



Michael R. Kenyon
Bruce L. Disend
Shelley M. Kerlake

Kari L. Sand
Chris D. Bacha
Margaret J. King
Bob C. Sterbank
Rachel B. Turpin
Ann Marie J. Soto

August 23, 2011

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

Re: Black Diamond Development Agreements

Dear Hearing Examiner Olbrechts:

This letter is in response to the letter to you from David Bricklin dated August 19, 2011. By e-mail dated August 19, 2011, you provided the City until 5 p.m. August 23 to respond.

As a threshold matter, the substantial bulk of the complaints in Mr. Bricklin's letter result from an administrative oversight, described in my enclosed declaration. As you will see there, Attachment A to the City's Response to Verbal Testimony and Written Comments (August 12, 2011) inadvertently omitted one page.

That one page, however, came directly from a Diamond Coalition web page - readily available via a simple Google search - and the HTML links found on the resulting Diamond Coalition web pages. Even so, this inadvertently omitted page was submitted into the record on Friday, August 19 as Attachment 1 to the City's Reply. In order to correct the record with respect to the City's Response, however, and to provide the document from which the Response quoted, the City is also submitting along with this letter a corrected Attachment 1 to its Response.

Given the vitriolic tone and tenor of Mr. Bricklin's letter, however, additional comment is warranted. First, although the Diamond Coalition's web page in question was quoted in full in the City's Response, the Bricklin letter in effect accuses the City's attorneys of inventing the quotation, claiming at page 2 that "no citation is provided for this allegation. It is another falsehood." To the contrary, it is perfectly accurate, and came directly from a Diamond Coalition web page reading, "Our goal is to see a significant reduction in the MPD proposed density/scale from the proposed 6,050 new dwelling units . . . [to] 1,900 new households for the City of Black Diamond." The City's Response accurately quotes the Diamond Coalition's

Exhibit

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website.¹ Accordingly, Mr. Bricklin's request for reconsideration, that you strike Exhibit 218 and Attachment A, or rule that they are false, must be denied.

A second troubling aspect of Mr. Bricklin's letter is its tone and approach. After labeling portions of the City's Response as "potentially slanderous," "demeaning," and "disparaging attacks," Mr. Bricklin then responds in turn, engaging in a lengthy personal attack on one particular City attorney. The irony of Mr. Bricklin's approach is outweighed only by its inefficiency - a simple telephone call or letter to opposing counsel - or, better yet - a simple check of his clients' own web page² via Google would have resolved this issue.³

Third, Mr. Bricklin's letter never responds to – implicitly conceding – the primary legal point made in the City's Response: by attacking the MPD's "scale/density," the projects' opponents are engaging in an untimely, impermissible collateral attack on the City's Comprehensive Plan and MPD development regulation density standards, both of which were never challenged to the Growth Board and accordingly remain valid. The legal impropriety of such collateral attacks has long been the law in Washington, and was unremarkably reiterated by our Supreme Court as recently as last Thursday, in *Feil v. Eastern Washington Growth Management Hearings Board*, __ Wn.2d __ (August 18, 2011).

Finally, it bears noting that Mr. Bricklin's letter underscores the deep differences of opinion, both factual and legal, among participants to the MPD-related proceedings. Project opponents are deeply and sincerely committed to their own vision for the future of the City of Black Diamond, and have clearly spent a great deal of their own time and resources to defend their vision. The City has never questioned that passion, nor has the City ever questioned the project opponents' use of multiple nonprofit organizations.⁴ Likewise, the Applicant is deeply committed to its proposal, and its staff and attorneys also appear to have spent a great deal of time and resources pursuing that proposal. The same is true for City staff, and its attorneys, who have devoted a substantial portion not just of their work week time, but personal time in the evenings and on weekends, working on the project consistent with the direction set forth in the unanimous decision of the City Council approving the MPD Permits themselves. It is hardly

¹ To the extent the August 19 letter quibbles about the City's Response using both the words "goal" and "mission" (lower case) interchangeably to describe the Diamond Coalition's "project," the Examiner should note that Roget's online Thesaurus indicates that "mission" and "goal" are both synonyms for the other.

² Mr. Bricklin represents the Wheelers and Mr. May in MPD-related proceedings in Superior Court, federal District Court, and the Court of Appeals.

³ Informal notice such as this is precisely what is called for when a lawyer intends to raise CR 11 concerns such as those alleged in Mr. Bricklin's letter. See, e.g., *Biggs v. Vail*, 124 Wn.2d 193, 198 n. 2, 876 P.2d 448 (1994) (adopting Advisory Committee on Federal Rules of Civil Procedure's advice that "counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation" of CR 11); see also FRCP 11, App. A (Advisory Comm. Comments) at 1993 amendments.

⁴ The City's Response specifically noted at page 5, n. 1 that the City's identification "of the project opponents' organizations is *not* intended to denigrate them." (Emphasis in original.)

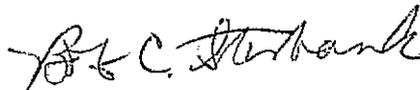
Phil Olbrechts, Hearing Examiner
August 23, 2011
Page 3

surprising that such committed efforts have yielded strikingly divergent viewpoints among the participants. Mr. Bricklin's letter simply highlights one such disagreement.⁵

The City respectfully requests that the Examiner deny the requests made in Mr. Bricklin's letter. The City also requests that the Examiner strike the portions of that letter indicated in the copy attached hereto.

Very truly yours,

KENYON DISEND, PLLC



Bob C. Sterbank

Enclosures

⁵ We continue to disagree with the factual claims in Mr. Bricklin's letter, which are simply mistaken. For example, the letter claims at page 2 that the City's Response "characterize[s] The Diamond Coalition as a party of record," and "suggest[s]" that the Wheelers or Mr. May "stated that they were testifying as representatives of the Diamond Coalition." The City's Response does not say that. The letter also states at page 2 that the City's Response "suggest[s]" that "citizens opposing these developments are simply the product of so many mindless marionettes orchestrated by a few puppeteers," and at page 3 that the City "believes" that commenting citizens "are so many lemmings remotely chanting the same theme." The City has double-checked its Response, and these phrases appear nowhere in it. These phrases are Mr. Bricklin's – not the City's.

The Diamond Coalition

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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.

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The Diamond Coalition

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Our Mission:

The Diamond Coalition was formed for exclusively charitable, and educationally purposes related to environmental awareness and advocacy. Specifically, the Diamond Coalition provides outreach to educate, energize, engage and assist the general public in environmentally responsible and sustainable communities through the protection and stewardship of rural lands in Southeast King County through citizen outreach, environmental analysis, volunteer participation, organization assistance, and a variety of other means.

The Coalition's goals are to educate, energize and manage local volunteers for the preservation of natural habitat, and recreational and resource lands. We serve as a voice on local issues that encourage a clean environment and managed growth.

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The Diamond Coalition

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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.

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BEFORE THE HEARING EXAMINER OF THE CITY OF BLACK DIAMOND

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

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

DECLARATION OF BOB C.
STERBANK CONCERNING
DIAMOND COALITION WEBSTIE
MATERIALS

BOB C. STERBANK declares and states as follows:

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

2. On August 12, 2011, I submitted the City of Black Diamond's Response to Verbal Testimony and Written Comments. Attached as Attachment A to that pleading were true and correct copies of documents retrieved from the Diamond Coalition's website.

3. In reviewing Attachment A, I noticed that one page from the Diamond Coalition's website had been inadvertently omitted. A true and correct copy of that missing page is attached as Exhibit 1 to this Declaration.



1 4. As is plain from the face of Exhibit 1 to this declaration, the "goal" of the
2 Diamond Coalition:

3 [i]s to see a significant reduction in the MPD proposed
4 density/scale from the proposed 6,050 new dwelling units to be
5 more consistent with current King County Growth
6 Management Act standards of 1,900 new households for the
7 City of Black Diamond. More importantly, we envision using
8 the Development Agreement as a tool that requires phased
9 incremental growth balanced throughout the 20 year GMA
10 guideline whose impacts can be measured to determine the
11 prudent extent of any further build out.

12 The URL for this website page is <http://www.thediamondcoalition.org/projects/html>.
13 Attachment A to the City's Response included two other pages from this website, the
14 "Contacts" page and a page entitled "Our Mission."

15 5. I located these pages through a simple Google search for "the Diamond
16 Coalition." That search yielded two results, one with the URL
17 www.thediamondcoalition.org/contact%20us.html and the second with the URL
18 www.thediamondcoalition.org/history.html. Both pages displayed an HTML
19 (hypertext markup language) link entitled "Projects." Clicking on "Projects" took me to
20 the page entitled "Projects," a copy of which is attached as Exhibit 1 to this Declaration.
21 Both pages also included HTML links to "Home," which took me to the Diamond
22 Coalition home page (www.thediamondcoalition.org) for which Ms. Wheeler previously
23 provided a screen shot. This showed that the two URLs were in fact associated with The
24 Diamond Coalition.
25

6. After receiving Ms. Wheeler's objection to Ex. 218, which in part questions
where the City could have located statements about the Diamond Coalition's "goal" to
"see a significant reduction in MPD proposed density/scale," and while in the process of

1 preparing the City's Reply, I double-checked the Google search result and HTML link to
2 the Diamond Coalition's "Projects" page. It was still active and publicly available. I
3 printed out Exhibit 1 to this Declaration on August 18, 2011.

4 7. Before finalizing the City's Reply on the morning of August 19, I double-
5 checked the link again. The page remained publicly available. I again printed out a
6 copy, which was attached to the City's Reply as Attachment 1. For the Examiner's
7 convenience, it is attached here as Exhibit 2. The City's Reply explained the way in
8 which the page was accessed, and also noted that the City's explanation might cause
9 project opponents to disable it.

10 8. On the morning of August 22, 2011, I checked the HTML a third time. The
11 two URLs that previously led to the Diamond Coalition's "Projects" page had been
12 disabled.

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

15 DATED this 23rd day of August, 2011, at Issaquah, Washington.

16
17
18 
19 Bob C. Sterbank

The Diamond Coalition

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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.

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Get involved. [Contact Us](#).

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The Diamond Coalition

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**Bricklin &
Newman**
LLP

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

Spokane Office:
35 West Main
Suite 300
Spokane, WA 99201

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

Reply to: Seattle Office

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 Rimbo, 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 Rimbo 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. Rimbo.~~ 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. Rimbo's 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 "I"s have been dotted.

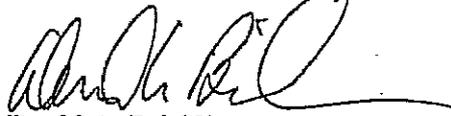
Curiously, rather than assessing whether Yarrow Bay's plans are consistent with the Black Diamond Comprehensive Plan, the City Attorney compares Yarrow Bay's plans with similarly massive development projects in Snoqualmie and Issaquah. ~~This is but another example of the City Attorney attempting to 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