

Before the City of Black Diamond Hearing Examiner

Response to Yarrow Bay Motion to Set Hearing Procedures for Development Agreement Hearings

I. Introduction

Yarrow Bay has moved for development agreement public hearing that attempts to limit the scope of the hearings to essentially a checklist and constrain public participation. The following is in response to that motion.

II. Discussion

a. Yarrow Bay proposes unacceptable limitations on the scope of the hearings without support.

Yarrow Bay moved that the scope of the hearing be “limited to confirming that the development agreements appropriately incorporate those matters directed and allowed to be incorporated by the MPD Approvals and State law” They maintain that the only issues that should be reviewed in the hearings are whether the development agreements incorporate MPD approval conditions and whether the agreements meet the requirements of State law and City code. This limitation on public testimony is far too narrow.

Meeting the MPD conditions and law are minimum requirements and development agreements must be rejected if the minimum requirements are not met – there is no discretion on the part of the City in that regard. However, the City and, by extension its citizens, certainly have the right to determine whether the implementation of each and every development agreement requirement is satisfactory to the community.

The development agreements are contractual agreements that will obligate Yarrow Bay (and their successors) and the City for twenty years. The public must be allowed to address the merits and adequacy of all implementation methods in the MPDs, not just their existence. There is nothing in State statutes or City code that says otherwise nor has Yarrow Bay made any argument to the contrary.

To claim that the public may not address the merits of a Yarrow Bay implementation approach is to say that the City must accept whatever approach is proposed.

Development agreements are not permit applications – they are contractual agreements where the City has the duty to negotiate an acceptable agreement and its citizens have the right to request and expect what is best for the community. The scope of the hearings should allow discussion of approaches that are poorly or insufficiently defined. The public should also be allowed to discuss the merits of an approach where the consequences to the community are unacceptable and where there are better alternative approaches.

Yarrow Bay's attempt to limit the scope of public hearings to requirements compliance should be rejected.

b. Yarrow Bay recommends a procedure for expert testimony based on a faulty premise and an alternative procedure that limits public participation.

Yarrow Bay proposes that all expert testimony be submitted in writing based on the faulty premise that the scope of the hearings should be limited as they propose. As discussed earlier, the scope should not be limited in that manner.

If the Hearing Examiner orders that expert testimony be submitted in writing as Yarrow Bay proposes then it should be posted for the public to review, there should be adequate time to rebut the testimony, and there should be adequate time to respond to rebuttal. Expert testimony can be quite complex, particularly if submitted in written dissertations with references to published papers. Therefore, adequate time should be allowed for rebuttal and responses to rebuttal. Forty-eight hours should be allowed for review and rebuttal after expert testimony is posted and twenty-four hours should be allowed for responses to rebuttals after posting.

Because of the complexity of expert testimony, it would be far preferable to require oral testimony and allow cross-examination. The procedure recommended by Yarrow Bay for this alternative would unnecessarily limit public participation. Requiring

questions to be submitted in writing to the Hearing Examiner is workable but Yarrow Bay proposes to allow follow-up questions from the Hearing Examiner only. The public should have the opportunity to also submit additional follow-up questions in writing after oral questioning by the Hearing Examiner. Completeness and fairness to the public should not fall victim to expediency.

c. Yarrow Bay proposes a schedule that might limit public participation.

Yarrow Bay proposes scheduling hearings to “continue day to day until completed” after the initial hearing. In a conflicting statement they propose that “written and oral public testimony will be closed at a date and time certain” The latter is certainly preferable although there must be provisions for extending completion to accommodate more speakers than anticipated. Public participation should not be arbitrarily restricted.

It is unlikely that all members of the public who wish to testify will be able to attend all hearings in anticipation of when they might be able to speak. Rather than assume that a lack of speakers on a particular day indicates public testimony is concluded, the hearings should be scheduled for a set number of days with prior notice of the schedule to the public. If additional days are required to accommodate more speakers than originally expected then the schedule should be extended and adequate notice should be give to the public.

d. Yarrow Bay proposes unnecessary limits on public testimony.

Yarrow Bay proposes that oral testimony be limited to ten minutes and that ceding of time be permitted up to a maximum of one hour. They also propose that persons ceding time must be present.

There is no justification for limiting public participation in this manner. Considering the exceedingly complex nature of the draft development agreements, there should be no time limits on testimony. Most of the public will probably require a small amount

of time and the Hearing Examiner certainly has the authority to curtail any abuses should they occur.

If the Hearing Examiner orders time limits but permits ceding, no person's testimony should be further limited by the inability of someone who ceded time to attend a particular hearing session.

e. Yarrow Bay proposes an unfair process for rebuttal and sur-rebuttal.

Yarrow Bay proposes that they be given unlimited time to orally rebut public testimony and also provide written rebuttal of unrestricted length. This would be followed by written public sur-rebuttal followed by Yarrow Bay response to sur-rebuttal. So there would be public testimony, rebuttal, sur-rebuttal, and rebuttal to sur-rebuttal. This is excessive and is apparently designed to give Yarrow Bay the last word. They should be able to make sufficient arguments in their unconstrained oral and written rebuttal.

f. Yarrow Bay proposes insufficient times for public responses considering the amount of time that they would allow for posting exhibits.

Yarrow Bay proposes 48 hours for public response to written rebuttal but also proposes that the City Clerk be allowed 48 hours to post exhibits.

Any schedule for response to exhibits, including written expert testimony, other written testimony, written rebuttal, and supplementary exhibits, should allow for the time to post the exhibits. If the City is allowed 24 hours to post exhibits (which seems reasonable) and the public is allowed 48 hours to respond after the exhibits have been posted then 72 hours should be allowed from the time that the exhibits are provided to the City to when responses are due.

g. Yarrow Bay proposes provisions for additional information without provisions for analysis and comment.

Yarrow Bay proposes the following:

In all matters involving an open record hearing, prior to and during the hearing, the Examiner may ask County [sic] staff to submit additional information into the record.

As with other exhibits, the public should be given adequate time to analyze and address additional information entered into the record by City staff. That time should allow for the amount of time it takes the City to post the information.

III. Nature of the development agreement process

At the pre-hearing conference, the Hearing Examiner solicited comments on the quasi-judicial versus legislative nature of his hearings. The Examiner can certainly conduct the hearings in a quasi-judicial manner at his discretion and, to my knowledge, no party has argued for a legislative Hearing Examiner procedure. This should not be taken as agreement with Yarrow Bay's assertion that the development agreement process must be quasi-judicial. On the contrary, there is known disagreement on that issue.

Thank you for your consideration of the above response.

Dated June 23, 2011



Robert M. Edelman
29871 232nd Ave SE
Black Diamond, WA 98010
(360) 886-7166