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BEFORE THE HEARING EXAMINER FOR  
THE CITY OF BLACK DIAMOND

Development Agreements Lawson Hills PLN10-0021; PLN11-0014 Villages PLN10-0020; PLN11-0013	Order on Expert Testimony
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As discussed more detail below, expert testimony from Save Black Diamond and King County will be allowed. However the total time for King County will be limited to one hour and the time for Save Black Diamond will be limited to two hours. Significant restrictions will apply to the testimony of both parties as outlined below. The hearings will be held on July 21, 2011 if hearing facilities are available.

**Clarification**

The Examiner Rules of Procedure and Pre-Hearing Order II do not prohibit expert testimony from being presented in writing. The restrictions on relevancy of this order are limited to verbal testimony. As discussed in more detail below, verbal expert testimony consumes a significant amount of public participation resources. That factor is not as significant for written expert testimony, since written input takes much less staff and attorneys to process than verbal. Further, written expert testimony will create no need to further delay the completion of the hearings. Save Black Diamond and King County both are free to supplement their verbal testimony with written comments on issues that are precluded from verbal testimony from this order. Of course, the Applicant may supply all of its expert testimony in writing as well. Requests for and evidence supporting supplemental conditions will be considered if submitted in writing.

The right of cross examination in Pre-Hearing Order II only applies to verbal testimony. The Order was not intended or worded to create a right of cross examination of written testimony, as indicated in the language of the Order that provides that expert witnesses shall be subject to cross-examination "at the end of each of their testimony". Professional reports such as geotechnical

1 reports, biological assessments and habitat management plans are routinely submitted in land use  
2 hearings without the presence of the author and it would be highly disruptive and costly to require  
3 the presence of the expert for every hearing. The courts have ruled there is a due process right to  
4 cross examination, but the only time that issue has been addressed was when the expert “testified on  
5 behalf of parties at hearing”. Chrobuck v. Snohomish County, 78 Wn.2d 858 (1971). Further, in  
6 this case the parties will have ample opportunity to respond in writing to any written expert  
7 opinions.

### 8 **Definitions**

9 Reference is made at various points to “supplemental conditions”. Supplemental conditions are  
10 defined as conditions that can be added to the development agreements to address project impacts  
11 but that are not necessary to implement MPD conditions of approval.

12 “MPDs” are the Lawson Hills and Villages Master Plan Developments.

13 “Development Agreement(s)” are the Lawson Hills and Villages development agreements.

### 14 **Background**

15 Given the public interest expressed at hearing on the procedural background of this ruling, this  
16 Order may be revised as time permits to provide more specific dates for the submissions that lead to  
17 this Order. As required by Pre-Hearing Order II, King County and Save Black Diamond submitted  
18 disclosures of their proposed expert witnesses to the City of Black Diamond. The Hearing  
19 Examiner determined that these witnesses qualified as expert witnesses and this determination was  
20 posted on the City’s website. King County’s determination was posted later than that of Save Black  
21 Diamond because King County did not initially supply all the expert witness information required in  
22 Pre-Hearing Order II. The Applicant then submitted written objections to the witnesses on the  
23 grounds of relevancy. Pre-Hearing Order II did not address how to voice objections over proposed  
24 expert witnesses. The Applicant’s objections were forwarded to the parties proposing the experts  
25 for a response. The Examiner reviewed and ruled upon the Applicant’s objections in order to  
26 provide King County and Save Black Diamond time to prepare a response to the objection and to  
prepare testimony in accordance to the ruling on the objection. As the Examiner has previously  
ruled, participation in arguments for objections to witness testimony are limited to the objector and  
the witness (and/or the witnesses representative).

### 27 **Distinguishing Expert from Lay Testimony**

28 Expert witnesses are treated differently than lay witnesses in this hearing for a number of reasons  
29 and they will be held to a higher standard of relevancy. There are a number of reasons for this  
30 disparate treatment. First, as previously discussed the courts have ruled that parties to a land use  
31 hearing have a right to cross-examine expert witnesses. By contrast, cross-examination of law  
32 witness testimony is usually discouraged or prohibited by local decision makers because it can

1 intimidate persons from testifying. Second, from a practical standpoint expert testimony generally  
2 takes more time to present than lay person testimony because the testimony often addresses complex  
3 issues that need to be laid out in detail in order to identify the grounds upon which opinions are  
4 based. Third, expert testimony will often be given more weight and credibility than lay person  
5 testimony on a given subject because it is based upon training and expertise. Finally, parties who  
6 have the resources and expertise to provide expert testimony can generally be reasonably expected  
7 to have a more detailed understanding of land use hearing procedures than the general public.

8 For the reasons stated above, experts in this proceeding are given more time to present their case  
9 than lay persons. For the same reasons, experts will be held to a higher standard of relevancy for  
10 their testimony to be admissible. As discussed in Pre-Hearing Order II, relevancy for development  
11 agreements can be broadly construed because development agreements can include conditions that  
12 supplement conditions that are necessary to implement the MPD approvals. In order to provide for  
13 a process that is comprehensible to the general public, lay persons should be able to share any  
14 concerns that could be potentially addressed in the development agreement, even for topics where  
15 there is little likelihood that the Council will act upon them. To be much more particular than that  
16 could extend the length of the hearings by triggering repeated and prolonged arguments on  
17 relevancy. More likely than not, such arguments would create confusion, resentment and  
18 intimidation, all inimical to an efficient and effective hearing process.

19 The considerations involved in assessing relevancy for expert testimony are markedly  
20 distinguishable from lay person testimony. Expert testimony takes up considerably more public and  
21 private resources than lay person testimony due to both the extended time to testify and the need to  
22 use attorneys to both present and challenge the testimony. As previously mentioned, experts can  
23 also be expected to have a more detailed understanding of land use procedures than the lay public.  
24 In the interests of conducting an expeditious hearing as required by Examiner Procedural Rule 2.06,  
25 expert testimony will only be admissible if it addresses conditions or terms necessary to implement  
26 the MPD approvals or it is information that could be reasonably anticipated as of interest to the City  
Council in negotiating supplemental conditions. Testimony that just duplicates information already  
provided in the MPD hearings (including the EIS portion) is not reasonably anticipated as being of  
any interest to the Council.

### **Restrictions on Testimony**

Both Paul Reitenbach and Matthew Nolan have already testified at the MPD hearings on the same  
subjects they would like to address in this hearing. None of that testimony may be repeated. Their  
verbal testimony, if any remains, is limited to any new issues created by the proposed terms and  
conditions of the development agreement or rural issues that were not addressed in their MPD  
testimony. As to the latter testimony, impacts to rural areas are a significant consideration under the  
Washington State Growth Management Act and are of significance to intergovernmental  
coordination and relations between King County and the City of Black Diamond. For these reasons,  
it is reasonably likely that the Council may find additional information useful in assessing the need  
for supplemental conditions. The Examiner's recommendation on the MPDs identifies the

1 transcript pages of the testimony for Mr. Reitenbach and Mr. Nolan. The Applicant is requested  
2 (but not required) to provide copies of these transcript pages to the expert witnesses and the  
3 Examiner so that redundant testimony can be more easily identified during the hearing.

4 Sarah Cook and Llyn Doremus propose to provide testimony on sensitive area issues and  
5 stormwater issues that have largely been comprehensively addressed in review of the MPD  
6 applications and are also comprehensively addressed in the City's Sensitive Areas Ordinance and  
7 stormwater regulations. Their verbal testimony will be limited to the issues disclosed in the 7/8/11  
8 expert disclosure statement supplied by Save Black Diamond in addition to the following  
9 restrictions:

- 10 1. Testimony shall be limited to the issue of whether the Development Agreement terms and  
11 conditions adequately implement the MPD conditions of approval.
- 12 2. Supplemental conditions will not be addressed.
- 13 3. The adequacy of MPD and FEIS conditions of approval, findings and conclusions will not  
14 be revisited.
- 15 4. The adequacy of City of Black Diamond development regulations, including its stormwater  
16 and sensitive area regulations will not be addressed.
- 17 5. If sensitive area boundaries have been "agreed to" as contemplated in Condition 155 of the  
18 Villages MPD and Condition 159 of the Lawson Hills MPD the witnesses may not revisit or  
19 challenge the boundaries "agreed to".

20 Chris Breeds will have more latitude in his verbal testimony. It can be reasonably anticipated that  
21 the City Council might be interested in negotiating some supplemental conditions that address the  
22 fact that the boundaries to mine hazard areas are set by the development agreements and cannot be  
23 changed even if additional severe mining hazards are identified. As noted in EIS testimony  
24 submitted by the Applicant, the ability to identify mine hazards is somewhat speculative and  
25 difficult. Further, it's likely that at least severe mine hazards can pose a significant threat to public  
26 safety. It is plausible that over the 15+ year build out of the MPDs that the appearance of sink holes  
or similar events could expose the existence of more mine hazards than those currently identified. It  
may be a matter of concern to the Council that the City could become aware of newly discovered  
severe mine hazard areas where single-family homes or other buildings could be built and have no  
authority to address the issue. In addition to the issues that Sarah Cook and Llyn Doremus may  
address, Mr. Breeds may suggest supplemental conditions addressing mine hazard areas and explain  
why he believes such supplemental conditions are necessary.

#### 23 **Time Limits**

24 Since the verbal expert testimony appears to be largely, if not entirely, composed of suggestions for  
25 supplemental conditions, time limits shall be imposed as follows:

26 King County shall have a total of one hour for its expert testimony.

1 Save Black Diamond shall have a total of two hours for its expert testimony.

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3 Time for addressing objections and cross-examination, including redirect, shall not apply to the time  
4 allotments above.

5 **Hearing Date**

6 There is no single date available for all of the proposed expert witnesses. At this point it appears the  
7 date best suited to meet everyone's needs is July 21, 2011. Save Black Diamond Experts can  
8 commence testimony at 10:00 am with objections and cross (hopefully) not extending the time  
9 period past 1:00 pm. King County testimony can be scheduled for 2:00 pm on that day.

10 ORDERED this 14<sup>th</sup> day of July, 2011.

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12 Phil A. Olbrechts  
13 Hearing Examiner for Black Diamond  
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