

Before the City of Black Diamond Hearing Examiner

Response due June 27, 2011

City of Black Diamond Motion: Analysis

C. The Requested Continuance of the Hearing Date Should be Denied

The City bases a section of their analysis on the fact that the citizens have organized, that they are interdependent of each other and that this organization and preparedness implies that we are as *equally* as prepared as the City Staff and stable of attorneys that have had months to review the final development agreement. It also implies that a few speak for all.

Mr. Examiner, the City is incorrect in the conclusions and conjectures they have arrived at as they investigate and watch those who have voiced their concerns on the size and pace of the MPDs. Neither I nor my Mother Vicki A. Harp belongs to any organized group. We do not belong to Save Black Diamond, we do not belong to Towards Responsible Development, and we do not belong to the Diamond Coalition. Although we are sympathetic to many of their issues and share information as needed, and while we are concerned about schools and wildlife, we appealed the FEIS and appealed the MPD Ordinance primarily due to two reasons, the pending noise at 90 dBAs and placement of high-density next to single-family homes.

Under the BDMC we have the right to speak before the Hearing Examiner with our concerns regarding the MPD projects, the right to due process and the right to appeal the hearing examiner's decision without intimidation and harassment by the City. It is outlined by the City's municipal code.

Under the First Amendment of the US Constitution we have the right to speak freely without government interference and the right to gather in public to march, protest, demonstrate, carry signs and otherwise express our views in a nonviolent way. This also means people can join and associate with groups and organizations without interference and that all have the right to appeal to government in favors of or against policies that affect them or that they feel strongly about. This freedom includes the right to gather signatures in support of a cause and to lobby legislative bodies for or against legislation.

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

I bring these points up because many of the citizens on the City's *watch* list also have a pending First Amendment suit on hold in Federal Court. Additionally, the Growth Management Hearing Board voted 3-0 that the City followed an illegal process when it denied the public the right to lobby their legislative officials, and that the Attorney's briefs were unprofessional.

(Exhibit 1) Finally, in the last year the City has been contacted by that State Attorney General's office regarding possible violations of the Public Disclosure Act not once, but twice. **(Exhibit 2)**

The relevancy of this in my response is due to the City's continued insistence in their responses and supplemental response to somehow blame the citizens for trying to participate in the public process, and the city's dogged efforts to actively watch and search for citizen organizations and then to call them out as something conspiratorial. The citizens need time to prepare. I personally read the first two versions of the Development Agreement and contrary to the City's positions there are substantial changes which require thoughtful review of all of the documents. Additionally, the City and the Applicant have made it abundantly clear that they want the public to stay within a fairly narrow discussion path related to the Development Agreement, yet somehow they think everyone knows that exact ins-and-outs of land-use and that they walk around with an attorney on retainer...with all due respect, we do not. What the City really wants is to limit the time to review thus limiting knowledgeable comments and limit the actual time to participate, or better yet make it so no one shows up.

All these actions are meant to intimidate people and to keep people from participating. It is working Mr. Examiner, the meeting venue was changed and/or cancelled; it is like a Kafkaesque novel and the City should be embarrassed and held accountable for submitting this type of a motion. I know that the City's actions of cyber-stalking and updating the Mayor on *who* comments at what public meeting (and exactly *what* they have to say) is scaring me and gives me pause on whether I will continue, specifically when we get to the Closed Record Hearing.

(Exhibit 3) If the City feels this emboldened with someone watching over them such as you Mr. Examiner, I can only imagine the tactics they will take when there is no one between them and the public at the Closed Record Hearing.

In regards to the City's position that time be limited to 3 minutes, maximum 21 minutes and no written submissions allowed if you cede your time, this is egregious. Mr. Examiner as an experienced land use attorney, and law professor, would you be able to give all the relevant, intelligent, and required public comments in 3 minutes on these massive MPDs!? Some, citizens

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need (3) minutes just to get their introductions done and I mean no offense on that, we are not all gifted speakers. I am perfectly confident that you will manage your hearing in a professional and thoughtful manner.

Finally, Mr. Examiner, I am very disturbed that we have to continue to fight for the basic right to participate. The City has assured us that the Development Agreement is complete, thorough, and meets the requirements of the law; however their continued collateral attack on the public participation process is in stark contrast to that declaration. The City assures us that the Development Agreement can stand on its own merit. Therefore they should not be concerned on whether someone has 10 minutes to speak, is ceded time up to an hour, submits written and oral comments or if the hearings are set 60 days from public notice to allow for full agency and public review. Furthermore, the City of Maple Valley has already made the same argument that the requirement to wait day-after-day waiting to be called is burdensome, which is consistent with the public position protocol for ceding time via email versus daily attendance. **(Exhibit 4)** There is no need to always settle for the minimum standards and requirements when we can do better regarding this irrevocable agreement that affects the entire South King County region. Let's please move on to a more respectful and focused process without all the conjectures.

Accordingly, I continue to respectfully request the Hearing Examiner allow additional time for review of the Development Agreement and its attachments of not less than 60 days from the June 10, 2011 notice date, resulting in a new Public Hearing date no earlier than August 10, 2011 (which is only 43 days from the June 28th informational meeting). I request the evening hearings start at 7:00 pm, I request 10 minutes per person, I request up to 60 minutes per person if time is ceded, I request that ceding of time permission can be emailed to the City Designated Official and that this will not limit written comments.

I also ask that the City's references to Save Black Diamond, the Diamond Coalition, TRD, and citizens "relationship" conjecture be stricken as non-responsive; and that the City's Supplemental Motion be stricken as untimely and non-responsive.

Audemus jura nostra defendere ~"We Dare To Defend Our Rights"

Exhibit 1

97 Pursuant to RCW 36.70A.106(3)(b), expedited review may be sought before the Department of Commerce.

Concurring Opinion of Boardmembers Earling, Pageler, and Paoella:

Because this comment does not bear on the outcome of the case, the Board writes separately to comment on the decorum of the attorneys in this matter. Generally, the Board expects and receives briefings from attorneys that are factual, straight forward, professional, and respectful of differing viewpoints expressed in a case. The current case before the Board is an exception. The sarcasm, disrespect, and foolish quotes to make points, add little to the briefing. Assuming the case continues in some fashion, the Board requests the attorneys reset their attitudes and return to the level of professionalism we are sure they expect of themselves and their counterparts.

Exhibit 2

Public Records - City of Black Diamond

From: **Ford, Tim (ATG)** (TimF@ATG.WA.GOV)
Sent: Tue 3/01/11 4:31 PM
To: Bob@kenyondisend.com
Cc: Cindy Proctor (proct@msn.com); Bob Edelman (BobEdelman@comcast.net); Ganga, Elaine (ATG) (ElaineG@ATG.WA.GOV); bmartinez@ci.blackdiamond.wa.us

Bob,

Cindy Procter and Bob Edelman contacted me with concerns regarding disclosure of public records by the City of Black Diamond. They each have specific and general concerns. Bob Edelman states he submitted a request for public records on January 3rd and that the city did not initially respond until January 13th. Cindy Proctor states she submitted a request on January 12th which is still outstanding. Their general concerns relate to several problems with the city's spam filter for emails that has prevented the city from responding to public records requests in a timely manner. Apparently the city has repeatedly encountered problems with the spam filter in December 2009, March 2010, and January 2011.

As you are aware, the courts have held that "administrative inconvenience or difficulty does not excuse strict compliance with the PDA". *Zink v. City of Mesa*, 14 Wn. App. 328, 337 (2007) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131-132 (1978)). Please contact me to explain what action the city is taking to ensure the spam filter problems don't recur.

Sincerely,

Tim Ford

Open Government Ombudsman

Assistant Attorney General for Government Accountability

Attorney General of Washington

1125 Washington St, SE

Olympia, WA 98504

(360) 586-4802

timf@atg.wa.gov

<http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx>

DISCLAIMER: This email is not intended or offered to provide legal advice or legal representation by the Office of the Attorney General to any recipient.

Exhibit 3

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022

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Rebecca Olness

From: Steve Pilcher
Sent: Wednesday, April 13, 2011 1:02 PM
To: Rebecca Olness; Brenda Martinez
Subject: Citizen comments at Planning Commission meeting last night

Mr. Rimbo, Ms. Proctor, Ms. Wheeler all addressed the Commission regarding their desire to meet with them to discuss the MPDs. They saw the Stay granted by the Superior Court as simply offering additional time for discussions, so the Commission won't be rushed.

In terms of the proposed amendment to the Subdivision Code to have appeals of Hearing Examiner decisions go directly to court, all who spoke (all of the above, plus Robbin Taylor, Erika Morgan, Melanie Gauthier and Jack Sperry) all favored retaining the existing system where appeals would go to Council. The Commission declined to render a recommendation on this issue, so it's being pulled from next week's Council agenda. Ms. Wheeler stated that should the change be made, it should not apply retroactively to preliminary plats that have already been filed. She felt that if those applicants wanted be subject to a "direct to Court" process, they should withdraw and reapply under the new rules (should those be adopted).

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

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Rebecca Olness

From: Steve Pilcher
Sent: Tuesday, March 01, 2011 5:12 PM
To: bob@kenyondisend.com; mike@kenyondisend.com
Cc: Andy Williamson; Rebecca Olness; Brenda Martinez; Stacey Borland
Subject: PC Min 06.08.10
Attachments: PC Min 06.08.10.doc

Attached are the minutes at which the Commission acted on the proposed amendments to BDMC 18.08. You will note that they specifically voted to not include changing the D.A. process.

If you need any of the preceding meeting minutes, let me know.

Steve Pilcher
Community Development Director
City of Black Diamond
360-886-2560

**BLACK DIAMOND
PLANNING COMMISSION
MINUTES OF JUNE 8, 2010 MEETING**

CALL TO ORDER

Chairman Bob Kaye called the meeting to order at 7:02 p.m. with the introduction of the role and duties of the Planning Commission.

ROLL CALL

Present: Commissioners Bob Kaye, Pam O'Brien, Ron Taylor, Sheri Roth, Greg Thesenvitz, Darryl Buss,
Absent: Keith Watson (ill)
Staff: Community Development Director Steve Pilcher

PUBLIC COMMENTS

Cindy Proctor, 2950 Sun Mountain Drive, Enumclaw, confirmed that the Commissioners had received a copy of an email she sent on June 6th. She stated that the minutes of the May 11th meeting should not be approved, as they did not include important statements, as noted in her email.

Mr. Pilcher provided the Commission with information from the website of MRSC (Municipal Research and Services Center) that indicates verbatim minutes are not required by law.

Ms. Proctor stated her opposition to the proposed amendment to Chapter 18.08 which would remove the Hearing Examiner from reviewing a proposed Development Agreement.

Chairman Kaye noted that at the public hearing, the Commission had provided ample opportunity for public comment and then had closed the hearing to further testimony. He noted that the purpose of the Public Comment portion of this meeting is for individuals to comment on issues not on the meeting agenda.

Cynthia Wheeler, 30221 234th Ave. SE, noted that three of the Planning Commission members in attendance were not present at the May 11th public meeting and therefore should not vote on whether to approve the minutes and on the proposed code changes. She asked Mr. Pilcher if a copy of the legal analysis of former Interim City Attorney had been provided to the Commission.

Mr. Pilcher declined to answer her question.

Commissioner O'Brien inquired if there was information lacking in the minutes that wasn't otherwise addressed in Ms. Proctor's email.

Ms. Wheeler stated Ms. Proctor's email included the information they feel needs to be included in the minutes.

Robert Taeschner, 30846 229th Pl. SE, advised the Commission they may not have adequate information available in order to make a decision on the proposed code amendments.

Lisa Garvich, 29625 232nd Ave SE, stated the Commission should not feel rushed to adopt the proposed amendments. She stated that staff is trying to push through too many amendments to the Municipal Code, particularly during this period while the MPDs are under consideration.

Mr. Pilcher pointed out there have been two instances in the past 6 months that the Council, in response to citizen comments, has adopted code amendments regarding the MPD process.

Sheri Miller, 23210 312th St. SE, stated it is important for the Commission to hear the concerns of citizens and be responsive to those concerns.

Robert Taeschner inquired of Mr. Pilcher whether he was a Black Diamond resident. Mr. Pilcher replied that he was not.

APPROVAL OF MINUTES

Commissioner O'Brien inquired of those Commissioners who were present at the May 11th meeting if they felt the minutes captured the "flavor" of the meeting. Commissioners Buss and Thesenvitz responded in the affirmative, as it was clear the majority of testimony was in opposition to removing the Hearing Examiner from the Development Agreement process.

Moved by Commissioner Thesenvitz, seconded by Commissioner Buss, to approve the minutes of the May 11, 2010 meeting as drafted. Passed 5-0 (Commissioner Taylor abstained).

PUBLIC HEARING REGARDING POTENTIAL AMENDMENTS TO BLACK DIAMOND MUNICIPAL CODE 18.08 CONCERNING APPLICATION PROCEDURES (testimony closed)

Chairman Kaye asked the Commission what their preference was concerning the issue of the Hearing Examiner and the Development Agreement process. Consensus was to keep the language as currently in code and therefore leave the Examiner in the Development Agreement process.

Commissioner Thesenvitz asked for clarification of the proposed amendment to 18.08.050 regarding the shoreline permit process.

Mr. Pilcher noted that this section is proposed for deletion as part of a broader amendment to make all shoreline permits Type 3 decisions and therefore require a public hearing before the Hearing Examiner. The code still provides that an appeal of an Examiner's decision is to be made to the State Shorelines Hearing Board.

Exhibit 4



P.O. Box 320 • 22017 SE Wax Road • Maple Valley, WA 98038

Phone: 425-413-8800 • Fax: 425-413-4282

November 2, 2010

Mayor Rebecca Olness
City of Black Diamond
P.O. Box 599
24301 Roberts Drive
Black Diamond, WA 98010

RE: Process for Consideration of MPD development agreements

Dear Mayor Olness:

On behalf of my staff, I wish to express a concern about the way the MPD open record hearings were conducted before the Hearing Examiner last spring, as well as how the MPD closed record hearings were conducted before the Black Diamond City Council last summer.

The MPD hearings before the Examiner lasted approximately five weeks. Several of my staff were involved in that process, and, due to the way the process was structured, were compelled to be there, day after day or night after night, with no participation – simply waiting for their names to be called. The same thing occurred when the closed record hearings were held before the Black Diamond City Council, which also took several weeks to conclude. As you may suspect, it was very disruptive to Maple Valley's ongoing operations to have key staff gone for such extended periods of time.

I cannot afford to have key Maple Valley staff out of the office again, attending hearings unnecessarily, for weeks during the development agreement process. Therefore, I hope you will consider this request as a possible solution to this problem. Please discuss this request with your legal counsel and staff in an effort to address my concerns.

I ask that you, your legal counsel and staff work with the Hearing Examiner to set up a specific date(s)/time(s) for governmental agency testimony during the public hearings before the Examiner on the development agreements, and that these date(s)/time(s) be noticed *in advance*, at the time that the hearings are scheduled. This will provide certainty to governmental agencies, who can schedule the staff that are necessary for testimony. I am proposing that you do the same thing when the City Council's closed record hearings on the development agreements begin.

Cindy Proctor 718 Griffin Ave #241 Enumclaw, WA 98022