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BEFORE THE CITY OF BLACK DIAMOND

HEARING EXAMINER

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

REPLY BRIEF IN SUPPORT OF MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)

I. INTRODUCTION

BD Village Partners, LP and BD Lawson Partners, LP (collectively, “Yarrow Bay”) files this reply brief to the responses to motions filed by the City of Black Diamond, as well as interested persons. Yarrow Bay requests that the Examiner issue a Pre-hearing Order setting procedures for the upcoming hearings on the development agreements for The Villages and Lawson Hills Master Planned Developments (“MPDs”). A revised proposed Pre-hearing Order is filed together with this Reply Brief.

II. DISCUSSION

A. The development agreements must be reviewed in a quasi-judicial hearing.

It is undisputed that BDMC 18.08.030 provides that development agreements are Type 4 – Quasi-Judicial decisions. The only interested person to address this issue was Mr. Edelman, who stated that the “Examiner can certainly conduct the hearings in a quasi-judicial manner at

1 his discretion and, to my knowledge, no party has argued for a legislative Hearing Examiner
2 procedure.” The Examiner’s Pre-hearing Order should provide that the hearing procedures will
3 be quasi-judicial.

4 **B. The scope of the hearing should be limited to confirming that the**
5 **development agreements appropriately incorporate those matters directed**
6 **and allowed to be incorporated by the MPD Approvals and State law.**

7 It is undisputed that the development agreements for The Villages and Lawson Hills are
8 required under BDMC 18.98.090, and that the development agreements are contracts between a
9 landowner and the City of Black Diamond. *See* RCW 36.70B.170. It is undisputed that the
10 purpose of the MPD development agreements is to ensure that the “MPD conditions of approval
11 shall be incorporated” into a development agreement that is “binding on all MPD property
12 owners and their successors,” to ensure that the MPD lands are developed “only in accordance
13 with the terms of the MPD approval.” BDMC 18.98.090. It is undisputed that under RCW
14 36.70B.170, a development agreement “shall be consistent with applicable development
15 regulations,” and “must set forth the development standards and other provisions that shall apply
16 to and govern and vest the development, use, and mitigation of the development of the real
17 property for the duration specified in the agreement.” *See also*, BDMC 18.66.020.

18 Given this undisputed law, the only issues that can be reviewed during the hearings on
19 the development agreements are the three issues initially stated by Yarrow Bay: (1) whether
20 each development agreement incorporates the conditions of each MPD Approval, as adopted in
21 Ord. Nos. 10-946 and 10-947, (2) whether each development agreement is consistent with
22 applicable development regulations, and (3) whether the matters set forth in the development
23 agreements are within the scope of development standards and provisions authorized to be
24 included in a development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020. The
25 City broke Yarrow Bay’s third issue into several categories, describing those items in greater
26 details as: (a) do the Development Agreements set forth the development standards and other

1 provisions that apply to, govern and vest the development, use and mitigation of the MPD
2 properties, (b) are the Development Agreements binding on all MPD property owners, and their
3 successors, and (c) do the Development Agreements require that the MPD property owners (and
4 their successors) develop the MPD property only in accordance with the conditions of the MPD
5 Permit approval. Either Yarrow Bay's three issues, or the City's more detailed set of five issues
6 are appropriate to define the limited scope of these Development Agreement hearings.

7 Various interested persons made arguments that the hearings should go well beyond this
8 scope. For example, in an email dated June 17, 2011 at 12:00 p.m. from Mr. Bricklin, it is
9 alleged that when the Black Diamond City Council approved the MPDs, the Council "stripped"
10 the Examiner's recommended conditions to eliminate bulk and use standards, that the supposedly
11 stripped language needs to be "restored" in the Development Agreements, and that the
12 Development Agreements will be used to establish the functional equivalent of a zoning code.
13 None of that is true, nor does it inform an analysis of the proper legal scope of the Examiner's
14 review of the Development Agreements.¹ We again object to the Examiner's consideration of
15 this email and the argument contained in that email. The arguments were not filed as a response
16 to motions, and were not procedural questions which staff could not answer, which was the
17 limited category of correspondence the Examiner was willing to accept by email. In addition, if
18 such arguments – or arguments like that of Ms. Proctor that the citizens should be allowed "to

19 ¹ The City of Black Diamond adopted the MPD zoning code and MPD permit requirements in 2005, and amended
20 them in 2009, codified in BDMC Chapter 18.98. In September 2010, the City Council approved the Lawson Hills
21 and The Villages MPDs under that Code, and imposed some new conditions and modified other conditions that the
22 Examiner recommended. The City Council did not "strip" the Examiner's recommendations regarding use or bulk
23 standards – but even if the Council had done so, the Development Agreement hearings are not an opportunity to re-
24 open and re-consider the approved MPD conditions. We also emphasize that the Examiner should not confuse the
25 Development Agreement as the functional equivalent of a zoning code. It is no such thing. Under RCW
26 36.70B.170, a development agreement is a contract that "must set forth the development standards and other
provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the
real property for the duration specified in the agreement." Moreover, under RCW 36.70B.170, a "development
agreement shall be consistent with applicable development regulations" of the City. Thus, there are certainly
"development standards" and references to code in the Development Agreement, because that's what the
Development Agreement is required to contain. But it is not a zoning code.

1 discuss the merits” of the MPDs – are raised at the Development Agreement hearings, they will
2 engender an objection as to relevance. Whether the Development Agreement properly
3 incorporates the MPD Conditions adopted by the City Council is relevant. Whether the MPD
4 Conditions were amended from the Examiner’s recommendation and whether the MPD
5 Approval and Conditions reflect a project that has merit is not relevant. These Development
6 Agreement hearings are not a referendum on the MPD process or the resulting MPD Approvals.

7 Next, Mr. Sperry argues that there are areas in the Development Agreements where
8 “detail is extremely lacking,” such that testimony should be accepted regarding “areas where
9 there is inadequate definition of how the MPD Conditions will be met” or “how aspects of these
10 developments will be built.” Similarly, Mr. Rimbos argues that the Development Agreements
11 “lack specificity” to answer questions as to “who, what, where, why, how and when” and that
12 this is the public’s “only chance” to speak to the issues. Mr. Edelman raises the same issues
13 when he argues that the public should be allowed to comment on the “merits of a Yarrow Bay
14 implementation approach” because otherwise the City “must accept whatever approach is
15 proposed.” All of these arguments misunderstand the extensive negotiations that have already
16 occurred, as well as the purpose and role of the Development Agreements vis a vis future
17 Implementing Project applications.

18 The Development Agreements coming before the Hearing Examiner are not just Yarrow
19 Bay’s proposal. Instead, and as described at pages 3-4 of the Staff Report, both City Staff and
20 outside consultants to the City reviewed the Development Agreements. All terms were
21 considered, addressed, sometimes revised, and ultimately accepted by those Staff people and
22 consultants as well as Yarrow Bay. The Development Agreements coming before the Hearing
23 Examiner reflect an agreement between City Staff and consultants, and Yarrow Bay staff and
24 consultants.

1 Next, no development agreement details and designates where every last blade of grass
2 will be planted. Instead, by law, the point of a development agreement is to set the standards
3 which all subsequent permits issued by the City must meet.² There will be significant additional
4 public process over the next 15 to 20 years of MPD build-out as Implementing Projects are
5 applied for by Yarrow Bay and processed by the City. The distinction between what is set in the
6 Development Agreement and what is set by the future Implementing Approvals seems best
7 described by using the example of the siting of a stormwater facility.

8 The public has raised concerns about the location of various stormwater detention
9 facilities. The Villages Development Agreement, Fig. 7.4 maps proposed ponds serving the
10 basins across the site. Each pond will be finally located, engineered, designed and built to meet
11 Section 7.4.1's "availability" criterion – the test to assure that the pond is built at the time
12 necessary to serve the Implementing Project(s) which need to drain to it. As described in Section
13 7.4.2, any regional facility is required to meet those standards, too. Next, the engineered designs
14 for each pond must meet all of the goals and standards listed in Sections 7.4.3 and 7.4.4.A. The
15 engineered designs for each pond must also meet the more detailed requirements in Section
16 7.4.4.B for its specific Basin. But the specific locations and engineered designs for the pond are
17 not set in the Development Agreement. Instead, that will be set during Implementing Project
18 review of, for example, the first subdivision that will require use of the pond.

19 Boiled down to its essentials, the subdivision process includes (a) a preliminary review,
20 public hearing, and then approval of the planned layout of the lots, infrastructure, and amenities,
21 followed by (b) detailed review and approval of fully engineered plans for the infrastructure and
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23 ² Specifically, RCW 36.70B.180 provides: "A development agreement and the development standards in the
24 agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the
25 agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or
26 a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement."

1 site grading, followed by (c) actual construction of the infrastructure and grading of the building
2 lots, followed by (d) inspections of the construction and, for some infrastructure (e.g., a water
3 main), acceptance into the City's system, and then (e) final City approval and recording in the
4 property records kept by King County of the final surveyed layout describing each and every lot
5 location.

6 None of the interested persons arguing about the scope of the Development Agreement
7 hearings – including Mr. Bricklin– cite any legal authority that would justify the Examiner using
8 the Development Agreement hearings to either reconsider the terms of the adopted MPD
9 Approvals, or to look forward in time to consider engineering details that have not yet been
10 designed. There is no such authority.

11 The Examiner's Pre-hearing Order should identify the applicable legal criteria (BDMC
12 18.98.090, BDMC Chapter 18.66, and RCW 36.70B.170 - .210) and the three (or five more
13 detailed) issues to which these Development Agreement hearings are limited: (1) whether each
14 development agreement incorporates the conditions of each MPD Approval, as adopted in Ord.
15 Nos. 10-946 and 10-947, (2) whether each development agreement is consistent with applicable
16 development regulations, and (3) whether the matters set forth in the development agreements
17 are within the scope of development standards and provisions authorized to be included in a
18 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020, meaning whether (a)
19 the Development Agreements set forth the development standards and other provisions that
20 apply to, govern and vest the development, use and mitigation of the MPD properties, (b) the
21 Development Agreements are binding on all MPD property owners, and their successors, and (c)
22 the Development Agreements require that the MPD property owners (and their successors)
23 develop the MPD property only in accordance with the conditions of the MPD Permit approval.
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1 **C. Procedures for addressing “expert” testimony and evidence, if any, should be**
2 **set by the Examiner.**

3 In light of the scope for a development agreement hearing, and having read the responses
4 and motions of other interested persons, Yarrow Bay still does not view these development
5 agreement hearings as calling for any “expert” testimony. However, to the extent testimony is
6 presented that drives Yarrow Bay to present experts in rebuttal, the Examiner needs to set rules
7 about how any expert testimony is provided and whether cross-examination is allowed. As the
8 City points out, cross-examination is a right typically limited to parties, including under the
9 Hearing Examiner Rules for the City of Black Diamond. As Yarrow Bay described in our
10 motion, under the *Chrobuck* case, cross-examination is limited to parties represented by counsel.
11 In these Development Agreement hearings, the only “party” is Yarrow Bay. Thus, the Examiner
12 either should not allow cross-examination, by requiring expert testimony to be in writing, or the
13 Examiner needs to explain and justify any cross-examination procedure adopted to ensure it
14 protects Yarrow Bay’s due process rights, and does not allow the hearing process itself to
15 devolve into chaos.

16 In addition to the matters set forth in Yarrow Bay’s original motion, the Pre-hearing
17 Order should clearly address the fact that the Hearing Examiner Rules at 2.14(c) note that citizen
18 opinion testimony is discouraged, but may be admitted although it need not be given weight by
19 the Examiner. This is consistent with ER 701 and 702.

20 To the extent that interested persons intend to rely on true experts, those experts and their
21 area of expertise and expected testimony must be disclosed by Friday, July 1. This includes any
22 agency personnel that an interested person believes will attend the hearing to testify against the
23 Development Agreements. Rebuttal experts should be disclosed by Wednesday, July 6. To the
24 extent that citizens will be testifying after their own study of a particular issue, the citizens are
25 not entitled to testify to expert opinions.

1 Finally, Mr. Edelman requested, among the alternative options he presented, that the
2 Examiner force experts to testify live. Yarrow Bay has some experts who are local and some
3 who are based in other states, as far away as Randall Arendt³ on the East Coast. In the event that
4 Yarrow Bay chooses to present expert testimony, due process requires that Yarrow Bay be
5 allowed to present that testimony in writing.

6 **D. Timing and process for hearing.**

7 In addition to the items outlined above, Yarrow Bay recommends the following matters
8 be addressed in the Examiner's Pre-hearing Order:

9 1. No interested persons raised objections to Yarrow Bay's request that the hearings
10 on the development agreements for both The Villages and Lawson Hills MPDs should be
11 consolidated. All persons speaking to either project's development agreement should be
12 instructed to state whether their comments extend to one or both projects and, if just one, which
13 project.

14 2. Mr. Edelman suggested that rather than open the hearing on July 11, 2011 at 6
15 p.m. and continuing day to day until completed, that if additional days were required after July
16 16, the hearing schedule should be "extended and adequate notice should be given to the public."
17 This appears to be an attempt to simply delay the proceedings. Adequate public notice for the
18 Development Agreement hearings has already been given, and that public notice plainly includes
19 the right to submit written comment should one be unable, unwilling, or unavailable to attend
20 one of the currently scheduled hearing dates. There is no legal authority to impose a new public
21 notice requirement on a hearing that has already been noticed. The Pre-Hearing Order should
22 explain that the Examiner will open the hearing on July 11, 2011 at 6 p.m. and continue it day to
23 day until completed.

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³ Randall Arendt is the author of "Rural by Design."
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1 3. The hearings should open and proceed in the following order and with the
2 following time limits, for the following reasons:

3 a. No interested persons raised objections to the City Staff giving an opening
4 oral presentation of their written Staff Report regarding the MPDs' Development
5 Agreements, limited to 1.5 hours.

6 b. No interested persons raised objections to Yarrow Bay giving an opening
7 presentation introducing the development agreements, limited to 1.5 hours, and
8 presenting any initial written statements in support of the Development Agreements.

9 c. Most interested persons had input regarding the amount of time to be
10 provided for public testimony, some suggesting 10 minutes, and some suggesting
11 unlimited amounts of time. As the Examiner is aware, Hearing Examiner Rule 2.11(d)
12 authorizes the Examiner to "limit the length of testimony to expedite the proceedings and
13 avoid the necessity to continue the hearing." As Yarrow Bay noted during the Pre-
14 Hearing Conference, and as the City points out in its response to motions, public
15 testimony that merely repeats the same point is not relevant or helpful to the Examiner's
16 decision making process. Moreover, unlimited time invites abuse such as a filibuster.
17 Yarrow Bay again requests that the Examiner set a time limit, with each person speaking
18 provided 3 minutes (for example, if they are providing a general comment regarding a
19 term of the Development Agreement) up to a maximum of 10 minutes (for example, if
20 they wish to explain a more specific concern about how a term of the Development
21 Agreements relates to the applicable legal criteria) to testify orally, and unlimited written
22 arguments and evidence. The Hearing Examiner should retain the right to limit such
23 testimony to relevant arguments and evidence. Written and oral public testimony will be
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1 closed at a date and time certain,⁴ so as to allow the City and Yarrow Bay to prepare their
2 rebuttal and closing statements, except for possible sur-rebuttal described below.

3 d. Most interested persons had input regarding whether time could be ceded
4 from one interested person to another to provide public testimony. Yarrow Bay again
5 requests that the Examiner allow members of the public wishing to testify to cede their
6 time to any person; provided, however, that any person ceding time must be present when
7 the person they are ceding their time to testifies. For the limited purposes of ceding time,
8 a maximum of one (1) hour is allowed for any one person testifying. Yarrow Bay
9 recognizes that not every person can attend every hearing session, and some persons are
10 ill or infirm. But persons who cannot attend have the option of submitting their concerns
11 in writing. As the Examiner knows from his experience, an allowance to cede time is not
12 often made in a public hearing but when made, it comes together with a requirement that
13 the person ceding time be present. The process for ceding time by email during the MPD
14 Closed Record hearings was different – during that process there was a set list of Parties
15 of Record who had already testified before the Examiner. That is not the case for these
16 open record hearings before the Examiner on the Development Agreements.

17 e. Other than arguing that the public should get the last word, which is an
18 issue addressed below regarding sur-rebuttal, no interested persons raised objections to
19 Yarrow Bay's proposal that at least 48 hours (or in the event public testimony closes on
20 the evening of a weeknight, and closings can be scheduled for the morning of the
21 following Saturday, approximately 36 hours) after written and oral public testimony has
22 closed, the City, followed by Yarrow Bay, will provide their own presentations of
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24 ⁴ The purpose of this request is to avoid the situation that occurred during the Examiner's prior hearings on the
25 MPDs themselves, in which public testimony was being created and submitted at the same time that Yarrow Bay
26 and the City were delivering their rebuttal and closing presentations. That engendered an unnecessary delay to
allow additional written rebuttal to be submitted.

1 whatever length is necessary to respond to questions asked and issues raised in the public
2 testimony. Given the limited scope of the hearing, it is estimated this oral presentation
3 will be no more than three hours combined between the City and Yarrow Bay. Written
4 rebuttal of any length from Yarrow Bay and the City will also be allowed.

5 f. Most interested persons had input regarding whether there should be
6 rebuttal allowed to Yarrow Bay's closing presentation. Yarrow Bay already anticipated
7 this concern and that is why we proposed one round of sur-rebuttal in which the public
8 would get a chance to comment on Yarrow Bay's closing, followed by Yarrow Bay's
9 chance to respond. Mr. Edelman thought this was excessive, but if it was to be allowed
10 wanted a fair time to be able to prepare rebuttal after exhibits were made available. Save
11 Black Diamond felt the sur-rebuttal process was important.⁵ Mr. Rimbos felt that sur-
12 rebuttal should be oral, not written, and both Mr. Rimbos and Mr. Sperry felt that the
13 public should have the "final say."

14 There is no reason, other than delay in completion of the hearing, to require sur-
15 rebuttal to be conducted orally. Sur-rebuttal in writing already provides an opportunity
16 that is not traditionally allowed for interested persons to respond to Yarrow Bay's closing
17 presentation. However, Yarrow Bay still must have the last word. Again, as the
18 Examiner explained in the pre-hearing conference, due process requires that the
19 proponent of a proposal be provided the last word.

20 Therefore, Yarrow Bay again asks the Examiner include in the Pre-hearing Order
21 the following process. After the rebuttal presentations of the City and Yarrow Bay have
22 been completed, the Examiner shall allow 48 hours for any interested person who has
23 testified or submitted evidence in the hearing to submit written testimony as sur-rebuttal
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25 ⁵ Yarrow Bay objects to Save Black Diamond's characterization that supposedly incorrect information was
26 contained in Yarrow Bay's rebuttal during the MPD hearings.

1 on a specific topic. After the submittal of that sur-rebuttal, Yarrow Bay and the City shall
2 then be provided 48 hours to respond to any sur-rebuttal testimony filed. No additional
3 rounds of sur-rebuttal shall be allowed by the Hearing Examiner.

4 g. No interested persons raised objections to the procedural rule that the
5 hearing examiner may ask questions of any person presenting or testifying.

6 4. No interested persons raised objections to the requirement that an audio recording
7 of the hearings shall be made by the City of Black Diamond. In addition, no one objected to the
8 requirement that Yarrow Bay shall pay the appearance fee for a court reporter to transcribe the
9 hearings or that any person desiring a copy of the court reporter's transcription is required to
10 order the transcript from the court reporter. However, Ms. Proctor appears to ask that if Yarrow
11 Bay uses any portion of a transcript in the following hearing proceedings, that Yarrow Bay be
12 required to submit that transcript as part of the public record. If any interested person or party
13 chooses to purchase a partial or complete transcript of any hearing session, it is normal practice
14 for the portion being quoted to be filed in the record. Thus, if Yarrow Bay ordered a transcript
15 from one hearing day in order to quote a particular person's statement, Yarrow Bay would
16 certainly submit the pages quoted and would expect any interested person to do so, as well.
17 However, if what Ms. Proctor was suggesting was that the decision to quote a single sentence
18 translates to an obligation to pay for the entire hearing transcript and file the entire transcript in
19 the record, Yarrow Bay objects and notes that the Examiner cannot impose such a rule because it
20 would create an undue financial burden on Yarrow Bay (or any other interested person who
21 chose to purchase part of the transcript to submit one person's testimony).

22 5. No interested persons objected to having the City clerk post all exhibits on the
23 City's website within 48 hours of submittal. However, the City noted that might not happen due
24 to other workload. The Revised Proposed Order reflects this City request.

1 6. All interested persons asserted that the beginning of the hearing should be
2 delayed.⁶ In its response to motions, Yarrow Bay briefed the many reasons why the hearing
3 should open on July 11, 2011 at 6 p.m., as previously noticed. In this reply we again note that
4 pursuant to BDMC 18.08.180, only fourteen days of notice are required prior to the
5 commencement of a public hearing, and here 31 days were provided. In addition, Yarrow Bay
6 asks the Examiner to review Exhibit A to the Declaration of Nancy Bainbridge Rogers filed
7 herewith. As plainly documented on the website of Save Black Diamond, the “Citizens’
8 Technical Action Team (TAT)” has been working on these issues for “the past nine months” and
9 after “studying” the Development Agreements is hosting a public meeting “prepared to provide
10 key information to you [the public], including reader-friendly summaries and highlights of
11 important details.” This further evidences that the citizens are more than ready to begin the
12 hearing on July 11 and requests for a later start are just requests for delay.

13 7. Two interested persons sought to supplement Yarrow Bay’s request that Hearing
14 Examiner Rule 2.12 regarding Expected Conduct of all persons be quoted in full in the Pre-
15 hearing Order. First, Mr. Edelman suggested that the allowance in subsection (c) for the
16 Examiner to ask City⁷ staff to submit additional information into the record be limited so that the
17 public has the opportunity to review that information. However, the other rules regarding
18 hearing proceedings will assure proper public access and review of substantive information
19 submitted. Second, Ms. Proctor argues that the Examiner should add terms preventing both the
20 City Attorney and Yarrow Bay’s Attorney from cross-examining or re-butting public testimony,
21 and preventing the City Attorney from interrupting public testimony. As Yarrow Bay argued in
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23 ⁶ Ms. Proctor also requested in her response to motions that the hearing venue be re-located. The City Staff has
24 reserved Sawyer Woods Elementary School and provided all legally required public notice. That hearing location
25 may be closer to some Black Diamond residents who did not attend the prior hearings in the Black Diamond
26 Elementary School. Regardless, there is no legal authority that would allow the Examiner to force City Staff to find
a new venue, move the hearing location, and provide new public notice.

⁷ The Hearing Examiner Rules contain a typographical error in referring to “County” rather than “City” staff.

1 its response to Mr. Edelman's motion, the Examiner must follow the well-established practice of
2 allowing objections to occur contemporaneous with submittal of the evidence.

3 There appears to be no objection to quoting in full the Hearing Examiner Rule 2.12
4 regarding Expected Conduct in the Prehearing Order as follows:

5 **2.12 EXPECTED CONDUCT**

6 (a) All persons appearing before the Hearing Examiner shall conduct
7 themselves with civility and courtesy to all persons involved in the hearing.

8 (b) No party or other person shall communicate with an Examiner presiding
9 over a matter or with any employee of the Hearing Examiner's Office in an
attempt to influence the outcome or to discuss the merits of that matter.

10 (c) No party or other person, other than staff when not acting as a party, shall
11 make or attempt ex parte communication with the Examiner regarding any matter
12 under pending review by the Examiner. Procedural matters may be addressed by
13 written correspondence, copied to all known parties. In all matters involving an
open record hearing, prior to and during the hearing, the Examiner may ask
County [sic - City] staff to submit additional information into the record.

14 (d) If a substantial prohibited ex parte communication is made, such
15 communication shall be publicly disclosed by the Examiner: any written
16 communications, and memorandums summarizing the substance and participants
of all oral communications, shall promptly be made available to the parties for
review and an opportunity to rebut those communications.

17 8. The Hearing Examiner shall begin each hearing session with an announcement of
18 these hearing procedures.

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III. CONCLUSION

Yarrow Bay respectfully requests that the Hearing Examiner enter the Revised Pre-hearing Order implementing the procedures described above.

DATED this 27th day of June, 2011.

CAIRNCROSS & HEMPELMANN, P.S.



Nancy Bainbridge Rogers, WSBA No. 26662
Andrew S. Lane, WSBA No. 26514
Randall P. Olsen, WSBA No. 38488
Attorneys for Applicants BD Lawson Partners, LP
and BD Village Partners, LP

Certificate of Service

I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of Washington that on June 27, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

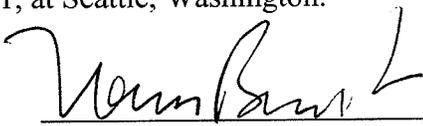
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DATED this 27th day of June, 2011, at Seattle, Washington.



Nancy Bainbridge Rogers, Attorney

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BEFORE THE CITY OF BLACK DIAMOND

HEARING EXAMINER

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

DECLARATION OF NANCY BAINBRIDGE ROGERS IN SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)

I, Nancy Bainbridge Rogers, declare as follows:

1. I am one of the attorneys for Applicants, BD Lawson Partners, LP and BD Village Partners, LP (collectively "Yarrow Bay"), in the above-captioned matter and give this declaration on my personal knowledge.

2. I am over the age of eighteen (18) and I am competent to testify to the matters herein.

3. Attached hereto as Exhibit A are true and correct copies of pages from Save Black Diamond's website. These were also attached as Exhibit F to the Supplemental Declaration of Bob C. Sterbank in Support of City's Response to Prehearing Motions dated June 24, 2011.

4. I have reviewed the factual allegations stated in the Reply Brief in Support of Motion to Set Hearing Procedures for Development Agreement Hearings (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) filed herewith and attest to their accuracy.

1 DATED this 27th day of June, 2011, in Seattle, Washington.
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4 CAIRNCROSS & HEMPELMANN, P.S.

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7 Nancy Bainbridge Rogers, WSBA No. 26662
8 Attorneys for Applicants BD Lawson Partners, LP
9 and BD Village Partners, LP
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DECLARATION OF NANCY BAINBRIDGE ROGERS IN
SUPPORT OF REPLY BRIEF IN SUPPORT OF MOTION TO
SET HEARING PROCEDURES FOR DEVELOPMENT
AGREEMENT HEARINGS (PLN10-0020, PLN10-0021,
PLN11-0013, & PLN11-0014) - 2
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CAIRNCROSS&HEMPELMANN
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Seattle, WA 98104
office 206 587 0700 fax 206 587 2308

Certificate of Service

I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of Washington that on June 27, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

Steve Pilcher
Community Development Director, City of Black Diamond
24301 Roberts Drive
PO Box 599
Black Diamond, WA 98010
Email: spilcher@ci.blackdiamond.wa.us

Brenda Martinez
Clerk, City of Black Diamond
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Andy Williamson
City of Black Diamond
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PO Box 599
Black Diamond, WA 98010
Email: awilliamson@ci.blackdiamond.wa.us

DATED this 27th day of June, 2011, at Seattle, Washington.


Nancy Bainbridge Rogers, Attorney

EXHIBIT A

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Public Hearing Soon

Notice of Development Agreement Public Hearings

On June 10, the city of Black Diamond released the final applications for Development Agreement (DA) contracts for the Yarrow Bay-proposed Master-Planned Developments (MPDs). Also, it announced that related **Public Hearings will commence on Monday, July 11. They will continue all week and there is a full day session scheduled for Saturday the 16th.** The location is **Sawyer Woods Elementary.**

Please see: <http://www.ci.blackdiamond.wa.us/Depts/CommDev/DA.html>.

Your opportunity is to speak for **ten minutes** on something that could then become a **twenty year binding contract.**

The Development Agreements are supposed to contain sufficient detail on the 15-to-20-yr plan for buildout of the developments and comply with the City's MPD Ordinances passed last September, each of which contained over 160 conditions of approval.

Plan to provide Oral Testimony and/or Written Statements.

Information on how to Prepare.

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Preparation for Development Agreement Hearings

Monday, June 27, 7 – 9 PM

Lake Sawyer Community Club - 29006 216th AVE SE, Black Diamond, WA

If you share our concerns and have an interest in shaping the future of Southeast King County, please attend.

The **Citizens' Technical Action Team (TAT)** will help us all prepare for the Master Planned Development (MPD) Development Agreement Hearings which are scheduled to start on July 11.

For the past nine months, since the Black Diamond City Council inexplicably passed two Ordinances approving the two Yarrow Bay-proposed developments, the TAT has been reviewing, dissecting, critiquing, and summarizing the issues. Since the release of the Development Agreement documents ([on the city's website](#)), TAT has been studying them. TAT is now prepared to provide key information to you, including reader-friendly summaries and highlights of important details. You can use this to write your Oral Testimonies and Written Statements.

The MPD Development Agreement Hearings are of great consequence. They are the method by which the public can critique the plans and voice their opinions on the development details. **Does Yarrow Bay's plan meet all of the 160+ Conditions listed in the Ordinances? Is there a long-range plan to mitigate the immense traffic volumes expected to be generated by 6,050 homes and 1.15 million sq ft of Commercial/Business space? Will Black Diamond go bankrupt? What happens when 750 acres of in-city forest are clear-cut?** Now is your chance to weigh in. Members of TAT will explain the details, help you prepare for the hearings, and answer any of your questions.

There will be two Hearings (just like last year for the MPD application). The first Hearing is called an **Open-Record Hearing** before the City's Hearing Examiner, Phil Olbrechts. The second Hearing is before the city council. All "evidence" must be presented in the first hearings in order to be valid in the second hearings and thus heard by the City Council. The same Hearing Examiner conducted the city's prior hearings, so he is well-versed on the subject. The public's past testimony helped form recommendations Mr. Olbrechts provided to the City Council. Unfortunately, the City Council ignored or watered down many of those recommendations (that is one reason why this November's Black Diamond City Council election is so very critical).

If you speak at the Open-Record Hearing, you are eligible to speak at the second hearing, called a **Closed-Record Hearing**. This hearing before the Black Diamond City Council will be held after Mr. Olbrechts has had time to create detailed recommendations based on testimony in the Open-Record Hearings.

This is your chance to have a voice on what could shape the future of Black Diamond and surrounding communities for generations!

- The documents are complex, and in order to get certain changes into them, incorporating a knowledge of land use beyond the documents into our testimony will be necessary. The TAT is ready to arm you with whatever information you need to testify.
- Conversely, some information that is simple to you, such as where water flows on your land, what roads you

commonly drive and are concerned about, or what will preserve the special character of Black Diamond, is nearly impossible for anyone else to know unless you testify.

Note: There is a modest rental fee for the location, Lake Sawyer Community Club. We will have a donation jar available for those who wish to help offset the fee.

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Action Ideas

How You Can Help

1. Testify at upcoming city Development Agreement Contract Hearings. Contact SaveBlackDiamond@gmail.com or Vern Gibson at 360-886-6974.
 2. Join Toward Responsible Development to become part of the legal appeal to the approvals. This will give you valuable, direct updates on the legal efforts that must continue. So far these efforts have resulted in at least one victory. Numerous challenges provide an exciting news weekly. Contact ResponsibleDevelopment@comcast.net.
 3. Connect with Save Black Diamond. This organization is building a community, holding educational meetings, and working on Black Diamond politics. We provide the knowledge, expert support, and peer support to take effective action to improve our future. We are coordinating action on many fronts. Contact SaveBlackDiamond@gmail.com.
 4. Watch the City of Black Diamond "[In the Spotlight](#)" section on its website. Read and provide comments to the city. Attend Black Diamond City Council Meetings (1st and 3rd Thursdays of the month at 7 PM at Black Diamond Council Chambers on Lawson St.)
 5. Voice your concerns to the Enumclaw School District –Superintendent Mike Nelson and the elected school board.
 6. Come to fundraisers for Black Diamond.
 7. Contributing to our efforts. Send contributions to Save Black Diamond, P.O. Box 581, Black Diamond, WA 98010.
 8. There is *much more* you can do. Contact Us to learn more at SaveBlackDiamond@gmail.com. We also welcome your ideas.
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BEFORE THE CITY OF BLACK DIAMOND
HEARING EXAMINER

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

[PROPOSED] REVISED ORDER GRANTING MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)

The Black Diamond Hearing Examiner has reviewed Applicants BD Lawson Partners, LP and BD Village Partners, LP's (collectively, "Yarrow Bay's") Motion to Set Hearing Procedures for Development Agreements (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014), and the motions, responses and reply briefs of the City of Black Diamond and other interested persons. The Hearing Examiner, having reviewed the file and records in this matter and considered the arguments of counsel and interested persons, deems itself fully advised.

NOW THEREFORE, the Examiner hereby ORDERS as follows:

1. The Motion to Set Hearing Procedures for Development Agreements (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) is hereby GRANTED as follows:

[PROPOSED] REVISED ORDER GRANTING MOTION TO SET HEARING PROCEDURES FOR DEVELOPMENT AGREEMENT HEARINGS (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014) - 1

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1 a) On June 3, 2011, the City issued a Determination of Significance and
2 Notice of Adoption under the State Environmental Policy Act (“SEPA”) for The Villages and
3 Lawson Hills development agreements. The City posted on its website, the final development
4 agreements of both The Villages and Lawson Hills MPDs on June 9, 2011. The City’s Staff
5 Report on the development agreements was posted on the City’s website on June 10, 2011.
6 Notice of the public hearings for the development agreements was published by the City on June
7 10, 2011 – more than thirty (30) days prior to the start date of the scheduled hearings. The
8 Villages MPD Development Agreement and Lawson Hills MPD Development Agreement
9 hearings shall commence on July 11, 2011 as provided in the City’s notices of public hearing.

11 b) The hearings on the development agreements for both The Villages and
12 Lawson Hills MPDs shall be consolidated.

13 c) Pursuant to BDMC 18.08.030, the hearing procedures for The Villages
14 MPD and Lawson Hills MPD Development Agreements shall be quasi-judicial.

15 d) The scope of the development agreement hearings shall be limited to
16 evidence and testimony regarding only the following : (1) whether each development agreement
17 incorporates the conditions of each MPD Approval, as adopted in Black Diamond Ord. Nos. 10-
18 946 and 10-947; (2) whether each development agreement is consistent with applicable
19 development regulations; and (3) whether the matters set forth in the development agreements
20 are within the scope of development standards and provisions authorized to be included in a
21 development agreement by RCW 36.70B.170 *et seq.* and BDMC 18.66.020, meaning whether (a)
22 the Development Agreements set forth the development standards and other provisions that
23 apply to, govern and vest the development, use and mitigation of the MPD properties, (b) the
24 Development Agreements are binding on all MPD property owners, and their successors, and (c)

1 the Development Agreements require that the MPD property owners (and their successors)
2 develop the MPD property only in accordance with the conditions of the MPD Permit approval.

3 e) While expert witness presentations are not anticipated given the limited
4 scope of The Villages MPD and Lawson Hills MPD Development Agreement hearings, if it is
5 delivered, the following distinction will be used to determine who is an expert:

6 i. Opinion Testimony by Lay Witnesses

7 If the witness is not testifying as an expert, the witness'
8 testimony in the form of opinions or inferences is limited to
9 those opinions or inferences which are (a) rationally based on
10 the perception of the witness, (b) helpful to a clear
11 understanding of the witness' testimony or the determination of
12 a fact in issue, and (c) not based on scientific, technical, or
13 other specialized knowledge within the scope of rule 702.

14 Testimony by Experts

15 If scientific, technical, or other specialized knowledge will
16 assist the trier of fact to understand the evidence or to
17 determine a fact in issue, a witness qualified as an expert by
18 knowledge, skill, experience, training, or education, may testify
19 thereto in the form of an opinion or otherwise.

20 Pursuant to Hearing Examiner Rule 2.14(c) opinion evidence of non-experts is
21 discouraged, but may be admitted, although it need not be given weight by the Examiner.
22 Expert disclosures, including the expert's name, public agency affiliation if from a public
23 agency, area of expertise, and expected testimony must be filed with Steve Pilcher by
24 Friday, July 1. Rebuttal expert disclosures, if any, must contain the same information and
25 are due by July 6.

26 f) If expert witness presentations are made, they shall be delivered only in
writing.

1 [OR, IN THE ALTERNATIVE:

2 *While expert testimony is not anticipated given the limited scope of*
3 *The Villages MPD and Lawson Hills MPD Development*
4 *Agreement hearings, if oral testimony is provided either in*
5 *addition to or in lieu of written testimony, cross-examination shall*
6 *be conducted as follows: (i) any party or interested person*
7 *represented by counsel may have such counsel conduct the cross-*
8 *examination; and (ii) any party or interested person not*
9 *represented by counsel who has questions should submit those*
10 *questions to the Hearing Examiner to ask of the expert.]*

11 g) On June 10, 2011, the City issued notice of the opening of the hearings on
12 July 11, 2011 at 6 p.m. and continuing on multiple days thereafter. The hearings shall continue
13 day-to-day until completed.

14 h) The hearings shall open and proceed in the following order and with the
15 following time limits:

16 i. The City Staff gives an opening oral presentation of their written
17 Staff Report regarding the MPDs' development agreements, limited to 1.5 hours.

18 ii. Yarrow Bay gives an opening presentation introducing the
19 development agreements, limited to 1.5 hours, and presenting any initial written statements in
20 support of the development agreements.

21 iii. Public testimony shall be taken, with each person speaking
22 provided 3 minutes to a maximum of 10 minutes to testify orally, and unlimited written
23 arguments and evidence. All persons speaking to either MPDs development agreement shall state
24 whether their comments extend to one or both MPDs and, if just one, which MPD. The Hearing
25 Examiner retains the right to limit such testimony to relevant arguments and evidence. Written
26 and oral public testimony will be closed at a date and time certain, except for possible sur-
rebuttal described below.

iv. Members of the public wishing to testify may cede their time to
any person; provided, however, that any person ceding time must be present when the person

1 they are ceding their time to testifies. For the limited purposes of ceding time, a maximum of one
2 (1) hour is allowed for any one person testifying.

3 v. At least 48 hours (or in the event public testimony closes on the
4 evening of a weeknight, and closings can be scheduled for the morning of the following
5 Saturday, approximately 36 hours) after written and oral public testimony has closed, the City,
6 followed by Yarrow Bay, shall provide their own presentations of whatever length is necessary
7 to respond to questions asked and issues raised in the public testimony. Given the limited scope
8 of the hearing, this oral presentation is estimated to be no more than 3 hours combined between
9 the City and Yarrow Bay. Written rebuttal of any length from Yarrow Bay and the City shall
10 also be allowed.

11 vi. After the rebuttal presentations of the City and Yarrow Bay have
12 been completed, any interested person who has testified or submitted evidence in the hearing
13 shall have 48 hours to submit written testimony as sur-rebuttal on a specific topic. After the
14 submittal of that sur-rebuttal, Yarrow Bay and the City shall have 48 hours to respond, in
15 writing, to any sur-rebuttal testimony filed. No additional rounds of sur-rebuttal shall be allowed.

16 vii. The Hearing Examiner may ask questions of any person presenting
17 or testifying.

18 i) An audio recording of the development agreement hearings shall be made
19 by the City of Black Diamond. In addition, Yarrow Bay shall pay the appearance fee for a court
20 reporter to transcribe the hearings. Any person desiring a copy of the court reporter's
21 transcription must order the transcript from the court reporter.

22 j) The Black Diamond City Clerk shall endeavor to post all exhibits on the
23 City's website within 48 hours of submittal; provided however, that to accommodate the
24 timeframes for the sur-rebuttal procedure described in this Order, the City Clerk shall create a
25 process to provide promptly any written materials related to the sur-rebuttal process to the parties
26 and any interested person who has testified.

1 k) During the development agreement hearings, the City, Yarrow Bay, and
2 all interested persons are specifically instructed to follow Hearing Examiner Rule 2.12:

3 **2.12 EXPECTED CONDUCT**

4 (a) All persons appearing before the Hearing Examiner shall conduct
5 themselves with civility and courtesy to all persons involved in the hearing.

6 (b) No party or other person shall communicate with an Examiner presiding
7 over a matter or with any employee of the Hearing Examiner's Office in an
8 attempt to influence the outcome or to discuss the merits of that matter.

9 (c) No party or other person, other than staff when not acting as a party, shall
10 make or attempt ex parte communication with the Examiner regarding any matter
11 under pending review by the Examiner. Procedural matters may be addressed by
12 written correspondence, copied to all known parties. In all matters involving an
13 open record hearing, prior to and during the hearing, the Examiner may ask
14 County [sic – City] staff to submit additional information into the record.

15 (d) If a substantial prohibited ex parte communication is made, such
16 communication shall be publicly disclosed by the Examiner: any written
17 communications, and memorandums summarizing the substance and participants
18 of all oral communications, shall promptly be made available to the parties for
19 review and an opportunity to rebut those communications.

20 l) Each development agreement hearing session shall begin with an
21 announcement of these hearing procedures by the Hearing Examiner.

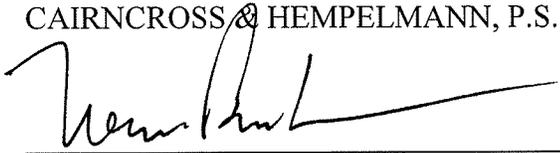
22 DATED this ____ day of June, 2011.

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PHIL OLBRECHTS
CITY OF BLACK DIAMOND HEARING
EXAMINER

1 Presented by:

2 CAIRNCROSS & HEMPELMANN, P.S.

3 

4 Nancy Bainbridge Rogers, WSBA No. 26662

5 Andrew S. Lane, WSBA No. 26514

6 Randall P. Olsen, WSBA No. 38488

7 Attorneys for Applicants BD Lawson Partners,
8 LP and BD Village Partners, LP

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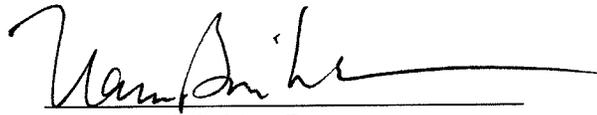
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DATED this 27th day of June, 2011, at Seattle, Washington.


Nancy Bainbridge Rogers, Attorney