

**BLACK DIAMOND
PLANNING COMMISSION
MINUTES OF JUNE 12, 2012 MEETING**

CALL TO ORDER

Chair Keith Watson called the meeting to order at 7:02 p.m. with the introduction of the role and duties of the Planning Commission.

ROLL CALL

Present: Commissioners Keith Watson, Sheri Roth, Kyle Danielson, Pam McCain,
Darryl Buss and Greg Thesenvitz
Absent: Pam Thurmond
Staff: Community Development Director Steve Pilcher and Senior Planner Stacey
Welsh

APPROVAL OF MINUTES

Moved by Commissioner McCain, seconded by Commissioner Buss, to approve the minutes of the May 2, 2012 meeting as written. Passed 6-0.

Moved by Commissioner Roth, seconded by Commissioner McCain, to approve the minutes of the May 8, 2012 meeting as written. Passed 6-0.

PUBLIC COMMENTS

None

**PUBLIC HEARING ON POTENTIAL AMENDMENTS TO BDMC TITLES 17 & 18,
REGARDING PRELIMINARY PLAT APPEAL PROCEDURES**

Chair Watson read the Rules & Procedures for a Planning Commission public hearing and opened the public hearing.

Mr. Pilcher provided the staff presentation and distributed a copy of the Council Resolution that initiated this code amendment process. The Commission asked about the proposed language and use of the word "may". The question was asked if the change is made, then can the City Council's decision be appealed. Mr. Pilcher said that yes, it would be appealed to Superior Court and explained the appeal process. The Commission asked if this would increase the cost from the standpoint of a property owner. Mr. Pilcher stated it would add time and a step in the process. The Commission asked about the cost of the appeal to Council. Mr. Pilcher said there is a fee; however an attorney would not necessarily be needed. He explained the importance of establishing a good record. The Commission asked if there could be a timeframe imposed on the duration of an appeal. Mr. Pilcher indicated that something could be added to the code; however we cannot dictate the timing of the courts.

The Commission requested an explanation of why the Council asked for this code amendment. Mr. Pilcher said he could not speak for the Council and that there was no statement of intent provided in the initiating resolution. The Commission inquired as to the urgency of the code amendment. Mr. Pilcher said that a reason is not reflected in the Council Resolution, but he noted that the City does have preliminary plat applications that have been filed. The Commission asked what the advantage would be to the City for this code change. Mr. Pilcher spoke to the pros and

cons and said it is a policy issue. The Commission discussed their previous action on this issue, which occurred in 2011. The Chair called for public testimony.

Public Testimony

Jack Sperry stated that in the Spring of 2011, the Planning Commission held a hearing regarding this conflict in code. The City staff proposed to fix the conflict to eliminate the opportunity to first appeal to Council before having to go to Court. This would deny citizens the ability to review land use changes with their elected representatives before they go to Court. He spoke to the prior Commission vote on the matter. He said with approval of the Development Agreements, the focus is now shifting to the preliminary plat applications; these changes regarding plat appeals are of such consequence. He urged the Planning Commission to adopt the proposal before them; citizens should first have an opportunity to present their case to the City Council. He submitted his written statement.

Bob Edelman said the plat applications are going to be upon us soon, so before that happens there should be a resolution to the conflict in the law. When an ordinance change is brought before the Planning Commission, the code requires that it be processed expeditiously. He said if you do not process it expeditiously, you are violating municipal code. It is quite clear that staff was requested to prepare a change to Title 18 to make it consistent with Title 17 at last year's Planning Commission meeting. He stated an appeal would take a matter of days, not months, and the main issue is the expense to citizens. He noted that Superior Court costs in excess of \$20,000, while an administrative appeal is \$250. There is equity in the way it would be handled. The City Attorney has his legal opinion about which Title currently prevails, but it is not law.

Megan Nelson, Director of Legal Affairs for Yarrow Bay Holdings, said she is submitting a comment letter on behalf of Yarrow Bay. She asked the Commission to read the letter and listen to the audio of the recent City Council study session before acting on this issue. At that meeting, the City Attorney had discussed several key issues. The appearance of fairness doctrine would be imposed as soon as the code change is passed; this means that constituents and the applicant cannot talk to the City Council about the plat applications. She said the proposed code amendment will cost the property owner more steps, time and money. It is expensive for both the property owner and appellants; it is equitable on both sides. A preliminary plat appeal will eventually go to Superior Court, so no cost avoidance will happen. She spoke about liability and bringing increased exposure to the City. Third parties are saying that, including Mike Walters of the Washington Cities Insurance Authority. He recommends that cities do not make this change. WCIA has gone on record to say this is a bad idea. She noted she had attended Land Use Bootcamp Basic Training earlier this year, where at least three presenters recommended that appeals of Hearing Examiner decisions go straight to Court because of liability concerns for local jurisdictions. She said the Hearing Examiner issued his viewpoint in Kahne plat decisions, so that is binding authority (*res judicata*) on the City since nobody appealed it. She recommended the Commission request a presentation from the City Attorney and the City's insurance defense counsel. She said the Commission's other obligation is to think of how to protect the City.

Janie Edelman said the Commission has listened to testimony from citizens and the developer. She asked the Commission to look at the information and look at what is best for the citizens of the city and the cost to citizens of the city and make an educated, intelligent decision.

Erika Morgan said she is reminded about the cone of silence which was a problem and how onerous appeals are to citizens. Black Diamond is a special place; there is a lot of professional expertise in the public. A lot of people have lived here for a long time and they have a lot of knowledge. She does not know if it should be Title 17 or 18. If the public is allowed to have their practical voice heard it will be a better project in the end. She asked if it is right to burden people who live in and around Black Diamond with the cost of going to Superior Court.

Colin Lund, Yarrow Bay Holdings, said it is frustrating as an applicant for the process to change midstream. Given the liabilities, he cannot see a reason to do this except to add delay. The MPD and DA hearings were lengthy closed record hearings. He said a plat decision would likely be appealed to Court anyway. TRD has made it clear they will be continuing to appeal. The City has experienced appeals including the Growth Management Hearings Board, two LUPA cases and the Supreme Court; there seems to be no lack of funding to continue to appeal the project. An administrative appeal is expensive for the applicant because they have attorney time and carrying costs. He recommended the Planning Commission do their due diligence. He said there are enough questions here that they should have a presentation from the City Attorney and insurance counsel.

Bill Roth said he is concerned about the change, and should a lawsuit result, questioned if the City has needed funds to defend against a lawsuit. He stated concern about members of any Black Diamond City Council being less impartial than a Court would be. He said it is hard to be impartial if you live and work in Black Diamond.

Bob Edelman stated he was appalled that Yarrow Bay is resorting to threats. If the City Council makes a decision that is arbitrary and capricious, then there is city insurance that would cover them; there is no liability. The cone of silence/appearance of fairness doctrine does not apply unless there are parties to a dispute of some type. He said it would be absurd to require the City Council to be under the cone of silence if they hear that an MPD application was being filed. They are only subject to it if there is a quasi-judicial action like an appeal.

Megan Nelson, Yarrow Bay Holdings, said there was no intention of threatening a lawsuit. Research shows there is increased liability for councils that have appeals go directly to them. Regarding the appearance of fairness doctrine, she provided the City Attorney's information on the issue. If an administrative appeal goes to the City Council, the Council is not deciding yes/no on the application. They are put in the awkward situation of deciding whether or not the Hearing Examiner made an error of law or fact.

Jack Sperry said Yarrow Bay expressed concern about the cost of an extended appeal period. He said some of these decisions will be in favor of the developer, in fact most of them. He spoke to plats having profound and lasting impacts to people's lives in the community; they should be able to appeal without having to go to Court. It is false that there is a website entitled Protect Black Diamond that says they are going to appeal forever.

Bob Edelman noted that the Yarrow Bay attorney said that the supremacy of Title 18 over 17 has been made by the Hearing Examiner. He said the Hearing Examiner decision is not precedential and that regarding the cone of silence, that is the City Attorney's opinion. He told the Commission to read the statute under LUPA.

Bill Roth said that the take away from tonight is that there are people at the state level that know much more about this topic.

The Chair closed the public hearing and stated the circumstances under which it could be reopened. Several members of the Commission discussed their need for time to review the information presented tonight and interest in having a presentation from the City Attorney or insurance carrier regarding liability. Another member noted that the Commission is not deciding whether the code change would be adopted and that it is the Council who should consult with the City Attorney. The Chair said the Commission does not have enough information to make a recommendation and they should see about having a presentation from legal counsel.

A motion was made and seconded to stay any decision on the information that Council wants an answer on until they have a formal presentation from the City Attorney and the City's insurance carrier as to liability. Passed 5-1 (Thesenvitz).

The hearing was continued to the July 10th meeting. The Chair encouraged the Commissioners to read the materials received and come prepared with questions.

WORKSESSIONS

Suggested 2012 Comprehensive Plan Amendments from the Planning Commission (if any)
Mr. Pilcher discussed how the amendment process works, including the June 15th application deadline. He handed out the Council Resolution regarding proposed items for review. He asked if the Commission had any items for the 2012 cycle. He noted that the parks issue may be coming back and the Bryant family may apply for changes related to their airport. He explained the docketing process. The Commission had no issues to bring forth. The Commission will work on this at their next meeting.

UNFINISHED BUSINESS

None

DEPARTMENT REPORT

Mr. Pilcher mentioned the recent meeting between the City and business people in town. Chair Watson was in attendance and said it was a positive meeting.

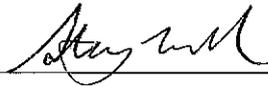
PUBLIC COMMENTS

Janie Edelman asked if the information provided by Yarrow Bay will be made available. Mr. Lund provided her with a copy of their letter.

ADJOURN

Moved by Commissioner Buss, seconded by Commissioner Danielson, to adjourn. Passed 6-0. The meeting adjourned at 8:31 p.m.

Minutes prepared by: Stacey Welsh, Senior Planner


Keith Watson, Chairman

ATTEST:


Planning Commission Secretary