BEFORE THE HEARING EXAMINER FOR
THE CITY OF BLACK DIAMOND

Development Agreements Lawson Hills PLN10-0021; PLN11-0014 Villages PLN10-0020; PLN11-0013	PRE-HEARING ORDER II

This pre-hearing order is merged with Pre-Hearing Order I for ease of reference. A marked up version will be posted to identify additions and deletions to Pre-Hearing Order I.

I. Evidence Relied Upon

Evidence relied upon for this pre-hearing order is as follows:

A. Testimony of pre-hearing conference held May 23, 2011.
B. Exhibits P-1 through P-7 (admitted during pre-hearing conference.
C. Pre-hearing motions[1] dated 6/13/11 by David Bricklin; Nancy Bainbridge; Robert Edelman and Cindy Wheeler.
D. Responses to Pre-hearing motions filed by Jack Sperry, Cindy Proctor, Save Black Diamond, Bob Edelman, Peter Rimbos (2 of them), Yarrow Bay and City of Black Diamond.
E. Replies submitted by Bob Edelman, Cindy Proctor and Yarrow Bay.

II. Rulings

[1] Brian Derdowski requested that his written comments dated May 23, 2011 5/23/11 (Ex. P-7) be considered a prehearing motion. Staff did not post his comments as a pre-hearing motion, but its content was replicated in other pre-hearing motions and the 5/23/11 document was fully considered by the Examiner for this pre-hearing order.

A. Scope. The scope of the development agreement hearings is broad and encompasses permitted land uses, mitigation measures, development conditions, vesting periods and all other elements identified as development standards in RCW 36.70B.180(3). The scope is broad only because the issues that can be voluntarily addressed by the Applicant and the City are broad. The development agreement process can only compel the Applicant to implement the conditions of approval of the approved master plans. Hearing participants should understand that if they address development issues beyond implementation of master plan conditions, their concerns can only be addressed if the Applicant is willing to address them.

A major reason why the scope is relatively broad in this proceeding is because Black Diamond regulations limit Council review of the agreements to closed record review. *See* BDMC 18.08.070. The net result is that the only opportunity for the public to provide new evidence that can be considered by the Council is in the hearing in front of the Hearing Examiner. Consequently, the Examiner must admit any evidence that would be relevant to Council review, even if that evidence may not be relevant to the Examiner's review. As shall be discussed, the issues that should be addressed by the Hearing Examiner are more narrow than those considered by the City Council.

The Applicant and City argue that the scope of the hearing is primarily limited to implementing the conditions of approval of the master plans. The Black Diamond and state regulations do not support this position. BDMC 18.98.090 does provide that a development agreement shall implement MPD conditions of approval. However, nothing in this provision states that the development agreement shall be limited to this function. Certainly, if the Applicant came forward and requested that the development agreement address other issues, the City would be hard pressed to conclude that its code or any other legal authority precluded that consideration. RCW 36.70B.170-230, which governs development agreements, also does not limit development agreements to implementing conditions of approval. Those statutes are notably silent on the scope of development agreements, merely providing that "*a development agreement 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.*' *See* RCW 36.70B.170(1). RCW 36.70B.170(3) defines a development standard to include development restrictions such as permitted uses, mitigation measures, development conditions, vesting and "*any other appropriate development requirement or procedure*".

The scope of what can be included in the development agreements should not be confused with what can be required as opposed to requested from the Applicant. As noted by the City, BDMC 18.98.090 requires the Applicant to enter into a development agreement to implement MPD conditions of approval. RCW 36.70B.210 provides that development agreements may not be used to require a developer to provide for any financial contributions or mitigation measures "*except as expressly authorized by other applicable provisions of state law.*" Since the City has made approval of a development agreement a requirement for MPD approval, it arguably[2] cannot condition

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Technically the prehearing order does not need to address what can be required as opposed to voluntarily provided by the Applicant. Any comments made on this issue are dicta and would have no preclusive effect. The issue is

participation in a development agreement upon terms that the Applicant would not otherwise be compelled to accept by state law. At this stage of permit review it appears that the only requirements that can be imposed in the development agreements is implementation of MPD permit conditions. The parties are free to identify other legal requirements that may apply at this time as well.

Realistically, it is unlikely that the City Council will both be able and willing to provide much incentive for the Applicant to agree to any mitigation beyond that required by the MPD conditions of approval. Any testimony or other evidence on voluntary conditions will probably not yield anything constructive and is not encouraged. Of course, the parties may incorporate evidence they provided during the MPD hearings by reference if that facilitates testimony.

The primary and ideally exclusive focus of the development agreement hearings should be on whether the terms of the agreements implement the MPD conditions of approval. In assessing this issue, compliance with MPD criteria can and probably will be a central focus of concern. The MPD conditions were imposed in order to satisfy the City's MPD criteria. Many of these conditions of approval deferred specific compliance to the development agreements. Consequently, in order to determine whether a deferred issue has been addressed as intended in a development agreement, the primary inquiry should be whether the term satisfies MPD permitting criteria.

One issue that can't be addressed is the validity of the MPD conditions of approval. As noted by the Examiner during the prehearing conference, the MPD approval and conditions are perfect so far as the development agreement hearings are concerned. Obviously, the documents are not actually perfect. No permit approval for a project of this complexity could be. However, the development agreement process cannot be used to modify those approvals. The courts have been very clear that permit decisions cannot be revisited except under a timely appeal. *See Chelan County v. Nykreim*, 146 Wn.2d 904 (2002); *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005). As previously discussed, requests to the Applicant to voluntarily agree to additional and/or more restrictive mitigation can be made, but any arguments that the MPD approvals should be otherwise modified are strictly beyond the scope of the MPD hearings.

B. Role of Examiner. In order to maximize fairness and equal participation to all hearing participants, the Examiner will conduct himself as a quasi-judicial decision maker. This may or may not be required by the law, but it is most consistent with the tasks assigned to him. The tasks of an examiner generally include an objective application of law to facts and the conduct of a hearing process that provides for fair and equal participation. There is also nothing illegal or prejudicial in voluntarily assuming a quasi-judicial role if it's not legally mandated.

To make this more comprehensible to citizen participants, acting in a quasi-judicial capacity means that the Examiner will conduct himself as a judge by ensuring that any information he

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addressed only to enlighten hearing participants as to the significance of comments made on issues beyond implementing conditions of approval, i.e. not very much unless the Applicant is willing to address them.

considers in making a recommendation to the City Council is made available to all hearing participants and that he disclose anything that would appear to make him biased in his decision making. Pursuant to these rules the Examiner will not engage in any "ex parte" communications with any parties except staff on necessary procedural matters. The Examiner will not engage in conversations about the project with the Applicant without project opponents present and vice-versa. Any inadvertent communications will be disclosed at hearing so all other hearing participants will have an opportunity to address them.

As a quasi-judicial decision maker the Examiner will also avoid making recommendations on policy issues beyond compliance with applicable law. "Applicable law" includes the BDMC 18.98.090 mandate to implement the MPD conditions of approval in a development agreement. Except for legal issues, the citizens of Black Diamond and in particular its elected representatives are in a far better position than the Examiner to make value choices on the future development of the City. Many policy choices can be evaluated as to consistency with the City's comprehensive plan, a legal issue, and the Examiner will probably make comments at that level. When applicable law does not compel any particular result the Examiner will most likely limit his recommendations to the options legally available to the City Council.

C. Hearing Date. The development agreements will commence on July 11, 2011 pursuant to the public notice issued by City staff. The hearing was scheduled as ordered by the Examiner at the May 23, 2011 pre-hearing conference, which was 30 days from the posting at the City's website of a final development agreement and staff report. Written comments will be accepted for two weeks following the close of the verbal testimony portion of the hearings, including expert testimony, which will give the parties at least seven weeks to review and comment upon the final documents. Although voluminous, the exhibits have remained substantially the same since they were released to the public in April, 2011. The development agreements themselves are "only" about 150 pages each. These are lengthy documents, but by the end of the hearing process the parties will have had almost two months or longer to review them.

D. Consolidation. The Villages and Lawson Hills MPD development agreement hearings are consolidated into one hearing. Any comments submitted into the hearing will be taken as applying to both MPDs unless the comments direct otherwise or are clearly applicable to only one specific MPD.

E. Rules of Procedure. The Rules of Procedure adopted during the MPD hearings will remain in effect, except for minor changes to Rule 2.05. The modification to Rule 2.05 is that service of all documents will be deemed complete upon the receipt of the document by the City as opposed to the date the document is deposited in US mail facilities. A copy of the Rules of Procedure should be posted with this prehearing order. Any order issued by the Examiner shall supersede any conflicting Rule of Procedure.

F. Transcripts. The Applicant is not required by state or local law to have any transcript prepared during the hearing. It does so for its own convenience and its election to do so does not

create an equitable or legal responsibility to make that service available to other parties. However, the Applicant should be aware that as soon as those transcripts are provided to the City or to the Examiner they are considered public documents subject to disclosure. The transcripts the Applicant provided to the Examiner for the MPD hearings were of immeasurable assistance and significantly reduced the time and expense the Examiner incurred in preparing a recommendation to the Council. If the Applicant chooses to provide a copy of the transcripts to the Examiner for review of the development agreements, the sooner those transcripts are submitted the sooner the Examiner will be able to issue his recommendation.

G. Expert Witnesses. When the Examiner issued his order on the hearing date at the pre-hearing conference, he did not anticipate that the issue would be revisited in the prehearing motions. He had intended to issue an order for the scheduling of expert witnesses as the prehearing motions came in. When it became evident that parties were still going to address the hearing date in the prehearing motions, the Examiner had to wait until all arguments had been submitted prior to addressing scheduling. Now that the motions have all been submitted, it is too late to require the submission of expert witness information in advance of the hearing. Consequently, expert testimony will be scheduled for the week commencing July 18, 2011. Parties wishing to submit verbal expert testimony shall supply written notice of this testimony to City staff by 5:00 pm July 8, 2011. Any parties wishing to provide rebuttal expert testimony shall provide notice of the testimony by 5:00 pm July 13, 2011. The notices must be received by the City by the dates specified above at the City address identified at Section D of this order or at the email address of Steve Pilcher at SPilcher@ci.blackdiamond.wa.us. The notices shall provide the following information:

a. Dates and times of availability to testify the week of July 18, 2011.
b. Curriculum vitae of the expert.
c. A summary of the issues that will be addressed in the expert testimony. The summary should be specific enough to identify what portions of the development agreements are addressed and what deficiencies the expert believes exist or don't exist with those provisions.
d. The amount of time the expert will need to testify (excluding cross-examination).

The Examiner will schedule proposed expert witnesses if they in fact qualify as expert witnesses and the notices identified above have been provided as directed. An expert witness is a person that is qualified by knowledge, skill, experience, training or education to provide opinions on scientific, technical or other specialized issues. *See* ER 702. A person does not qualify as an expert witness due to his or her residency alone in the Black Diamond Community. Persons who do not qualify as expert witnesses will be allowed to testify as members of the public.

Expert witnesses shall not be subject to any time limit. Expert witnesses will be subject to cross examination at the end of each of their testimony. Persons who wish to cross examine the witness shall line up at the podium to ask their questions upon the completion of the expert's testimony. Attorneys shall be allowed to ask questions first, followed by any other members of the public in the order in which they've entered the line. Each person cross examining the expert witness shall only

be allowed to ask questions once per witness, provided that the Examiner may within his discretion allow re-cross for any new information provided under redirect examination. Duplication of cross-examination questions will not be allowed.

H. Time Limits. The general public will be subject to a time limit of ten minutes per speaker. A more detailed rule on time limits is quoted from the sign-up sheet notice the Examiner provided to staff as follows:

> *Persons who wish to testify may reserve time in advance on the posted sign-up sheets. Each person shall be allowed up to ten minutes to speak. Up to six persons shall be assigned to each hour of hearing and those persons will speak in the order in which they have signed up. Persons may cede their entire ten minute allocation to another speaker, provided they are present at hearing to cede their time. Persons who have a disability that prevents them from being present at the hearing need not be present to cede their time. The recipients of any ceded time may schedule their additional time on the sign-up sheets, i.e. "John Smith, using ceded time". One additional sign up slot must be filled in for each ten minutes of time ceded, e.g. if a person will use their time and ceded time from four others to speak, they should fill in five speaking slots. The maximum time that any speaker may testify during the public comment portion of the hearings is one hour total. The grantor of the ceded time need not be identified on the sign-up sheets, but will have to be identified at the hearing. Any unused time during the hearing will be available to others present at the hearing who have not already spoken or ceded their time.*

The Applicant and staff will each have 1.5 hours each to make initial presentations and one hour each to make rebuttal/closing presentations. This extra time acknowledges the fact that they must explain the project to the public and respond to all public concerns.

Sign-up sheets will be posted at the Black Diamond Community Development Department, 24301 Roberts Drive, Black Diamond, commencing July 1, 2011 during regular business hours. The Community Development Department will be closed July 4 and 5, 2011 due to the holiday and a furlough day. The sign-up sheets will also be present at the hearings themselves and people will be able to reserve time through 2:10 pm on July 16, 2011.

Members of the general public (defined as those speakers other than City staff, the Applicant and expert witnesses) will only be allowed to speak once and cannot reserve time for an additional speaking time, unless they are cut-off due to the close of a hearing day.

The rights of the public to speak will not be modified because they happen to belong to an organization. If someone makes the effort to appear (unless disabled, as previously discussed) they will have the same right to speak for ten minutes as any other member of the public.

I. Hearing Format. The hearings will commence with a presentation from the Applicant and then City staff on July 11, 2011, starting at 6:00 pm after opening comments from the Hearing Examiner. All testimony at evening hearings will be taken until 9:20 pm. If the Applicant and staff are finished prior to 9:20 pm on July 11, members of the public will be allowed to commence their testimony. A sign-up sheet will be provided and members of the public will testify in order of signing up.

General public testimony for the hearings scheduled for July 12, 13 and 14 will all commence at 6:10 pm after opening comments from the Hearing Examiner. All persons signed up to speak should be present at the hour they are scheduled to speak. Any unused time will be made available to others who have not spoken or ceded their time. Sign-up sheets will be available at the hearings for people who wish to speak during the unused time.

General public testimony on July 16, 2011 will commence at 9:10 am after opening comments from the Hearing Examiner. Sign-up sheets will be available at the hearing for the first hour (until 10:00 am). General public testimony will be taken until 12:10 pm and from 1:10 pm to 2:10 pm. If this does not provide sufficient time to accommodate all those who signed up to speak, additional hearing date(s) will be scheduled as needed. Only those persons who signed up prior to 10:00 am, including signing up through the reserve sign-up sheets posted at City Hall pursuant to subsection C herein, will be allowed to speak. Upon the completion of all general public testimony, City staff and then the Applicant will then have one hour each to provide rebuttal and closing comments. Expert testimony will be scheduled once the expert witness notices required by this order have been submitted. The hearings will be continued to specified dates for expert testimony, if any. When possible, expert rebuttal witnesses will be scheduled for the same day as the expert rebutted.

All testimony will be taken under oath.

Written comments will be accepted from all parties for a period of two weeks after the close of the verbal testimony portion of the hearing, which will include verbal expert testimony. All parties shall then be given one week to provide a written response to all written comments submitted at any time during the hearing and the verbal testimony submitted during the last two days of verbal testimony. All parties shall then have two business days to provide a written reply to all written responses. Specific dates will be given at the close of verbal testimony.

J. Completeness. Some hearing participants have asserted that the development agreement is not complete enough for review. Completeness as a prerequisite to scheduling a hearing is traditionally governed during prehearing review by staff. *See, e.g.,* RCW 36.70B.170. Once an application is presented to the Examiner completeness becomes an issue for approval or denial. Applications that do not contain sufficient information to assess compliance with applicable law will be recommended for denial or conditions that bring the project into compliance[3].

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[3] Projects are sometimes conditioned for further staff level analysis and mitigation. There is little or no legal authority on what degree of "delegation" in this manner is appropriate. Should these types of conditions become an issue in this case, the Examiner would like to hear argument from the parties prior to addressing their validity.

K. Miscellaneous. Venue at Sawyer Woods Elementary School is appropriate. It is the largest more reasonably available venue in the area. It does not appear that there is any larger venue reasonably available, but the Examiner needs more information on this issue should it arise. If the venue is not sufficient to accommodate the public and there is no larger venue reasonably available the most likely solution will be to take the testimony of those who can be accommodated and make audio recordings of the testimony available to those who cannot be accommodated. Of course, all persons who wish to testify that evening but cannot be accommodated will be given an opportunity to testify at another time.

All hearing participants will be allowed to object to evidence when it is submitted. Failure to do so will be considered a waiver of objection.

Non-expert witnesses will not be subject to cross-examination. Requests for clarification can be made through the hearing examiner.

"Party" as used in this order refers to all hearing participants.

ORDERED this 6th day of July, 2011.

Phil A. Olbrechts
Hearing Examiner for Black Diamond