

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

I. Introduction

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

II. Reply to Responses

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

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

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

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

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

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

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

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

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

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

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

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

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

Condition 128 of The Villages MPD ordinance requires

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

Condition 141 of The Villages MPD ordinance requires:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Development Agreement	Main document	Appendices excluding E⁵	Total
Lawson Hills	155	515	670
The Villages	166	503	669
Grand Total			1339 ⁶

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

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

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

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

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

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

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

See Exhibit A.

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

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

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

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

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

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

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

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

Yarrow Bay misunderstood the following from my motion:

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

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

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

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

Yarrow Bay responded that they did not understand the following:

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

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

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

7. The City responded to a Bricklin email comment that was entered as a motion by the Examiner. The City's comment began:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Summary

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

Dated June 27, 2011

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

Robert M. Edelman

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NOTICE OF PUBLIC HEARING

PROPOSED DEVELOPMENT AGREEMENT FOR THE VILLAGES MASTER PLANNED DEVELOPMENT

CITY OF BLACK DIAMOND HEARING EXAMINER

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit A

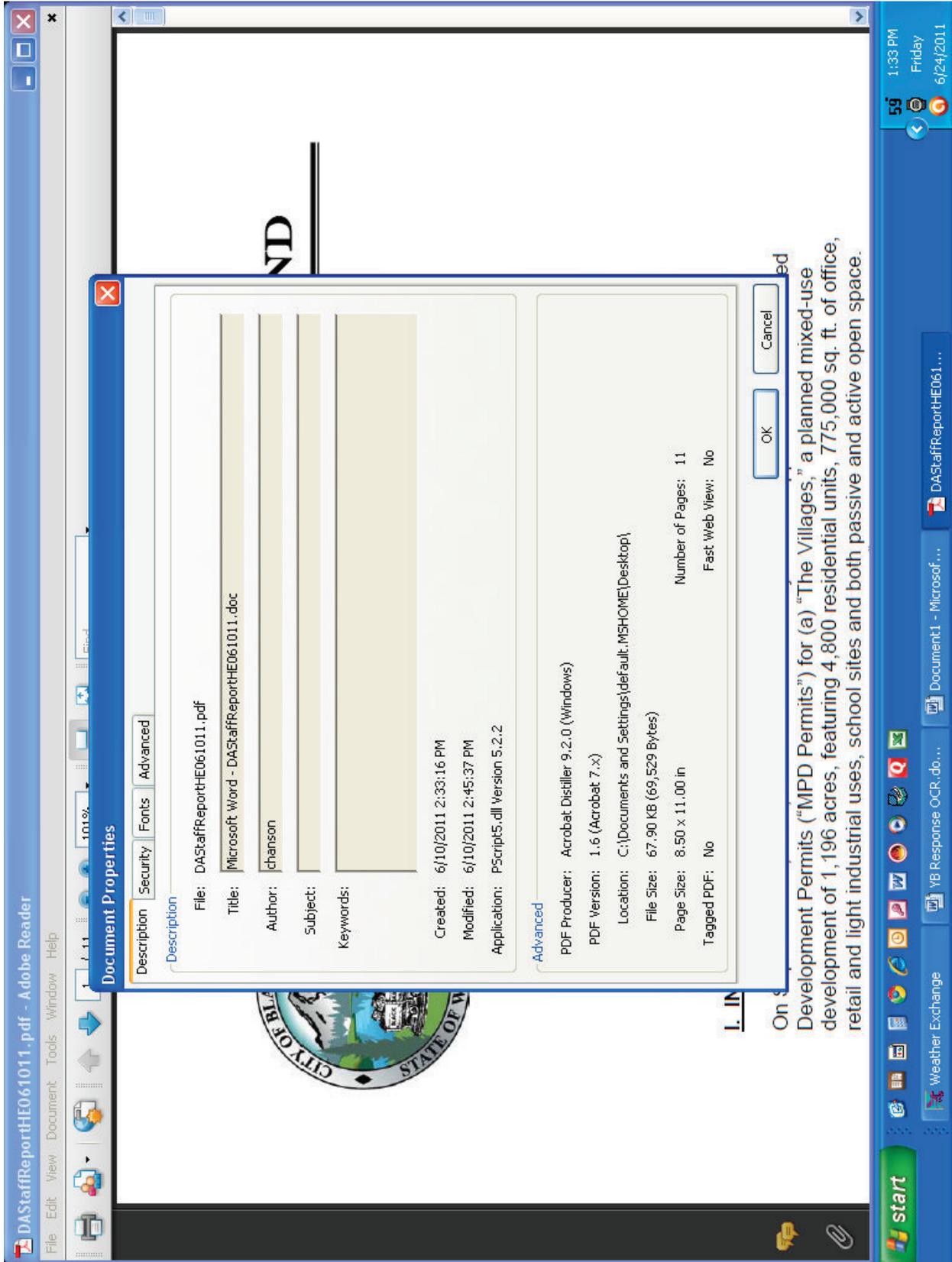


Exhibit B

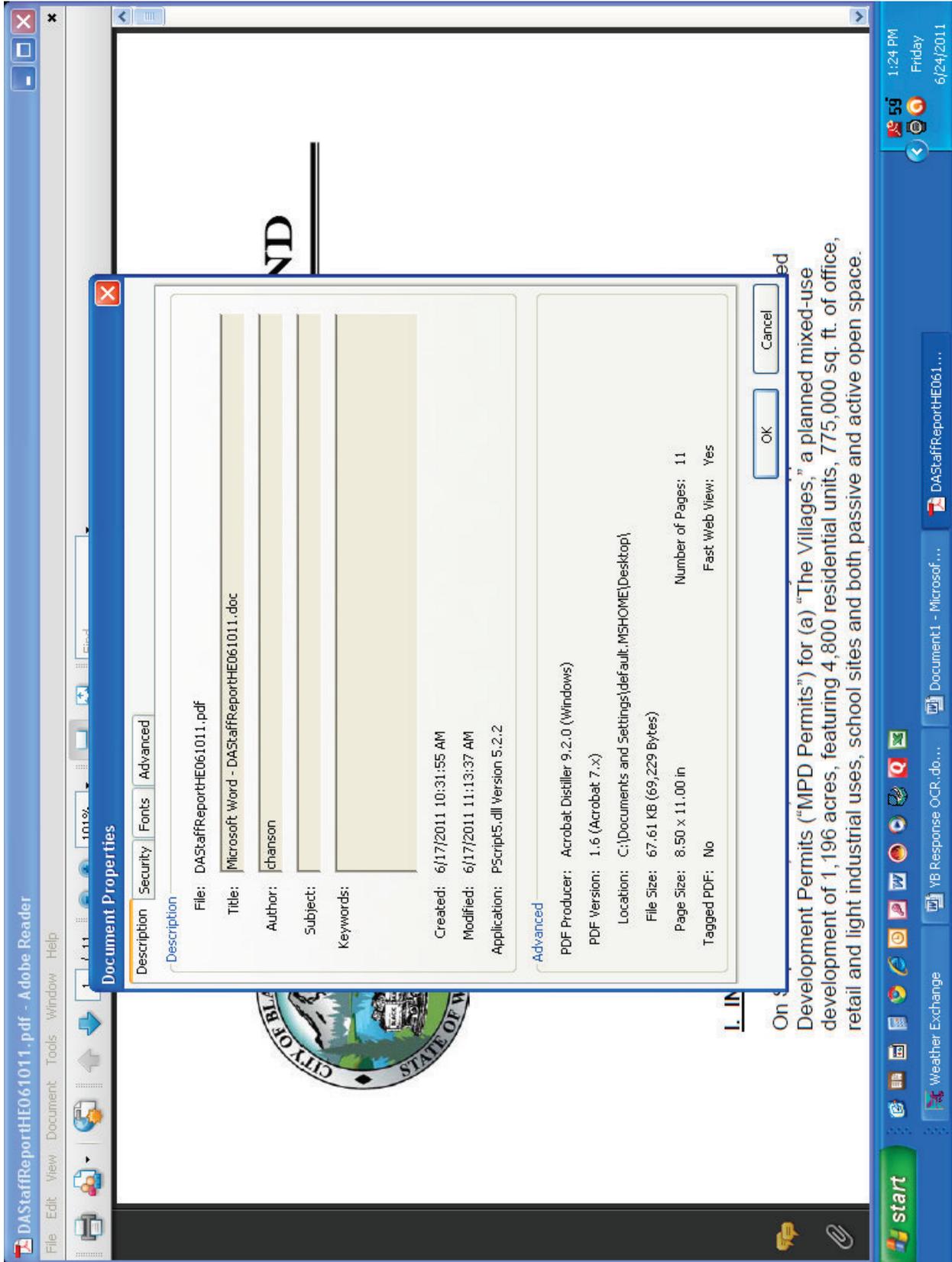
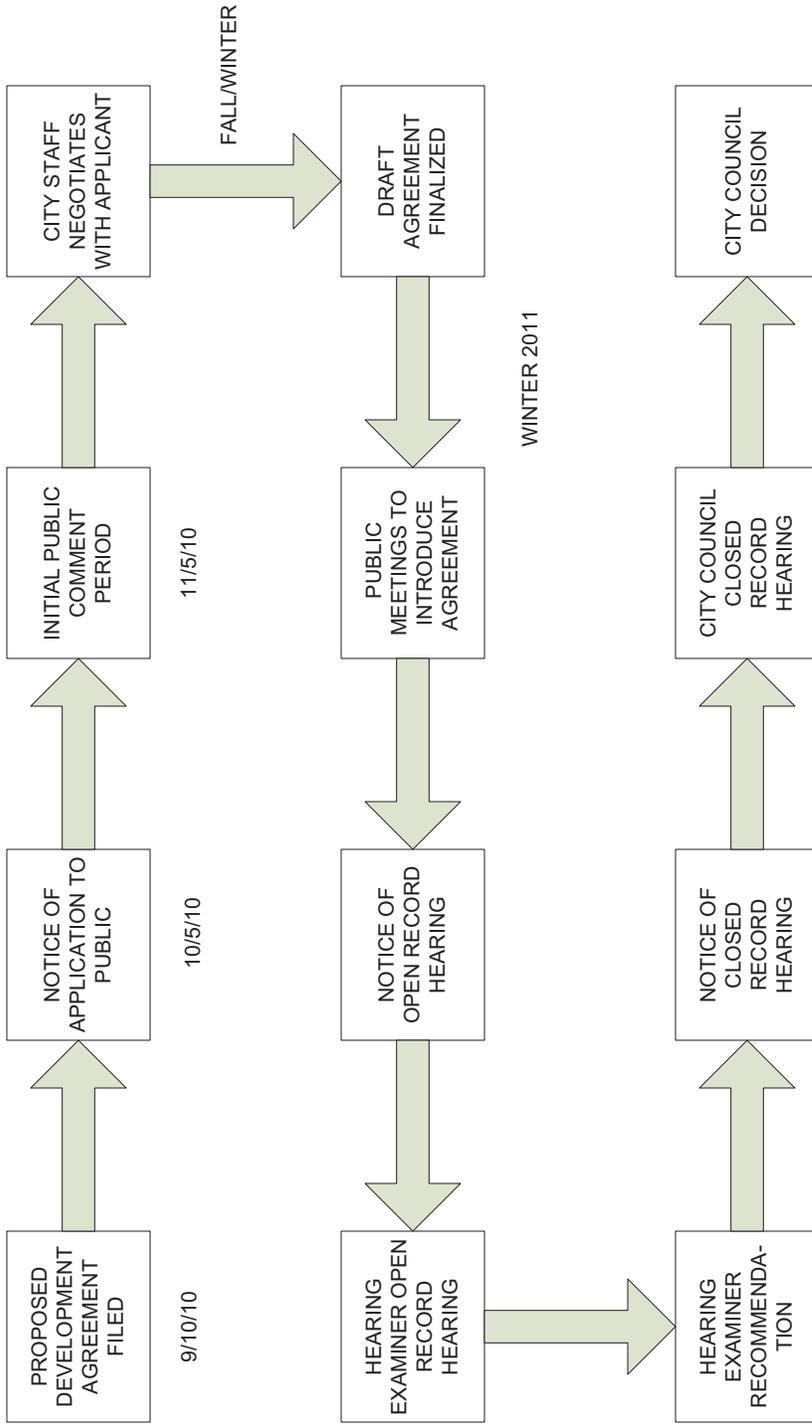


Exhibit C

MPD DEVELOPMENT AGREEMENT PROCESS



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

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

Petitioners,

vs.

CITY OF BLACK DIAMOND,

Respondent.

NO. 10-3-0014

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

I. RELIEF REQUESTED

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

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



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

4 II. STATEMENT OF FACTS

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

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

17 By order of the Presiding Judge dated March 2, 2011, the motion to consolidate
18 was denied without prejudice, but the appeal was “re-assigned” to Judge Carey to make a
19 determination on consolidation. Judge Carey could rule on consolidation, and enter a
20 scheduling order on the appeal, as early as Friday, March 4.² Id. at 2, ¶ 4.

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

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

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



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

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

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

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

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

19 III. LEGAL ARGUMENT

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

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

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

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

17 IV. CONCLUSION

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

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

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

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

7 DATED this 3 day of March, 2011.

8 KENYON DISEND, PLLC

9
10 By

Michael R. Kenyon

WSBA No. 15802

Bob C. Sterbank

WSBA No. 19514

Attorneys for City of Black Diamond

DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

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

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

Attorneys for Petitioners:

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

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

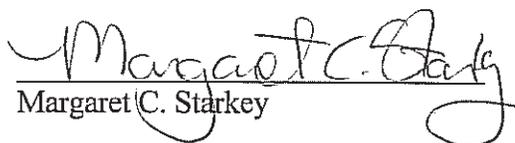
Attorneys for Intervenor Yarrow Bay:

Andrew S. Lane
Nancy Bainbridge Rogers
Cairncross & Hempelmann, P.S.
524 Second Avenue, Suite 500
Seattle, WA 98104

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

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

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


Margaret C. Starkey



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

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

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

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

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

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

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

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

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

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

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