

Stacey Borland

From: Ryan Kohlmann <rkohlmann@yarrowbayholdings.com>
Sent: Friday, August 26, 2011 2:14 PM
To: Steve Pilcher; Stacey Borland; Andy Williamson; Brenda Martinez
Subject: Reply to Exhibit 270
Attachments: Reply re Exhibit 270.pdf

Attached is our reply to Exhibit 270. Please confirm receipt.

Ryan J. Kohlmann, AICP
Senior Project Manager, Black Diamond



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EXHIBIT 272



MEMORANDUM

To: The Black Diamond Hearing Examiner
From: Megan Nelson, Director of Legal Affairs, YarrowBay Holdings
cc: Nancy Bainbridge Rogers, Counsel for YarrowBay Holdings
Re: YarrowBay's Reply to Exhibit 270 (Sarah Cooke's Written Response)
Date: August 26, 2011

Sarah Cooke's written response regarding The Villages and Lawson Hills Development Agreements was posted on the City of Black Diamond's website as Exhibit 270.

BD Village Partners, LP and BD Lawson Partners, LP (collectively, "YarrowBay") submit this Reply to Exhibit 270 "In re: The Matter of Development Agreement Hearings Related to The Villages MPD Approved in Ord. No. 10-946 and Lawson Hills MPD Approved in Ord. No. 10-947" pursuant to the Black Diamond Hearing Examiner's email to Steve Pilcher dated Wednesday, August 24, 2011 4:03 PM ("The reply deadline for the materials submitted by Sarah Cook and posted on the City's website on August 23, 2011 shall be Friday, August 26 at 5:00 pm.").

YarrowBay asked its wetlands expert, Scott Brainard of Wetland Resources, Inc. to review and respond to Exhibit 270. Attached hereto is Mr. Brainard's reply to Exhibit 270. In summary, and as further explained in Attachments 1 to Exhibits 139, 210, and 245, The Villages and Lawson Hills Development Agreements adequately protect wetlands within the MPDs by requiring compliance with Black Diamond's Sensitive Areas Ordinance, BDMC Ch. 19.10. As such, Exhibit 270 provides no reason or basis to revise the Development Agreements.

Attachment:

1. Fourth Declaration of Scott Brainard and Wetland Resources, Inc. Letter

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BEFORE THE CITY OF BLACK DIAMOND HEARING EXAMINER

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

**FOURTH DECLARATION OF SCOTT
BRAINARD**

I, Scott Brainard, PWS, am a citizen of the United States and a resident of the State of Washington, am over the age of 18 years, have firsthand knowledge of the matters to which I attest below, am fully competent to testify as a witness, and have sworn and do certify and declare, under penalty of perjury, that the following declaration is true and correct.

1. I am a Certified Professional Wetland Scientist, and a true and correct copy of my curriculum vitae was attached to my Declaration submitted as Attachment 1 to Exhibit 139.
2. I was an investigator and author of Wetland Resources, Inc.'s sensitive area reports for Lawson Hills and Villages MPDs. I also have read and understand the City of Black Diamond's 2009 Sensitive Areas Ordinance requirements that apply to wetlands.
3. In Exhibit 270, Ms. Sarah Cooke expresses concerns regarding wetland impacts caused by The Villages and Lawson Hills Development Agreements.
4. I was asked to respond to Ms. Cooke's Exhibit 270. Attached is a true and correct copy of the letter I prepared in response.
5. As explained in the attached letter and Attachment 1 to Exhibit 210, the City's Sensitive Areas Ordinance, BDMC Ch. 19.10, does not require that wetland boundaries be

FOURTH DECLARATION OF SCOTT BRAINARD - 1

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Cairncross & Hempelmann, P.S.
Law Offices
524 Second Avenue, Suite 500
Seattle, Washington 98104-2323
Phone: 206-587-0700 • Fax: 206-587-2308

1 reviewed and/or approved by the US Army Corps of Engineers or the Washington State
2 Department of Ecology (DOE). YarrowBay fully understands that if wetland impacts are
3 proposed as part of any MPD Implementing Project, preconstruction notification will be required
4 by the Corps. This preconstruction notification process will involve the Corps and DOE
5 reviewing the delineated wetland boundaries, Sensitive Areas Studies and Mitigation Plans. It is
6 fully anticipated that, as part of any Corps and DOE review process, additional technical reports
7 and/or documents may be required. This Corps and DOE preconstruction notification and review
8 process is consistent with The Villages and Lawson Hills Development Agreements.

9 6. As summarized in Attachment 1 to Exhibit 139, Exhibit "G" in both The Villages
10 and Lawson Hills Development Agreements accurately depict the wetland boundaries within the
11 MPDs. Wetland F and all the wetlands further west *are*, in fact, hydrologically isolated from the
12 Black Diamond Lake System.

13 7. As summarized in Attachment 1 to Exhibit 139, the City of Black Diamond and
14 Parametrix, the City's third party review consultant, reviewed the wetland delineations prepared
15 by Wetland Resources, Inc. and agreed as to their appropriateness.

16 8. As summarized in Attachment 1 to Exhibit 139, Exhibit "G" in both The Villages
17 and Lawson Hills Development Agreements is consistent with Figure 1-1 of the Best Available
18 Science Document adopted by reference in the City's Sensitive Areas Ordinance.

19 9. In my professional opinion and as outlined in the attached letter, as well as
20 Attachments 1 to Exhibits 139, 210, and 245, The Villages and Lawson Hills Development
21 Agreements adequately protect wetlands within the MPDs by requiring compliance with Black
22 Diamond's Sensitive Areas Ordinance, BDMC Ch. 19.10.

23
24 Dated this 25 day of August, 2011 at Everett, Washington.

25
26 
SCOTT BRAINARD, PWS

FOURTH DECLARATION OF SCOTT BRAINARD - 2

{01752406.DOC;1 }

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Wetland Resources, Inc.

Delineation / Mitigation / Restoration / Habitat Creation / Permit Assistance

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Everett, Washington 98208
(425) 337-3174
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August 23, 2011

Yarrow Bay Holdings
Attn: Ryan Kohlmann
10220 NE Points Drive, Ste 310
Kirkland, WA 98033

RE: Reply to Sarah Cooke's August 12, 2011 (Submitted August 22, 2011 as Exhibit 270) response letter to the City of Black Diamond, Steve Pilcher.

Dear Mr. Kohlmann:

The intent of this letter is to provide responsive comments to the written rebuttal testimony provided by Sarah Cooke to Steve Pilcher and the City of Black Diamond on August 22, 2011 (dated August 12, 2011) (Exhibit 270). I have read Dr. Cooke's rebuttal testimony and have the following comments.

The majority of the comments within Exhibit 270 have been addressed in my prior comment letters (Attachment 1 to Exhibit 139, Exhibit 210 & Attachment 1 to Exhibit 245). No new points have been raised in the August 22 response of Cooke. However, comment Number 7 in the letter does warrant an additional response. Dr. Cooke states that the Washington State Wetland Delineation Manual¹ was "replaced and required to be used by both the DOE and Army Corps of Engineers in 2008 with the publication on June 27, 2008 of the Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coasts." She further states "the use of the wrong method and criteria increases the chance that some of the wetland boundaries are incorrect and that impacts to wetlands can occur because development is planned in some areas that meet the wetland criteria, but which are identified as wetlands in the Development Agreement Maps."

First, while Dr. Cooke is correct in that the methodology for wetland delineations changed for the Corps on June 27, 2008 and were adopted by the State on March 14, 2011, she fails to discuss how this change in methodology is directly reflected in a

¹ *Washington State Wetlands Identification and Delineation Manual*. Washington State Department of Ecology. Publication #96-94. March 1997.

delineated wetland boundary. The introduction of the Regional Supplement² (Page 1, Paragraph 2, fifth sentence) states, “The intent of this supplement is to bring the Corps Manual up to date with current knowledge and practice in the region and not to change the way wetlands are defined or identified.” The Washington State Department of Ecology also addresses this concern in the Wetland Delineation section of their website, <http://www.ecy.wa.gov/programs/sea/wetlands/delineation.html>, under Frequently Asked Questions. Their question and response is as follows:

“If applicants have to use two different manuals, will this result in two different delineated boundaries?”

Based on our experience, it is very rare that wetland boundaries differ when applying the state manual and the new federal manual with applicable supplements. When applied correctly, the two manuals should result in the same boundary. When this is not the case, the applicant should consult with Corps or Ecology wetlands specialists to help determine whether the difference is appropriate”. Emphasis added

The wetlands located within The Villages and Lawson Hill MPDs were delineated using the methodologies that were applicable at the time. Since the time of the delineation, new methodologies were adopted to address regional differences in wetland characteristics. As is clear from text of the regional supplement and the FAQs on the DOE website, the wetland boundaries should be the same whether the Washington State Delineation Manual or the Regional Supplement is used. It is my professional opinion that the wetland delineations would not change if the Corps Regional Supplement is used.

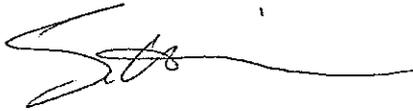
Second, Dr. Cooke mischaracterizes the Regional Supplement by stating “The regional supplement methodology for determining wetlands is quite different in the criteria for soils, vegetation, and hydrology.” The Regional Supplement did not provide additional or new criteria for wetland determinations. What it did do was provide new procedures for determining if the three individual criteria are met. Whether using the Washington State Delineation Manual or the Regional Supplement, the criteria for delineating wetland boundaries are the same.

In summary, the wetland boundaries have been delineated and approved by the City of Black Diamond. This delineation was conducted with required methodology at the time, which establishes wetland boundaries that are consistent with those obtained through use of the Regional Supplement. As previously stated in my August 9, 2011 response letter (Exhibit 210), BDMC 19.10 does not require that wetland boundaries be reviewed

² U.S. Army Corps of Engineers. 2010. *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0)*, ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-3. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

and/or approved by the US Army Corps of Engineers (Corps) or the Washington State Department of Ecology (DOE). WRI and the applicant fully understand that if wetland impacts are proposed as part of any individual development activity, preconstruction notification will be required by the Corps. This preconstruction notification process will involve the Corps and DOE reviewing the delineated wetland boundaries (including the methodology), Sensitive Area Studies and Mitigation Plans. This review and/or any additional documents required by the Corps or DOE have no relationship to the City's Sensitive Areas Ordinance or the Development Agreement process. As such, should DOE or the Corps review result in a different result than what is provided in the Development Agreements, that result would prevail.

Cordially,

A handwritten signature in black ink, appearing to read 'S. Brainard', with a long horizontal flourish extending to the right.

Scott Brainard, PWS
Principal Wetland Ecologist

Stacey Borland

From: Peggy Cahill <cahill@bnd-law.com>
Sent: Monday, August 29, 2011 11:13 AM
To: Steve Pilcher
Cc: Andy Williamson; Brenda Martinez; Stacey Borland; 'BOB STERBANK'; nrogers@cairncross.com; Dave Bricklin
Subject: Letter to Examiner Olbrechts
Attachments: Olbrechts Phil-08 29 11.pdf

Please provide the attached to the Examiner and include it in the record.

Thank you for your attention to this matter.

Peggy S. Cahill
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EXHIBIT 273



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August 29, 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: Sterbank Letter of August 23, 2011

Dear Mr. Olbrechts:

Kenyon Disend has moved to strike substantial portions of my August 19, 2011 letter, but Kenyon Disend provides no argument to support its request to strike key sections of my letter. Kenyon Disend focuses on a single allegation in my earlier letter, *i.e.*, that The Diamond Coalition's mission statement had been inaccurately quoted in Exhibit 218. I address that issue below, but the more important observation is that no argument has been provided by Kenyon Disend for striking the following portions of my earlier letter:

- Paragraphs 1 and 2: In my opening paragraphs, I noted ambiguity in whether Exhibit 218 reflects the comments of Kenyon Disend or the Department of Community Development and argued that in no case should they be construed to represent the views of the City's Hearing Examiner, Planning Commission, or City Council. Kenyon Disend's August 23, 2011 letter offers absolutely no basis for striking those passages. For that matter, Kenyon Disend's letter continues the pattern and fails to state whether its comments in the letter are endorsed by any City department or official.
- Page 2, first full paragraph: I argued that Kenyon Disend cannot cite a single piece of evidence to support its characterizing The Diamond Coalition as a party to these proceedings. Kenyon Disend's perfunctory response is that Exhibit 218 "does not state that." Sterbank Letter (Aug. 23, 2011), at 3, n.5. Exhibit 218 may not have included that assertion in so many words, but it certainly was strongly inferred. Exhibit 218 states that Cynthia Wheeler, Bill Wheeler, and Joe May are officers of

The Diamond Coalition. The very next sentence states that “all three testified to the Hearing Examiner on the MPDs, and the Wheelers did so again on the DAs.” Exhibit 218 at 4-5. The inference was clear. Our effort to demonstrate the inaccuracy of that inference should not be stricken.

- Last paragraph, page 2-top of page 3 and last paragraph page 3-top of page 4 and two sentences on page 5: In these parts of my August 19, 2011 letter, I addressed the City Attorney’s efforts to undercut the input from citizens on the basis that they had received assistance from Peter Rimbo and other community leaders. I characterized Exhibit 218 as attempting to portray citizens opposing the developments as “so many mindless marionettes orchestrated by a few puppeteers” and (switching metaphors) as “so many lemmings rotely chanting the same theme.” The City Attorney’s recent letter states that he did not use those exact words. (Footnote 5.) Of course not. But I did not put those words in quotes as if they had been written by the City Attorney. Those were my words to describe the City Attorney’s attack on the citizens who took the time to respond to requests for their input from both the City and community leaders. That the words of my metaphors were not taken from Exhibit 218 is not grounds for striking the argument.

Kenyon Disend’s August 23, 2011 letter provides little or, in most cases, no justification for striking the foregoing passages of my earlier letter. Those passages should not be stricken.

The only part of my earlier letter that is addressed in any significant way in Kenyon Disend’s recent letter is the part where I take issue with ostensible quotes from The Diamond Coalition website. Kenyon Disend admits that it failed to provide the correct documentation to support its earlier claim when Exhibit 218 was filed. Kenyon Disend filed that material belatedly, after my objection was filed. We stand by our statement that The Diamond Coalition’s stated goal is not to “see a significant reduction in the MPD proposed density/scale.” Yes, that statement appeared on an early, draft version of The Diamond Coalition’s website, but it has never been formally adopted by The Diamond Coalition as its goal and was never included in any web page sanctioned by the organization.

Kenyon Disend neglects to note that the web page it found on the internet was only accessible through a search engine or a snapshot of a web page from some earlier point in time. The earlier point in time was when The Diamond Coalition was first developing its website. The person working to develop the web site included the statement now highlighted by Kenyon Disend in an initial posting. But the managing body of The Diamond Coalition never adopted that statement as a goal of the organization and it was taken down from the website last year, a few days after it was initially posted. (Until Mr. Sterbank’s supplemental declaration was filed, The Diamond Coalition was not even aware that the artifact remained in the web site’s files. Upon learning of it, The Diamond Coalition promptly had it removed.)

Perhaps Kenyon Disend’s attorney was not aware that he was looking at a page that could not be linked from the web site’s index page and almost certainly was not aware that the statement was “live” on the web for only a few days a year ago and that it never was an officially endorsed

Phil Olbrechts
August 29, 2011
Page 3

position statement of The Diamond Coalition. But those are the facts and so we continue to assert that the City's arguments based on those characterizations of The Diamond Coalition's official position should be stricken and/or rejected.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Fol David A. Bricklin

DAB:psc

cc: Mike Kenyon/Bob Sterbank
Nancy Bainbridge Rogers
Client