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BEFORE THE HEARING EXAMINER FOR
THE CITY OF BLACK DIAMOND

Development Agreements
Lawson Hills PLN10-0021; PLN11-0014
Villages PLN10-0020; PLN11-0013

Order on Yarrow Bay Objections to Exhibits

As authorized by the Examiners July 14, 2011 “Order on Exhibits and Response/Reply Documents”, Yarrow Bay has submitted an extensive number of objections to most of the exhibits entered into the record after the close of the verbal portion of the hearings. All objections are overruled except for those that pertain to the proper authentication of photographs for Exhibits 123, 124 and 132. The party that submitted those documents will be given an opportunity to authenticate as outlined in the “Order” section of this document.

The primary reason the objections are overruled is that as discussed in Pre-Hearing Order II the scope of a development agreement is broad. It is with some irony that almost every time the Applicant’s attorney has argued that the development agreements (“DAs”) are limited to implementing the master plan development (“MPD”) conditions of approval, she has followed those comments with the observation that the Applicant has already proposed terms for the DAs that go beyond what is required by the MPD ordinances. Of course, it is highly commendable that the Applicant is willing to cooperate in this fashion and it is hoped that the Black Diamond community acknowledges these efforts. However, the Applicant’s position results in a bifurcated review process where the City and the Applicant are free to discuss and negotiate terms that both implement and supplement the MPD conditions of approval while the public can only comment on terms that implement them. As authorized by the state statutes that create them, development agreements are an opportunity for the City and the Applicant to both satisfy the requirements of the Black Diamond Municipal Code and to negotiate the mitigation of any other impacts associated with the development proposal. The fact that the DAs are required by the Black Diamond Municipal Code to implement the MPD conditions of approval does not in any way suggest that the public is prohibited from making suggestions on how to supplement the conditions of approval as

1 authorized by state statute, especially when the City and the Applicant have been engaged in those
2 discussions themselves.

3 The Applicant's most frequent objection is that environmental impacts have already been
4 addressed in SEPA review. For the reasons discussed in the preceding paragraph, the scope of a
5 development agreement is certainly broad enough to encompass environmental impacts. The courts
6 have also ruled that the completion of SEPA review does not preclude the mitigation of impacts in
7 associated permitting review if relevant to the permitting criteria. *See Quality Products, Inc. v.*
8 *Thurston County*, 39 Wn. App. 125 (2007). Further, a finding that an FEIS is adequate does not
9 preclude mitigation in other development review as suggested by the Applicant in its objections.
10 RCW43.21C.060 provides that "any governmental action may be conditioned or denied" pursuant
11 to SEPA. (emphasis added). An environmental document such as an EIS is intended to provide the
12 basis for this exercise of supplemental authority to all the government actions to which it applies.
13 However, the exercise of SEPA supplemental authority is subject to numerous restrictions. Most
14 pertinent, conditions must mitigate impacts identified in the FEIS and the conditions must be
15 reasonable, which in the context of the DAs probably means they must be related to and
16 proportionate to the mandatory (i.e. as an implementing tool) scope of the DAs. *See*
17 *RCW43.21C.060*. Parties may also be precluded from arguing for specific mitigation if they
18 argued for the same mitigation in the MPD/FEIS hearings. *See Willapa Grays Harbor Oyster*
19 *Growers Ass'n v. Moby Dick Corp.*, 115 Wash. App. 417, 423, 62 P.3d 912 (2003). However, if all
20 the pre-requisites are satisfied, SEPA can be used to mitigate a broad range of environmental issues
21 triggered by the DAs.

22 The Applicants also object to several exhibits on the premise that they are challenging the
23 MPD conditions of approval. As made clear by the Examiner in Pre-Hearing Order II and during
24 the hearings, the DA hearings are not an opportunity to request a revision to the MPD conditions of
25 approval. However, the exhibits in question do not advocate revisions to the MPD conditions.
26 They cite what the authors view as deficiencies in the MPD conditions that the authors hope to be
addressed in supplemental conditions in the DAs. Framed in this manner, the arguments are relevant
to the DA hearings.

Exhibits depicting problems associated with other developments are admitted. That
information is relevant to evaluating the effectiveness of proposed design and mitigation. The
Applicants were free to identify distinguishing features. Exhibits critical of the City's design
standards are also relevant. Supplemental conditions can be used to address deficiencies of the
standards.

It is recognized that some of the concerns raised in the DA hearings are duplicative of
MPD/FEIS hearing testimony. It is also recognized that the MPD conclusions and conditions were
intended to serve as a final resolution to some issues. The Examiner's recommendation will
identify where testimony is duplicative and will identify language from the MPD approvals and
FEIS decision indicating a final resolution of issues resurrected by the public. If the Council still
wishes to try to negotiate some voluntary supplementary conditions on those issues anyway, that is
its choice. The Examiner is not in a position to deprive the Council of those choices by excluding
evidence the Council could use from the record.

The Applicant has objected to photographs presented in Exhibits 123, 124 and 132 as not
properly authenticated. The party responsible for those exhibits will be given an opportunity to
authenticate them.

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2 **Order**

3 Except as to Exhibits 123, 124 and 132, all objections presented in “YARROW BAY’S
4 OBJECTIONS TO EXHIBIT 47 THROUGH EXHIBIT 180” are overruled. As to Exhibits 123,
5 124 and 132, the party submitting those exhibits shall identify where, when and by whom the
6 photographs were taken. No further location information on photographs identifying cross streets is
7 necessary. Tax parcel numbers may suffice instead of addresses. If the photographer and/or date of
8 a photograph is unknown, a statement that the photograph accurately depicts current conditions will
9 suffice. The requested information shall be emailed to Steve Pilcher at
10 SPilcher@ci.blackdiamond.wa.us or otherwise received by him by 8:00 am, August 19, 2011.
11 Yarrow Bay may provide a written response on the authentication information, which must be
12 emailed to Steve Pilcher at SPilcher@ci.blackdiamond.wa.us or otherwise received by him by 8:00
13 am, August 23, 2011. Mr. Pilcher is requested to immediately forward the email to the Applicant.

14 This order will be emailed by the Examiner to Kristen Bryant, who submitted Exhibits 123, 124 and
15 132, as well as the Applicant. As previously ruled by the Examiner, arguments concerning
16 objections to evidence are to be limited to the person making the objection and the person subject to
17 the objection.

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ORDERED this 16th day of August, 2011.

Phil A. Olbrechts
Hearing Examiner for Black Diamond