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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

YARROW BAY'S RESPONSE TO MOTIONS REGARDING 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") file this response to the motions filed by interested persons Bob Edelman, David Bricklin, Brian Derdowski, and Cindy Wheeler.

II. DISCUSSION

A. The Development Agreement Hearings Should be Held as Scheduled, Beginning July 11, 2011.

On June 10, 2011, the City issued notice that the Development Agreement hearings would open on July 11, 2011 at 6 p.m. and continue for several days thereafter. Therefore, the City has provided a 31-day notice of the July 11th hearings. The Black Diamond Municipal Code requires only a 14-day notice for a hearing on a development agreement. BDMC 18.08.180. Despite this code provision and the fact that the City is providing over two weeks of additional

1 time for hearing preparation, the motions request a 60 to 90-day notice. These requests are
2 unreasonable and unjustified for at least five reasons.

3 First, the responsibility of setting a hearing date belongs to City Staff, not the Hearing
4 Examiner. See BDMC 18.08.180 (“notice shall be provided by the [City’s Community
5 Development] Department no less than fourteen days prior to the hearing”). City staff has
6 executed its responsibility and issued a public notice 31 days prior to the hearing.¹ At the pre-
7 hearing conference, the Examiner commented that he would prefer to see at least 30 days public
8 notice provided following availability of the final versions of the development agreements and
9 the City’s staff report. The City’s notice complies with the Examiner’s suggested timing even
10 though City staff was not legally required to follow the Examiner’s preference.

11 Second, follow-up emails between Mr. Bricklin and Mr. Kenyon (attorney for the City)
12 directed to the Examiner on June 13, 2011, establish that the Staff Report was available on June
13 10, 2011. We also obtained the Staff Report from the City’s website on that date. We also note
14 that Attachment 6 to the Staff Report contains compliance matrices that correlate development
15 agreement provisions with the source of those provisions within the MPD Approval decisions.
16 Accordingly, the Staff Report does an excellent job of providing the interested parties with all
17 the tools they need to be fully prepared for the July 11th hearings.

18 Third, arguments regarding the supposed overwhelming length of the documents ignore
19 many factors. Each version of the development agreements was made available for public
20

21 ¹ As the Staff Report identifies, Staff has provided public notice during the Development Agreement process
22 consistent with the requirements of BDMC 18.08 for a Type 4 Quasi-judicial process. Notice has included:

23 A. Notices of Application dated October 5, 2010 and April 22, 2011: published in the official City newspaper;
24 posted to City’s website; existing on-site Public Notice Boards modified; plus, mailed notice to approx. 1600
25 individuals. The initial drafts of the Development Agreements were posted to the City’s website, as were all
26 subsequent drafts, including those currently under consideration.

B. Notice of Open House Event: posted on City’s website; notice emailed to individuals on City Clerk’s
Council distribution list (note: this was an additional event intended to provide public notice and information
about the Development Agreements and related MPD Permits, and was not required by any City code).

C. Notice of Public Hearing: published on June 10, 2011 in the official City newspaper; posted to City’s website
on the same day; posted on Notice Boards on the same day; mailed to approx. 1,600 individuals, which includes
all participants from the MPD public hearing process.

1 review when submitted to the City: in September 2010, in December 2010, in April 2011, and
 2 now on June 10, 2011.² With regard to length, the text of the Staff Report is only 11 pages, and
 3 applies to both projects. The Lawson Hills Development Agreement is 140 pages. The Villages
 4 Development Agreement is 152 pages. The terms of both Development Agreements are
 5 substantially the same, and the text of each (with the exception of Sections 13.4, 13.6, and 13.9)
 6 is substantially the same as the text in the prior draft Development Agreements posted by the
 7 City in April 2011. Thus, by the time the July 11 hearing begins, the issues will have been
 8 available for review for at least 3 months. Furthermore, public comment at the May 23, 2011
 9 pre-hearing conference made clear that many members of the public have reviewed these
 10 documents.

11 There are a number of Exhibits to each Development Agreement, but the Exhibits are
 12 either identical to those that were provided in the April draft, substantially similar to the versions
 13 provided with the April draft, or are existing public documents. Specifically, the following list
 14 provides the status of each exhibit to the Development Agreements:

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"A" – Project Boundaries and MPD Site Plan	Provided.	Conceptual layouts for commercial and multi-family development parcels added.
"B" – Legal Description and Parcel Map	Provided.	Identical to April Version.
"C" – MPD Permit Approval	Placeholder identified this public document would be an Exhibit.	Provided. This Black Diamond ordinance is by definition a public document, widely available since September 20, 2010.
"D" – Summary of Prior Agreements	Provided.	Substantially similar to April version.

25 ² Concern was raised regarding whether the label "Public Hearing Version" for the June 2011 development
 26 agreements means that there is some other private version. The "Public Hearing Version" of the development agreements is the only version.

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"E" – City of Black Diamond Municipal Code	Placeholder identified this public document would be an Exhibit.	Provided. These are widely available public documents.
"F" – Traffic Monitoring Plan	Provided.	Substantially similar to April version with only one typo corrected.
"G" – Constraint Maps	Provided.	Identical to April Version
"H" – MPD Project Specific Design Standards and Guidelines	Provided.	Substantially similar to April version with only several typos corrected, and term "Town Center" revised to "Village Center"
"I" – High Density Residential Supplemental Design Standards and Guidelines	Provided.	Identical to April version.
"J" – Construction Waste Management Plan	Provided.	Identical to April version.
"K" – MPD Phasing Plan	Provided.	Substantially similar to April version only with redactions reflecting the MPD Approval conditions added.
"L" – Excerpts from Chapter 3 of MPD Permit Application	Provided.	Substantially similar to April version only with redactions reflecting the MPD Approval conditions added.
"M" – Mine Hazard Release Form	Provided.	Identical to April version.
"N" – MPD Funding Agreement	Provided.	Substantially similar to April, with one change made to Ex. C and some typos corrected.
"O" – Stormwater Monitoring	Provided.	Identical to April version.
"P" – Green Valley Transportation Mitigation Agreement	Provided.	Identical to April version.
"Q" – Maple Valley Transportation Mitigation Agreement	Provided.	Identical to April version.
"R" – Covington Transportation Mitigation Agreement	Provided.	Identical to April version.
"S" – Potential Expansion Areas	Provided.	Identical to April version.

Exhibit Designation	Status in April version	Difference in June 10, 2011 Public Hearing Version
"T" – Impact Fees for Fire Protection Facilities dated 1-13-2011	Not provided.	This January 13, 2011 report was provided at the request of City Staff. This is a public document, available since January 13, 2011.

Fourth, the allegation that the hearing cannot be scheduled until the City hosts a voluntary public information meeting is without basis. There is no code requirement for a public information meeting. Nor is a representational flow chart of the proposed process—which included a public information meeting—binding on the City. The City does not need to hold the public information meeting. Nonetheless, the meeting has now been scheduled for June 28.

Fifth, allegations that the June 10, 2011 Development Agreements are not complete are simply not true. The interested persons' motions each raise this allegation but do not make a clear procedural request. Rather, the motions simply request that, prior to the hearing, the agreements be final. But their request is moot because the agreements are final. While not raising true procedural issues, we note that the motions incorrectly raise the following matters in an attempt to show that the Development Agreements are in some way incomplete.

- The School Agreement is complete and executed. The School Agreement is referenced at Section 13.3 of each Development Agreement, and it is the School Agreement that provides the process for siting schools.
- The mitigation agreements between Yarrow Bay and the Cities of Maple Valley and Covington are complete and executed and, pursuant to their terms, also are included as Exhibits Q and R to each Development Agreement.
- The precise engineered location of stormwater facilities or of certain wastewater facilities is not set in the Development Agreement, but instead will be set as Implementing Projects are processed which include much more detailed engineering. Under State law, development agreements anticipate there will be future implementing permits. For example, Yarrow Bay has submitted several preliminary plat applications to the City. Those applications include more precise locations for the stormwater facilities serving those development parcels, and the subsequent fully engineered construction drawings that will be processed after preliminary plat approval will further refine the engineered location.

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- While it is true that the City of Black Diamond does not have a fire *impact* fee ordinance adopted, that does not preclude the City from entering into a voluntary mitigation agreement with Yarrow Bay for the payment of fire *mitigation* fees. RCW 82.02.020. That voluntary agreement is found in Section 13.4 of each Development Agreement.
 - We are uncertain what the motions mean when they allege a development agreement would be incomplete if it was dependent on some future legislative action.
 - The development agreements do include “optional manners of implementation or location of facilities” which Mr. Edelman describes as being appropriate, though he further states that “all such impact must be included.” We assume this is a reference to review under the State Environmental Policy Act (“SEPA”), and note that the City has issued a determination of significance and notice of adoption of the Environmental Impact Statement (“EIS”), dated December 2009.

9 Sixth, the time period between public notice and the start of the hearing does include the
10 Fourth of July, a national holiday. Mr. Edelman’s motion complains that this disruption should
11 entitle the public to additional time for review. However, here, a 31-day period has been
12 provided, which is more than double the time required by City Code and is more than sufficient
13 for hearing preparation with regard to documents that have been largely available for several
14 months.

15 **B. The Sawyer Woods Elementary School is an Appropriate Venue for the Hearing**
16 **and the Hearing Should Not be Cancelled in the Event of a Large Crowd.**

17 The hearing is scheduled to be held in the Sawyer Woods Elementary School. That
18 venue is larger than the venue available in the Black Diamond Elementary School and, therefore,
19 is expected to be sufficient to accommodate persons interested in attending the hearing.
20 Contrary to the request of Mr. Edelman, the hearing should not be “suspended” in the event that
21 a larger crowd than expected turns out. To suspend a hearing on that basis denies Yarrow Bay,
22 as well as those interested persons who first arrived, their rights to be heard. Given the large size
23 of the venue, this issue is unlikely to arise, but in the event that it does, efforts should be made to
24 accommodate all attendees (up to fire code limits) and the Examiner should proceed with the
25 hearing, likely by taking names of persons wishing to testify, setting a subsequent date for them
26 to do so, and then requesting that they return and give testimony at that time.

1 **C. The Hearings have been Set to Begin at 6 p.m. on Weeknights and 9 a.m. on**
2 **Saturday, and this Schedule Should be Followed.**

3 The Notice of Public Hearing set the hearings to begin at 6 p.m. each evening from
4 Monday, July 11, 2011 through Thursday, July 14, 2011. A fifth hearing day is scheduled to
5 begin at 9 a.m. on Saturday, July 16, 2011. The Examiner should adhere to these start times so
6 that the material can be covered efficiently. Beginning the hearings at 7 p.m. and ending them at
7 9 p.m. has a strong probability of extending these hearings beyond the full week now scheduled.
8 In order to efficiently cover material and to avoid unnecessary delay, the hearings should begin
9 as scheduled.

10 **D. There Should be a Reasonable Limit Set on Oral Testimony.**

11 Yarrow Bay agrees that there should be no limit to the submission of relevant written
12 evidence. However, to avoid unnecessary repetitious testimony and protracted delays, public
13 testimony should be limited as described in Yarrow Bay's motion. The "unlimited" time
14 requested by Mr. Edelman invites filibuster and delay, and is contrary to the universal
15 adjudicatory policy of achieving a fair and efficient hearing, resulting in a timely decision.

16 For example, this policy is embodied in Evidence Rule 611 which directs courts to
17 "exercise reasonable control over the mode and order of...presenting evidence so as to...avoid
18 needless consumption of time." Further, Washington courts have recognized that trial courts
19 possess considerable latitude in managing their schedules to ensure the orderly and expeditious
20 disposition of cases. *Idahosa v. King County*, 113 Wn.App. 930, 937, 55 P.3d 657 (2002).
21 Lastly, courts also have held that reasonable time constraints on the presentation of evidence in
22 administrative proceedings are permissible. *Pacific Topsoil, Inc. v. Washington State Dep't of*
23 *Ecology*, 157 Wn.App. 629, 238 P.3d 1201 (2010). The Examiner should exercise his authority
24 to place reasonable time limits on the public's oral testimony so that this hearing can proceed in
25 an orderly and expeditious manner. This will comply with Hearing Examiner Rule 2.06 which
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1 calls for hearings to be conducted “expeditiously,” and provides that “at every stage in the
2 proceedings, all parties shall make every reasonable effort to avoid delay.”

3 **E. Cross-Examination of Expert Witnesses, if Allowed, Should be Structured.**

4 Yarrow Bay agrees that cross-examination of expert witnesses, if experts testify, should
5 be structured. Overall, however, Yarrow Bay recommends the alternative approaches to expert
6 testimony and cross-examination described in the Yarrow Bay’s motion. We also note that dates
7 for expert witness disclosures and rebuttal witnesses should be set.

8 **F. Objections to Testimony and Evidence should be Contemporaneous with the**
9 **Submittal of the Objectionable Testimony and Evidence.**

10 Mr. Edelman’s motion argues that objections should be withheld until the close of the
11 hearing, then made in writing, and then be subject to response from the person who submitted the
12 alleged objectionable materials or information, but no reply. Mr. Edelman’s justification for this
13 approach is that objections can be “disruptive and intimidating.” In any normal adjudicatory
14 setting, objections are required to be raised in a timely manner and on specific grounds.
15 According to the Court of Appeals, Division I, “[t]o be timely, the party must make the objection
16 at the earliest possible opportunity after the basis for the objection becomes apparent.” *State v.*
17 *Gray*, 134 Wn.App 547, 557, 138 P.3d 1123 (2006).

18 There are many policy reasons for requiring objections to be contemporaneous with the
19 objectionable testimony. One very important reason is that objections made contemporaneous
20 with the submittal of materials are actually helpful to building a record containing relevant
21 information. An objection, for example, as to relevance of certain testimony allows the person
22 testifying to re-frame his or her testimony into something that is relevant. If the objection was
23 held until the end of the process, that opportunity would be lost. In the instant matter, the
24 Examiner should follow the well-established practice of allowing objections to occur
25 contemporaneous³ with submittal of the evidence.

26 ³ To the extent that written materials are not made available until several days after the hearing proceeding,
objections should be allowed at the opening of the next hearing day after which the materials were available.

1 **G. The Sequence for the Hearing Presentation must be: City, Yarrow Bay, Public**
2 **Testimony, Rebuttal by City, Rebuttal by Yarrow Bay, Together with One Round of**
3 **Sur-Rebuttal.**

4 Mr. Edelman's motion argues that interested persons should be allowed to "reply" to any
5 rebuttal presented by Yarrow Bay and the City, and that the record would then be closed. As the
6 Examiner explained in the pre-hearing conference, due process requires that the proponent of a
7 proposal be provided the last word. Generally, the proponent of a cause has the right to make the
8 first opening statement, present evidence first, and make the first and final arguments. The usual
9 justification for this ordering is that the party with the burden of proof should have the advantage
10 of making the first and last presentation. In its procedural motion, Yarrow Bay has proposed a
11 single round of "sur-rebuttal" to provide interested persons, like Mr. Edelman, an opportunity to
12 respond to the rebuttal presentations. Under that process, however, Yarrow Bay will still be
13 provided the last word and must be provided that right.

14 **H. In its Rebuttal Presentations, Yarrow Bay may Include New Conditions or Other**
15 **Provisions in Response to the Testimony of Interested Persons, and Interested**
16 **Persons can Avail themselves of the Opportunity to Comment on Yarrow Bay's**
17 **Conditions or Other Provisions.**

18 Mr. Edelman's motion argues that "no change or supplement to the record is permitted
19 after it is closed," that the "developers submitted land use map changes after the MPD record
20 was closed and those changes were accepted by the City and incorporated into the closed record
21 hearings" and that the changes were "made without public knowledge." It is unclear exactly
22 what Mr. Edelman's allegations are referencing.

23 It is true that Yarrow Bay's rebuttal presentation to the Examiner (a presentation open to
24 the public) included updated proposed revisions to MPD Conditions. In substance, Mr.
25 Edelman's motion argues that citizens should be allowed the final word in the hearings.
26 However, as discussed above, Yarrow Bay has the right to make the first and last arguments.
Finally, a rebuttal presentation that directly responds to comments made during the hearing is
exactly what this process is intended to achieve. Accordingly, Yarrow Bay's closing

1 presentation should not be limited such that Yarrow Bay cannot address citizen concerns without
2 continuously providing another opportunity for comments on Yarrow Bay's closing. Such a
3 process would never end.⁴

4 **I. The Citizen's Guide to the Hearing Examiner Process Exists to Alleviate Confusion**
5 **Regarding Hearing Procedures.**

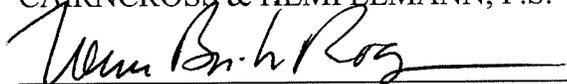
6 Some members of the public have expressed their concern about understanding the
7 process and procedure before the Hearing Examiner. We recognize that the process may be
8 foreign to many citizens. The City, however, has provided a citizen's guide to the Hearing
9 Examiner process, which can be found on the City's website.⁵ This guide demystifies the
10 process and should alleviate the vast majority of confusion. In addition, the Examiner's pre-
11 hearing order is expected to set specific procedures for this hearing.

12 **III. CONCLUSION**

13 Yarrow Bay respectfully requests that the Hearing Examiner enter a Pre-hearing Order
14 implementing the procedures described in Yarrow Bay's Motion to Set Hearing Procedures for
15 Development Agreement Hearings (PLN10-0020, PLN10-0021, PLN11-0013, & PLN11-0014)
16 filed on June 13, 2011.

17
18 DATED this 23rd day of June, 2011.

19 CAIRNCROSS & HEMPELMANN, P.S.

20 

21 Nancy Bainbridge Rogers, WSBA No. 26662

22 Andrew S. Lane, WSBA No. 26514

23 Randall P. Olsen, WSBA No. 38488

24 Attorneys for Applicants BD Lawson Partners, LP
and BD Village Partners, LP

25 ⁴ This situation is often referred to as a feedback loop.

26 ⁵<http://www.ci.blackdiamond.wa.us/Depts/CommDev/building/forms/Citizens%20Guide%20to%20Hearing%20Examiner%20Process.pdf>

Certificate of Service

1 I, Nancy Bainbridge Rogers, certify under penalty of perjury of the laws of the State of
2 Washington that on June 23, 2011, I caused a copy of the document to which this is attached to
3 be served on the following individual(s) via email:
4

5 Steve Pilcher
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DATED this 23rd day of June, 2011, at Seattle, Washington.


Nancy Bainbridge Rogers, Attorney