated traffic is in order to parcel it out of the traffic volume and intersection timing numbers? Once again, this does not satisfy the stipulations of Conditions 11 and 17.

YarrowBay Response:

Here too, Mr. Rimbos asserts that the Traffic Monitoring Plan is reactive. He also asserts that intersections beyond Black Diamond should be monitored and there is great risk that transportation improvements will only be constructed at YarrowBay's discretion. Again, the intent of monitoring is to understand current conditions and how conditions are changing as a way to better anticipate, through modeling, when standards may no longer be met so that improvements can be completed prior to the impact. This is a proactive approach.

REPLY: The term “discretion” is used in the Development Agreements: “The City, in its reasonable discretion, may use the report to determine whether to request that the Master Developer [*“alter”? Your Honor, a verb--an important one--is missing here.*] its proposed timing for construction of any new roadway alignments or intersection improvements....” So, the Development Agreements state the City may only make a “request” of the Master Developer and, thus, has no control over its own transportation infrastructure and, as I stated in my Written Statement, “it’s all at the discretion of the Master Developer.”

With respect to a *re-active* vs. a *pro-active* approach, I made it very clear in my Written Statement there is a distinction between using the “results” from the “modeling” or the “monitoring.” If one uses only the latter, then the Traffic Monitoring Plan is reactive (not pro-active) and constitutes a risky approach that must be rectified. However, should results from a validated model be used here, those model runs must be done frequently, as conditions will change markedly throughout buildout of the MPDs.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

“For intersection improvements, the report shall compare the results with the LOS threshold for each existing facility to determine whether and at what time any improvement to an existing facility is required.”

Does this refer to “results” from the “modeling” or the “monitoring”? If the latter, then this is reactive and not pro-active. Consequently, it constitutes a risky approach that must be rectified. Results from a validated model could be used here, but those model runs must be done frequently, as conditions will change markedly throughout buildout of the MPDs.

“The report shall also evaluate the extent to which MPD traffic would cause or contribute to any level of service failure on an existing facility in Black Diamond or need for access to or circulation within the MPD.”

What about “level of service failure” on roads/intersection outside of Black Diamond? Just because the Master Developer has signed **Transportation Mitigation Agreements** with outside jurisdictions, doesn’t mean the City of Black Diamond is “off the hook” for problems caused outside its city limits. Those “outside” problems also will adversely affect Black Diamond residents, commuters, and shoppers. This does not satisfy the stipulations of Condition 15.

YarrowBay Response:

Condition of Approval No. 15 states that intersection improvements outside Black Diamond can be mitigated through measures set forth in an agreement with the affected agency. That is exactly the case given the Transportation Mitigation Agreements between YarrowBay and the Cities of Covington and Maple Valley. With respect to intersections in unincorporated King County that are listed in Condition of Approval No. 15, these locations will likewise be evaluated as part of the Plan, as is a requirement of Conditions of Approval Nos. 20 and 25.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

REPLY: Unfortunately, YarrowBay has chosen not to respond to the arguments presented in my Written Statement regarding MPD Ordinance Condition 15. These arguments were clear on the following concerns--none of which are specifically addressed in the Development Agreements:

1. What happens after the 850-building permit “trigger” is reached and a new traffic assessment finds the Maple Valley and/or Covington Mitigation Agreements to be inadequate?
2. Will these Mitigation Agreements be re-opened and re-negotiated?
3. What process will be followed?

Regarding MPD Ordinance Condition 20 the Development Agreements provide no details on how improvements and timing will be identified using a clear set of trigger mechanisms that can be routinely measured and assessed.

Regarding MPD Ordinance Condition 25 once again the Development Agreements provide no details on the what, how, and when of evaluation vs. the City’s adopted Level of Service. As I stated in my Written Statement, in fact, Condition 25 implies such modeling, analyses, and mitigation identification be completed before entering into the Development Agreement or, at least, prior to “*submitting land-use applications*” for any particular phase. Yet, this is not specifically addressed in the Development Agreements except to state there will be a Traffic Monitoring Plan.

“The City, in its reasonable discretion, may use the report to determine whether to request that the Master Developer [“alter”? Your Honor, a verb--an important one--is missing here.*] its proposed timing for construction of any new roadway alignments or intersection improvements described in MPD Condition of Approval No. 10 of the MPD Permit Approval.”*

The City may only “request” the Master Developer “alter” [a guess as to the missing verb] its timing for construction. This means that the City and its residents have no control over their own transportation infrastructure--it’s all at the discretion of the Master Developer. The City and its Citizens are at risk and have no control over how to mitigate that risk. This is irresponsible and does not meet the intent of numerous MPD Ordinance Conditions.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

YarrowBay Response:

And with respect to the "risk" Mr. Rimbo's purports, the language he cites from the Traffic Monitoring Plan simply recognizes that the City may want YarrowBay to construct an improvement described in Condition of Approval No. 10 before it would otherwise be required, per the triggers and timings described in Section D of the Plan. If so, the City can make this request. YarrowBay is not required to construct an improvement well before it is needed, but could agree to do so.

REPLY: It is good YarrowBay makes such a distinction here, but it is not contained in the language of the Development Agreements and that should be rectified now that YarrowBay has stated so.

C. Transportation Projects to be Monitored and Modeled

How does this subsection satisfy **Condition 10** (maintain Level of Service), **Condition 15** (mitigation outside Black Diamond), and **Condition 18** (funding and pro-rata shares)?

“The following projects shall be monitored and/or included in the model of the Phase’s future traffic impacts: all projects listed in Table 11-3 of the Development Agreement, (and any modifications to that list following the periodic review process of MPD Approval Condition 17 of the MPD Permit Approval), together with existing facilities in the City of Black Diamond where the level of service impacts of the MPD may be addressed by construction of a new roadway alignment or intersection improvements inside Black Diamond as described in MPD Approval Condition 10 of the MPD Permit Approval. However, if the Master Developer has entered into a mitigation agreement with an outside jurisdiction that either sets the timing for payment towards or construction of the mitigation projects, or exempts that jurisdiction’s projects from later monitoring, modeling or other review, that mitigation agreement is deemed to satisfy all mitigation and no further monitoring or modeling of facilities within that jurisdiction are required.”

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

This is both technically irresponsible and unacceptable! All “projects” must be “included in the model.” [Rationale was provided above in earlier sections of *Exhibit F.*] Why are all “projects” subject to a “mitigation agreement” reached “with an outside jurisdiction” exempt from later “modeling” and “monitoring” of traffic flows? The traffic impacts of the proposed MPDs will reach far, far beyond the borders of the City of Black Diamond directly and indirectly affecting a large portion of southeast King County. Your Honor acknowledged that very clearly in his *FEIS Appeals Decisions* and *MPD Application Recommendations*, especially in your call for “regional” traffic model.”

Notwithstanding any “Mitigation Agreements” with the Cities of Maple Valley and Covington, there is no consideration given to WSDOT; KCDOT; the cities of Auburn, Enumclaw, Issaquah, and Kent; and residents of Unincorporated King County. This is a recipe for disaster down the road. There is no mechanism in place to adjust to ever-changing circumstances. Projects that could be designed and built as late as 2031 could be based on 2009 Traffic analyses using 2000 Census data! We could be 30 years off between mitigation identification and mitigation implementation? This is not a credible plan!

YarrowBay Response:

Mr. Rimbos asserts that the list of projects required to be monitored and modeled is incomplete and unacceptable because projects in Covington and Maple Valley are “exempt.” The project list simply incorporates Condition of Approval No. 20 and the reason for project exemptions follow Condition of Approval No. 15. There is consideration for both King County and WSDOT as the project list includes intersections on SR 169 as well as intersections located in unincorporated King County. The Cities of Maple Valley and Covington agreed that their mitigation projects would not be subject to these procedures, perhaps because they wanted more certainty for their own planning purposes. Whatever their reason, those Cities did so agree, and the issue of concern to Mr. Rimbos is required by the adopted MPD Conditions of Approval.

REPLY: Notwithstanding the outrageous “exemption” of monitoring and modeling anything beyond the City limits of Black Diamond, I continue to have major concerns. Unfortunately, YarrowBay’s response does not allay any of them. I stand by my Written

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Statement regarding the deficiencies in the Development Agreements: *“There is no mechanism in place to adjust to ever-changing circumstances. Projects that could be designed and built as late as 2031 could be based on 2009 Traffic analyses using 2000 Census data! We could be 30 years off between mitigation identification and mitigation implementation? This is not a credible plan!”*

“The monitoring plan and model need not analyze a specific improvement after that improvement has been constructed.”

This is both irresponsible and technically indefensible and represents a “head-in-the-sand” approach. There is no technical or experiential justification to assume the “improvement” will work as modeled/designed and no changes will be necessary. The improvement must be monitored continuously for a period of time to ascertain whether the improvement works as designed and that the original 2009 Traffic analysis still adequately addresses real conditions in place at the time of completion of the improvement. The improvement also could alter traffic flow patterns such that other areas within the model grid could be affected. Transportation infrastructure is not static, it evolves over time to meet the needs of its users. If not, both quality of life and economic vitality will be needlessly detrimentally affected for all.

YarrowBay Response:

Mr. Rimbo also asserts that the Traffic Monitoring Plan should continuously analyze specific improvements once constructed. The purpose of the Traffic Monitoring Plan is to monitor conditions where traffic impacts are anticipated and improvements required as well as establish the timing of necessary improvements. It is not to continuously analyze a specific improvement following the construction of such improvement. However, it is possible that the subsequent monitoring and modeling could determine that additional improvements are necessary in conjunction with additional MPD traffic.

REPLY: YarrowBay has not responded to my concern that no technical or experiential justification exists to assume the “improvement” will work as modeled and designed and that no changes will be necessary. That is why traffic improvements must be monitored continuously for a period of time after they are built and put into service to ascertain

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

whether the improvement works as designed. This is simply part and parcel of prudent engineering and fiscal responsibility as transportation infrastructure must evolve over time to meet changing user needs.

YarrowBay Response:

It is also worth noting that the basis for any constructed improvement will not be the 2009 traffic analysis but the monitoring and modeling completed just prior to such improvement. What this means is that improvements identified in later phases of development will not be based on dated analysis but instead, recent analysis supporting the effectiveness of any particular improvement.

REPLY: I will not rehash a major bone of contention here--namely the timing of validation and use of the “new” model--except to state that, before the 850-home threshold is reached, everything is based on the 2009 traffic analysis that was found by your Honor to have used a flawed model fed with flawed assumptions resulting in inadequate mitigation proposed.

D. Triggers and Timing for Construction of Transportation Projects

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

Once again, this is all reactive, not pro-active and, thus, unnecessarily risky. This does not meet either **Black Diamond Municipal Code Section 18.98.020 or 18.98.80** to provide infrastructure when needed (as described earlier). This is particularly the case with **18.98.80**: “Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted”

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

It appears the improvements will not even be identified until after LOS has been compromised! This uses the wrong “*trigger*” to mis-“*time*” construction of needed projects to alleviate congestion. In addition, Peak-Hour Factors (PHFs) must be addressed, as evaluating LOS for the “*entire PM peak hour*” is insufficient. Your Honor specified that in his *FEIS Appeals Decision* and *MPD Application Recommendations*. The evaluation of Peak-Hour Factors also was stated by WSDOT in their Expert testimony during the FEIS Appeals Hearings.

How are the vague phrases: “*additional impact*” and “*delay*” defined? Who defines them? How large will the time lag be between “*delay*” or “*impact*,” intersection improvement design, securing funds, and construction?

This approach is reactive after-the-fact thinking that will result in a continual guaranteed lag in meeting ever-changing traffic needs and, in the end, essentially never catching up. This approach does not meet MPD Ordinance Condition 20:

“The Monitoring Plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service.”

“For new roadway improvements inside Black Diamond, the MPD Phasing Plan anticipates that the projects will be constructed to service the new MPD development of each Phase, including for access to and circulation within the MPD. For purposes of the modeling and monitoring plan, the threshold trigger to construct the improvement is when MPD traffic would increase delay or impact LOS at any intersection on existing roadways to a point at which the new roadway would be warranted.”

Again, this is all reactive, not pro-active. It appears the improvements will not even be identified until after LOS has been compromised! This approach does not meet MPD Ordinance Condition 20.

“The Master Developer shall only be required to perform an improvement if the applicable threshold is triggered.”

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Once again, this is all reactive, not pro-active. These so-called “*thresholds*” really mean “*failure*” of an intersection or intervening road segments. Successful engineering projects do not plan for “*failure*” and then react, they seek to thoroughly analyze and design their projects ahead of time with adequate margins so as to avoid failure.

“The specific construction timing shall be set in each report, based on the results of the required monitoring and modeling. For City of Black Diamond projects, by execution of the Development Agreement, the City commits to prompt permit review, such that the Master Developer’s prompt construction of transportation improvements shall commence before the impacted street or intersection falls below the applicable level of service.”

The timing described is inadequate and unacceptable. How can permits be reviewed and issued and “*construction of transportation improvements*” “*commence before the impacted street or intersection falls below the applicable level of service*” when the entire Monitoring Plan is predicated on “*failure*” as a trigger mechanism? This is, at best, “double-speak.”

Plus, why should construction timing pressure be a lever on the City to rush through permit review and approval. That puts the onus on the City for “delaying” the construction of a transportation mitigation improvement that the Master Developer should have had in place earlier, save for a “re-active” “monitoring” plan.

YarrowBay Response:

Here, Mr. Rimbos asserts over and over that the Traffic Monitoring Plan is reactive and should be proactive. This is not true as the Plan is designed to ensure that the construction of a necessary transportation improvement project begins before a street or intersection is impacted by MPD traffic. In fact, potential traffic impacts of an entire phase of development must be evaluated before land use applications are submitted (Condition No. 25). Likewise, the Plan must establish the timing of necessary transportation improvements before land use applications are submitted (Condition No. 25). Construction of a particular transportation improvement must begin before the

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

street or intersection is predicted to no longer meet the applicable standard (Condition No. 20).

REPLY: I see no reason to burden your Honor by restating the “re-active” vs. “pro-active” argument rationale I discussed earlier herein.

It is interesting that YarrowBay chose not to respond to my requests for definition in the Development Agreements for the following vague phrases used: “additional impact” and “delay.” The Development Agreements do not specify who defines them. The Development Agreements do not discuss how the time lag--that will exist between “delay” or “impact,” intersection improvement design, securing funds, and construction--will be assessed and addressed.

YarrowBay Response:

Mr. Rimbo also demands that the Development Agreements be rewritten to provide a deadline for commencement of construction of improvements on SR 169 within Black Diamond or improvements outside Black Diamond. The Traffic Monitoring Plan implements Condition No. 20 that states: “the monitoring plan shall establish timing for commencement of only engineering and design of improvement and shall not including [sic] deadlines for commencement of construction.” As the Examiner might imagine, the reason a deadline cannot be required is because neither the City of Black Diamond nor YarrowBay (who are the only signatories to the Development Agreement) can control the timing of outside jurisdiction review and approval. Likewise, construction in Western Washington is limited to the construction season and therefore, a deadline to commence construction during the non-construction season is impractical.

REPLY: Unfortunately, YarrowBay misses the point here: No one questions the volatility in timing for transportation construction project permit review, project approval, securing funding, and building the improvement. In fact, it is because of these concerns that the Development Agreements need to provide plans that include schedules for major transportation improvement projects, along with cost contingencies and risks identified. Without such information there are no cost and schedule control mechanisms that could be put in place to manage mitigation improvements and overall project flow and priority--all the basics of Project Planning.

“For projects *within* Black Diamond that are also *within* the State right-of-way, the report shall set a deadline for commencement of only engineering and design of the improvement but not a deadline for commencement of construction.”

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

This parrots back provisions of poorly written **Condition 20**. While it is understandable that WSDOT will have some say on improvements along State Routes (e.g., SR-169 straight through the heart of the City), timely mitigations still are necessary to be put in place before level of service is compromised. There is no plan in the Development Agreements that explains how this “lag time” will be overcome or what will happen when planned mitigations are not put in place when needed.

Projects of this size, cost, risk, and impact require detailed schedules with major milestones and decision points identified, risks associated with each enumerated, and risk mitigation plans spelled out. None of this appears to be even contemplated in the Development Agreements!

“For projects *outside* the City of Black Diamond *where additional permitting from another jurisdiction is required*, the report shall set the time at which the Master Developer must commence the permitting and/or engineering and design process, but shall not set a deadline for commencement of construction.”

Why for projects “*outside the City of Black Diamond*” are the deadlines only for commencement of “*permitting and/or engineering and design process*” of the improvement”? This provides no assurance or protection for the customers/users: commuters, shoppers, businesses, emergency services, etc.--including those from Black Diamond. Since the vast majority of proposed mitigations are “*outside the City of Black Diamond,*” this in effect unnecessarily delays timely construction of those improvements. Many of the proposed projects are major undertakings and the Master Developer won’t even commit to a process whereby the commencement of construction of needed improvements is identified. This does not meet the MPD Ordinance Conditions, especially in dealing with King County, and must be rewritten in the Development Agreements.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

“Within the City of Black Diamond, if additional public right-of-way should be needed for the design of a particular improvement, the Master Developer shall first demonstrate a good faith effort to acquire the right-of-way needed. If, after making an offer equal to the fair market value, the Master Developer is unable to purchase the needed right of way, the City shall be responsible for acquiring the needed right-of-way.”

This is vague and non-committal. The improvements necessary to ensure that even the initial phases of these MPDs are viable from a transportation point of view will require much right-of-way acquisition, especially along the narrow SR-169 corridor winding through the heart of Black Diamond.

The Master Developer cannot be allowed to “punt” this political football to the City and its taxpayers. This is a plan to use Eminent Domain in its worse form to benefit a private developer to help it “mitigate” problems that its development is causing. The City must protect itself and its existing residents and business and property owners from such an ill-conceived plan that has no basis in the MPD Ordinance Conditions.

YarrowBay Response:

Mr. Rimbos asserts that the responsibility to acquire needed right-of-way, first upon YarrowBay and then, if necessary, upon Black Diamond, is both vague and non-committal. Since YarrowBay is required to "construct any new roadway alignment or intersection improvement that is (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan..." (Condition No. 10), and to the extent it would otherwise be the responsibility of the City to acquire such right-of-way to implement the improvements in the City's own Transportation Element, the Traffic Monitoring Plan simply acknowledges that the City will acquire such right-of-way in the event YarrowBay is unable to do so after "making an offer equal to the fair market value." Like the commencement for construction, this language simply acknowledges what is, and what is not, within YarrowBay's control.

REPLY: The YarrowBay “response” is insufficient and non-responsive to the concerns raised. Major transportation infrastructure changes are proposed along SR-169. Right-of-way acquisition along this at times very narrow corridor, especially within the Black Diamond city limits will be a keystone of this plan.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

It appears a thrust of the mitigation plan is for the City to use Eminent Domain to benefit a private developer! Contrary to what YarrowBay implies, MPD Ordinance Condition 10 does not discuss this at all. Such right-of-way only needs to be acquired because of the massive disruption to the transportation infrastructure caused by YarrowBay-proposed MPDs. Yet, YarrowBay would have us believe that the onus for such right-of-way acquisition falls only on the City.

YarrowBay Response:

There is no need or basis to revise this section of the Development Agreements.

REPLY: I believe I have provided ample evidence as to why and how this section of the Development Agreements falls short of what is needed to meet the MPD Ordinance Conditions and provide the long-term plans required to be put in place to execute same. The section should be revised accordingly.

EXHIBIT P – GREEN VALLEY ROAD MEASURES

1. Traffic Calming Measures

“Any potential traffic calming strategies will need to be evaluated with respect to maintaining historical and cultural character of SE Green Valley Road since this roadway is identified as one of nine Heritage Corridors in King County.”

How will the “*potential traffic calming strategies ... be evaluated*”? The Master Developer is planning to place up to 20,000 new residents just north of rural and historic Green Valley Road, add a few speed bumps, and expect them to divert or slow down a “*300 - 400% increase in traffic*” (ref.: KCDOT testimony previously cited). This is not a credible plan !

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Comments:

Peter Rimbos (August 4, 2011, Exhibit 118): Mr. Rimbos asserts that Exhibit "P" does not implement the required Conditions of Approval and provides several detailed comments.

YarrowBay Response:

First, Mr. Rimbos raises the concern that there will be a 300 - 400 % increase in traffic on Green Valley Road. As conceded by Matt Nolan during the FEIS hearings, Green Valley Road has very little traffic today, such that even a small numerical increase in trips can be a larger percentage increase in trips. Mr. Nolan also conceded that Green Valley Road has capacity to accommodate the MPD traffic. See Attachment C (Hearing Transcript Excerpts, 3/8/2010, at p. 459).

That Green Valley Road has capacity was also confirmed in Exhibit 30 at pages 9-10, concluding that "with the build out of both MPDs all east-west routes [including Green Valley Road] would still have available capacity in 2035." As is also shown on those pages, the Green Valley Road Study used the traffic volumes predicted for Green Valley Road that were included in the TTRs for the FEISs, meaning that the volumes assigned to Green Valley Road were assigned assuming that the South Connector Roadway was built to intersect with SR 169.

REPLY: I refer your Honor to the Reply I provided regarding Green Valley Rd. testimony by KCDOT’s Matthew Nolan herein under Section V. DEVELOPMENT AGREEMENTS (discussion of sect. 13.8).

2. Permit Process and Timing

A. “Upon commencement of Phase 1A, or earlier at the discretion of the Master Developer, the Committee shall meet to consider the Traffic Calming Measures identified in 1(A) above. The intent of the Committee is to attempt to reach an agreement on whether any suggested Traffic Calming Measures should be provided. If the community members decide against the Traffic Calming Measures, then the Master Developer need not construct any of them.”

This meets MPD Ordinance **Condition 33 b**. However, since it unduly puts Green Valley Road citizens in a permanent minority on the so-called “Green Valley Road Review Committee” and presents them with a “take-it-or-leave-it decision on

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

so-called “*traffic-calming*” measures to try to protect their road and quality of life, a “new” **Condition 33 c.** is provided in Section VI. *Proposed “New” Conditions.*

YarrowBay Response:

Next, Mr. Rimbo asserts that there is no process by which YarrowBay, the residents along Green Valley Road, and King County will determine mutually agreeable solutions. This is simply not true. The process is plainly stated in Condition 33 which requires the committee to meet to try to reach agreement on whether any traffic calming measures should be pursued. If the committee agrees on certain measures, then YarrowBay is required to submit permit applications to King County.

REPLY: As I stated in my Written Statement, the Development Agreements meet the provisions of MPD Ordinance Condition 33. Rather, my argument is with the Condition language. That is why I proposed a “new” condition (33 c), as permitted by your Honor, in order to provide the Rural Area citizens, who live along Green Valley Road, a greater say in their own quality of life and vibrancy of their rural agricultural businesses. The issue is very clear: YarrowBay’s so-called “traffic calming” measures are a take-it-or-leave-it proposition laid on the Citizens and King County. The Development Agreements provide no description of a process whereby the Master Developer, the residents along Green Valley Road, and King County Department of Transportation will develop solutions that are “*mutually agreeable.*”

C. *“Prior to the conclusion of construction in Phase 1A, the Master Developer shall submit to King County permit applications for any Traffic Calming Measures chosen by the Committee on Green Valley Road.”*

This is meant to satisfy MPD Ordinance **Condition 33 a.:** *“...a description of the process and timing required for the Applicant to seek permits from King County....”* However, it simply states the Master Developer will submit permit applications. There is no description of a process whereby the Master Developer, the residents along Green Valley Road, and King County Department of Transportation will develop solutions that are mutually agreeable.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

YarrowBay Response:

There is no need or basis to revise this section of the Development Agreements.

REPLY: I believe I have provided ample evidence as to why and how this section of the Development Agreements falls short of what is needed to meet the MPD Ordinance Conditions and provide the long-term plans required to be put in place to execute same. The section should be revised accordingly.

EXHIBITS Q and R – TRANSPORTATION MITIGATION AGREEMENTS

How can such “agreements” with “applicable agencies” be reached before the Development Agreements are subject to any Public process and vetted through your Honor and the Black Diamond City Council without first developing a new **Traffic Demand Model**, then validating it with existing data, and finally using it to analyze future scenarios to identify potential mitigations to be implemented?

The Development Agreements state the **Transportation Mitigation Agreements** “*supersede*” the **Conditions 11-34, except 15** (which mentions the Agreements). Therefore, after the new **Traffic Demand Model** is first validated and used to look at various road and intersection volumes (after 850 building permits are issued), there will be no adjustments to the Agreements. This completely ignores your Honor’s rationale for a new **Traffic Demand Model**--to address regional deficiencies in the original model because it tied to the Puget Sound Regional Council’s higher level model. Consequently, a new **Traffic Demand Model** is being developed, it will be validated after 850 building permits have been issued, and then it will not be used to assess traffic volumes and needs outside of Black Diamond! This isn’t simply a “deficiency,” it’s another recipe for failure and a Fatal Flaw !

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

The vast majority of the road mitigation (e.g., widening/adding lanes between intersections) occurs after many of the intersection improvements. This raises the concern that should the Master Developer cease development after Phase “X” is complete and only “Y,YYY: Units have been built, certain “Trigger Points” in the Maple Valley Transportation Mitigation Agreement will not be reached. Thus, some key mitigations will never be undertaken. This would result in a hodgepodge of mitigation along SR-169 between SR-18 and the City of Black Diamond whereby intervening road segments will remain “choke” points even after some intersections have been improved, thus rendering those improvements moot. Having lived in the Maple Valley area for over 30 years and driven most of the major intersections everyday, I know first hand what adverse impacts this will have on my community and the surrounding region.

Notwithstanding the discussion above, the largest deficiency in the **Maple Valley Transportation Mitigation Agreement** is the complete lack of mitigation to eliminate “choke points” along SR-169 north of the SR-18 intersection. The commute doesn’t suddenly stop there, rather it continues on to Renton, I-405 and I-5 to Seattle. SR-169 from this point north will continue to be a 2-lane undivided road for ~ 5 miles until it passes the 196th Ave SE intersection and becomes a 4-lane undivided road to Renton. Not only is this ~5-mi 2-lane portion a “choke point,” but so is the narrow Cedar River Bridge less than a mile north of the SR-18 intersection.

Because of these flaws, the already inadequate mitigations proposed in the **Maple Valley Transportation Mitigation Agreement** are rendered essentially moot as traffic will balloon as it approaches these “choke points” from either direction during the morning and evening commutes.

Comments:

Peter Rimbo (August 4, 2011, Exhibit 118): Mr. Rimbo asserts that Exhibits “Q” and “R” are problematic because they were created before the new traffic demand model

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

and because they are allowed to supersede any future mitigation that may result from the new model.

YarrowBay Response: The FEISs for the MPDs were deemed adequate. The FEISs included an extensive list of traffic mitigation based on the running of a regional transportation model conducted by the City's consultant Parametrix. During the appeal hearings regarding the FEISs, the City of Maple Valley made a number of assertions about the adequacy of the Parametrix model versus its own model. Subsequently, in addition to the mitigation that resulted from the Parametrix model in the FEIS, YarrowBay and Maple Valley negotiated an agreement in which YarrowBay voluntarily agreed to many more mitigation projects that Maple Valley desired. A similar agreement was reached with the City of Covington. Therefore, Mr. Rimbo's concern that these agreements were reached without use of any model is misplaced. Future traffic scenarios have been modeled, and mitigation for those impacts is reflected in the Development Agreements at Exhibit "C," Condition of Approval Nos. 10 (roadway improvements inside the City of Black Diamond), 15 (list of improvements in Black Diamond, King County, Maple Valley and Covington), as well as all of the mitigation provided for in agreements with the City of Maple Valley and the City of Covington, Exhibits "Q" and "R." Mr. Rimbo's next concern is what might happen if only part of the MPDs get built, such that construction triggers in Exhibits "Q" and "R" for some mitigation projects are never reached. In Mr. Rimbo's opinion, this means some needed mitigation will never be built. Mr. Rimbo is incorrect. If additional units are not built within the MPDs, such that the construction triggers are not reached, then the mitigation is not required. Simply put, fewer houses means less mitigation is required. Finally, Mr. Rimbo argues that there needs to be more mitigation on SR 169. No such mitigation has been identified in the FEISs, or the two independent negotiations that led to Exhibits "Q" and "R."

REPLY: I will not repeat my detailed arguments contained in my Written Statement; however, I will summarize the main points below.

Such “Mitigation Agreements” were reached:

1. Before the Development Agreements were subject to any Public process and vetted through your Honor and the Black Diamond City Council.
2. Without first developing a new Traffic Demand Model, then validating it with existing data, and finally using it to to inform traffic analyses that assess future traffic scenarios to identify potential road and intersection mitigations to be implemented.
3. With the cities of Maple Valley and Covington whereby they took what they could get, as both cities were in a disadvantageous position because they failed to appeal the FEISs and were offered what amounted to another “take-it-or-leave-it” proposition: Accept the mitigation projects the City of Black Diamond proposes (MPD Ordinance Condition 15) or reach agreement with YarrowBay.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

4. That define certain “trigger points” for construction of intersection improvements such that, should the Master Developer cease development after a certain point, there could be a hodgepodge of mitigation creating “choke” points along SR-169 corridor.
5. That do not include any mitigation along SR-169 north of the SR-18 intersection, thus creating the biggest “choke point” of all on the way to a major employment center--the City of Renton.

YarrowBay Response:

There is no need or basis to revise Exhibits "Q" and "R" to the Development Agreements, and by their terms, they cannot be revised without agreement from the Cities of Maple Valley and Covington.

REPLY: I believe I have provided ample evidence as to why and how this section of the Development Agreements falls short of what is needed to meet the MPD Ordinance Conditions and provide the traffic mitigation needed. YarrowBay provides the empty excuse that the terms of such “Mitigation Agreements” “*cannot be revised without agreement from the Cities of Maple Valley and Covington.*” Those “Mitigation Agreements” should be re-opened to address the long-term needs of those communities. Maple Valley politicians already have stated that such “mitigation” is only a start to meet the massive traffic to be generated by the proposed MPDs:

“ ‘My biggest concern is that I don’t want Maple Valley, SR 169 and Kent-Kangley to turn into the South Hill of Puyallup,’ Kelly said. ‘Then we have the Black Diamond development coming in and that’s going to create a lot of traffic over the next several years.’ And while the city received mitigation fees from YarrowBay for its proposed Black Diamond developments, Kelly said, ‘that’s just enough to get started.’ “-- appeared in the Covington-Maple Valley Reporter; August 12, 2011.

The section should be revised accordingly.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

VI. PROPOSED “NEW” CONDITIONS

I, and many, would say your Honor’s most critical MPD Application recommended **Transportation Conditions** were:

Condition 16: *“The resulting project impacts and mitigations must be integrated into the development agreement or processed as a major amendment to the MPD prior to City approval of any implementing projects.”*

and

Condition 17, which stated in part: *“The Monitoring Plan shall require that improvements be constructed with development in order to bring mitigation projects into service before the Level of Service is degraded below the City’s standard.”*

Unfortunately, these removed from further consideration by the Black Diamond City Council at the behest of YarrowBay (ref.: 6/21/10, 10:20 AM e-mail letter from YarrowBay Attorney Nancy Rogers to City Attorneys Mike Kenyon and Bob Sterbanks; I submitted this document as an Exhibit during my Oral Testimony on July 13, 2011; Ms. Rogers e-mail was later expanded into a memorandum to the City Council dated June 22, 2010 and entered into the Closed-Record MPD Application Hearing as Exhibit C-8. [ASIDE: I wish to set the record straight: During my Oral Testimony I incorrectly stated this was not entered into the record in the Closed-Record MPD Application Hearing. I apologize for that incorrect assertion. I personally apologized to Ms. Rogers just before the Expert Witness testimony started on July 21, 2011]).

In fact the letter recommended your Honor’s **Conditions 11-17** be deleted in their entirety and replaced in full and that your Honor’s **Conditions 18, 21, 24, and 34** be revised. These represent nearly half of the your Honor’s Transportation Conditions and possibly the most important ones.

Unfortunately, these YarrowBay-suggested Transportation Conditions formed the basis for those finally approved by the City Council in the MPD Ordinance *Exhibit C--Conditions of Approval*. The major thrust of YarrowBay’s recommendations were to

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

move the development and use of the new Traffic Demand Model from prior to (and, thus, informing) the Development Agreement to a distant (~8 to 10 years?) “Mid-Point Review” (e.g., ~3,000 homes) The City Council in their deliberations changed this in their final approved MPD Ordinances to the issuance of 850 building permits. Better, but still wholly inadequate. Your Honor had rightly recommended doing this essentially at 0 homes.

[ASIDE: My big concern here is one of process. Your Honor conducted a thorough FEIS Appeals Hearing with many Transportation Expert witnesses testifying (State, County, Maple Valley, and Consultants from both sides). That FEIS Appeals Hearing formed the basis for your Honor’s recommended Transportation Conditions of Approval for the MPD Application Hearings. Then YarrowBay submitted their 6/21/10 letter to the City Staff and introduced their recommended Transportation Conditions as an Exhibit in the Closed-Record Hearings. At the end of those Hearings the City Council *miraculously* adopted the YarrowBay-suggested Transportation Conditions almost *verbatim*, thus completely ignoring all the Transportation Expert Witness testimonies from the FEIS Appeals Hearings and your Honor’s careful study and prudent judgement. This all might be legal, but it gives the Public the strong feeling that the process stacks the deck against them, the science, and the experts.]

Your Honor’s clear response to the Expert Testimony and that of the Public during last year’s Hearings was as follows:

“For both traffic and noise, the Examiner recommends that added mitigation be added to the project either through the development agreement or processed as a major amendment to the MPD. Traffic and noise mitigation should go through one of those processes to provide the public an opportunity to comment on the new mitigation.”

All this was flippantly ignored by YarrowBay, the City’s Attorneys, and, worst of all, by the elected representatives of the people, the Black Diamond City Council !

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

The current set of Transportation Conditions contained in the MPD Ordinances’ *Exhibit C--Conditions of Approval* were modified by the Black Diamond City Council from those discussed in your Honor’s *FEIS Appeals Hearing Decision* and those enumerated in detail in your Honor’s *MPD Application Hearing Recommendations*. As discussed earlier, some were eliminated outright! The e-mail letter referenced above and submitted as an Exhibit in the current Hearings, possibly and, I would content, most probably, resulted in such wholesale changes to your recommended Transportation Conditions. Unfortunately many of those changes and eliminations benefit the Master Developer while increasing the risk, uncertainty, and future costs to the City and the Region and its citizens.

So now you and the Public have before us a set of voluminous, yet relatively empty, Development Agreements that describe no new Traffic Demand Model (though one is in development for some far future use), no new Traffic Analyses, and no new Traffic Mitigations. Consequently, we effectively are where we were 17 months ago on Saturday, March 6, 2010, the first day of the FEIS Appeals Hearings! No one, neither YarrowBay, the City, Maple Valley, King County, Parametrix, or the Public have a clear understanding of what it will take to mitigate the massive traffic volumes that will be added by these outsized MPDs to the existing southeast King County road network and infrastructure! Let’s look at each one of these:

1. A new **Traffic Demand Model** is under development. That is good. But when will it be ready? When will it be validated? When will it be used? As a long-time Boeing Principal Engineer and Project Manager, these are the critical questions I ask my people repeatedly. I ask no less of the City and YarrowBay!

2. The model must be verified and validated now. Assumptions must be reassessed, such as the wildly unsubstantiated Internal Capture Rates used in the past analysis (and now cemented in stone in the **Maple Valley Transportation Mitigation**

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Agreement), as well as others your Honor recommended be revisited. Then rigorous **Traffic Analyses** must be conducted to assess future traffic scenarios.

3. A complete set of comprehensive **Traffic Mitigations** then must be developed with **Mitigation Plans** that include design concepts, cost estimates, funding requirements, cost-share splits, tentative schedules, and cost/benefit/risk analyses.

All this must be done now. It must be done prior to the approval of any Development Agreements, so that these 15- to 20-year contractual documents can be informed by the results. Then the Public, adjacent jurisdictions, the County, and the State must be given the opportunity to thoroughly critique these plans in open Public Hearings.

This is the most glaring flaw in the entire process! And the most glaring weakness in the proposed Development Agreements before your Honor and the Public. It is unconscionable that the City of Black Diamond would blithely ignore these flaws and impose unnecessary adverse impacts on its own citizens and on citizens like me who live in Southeast King County! Again, this must and will be rectified.

Consequently, I propose five “new” Conditions. The first four are intended to reduce risk and cost to the City and the Region and its citizens, as well as ensure “*Growth Pays for Growth*” by holding the Master Developer accountable. The fifth “new” Condition is proposed to address impacts on King County road and Public involvement.

YarrowBay’s Response:

Here, again, Mr. Rimbo asks the Examiner to reinstate the Examiner’s proposed Conditions so that a new model would be run before the Development Agreements were approved. Mr. Rimbo views the Council’s adoption of the MPD Conditions of Approval as evidence that YarrowBay, the City’s Attorneys and the City Council “flippantly ignored” expert opinion, and the Examiner’s recommendation. While we recognize that Mr. Rimbo’s concern is heartfelt, nothing could be further from the truth. The major change in those conditions was to shift the timing for running the new model. The rationale for doing so is so that the City can run a model that includes not only all of the new model parameters included in the Conditions of Approval, but also model inputs

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

consisting of real data from the MPD developments. Importantly, Matt Nolan, King County Traffic Engineer and Manager of the King County Traffic Engineering Section, testified to the City Council that King County agreed that it made sense to delay running a new model until a point at which 1000 - 2000 dwelling units were on the ground. Shifting the timing of the model makes sense, was suggested by YarrowBay's and the City's traffic engineers, was supported by King County, and was approved by the City Council.

REPLY: Unfortunately, YarrowBay continues to voice the same rationale on model timing. Let’s be clear what happened here:

1. A Traffic Demand Model was developed and used to support Traffic Analyses that identified potential Transportation problems the proposed MPDs could cause.
2. That information informed the preparation of the DEISs, FEISs, and MPD Applications.
3. Your Honor held simultaneous rigorous Hearings on the latter two documents and found that model and some of its assumptions to be flawed.
4. Your Honor recommended extensive Conditions to remedy these issues, the biggest of which dealt with timing of the “new” model’s development, validation, and use.
5. The Black Diamond City Council at the behest of YarrowBay decided to eliminate or modify many of your Honor’s Transportation Conditions.

For YarrowBay to state that *“The rationale for doing so is so that the City can run a model that includes not only all of the new model parameters included in the Conditions of Approval, but also model inputs consisting of real data from the MPD developments”* is hard to believe. The model can always be run as real data is developed and synthesized. The “new” model could be completed now (it’s nearly complete), validated using existing data, and run periodically as new traffic data is generated.

YarrowBay does not provide a technically credible rationale to radically alter the timing of the model. Rather, it was a way to not have to re-evaluate the already-identified and, most likely, flawed mitigations and, most probably, discover that far more mitigation is needed or, worse yet for YarrowBay, that the MPDs need to be scaled down in size and breadth to provide the only sure-fire traffic mitigation that could hope to work: generate less traffic!

I have already discussed KCDOT’s Matthew Nolan’s past testimony being taken out of context and what parts of his testimony that were not cited by YarrowBay (see *YARROWBAY’S RESPONSE INTRODUCTION* under **What This “REPLY” Contains** herein). Mr. Nolan never testified that *“it made sense to delay running a new model.”* In fact, Mr. Nolan testified:

“The hearing examiner has made a number of conditions and suggestions to you as a council to adopt. I would just point out the first thing he suggested is you do that modeling right away.”

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

Mr. Nolan was agreeing with your Honor's recommendation for new modeling for the Development Agreement process. So, “(s)hifting the timing of the model” was not supported by King County; in fact, KCDOT supported your Honor’s recommendation to do the “*modeling right away.*”

Finally, my “concern” is not “heartfelt,” rather, as an Engineer, my concern is deeply rooted in facts and data. Your Honor, by definition, has done and continues to do his job based on facts and data and I am glad that is the case.

YarrowBay’s Response:

Mr. Rimbo also asks for a number of new conditions. Again, the Examiner does not have the jurisdiction to modify the MPD Conditions of Approval, and none of Mr. Rimbo’s requests are necessary, appropriate or acceptable to YarrowBay.

REPLY: In submitting a number of proposed “new” Conditions I was following to the letter your Honor’s Pre-Hearing and subsequent Orders. My understanding of those Orders is that your Honor will review and pass on any proposed “new” Conditions to the City Council. My Written Statement already detailed why these proposed “new” Conditions are “necessary and appropriate.”

“New” Condition 12 a.

Because MPD Ordinance **Condition 12** deals with **Traffic Analyses**, I recommend a **new Condition 12 a.** to deal with **Sensitivity Analyses**. Below please find supporting rationale followed by the proposed “new” Condition language.

Although MPD Ordinance Condition 17 b. does call for **Sensitivity Analyses** on Peak-Hour Factors (PHFs), it does so only after the **Traffic Demand Model** has been validated following the issuance of 850 building permits. That is inadequate, since, as stated earlier, 850 building permits represents a ~50% increase in the City of Black Diamond’s population and is estimated to not occur for 5 years until 2016!

Recommendation for a “New” Condition 12 a.

Condition 12 a. The new Traffic Demand Model shall be used to conduct **Sensitivity Analyses** to understand the effects of changes in projected Peak-Hour

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

factor (PHF), intersection spacing, signal timing, and Queue length assumptions. The varying consequences to travel times, overall project impacts, and mitigation measures shall be presented to the City and all affected jurisdictions for full evaluation of performance. In addition, a rigorous **Cost-Benefit-Risk Analysis** shall be performed, at a minimum, for three scenarios: 6-year Transportation Improvement Plans (TIPs) are funded on time; 20-year TIPs are not fully funded; and 20-year TIPs are funded on time.

YarrowBay’s Response:

Here, Mr. Rimbos recommends a condition whereby the new transportation demand model would be used to test the sensitivity of peak hour factors (PHFs), intersection spacing, signal timing, and queue length assumptions. This condition would also require a "Cost-Benefit-Risk Analysis" be performed for three future roadway network scenarios. This recommended condition is completely inappropriate and unnecessary. Simply put, the new transportation demand model will be used for estimating where MPD traffic will travel (trip distribution) and for projecting future traffic volumes. PHF, intersection spacing, signal timing, and queue length assumptions are not even used as part of a transportation demand model. The intersection operations portion of the work required under Condition No. 17.b. does include an assessment of PHF. Finally, the Rimbos-defined Cost-Benefit-Risk Analysis, is inappropriate and, as argued elsewhere in this Memorandum, not meaningful.

REPLY: As described earlier, I fully understand that a “global” Traffic Demand Model is used in conjunction with “local” traffic analysis tools in the overall Traffic Analyses to address a variety of traffic parameters. That is why I labeled this proposed “new” Condition 12 a., because MPD Ordinance Condition 12 deals with Traffic Analyses. The intent of proposed “new” Condition 12 a. is to ensure these important traffic parameters are fully addressed and that Sensitivity Analyses are performed to provide a much better understanding of traffic flow and efficiency of any proposed mitigations.

Finally, I already have provided ample evidence in my Written Statement and herein as to why Cost-Benefit-Risk Analyses are so important to *Projects* of this size. And, once again, I am not talking about Cost-Benefit-Risk Analyses associated with SEPA environmental considerations, rather I am talking about Cost-Benefit-Risk Analyses as they relate to *Project* planning decisions.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

“New” Condition 14 a.

Because MPD Ordinance **Condition 14** deals with **Traffic Demand Model** assumptions and revisions, I recommend two **new Conditions 14 a** and **14 b**. Below please find supporting rationale followed by the proposed “new” Condition language.

Unfortunately, with respect to the new **Traffic Demand Model**, your Honor’s recommended Conditions 16 & 17 were eliminated. This must be rectified. By eliminating these two conditions there will be no evaluation of impacts and mitigations and no transportation monitoring plan prior to entering into a Development Agreement. This is very risky and does not protect the City, its businesses, and its citizens.

For any mitigation plan to succeed, at a minimum, **Transportation Concurrency** must be met. The MPD Ordinances’ *Exhibit B--Conclusions of Law, para. 30* mentions ensuring “*concurrency at full build-out.*” Unfortunately the *MPD Ordinance Exhibit C--Conditions* fail to stipulate Transportation Concurrency testing, nor require adjustments--such as funding, timing, moratoriums, etc.--to be made should a particular improvement fail the Concurrency test. A viable and executable Transportation Concurrency Plan must be required.

Lastly, **Transportation Monitoring** must be pro-active, not re-active, as testified to by WSDOT and many other Expert witnesses during the FEIS Appeals Hearings held in 2010.

Recommendation for a “New” Condition 14 a. (same as your Honor’s Villages Condition 16, but with additions: underlined sentences are new).

Condition 14 a. Once a new Traffic Demand Model is developed, validated, and run, the resulting project impacts and mitigations must be integrated into the Development Agreement or processed as a major amendment to the MPD prior to City approval of any implementing projects. Transportation Concurrency testing shall be periodically conducted at the beginning, midpoint, and end of each Phase to ensure concurrency at full build-out. Subsequent model revisions also shall be

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

validated to ensure results are real and reproducible. Sensitivity analyses shall be conducted to gage the adequacy of key assumptions such as the internal trip capture rates. These sensitivity analyses must assess the risks associated with assuming different sets of assumptions. All results, assessments, conclusions, and recommendations shall be fully documented.

“New” Condition 14 b.

Please see supporting rationale above under **Condition 14 a** discussion. This also should fix the “timing” conflicts between MPD Ordinance **Condition 25** and that of **Conditions 11 and 17** “to bring mitigation projects into service before the Level of Service is degraded below the City’s standard.”

Recommendation for a “New” Condition 14 b. (same as your Honor’s Villages Condition 17).

Condition 14 b. *The intersections needing mitigation as identified in the analysis required above shall be monitored under a Transportation Monitoring Plan which shall be incorporated into the Development Agreement for the MPD, with each designated improvement being required at the time defined in the Monitoring Plan. The Monitoring Plan shall require that improvements be constructed with development in order to bring mitigation projects into service before the Level of Service is degraded below the City’s standard.”*

YarrowBay’s Response to both “New” Conditions 14 a and 14 b:

Here, Mr. Rimbos seeks a condition imposing concurrency testing, and a condition that repeats the requirements of Condition of Approval No. 20 for the Traffic Monitoring Plan. As described in the Transpo Group Response Brief, Attachment 6 to Ex. 139, the requirements of the MPD Conditions of Approval and the Traffic Monitoring Plan are better than concurrency testing. In addition, there is no basis to repeat the fundamental

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

requirement already imposed by Condition of Approval No. 20 that traffic mitigation should be installed before Level of Service problems occur.

REPLY: Proposed “new” Condition 14 a. attempts to rectify several issues:

1. Restore your Honor’s Condition 16 dealing with Traffic Demand Model timing.
2. Ensure Transportation Concurrency testing is conducted at three points of time during each Phase to better ensure concurrency at full build-out.
3. Require re-validation of the Traffic Demand Model, as necessary.
4. Require Sensitivity Analyses as part of the overall Traffic Analyses to gage the adequacy of key assumptions.

All of these are necessary to best ensure mitigation needs are identified, adequate mitigation is designed, and necessary mitigation is put in place when needed to ensure concurrency at full build-out.

Proposed “new” Condition 14 b. is offered to restore your Honor’s Condition 17 and to fix the timing conflicts between MPD Ordinance Condition 25 and that of Conditions 11 and 17 “*to bring mitigation projects into service before the Level of Service is degraded below the City’s standard.*”

“New” Condition 29 a.

A “new” Condition is sorely needed on Transportation Planning. Below I discuss specific *Black Diamond Municipal Code (BDMC)* sections that require such planning be done and when it should be done. Because MPD Ordinance **Condition 29** deals with Implementation Plans, I recommend a **new Condition 29 a**. Below please find supporting rationale followed by the proposed “new” Condition language.

BDMC 18.98.010 states the purposes for an MPD and includes under *Paragraph I*: “*Provide needed services and facilities in an orderly, fiscally responsible manner.*” This includes all transportation-related improvements.

BDMC 18.98.020 states, in part, the Public Benefits to be derived and includes under *Paragraph G*: “*Timely provision of all necessary ... infrastructure ... equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops.*” This means that all transportation-related infrastructure, must be provided in

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

a “timely” matter. This is a must as it is common sense to avoid even worse gridlock than we already experience each and every day of the work week. Plus, it is the law!

BDMC 18.98.080 states, in part, as conditions of approval of any future MPD permits under *Paragraph A.4.a* that there be a: “...*phasing plan and timeline for the construction of improvements ... so that: Prior to or concurrent with final plat approval ... the improvements have been constructed and accepted ...*” So, looking ahead, the required transportation improvements must be in place, at least, at final plat approval. However, the City’s current *Six-Year Transportation Improvement Plan* contains projects that clearly will not mitigate the immense impacts of the MPDs and do not have real funding sources or risks identified with financing, securing Right-of-Ways, nor construction. This effectively lets the Master Developer largely off the hook for funding such mitigations. Once again, where is “*growth paying for growth*”?

In addition, the mitigations proposed for the Cities of Maple Valley and Covington also must be addressed in an overall **Transportation Plan**. Those proposed mitigations (out to at least 2026!) must not be “frozen in time” based on the 2009 flawed traffic analyses.

As described earlier, **Transportation Plans** must, at a *minimum*, define the needs, routes, concepts, schedule, estimates, funding sources, risks, cost-benefit-risk analyses, and potential impacts related to each risk factor.

Recommendation for a “New” Condition 29 a.

Condition 29 a. *A complete set of Transportation Plans shall be developed that include, at a minimum, project descriptions, project impacts, mitigations proposed, estimated costs, cost shares, identified funding mechanisms, and risks of potential revenue sources for both route and intersection improvements to fully mitigate all transportation-related impacts on all geographic areas (including the Cities of Maple Valley and Covington and the surrounding unincorporated areas of King County) studied before each Phase begins. Cost-Benefit-Risk Analyses shall be conducted for each mitigation proposed that provide specific details for decision-makers and*

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

assess potential impacts associated with slips in schedule, not securing adequate funding, and traffic pattern changes. Such Plans shall be submitted to the City for review and approval 180 days before a Phase is scheduled to begin.

YarrowBay’s Response:

Here, Mr. Rimbo asks the Examiner to re-write the MPD Conditions of Approval, by recommending a condition that would completely ignore and over-write the existing conditions. There is no legal basis to do so. And there is no practical reason to do so. As described above, the MPD Conditions of Approval already assure that transportation mitigation is identified, updated, and constructed in a timely fashion.

REPLY: As I have explained in detail in my Written Statement and herein, the Development Agreements must discuss Transportation Planning. Proposed “new” Condition 29 a. requires a complete set of Transportation Plans be developed, which must, at a *minimum*, define needs; routes; concepts; schedule; cost estimates; potential funding sources and likelihood of access to them; technical, cost, and schedule risks; cost-benefit-risk analyses; and potential impacts related to each risk factor.

YarrowBay continues to state the “MPD Conditions of Approval already assure that transportation mitigation is identified, updated, and constructed in a timely fashion.” The Conditions of Approval lay out the rules and contours of what is required. The Development Agreements are to detail the 7 “W’s” of Who? What? Where? Why? When? Which? and How?

“New” Condition 33 c.

Because MPD Ordinance **Condition 33** deals with Green Valley Road--a King County road--and affected residents outside the city limits, a **new Condition 33 c.** is proposed that deals with all King County roads that will be affected by the massive traffic to be generated by the MPDs on these 2-lane windy country roads.

Recommendation for a “New” Condition 33 c.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Condition 33 c. Separate Citizen Review Committees will be established for Issaquah-Hobart-Ravensdale-Black Diamond Rd., Auburn-Black Diamond Rd., Kent-Black Diamond Rd., Lake Holm Rd., Thomas Rd., Covington-Sawyer Rd., and Green Valley Rd. Some may be combined should the citizens agree. Each of these Committees will be comprised of five members. The Chair shall be an employee designated by the King County Department of Transportation. The same person can chair multiple committees. The other members will include three citizens along the road in question and one representative of the Master Developer. The City of Black Diamond can send a non-voting representative to participate in Committee meetings. The Committees will be responsible for setting their goals and agendas. The express intent of the Committees is to provide the Public a direct voice on potential impacts that could affect them, their property, and their quality of life.

YarrowBay’s Response:

Here, Mr. Rimbo asks the Examiner to recommend a condition establishing citizen committees, chaired by King County, for a long list of area roads, with the purpose of the committee being to provide the public a "direct voice." YarrowBay recognizes that the public is concerned about the impacts of the MPDs, and YarrowBay is more than willing to meet with members of the public to discuss their concerns, and has met with a number of individuals.¹ However, the Examiner cannot recommend nor can the City impose a mitigation condition that obligates King County to act, especially one that appears intended to provide a citizen veto to YarrowBay's development plans.

¹ YarrowBay is happy to meet, discuss, and learn from members of the public, and even to potentially provide additional mitigation associated with the MPDs. That process is largely how YarrowBay's agreement to no net increase in phosphorus flowing to Lake Sawyer from the MPD development first arose. Unfortunately, at least one member of the public who sought to meet with YarrowBay demanded pre-conditions to the meeting which effectively required YarrowBay to agree prior to the meeting to that person's requests for additional mitigation. That approach is not productive and prevents both YarrowBay and the concerned members of the public from learning from one another.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

REPLY: I applaud the City Council for establishing a Citizens’ Review Committee for Green Valley Road and YarrowBay for supporting same. However, as explained in my Written Statement, there are several flaws in MPD Ordinance Condition 33 b.:

1. There are many other King County roads that will be directly affected by the proposed MPDs, especially the well-traveled *Issaquah-Hobart-Ravensdale-Black Diamond Rd.* corridor.
2. Inexplicably, King County is not offered a position on a Committee dealing with a road under its exclusive jurisdiction.
3. Inexplicably, Black Diamond is provided a position on a Committee dealing with a road not under its jurisdiction.
4. The citizens who live, work, worship, and recreate along the road are offered a permanent minority say on the Committee.

The intent of proposed “new” Condition 33 c. is to rectify each of these flaws in Condition 33 b. YarrowBay is correct on one point though, this proposed “new” Condition cannot obligate King County to be a member of these Committees. Of course, that will be up to King County. However, that being said, I would be surprised if King County chose not to participate given its already keen interest in these proposed MPDs as evidenced by its extensive Written Comments submitted on the DEISs and FEISs and its participation by senior officials and technical experts in every Hearing held to date including this one.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

VII. CHRONOLOGY AND REMAINING CONCERNS

We all followed a very interesting path to get to where we are now:

1. A **Local-Regional Traffic Demand Model** was created and used to analyze traffic impacts to support the MPD **DEIS** and **FEIS** documents. [late 2009]
2. During the **FEIS Appeals Hearings** (local citizens appealed the adequacy of the FEISs) following Expert Witness testimony from Traffic experts, KCDOT, WSDOT, and Maple Valley’s expert your Honor found the **Traffic Demand Model** flawed in its regional geographic coverage and several of its assumptions. Consequently, your Honor ruled the resulting analyses and traffic mitigations generated were flawed. However, your Honor ruled the FEISs adequate and said specific Conditions would be imposed on the MPD Applications during subsequent hearings. Your Honor did so. [Spring 2010]
3. Following the **MPD Application Open-Record Hearings** your Honor recommended a set of over 160 Conditions which included 25 Transportation-specific Conditions that were meant to address the Traffic Demand Model, Traffic Analyses, and Road and Intersection Mitigation shortcomings found during the FEIS Appeals Hearings. [Spring 2010]
4. Following the **MPD Application Closed-Record Hearings** the Black Diamond City Council passed two MPD Approval Ordinances each with a set of over 160 Conditions which included 25 Transportation-specific Conditions. However, the City Council proceeded to eviscerate (i.e., Merriam-Webster’s Dictionary: “*deprive of vital content*”) many of your Honor’s major Transportation Conditions. [September 2010]

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

5. The Applicant submitted its **first draft** of the Development Agreements. [September 2010]
6. The Applicant submitted its **“final” version** of the Development Agreements. [June 2011]

Even as we participate in the Open-Record Hearings on the Development Agreements, many remaining issues still concern us. Unfortunately, many of the City Council’s changes to your Honor’s recommended Transportation Conditions benefit the Master Developer while increasing the risk, uncertainty, and future costs to the City and the Region and its citizens. Major concerns are:

1. There is no validated **Baseline Traffic Demand Model** to provide predictions, reduce risk, and lend some certainty to understanding impacts on the City’s and Region’s Transportation infrastructure. Consequently, there is a complete lack of reliable forecasts of what future traffic pattern and volume scenarios could look like and what transportation infrastructure mitigations might even work.
2. **Mitigation Agreements** with outside jurisdictions do not include Transportation mitigations your Honor believed were technically defensible. Nor did all the independent Technical experts and the vast majority of the Public. Consequently, those negotiations have no common database with which to work and, thus, the mitigations listed are suspect, at best, and completely inadequate, at worst.
3. The Developer is effectively vested on all transportation-related standards and requirements through full build-out. Such standards and requirements protect the Master Developer, **not** the City, its residents, or the Region’s citizens. They will unduly handcuff future City Councils by putting the burden of proof on the City to

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

substantiate the MPDs are causing future traffic problems--a recipe for future lawsuits.

4. The changes needed to the region’s **Transportation Infrastructure** due to total size of the MPDs--over 6,050 homes and 1.15 million sq ft commercial footprint--are not likely to be feasibly or economically mitigated due to the geographic and funding constraints. The region’s Transportation infrastructure could suffer gridlock for several decades.

5. The Master Developer proposes **Funding Sources** that rely primarily on other people’s money to build needed infrastructure or monies that currently do not exist and are not likely to exist. Both the WA State and King County Departments of Transportation have precious little funds to allocate in southeast King County. The Alaskan Way Viaduct Replacement and 520 Bridge Replacement projects will drain State funding coffers for a very, very long time. King County is trying to stretch its ever-dwindling transportation budget to simply maintain road safety, not increase capacity, in the unincorporated areas as is its policy. State-elected officials, WSDOT, KCDOT, and the PSRC (e.g., Transportation 2040) have repeatedly made these points abundantly clear. This is possibly where risks are the greatest !

YarrowBay’s Response:

Mr. Rimbo’s chronology and remaining concerns simply repeat his position that the Council-adopted transportation conditions are insufficient. These issues have all been addressed elsewhere in this Memorandum, Exhibit 139 and the Guide, at Exhibit 8.

REPLY: It is unfortunate that YarrowBay chose not to directly respond to 16 pages of Section VII. CHRONOLOGY AND REMAINING CONCERNS, Section VIII. CONCLUSIONS, Section IX. RECOMMENDATIONS, and Section X. FOR THE CITY COUNCIL in my Written Statement.

This section defined the *Chronology* of how we got to where we are today and provided an assessment of *Remaining Concerns* to be addressed. Unfortunately,

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

YarrowBay chose not to directly respond to any of the *Remaining Concerns* listed herein.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

VIII. CONCLUSIONS

In closing, it is clear designing, financing, and building the massive amount of Transportation infrastructure necessary to support the proposed MPDs is a massive undertaking--both financially and technically.

Throughout the Expert testimony of the FEIS Appeals Hearings and the Public testimony of the MPD Application Hearings no-one believed the traffic problems associated with adding over 6,000 homes and over 1.1 million square feet of commercial/business space (once again, effectively quintupling the City of Black Diamond) all feeding onto an undivided 2-lane State road, SR-169, were properly mitigated--including you, your Honor! Unfortunately, after 17 months of hearings and documents being written by the Applicant and negotiated with City Staff, sadly nothing really has changed!

In this Section Conclusions are listed for each of the major Transportation issues. Accompanying each Conclusion are those specific segments of the **Stop-Light Assessment Table**, shown earlier in Section II. Overview/Summary, that apply to each MPD Ordinance Transportation Condition or Black Diamond Municipal Code requirement addressed. They are reproduced here for convenience of the reader.

1. TRANSPORTATION PLANS

The Development Agreements lack a credible overarching Transportation Plan, let alone a detailed one, to address future traffic loads and develop needed mitigations. Transportation Plans must, *at a minimum*, define the traffic mitigation needs and locations, project descriptions, schedules, estimated costs, funding sources and mechanisms, risks, and potential impacts related to each risk factor for both route and intersection improvements to fully mitigate all transportation-related impacts on all geographic areas studied before each Phase of the MPDs begins.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

The Development Agreements fall far short in this critical area. Important provisions of the MPD Ordinance Conditions dealing with Transportation Plans--10 and 29--are not met, as highlighted in the Stop-Light Table.

Cond.	Subject.	Citation	Assessment of DAs	Gr.
# 10	Trans- portation Planning	...construct any new roadway alignment or intersection improvement....specify for which projects...eligible for either credits or cost recovery and by what mechanisms....	<input type="checkbox"/> No Transportation Plan detailing tasks and schedule. <input type="checkbox"/> No <u>details</u> on Credit or Cost Recovery mechanisms.	
# 29	Regional Infra- structure Implemen- -tation Schedule	Prior to the first implementing project...being approved, a more detailed implementation schedule of the regional infrastructure projects...shall be submitted for approval.	<input type="checkbox"/> No Transportation Plan that includes a detailed implementation schedule (i.e., What information will inform such a Schedule and How will it be vetted?).	

2. FINANCIAL PLANS

The amount of funding to upgrade and build new Transportation infrastructure contemplated here is enormous and primarily relies on the Master Developer using the new mechanism of CFDs. The Master Developer does not have the money--the risks are great!

Cost-Risk-Benefit Analyses must be included and continually revisited throughout the life of the projects. Such critical analyses must address impacts of funding mechanisms not materializing for all mitigations proposed in order to identify those mitigations unlikely to be fully funded and the attendant adverse impacts on traffic levels of service.

In addition to cost risks, assessments also must include technical risk and schedule risk to weigh against the perceived benefits. The Development Agreements do not even address these risk area, which are a critical consideration of any Financial Plan, especially for something as large and important to the City and Region as these MPDs.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Important provisions of the MPD Ordinance Conditions dealing with Financial Plans--18 and 34 a.--are not met, as highlighted in the Stop-Light Table.

Cond	Subsect.	Citation	Assessment of DAs	Gr.
# 18	Funding Responsibility & Pro-Rata Shares	The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established...which must cover the complete mitigation list.	<input type="checkbox"/> No Financial Plan that provides assurance obligations can be met, nor provides a process to evaluate pro-rata shares amongst jurisdictions.	
# 34a	Project Responsibility Split	...address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery.	<input type="checkbox"/> No Financial Plan that provides cost estimates, timing, funding sources, contingencies, or risks. <input type="checkbox"/> No Cost-Benefit-Risk Plan .	

3. TRAFFIC ANALYSES

A comprehensive **Traffic Analysis Plan** that provides details on how the **Traffic Demand Model** will be used and what assumptions will be made and on what bases must be formulated. A clear methodology must be presented to determine, analyze, and mitigate future traffic scenarios. An understanding of the model’s key assumptions and the sensitivity of results to those assumptions, along with how model results will be assessed is a necessity. This especially is important once 850 building permits are issued and the validated model is ready to be used.

A complete unknown is what model will be used prior to that 850 threshold. A validated Traffic Demand Model does not exist. In fact, the new Traffic Demand Model, as dictated by the MPD Ordinance Conditions of Approval, is not yet complete! One cannot contemplate initiating projects of this size, scope, and far-reaching regional consequences without knowing how severe the traffic problems could be and how to mitigate them without analysis tools that are sufficient for the job and proven to produce verifiable and reproducible results for a variety of traffic scenarios.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

In the FEIS Appeals Hearings and the MPD Application Hearings your Honor stated that Black Diamond currently has an inadequate Traffic Demand Model, which lacks sufficient detail, and has used several suspect input variables. This results in a total lack of confidence in the output of the existing model (i.e., currently defined traffic mitigations). Consequently, the mitigations proposed to Black Diamond and Maple Valley by YarrowBay may be, and most probably are, wholly inadequate. This puts the City and its citizens at risk until 850 building permits are issued and the model is validated. With the long lead times typically involved for traffic mitigation planning, design, and construction this will mean a traffic volume increase of between 50% and 75% before the correct traffic mitigations can be put in place. Consequently, much greater congestion will exist at many key intersections in Black Diamond and surrounding communities for several years. These situations can and must be avoided.

The Development Agreements simply parrot the MPD Conditions of Approval without providing any detailed plans and methodology to address inadequate or failed mitigations. What process will be put into place? When and what are the key trigger points? Who makes the decisions? Where are the checks and balances? None of this is described in the Development Agreements.

Important provisions of the MPD Ordinance Conditions dealing with Traffic Analyses--12, 14, 17 and 25--are not met as highlighted in the Stop-Light Table.

Cond	Subsect.	Citation	Assessment of DAs	Gr.
# 12	Model Assump-tions & Analyses	The model must be run with currently funded transportation projects...shown in the applicable 6-yr & (unfunded) 20-yr TIPs.	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	
# 14	Model Internal Capture Rate (ICR)	The new model must include a reasonable ICR assumption. The assumed ICR must be based upon and justified by an analysis....	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

# 17a. thru j.	Trans- portation Analysis [most critical Transp. Condi- tion]	[Three pages long.] 17f.: Proposed conditions & mitigations ...shall be revised if...the conditions or mitigation measures...have resulted in an unsatisfactory level of mitigation....	<input type="checkbox"/> No Traffic Analysis Plan describing what will be done with results and how they will be used to inform needed mitigations. No [post-850-building-permit] Traffic Analysis Plan.	
# 25	Pre-Phase Modeling	...model...traffic impacts of a...phase before submitting land use applications...to determine at what point a ...(facility)...is likely to drop below...adopted LOS....	<input type="checkbox"/> No Traffic Analysis Plan [Also, Condition <u>conflicts</u> with provisions of Conditions 11 and 17 on timing.]	

4. TRANSPORTATION CONCURRENCY

A **Transportation Concurrency Plan** is needed to lay out the details of concurrency testing to ensure “*concurrency at full build-out*” as required by *Black Diamond Municipal Code 18.98.080(A)(4a)*. Concurrency testing is a pillar of the State’s Growth Management Act as set forth in *WA State RCW 36.70A.070(6)(b)*.

The plan also must meet the provisions of the *Black Diamond Comprehensive Plan sections 7.2.2, 7.9.2, and 7.11.1*. Finally, the plan must address the methodology to be employed should certain elements of the Transportation infrastructure fail concurrency testing. What are the contingencies?

Important provisions of the MPD Ordinance Conditions dealing with Transportation Concurrency--17, 20, and 25--are not met as highlighted in the Stop-Light Table.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

Cond	Subject.	Citation	Assessment of DAs	Gr.
# 17a. thru j.	Transportation Analysis [most critical Transp. Condition]	[Three pages long.] 17f.: Proposed conditions & mitigations ...shall be revised if...the conditions or mitigation measures...have resulted in an unsatisfactory level of mitigation....	<input type="checkbox"/> No Traffic Analysis Plan describing what will be done with results and how they will be used to inform needed mitigations. No [post-850-building-permit] Traffic Analysis Plan .	
# 20	Transportation Monitoring Plan	The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....	<input type="checkbox"/> Transportation Monitoring Plan is reactive, not pro-active; does not identify proper “trigger mechanisms” that can be measured and assessed.	
# 25	Pre-Phase Modeling	...model...traffic impacts of a...phase before submitting land use applications...to determine at what point a ...(facility)...is likely to drop below...adopted LOS....	<input type="checkbox"/> No Traffic Analysis Plan [Also, Condition <u>conflicts</u> with provisions of Conditions 11 and 17 on timing.]	

5. TRAFFIC DEMAND MODEL

Validation of the **Traffic Demand Model** is a cornerstone of any subsequent traffic analyses and mitigation identification and evaluation. A **Traffic Model Validation Plan** needs to be developed that provides the methodology and schedule to be used to verify model results and reproducibility of same. This is required by MPD Ordinance Transportation Condition 17. The Development Agreements provide no Traffic Model Validation Plan, nor any details on how validation will be accomplished and tested.

A more complete discussion of the concerns and risks associated with the questionable validity of the Traffic Demand Model to be used prior to reaching the 850 building-permit-issued threshold for model validation is contained in Conclusion 3. above.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

The Traffic Demand Model was a major point of contention during the FEIS Appeals Hearings with much Expert Testimony provided. None of the issues raised during those testimonies--scope and depth, assumptions, timing, validation--have gone away.

It is difficult to ascertain how some of the MPD Ordinance Transportation Conditions, which conflict in terms of the timing for the Traffic Model and Traffic Analyses--11, 12, 14, 17, and 25--can be met. Certainly, the dearth of details in the Development Agreements provide little confidence they can be met.

Cond	Subsect.	Citation	Assessment of DAs	Gr.
# 11	Traffic Demand Model	The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation.	<input type="checkbox"/> No Model Validation Plan to validate and re-validate the model leading to identification and evaluation of additional mitigation.	
# 12	Model Assumptions & Analyses	The model must be run with currently funded transportation projects...shown in the applicable 6-yr & (unfunded) 20-yr TIPs.	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	
# 14	Model Internal Capture Rate (ICR)	The new model must include a reasonable ICR assumption. The assumed ICR must be based upon and justified by an analysis....	<input type="checkbox"/> No Traffic Analysis Plan <input type="checkbox"/> No <u>details</u> on assumptions.	
# 17a. thru j.	Transportation Analysis [most critical Transp. Condition]	[Three pages long.] 17f.: Proposed conditions & mitigations ...shall be revised if...the conditions or mitigation measures...have resulted in an unsatisfactory level of mitigation....	<input type="checkbox"/> No Traffic Analysis Plan describing what will be done with results and how they will be used to inform needed mitigations. No [post-850-building-permit] Traffic Analysis Plan .	

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

# 25	Pre-Phase Modeling	...model...traffic impacts of a...phase before submitting land use applications...to determine at what point a ... (facility)...is likely to drop below...adopted LOS....	<input type="checkbox"/> No Traffic Analysis Plan [Also, Condition <u>conflicts</u> with provisions of Conditions 11 and 17 on timing.]	
------	--------------------	---	---	---

6. TRAFFIC MITIGATION

Transportation and adequate mitigation for up to 15,000 additional vehicles and all the vehicle trips to be generated by the MPDs are the potential Fatal Flaws of the entire project. Given this, the Public still does not know what mitigations will work how much they will cost, who ultimately will pay, and when they will be built and operational.

If the Development Agreements don’t answer any of these questions, nor even show methodologies to address them then when and by what mechanism will the City and the Public find out answers to such critical questions? And at what future short- and long-term costs and risks to the taxpayers and the communities affected?

Important provisions of the MPD Ordinance Conditions dealing with Traffic Mitigation--18, 20, 29, 33 a., and 34 a.--are not met as highlighted in the Stop-Light Table.

Cond	Subsect.	Citation	Assessment of DAs	Gr.
# 18	Funding Responsibility & Pro-Rata Shares	The responsibilities and pro-rata shares of the cumulative transportation mitigation projects shall be established...which must cover the complete mitigation list.	<input type="checkbox"/> No Financial Plan that provides assurance obligations can be met, nor provides a process to evaluate pro-rata shares amongst jurisdictions.	
# 20	Transportation Monitoring Plan	The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....	<input type="checkbox"/> Transportation Monitoring Plan is reactive, not pro-active; does not identify proper “trigger mechanisms” that can be measured and assessed.	

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

# 29	Regional Infrastructure Implementation Schedule	Prior to the first implementing project...being approved, a more detailed implementation schedule of the regional infrastructure projects...shall be submitted for approval.	<input type="checkbox"/> No Transportation Plan that includes a detailed implementation schedule (i.e., What information will inform such a Schedule and How will it be vetted?).	
# 33a	Limiting Green Valley Rd Traffic	...a description of the process and timing required for the Applicant to seek permits from King County should King County allow installation of the (calming) improvements....	<input type="checkbox"/> The “process” simply states the Master Developer will submit permit applications. No description of a process whereby the Master Developer, GVR residents & KCDOT develop mutually agreeable solutions. [Traffic Calming Study was simplistic.]	
# 34a	Project Responsibility Split	...address which traffic projects will be built by the developer, which projects will be built by the City and what projects will qualify for cost recovery.	<input type="checkbox"/> No Financial Plan that provides cost estimates, timing, funding sources, contingencies, or risks. <input type="checkbox"/> No Cost-Benefit-Risk Plan .	

7. VEHICLE TRIP REDUCTION

The *Black Diamond Municipal Code 18.98.010(H)* calls out the need for **Vehicle Trip Reduction**. With the magnitude of the potential traffic volumes to be generated by the proposed MPDs, vehicle-trip reduction schemes are a must to the success of the projects. The Development Agreements barely give such schemes lip service and, thus, provide no basis to determine what could work and how much it would reduce traffic volumes and/or travel times if employed.

This important provision of BDMC 18.98.010(H) dealing with Vehicle Trip Reduction is not met as highlighted in the Stop-Light Table.

DEVELOPMENT AGREEMENT OPEN-RECORD HEARINGS--July/August 2011

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

BD Code	Subsect.	Citation	Assessment of DAs	Gr.
18/98.010 (H); [COL 11]	---	Provide environmentally sustainable dvmt. (COL 11 implies this includes Vehicle Trip Reduction)	<input type="checkbox"/> No Vehicle Trip Reduction Plan.	

8. TRANSPORTATION MONITORING

Transportation Monitoring should be used to assess the adequacy of mitigations as they are put into service. However, the purported use of such “monitoring” as espoused in the Development Agreements--to aid in identifying traffic mitigations--is the wrong use of such a “tool.”

“Monitoring” should be used to provide needed traffic data in terms of traffic patterns, intersection timing and queueing, and traffic speed and throughput. This important information must be used to verify results of traffic model runs and intersection analyses. The Development Agreements need to identify the right tools and how and when they will be used.

MPD Ordinance Condition 20 Transportation Monitoring Plan is not adequately described or detailed in the Development Agreements, nor is the use of Transportation Monitoring as a tool to measure key traffic data correctly described, as highlighted in the Stop-Light Table.

Cond	Subsect.	Citation	Assessment of DAs	Gr.
# 20	Trans- portation Monitor- ing Plan	The monitoring plan shall ensure that construction of improvements commences before the impacted street or intersection falls below the applicable level of service....	<input type="checkbox"/> Transportation Monitoring Plan is re-active, not pro-active; does not identify proper “trigger mechanisms” that can be measured and assessed.	

A set of Recommendations based on these Conclusions and the arguments presented in this Written Statement is provided in the next section: Section IX. Recommendations.

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

YarrowBay’s Response:

Mr. Rimbos's testimony sections entitled Conclusions, Recommendations, and For the City Council simply repeat and re-iterate his Written Testimony. All issues are addressed elsewhere in this document and in Attachment A, YarrowBay's Traffic Signal Assessment Table.

REPLY: It is unfortunate that YarrowBay chose not to directly respond to 16 pages of Section VII. CHRONOLOGY AND REMAINING CONCERNS, Section VIII. CONCLUSIONS, Section IX. RECOMMENDATIONS, and Section X. FOR THE CITY COUNCIL in my Written Statement.

This section provided a cogent set of *Conclusions* tied back to my “*Stop-Light Assessment Table*,” which I hope your Honor found helpful. Unfortunately, YarrowBay chose not to directly respond to any of the *Conclusions* listed herein. Rather it provided the following:

YarrowBay’s Response:

Mr. Rimbos plainly devoted substantial effort to preparing his written testimony. YarrowBay sincerely wishes that we had been able to meet directly with Mr. Rimbos to discuss his concerns. Had we been able to meet with him, we feel confident that many of his concerns - if not all of them - would have been allayed. The adopted MPD Conditions of Approval regarding transportation are extensive. Those conditions combine the Examiner's recommended conditions with additional details and timing recommended by YarrowBay and the City's consultants after they saw the Examiner's recommendation. The timing for the new model run was supported by King County. Together, the adopted MPD Conditions of Approval regarding transportation result in the most heavily regulated, tested, and re-tested projects YarrowBay has ever seen. Substantial transportation mitigation is already on the books. Additional mitigation may be required and imposed through repeated "Periodic Reviews." Contrary to Mr. Rimbos's conclusion, we ask that the Examiner recommend approval of the Development Agreements as drafted, with the revisions recommended in Ex. 139.

REPLY: I will not question the sincerity of YarrowBay’s willingness to meet. Such a meeting did not take place, because, after an exchange of information, it was clear there was a chasm between what each of us wanted to be done.

Herein, I already have discussed KCDOT’s positions and testimonies and YarrowBay’s selective use of statements out of context to draw conclusions advantageous to them. To make it clear, once again, KCDOT agreed with your Honor’s Recommendations on timing of the model.

However, while it is out of scope here, I find I must briefly discuss the “process.” While it is commendable that YarrowBay would meet with the Public, it is deplorable

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

that a process, such as this quasi-judicial process, is being used to effectively shut out ALL communication between the Public and their elected representatives on the City Council!

The Citizens Technical Team, which I lead, tried desperately over many months to meet with the Black Diamond City Council after passage of the MPD Ordinances to discuss our proposed changes to Conditions and detailed supporting rationale. To their credit two City Council members agreed to meet with us and we held four productive, detailed technical meetings on Transportation, Fiscal Impacts, Stormwater, and Environment. The other three City Council members refused to meet with us citing “*pending litigation*” even though not all members of the Citizens’ Technical Team are parties to that litigation. The process is wanting.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

IX. RECOMMENDATIONS

The Development Agreements must be rejected outright based on Transportation considerations alone, as needed analyses and assessments have not been conducted and plans poorly defined or missing and undefined. This violates many of the Transportation Conditions of Approval as highlighted in the Stop-Light Table and detailed throughout this Written Statement.

During the FEIS Appeals Hearings the Public was constantly mollified by statements such as *“this is not addressed at the programmatic-level FEIS, but all the details will be provided in the project-level Development Agreements.”* That wasn’t true then, and it certainly isn’t true now that the incredibly detail-deficient Development Agreements have been released to the Public.

A complete rewrite of the Development Agreements clearly is required. This must include detailed plans, schedules, costs, and risks--all identified and justified. These Development Agreements must be rejected to protect the Public, the community, and the greater region from flawed, inadequate, or missing plans and unacceptable long-term unmitigated impacts. The Public expects that once your Honor reviews all the Oral Testimony from these Hearings and the extensive Written Statements, you will reject these Development Agreements.

Once these Development Agreements are rejected and subsequently improved--hopefully vastly improved--I look forward to speaking before you again at the next set of Development Agreement Hearings. Thank you for your focussed attention to the concerns of the Public and your careful review and consideration of all the evidence presented in Oral Testimony, Exhibits, and Written Statements.

YarrowBay’s Response:

Mr. Rimbos's testimony sections entitled Conclusions, Recommendations, and For the City Council simply repeat and re-iterate his Written Testimony. All issues are

**“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)**

addressed elsewhere in this document and in Attachment A, YarrowBay's Traffic Signal Assessment Table.

REPLY: It is unfortunate that YarrowBay chose not to directly respond to 16 pages of Section VII. CHRONOLOGY AND REMAINING CONCERNS, Section VIII. CONCLUSIONS, Section IX. RECOMMENDATIONS, and Section X. FOR THE CITY COUNCIL in my Written Statement.

This section provided a set of *Recommendations* for a clear and, hopefully, successful path ahead. Unfortunately, YarrowBay chose not to directly respond to any of the *Recommendations* listed herein.

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

X. FOR THE CITY COUNCIL

Although beyond the scope of your Honor’s jurisdiction in these Hearings, please forward on to the Black Diamond City Council the following, along with the Section VI. *Proposed “New” Conditions.*

Clearly, the Transportation Conditions require a major rewrite and possible redirection. Since a full and adequate evaluation of future Transportation Infrastructure needs is required, which would directly impact the viability of both proposed MPDs, a repeal of the MPD Approval Ordinances is recommended.

Should the process be restarted, as it must be, a rigorous re-assessment of the major Transportation impacts imposed by the size and breadth of the proposed MPDs is necessary to truly understand the Transportation infrastructure needs, costs, timing, and risks. This is especially true of the critical Maple Valley Transportation Mitigation Agreement, which provides for wholly inadequate mitigations along SR-169 the backbone of the the Cities of Black Diamond and Maple Valley and the surrounding unincorporated area communities. It is expected that such a re-assessment will call for a significant downsizing of the proposed MPDs.

Some deficiencies in the Development Agreements could have been cured had the Hearing Examiner’s MPD Application recommendations on Transportation Conditions been followed. Yarrow Bay proposed deleting this condition and City Staff agreed and recommended deleting it. The Black Diamond City Council accepted City Staff’s recommendation to delete this critical condition. As a result no new analyses will be run to develop a new set of credible mitigations prior to the approval of any *“implementing projects.”* Consequently, the Development Agreements are grossly deficient in the area of traffic modeling, analyses, and mitigation. This possibly is the most glaring flaw in the entire MPD process!

***“REPLY” to YarrowBay’s 8/15/11 Response (Exh. 208)
to Written Statement: Transportation (Exh. #118)***

If an improved **Traffic Demand Model** is built, validated with existing traffic data, and then used to conduct **Sensitivity Analyses** prior to Development Agreement approval, the proper mitigations can be known early enough to forestall the exacerbation of existing and growing traffic problems during peak commuting times. In this way the acceptance and associated funding responsibilities for those mitigations can be made a part of the Development Agreements. This would be the prudent path to take. The new traffic model and methodology should be used to analyze at least five (5) future scenarios ranging from both “business-as-usual” growth patterns to full MPD buildout over the next 5, 10, 15, 20, and 25 years. This must all be done before approval of the Development Agreements.

There are ways to fix this and ensure a sustainable set of downsized MPDs that would maintain Black Diamond’s “Rural by Design” goals, while protecting the greater region from traffic nightmares. The Public is ready and willing to help make this a reality.

YarrowBay’s Response:

Mr. Rimbo’s testimony sections entitled Conclusions, Recommendations, and For the City Council simply repeat and re-iterate his Written Testimony. All issues are addressed elsewhere in this document and in Attachment A, YarrowBay’s Traffic Signal Assessment Table.

REPLY: It is unfortunate that YarrowBay chose not to directly respond to 16 pages of Section VII. CHRONOLOGY AND REMAINING CONCERNS, Section VIII. CONCLUSIONS, Section IX. RECOMMENDATIONS, and Section X. FOR THE CITY COUNCIL in my Written Statement.

This section provided a *guidance* for the Black Diamond City Council going forward. Unfortunately, YarrowBay chose not to directly respond to any of the *guidance* listed herein.

Stacey Borland

From: Cincity63@comcast.net
Sent: Friday, August 19, 2011 7:52 AM
To: Stacey Borland; Steve Pilcher; Andy Williamson; Brenda Martinez
Cc: Bill Wheeler; Joe May
Subject: Response to 218
Attachments: Olbrechts Phil-08 19 11.docx

Steve-

While I understand you and Mr. Williamson are out of office, I ask that Ms. Borland forward this response to the Hearing Examiner before the the 8am deadline and provide confirmation receipt to myself, William Wheeler and Joe May.

Thank you.

Cindy Wheeler

EXHIBIT 263



**Bricklin &
Newman**
LLP

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

Spokane Office:
35 West Main
Suite 300
Spokane, WA 99201

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

Reply to: Seattle Office

August 19, 2011

VIA E-MAIL

Phil Olbrechts
Hearing Examiner, City of Black Diamond
Olbrechts & Associates, PLLC
18833 74th Street NE
Granite Falls, WA 98252-9011

Re: Development Agreements

Dear Mr. Olbrechts:

I have been asked by several individuals to respond to the comments of the City Attorney in Exhibit 218. I note that the title of the document is erroneous in an important respect. It characterizes the response as that of the "City." The comments contained in Exhibit 218 are, presumably, the comments of only the City Attorney. At most, they may also represent the comments of the Department of Community Development. They certainly do not represent the views of the City's Hearing Examiner, the City's Planning Commission, the City Council, or any other person or body that works for or represents the City of Black Diamond.

Given the nature of the comments in Exhibit 218, we would appreciate a clarification from the Department of Community Development whether these comments are presented on its behalf or solely on behalf of the City Attorney. If the comments were not presented with the review and consent of the Department of Community Development, it would be good for the Department to so state and expressly disavow association with Exhibit 218.

I have been asked to respond to accusations in Exhibit 218 which are flatly incorrect, irrelevant, and potentially slanderous. These comments raise questions as to whether the City Attorney has violated his ethical obligations (a matter which we recognize is not before the Hearing Examiner, but which demonstrates the magnitude of the issues created by the City Attorney's comments).

First, the City Attorney is wrong about the core facts central to his accusations. As documented in the "Blanket Objection to Response to City of Black Diamond, Exhibit 218" filed by William Wheeler, Cynthia Wheeler, and Joe May (Exhibit No. ?), the quote in Exhibit 218 of the Diamond Coalition's "Mission Statement" is completely inaccurate. The Exhibit 218 "quote" of the Diamond Coalition's Mission Statement on page 4 of Exhibit 218 does not even match the Mission Statement included in the City Attorney's "Attachment A" (which purports to be the basis for the quotation on page 4). Before the City Attorney makes allegations of this sort, he

should check his facts carefully. While CR 11 does not directly apply to the City Attorney's filings in this proceeding, it is clear that if Exhibit 218 had been filed in Court, the City Attorney would be subject to sanctions under that rule. Whether this and other inaccurate and disparaging comments in Exhibit 218 violate the City Attorney's ethical obligations will need to be addressed in another forum.

The City Attorney is also inaccurate in characterizing the Diamond Coalition as a party of record to these or any other proceedings relating to Yarrow Bay's development plans. The City Attorney cannot cite a single piece of paper or a fragment of any transcript where anyone has spoken on behalf of the Diamond Coalition in these or any of the related proceedings. The City Attorney's accusations to the contrary are not founded on any evidence of any kind.

Likewise, it is totally inaccurate for the City Attorney to suggest that William and Cynthia Wheeler or Joe May ever stated that they were testifying as representatives of the Diamond Coalition. At no time did any of these individuals state that their testimony was presented on behalf of the Diamond Coalition. The City Attorney can cite no document or transcript that suggests otherwise.

Next, the City Attorney alleges that the Diamond Coalition has the goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5:12. No citation is provided for this allegation. It is another falsehood. The City Attorney should check his facts.

William and Cynthia Wheeler and Joe May previously requested the Hearing Examiner to strike Exhibit 218 because it contains falsehoods. The Examiner denied the request, reasoning that the objections went to the accuracy of the testimony, not its admissibility. However, ER 403 makes clear that even relevant evidence may be excluded under circumstances like these:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury [fact finder] . . .

Exhibit 218 will become part of the permanent record of this proceeding. It will be available to the public at-large via its posting on the City's website. It contains falsehoods and factual allegations that are totally unsubstantiated. It is demeaning to those citizens who are unjustly accused therein. The Examiner should not allow this exhibit to remain in the record and available indefinitely on the City's website. The Examiner should reconsider his ruling not to strike this exhibit. It should be expunged.

If the Examiner does not strike the exhibit, at minimum, the Examiner should enter findings that make clear that Exhibit 218's allegations are false and unsubstantiated and that they should be ignored by the City Council.

The City Attorney continues his disparaging attack on the citizens by suggesting that the comments filed by hundreds of citizens opposing these developments are simply so many unthinking marionettes orchestrated by a few puppeteers. This allegation is demeaning not only

to hard working volunteer community leaders like Peter Rimbos, William and Cynthia Wheeler, Bob Edelman, and Cindy Procter, but, more importantly, it is extremely demeaning to the hundreds of citizens who have taken the time to participate in this process.

We are flabbergasted that the City Attorney would seek to undercut the input from these citizens by suggesting that they had been assisted by community leaders. The City ostensibly supports public participation. The City ostensibly encourages the public to participate in its planning proceedings. The City ostensibly *wants* to hear from its citizens. If people like Peter Rimbos and Cynthia Wheeler help citizens respond to the City's request for public participation, they should be thanked for their efforts, not assailed. The Department of Community Development and the Hearing Examiner should go out of their way to thank the citizens for their input and to caution the City Attorney not to disparage those citizens who take time from their busy schedules to participate in these proceedings.

Underlying the City Attorney's accusations is the apparent argument that the comments of these hundreds of citizens should be ignored or given less weight because they responded to the request for citizen input from the City and community leaders. Apparently, the City Attorney believes that the citizens who have commented are so many lemmings rotely chanting the same theme as that expressed by people like Mr. Rimbos. Anyone who has been involved in public participation efforts knows that it is not easy to prompt a citizen to take action in a proceeding like this. In a typical case, even repeated requests for citizen input fall on deaf ears as citizens either do not care about the project or at least do not care enough about it to take the time to comment given all the other demands on their time. The City has received hundreds of citizen comments in opposition to these development proposals not simply because the City and community leaders asked the citizens to comment, but because these hundreds of citizens *cared*. They *care* about their community. They *care* about protecting the small town atmosphere of Black Diamond. They *care* about upholding the primary tenets of the Comprehensive Plan which calls for maintaining Black Diamond's small town atmosphere. And they *cared* enough about these issues to take up a pen or come to a hearing even though they are extremely busy raising families, earning a living, taking care of personal health issues, and otherwise trying to stay on top of their own personal needs. The huge outpouring of public sentiment cannot be attributed to Mr. Rimbos' efforts alone. The huge outpouring of public sentiment is a reflection of the huge and adverse impact that Yarrow Bay's plans would have on the small town called Black Diamond and the love of that small town by so many of its citizens.

In sum, the City Attorney's efforts to demean and trivialize the massive citizen input (which is nearly uniformly in opposition to these proposed developments in their current form) should be rejected. But the City Attorney's decision to devote so much time and space to this demeaning effort begs the question: Why? Why has the City Attorney spent more time attacking the motives and credibility of the citizens than in addressing the substance of their issues? The answer is obvious. The City Attorney has little to say with regard to the substance. The City Attorney cannot deny that the proposals are wildly at variance with the basic tenets of the City's Comprehensive Plan, which calls for maintenance of the town's small-town atmosphere and *slow* growth within the town, not a rapid fivefold expansion. But while the City Attorney primarily

uses Exhibit 218 to attack the citizens, he does devote a few passages to discuss substantive issues. We turn to those now.

One of the City Attorney's attacks is based on misuse of terms, in particular, misunderstandings regarding the meaning of the word "density." To a trained land use planner, the word "density" refers to a mathematical concept: the number of units per acre. Technically, density is unrelated to the size of a development. That is, a small development could have a high density or a low density, depending on whether many or a few homes were located on the (small amount of) land being developed. Likewise, a large development proposal may have a high or low density, again depending on whether the number of units per acre were high or low.

But while "density" has this technical meaning to land use planners, many lay people do not distinguish between "density" and the size of a project. That is, they conflate the concepts of "high density" and "scale." Thus, the City Attorney refers (inaccurately) to the Diamond Coalition's goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5. It certainly is true that many members of the public desire to see a reduction in the "scale" of the proposal. They believe it is too many homes, particularly in such a short period of time, given the small town atmosphere that Black Diamond seeks to maintain and the Comprehensive Plan's call for gradual growth. But while they oppose the scale and pace of development, few, if any oppose the "density" when that term is used in its technical sense. Much of downtown Black Diamond today is developed at densities of four units per acre or greater. It is not a 4 du/acre density that is opposed as much as it is the massive scale and rapid pace of the proposed development.

Thus, the City Attorney is inaccurate when he states that the base density (of 4 du/acre) is "largely responsible" for the total unit count. Exhibit 218 at 8. That is not true at all. All of this land did not need to be developed in one fell swoop. Nothing in the BDUGAA or City's Comprehensive Plan requires that. It would have been entirely consistent with those documents for this land to be developed in small pieces – at urban densities – without having a total unit count that dwarfs the existing residences in the City. The City Attorney is absolutely wrong to suggest otherwise.

In like manner, the City Attorney is wrong to suggest that the Hearings Board has or will conclude that these development plans are consistent with the City's Comprehensive Plan. The City Attorney notes that the Hearing Board's initial ruling only resolved the public participation issue (and determined that the City had erroneously failed to involve its Planning Commission in reviewing the development proposals). But let there be no misunderstanding: the Hearings Board did not reject any of the other challenges to the MPD ordinances. Those challenges, including the core issues like whether the development proposals are consistent with the City's Comprehensive Plan remain to be resolved after other appeals and litigation are concluded. We remain confident that when those core substantive issues are decided, the MPD ordinances will be rejected for those reasons (in addition to the public participation flaws already addressed).

While the development agreement may not be the place to reexamine issues resolved in the MPD ordinances, the MPD ordinances left many issues to be resolved in the development agreement.

As the Examiner has recognized, the City Council has significant discretion to exercise with regard to resolving many of those issues. The City Attorney's efforts to portray the development agreement as a mechanical "checklist" undertaking is an effort to mislead the City Council as to the broad discretion it retains at the development agreement stage. The Hearing Examiner should be clear in his recommendations to alert the City Council that it retains much discretion on many of these issues and to reject the suggestions by the City Attorney (and Yarrow Bay) that they are in some kind of "punch list" role, merely checking that all the "Ts" have been crossed and "Is" have been dotted.

Curiously, rather than assessing whether Yarrow Bay's plans are consistent with the Black Diamond Comprehensive Plan, the City Attorney compares Yarrow Bay's plans with similarly massive development projects in Snoqualmie and Issaquah. This is but another example of the City Attorney attempting to distract the Hearing Examiner and decision makers from core issues. Black Diamond's Comprehensive Plan does not contain a vision which suggests that the town seeks to become another Issaquah. The Comprehensive Plan is replete with policies and discussion seeking to preserve the town's small town atmosphere. While Issaquah (and Snoqualmie) may claim that they have done so, anyone familiar with the massive developments around those former small towns is aware that the small town atmosphere is long gone. That is a fate that most of the citizens of Black Diamond seek to avoid for their town.

Thank you for considering these comments.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Bainbridge Rogers
Client

Stacey Borland

From: Cindy Proctor <proct@msn.com>
Sent: Friday, August 19, 2011 7:54 AM
To: Steve Pilcher; Stacey Borland
Cc: Brenda Martinez; Andy Williamson
Subject: Incorrect

Importance: High

Steve,

Should this be "response to Exhibit 218 not 128? Its important that we reference our documents correctly.

"Hearing Examiner response Email - FW: Response to Exhibit 128 (second email)(NEW)"

Cindy Proctor

EXHIBIT 264

Stacey Borland

From: Dave Bricklin <bricklin@bnd-law.com>
Sent: Friday, August 19, 2011 7:55 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; 'BOB STERBANK (BOB@kenyondisend.com)'; 'Nancy Rogers'
Subject: RESPONSE TO EXHIBIT 218
Attachments: SharpScanner@bnd-law.com_20110819_075607.pdf

Please provide the attached to the Examiner and include it in the record. 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>

BRICKLIN AND NEWMAN IS PLEASED TO ANNOUNCE THAT JULIE AINSWORTH-TAYLOR HAS JOINED THE FIRM AS AN ASSOCIATE. JULIE MOST RECENTLY SERVED AS STAFF ATTORNEY FOR THE GROWTH MANAGEMENT HEARINGS BOARD AND HAS BEEN SERVING AS A LAND USE HEARING EXAMINER IN CITIES THROUGHOUT WESTERN WASHINGTON.

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.

EXHIBIT 265



**Bricklin &
Newman
LLP**

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

Spokane Office:
35 West Main
Suite 300
Spokane, WA 99201

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

Reply to: Seattle Office

August 19, 2011

VIA E-MAIL

Phil Olbrechts
Hearing Examiner, City of Black Diamond
Olbrechts & Associates, PLLC
18833 74th Street NE
Granite Falls, WA 98252-9011

Re: Development Agreements

Dear Mr. Olbrechts:

I have been asked by several individuals to respond to the comments of the City Attorney in Exhibit 218. I note that the title of the document is erroneous in an important respect. It characterizes the response as that of the "City." The comments contained in Exhibit 218 are, presumably, the comments of only the City Attorney. At most, they may also represent the comments of the Department of Community Development. They certainly do not represent the views of the City's Hearing Examiner, the City's Planning Commission, the City Council, or any other person or body that works for or represents the City of Black Diamond.

Given the nature of the comments in Exhibit 218, we would appreciate a clarification from the Department of Community Development whether these comments are presented on its behalf or solely on behalf of the City Attorney. If the comments were not presented with the review and consent of the Department of Community Development, it would be good for the Department to so state and expressly disavow association with Exhibit 218.

I have been asked to respond to accusations in Exhibit 218 which are flatly incorrect, irrelevant, and potentially slanderous. These comments raise questions as to whether the City Attorney has violated his ethical obligations (a matter which we recognize is not before the Hearing Examiner, but which demonstrates the magnitude of the issues created by the City Attorney's comments).

First, the City Attorney is wrong about the core facts central to his accusations. As documented in the "Blanket Objection to Response to City of Black Diamond, Exhibit 218" filed by William Wheeler, Cynthia Wheeler, and Joe May (Exhibit No. ?), the quote in Exhibit 218 of the Diamond Coalition's "Mission Statement" is completely inaccurate. The Exhibit 218 "quote" of the Diamond Coalition's Mission Statement on page 4 of Exhibit 218 does not even match the Mission Statement included in the City Attorney's "Attachment A" (which purports to be the basis for the quotation on page 4). Before the City Attorney makes allegations of this sort, he

should check his facts carefully. While CR 11 does not directly apply to the City Attorney's filings in this proceeding, it is clear that if Exhibit 218 had been filed in Court, the City Attorney would be subject to sanctions under that rule. Whether this and other inaccurate and disparaging comments in Exhibit 218 violate the City Attorney's ethical obligations will need to be addressed in another forum.

The City Attorney is also inaccurate in characterizing The Diamond Coalition as a party of record to these or any other proceedings relating to Yarrow Bay's development plans. The City Attorney cannot cite a single piece of paper or a fragment of any transcript where anyone has spoken on behalf of The Diamond Coalition in these or any of the related proceedings. The City Attorney's accusations to the contrary are not founded on any evidence of any kind.

Likewise, it is totally inaccurate for the City Attorney to suggest that William and Cynthia Wheeler or Joe May ever stated that they were testifying as representatives of The Diamond Coalition. At no time did any of these individuals state that their testimony was presented on behalf of The Diamond Coalition. The City Attorney can cite no document or transcript that suggests otherwise.

Next, the City Attorney alleges that The Diamond Coalition has the goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5:12. No citation is provided for this allegation. It is another falsehood. The City Attorney should check his facts.

William and Cynthia Wheeler and Joe May previously requested the Hearing Examiner to strike Exhibit 218 because it contains falsehoods. The Examiner denied the request, reasoning that the objections went to the accuracy of the testimony, not its admissibility. However, ER 403 makes clear that even relevant evidence may be excluded under circumstances like these:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury [fact finder] . . .

Exhibit 218 will become part of the permanent record of this proceeding. It will be available to the public at-large via its posting on the City's website. It contains falsehoods and factual allegations that are totally unsubstantiated. It is demeaning to those citizens who are unjustly accused therein. The Examiner should not allow this exhibit to remain in the record and available indefinitely on the City's website. The Examiner should reconsider his ruling not to strike this exhibit. It should be expunged.

If the Examiner does not strike the exhibit, at minimum, the Examiner should enter findings that make clear that Exhibit 218's allegations are false and unsubstantiated and that they should be ignored by the City Council.

The City Attorney continues his disparaging attack on the citizens by suggesting that the comments filed by hundreds of citizens opposing these developments are simply the product of so many mindless marionettes orchestrated by a few puppeteers. This allegation is demeaning

not only to hard working volunteer community leaders like Peter Rimbos, William and Cynthia Wheeler, Bob Edelman, and Cindy Procter, but, more importantly, it is extremely demeaning to the hundreds of citizens who have taken the time to participate in this process.

We are flabbergasted that the City Attorney would seek to undercut the input from these citizens by suggesting that they had been assisted by community leaders. The City ostensibly supports public participation. The City ostensibly encourages the public to participate in its planning proceedings. The City ostensibly *wants* to hear from its citizens. If people like Peter Rimbos and Cynthia Wheeler help citizens respond to the City's request for public participation, they should be thanked for their efforts, not assailed. The Department of Community Development and the Hearing Examiner should go out of their way to thank the citizens for their input and to caution the City Attorney not to disparage those citizens who take time from their busy schedules to participate in these proceedings.

Underlying the City Attorney's accusations is the apparent argument that the comments of these hundreds of citizens should be ignored or given less weight because these citizens responded to the request for citizen input from the City and community leaders. Apparently, the City Attorney believes that the citizens who have commented are so many lemmings rotely chanting the same theme as that expressed by people like Mr. Rimbos. Anyone who has been involved in public participation efforts knows that it is not easy to prompt a citizen to take action in a proceeding like this. In a typical case, even repeated requests for citizen input fall on deaf ears as citizens either do not care about the proposal or at least do not care enough about it to take the time to comment given all the other demands on their time.

The City has received hundreds of citizen comments in opposition to these development proposals not simply because the City and community leaders asked the citizens to comment, but because these hundreds of citizens *care*. They *care* about their community. They *care* about protecting the small town atmosphere of Black Diamond. They *care* about upholding the primary tenets of the Comprehensive Plan which calls for maintaining Black Diamond's small town atmosphere. And they *cared* enough about these issues to take up a pen or come to a hearing even though they are extremely busy raising families, earning a living, taking care of personal health issues, and otherwise trying to stay on top of their own personal needs. The huge outpouring of public sentiment cannot be attributed to Mr. Rimbos' efforts alone. The huge outpouring of public sentiment is a reflection of the huge and adverse impact that Yarrow Bay's plans would have on the small town called Black Diamond and the love of that small town by so many of its citizens.

In sum, the City Attorney's efforts to demean and trivialize the massive citizen input (which is nearly uniformly in opposition to these proposed developments in their current form) should be rejected. But the City Attorney's decision to devote so much time and space to this demeaning effort begs the question: Why? Why has the City Attorney spent more time attacking the motives and credibility of the citizens than in addressing the substance of their issues? The answer is obvious. The City Attorney has little to say with regard to the substance. The City Attorney cannot deny that the proposals are wildly at variance with the basic tenets of the City's Comprehensive Plan, which calls for maintenance of the town's small-town atmosphere and *slow*

growth within the town, not a rapid fivefold expansion. But while the City Attorney primarily uses Exhibit 218 to attack the citizens, he does devote a few passages to discuss substantive issues. We turn to some of those now.

One of the City Attorney's attacks is based on misuse of terms, in particular, misunderstandings regarding the meaning of the word "density." To a trained land use planner, the word "density" refers to a mathematical concept: the number of units per acre. Technically, density is unrelated to the size of a development. That is, a small development could have a high density or a low density, depending on whether many or a few homes were located on the (small amount of) land being developed. Likewise, a large development proposal may have a high or low density, again depending on whether the number of units per acre is high or low.

But while "density" has this technical meaning to land use planners, many lay people do not distinguish between "density" and the size of a project. That is, they conflate the concepts of "high density" and "scale." Thus, the City Attorney refers (inaccurately) to the Diamond Coalition's goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5. It certainly is true that many members of the public desire to see a reduction in the "scale" of the proposal. They believe it would result in too many homes, particularly in such a short period of time, given the small town atmosphere that Black Diamond seeks to maintain and the Comprehensive Plan's call for gradual growth. But while they oppose the scale and pace of development, few, if any oppose the "density" when that term is used in its technical sense. Much of downtown Black Diamond today is developed at densities of four units per acre or greater. It is not a 4 du/acre density that is opposed as much as it is the massive scale and rapid pace of the proposed development.

Thus, the City Attorney is inaccurate when he states that the base density (of 4 du/acre) is "largely responsible" for the total unit count. Exhibit 218 at 8. That is not true at all. All of this land did not need to be developed in one fell swoop. Nothing in the BDUGAA or City's Comprehensive Plan requires that. It would have been entirely consistent with those documents for this land to be developed in small pieces – at urban densities – over an extended time without having a total unit count in the next fifteen years that dwarfs the existing residences in the City. The City Attorney is absolutely wrong to suggest otherwise.

In like manner, the City Attorney is wrong to suggest that the Hearings Board has or will conclude that these development plans are consistent with the City's Comprehensive Plan. The City Attorney notes that the Hearing Board's initial ruling only resolved the public participation issue (and determined that the City had erroneously failed to involve its Planning Commission in reviewing the development proposals). But let there be no misunderstanding: the Hearings Board did not reject any of the other challenges to the MPD ordinances. Those challenges, including core issues like whether the development proposals are consistent with the City's Comprehensive Plan, remain to be resolved after other appeals and litigation are concluded. We remain confident that when those core substantive issues are decided, the MPD ordinances will be rejected for those reasons (in addition to the public participation flaws already addressed).

Phil Olbrechts
August 19, 2011
Page 5

The City Attorney explains that the development agreement is not the place to reexamine issues resolved in the MPD ordinances, but he fails to acknowledge that the MPD ordinances left many issues to be resolved in the development agreements. As the Examiner has recognized, the City Council has significant discretion to exercise with regard to resolving many of those issues. The City Attorney's efforts to portray the development agreement as a mechanical "checklist" undertaking is an effort to mislead the City Council as to the broad discretion it retains at the development agreement stage. The Hearing Examiner should be clear in his recommendations to alert the City Council that it retains much discretion on many of these issues and to reject the suggestions by the City Attorney (and Yarrow Bay) that they are in some kind of "punch list" role, merely checking that all the "T"s have been crossed and "P"s have been dotted.

Curiously, rather than assessing whether Yarrow Bay's plans are consistent with the Black Diamond Comprehensive Plan, the City Attorney compares Yarrow Bay's plans with similarly massive development projects in Snoqualmie and Issaquah. This is but another example of the City Attorney attempting to distract the Hearing Examiner and decision makers from core issues. Black Diamond's Comprehensive Plan does not contain a vision which suggests that the town seeks to become another Issaquah. The Comprehensive Plan is replete with policies and discussion seeking to preserve the town's small town atmosphere. While Issaquah (and Snoqualmie) may claim that they have done so, anyone familiar with the massive developments around those former small towns is aware that the small town atmosphere is long gone. That is a fate that most of the citizens of Black Diamond seek to avoid for their town.

For the reasons set forth above, please strike exhibit 218 from the record. And among your other recommendations, you might also recommend to the City Council that it retain a city attorney who has more respect for citizen input.

Thank you for considering these comments.

Very truly yours,

BRICKLIN & NEWMAN, LLP



David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Bainbridge Rogers
Client

11/11/11

Stacey Borland

From: Cincity63@comcast.net
Sent: Friday, August 19, 2011 8:00 AM
To: Stacey Borland; Steve Pilcher; Andy Williamson; Brenda Martinez
Cc: Bill Wheeler; Joe May; Dave Bricklin
Subject: Re: Response to 218
Attachments: Olbrechts Phil-08 19 11.docx

All-

Mr. Bricklin has sent an "updated" version of this response.....Please allow his version to supersede my submittal.

Please acknowledge. Thank you.

Cindy Wheeler

From: Cincity63@comcast.net
To: sborland@ci.blackdiamond.wa.us, "Steve Pilcher" <SPilcher@ci.blackdiamond.wa.us>, "." <AWilliamson@ci.blackdiamond.wa.us>, BMartinez@ci.blackdiamond.wa.us
Cc: "Bill Wheeler" <wbwheeler50@comcast.net>, "Joe May" <president@lakesawyer.org>
Sent: Friday, August 19, 2011 7:51:31 AM
Subject: Response to 218

Steve-

While I understand you and Mr. Williamson are out of office, I ask that Ms. Borland forward this response to the Hearing Examiner before the the 8am deadline and provide confirmation receipt to myself, William Wheeler and Joe May.

Thank you.

Cindy Wheeler

EXHIBIT 266



**Bricklin &
Newman
LLP**

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

Spokane Office:
35 West Main
Suite 300
Spokane, WA 99201

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

Reply to: Seattle Office

August 19, 2011

VIA E-MAIL

Phil Olbrechts
Hearing Examiner, City of Black Diamond
Olbrechts & Associates, PLLC
18833 74th Street NE
Granite Falls, WA 98252-9011

Re: Development Agreements

Dear Mr. Olbrechts:

I have been asked by several individuals to respond to the comments of the City Attorney in Exhibit 218. I note that the title of the document is erroneous in an important respect. It characterizes the response as that of the "City." The comments contained in Exhibit 218 are, presumably, the comments of only the City Attorney. At most, they may also represent the comments of the Department of Community Development. They certainly do not represent the views of the City's Hearing Examiner, the City's Planning Commission, the City Council, or any other person or body that works for or represents the City of Black Diamond.

Given the nature of the comments in Exhibit 218, we would appreciate a clarification from the Department of Community Development whether these comments are presented on its behalf or solely on behalf of the City Attorney. If the comments were not presented with the review and consent of the Department of Community Development, it would be good for the Department to so state and expressly disavow association with Exhibit 218.

I have been asked to respond to accusations in Exhibit 218 which are flatly incorrect, irrelevant, and potentially slanderous. These comments raise questions as to whether the City Attorney has violated his ethical obligations (a matter which we recognize is not before the Hearing Examiner, but which demonstrates the magnitude of the issues created by the City Attorney's comments).

First, the City Attorney is wrong about the core facts central to his accusations. As documented in the "Blanket Objection to Response to City of Black Diamond, Exhibit 218" filed by William Wheeler, Cynthia Wheeler, and Joe May (Exhibit No. ?), the quote in Exhibit 218 of the Diamond Coalition's "Mission Statement" is completely inaccurate. The Exhibit 218 "quote" of the Diamond Coalition's Mission Statement on page 4 of Exhibit 218 does not even match the Mission Statement included in the City Attorney's "Attachment A" (which purports to be the basis for the quotation on page 4). Before the City Attorney makes allegations of this sort, he

should check his facts carefully. While CR 11 does not directly apply to the City Attorney's filings in this proceeding, it is clear that if Exhibit 218 had been filed in Court, the City Attorney would be subject to sanctions under that rule. Whether this and other inaccurate and disparaging comments in Exhibit 218 violate the City Attorney's ethical obligations will need to be addressed in another forum.

The City Attorney is also inaccurate in characterizing the Diamond Coalition as a party of record to these or any other proceedings relating to Yarrow Bay's development plans. The City Attorney cannot cite a single piece of paper or a fragment of any transcript where anyone has spoken on behalf of the Diamond Coalition in these or any of the related proceedings. The City Attorney's accusations to the contrary are not founded on any evidence of any kind.

Likewise, it is totally inaccurate for the City Attorney to suggest that William and Cynthia Wheeler or Joe May ever stated that they were testifying as representatives of the Diamond Coalition. At no time did any of these individuals state that their testimony was presented on behalf of the Diamond Coalition. The City Attorney can cite no document or transcript that suggests otherwise.

Next, the City Attorney alleges that the Diamond Coalition has the goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5:12. No citation is provided for this allegation. It is another falsehood. The City Attorney should check his facts.

William and Cynthia Wheeler and Joe May previously requested the Hearing Examiner to strike Exhibit 218 because it contains falsehoods. The Examiner denied the request, reasoning that the objections went to the accuracy of the testimony, not its admissibility. However, ER 403 makes clear that even relevant evidence may be excluded under circumstances like these:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury [fact finder] . . .

Exhibit 218 will become part of the permanent record of this proceeding. It will be available to the public at-large via its posting on the City's website. It contains falsehoods and factual allegations that are totally unsubstantiated. It is demeaning to those citizens who are unjustly accused therein. The Examiner should not allow this exhibit to remain in the record and available indefinitely on the City's website. The Examiner should reconsider his ruling not to strike this exhibit. It should be expunged.

If the Examiner does not strike the exhibit, at minimum, the Examiner should enter findings that make clear that Exhibit 218's allegations are false and unsubstantiated and that they should be ignored by the City Council.

The City Attorney continues his disparaging attack on the citizens by suggesting that the comments filed by hundreds of citizens opposing these developments are simply so many unthinking marionettes orchestrated by a few puppeteers. This allegation is demeaning not only

to hard working volunteer community leaders like Peter Rimbos, William and Cynthia Wheeler, Bob Edelman, and Cindy Procter, but, more importantly, it is extremely demeaning to the hundreds of citizens who have taken the time to participate in this process.

We are flabbergasted that the City Attorney would seek to undercut the input from these citizens by suggesting that they had been assisted by community leaders. The City ostensibly supports public participation. The City ostensibly encourages the public to participate in its planning proceedings. The City ostensibly *wants* to hear from its citizens. If people like Peter Rimbos and Cynthia Wheeler help citizens respond to the City's request for public participation, they should be thanked for their efforts, not assailed. The Department of Community Development and the Hearing Examiner should go out of their way to thank the citizens for their input and to caution the City Attorney not to disparage those citizens who take time from their busy schedules to participate in these proceedings.

Underlying the City Attorney's accusations is the apparent argument that the comments of these hundreds of citizens should be ignored or given less weight because they responded to the request for citizen input from the City and community leaders. Apparently, the City Attorney believes that the citizens who have commented are so many lemmings rotely chanting the same theme as that expressed by people like Mr. Rimbos. Anyone who has been involved in public participation efforts knows that it is not easy to prompt a citizen to take action in a proceeding like this. In a typical case, even repeated requests for citizen input fall on deaf ears as citizens either do not care about the project or at least do not care enough about it to take the time to comment given all the other demands on their time. The City has received hundreds of citizen comments in opposition to these development proposals not simply because the City and community leaders asked the citizens to comment, but because these hundreds of citizens *cared*. They *care* about their community. They *care* about protecting the small town atmosphere of Black Diamond. They *care* about upholding the primary tenets of the Comprehensive Plan which calls for maintaining Black Diamond's small town atmosphere. And they *cared* enough about these issues to take up a pen or come to a hearing even though they are extremely busy raising families, earning a living, taking care of personal health issues, and otherwise trying to stay on top of their own personal needs. The huge outpouring of public sentiment cannot be attributed to Mr. Rimbos' efforts alone. The huge outpouring of public sentiment is a reflection of the huge and adverse impact that Yarrow Bay's plans would have on the small town called Black Diamond and the love of that small town by so many of its citizens.

In sum, the City Attorney's efforts to demean and trivialize the massive citizen input (which is nearly uniformly in opposition to these proposed developments in their current form) should be rejected. But the City Attorney's decision to devote so much time and space to this demeaning effort begs the question: Why? Why has the City Attorney spent more time attacking the motives and credibility of the citizens than in addressing the substance of their issues? The answer is obvious. The City Attorney has little to say with regard to the substance. The City Attorney cannot deny that the proposals are wildly at variance with the basic tenets of the City's Comprehensive Plan, which calls for maintenance of the town's small-town atmosphere and *slow* growth within the town, not a rapid fivefold expansion. But while the City Attorney primarily

uses Exhibit 218 to attack the citizens, he does devote a few passages to discuss substantive issues. We turn to those now.

One of the City Attorney's attacks is based on misuse of terms, in particular, misunderstandings regarding the meaning of the word "density." To a trained land use planner, the word "density" refers to a mathematical concept: the number of units per acre. Technically, density is unrelated to the size of a development. That is, a small development could have a high density or a low density, depending on whether many or a few homes were located on the (small amount of) land being developed. Likewise, a large development proposal may have a high or low density, again depending on whether the number of units per acre were high or low.

But while "density" has this technical meaning to land use planners, many lay people do not distinguish between "density" and the size of a project. That is, they conflate the concepts of "high density" and "scale." Thus, the City Attorney refers (inaccurately) to the Diamond Coalition's goal "to see a significant reduction in the MPD proposed density/scale." Exhibit 218 at 5. It certainly is true that many members of the public desire to see a reduction in the "scale" of the proposal. They believe it is too many homes, particularly in such a short period of time, given the small town atmosphere that Black Diamond seeks to maintain and the Comprehensive Plan's call for gradual growth. But while they oppose the scale and pace of development, few, if any oppose the "density" when that term is used in its technical sense. Much of downtown Black Diamond today is developed at densities of four units per acre or greater. It is not a 4 du/acre density that is opposed as much as it is the massive scale and rapid pace of the proposed development.

Thus, the City Attorney is inaccurate when he states that the base density (of 4 du/acre) is "largely responsible" for the total unit count. Exhibit 218 at 8. That is not true at all. All of this land did not need to be developed in one fell swoop. Nothing in the BDUGAA or City's Comprehensive Plan requires that. It would have been entirely consistent with those documents for this land to be developed in small pieces – at urban densities – without having a total unit count that dwarfs the existing residences in the City. The City Attorney is absolutely wrong to suggest otherwise.

In like manner, the City Attorney is wrong to suggest that the Hearings Board has or will conclude that these development plans are consistent with the City's Comprehensive Plan. The City Attorney notes that the Hearing Board's initial ruling only resolved the public participation issue (and determined that the City had erroneously failed to involve its Planning Commission in reviewing the development proposals). But let there be no misunderstanding: the Hearings Board did not reject any of the other challenges to the MPD ordinances. Those challenges, including the core issues like whether the development proposals are consistent with the City's Comprehensive Plan remain to be resolved after other appeals and litigation are concluded. We remain confident that when those core substantive issues are decided, the MPD ordinances will be rejected for those reasons (in addition to the public participation flaws already addressed).

While the development agreement may not be the place to reexamine issues resolved in the MPD ordinances, the MPD ordinances left many issues to be resolved in the development agreement.

As the Examiner has recognized, the City Council has significant discretion to exercise with regard to resolving many of those issues. The City Attorney's efforts to portray the development agreement as a mechanical "checklist" undertaking is an effort to mislead the City Council as to the broad discretion it retains at the development agreement stage. The Hearing Examiner should be clear in his recommendations to alert the City Council that it retains much discretion on many of these issues and to reject the suggestions by the City Attorney (and Yarrow Bay) that they are in some kind of "punch list" role, merely checking that all the "Ts" have been crossed and "Is" have been dotted.

Curiously, rather than assessing whether Yarrow Bay's plans are consistent with the Black Diamond Comprehensive Plan, the City Attorney compares Yarrow Bay's plans with similarly massive development projects in Snoqualmie and Issaquah. This is but another example of the City Attorney attempting to distract the Hearing Examiner and decision makers from core issues. Black Diamond's Comprehensive Plan does not contain a vision which suggests that the town seeks to become another Issaquah. The Comprehensive Plan is replete with policies and discussion seeking to preserve the town's small town atmosphere. While Issaquah (and Snoqualmie) may claim that they have done so, anyone familiar with the massive developments around those former small towns is aware that the small town atmosphere is long gone. That is a fate that most of the citizens of Black Diamond seek to avoid for their town.

Thank you for considering these comments.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Bainbridge Rogers
Client

Stacey Borland

From: BOB STERBANK <BOB@kenyondisend.com>
Sent: Friday, August 19, 2011 8:03 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; MARGARET Starkey; MIKE KENYON
Subject: City's Reply Comments
Attachments: PLD - CITY'S Reply Regarding Responses to Verbal Testimony and Written Comments.doc

Steve:

Please find attached the City's Reply Regarding Responses to Verbal Testimony and Written Comments. This is the third of three submissions.

Regards,

Bob Sterbank

Bob C. Sterbank
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Direct Tel: (425) 988-2208
Main Tel: (425) 392-7090
Fax: (425) 392-7071
bob@kenyondisend.com
www.kenyondisend.com

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

EXHIBIT 267

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 OF BLACK DIAMOND'S
REPLY REGARDING RESPONSES
TO VERBAL TESTIMONY AND
WRITTEN COMMENTS

I. INTRODUCTION

The City of Black Diamond submits this reply regarding the responses filed by other parties of record regarding the verbal testimony given during the last two days of the open record hearing in this matter and written comments. Like the verbal testimony and written comments, the responses thereto consist primarily of improper collateral attacks and legal arguments that, while creative, lack merit, factual support or both. The City renews its request that the Examiner recommend approval of both Development Agreements.



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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

II. ANALYSIS

A. Standard of Review

1. The Hearing Examiner's and the City Council's Review of the Development Agreements Is a Quasi-Judicial, Project-Specific Land Use Action.

At the outset, the Examiner should clarify that the Examiner's and City Council's review of the Development Agreements is a quasi-judicial, project-specific land use action. Some parties, *e.g.*, Brian Derdowski, Save Black Diamond the Sensible Growth Alliance and other individuals, allege that the "Development Agreements are inherently an exercise of the City's legislative authority." Ex. 205 at pages 7 and 8.¹ This is incorrect. Ex. 205 cites no legal authority for its contention, and there is none.

The Development Agreements are quasi-judicial, first because the City's code says so. BDMC Section 18.08.030 provides that development agreements are reviewed using a "Type 4 – Quasi-Judicial" process. See also BDMC 18.08.070(C)(2) (Development agreements require Type 4 process). The DAs are quasi-judicial also because state law so provides. Under RCW 36.70B.200, "[i]f the development agreement relates to a project permit application, the provisions of chapter 36.70C RCW [LUPA] shall apply to the appeal of the decision on the development agreement." Because LUPA governs review of quasi-judicial project permit decisions (but not review of legislative decisions), a development agreement that "relates to a project permit application" is necessarily quasi-judicial. *See also Mercer Island Citizens for a Fair Process v. Mercer Island*, 156 Wn. App. 393 (Div. I 2010) (temporary use agreement was land use decision subject to LUPA's 21-day limitations period). Here, as the Examiner can readily

¹ Mr. Derdowski's Ex. 205 is not paginated. The page citations above were determined by counting the

1 observe, the proposed DAs relate to and govern subsequent, implementing project
2 permits, such as subdivisions, binding site plans, building permits, and the like. *See, e.g.,*
3 Villages DA at 4 (Recital H), at 6, § 2.1, and at 143, §15.1; Lawson Hills DA at 4
4 (Recital H), at 6, §2.1, and at 130, § 15.1. These DAs are reviewable under LUPA, and
5 accordingly must be conducted under a quasi-judicial process.

6 2. The Development Agreements Are Required to Comply with BDMC
7 18.98.090 and the City's Development Regulations – Not Every Hypothetical
8 Legal Hurdle.

9 At the outset, the Examiner should clarify the legal standards applicable to the
10 Development Agreements. These requirements are chiefly BDMC 18.98.090 and RCW
11 36.70B.170, and not every conceivable legal hurdle that can be identified. Some
12 commenters argue otherwise. Lisa Schmidt, for example, contends that the Development
13 Agreements should be tested against even *inapplicable* laws. *See, e.g.,* Exhibit 197 at 1-2
14 (“The seeming inapplicability of some codes or ordinances does not grant permission to
15 act in a manner inconsistent with them.”). Ms. Schmidt also cites Brian Derdowski’s
16 argument (Exhibit 40), to the effect that that every possible municipal code, regulation, or
17 ordinance must also apply to the Development Agreements.

18 The commenters -- who point to no legal authority for their position² -- are again
19 incorrect. The basic requirements for a development agreement are set out in RCW
20 36.70B.170(1), which states:

21 A development agreement must set forth the development
22 standards and other provisions that shall apply to and
23 govern and vest the development, use, and mitigation of the
development of the real property for the duration specified

24 pages.

25 ² This is curious, and therefore telling, given their ready access to legal counsel (Mr. Bricklin), who also submitted separate written comments on behalf of Save Black Diamond.

1 in the agreement. A development agreement shall be
2 consistent with applicable development regulations adopted
3 by a local government planning under chapter 36.70A
4 RCW.

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

9 The term “development regulations” has a specific meaning. It does not mean
10 every conceivable ordinance, regulation or arguable legal requirement. Instead, it refers
11 specifically to “development regulations adopted by a local government planning under
12 chapter 36.70A RCW.” As such, “development regulations” does not refer – as Mr.
13 Derdowski and Ms. Schmidt would have it – to ordinances or resolutions that authorized
14 execution of prior contracts with third parties (such as the BDUGAA, or the Black
15 Diamond Area Open Space Agreement). Instead, “development regulations” refers to the
16 City’s project- specific development regulations adopted under the GMA and applicable
17 to the DAs and MPD Permits. Thus, the DAs must be “consistent with” the
18 “development regulations” in Chapter 18.98 of the BDMC, and other City development
19 regulations applicable to MPD development (for example, the City’s Engineering Design
20 and Construction standards, adopted by reference in BDMC Section 15.08.010).

21 To say that the DAs must be “consistent with” BDMC 18.98 is not the same thing
22 as saying that the DAs must be measured against every provision of Chapter 18.98 before
23 they may be approved. Instead, the DAs must be measured against the specific
24 provisions in Chapter 18.98 that apply to development agreements – that is, BDMC
25



1 18.98.090. While the DAs may not be inconsistent with other provisions of BDMC
2 18.98, that is, they may not authorize something that is prohibited by another section of
3 Chapter 18.98, the individual provisions of Chapter 18.98 do not generally apply to the
4 consideration of approval of a DA for an MPD. That is because the sections of Chapter
5 18.98 apply to issuance of MPD Permits – which have already been issued for the two
6 projects that are the subject of the DAs – and only the more specific provision in
7 18.98.090 applies to approval of DAs for the MPDs. *See, e.g., Bainbridge Island Police*
8 *Guild v. Puyallup*, ___ Wn.2d ___ (August 18, 2011), *slip op.* at 6, n.2 (“We have long
9 recognized that where two statutes apply, the specific statute supersedes the more general
10 statute,” *citing Gen. Tel. Co. of the Nw., Inc. v. Utils. & Transp. Comm’n*, 104 Wn.2d
11 460, 464, 706 P.2d 625 (1985)).

12 As to the particular requirements for a Master Planned Development Permit
13 (“MPD”) development agreement, those are set out in BDMC Section 18.98.090:
14

15 The MPD conditions of approval shall be incorporated into
16 a development agreement as authorized by RCW
17 36.70B.170. This agreement shall be binding on all MPD
18 property owners and their successors, and shall require that
19 they develop the subject property only in accordance with
20 the terms of the MPD approval.

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

1 The foregoing are the legal standards applicable to the DAs. Contrary to Ms.
2 Schmidt's and Mr. Derdowski's suggestions, not every resolution, ordinance, regulation
3 or conceivable legal requirement applies to the DA. While some may wish to stack as
4 many legal hurdles before the DAs as possible, the applicable legal requirements are
5 relatively limited, and are the ones described above.

6 B. The Hearing Examiner Should Reject Calls for Imposition of New
7 Conditions Not Included as MPD Permit Conditions.

8 As pointed out in the City's Response, a number of written comments call for the
9 imposition of new DA conditions that are acknowledged to not be required by the terms
10 of MPD Permit approval. City Response at 10-11. Some of the project opponents'
11 response comments continue requesting new DA conditions, even though they are not
12 required by terms of MPD Permit approval. *See, e.g.,* "Response" to Yarrow Bay's
13 8/4/11 Written Comments and Oral Testimony Regarding Transportation Issues by Peter
14 Rimbos (Exh. 224) at 10-12 (calling for Cost/Benefit/Risk analysis condition). The
15 Hearing Examiner himself commented on this in the Order on Yarrow Bay Objections,
16 stating:

17 The fact that the DAs are required by the Black Diamond
18 Municipal Code to implement the MPD conditions of approval
19 does not in any way suggest that the public is prohibited from
20 making suggestions on how to supplement the conditions of
21 approval as authorized by state statute, especially when the City
and the Applicant have been engaged in those discussions
themselves.

22 Order on Yarrow Bay Objections at 1-2.

23 With all due respect, the foregoing statement overlooks the difference between
24 members of the public demanding imposition (over the Applicant's objection) of
25

1 required DA conditions, on the one hand, and the City and Applicant engaging in
2 discussions concerning voluntary, agreed-upon additional conditions for the DAs. This
3 is a critical distinction. The Examiner and City Council have the authority to insist that
4 the DAs include the conditions that BDMC 18.98.090 requires DAs to include, namely,
5 incorporation of MPD Permit conditions. The DAs may include such other additional
6 conditions that the two parties agree upon (RCW 36.70B.170(3)), but beyond this,
7 neither state statute nor the City's code provides express authority. This is especially
8 the case where by city code, as here, the DAs function primarily as the recorded
9 memorialization of already-extant project permit conditions.³ Simply put, the fact that
10 the City and Applicant have engaged in discussions about voluntary additional
11 conditions to which the Applicant might agree does *not* open the door for the public to
12 demand that the Examiner or Council impose additional new, required conditions.

13
14 C. Inclusion of More Specific Conditions in the DAs Does Not Violate State
15 Law.

16 Turning the above argument on its head, Save Black Diamond ("SBD") argues
17 in a separate submission by David Bricklin (Ex. 202) that the presence within the DA
18 of additional or more specific conditions than those included in the MPD Permit
19 violates the applicable statute, RCW 36.70B.170. August 10, 2011 letter from D.
20 Bricklin to Examiner Phil Olbrechts. This argument misreads the statute.

21 As noted above, RCW 36.70B.170 requires that 'a development agreement shall

22
23 ³ See, e.g., BDMC 18.98090. Save Black Diamond apparently agrees on this point. See August 10, 2011
24 letter from David Bricklin (Ex. 202) at 2 ("the statute authorizes the development agreement to specify
25 existing regulations which will apply to the multiple phases of a long-term project, but it does not authorize
the development agreement to actually establish new regulations that do not currently apply to the subject
property."); at 3 ("the development agreements can only lock-in (vest to) regulations that already apply to
the property; the development agreement cannot adopt new regulations . . .").

1 be consistent with applicable development regulations adopted by a local government
2 planning under chapter 36.70A RCW.” As also noted above, “development
3 regulations” is a term of art, specifically referring to those regulations adopted pursuant
4 to the GMA planning process to implement a city’s GMA comprehensive plan. The
5 requirement in RCW 36.70B.170 that a DA be “consistent with” “development
6 regulations” simply means that a development agreement may not permit something
7 that an applicable development regulation prohibits.

8 This is not to say, however, that a DA may not address other, project-specific
9 standards (as opposed to generally applicable “development regulations”). RCW
10 36.70B.170 requires, in fact, that a DA “must set forth the development standards and
11 other provisions that shall apply to and govern and vest the development, use, and
12 mitigation of the development” RCW 36.70B.170(3) outlines a non-exhaustive
13 list of the types of provisions that constitute “development *standards*” (as distinct from
14 “regulations”). These include, expressly, “project elements such as permitted uses . . .
15 or building sizes,” “design standards such as maximum heights [or] setbacks,”
16 “phasing” and “review procedures and standards for implementing decisions.” RCW
17 36.70B.170(3)(a), (d), (g) and (h). If a DA’s “development *standards*” could lawfully
18 consist of only those provisions already incorporated in a city’s GMA “development
19 regulations,” there would be nothing to include in the DA. Save Black Diamond’s
20 argument in Ex. 202, that “the statute authorizes the development agreement to specify
21 existing regulations which will apply to the multiple phases of a long-term project, but
22 it does not authorize the development agreement to actually establish new regulations
23 that do not currently apply to the subject property,” just flat-out misinterprets the
24
25



1 statute.

2 The remainder of Save Black Diamond's argument proves this point. At pages
3 2-3, SBD cites RCW 36.70C.170(3) and admits that a development agreement "also
4 addresses matters like the duration of the vesting period, phasing requirements,
5 subsequent review procedures, and impact fees." As such, SBD continues, "the City has
6 nearly unbridled discretion to determine the content of the development agreement."
7 Paradoxically, SBD then claims that the City and the Applicant have put themselves in
8 a box by including in the DAs certain other standards, even though those other
9 standards are *expressly authorized by the very same statute* that SBD says give the City
10 "nearly unbridled discretion." For example, SBD singles out Table 4-1's list of
11 "possible uses" and Chapter 5's provisions for "setbacks, other bulk regulations,
12 landscaping and signs,⁴ but these fall squarely within RCW 36.70B.170(3)(a) ("project
13 elements such as permitted uses . . . or building sizes") and (3)(d) ("design standards
14 such as maximum heights, setbacks [or] landscaping . . .").

15
16 There is one simple explanation that harmonizes RCW 36.70B.170, BDMC
17 18.98.090, the MPD Permits, and the DAs. That is as follows: (1) the DAs must be
18 consistent with the applicable MPD development regulations set forth in Chapter 18.98
19 and elsewhere in the City's code⁵; (2) the DAs are required to incorporate the terms and
20 conditions of MPD Permit approvals⁶; and (3) the DAs may contain additional
21 "development standards" – which by definition include Table 4-1 and the standards in
22

23
24 ⁴ Ex. 202 at 3-4.

⁵ RCW 36.70B.170(1).

⁶ BDMC 18.98.090.



1 Chapter 5 -- if agreed to by both the City and the Applicant.⁷ Properly viewed this
2 way, the DAs currently before the Examiner for review comply perfectly with
3 applicable law.

4 D. Legally Cognizable Justification for the Exercise of Substantive SEPA
5 Authority Has Not Been Identified.

6 Save Black Diamond's Ex. 202 also seems to invite the Hearing Examiner to
7 recommend that the City Council require additional environmental analysis, under the
8 guise of the exercise of substantive SEPA authority. Ex. 202 at 4-5. No legally
9 cognizable grounds have been identified for the exercise of substantive SEPA authority.

10 The legal basis for the exercise of substantive SEPA authority is neatly
11 summarized at page 2 of the Hearing Examiner's Order on Yarrow Bay Objections:

12 RCW43.21C.060 provides that "any governmental action may be
13 conditioned or denied" pursuant to SEPA. (emphasis added). An
14 environmental document such as an EIS is intended to provide the
15 basis for this exercise of supplemental authority to all the
16 government actions to which it applies. However, the exercise of
17 SEPA supplemental authority is subject to numerous restrictions.
18 Most pertinent, conditions must mitigate impacts identified in the
19 FEIS and the conditions must be reasonable, which in the context
20 of the DAs probably means they must be related to and
21 proportionate to the mandatory (*i.e.* as an implementing tool) scope
22 of the DAs. See RCW43.21C.060. Parties may also be precluded
23 from arguing for specific mitigation if they argued for the same
24 mitigation in the MPD/FEIS hearings. *See Willapa Grays Harbor*
25 *Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wash. App. 417,
423, 62 P.3d 912 (2003).

21 Additional conditions that are a prerequisite to the exercise of substantive SEPA
22 authority are set forth in WAC 197-11-660(1). These include the requirement that
23 the additional conditions be "related to specific, adverse environmental impacts
24 clearly identified in an environmental document on the proposal," "stated in

25 ⁷ RCW 36.70B.170(1) and (3).

1 writing by the decision maker,” and “cite the agency SEPA policy that is the basis
2 of any condition” WAC 197-11-660(1)(b).

3 Given these requirements, no legally cognizable basis has been identified
4 for the exercise of substantive SEPA authority. First, SBD’s Ex. 202 does not call
5 for additional mitigating conditions, but rather, additional environmental analysis.
6 Substantive SEPA authority provides a limited opportunity for imposition of
7 additional mitigation, not analysis. SBD’s argument represents exactly the type of
8 collateral attack on the FEIS process that Yarrow Bay has identified. The City’s
9 adoption of the FEIS for consideration of the DAs is not subject to administrative
10 appeal, and cannot be made so via substantive SEPA authority.

11 Further, as the Applicant points out, the FEIS issued for the MPD Permits
12 was deemed adequate, and the City adopted that FEIS for the DAs. While SBD
13 suggests that The FEIS may not also be adequate “for making the more detailed
14 decisions that now arise in the development agreement context,” the project
15 authorized by the MPD Permits and the DAs are one and the same, some
16 additional feature identified as part of the DAs would need to be identified as the
17 source of the impact requiring the additional mitigation. Otherwise, the exercise
18 of substantive authority would merely add mitigation for the same impacts
19 identified and already mitigated via the MPD Permit Conditions. As the
20 Examiner’s Order observes, this is impermissible if the party seeking the
21 additional mitigation “argued for the same mitigation in the MPD/FEIS hearings.
22 *See Willapa Grays Harbor Oyster Growers Ass’n v. Moby Dick Corp.*, 115 Wash.
23 App. 417, 423, 62 P.3d 912 (2003).” It would also run afoul of WAC 197-11-
24
25



1 660(1)(e), which provides that “before requiring mitigation measures, agencies
2 shall consider whether local, state, or federal requirements and enforcement
3 would mitigate an identified significant impact.”

4 To date, no party has identified any new aspect of the DAs that was not a
5 feature of the MPD Permits and mitigated via the FEIS and conditions of the
6 MPD Permits. Instead, the project opponents demand the same mitigation they
7 sought during the MDP Permit process. Peter Rimbo, for example, seeks new
8 conditions relating to a new traffic demand model, analysis of peak hour factor,
9 queuing, travel time, and the like. Ex. 113 and 224. Judith Carrier requests more
10 analysis and more measures to reduce traffic volumes on Green Valley Road, or
11 more protections for bicyclists thereon. Ex. 187. Jack Sperry asks for additional
12 mitigation to prevent a potential increase in the level of Lake Sawyer. Ex. 67, 68
13 and 198. Each of these individuals (and many others) argued about the existence
14 of the exact same impacts, and for imposition of the same mitigation for them,
15 during the MPD Permit hearings and FEIS appeals. Those issues were resolved
16 by the City Council’s issuance of the MPD Permits with hundreds of conditions.

17
18 E. The Hearing Examiner Should Reject The Project Opponents’
19 Collateral Attack on the MPD Density Standards in the City’s
20 Comprehensive Plan and Development Regulations.

21 In the City’s Response to Verbal Testimony and Written comments, the City
22 asked the Examiner to reject the project opponents’ collateral attack upon the City
23 Council’s 2009 policy decisions to adopt an MPD density standard of a minimum of 4
24 units per gross acre. The City provided evidence that oral and written testimony had been
25 solicited and coached by an inter-linked network of three nonprofit corporations, and that



1 a goal stated in online materials of the funding organization (the Diamond Coalition) is
2 “to see a significant reduction in the MPD proposed density/scale from the proposed
3 6,050 new dwelling units to . . . 1,900 new households.” Ex. 218, Att. A. The reason for
4 City’s request that the Examiner reject the project opponents’ arguments is that the City’s
5 prior policy decisions – which were not challenged or appealed -- are beyond the reach of
6 the Examiner’s limited jurisdiction concerning the DAs.

7 1. Project Opponents Responses Expressly Seek MPD Density Reduction

8 Following submission of the City’s response, some individuals (Mr. Edelman and
9 Ms. Wheeler) objected to the City’s submission of this evidence on the grounds that, *inter*
10 *alia*, there is no goal to reduce MPD project density.⁸ The Examiner rejected these
11 objections, but it is also worth noting that the written responses of other parties prove the
12 City’s point. For example, the response submitted by Lisa Schmidt expressly argues that
13 “losses and suffering [from the MPDs] can only be *mitigated by a greatly reduced scope*
14 *of development.*” Ex. 197 at 1 (italics added). This argument is repeated at page 9 with
15 respect to traffic impacts regarding Green Valley Road: “If the only mitigation to ensure
16 safety on the road is *to reduce the scope of development, then that is the action that needs*
17 *to be taken.*” Ex. 197 at 9 (italics added). It can hardly be contended that there is no
18 express MPD density reduction goal when project opponents like Ms. Schmidt expressly
19

20
21 ⁸ Ms. Wheeler also challenged the provenance of Att. A to Ex. 218. Those documents are readily locatable
22 with a quick “Google” search for “The Diamond Coalition,” which provides a link to the organization’s
23 “Contact information,” which is page 2 of Attachment A. From there, one click on the link to “Projects”
24 discloses page 1 of Attachment A, which states the group’s “goal” to “to see a significant reduction in the
25 MPD proposed density/scale.” Those documents were located and printed this way on August 12, as the
Examiner can observe by the printing date shown in the bottom right corner of both pages of Att. A to Ex.
218. They remain available today. See printing date on Att. 1 hereto. Project opponents lacking courage
of their convictions may have hurried to take down these links by the time the Examiner reads this, but the
printing dates on Attachment 1 hereto and Att. A to Ex. 218 demonstrates that the statements’ ready public
availability.



1 argue for it.

2
3
4 2. Calls for MPD Density Reduction Are an Improper, Untimely
5 Collateral Attack on the City's Comprehensive Plan and MPD
6 Development Regulations.

7 As pointed out in the City's Response, arguments such as Ms. Schmidt's
8 that call for MPD density reductions constitute an improper, untimely attack on the City's
9 2009 Comprehensive Plan MPD density standards, and those codified in BDMC
10 18.98.120(E). When a GMA comprehensive plan or development regulation is adopted,
11 and the 60-day limitations period expires, the enactment cannot be later challenged in
12 another forum.⁹ The Washington Supreme Court just re-affirmed this rule, in *Feil v.*
13 *Eastern Washington Growth Management Hearings Board*, __ Wn.2d __ (August 18,
14 2011), slip. op. at 12-13.

15 In *Feil*, a group of orchardists challenged Douglas County's determination to
16 proceed with development of a regional bicycle trail. The orchardists sought to challenge
17 the trail on the grounds that, among other things, the Recreational Overlay District permit
18 used to authorize the trail was inconsistent with the GMA's command to preserve
19 agricultural lands of long-term significance. The Supreme Court first held that the
20 Growth Board lacked jurisdiction to review the R-O District permit, because it was a
21 project permit and not a development regulation subject to Board review. The Court also
22 rejected the Orchardists' claim that the R-O district itself was inconsistent with the GMA,
23

24 ⁹ See, e.g., *Coffey v. Walla Walla*, 145 Wn.App. 435, 187 P.3d 272 (Div. III 2008) (challenge to
25 comprehensive plan amendment could not be brought in superior court, after 60-day period for petition for
review to Board had expired); see also *Woods v. Kittitas County*, 162 Wn.2d 597, 615, 174 P.3d 25 (2007);

1 because:

2 the Orchardists' recourse was to file a petition with the EWGMHB
3 within 60 days of the adoption of the regulation permitting an R-O
4 district. See RCW 36.70A.290(2). After the 60-day window has
5 expired, only LUPA challenges to the compliance of site-specific
6 rezones with the County's comprehensive plan and development
7 regulations can be brought, which are heard by the superior court.
8 *Woods*, 162 Wn.2d at 616. As noted above, the Orchardists filed a
9 LUPA petition, but the challenge was unsuccessful and the
10 Orchardists did not ask us to review that decision of the Court of
11 Appeals.

12 Slip op. at 13. The *Feil* Court distinguished the case before it from its decision in King
13 County v. CPSGHB, in which it overturned a challenge to a King County decision to
14 approve certain soccer fields on agricultural lands, noting that in *King County*, "unlike
15 here, the party challenging the hearings board's decision timely did so by filing its
16 petition within the 60- day statute of limitations set forth in the GMA." *Id.* at 12, n. 6.

17 The Court's holding today in *Feil* confirms that, once the 60-day limitations
18 period for challenging a GMA comprehensive plan or development regulations passes,
19 courts will not entertain collateral challenges to those enactments. Instead, only LUPA
20 challenges may be brought to a project permit's consistency with applicable development
21 regulations. Here, the challenges to the MPD's size, scale and density, however labeled,
22 are nothing more than collateral attacks upon the MPD minimum density standards set by
23 the City's Comprehensive Plan and BDMC 18.98.120(E). In fact, at least one project
24 opponent implicitly admits to this collateral attack, acknowledging a desire to challenge
25 the Comprehensive Plan, development regulations, and design guidelines, despite also
admitting to having closely followed the City Council's 2009 process for adopting all
three of those legislative policy documents. See, e.g., 8/12/2011 submission of C. Proctor

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 1

1 at 1-2 (arguing that public should still be allowed to challenge Comp Plan, development
2 regulations and other documents adopted by City Council prior to lifting moratorium).
3 The 60-day limitations period for challenging the Comprehensive Plan and development
4 regulations' MPD minimum density standard passed long ago, in 2009. Such challenges
5 now are untimely.¹⁰

6 Given the foregoing, the Hearing Examiner should reject the project opponents'
7 calls to address project density, either overtly, or by use of the DAs as a "tool" (the
8 Diamond Coalition's word) to limit the amount of MPD development other than as
9 approved by the City Council in the MPD Permits themselves.

10 F. There Is No Factual Basis for The Additional Mitigation Requested.

11 As noted above, several project opponents continue to request that the Hearing
12 Examiner revise MPD Permit conditions of approval, and/or impose additional mitigation
13 not required by the MPD Permit conditions. *See, e.g.,* Ex. 198 (Sperry Written
14 Comments), Ex. 187 (Carrier), Ex. 197 (Schmidt) and Ex. 224 (Rimbos). In addition to
15 the legal flaws with these requests already identified, these requests are unwarranted for
16 technical and factual reasons as well. This is explained in the Reply Declarations of John
17 Perlic and Daniel Ervin, filed in support of this Reply. As before, the individual
18 commenters are not experts. Accordingly, under the terms of the Examiner's previous
19 rulings, their testimony on these technical topics must be given weight only as their
20 personal opinions, and not an expert opinion. Conversely, both Mr. Ervin and Mr. Perlic
21 are leading experts in their fields, as demonstrated by their resumes attached to their
22 declarations. Their declarations conclusively demonstrate why Mr. Sperry's, Mr.
23
24

25 ¹⁰ Project opponents did challenge the MPD Permits in a LUPA petition in Superior Court, but chose not to

1 Rimbos, Ms. Carrier's and Ms. Schmidt's personal opinions and requested conditions are
2 unsupported by the applicable, relevant, prudent engineering principles. The requested
3 additional conditions should be rejected.

4 G. Comments Concerning Adequacy of Water Rights Lack Merit.

5 Some commenters continue to claim, piggybacking on earlier comments of Brian
6 Derdowski, that Section 7.2.1 of the DAs is defective because there has been no
7 demonstration that water rights are valid or capable of being perfected, and that therefore,
8 "provisions should exist in the DA that require firm water certificates for every portion of
9 the proposed development." Ex. 197 (Schmidt) at 6-7. These comments misunderstand
10 the language in Section 7.2.1 of the DAs.

11 Section 7.2.1 refers to property with rights to approximately 1.087 million GPD . .
12 . ." This is not a reference to "water rights" as that term is used in RCW Chapters 90.03
13 or 90.44. "Water rights" used in that context involve issuance of a water right permit by
14 the Department Ecology, a "perfection" process, followed ultimately by issuance of a
15 water right certificate pursuant to RCW 90.03.330. Approvals to change the place of
16 withdrawal of a groundwater right, the place of diversion of a surface water right, or to
17 change the place of use, also require Department of Ecology review that takes into
18 account a determination of the validity of the underlying claimed water right certificate.
19 *See, e.g.,* RCW 90.03.380 and 90.44.100(1). A "water right" is a form of property right.
20

21 The "rights" referred to the DAs, by contrast, refer to the right to receive
22 wholesale water, from the City of Black Diamond. The DAs refer to a contractual right,
23 not a "water right" as that term is used in the context of RCW 90.03 and 90.44. Such
24

25 pursue that action. It has since been stayed by the Superior Court.

1 contractual rights to receive water from a water purveyor are not subject to requirements
2 for validation and perfection as Mr. Derdowski and Ms. Schmidt's comments assume.
3 Instead, those contractual rights rely on the City's Comprehensive Water System Plan
4 (part of Ex. E to the DAs) which outlines at pages 2-8 – 2-14 the City's water right
5 certificates and rights to receive wholesale water under an Intertie Agreement with the
6 City of Tacoma. Black Diamond's water rights certificates are municipal water rights,
7 have already been perfected and, as such, are statutorily protected from relinquishment
8 and against the validation process pursuant to the 2003 Municipal Water Law's
9 amendments to RCW 90.03.015 and .330. *See Lummi Nation v. State*, 170 Wn.2d 247,
10 259-69, 241 P.3d 1220 (2010). The City of Tacoma's water rights, by which it will
11 supply Black Diamond under the Intertie Agreement, are likewise municipal water rights
12 protected by the Municipal Water Law. Black Diamond's water sources (both those
13 supplied by the water rights certificates and the Tacoma Intertie Agreement) were
14 evaluated in the City's Water System Plan (see pages 3-4 – 3-6) and determined to be
15 sufficient to supply the MPDs (pages 4-10 – 4-11). This judgment was concurred in by
16 the Department of Health when it approved the Water System Plan. See Ex. 218, Att. E-
17 2.
18

19 In turn, the City has entered into an agreement with Yarrow Bay's predecessors
20 that, "in essence reserve capacity" in the City's water supply for the properties. Water
21 System Plan at 3-5, citing the Water Supply Facilities Funding Agreement (WSFFA) and
22 other agreements at Appendix M of Plan. Yarrow Bay's predecessors made further
23 agreements among themselves in the "Three Party Agreement." It is these contractual
24 "rights" associated with the MPD property to which the DAs refer. Because these are
25



1 contractual rights to receive water, and because the City's approved Water System Plan
2 planned for and documented sufficient, statutorily-protected municipal water sources by
3 which to serve the MPDs, Mr. Derdowski and Ms. Schmidt's concerns are misplaced.

4 H. Claims of Unlawful Contracting of Legislative Powers Lack Merit.

5 Other project opponents take a different tack, attacking features of the DAs such
6 as the Funding Agreement that require Yarrow Bay to pay for certain ongoing costs of
7 the MPDs. See, e.g., Ex. 199 (Edelman) at 7-9. At first blush, this approach might seem
8 curious, given that project opponents have typically argued that Yarrow Bay must bear all
9 costs of the MPDs, and the City (or the public none. The tactic makes sense when
10 considered in conjunction with the project opponents' stated goal (Att. 1) "to see a
11 significant reduction in the MPD proposed density/scale." If funding mechanisms can be
12 successfully attacked, project opponents appear to reason, this will support their other
13 arguments that the only way to allow the project to proceed is to reduce it in size/scale.
14

15 This approach, while creative, also lacks legal merit. For example, while Mr.
16 Edelman argues that the City may not establish the MDRT by contract because that
17 would limit future City Council's exercise of legislative powers, it has long been
18 established that cities may do exactly that, so long as the exercise of the contracting
19 power is legally authorized. See, e.g., *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 29-30,
20 578 P.2d 1292 (1978) (City could enter into binding contract fixing future price of water,
21 even though such contract bound City's exercise of future, legislative utility rate setting
22 powers). Mr. Edelman obliquely denigrates this authority by reference, claiming that
23 "this would not be a contract to run a City-owned utility or similar function of
24 government," but he then admits the point, acknowledging that the MDRT would be
25



1 engaged in a typical function of government: “processing, reviewing, and implementing
2 development permits.” Mr. Edelman ignores that RCW 36.70B.170(3)(g) expressly
3 authorizes a city to include provisions for such procedures in a development and,
4 therefore, under *Scott Paper* such a contract is indisputably legal. Indeed, Mr.
5 Edelman’s arguments, that a City may not use a contract to bind its future City Council’s
6 exercise of authority to appoint employees and set their compensation, simply make no
7 sense – if Mr. Edelman were right, no city could ever enter into a contract with a
8 collective bargaining unit, because collective bargaining units often lock in rates of
9 compensation and benefits that in the absence of the contract would be subject to the city
10 council’s exercise of legislative authority to set employee compensation. This argument
11 should be rejected.

12
13 In any event, the Funding Agreement does not actually lock in the City’s exercise
14 of employee appointment or compensation authority. It simply governs what employee
15 costs will be reimbursed by Yarrow Bay, and under what conditions. The City retains the
16 right under the Funding Agreement to make personnel decisions, it just may need to find
17 a way to pay for them other than looking to Yarrow Bay.

18 III. CONCLUSION

19 For all the foregoing reasons, the Examiner should recommend approval of the
20 DAs as outlined in the Staff Report and with the minor changes recommended by Yarrow
21 Bay, in which the City joins.

22 DATED this 19th day of August, 2011.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

KENYON DISEND, PLLC

By // S //
Michael R. Kenyon
WSBA No. 15802
Bob C. Sterbank
WSBA No. 19514
Attorneys for City of Black Diamond



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

Stacey Borland

From: BOB STERBANK <BOB@kenyondisend.com>
Sent: Friday, August 19, 2011 8:06 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland
Subject: Attachment 1 to City's Reply
Attachments: PLD - CITY'S Reply Att 1.pdf

Is attached. This was inadvertently omitted from the previous e-mail. Please include with the City's Reply.

Regards,

Bob Sterbank

Bob C. Sterbank
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Direct Tel: (425) 988-2208
Main Tel: (425) 392-7090
Fax: (425) 392-7071
bob@kenyondisend.com
www.kenyondisend.com

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

EXHIBIT 268

The Diamond Coalition

[Home](#)

[History](#)

[Projects](#)

[Our Mission](#)

Contact Us:

Mailing Address:

The Diamond Coalition
P.O. Box 448
Black Diamond, WA 9801

Contact Information:

email contact: thediamondcoalitionorg@gmail.com
William Wheeler - President
Eugene J. May - Vice President
Cynthia Wheeler - Secretary/Treasurer

About Us:

Organization Name: The Diamond Coalition
Federal Tax ID #: 27-1773790
Non-profit Type: 501(c)(3)
Advanced Letter Ruling Status: Approved

Getting Involved:

These monster developments will affect you, either through higher taxes, gridlocked roads, degraded environment, or all of the above. Over the next few months as citizens appeal the decision, please consider donating your time and expertise or making a tax deductible contribution.

[Contribute](#)

Copyright © 2010 Diamond Coalition All rights reserved

The Diamond Coalition

[Home](#)

[Our Mission](#)

[History](#)

[Contact Us](#)

Projects:

Currently, our project is to help in the appeal of the Decision to Approve Yarrow Bay's Master Planned Developments which will bring to Black Diamond 6,050 dwelling units, and nearly 1,200,000 square feet of office, retail, and light industrial space.

Our goal is to see a significant reduction in the MPD proposed density/scale from the proposed 6,050 new dwelling units to be more consistent with current King County Growth Management Act standards of 1,900 new households for the City of Black Diamond. More importantly, we envision using the Development Agreement as a tool that requires phased incremental growth balanced throughout the 20 year GMA guidelines whose impacts can be measured to determine the prudent extent of any further build out. Controlling the growth targets inherently benefits goals to improve the transportation and water quality issues.

Getting involved does make a difference. Forget the big developers that constantly reinforce the notion that "you can't stop growth." Disregard those that say "You can't fight city hall." One person can make a difference. It might as well be you.

Get involved. [Contact Us](#).

Read the [Towards Responsible Development Appeal and Press Release](#)

Copyright © 2010 Diamond Coalition All rights reserved

Stacey Borland

From: Chip Hanson
Sent: Friday, August 19, 2011 12:21 PM
To: Stacey Borland
Subject: FW: RelytoWrittenStatements-Bortleson
Attachments: ReplytoWrittenResponse_Bortleson.docx

Chip Hanson
IS Manager/City of Black Diamond

☎ Phone: 206-909-2456
✉ Email: chanson@ci.blackdiamond.wa.us

From: G Bort [<mailto:gbortles@gmail.com>]
Sent: Friday, August 19, 2011 7:49 AM
Subject: RelytoWrittenStatements-Bortleson

Steve,
Please find attached reply to written statement regarding the Black Diamond MPD's. Gil Bortleson

EXHIBIT 269

Stacey Borland

From: Chip Hanson
Sent: Friday, August 19, 2011 12:21 PM
To: Stacey Borland
Subject: FW: RelytoWrittenStatements-Bortleson
Attachments: ReplytoWrittenResponse_Bortleson.docx

Chip Hanson
IS Manager/City of Black Diamond

☎ Phone: 206-909-2456
✉ Email: chanson@ci.blackdiamond.wa.us

From: G Bort [<mailto:gbortles@gmail.com>]
Sent: Friday, August 19, 2011 7:56 AM
Subject: Fwd: RelytoWrittenStatements-Bortleson

Please find forward. Gil Bortleson

----- Forwarded message -----

From: G Bort <gbortles@gmail.com>
Date: Fri, Aug 19, 2011 at 7:48 AM
Subject: RelytoWrittenStatements-Bortleson
To: Steve Pilcher <spilcher@ci.blackdiamond.wa.us>, bmartinez@ci.blackdiamond.wa.us
Cc: Gil Bortleson <gbortles@gmail.com>

Steve,
Please find attached reply to written statement regarding the Black Diamond MPD's. Gil Bortleson

Stacey Borland

From: G Bort <gbortles@gmail.com>
Sent: Friday, August 19, 2011 7:59 AM
To: Stacey Borland
Subject: Fwd: Out of Office: RelytoWrittenStatements-Bortleson

----- Forwarded message -----

From: **Steve Pilcher** <SPilcher@ci.blackdiamond.wa.us>
Date: Fri, Aug 19, 2011 at 7:48 AM
Subject: Out of Office: RelytoWrittenStatements-Bortleson
To: G Bort <gbortles@gmail.com>

I am out of the office on Friday August 19th and Monday August 22nd and will respond to emails upon my return.

If you are sending response comments regarding the two MPD Development Agreements, be sure to include Stacey Borland in the distribution list (sborland@ci.blackdiamond.wa.us). All responses are due by 8:00 a.m. Friday August 19th.

Honorable Examiner Olbrechts
Steve Pilcher, City of Black Diamond

The following environmental subjects were submitted concerning the adequacy of the Development Agreement in meeting Conditions of Approval. The Applicant has responded to assertions made related to these conditions and replies are given here.

Open Space
Sensitive Areas
Parks, Recreational Facilities, and Trails
Vegetation and Wetlands
Fish and Wildlife Habitat
Visual and Aesthetic Values

Open Space

Condition 151. *The Development Agreement shall include a tabular list of the types of activities and the characteristics of passive open space and active open space so that future land applications can accurately track the type and character of open space that is provided.*

Assertion: Complete documentation of active open space is required according to MPD standard 18.98.150 (B): "The MPD permit and development agreement shall establish the sizes, locations, and types of recreational facilities and trails to be built and also shall establish methods of ownership and maintenance." The Development Agreement needs to provide complete documentation of the amount of open space (in acres) for on- and off-site by categories of active and passive open space.

Applicant Response: Also refers to Condition 97 indicating Applicant needs only to respond to characteristics of active and passive open space. Moreover, the Development Agreements do not propose allowing off-site open space to be counted toward the total open space required for each MPD. While off-site recreational facilities count towards Master Developer's recreational facilities requirements set forth in Table 9-5, off-site open space does not count towards either The Villages MPD's or Lawson Hill's MPD's total open space requirements. There is no reason or basis to revise the Development Agreements as a result of this condition of approval.

Reply: *Despite the clarifying comments and apparent limitation requested of Condition 151. A compliance matrix (data base) showing open space accounting to track the sizes, location, type of recreational facilities and whether the facilities are on- or off-site is warranted to assist City officials in assessing level of service requirements and to*

provide oversight by the public. The compliance matrix for open space accounting would serve its purpose from the first to the final implementing plat.

Condition 153. *Specific details on which open space shall be dedicated to the city, protected by conservation easements or protected and maintained by other mechanisms shall be established as part of the Development Agreement.*

Assertion: The Development Agreement fails to provide specific details for the protection of open space to be dedicated to the City as required by this condition. The Development Agreement needs to specify restrictions and non-allowed activities in passive open space and define the circumstances non-temporary use of passive open space would be allowed. A stated goal of no net loss of open space in sensitive areas/passive open space should be provided in the Development Agreement. One purpose of the SAO is *“to limit development and alteration of sensitive areas to achieve the goal of no net loss of sensitive areas or their functions and values.”* (SAO, 19.10.010, Purpose B, 2009, p.5). Mitigation measures need to be provided in the Development Agreement to maintain a no net loss of sensitive areas / passive open space. If non-temporary use of open space occurs, mitigation measures need to provide for replacement passive open space within the project area. Specific mitigation measures for loss of passive open space needs to be provided in the Development Agreement.

Applicant Response: The Applicants response is contained Section-by-section on 9.9.1 and 9.9.2 where the discussion of timelines and details of ownership of sensitive areas and their buffers is the thrust of the response.

Reply: *The response does not appear to include the intent of the entire Condition 153. The Condition seems to ask also for specific details on protection of open space which in the assertion is stated as not adequate. Given a no net loss goal of wetlands in the Sensitive Area Ordinance, it is important for the Development Agreement to lay out specific protection measures for wetlands..*

Assertion: The Development Agreement falls short of the 50% open space required for the total MPD project area. The Development Agreement provides for less than 50 percent of the required open space for the total project. The Development Agreement shows total open space is comprised of the land-use categories: (a) open space, trails and parks, (b) buffers, and (c) wetlands which is 42.2% of the total Villages project area (Exhibit L, Figure 3.1). These same open space categories make up 38.8% of the total Lawson Hills project area.

Applicant Response: The Applicant's response is found in Section 2.2 where the Applicant maintains *“....,based on Land Use Maps approved with each MPD contained within Exhibit “L” of each Development Agreement, each MPD is in fact providing more open space than is minimally required.”*

Reply: *A case has been presented in the assertion, which is based on simple “on-the-ground” acreage data presented in Exhibit L, Figure 3.1, that open space percentages*

do not meet the 50 percent requirement for the total project area. The Applicant argues open space requirements have been met through a process of past agreements.

Sensitive Areas

Condition 104. *Major earth moving and grading may be limited to the "dry season," between April and September, to avoid water quality impacts from erosion due to wet soils. Construction during the "wet season" may occur as allowed by the Engineering Design and Construction Standards Section 2.2.05.*

Assertion: The Development Agreement needs to disallow major earth moving and grading in the winter. The City of Black Diamond is in a constrained environment of numerous lakes, streams, and wetlands. In this constrained environment, it is prudent, and perhaps economical, to restrict major earth moving and grading from October through March.

Applicant response: Section 2.2.05 authorizes applicants to seek permission from the City Engineer for clearing and grading activities from Oct 1st to March 31st. Thus the BDMC does not prohibit winter grading activities.

Reply: *It is recommended the Development Agreement contain language for no major winter earth-moving activities to occur in areas highly constrained by sensitive or geologically hazardous areas.*

Condition 110. *Prior to approval of the first implementing plat or site development permit within a phase, the applicant shall submit an overall grading plan that will balance the cut or fill so that the amount of cut or fill does not exceed the other by more than 20%.*

Assertion: The Development Agreement is not clear on whether an overall Grading Plan will be submitted for the first implementing plat. The Development Agreement needs to layout elements for an overall Grading Plan that will preserve existing topography and vegetation to meet BDMC 18.98.020 (A). The City's development standards for erosion hazard areas include measures such as: "grading shall minimize alterations to the natural contour of the slope", and "retaining walls shall be preferred over cut and fill for roads, parking lots and structures" (SAO, p. 80).

Applicant Response: This condition only requires that the applicant submit an overall grading plan prior to approval of the first plat or site development permit within a phase. As such, there is no action required in the Development Agreements. A grading plan will be submitted prior to approval of the first implementing Project at which point compliance with the condition's criteria can be reviewed by City Staff.

Reply: *Review by City Staff and opportunity for the public to view the overall grading plan prior to approval of the first implementing project is a step in detail that would be*

informative and constructive. Such language in the Development Agreement is suggested. Elements in a grading plan to meet preservation of topography and vegetation are needed in the Development Agreement.

Condition 112. *Stormwater and groundwater shall be managed to avoid increases in overland flow or infiltration in areas of potential slope failure to avoid water-induced landslides.*

Assertion: The Development Agreement needs to detail stormwater control mitigations in geologically hazardous areas to lessen the likelihood of uncontrolled stormwater runoff and water-induced landslides.

Response: No action in the Development Agreement is required. The Condition shall be complied with and compliance tested at time of implementing project review.

Reply: *Despite the need for no action required in the Development Agreement, the application for review will require this information. Therefore outlines of compliance in the Development Agreement would be constructive and lend toward making the Development Agreement more specific in detail.*

Condition 113: *Geologically hazardous areas shall be designated as open space and roads and utilities routed to avoid such areas. Where avoidance is impossible, utilize the process in the Sensitive Areas Ordinance (supplied with adequate information as defined in code) and Engineering Design and Construction Standards (ED&CS) to build roads and utilities through these areas.*

Assertion: The Development Agreement needs to specifically retain geologically hazardous areas as designated open space. Instead the Development Agreement makes allowances to alter or eliminate geological hazards by grading.

Applicant Response: In fact, the City's SAO authorizes (i.) the alteration and/or elimination of geologic hazard and landslide areas per the standards set forth in BDMC 19.10.410. See Section 8.3 of Development Agreements.

Reply. *Despite the legal language to allow alteration of geologically hazard areas, the Development Agreement should state as a goal such areas shall remain in open space per condition 113 and allow language in the Development Agreement that clearly recognizes these areas to be altered only where avoidance is impossible on a strict case-by-case basis. This strictness is needed to satisfy BDMC 18.98.020 (A): "A specific objective of the MPD permit process and standards is to provide public benefits not typically available through conventional development. These public benefits shall include but not limited to: A. preservation and enhancement of the physical characteristics (topography, drainage, vegetation, environmentally sensitive areas) of the site." Setting aside primary conservation areas such as geologic hazard areas is*

normal for conventional development. This project purports to embrace unconventional development which needs to preserve landforms and topography.

Condition 114. *Development within the moderate mine hazard area may require additional mitigation measures, which shall be evaluated with future implementing development proposals.*

Assertion. The Constraints Map (Exhibit G) legend indicates, for parts of the Lawson Hills area, additional borings will be necessary to determine the construction methods for development of the area. If a preponderance of evidence from additional borings shows increased risks to development defined under BDMC 19.10.430, the Development Agreement in Section 8.2.3 needs to reflect these potential risks and allow additional open space or buffer widths to moderate and severe mine hazardous areas [or reclassify moderate mine hazards to severe mine hazard].

Applicant Response. The concerns expressed in these exhibits are addressed in the proposed revised Development Agreement language set forth in Section 8.2.3 of Yarrow Bay's exhibit 139. No further revisions to this section are necessary.

Reply: Dr. Breeds expert testimony on mine hazards probably was the persuasive factor in the revisions by Yarrow Bay, so deferral is made here for Dr. Breeds reply.

Sensitive Aquifer Recharge Area

Condition 68. *The Development Agreement shall include restrictions on roof types (no galvanized, copper, etc.) and roof treatments (no chemical moss killers, etc) to ensure that storm water discharged from roof downspouts is suitable for direct entry into wetlands and streams without treatment. This condition does not constitute approval for direct discharge of roof drainage into wetlands, streams or their buffers; any such direct discharge is authorized only if approved by the Public Works Director as in compliance with Black Diamond Municipal Code Ch. 14.04 and the standards adopted therein. The applicant shall develop related public education materials that will be readily available to all homeowners and implement a process that can be enforced by future homeowners associations.*

Assertion: Areas within the MPD's have been mapped "highly susceptible to ground water contamination" in the Black Diamond Comprehensive Plan (Figure 4-3, Exhibit 1). The Development Agreement needs to provide detailed measures targeted to protect groundwater quality in areas mapped as highly susceptible to groundwater contamination.

Applicant Response: Section 7.4.4 (A) (3) of both the Villages and Lawson Hills Development include restrictions and roof treatments. In addition the City's SAO at BDMC 19.10.500, which MPD implementing projects are required to comply with the section 8.1 of both Development Agreements, provides reasonable measures necessary for the protection of sensitive ground water recharge areas.

Reply: It is recognized that compliance with Condition 68 is a laudable step to protect ground water quality, but this condition cites one of many targeted Best Management Practices (BMPs) that could be provided in the Development Agreement. Applicant consultants have extensively studied the ground water system and must have a basis for assurances that ground water resources will not be degraded. The basis for these assurances should be brought forward in the Development Agreement in the form of protection measures. Off-site domestic water users who are downgradient of areas highly susceptible to ground water contamination are especially wanting of assurances of protections by the Applicant for their well and spring water supplies. As a precedent off-site Horseshoe Lake has been incorporated in the Development Agreement to protect existing water levels.

Parks, Recreational Facilities, and Trails

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

Assertion: The Development Agreement is inadequate in defining whether park and recreation facilities may be constructed on- or off site (Development Agreement, Section 9, table 9.5, June, 2011). A lump-sum payment option for construction of all off-site recreational facilities is shown table 9.5. Overweighing off-site construction of recreational facilities puts the City at risk of not meeting level of service (LOS) requirements for distance of recreational facilities to residential neighborhoods. On-site recreational facilities are required according to BDMC 18.98.150(A).

Applicants Response: ...repeat assertion... This, however, is not required by the terms of the condition. Repeats Condition 89.... .. may be constructed on-or off –site. (emphasis added). The Development Agreements provide at section 9.5.2 that recreational facilities identified table 9.5 may be constructed off-site if agreed to by the City. Thus, section 9.5.2 meets the requirements of this condition and there is no reason or basis to revise the Development Agreements.

Reply: Despite the clarifying comments, an apparent bias remains toward building recreational facilities off-site with the Applicant request to build any of listed facilities in table 9.5 off-site with approval of the Designated Official. A tabular data base showing accounting of on- and off-site construction of recreational facility is warranted to assist City officials in assessing level of service requirements and provide oversight by the public. Mr. Derdowski in his written testimony referring to Section 9.5 states, “ The Applicant may locate facilities off site, negating the intent of providing recreational facilities within the MPD, internalizing impacts and minimizing off- site vehicle trips. The Applicant may pay a fee in lieu of providing the facilities. The procedure for establishing the fee pre-empts legislative authority.”

Condition 97. *The Development Agreement shall include a tabular list of the characteristics of passive open space and active open space and permitted activities*

thereon so that future land use applications can accurately track the type and character of open space that is provided.

Assertion: Complete documentation of recreational facilities and trails is required according to MPD standard 18.98.150 (B): “The MPD permit and development agreement shall establish the sizes, locations, and types of recreational facilities and trails to be built and also shall establish methods of ownership and maintenance.” The Development Agreement needs to provide complete documentation of recreational facilities and trails by size (in acres), location and type in categories of active and passive open space and whether the facilities are located on- or off-site.

Applicant Response: ...Contrary to this assertion, however, Condition of Approval no. 97 (The Villages) only requires the Development Agreements include “ a tabular list of passive open space and active open space and permitted activities thereon ...” This tabular list is provided within Section 9.10 of both Development Agreements. Thus, there is no reason or basis to amend this section of the Development Agreements.

Reply: Specification of size (acreage) and location is the heart of providing complete documentation of recreational facilities. Ms Hoefig’s request for a new condition also relates to complete documentation—The Development Agreement shall have; ii An initial open space and parks compliance matrix (excel spreadsheet or similar data sheet) that reflects all the MPD’s required open space, parks, trails and recreational facilities....”.

Trails

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

Assertion. The Development Agreement does show an on-site trail system, but lacks conceptual plans for providing trail connections to current and future local and regional trails (Development Agreement, Park and Trail Plan, Figure. 9.2).

Applicant Response. This condition does not require the trail connections requested in exhibit 143 [exhibit 113] [added]. Instead, condition of approval no. 95 (The Villages) provides: As proposed in the Master Plan Application, on-site trails (ie on site of the implementing project) shall be constructed or bonded prior to occupancy, final site plan or final plat approval, whichever occurs first. Off-site trail connections shall meet the same standard to the extent authorized by law. Section 9.6 of the Development Agreement provides that “the construction of trails located outside of the project that are necessary to achieve connectivity may be required by the City prior to issuance of certificate of occupancy, final plat approval for an Implementing project to extent authorized by law.” This is consistent with the language of the condition. The connections requested in Exhibit 143 [Exhibit 113] may be requested at the

Implementing project stage. There is no need or basis to amend Section 9.6 of the Development Agreements.

Reply: The Black Diamond Comprehensive Plan and Municipal Code lends strong support for local and regional trail connections. Connecting trail plans shown in the Comprehensive Plan are shown as attached figures to Exhibit 113. These connecting trail plans should be honored as part of the process. Mr. Derdowski in his written testimony indicates the Applicant provision allows trails to be built on an implementing project basis. Mr. Derdowski states, "This defeats the intend of providing interconnectivity and a regional trail system. Many years will likely pass before the trails will actually lead anywhere. The Trails Plan should be built on a Phase-by-Phase basis."

New Condition: The Development Agreement shall provide specific details for the timing, uses, and acreages of all park, trails, recreation facilities and whether facilities are to be constructed on- or off-site for each phase of the development.

Applicant Response: Mr. Bortleson alleges the Development Agreements are inadequate in providing up-front commitments of costs, available space, timing, and whether construction recreational facilities is on-site or off-site. The Development Agreements, however, meet the information requirements set forth in MPD Permit Approvals' Conditions of Approval. While Mr. Bortleson may desire this additional information it is simply not required at this stage of the MPD development.

Reply: It is requested this new condition be forwarded to the City Council for consideration. Rationale and BDMC justification for the new condition is provided in Exhibit 113.

Vegetation and Wetlands

Wetlands

Condition 71. *Develop a proactive temporary erosion and sediment control plan to prevent erosion and sediment transport and provide a response plan to protect receiving waters during the construction phase.*

Assertion. The Development Agreement needs to specify protections for wetlands by employing strict sediment -control measures during the construction phase and a detailed emergency response plan to guard against large storms overwhelming temporary erosion-control structures.

Applicant Response.However, Section 7.4.3 of The Villages Development Agreement indicates the Master Developer will comply with Condition 71 as a stormwater management provision. No further action is required by this condition in the Development Agreements.

Reply. Section 7.4.3 of the Development Agreement indicates the Applicant will comply with Condition 71 as a stormwater management provision. The provisions need to be

backed up in the Development Agreement with planned mitigation measures preventing stormwater volumes and flow rates that would cause sediment deposition to wetlands and natural drainage systems during the construction phase. The Development Agreement needs to lay out mitigation measures to protect wetlands and their buffers from sediment discharge during the multi-year (decades-long) construction phase (reply applies to Condition 117). One such mitigating measure was pointed out by Mr. Derdowski in his testimony—“...sensitive areas should not only be field marked they should be protected with temporary barriers and silt fences.”

Condition 119. *New stormwater outfalls shall be located to avoid impacts to any stream and adjacent wetlands, riparian buffers, unstable slopes, significant trees, and instream habitat. Where all practical and feasible avoidance measures have been employed, provide mitigation in the form of outfall energy dissipaters and/or vegetation restoration and slope stabilization as necessary. [FEIS Mitigation Measure].*

Assertion: The Development Agreement does not address Condition 119. The Development Agreement needs to detail measures to locate new stormwater outfalls to avoid impacts to streams and adjacent wetlands and detail mitigation measures for sensitive areas as described in Condition 119.

Applicant Response: The Applicant rewrites condition 119 in its response and then continues on to say, “Compliance with the condition will be reviewed when Implementing Project applications are submitted. There is no reason or basis to revise the Development Agreements based on this Condition.”

Reply: *Black Diamond Municipal Code and the Sensitive Area Ordinance provide strong support for preservation and no net loss of wetlands and sensitive areas. The Development Agreement needs to provide goals and mitigation measures to preserve wetlands and sensitive areas and replacement of lost wetlands due to road and utility construction shall be replaced on-site. (reply applies to condition 65).*

Vegetation

Condition 120. *A tree inventory shall be required prior to the development of implementing projects so that other opportunities to preserve trees may be realized.*

Assertion: The Development Agreement is silent on Condition 120. Tree inventories need to be done “on the ground” in early planning stages at a project level in order to identify and conserve significant trees or stands of trees.

Applicant Response: This condition, however, does not require action in the Development Agreements:...repeat of condition above... As such, a tree inventory will be performed by the Master Developer prior to the development of implementing projects. There is no requirement for a tree inventory to be in the Development Agreement. There is no reason or basis to amend the Development Agreements based on this condition of approval.

Reply: Tree inventories are consistent with rural- by-design principles and need to be done in the early “on-ground” planning design (before Land Use plot lines are drawn) in order integrate significant trees or stands of trees into creative open space and to satisfy BDMC 18.98.020 (A): “A specific objective of the MPD permit process and standards is to provide public benefits not typically available through conventional development. These public benefits shall include but not limited to: A. preservation and enhancement of the physical characteristics (topography, drainage, vegetation, environmentally sensitive areas) of the site.”

Protection of Wetlands

The Development Agreement is silent on plans for the preservation and enhancement of wetlands and on mitigation measures to be implemented to meet no net loss of wetlands and sensitive areas due to alterations caused by utility and road crossings and other encroachments. It is recommended a Wetland Preservation Plan be incorporated in the Development Agreement to provide goals, guidelines, and oversight to protect wetlands on- and off-site. A new condition of approval is requested to protect a no net long-term loss or gain of water to the core stream-lake-wetland complex of Black Diamond Lake through a Wetland Preservation Plan.

New Condition: Water-levels for the core stream-wetland-lake complex of Black Diamond Lake shall be monitored pre- and post- development through a Wetland Preservation Plan.

Applicant Response: See Second Declaration of Scott Brainard attached hereto as Attachment 1. In Mr. Brainard’s expert opinion, the Development Agreements’ requirement that the MPD’s comply with the City’s SAO ensures that wetlands will be adequately protected. There is no reason or basis to include this new condition of approval in the Development Agreements.

Reply: Wetlands are a dominant part of the City landscape including a large interconnecting Core stream-wetland-lake complex of Jones Lake - Rock Creek and Black Diamond Lake - Black Diamond Lake Creek. Wetland expert, Dr. Cooke notes in her written testimony, “Cumulative Impacts as identified in both the Lawson Hills and The Villages EIS documents do not cover the indirect effects of having these massive wetlands systems that are completely surrounded by development, some of it high density residential and industrial.” It is requested this new condition be forwarded to the City Council for consideration. Rationale and BDMC justification for the new condition is provided in Exhibit 113.

Fish and Wildlife Habitat

Condition 125. *Provide a 300-ft-wide wildlife corridor from the western edge of the Core Complex to the City's western boundary. The corridor should be located within areas of contiguous open space that form a network.*

The Development Agreement does comply with an additional 300-ft wildlife corridor extension from the western edge the core stream-wetland Black Diamond Lake complex to the western edge of the property.

Assertion: The Development Agreement needs to show on Constraints Map (Exhibit G) a continuous wildlife corridor from the western boundary through the Villages to the northern boundary of the Villages in order to meet the intent of Condition 125. No continuous wildlife corridor is shown as an overlay with the wetland-stream-lake complex of Black Diamond Lake (Exhibit G) if indeed the Black Diamond Lake wetland complex was intended to serve as a wildlife corridor. The Development Agreement deems the delineation of Fish and Wildlife Habitat Conservation Areas (FWHCA's) as final and complete (Villages, Development Agreement, Section 8.2.2, June, 2011) even though FWHCA's are not shown on the Constraint Maps.

Applicants Response: Repeats first sentence of assertion....The Villages Constraints Map at Exhibit "G" does show, as Exhibit 113 admits, an additional 300 feet of wildlife corridor extension from the western edge of core- stream-wetland Black diamond Lake complex to the western edge of the MPD project site. This is all that is required by Condition of Approval no 125. There is reason or basis to revise The Villages Development Agreement based on this condition.

Reply: *The Development Agreement needs to provide plans for a high degree of connectivity and compatibility for wildlife on- and off-site and corridors designated through MPD properties. The wildlife corridor, although not designated as such on the Constraint Maps, is apparently through the core wetland-stream-Black Diamond Lake complex with no coordinated use of non-wetland habitat.*

New Condition. A Wildlife and Habitat Preservation Plan shall provide guidance for the size, placement, and connections of on- and off-site habitats in consultation with outside experts and agencies.

Applicants Response: Mr. Bortleson cites BDMC 18.98.155(B), 18.98.010(C), and 18.98.140(C) as his authority for requesting inclusion of this new condition of approval. The Black Diamond City Council, however, already found that the MPD's satisfied the wildlife criteria at Conclusion of Law 6, Conclusion of Law 54, and Conclusion of Law 61 of the MPD Permit Approval Ordinance (Nos. 10-946 and 10-947). There is no reason or basis to add this condition of approval to the Development Agreements.

Reply: The Black Diamond Municipal requires "*The open space shall be located and designed to minimize the adverse impacts on wildlife resources and achieve a high degree of compatibility with wildlife habitat areas where identified.*" It is requested this

new condition be forwarded to the City Council for consideration. Rationale and BDMC justification for the new condition is provided in Exhibit 113.

Visual and Aesthetic Values

Condition 124. *Mast-producing species (such as hazelnut) and such other native, preferred native vegetation shall be used to mitigate for reduced food sources resulting from habitat reductions when designing landscape plans for development parcels adjoining wetland buffers, or for wetland buffer enhancement plantings. The Development Agreement shall specify a process by which such landscape plans are to be reviewed and approved by the Director of Natural Resources and Parks for compliance with the mitigation requirement herein.*

Assertion: It is recommended the Director of Natural Resources and Parks review and approve all landscaping plans prior to permit approval to ensure compliance with BDMC18.98.140 (B): “Natural open space shall be located and designed to form a coordinated open space network resulting in continuous greenbelt areas and buffers to minimize the visual impacts of development within the MPD, and provide connections to existing or planned open space networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD.”

Applicants Response: . Repeats assertion. To the contrary, however, Section 5.5.2 of the Development Agreements does in fact require landscaping plan review by Director of Natural Resources prior to approval. As such, there is no reason or basis for revisions of the Development Agreements.

Reply. *It is recognized as a laudable provision in Development Agreement for City's Director of Natural Resources to review with the Designated Official all Landscape Plans.[emphasis added]. However it is unclear whether this provision pertains to the Directors authority to ensure compliance to BDMC18.98.140(B) or only to compliance with mitigation measure 124. Mr. Derdowski in his written comments notes in section 5.5.2 “This provision fails to establish the standards for Mast producing species as required by the MPD permit approval requirements”. In regard to the related Section 5.5.7, Mr. Derdowski adds, “This provision would allow the Applicant to delay landscape plantings for three years by bonding. The establishment of landscaping takes time, and the visual impact of new development especially needs the benefit of landscaping. The Applicant should be required to actually plant the landscaping concurrent with development.”*

New Condition: Provide a Visual, Aesthetic and Buffer Plan that addresses visual and aesthetic values and adapts design standards that incorporates continuous greenbelt areas, retains natural landforms and vegetation, provides buffers, setbacks, and conservation easements to transition incompatible land uses of the MPD's and perimeter and adjoining properties.

Applicants Response: Mr. Bortleson cites 18.98.140(B) as part of his authority for requesting inclusion of this new condition of approval. The Black Diamond City Council already found that the MPD's met this criterion in Conclusion of Law 53 in the MPD Permit Approval Ordinances (nos. 10.946 and 10.947). Mr. Bortleson also cites BDMC 18.72.030(E) as source of authority for this new condition. The Development Agreements, however, already require that the Master Developer comply with this code at section 5.5. There is no reason or basis to add this condition to the Development Agreements.

Reply: In the next 100 years, as envisioned in the City's Comprehensive Plan, the City will be characterized by "...the preservation of the quality of its natural setting, its scenery and views, and the preservation of its historic treasures." The City's Comprehensive Plan calls for a new direction by maintaining small-town character by controlling the scale and character of new development, yet provisions in the Development Agreement to retain natural beauty and the small-town character are lacking. It is requested this new condition be forwarded to the City Council for consideration. Rationale and BDMC justification for the new condition is provided in Exhibit 113.

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