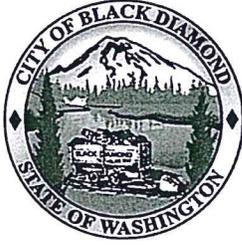




CITY OF BLACK DIAMOND
PLANNING COMMISSION MEETING AGENDA
April 7, 2015 7:00 PM
25510 Lawson Street, Black Diamond, Washington

- 1) CALL TO ORDER, ROLL CALL
- 2) APPROVAL OF MINUTES – March 10, 2015
- 3) PUBLIC COMMENTS: Individuals wishing to address the Planning Commission regarding any item not on this meeting’s agenda may do so at this time.
- 4) PUBLIC HEARINGS
 - a. Repealing Chapter 18.14 (Vesting) and Replacing with New Language
- 5) NEW BUSINESS
 - a. Traffic Concurrency Ordinance
- 6) UNFINISHED BUSINESS
- 7) DEPARTMENT REPORT
- 8) PUBLIC COMMENTS - Individuals wishing to address the Planning Commission regarding any item not on this meeting’s agenda may do so at this time.
- 9) ADJOURN



**CITY OF BLACK DIAMOND
PLANNING COMMISSION MEETING MINUTES
MARCH 10, 2015, 7:00 PM**

CALL TO ORDER

Chair Pam McCain opened the meeting at 7:00 pm.

ROLL CALL

Present: Commissioners Roth, McCain (Chair), Pepper, Senecal, Kuzaro, Davis and Weber (Co-Chair)
Absent: N/A
Staff: Aaron C. Nix, MPA

APPROVAL OF MINUTES

A MOTION WAS MADE AND SECONDED BY COMMISSIONER ROTH TO ACCEPT THE FEBRUARY 10, 2015 PLANNING COMMISSION MEETING MINUTES, WITH THE DESCRIBED CHANGES AS OFFERED BY THE COMMISSIONERS. ISSUE PASSED 5-0.

PUBLIC COMMENTS

Colin Lund, Yarrow Bay, 10220 NE Points Drive, Suite 120, Kirkland, WA 98033 – Spoke to the Commission with regard to the proposed removal of Chapter 18.14 Vesting and its replacement with new language as provided in the DRAFT Ordinance in front of the Planning Commission. Mr. Lund expressed his desire to work with the Planning Commission with regard to this issue and supplied the Commissioners with some research that he had done on this topic from the MRSC website (Staff did not receive a copy as there were no extras available). He also stated his desire to help the Commission through some potential conflicts and gave an example.

Chair McCain asked if anyone wanted to provide additional comment. The public comment period was closed.

NEW BUSINESS

Mr. Nix passed out additional information as it pertained to the new language being proposed by the City Council, including an email from the City's Attorney and an accompanying court case that was supplied by the City's Attorney in regard to this issue.

The question was asked by the Commission on why the City wanted to move forward with revising this section of the code at this time. Mr. Nix stated that this item was included within a list of areas to be updated, as provided by the City Attorney/previous Administration.

Additional discussion occurred with regard to specific language with the proposed new code and the appearance of discretion on the part of the City as it pertained to components of applications and what actually vests to completed applications. Further discussion focused on the positive and negative components to elements that become vested.

UNFINISHED BUSINESS

Mr. Nix outlined the discrepancies associated with previous versions of the zoning code map and providing updates as changes have occurred. Significant work was done by Staff in trying to update these maps as the previous color coding was something less than to be desired. Mr. Nix then outlined the discrepancies that were previously brought up by Commissioner Weber and detailed fixes to these issues.

DEPARTMENT REPORT

None

PUBLIC COMMENTS

Bill Roth, 28952 234th Avenue SE – Mr. Roth presented information as it pertained to the Potala Village court case given by Staff to the Commission earlier in the meeting with regard to vesting as it pertained to building permits.

ADJOURN

A Motion was made by Commissioner and seconded by Commissioner to adjourn. This issue was voted on by the Commission and Passed 5-0. The meeting adjourned at 8:15 p.m.

Minutes Respectively Prepared By: A. Nix, CD/NR Director: _____

ATTEST:

Pam McCain, Chairperson

Planning Commission Secretary

DRAFT
CITY OF BLACK DIAMOND, WASHINGTON
ORDINANCE NO. 15-XXXX

AN ORDINANCE OF BLACK DIAMOND, WASHINGTON, RELATING TO PROJECT PERMIT PROCESSING, REPEALING THE CITY’S EXISTING REGULATIONS ON VESTING, ADDING DEFINITIONS, DESCRIBING THE PROCEDURE FOR DETERMINING THE COMPLETENESS OF A PROJECT PERMIT APPLICATION, DESCRIBING THE ELEMENTS OF A DETERMINATION OF COMPLETE/INCOMPLETE APPLICATION, DESCRIBING THE EFFECT OF SUCH DETERMINATION, ADDING A NEW PROCEDURE THAT ALLOWS THE CITY TO DETERMINE THAT AN APPLICATION HAS EXPIRED FOR THE APPLICANT’S FAILURE TO PROVIDE THE INFORMATION REQUESTED BY THE CITY AND PROHIBITING THE “HOLDING” OF APPLICATIONS BY THE STAFF FOR INDEFINITE PERIODS OF TIME, ADDRESSING EXPIRATION OF PROJECT PERMIT APPLICATIONS, REPEALING CHAPTER 18.14 AND ADDING A NEW CHAPTER 18.14 TO THE BLACK DIAMOND MUNICIPAL CODE AND SETTING AN EFFECTIVE DATE.

WHEREAS, the City of Black Diamond is required to adopt procedures for the processing of project permit applications (as defined in RCW 36.70B.020) to conform to chapter 36.70B RCW; and

WHEREAS, RCW 36.70B.070 requires that the City establish procedures to determine the completeness of applications, which requires that the City provide a determination of completeness or incompleteness in writing to an applicant within 28 days after the submission of an application; and

WHEREAS, once the City issues a notice of incompleteness to an applicant, the applicant has the discretion to ~~the~~ submit additional information or not; and

WHEREAS, the City desires to establish a clear process whereby an application will expire or lapse, if the applicant fails to respond to the City’s notice of incomplete application by providing the requested information by a certain deadline; and

WHEREAS, although the City’s existing code provisions describe a process for “lapsing” of applications, it is mixed with an interpretation of the vested rights doctrine that is not consistent with applicable law; and

WHEREAS the City’s existing code includes provisions relating to the vested rights doctrine that are unnecessary and are inconsistent with state law and applicable case law (RCW 19.27.095(1) and RCW 58.17.033; *Potala Village Kirkland LLC v. City of Kirkland*, 183 Wash. App. 191, 334 P.3d 1143 (2014) by extending the vested rights doctrine to all “project permit applications;” and

WHEREAS, the City SEPA Responsible Official determined that this Ordinance was exempt from SEPA under WAC 197-11-800(19); and

WHEREAS, there was a public hearing on this Ordinance before the Planning Commission on April 7, 2015, 2015 and the Planning Commission recommended that _____

WHEREAS, the City Council introduced this Ordinance on _____, 2015, during a regular Council meeting; and

WHEREAS, the City Council considered this Ordinance for adoption on _____, 2015; Now, Therefore,

IT IS HEREBY ORDAINED BY THE BLACK DIAMOND CITY COUNCIL AS FOLLOWS:

Section 1. Chapter 18.14 of the Black Diamond Municipal Code is hereby repealed.

Section 2. A new Chapter 18.14 of the Black Diamond Municipal Code is hereby added, which shall read as follows:

Permit Processing Standards
CHAPTER 18.14

Sections:

- 18.14.010** **Definitions.**
- 18.14.020** **Determination of Completeness.**
- 18.14.030** **Deadline for Submission of Materials Prior to Hearing.**
- 18.14.040** **Changes or Additions to Application During Review Period.**
- 18.14.050** **Duration of Approvals.**

18.14.010 **Definitions.** For purposes of this chapter, the following definitions apply:

A. “Complete project permit application” means a project permit application that meets the requirements established in the Black

Diamond Municipal Code and administrative regulations needed for a complete application, including the payment of applicable fees.

B. “Lapse” means that any project permit application submitted to the City for processing is expired and/or void under BDMC Section 18.14.050—.

C. “Project Permit” means any land use or environmental permit or license required from the City for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by sensitive area or critical area ordinances, master planned developments and site specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, master planned development regulations or other development regulations.

18.14.020. Determination of completeness.

A. *Deadline.* Within twenty-eight (28) days after receiving a project permit application, the City shall mail or personally deliver to the applicant, a determination which states either: (1) that the application is complete; or (2) that the application is incomplete and exactly what is necessary to make the application complete.

B. *What must be included.* If more than one application is submitted under the consolidated permit review process, the determination of completeness shall include all project permits being reviewed in a consolidated manner. To the extent known by the City, other agencies with jurisdiction over the project shall be identified in the determination of completeness. However, it is the applicant’s responsibility to determine which permits are required from other agencies for a development, and to submit the appropriate permit applications.

D. *Required elements.* A determination of completeness is made by the City when the application includes all of the elements identified in the development regulations in this chapter as well as the chapter relating to the individual permit/approval. The City’s issuance of a determination of completeness means that the application is sufficiently complete to initiate review, even though additional information may be required by the City during processing or when subsequent application modifications are made. Issuance of a determination of completeness does not bar the City from requesting additional information or studies whenever new information is required, or substantial changes are made to the proposal.

E. *Deemed Complete.* If a determination of completeness is not issued by the City as provided in this section and within the deadlines established herein, the permit/approval application shall be deemed complete.

F. *Effect of Determination of Completeness or Application Deemed Complete.* If an application has been determined complete or deemed complete under this section, it does not mean that the application is “vested” to the applicable development regulations in place at the time the application was determined complete or deemed complete under this section. Not all project permit applications are subject to the vested rights doctrine. An application that is “deemed complete” may not trigger vesting. The City will not make any determination whether an application is vested prior to the time that the City has determined that the application is consistent with the applicable development regulations.¹

G. *Incomplete Applications.* Once the applicant receives notice of an incomplete application, the applicant has two choices. The applicant may:

1. Submit the information requested by the City within ninety (90) days. If the additional information is submitted within this time period, the Community Development Planning Director shall re-initiate the process for a determination of completeness in Subsection A above, and notify the applicant within fourteen (14) days of the receipt of the additional information whether the application is complete or incomplete. If another notice of incomplete application is sent to the applicant, the process shall continue until the City issues a determination of completeness.

2. Fail (or refuse) to submit the information requested by the City within ninety (90) days. After this period expires, the Planning Director shall send a letter by certified mail to the applicant, informing the applicant that unless the information is received within thirty (30) days from the date of the letter, the Director will make written findings and issue a decision that the application has expired for lack of the information necessary to complete review and processing. The decision shall be sent to the applicant, and will also state that the City shall take no further action on the application, and if no arrangements are made within thirty (30) days to pick up the application materials, they will be destroyed. If the application expires under this procedure, the applicant may request a refund of the application fee remaining after the City’s determination of incompleteness. A decision that an application has expired does not

¹ See, *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984) (an application subject to the vested rights doctrine must be processed according to the building and land use control ordinances in place at the time a complete application is submitted, as long as the application is consistent with the applicable development regulations and the permit issues).

preclude the applicant from submitting new applications which are the same or substantially similar to the expired application.

H. *“Holding” of Applications.* Applicants may not request that the City “hold” incomplete *or* complete applications in abeyance, indefinitely or for any set period of time. Once an application is submitted to the City, it will be processed according to the timeframes in this Title to a final decision, or the applicant may withdraw the application.²

18.14.030. Deadline for Submission of Materials Prior to Decision/Hearing. All documents and other evidence in support of an application and relied upon by the applicant for approval shall be submitted to the Community Development Director no more than seven (7) days after the City issues the notice of application or the notice of public hearing on the application.³ Documents or evidence submitted after that date shall be received by the Director, but may be too late to be considered in the decision (if no hearing is allowed before an appeal). If a hearing is allowed on the application, documents or evidence received after that date shall be received by the Director and transmitted to the hearing body, but may be too late to include with or to integrate in the staff report and staff’s evaluation of the application.

18.14.040 Changes or Additions to Application During Review Period.

A. When documents or other evidence are submitted by the applicant during the review period but after the application is determined (or deemed) complete, the assigned reviewer shall determine whether or not the new documents or other evidence submitted by the applicant significantly revise the application. Some of the factors that the City may consider as significantly revising the application include, but are not limited to, adding/subtracting from the property originally included in the application, making changes in the proposed use, expansion of any proposed structures, revisions requiring additional potable water and/or sewer, etc.⁴

² When state law requires the city to adopt new regulations or the city announces that it will soon adopt new regulations, a developer may submit an application for development in order to vest under the old regulations, even if the developer has no plans to construct the development in the immediate future. The developer will take pains to submit all information necessary for a complete application, but then asks the city to “hold” the application (sometimes for years) until the developer is ready to construct the development. In this way, the developer attempts to evade compliance with the new regulations.

³ These notices are covered in chapter ____.

⁴ See, *Families of Manito v. City of Spokane*, 172 Wash. App. 727, 291 P.3d 930 (2013) (site plan application was not a substantial revision to original application or constitute a new application where the plan did not change the use of the property or site area, did not substantially change the density or the traffic patterns, although the number of parking spaces did increase).

B. If the assigned reviewer determines that the new documents or other evidence significantly change the application, the reviewer shall include a written determination that a significant change in the application has occurred. Such a determination may trigger the need for additional review and submission of additional information, including, but not limited to, revised application materials and a new SEPA ~~Checklist determination~~. In the alternative, the reviewer may inform the applicant either in writing, or orally at the public hearing, that such changes may constitute a significant change (see subsection C below), and allow the applicant to withdraw the new materials submitted.

C. If the applicant's new materials are determined to constitute a significant change in an application that was previously determined complete, the City shall take one of the following actions:

1. If the applicant chooses to withdraw the new materials which constitute a significant change in the application, the City shall continue to process the existing application without considering the new documents or other evidence; or

2. Allow the applicant to submit a new application with the proposed significant changes, immediately after the existing application is withdrawn. If the applicant chooses this option, the application shall be subject to an additional fee, separate review for completeness, and will be subject to the standards and criteria in effect at the time the complete new application was submitted.

18.14.050. Duration of approvals – Effect of permit expiration.

A. Except where a different duration is established elsewhere in the Black Diamond Municipal Code or by an executed development agreement or applicable law, all project permits shall expire two years after the date of issuance if construction of the project has not substantially begun; provided, an extension of the permit may be granted as allowed under subsection B.

B. The City may extend the date of permit expiration for permits subject to subsection A above for up to two years with good cause shown by the permittee, and as long as the permittee submits a written request at least thirty days prior to the expiration of the permit. Requests for extensions shall be submitted in writing, together with payment of a fee equal to one-half of the permit application fee in effect at the time the request for an extension is filed. The "good cause" that must be described in the written request for an extension shall include documentation of the facts supporting the permittee's claim that he/she was unable to substantially begin construction during the life of the original permit

because of circumstances that were beyond the permittee's control and not foreseeable at the time of permit issuance. The ~~permitee~~ permittee must also demonstrate the ability to complete the project within the extended time period.

Section 3. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be unconstitutional or unlawful by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 4. Publication. This Ordinance shall be published by an approved summary consisting of the title.

Section 5. Effective Date. This Ordinance shall take effect and be in full force and effect five days after publication, as provided by law.

PASSED by the City Council of Black Diamond this ___nd day of ____, 2015.

Mayor Carol Benson

AUTHENTICATED:

City Clerk, Brenda Martinez

APPROVED AS TO FORM:
Office of the City Attorney

Carol Morris, City Attorney

PUBLISHED:
EFFECTIVE DATE:

Aaron Nix

Subject: FW: Repealing the Vesting Section of the BDMC and replacing it with new language (DO NOT HIT RESPOND ALL)

Attachments: Guilfoil Vesting 11252008.pdf; vested rights memo Morris 03162015.pdf; 08-892.pdf; 10-942.pdf; Abbey Road Group LLC v City of Bonney Lake.doc

Planning Commissioners,

(DO NOT HIT RESPOND ALL TO THIS EMAIL. IT IS FOR INFORMATION PERTAINING TO OUR DISCUSSION LAST MEETING on BDMC 18.14 VESTING)

As an FYI, we will be holding a Public Hearing on repealing section 18.14 Vesting of the BDMC and replacing it with new language, as proposed at our last meeting. Some homework that I've done on my end, based on our discussions last week include:

1. I've attached a memo from our previous City Attorney, Tom Guilfoil (VSI), that was developed as the City was revising its' vesting section of code back in 2008 (Adopted in 2009), a re-buttal memo, created by our current City Attorney (Carol Morris), discussing the substance of Mr. Guilfoil's letter and additional information you wanted with regard to this issue.
2. ~~Ordinance #08-892 and #10-942, on revisions to the vesting section of BDMC 18.14.~~
3. Questions and answers are found below

Question: Under the proposed new section of 18.14.020 (F), what specifically vests, as we understand that this includes building and land use controls in place at the time of a complete application, but recent court decisions may have revised this?

Carol Morris's Response: Preliminary plat applications and building permit applications. If the City has a binding site plan ordinance, then the preliminary binding site plan would vest.

Question: Under what authority does the City have the right to set deadlines as it pertains to when it receives required information on applications (i.e. 18.14.020, section G Incomplete Applications)

Carol Morris's Response: Note that under G, the applicant is not **required** to submit information to the City by any particular deadline. The code states that: "once the applicant receives notice of an incomplete application, the applicant has two choices . . ." and then the choices are to submit the information to the City within 90 days, OR the applicant can decide not to submit the information within 90 days. If the applicant doesn't submit the info within 90 days, then the City will take steps to make a decision that the application has expired.

Question: The Commission took issue with the notion that the word "Significant" revisions to permit applications is subjective to the reviewer of the application. It was my understanding that some of the Commissioners wanted this more clearly defined. Any thoughts?

Carol Morris's Response: No. It is subjective because it has to be. There are a number of ways an applicant can revise the application that could result in a decision that it must be considered a new application. This is a decision that needs to be made on a case by case basis and the planner needs to work closely with the city attorney on this.

4. City of Bonney Lake vs. Abbey Road Group LLC court case.

If there is additional information that you would like me to look into, please ask. I'll do my best to get you an answer to your questions. We will be looking for a recommendation from the Planning Commission after the Public Hearing.

Regards,

Aaron C. Nix, MPA

City of Black Diamond

Community Development and Natural Resources Director

360.886.5700 Office

anix@ci.blackdiamond.wa.us

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TO: Black Diamond City Council; Mayor Botts; City Administrator Gwen Voelpel

CC: Steve Pilcher, Community Development Director; Seth Boettcher, Public Works Director; Loren Combs, City Attorney

FROM: Tom Guilfoil, Assistant City Attorney

DATE: November 25, 2008

RE: PROPOSED PERMITS VESTING ORDINANCE with LAPSING PROVISION

Summary: As development within the Black Diamond community increases, the potential will also increase for disputes over what rules apply to a particular development project. To help avoid some of these disputes, the Community Development Department is proposing that the City adopt an ordinance that clarifies when certain development rights “vest.” This memo explains what “vesting” is, how it works under the current municipal code, and what the Community Development Department is proposing under the attached draft ordinance and why.

1. *What is “vesting”?*

“Vesting” is a term we often hear, yet it can sometimes be confusing. In a nutshell, “vesting” refers to the point at which your specific rights to do something are guaranteed and cannot be changed or taken away, at least for a period of time. Without thinking about it, we “vest” our rights many times every day. For example, when you go to a restaurant and order a sandwich that is listed on the menu for \$2.99, the restaurant can’t decide to charge you \$5.99 while you are waiting to be served. Your right to pay \$2.99 was “vested” once the waiter took your order. In other words, “vesting” refers to the idea that it’s unfair to change the rules in the middle of the game.

It’s the same when we talk about vesting of development rights. A developer wants to know at what point the City can no longer change the requirements for getting a project approved and built. When the developer has reached the point where the City can’t change the requirements or add new ones, the developer is “vested.”

However, vesting of development rights is complicated because a developer usually does not have just one “right.” During every step of the development process, there may be a separate “right” that could vest. For instance, state law says that some zoning and land use rights are vested as soon as the developer files a complete development application. That means a City can’t suddenly rezone the developer’s property while he’s in the middle of the project. But does that mean the developer has also vested the cost of

any permit fees or other charges that he will have to pay? And if he is vested, for how long? What if years pass and the project still hasn't been completed? The more clarity the municipal code provides in answering such questions, the more the City can avoid costly legal arguments.

2. *Why the proposed ordinance is needed*

Under the “vested rights doctrine” recognized in Washington, developers filing a timely and complete land use application obtain a vested right to develop land in accordance with the land use laws and regulations in effect at the time of application.¹ However, the law leaves certain details of vesting doctrine up to local judgment. For example, the City is free to decide what constitutes a “complete” application. The law is also silent on when permit fees and charges vest. In addition, the law doesn't state how long the City must honor a vested permit application. Further, the law doesn't address whether certain materials submitted to the City prior to making a formal application can be considered in determining whether an application is complete. A local ordinance is needed to address these points.

3. *What the proposed ordinance does*

The proposed ordinance clarifies some issues surrounding vesting of project permits. The key elements of the ordinance are:

A. Defines “complete application”

How the City defines “complete” is probably the most important step in the process from the City's point of view, because once an application is “complete,” the proposed development is protected from any zoning changes that the City may make from that point forward. The ordinance states that a complete application must have all the information required under the municipal code and any other information required by the Community Development Director and the application fee must have been paid.

B. Defines “project permit”

The definition tries to cover all possible types of permits related to a development project so that a developer cannot later argue that a particular permit is not covered under the ordinance.

¹ By coincidence, the state Supreme Court is currently deciding a case that may affect the point of vesting for certain types of permit applications. This memo describes the current state of the law.

C. Clarifies when an inactive application can be closed—proposed section 18.14.020

- 18.14.020(A) codifies in the municipal code the state law requirement that no stage of application review by the City shall take longer than 120 days.
- 18.04.020(B) allows the City to close an application where the applicant fails to pay fees or provide requested information within 180 days. (Holds the applicant to the standard established in the International Building Code for when an application should be closed.)
- 18.04.020(C) allows the City to close an application if the application has been inactive for at least a year (meaning there has been no final decision on the application by the City and also no contact from the applicant). This provision is intended to prevent situations where an applicant shows up several years after filing his application and argues that, because the City allowed his application to languish without making any final decisions, the permit must be approved under the regulations that were in place when the application was filed.
- 18.04.020(D) allows the City to be more flexible and enter into development agreements where different permit application timeframes might be desirable.

D. Clarifies vesting of project permits—proposed section 18.14.030

- 18.14.030(A) states that development permit applications shall be controlled under the zoning and land use ordinances that are in effect on the date a complete application is filed (pursuant to the state law).
- 18.14.030(B) states filing a complete application does NOT vest any subsequent required permits. This means that the developer will still need to apply for the permits needed to perform each separate part of the project—for example, plumbing and electrical permits—and that EACH OF THESE PERMITS WILL VEST SEPARATELY. Therefore, the regulations relating to getting these permits, and the requirements for getting approval for the work performed, could change between the time the permit application is complete and the time when the developer applies for a particular work permit.
- 18.14.030(C) deals with vesting of grading and filling permits, and states that filing a complete grading and filling permit application ONLY

VESTS GRADING AND FILLING described under that permit and does not vest other any development rights or later construction activities on the property. This prevents a developer from arguing that application for a grading and filling permit should vest his entire development proposal, which might involve zoning issues, etc. 18.14.020(C) also states that filing a complete grading and filling permit application will not vest the STORM WATER development regulations UNLESS the developer also files a complete storm water permit application at the same time that he files a grading and filling application. Compliance with storm water regulations will become ever more important due to new federal laws placing stricter liability for storm water pollution on cities.

- 18.14.030(D) clarifies that development rights do not vest upon the filing of pre-application materials, such as SEPA checklists, even if such materials are a mandatory part of the permit application process, BUT that such materials can be used to provide information required for a complete application.
- 18.14.030(E) is a catch-all for situations where allowing the project to go forward under the vested rules would cause a serious threat to public health or safety. It tracks language in RCW 58.17.170.

E. What happens when a developer requests changing a permit condition—proposed section 18.14.040

Sometimes conditions may change and a developer who has been issued a permit may ask the City to alter one or more conditions or requirements of his building permit. This proposed section provides guidelines for when changes will be allowed or when a new permit application process will be required, and how amending a permit affects the rights that may have previously vested.

- 18.14.040(A) states that “minor” changes to permit conditions can be made without requiring a new permit application. “Minor” means a change that doesn’t create problems that can’t be corrected, is not otherwise prohibited under the municipal code and would not require additional environmental review under BDMC Title 19.
- 18.14.040(B) states that “major” changes shall not be allowed unless a new permit application is filed and reviewed by the City, and that any requested change that doesn’t meet the definition of “minor” shall be considered a “major” change.
- 18.14.040(C)(1) says if the developer gets his minor change approved, he can’t later argue later he’s vested under the original conditions if he changes his mind and wants to go back to his original plan, and also if the

City approves a minor change to the permit, the permit will still expire two years from the original issuance date unless the City agrees otherwise.

- 18.14.040(C)(2) says if you want to make a major change, your new permit application will not be vested under the laws and regulations that were in effect when you applied for your original permit. So if you want to make a major change, you're going to be subject to all current regulations.
- 18.14.040(D) says the City's determination whether a requested change is major or minor is final and can't be appealed. This is because the developer already had the right to appeal the original permit conditions. Moreover, the developer can file a new permit application and appeal it if the City rules against what he wants to do. This rule is trying to prevent giving a person a way to get vested under existing regulations and then request major changes as a way to get around current regulations or to bypass a formal review.
- 18.14.040(E) makes explicit that requests to change permits that are part of an MPD will be governed by the MPD section of the municipal code, not this chapter.

F. Waiver of vesting—proposed section 18.14.050

This section authorizes the City to accept a voluntary waiver of vested rights by a property owner. This might occur in a situation where, in exchange for the City agreeing to take some action that benefits the developer, the developer signs a waiver and agrees to be bound by the current development regulations rather than the ones that were in effect when his permit application was filed.

G. Duration of permit approvals—proposed section 18.14.060

- 18.14.060(A) fills in one of the big blank spaces of the current law by establishing a clear rule that all project permits shall EXPIRE IN TWO YEARS if the developer has not “substantially” completed the work, unless a different period of time has been previously agreed upon in writing thru a development agreement or a different period of time is specifically stated elsewhere in the municipal code (such as Master Planned Developments, which allow 15 years). “Substantial” means whatever the City decides it means.
- 18.14.060(B) gives the City flexibility by allowing us to extend the permit for up to an ADDITIONAL TWO YEARS if the City believes there is good cause, such as conditions beyond the developer's control. However, the developer has to pay another (reduced) application fee.

- 18.14.060(C) specifically states that a developer LOSES HIS VESTED RIGHTS under the permit when the PERMIT EXPIRES, unless the permit has been extended by the City as described in subsection B, above. This means he will be subject to whatever fees and conditions are in effect when he applies for a new permit.

In sum, under the new ordinance a developer's vested permit rights would be limited to a *maximum period of four years* (except where a separate written agreement between the City and the developer provides otherwise).

- 18.14.060(D) causes a permit to become void if work is not substantially commenced within 180 days of the permit being issued, or if work stops for 180 days. This section addresses the problem of developers who begin a project and don't move forward, or who have to stop because of financial distress. It allows the City to potentially impose more current code restrictions if either of those situations occur.

H. Suspension or revocation of permit approvals—proposed section 18.14.070

- 18.14.070(A) authorizes the City to revoke a permit that was issued in error. This might occur because of incorrect information provided by the applicant or an oversight by the City (for example, not realizing that another law or ordinance prohibited the project being approved).
- 18.14.070(B) section of the code is intended to protect applicants who are incorrectly issued a permit through no fault of their own, by allowing the applicant to be vested for another 90 days under the rules that were in effect when the original permit was inappropriately issued. The applicant can adjust his project as needed and then re-apply and get a new permit if possible. However, there may be situations where the applicant simply cannot do what he wants to do. In such situations, City staff should consult with the City Attorney.

4. *When other fees and charges vest*

The following summary describes the point when certain other fees and charges vest under the current version of the municipal code:

- *“Impact fees” imposed under the Growth Management Act.* Impact fees are imposed under the Growth Management Act to help communities pay for infrastructure and other improvements made necessary by new development. The state does not require that these fees automatically vest at the time a complete development application is filed; a city is free to decide when these fees shall vest. Black Diamond currently vests impact fees at different points in

the development process, depending on the type of project. Under BDMC 3.50.080, impact fees vest at the following times:

Impact fee vests at time of complete building permit application:

Model home (built prior to final plat approval)
Development projects not requiring plat or site plan approval

Impact fee vests at time of site plan approval:

Multi-family developments*
Non-residential developments*
Mobile home park**
Any project where a building permit is not required

**Under certain circumstances, fee may vest upon complete building permit application*

***If constructed in phases, fee may vest at beginning of each phase*

Impact fee vests at time of final plat approval:

Single family subdivisions and short subdivisions
Duplex subdivisions and short subdivisions

How long are GMA impact fees vested?

The municipal code doesn't say explicitly how long impact fees are vested, but implies that vesting is for three years, because BDMC 3.50.080(3) states that three years after vesting, any *new* building permit applications shall be subject to impact fees at current rates. However, the vesting period is generally not an issue because BDMC 3.50.080 requires the developer to pay the impact fees in full at the time they are assessed or soon after.

- **“Mitigation fees” under SEPA.** The State Environmental Policy Act (SEPA) is limited to addressing environmental problems only. Under SEPA, the City may require the developer to pay a fee to pay for mitigation of an environmental problem. The amount of this fee does not automatically vest when a complete application is filed, because SEPA is not a zoning or “land use control ordinance.” The current municipal code is silent as to when a SEPA fee would vest, but this is understandable because any mitigation fees imposed under SEPA can only be calculated after all the application materials are submitted and reviewed by the City. Then, because of other SEPA rules, the City is required to determine the amount of the fee prior to issuance of a permit. So the *de facto* vesting point is when the SEPA permit is issued. However, the current municipal code also fails to specify how long the vesting period lasts. The proposed ordinance would answer this question by stating that any vesting of fees and charges ends when the project permit expires (*i.e.*, in two years, with a possible two year extension).
- **Vesting of connection charges.** The City is authorized to charge a separate one-time fee for residential developments or businesses that are physically connecting to the City’s water, sewer, and storm water systems for the first time. These charges help recover the cost of building the systems and assist in paying for future improvements. The state does not require that these charges automatically vest at a particular time; a city is free to decide when these charges shall vest. Currently, the

Black Diamond municipal code doesn't explicitly say when these fees vest or for how long. But under the proposed ordinance it would be clear that vesting of the connection charge amount would lapse when the construction permit expired (*i.e.*, in two years, with a possible two year extension).

TO: Aaron Nix, Community Development Director
FROM: Carol Morris, City Attorney
DATE: March 13, 2015
RE: **Vested Rights Doctrine**

Aaron, this is a response to the November 25, 2008 Memo on the Proposed Permits Vesting Ordinance with Lapsing Provision written by Tom Guilfoil, Assistant City Attorney, with the VSI Law Group. As a preliminary matter, it should be noted that there is absolutely **no** authority cited in this memo to support this "legal analysis."

1. What is vesting?

Note that in the explanation provided here, the focus is on the **developer**. There is no mention of the effect of the vested rights doctrine on the City or the public. As the City Attorney, my focus is on the City and the public interest.

Consider that "Washington's vesting rule runs counter to the overwhelming majority rule that 'development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit.'" *Erickson & Associates, Inc. v. McLerran*, 123 Wash.2d 864, 868, 872 P.2d 1090 (1994). There are only a few states with a vested rights doctrine similar to Washington's, which is already **very** favorable to developers. Given that developers are given this extraordinarily favorable treatment in Washington, the City needs to ask whether it is a good idea to expand the vested rights doctrine even further within the City of Black Diamond.

"Washington's doctrine of vested rights entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of the subsequent changes in zoning or other land use regulations." *West Main Assocs. V. Bellevue*, 106 Wash.2d 47, 720 P.2d 782 (1986). As you can see, the Washington rule has nothing to do with restaurant menus and it is limited to **building permits**,

The vested rights doctrine **does not apply to all permits**. The ordinance drafted by VSI and adopted by the City expands this doctrine so that it applies to all permits. While the City has the authority, we need to ask whether this is in the public interest. Here is the language from the *Erickson* case:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition,

inimical to the public interest embodied in those laws. If a vested rights is too easily granted, the public interest is subverted.

This court recognized the tension between public and private interests when it adopted Washington's vested rights doctrine. The court balanced the private property and due process rights against the public interest by selecting a vesting point which prevents 'permit speculation,' and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. The application for a **building permit** demonstrates the requisite level of commitment. . . .

Erickson, 123 Wash.2d at 874 (emphasis added).

Based on the above, and recent case law (*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wash. App. 191, 334 P.3d 1143 (2014)), my recommendation is that the City should recognize that two types of permits vest – building permits (under RCW 19.27.095(1) and preliminary plats (under RCW 58.17.033(1)). If the City has a binding site plan ordinance, the preliminary binding site plan should also vest.

2. Why VSI believed the expansive vesting ordinance was needed.

The explanation of the vested rights doctrine in this memo is not consistent with the case law (cited above) or state law. The Washington courts have not held that all "land use applications" have a "vested right to develop land in accordance with the land use laws and regulations in effect at the time of application." Loren Combs and the VSI Law Firm discovered that their interpretation of the vested rights doctrine was completely erroneous when their developer client submitted a site plan application to the City of Bonney Lake without a building permit, the City subsequently adopted a zoning change and then denied the project in *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wash.2d 242, 128 P.3d 180 (2009). The court in *Abbey Road* determined that the site plan did not vest the project and that the City of Bonney Lake's denial was proper.

Mr. Guilfoil is incorrect in his statement that "the law is also silent on when permit fees and charges vest." The Washington courts have determined that impact fees do not vest. *New Castle Investments v. LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999). Water and sewer connection fees do not vest. *Irvin Water District No. 6 v. Jackson Partnership*, 109 Wn.App. 113, 34 P.3d 840 (2001). It is better for a city not to adopt a rule allowing impact fees to vest prior to building permit issuance because impact fees usually increase over time and rarely decrease. Therefore, it is not in the City's best interest to adopt a rule allowing a developer to vest impact fees at preliminary plat or even final plat approval.

Anyone working for a City would **never** suggest that permit fees vest because these fees must be established so that the City's administrative costs associated with the processing of the permit are reimbursed to the City. Otherwise, if the City's permit fees were "frozen" at a certain level, the City would be providing an unconstitutional gift of public funds to developers.

MEMO

3. What the ordinance allowing all permits and fees to vest does.

It is true that the City is required by RCW 36.70B.080 to adopt ordinances which describe the elements of a complete application. However, there is no statutory authority that **requires** a City to adopt an ordinance which extends the vested rights doctrine beyond that already established in state law.

The City is required to issue a final decision on a project permit application within 120 days (usually) after it is determined complete. While I agree that a permit application should expire if the applicant does not provide information required to make the application complete or for continued processing, 180 days is too long. My model code has a provision addressing this.

The development agreement language is completely contrary to state law. RCW 36.70B.170(1). That is why I recommended that the development agreement sections be repealed and a new ordinance adopted. The City can't use development agreements to waive or deviate from "pesky" development regulations. Use of development agreements to "create" the development regulations that apply to a particular project avoids the public process inherent in the procedures that a GMA city must follow when adopting development regulations.

The discussion regarding grading, filling and storm water is outdated and should be disregarded as a result of *Potala Village v. Kirkland*, 183 Wash. App. 191, 334 P.3d 1143 (2014). The City should not be issuing stand-alone storm water permits anyway – an underlying development permit is required.

With regard to the discussion on suspension or revocation of permits – there are very limited circumstances under which the City can suspend or revoke a permit, once it issued. In most situations, if the property owner has violated a permit condition, the City initiates a code enforcement action. Revoking a permit is the way to ensure that the City will be immediately slapped with a damage lawsuit.

4. When other fees and charges vest.

Here, the attorney attempts to explain why the code allows impact fees to vest at three different times. However, impact fees don't vest and the City shouldn't adopt a rule allowing them to vest. *New Castle Investments v. LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999). Impact fees should be paid in order to obtain a building permit. The City should not adopt provisions in the code which vest impact fees at an earlier point in time.

The VSI attorney explains that the City is free to decide when connection fees vest. Again, is there ever a situation when the City's connection fees have decreased over time? Under state law, connection fees don't vest. *Irvin Water District No. 6 v. Jackson Partnership*, 109 Wn. App. 113, 34 P.3d 840 (2001). So, it is not in the public interest to adopt an ordinance allowing connection fees to vest earlier than the date that a developer submits an request for a water or sewer connection.

If you have any other questions, please let me know. Thanks.

DRAFT – February 11, 2015

ORDINANCE NO. 15__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, RELATING TO COMPREHENSIVE PLANNING UNDER THE GROWTH MANAGEMENT ACT, ADOPTING CONCURRENCY REGULATIONS FOR THE REVIEW OF LEGISLATIVE AND QUASI-JUDICIAL APPLICATIONS, AS MANDATED BY THE GMA FOR TRANSPORTATION FACILITIES AND AS RECOMMENDED BY THE GMA FOR WATER AND SEWER FACILITIES, ADOPTING A NEW CHAPTER 18.21 IN THE BLACK DIAMOND MUNICIPAL CODE AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the Growth Management Act (“GMA,” chapter 36.70A RCW) requires that cities planning under GMA “adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development (RCW 36.70A.070(6)(b));” and

WHEREAS, the City has no concurrency regulations; and

WHEREAS the SEPA Responsible Official has determined that this Ordinance is categorically exempt from SEPA as affecting only procedural and no substantive standards, pursuant to WAC 197-11-800(19); and

WHEREAS, the Planning Commission held a public hearing on this Ordinance on _____, and made a recommendation of _____ to the City Council; and

WHEREAS, on _____, 2015, the City Council considered this Ordinance,
together with the Planning Commission's recommendation, during a regular Council meeting;

Now, Therefore,

THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON,
ORDAINS AS FOLLOWS:

Section 1. A new Chapter 18.18 is hereby added to the Black Diamond Municipal Code,¹
which shall read as follows:

**CHAPTER 18.18
CONCURRENCY MANAGEMENT**

Sections:

- 18.18.001 Purpose.
- 18.18.002 Authority.
- 18.18.003 Exempt development.
- 18.18.004 Capacity evaluation required for a change of use.
- 18.18.005 Capacity evaluations required for certain rezones or comprehensive plan amendments.
- 18.18.006 All capacity determinations exempt from project permit processing.
- 18.18.007 Level of Service standards.
- 18.18.008 Effect of LOS standards.

- 18.18.010 Capacity evaluations required prior to issuance of CRC.
- 18.18.011 Water, transportation and sewer – Application for capacity evaluation.
- 18.18.012 Submission and acceptance of an application for a CRC.
- 18.18.013 Method of capacity evaluation.
- 18.18.014 Purpose of capacity reservation certificate.
- 18.18.015 Procedure for capacity reservation certificates.
- 18.18.016 Use of reserved capacity.
- 18.18.017 Transfer of reserved capacity.
- 18.18.018 Denial letter.
- 18.18.019 Notice of concurrency determination.
- 18.18.020 Expiration and extensions of time.
- 18.18.021 Appeals.
- 18.18.022 Purpose and procedure for administration.
- 18.18.023 Capacity classifications.
- 18.18.024 Annual reporting and monitoring.
- 18.18.025 Road LOS monitoring and modeling.

¹ The definitions for this chapter are in the impact fee ordinance.

18.18.001 Purpose. The purpose of this Chapter is to implement the concurrency provisions of the transportation and utilities elements of the City’s comprehensive plan, the water and sewer comprehensive plans, all in accordance with RCW 36.70A.070(6)(b), consistent with **WAC 365-195-510 and 365-195-835**. All applications that are not exempt (as defined herein) shall be processed under and shall comply with this Chapter, which shall be cited as the City’s “concurrency management ordinance.”

18.18.002 Authority. The Director of Public Works or his/her designee, shall be responsible for implementing and enforcing this concurrency management ordinance.

18.18.003 Exempt development.

A. No development activity (as defined in Section _____ BDMC) shall be exempt from the requirements of this chapter, unless the permit is listed below. The following types of permits are not subject to the capacity reservation certificate (CRC) process because they do not create additional long-term impacts on transportation facilities or sewer capacity in the City’s waste water treatment plant, or water capacity in the City’s water system:

1. Administrative interpretations;
2. Sign permit;
3. Street vacations;
4. Demolition permit;
5. Street use permit;
6. Interior alterations of a structure with no change in use;
7. Excavation/clearing permit;
8. Hydrant use permit;
9. Right-of-way permit;
10. Single-family remodeling with no change of use;
11. Plumbing permit;
12. Electrical permit;
13. Mechanical permit;
14. Excavation permit;
15. Sewer connection permit;
16. Driveway or street access permit;
17. Grading permit;
18. Tenant improvement permit;
19. Fire code permit;
20. Design review approval.

Notwithstanding the above, if any of the above permit applications will generate any new p.m. peak hour trips, require additional sewer capacity, or increase water consumption, such application shall not be exempt from the requirements of this Chapter.

B. Transportation. This Chapter shall apply to all applications for development or redevelopment if the proposal or use will generate any new p.m. peak-hour trips. Every application for development shall be accompanied by a concurrency application. Developments or redevelopments, excluding an individual single-family residence, that will generate one or more new projected vehicle trips that will pass through an intersection or roadway section identified with a level of service below the acceptable level noted in the transportation element in the City's comprehensive plan, or that will generate 15 or more new p.m. peak hour trips shall also be required to have the City prepare a traffic report as defined in BDMC Section _____.

C. Water. This Chapter shall apply to all applications for development inside the City limits or outside City limit utility extension agreements (under chapter ___ BDMC) for development or redevelopment if the proposal or use requires water from the City's water system. In addition, this Chapter shall apply to existing developments to the extent that the property owner requires water for a use not disclosed on a previously submitted water service application under Section _____ or a previously submitted application for a capacity reservation certificate.

D. Sewer. This Chapter shall apply to all applications for development inside the City limits or outside City limit utility extension agreements under chapter ___ POMC) for development or redevelopment if the proposal or use requires sewer from the City's sewer system. In addition, this Chapter shall apply to existing developments to the extent that the property owner requires sewer for a use not disclosed on a previously approved request for sewer service or a previously approved application for a capacity reservation certificate.

18.18.004 Capacity evaluation required for a change in use. Any non-exempt development activity shall require a capacity evaluation in accordance with this Chapter.

A. Increased Impact on Road Facilities, and/or the City's Water/Sewer System. If a change in use will have a greater impact on road facilities and/or the City's water/sewer system than the previous use, as determined by the Director, based on review of information submitted by the applicant and such supplemental information as available, a CRC shall be required for the net increase only. Provided that: the applicant shall provide reasonably sufficient evidence that the previous use has been actively maintained on the site during the five-year period prior to the date of application for the capacity evaluation.

B. Decreased Impact on Road Facilities and/or the City's Water/Sewer System. If a change in use will have an equal or lesser impact on road facilities and/or the City's water/sewer system than the previous use as determined by the Director, based on review of information submitted by the applicant and supplemental information as available, a CRC will not be required.

C. No Capacity Credit. If no use existed on the site for the five-year period prior to the date of application, no capacity credit shall be issued pursuant to this Section.

D. Demolition or Termination of Use. In the case of a demolition or termination of an existing use or structure, the capacity evaluation for future redevelopment shall be based upon

the net increase of the impact on road facilities or the City's water or sewer system for the new or proposed land use, as compared to the land use existing prior to demolition. Provided that: such credit is utilized through a CRC within five years of the date of the issuance of the demolition permit.

18.18.005. Capacity evaluations required for certain rezones and comprehensive plan amendments. A capacity evaluation shall be required as part of any application for a comprehensive plan amendment or zoning map amendment (rezone) which, if approved, would increase the intensity or density of permitted development. As part of that capacity evaluation, the Director shall determine whether capacity is available to serve both the extent and density of development which would result from the zoning/comprehensive plan amendment. The capacity evaluation shall be submitted as part of the staff report and shall be considered by the City in determining the appropriateness of the comprehensive plan or zoning amendment.

18.18.006 All capacity determinations exempt from project permit processing. The processing of applications pursuant to the authority in this Chapter shall be exempt from project permit processing procedures as described in Chapter ___ of the Zoning Code, except that the appeal procedures of Chapter ___ shall apply as indicated in this Chapter. The City's processing of capacity determinations and resolving capacity disputes involves a different review procedure due to the necessity to perform continual monitoring of facility and service needs, to ensure continual funding of facility improvements, and to develop annual updates to the transportation and utilities elements of the comprehensive plan.

18.18.007 Level of Service Standards.

A. Generally. Level of Service (LOS) is the established minimum capacity of public facilities or services that must be provided per unit of demand or other appropriate measure of need, as mandated by chapter 36.70A RCW. LOS standards shall be used to determine if public facilities or services are adequate to support a development's impact. The concept of concurrency is based on the maintenance of specified levels of service through capacity monitoring, allocation and reservation procedures. Concurrency describes the situation in which water, sewer and/or road facilities are available when the impacts of development occur. For road facilities, this time period is statutorily established as within six years from the time of development. (See, RCW 36.70A.070(6)(b) and WAC 365-195-210.)

1. *Roads.* The City has designated levels of service for road facilities in the transportation element of the City's comprehensive plan:

- a. to conform to RCW 47.80.030 for transportation facilities subject to regional transportation plans;
- b. to reflect realistic expectations consistent with the achievement of growth aims;
- c. for road facilities according to WAC 365-195-325; and

d. to prohibit development if concurrency for road facilities is not achieved (RCW 36.70A.070), and if sufficient public and/or private funding cannot be found, land use assumptions in the City's comprehensive plan will be reassessed to ensure that level of service standards will be met, or level of service standards will be adjusted.

2. Water. The City has a permitted withdrawal volume of water issued by the Department of Ecology. "Level of Service" as it relates to water is defined in the water element of the City's comprehensive plan as the ability to provide potable water to the consumer for use and fire protection. The ability to provide water supply is limited by the water permit from the Department of Ecology.

3. Sewer. The City is required to obtain a permit from the Department of Ecology in order to discharge effluent into the waters of the State. This permit is limited by levels and volume. "Level of Service" as it relates to sewer is defined in the City's sewer comprehensive plan as the ability to provide sanitary sewer services to the consumer for use, treatment at the City's wastewater treatment plant and discharge into Puget Sound. The City's ability to provide such service is limited by the physical capacity of the City's wastewater treatment plant as well as the NPDES permit issued by the Department of Ecology.

18.8.008 Effect of LOS standards.

A. Roads. The Director shall use the LOS standards set forth in the transportation element of the City's comprehensive plan to make concurrency evaluations as part of the review of any application for a transportation concurrency reservation certificate (CRC) issued pursuant to this chapter.

B. Water. The Director shall use the existing water rights as permitted by the Department of Ecology and as identified in the utilities element of the City's comprehensive plan to make concurrency evaluations as part of the review of any application for a water CRC issued pursuant to this chapter.

C. Sewer. The Director shall use the limits and levels established in the City's NPDES permit from the Department of Ecology, and evaluate the remaining capacity in the City's wastewater treatment plan as part of the review of any application for a sewer CRC issued pursuant to this chapter.

18.18.009 Capacity evaluations required prior to issuance of CRC.

A. A capacity evaluation for transportation, water or sewer shall be required for any of the nonexempt activities identified in Section _____ of this chapter.

B. The Director shall utilize the requirements in Sections _____ through _____ to conduct a capacity evaluation prior to issuance of a CRC. In addition to the requirements set forth in these sections, the Director may also utilize state law or the Washington Administrative Code, or such other rules regarding concurrency, which may be established from time to time by administrative rule. In cases where LOS standards do not apply, the Director

shall have the authority to utilize other factors in preparing capacity evaluations to include, but not be limited to, independent LOS analysis.

C. A capacity reservation certificate (CRC) will not be issued except after a capacity evaluation performed pursuant to this Chapter, indicating that capacity is available in all applicable road facilities and/or within the City's water or sewer system.

18.18.010 Application for capacity evaluation.

A. An application for a CRC and the application for the underlying development permit, or other activity, shall be accompanied by the requisite fee, as determined by City Council resolution. An applicant for the CRC shall submit the following information to the Director, on a form provided by the Director, together with the underlying development application:

1. Date of submittal;
2. Developer's name, address, telephone number and e-mail;
3. Legal description of property as required by the underlying development permit application, together with an exhibit showing a map of the property;
4. Proposed use(s) by land use category, square feet and number of units;
5. Phasing information by proposed uses, square feet and number of units, if applicable;
6. Existing use of property;
7. Acreage of property;
8. Proposed site design information, if applicable;
9. The applicant's proposed mitigation (if any) for the impact on the City's transportation facilities;
10. Written consent of the property owner, if different from the developer;
11. Proposed request of capacity by legal description, if applicable;
12. For water capacity evaluations only: Water hydraulic report prepared by a licensed professional engineer, which shall include the purpose for which water is required;
13. For sewer capacity evaluations only: Sewer hydraulic report prepared by a licensed professional engineer, which shall include the purpose for which the sewer is required.
14. Stormwater drainage report prepared by a licensed professional engineer.

B. Additional information for transportation capacity evaluations only:

1. A preliminary site plan, which is a plan showing the approximate layout of proposed structures and other development, type and number of dwelling units, type and number of nonresidential building areas with gross square footage, the land use codes per the most recent edition of Trip Generation from the Institute of Transportation Engineers (ITE) and an analysis of the points of access to existing and proposed roadways;

2. The applicant is not required to submit a traffic impact analysis from an independent traffic engineer. Instead, those applicants with a transportation CRC application that are required to have the City provide a traffic report in accordance with

18.18.003(B)(1) shall instead pay to the City a deposit equal to the estimated fee for the City's preparation of a traffic report. The amount of the fee shall be determined by City resolution and paid at the time the transportation CRC application is submitted. The fee shall be vary based on the number of new p.m. peak-hour trips produced by the development. The applicant shall be subject to repayment of fees for any subsequent revisions to the original traffic report. Fees for revisions may be calculated in proportion to the original fee depending on the effort involved to revise the traffic report. Even if the traffic report is based on an estimate of the impact, the applicant will still be bound by the estimate of the impact, and any upward deviation from the estimated traffic impact shall required at least one of the following: (a) a finding that the additional concurrency sought by the developer through a revised application is available to be reserved by the project; (b) mitigation of the additional impact under SEPA; (c) revocation of the CRC.

18.18.011 Submission and acceptance of a CRC application.

A. Notice of application. Issuance of a notice of application for the underlying permit application shall be handled by the planning director or designee, following the process in Section _____. The notice of application required by Section _____ shall state that an application for a concurrency determination has been received by the City.

B. Determination of Completeness. The planning director shall immediately forward all CRC applications received with development applications to the public works/engineering staff. Within twenty-eight (28) days after receiving an application for a CRC, the public works/engineering staff shall mail or personally deliver to the applicant a determination which states either:

1. That the concurrency application is complete; or
2. That the concurrency application is incomplete and what is necessary to make the application complete.

C. Additional information. An application for a CRC is complete for purposes of initial processing when it meets the submission requirements in Section _____. The determination of completeness shall be made when the application is sufficiently complete for review, even though additional information may be required or project modifications may be undertaken subsequently. The Director's determination of completeness shall not preclude the Director's ability to request additional information or studies.

D. Incomplete applications.

1. Whenever the City issues a determination that the CRC is not complete, the CRC application shall be handled in the same manner as a project permit application under Section _____.

2. Date of Acceptance of Application. An application for a CRC shall not be officially accepted or processed until it is complete and the underlying

development application has been determined complete. When an application is determined complete, the Director shall accept it and note the date of acceptance.

18.18.012 Method of capacity evaluation.

A. Generally. In order to determine concurrency for the purposes of issuance of a transportation, water or sewer CRC, the Director shall make the determination described in subsections B, C and D of this Section. The Director may deem the development concurrent with transportation facilities or the City's water or sewer system, with the condition that the necessary facilities or services shall be available through a financial commitment in an enforceable development agreement (*see*, chapter ___ of this Code). In no event shall the Director determine concurrency for a greater amount of capacity than is needed for the development proposed in the underlying application.

B. Transportation.

1. Upon submission and acceptance of a complete transportation CRC application, the Director shall conduct a traffic impact analysis and issue a traffic report for those applications meeting the requirements of Section 16.60.003(B)(1).

2. In performing the concurrency evaluation for transportation facilities, and to prepare the transportation CRC, the Director shall determine, based on the conclusions of the traffic report, whether a proposed development can be accommodated within the existing or planned capacity of transportation facilities. This shall involve the following:

- a. A determination of anticipated total capacity at the time the proposed impacts of development occur or within six years of such time;
- b. Calculation of how much of that capacity will be used by existing developments and other planned developments at the time the impacts of the proposed development occur;
- c. Calculation of the available capacity for the proposed development;
- d. Calculation of the impact on the capacity of the proposed development, minus the effects of any mitigation identified by the applicant to be provided by the applicant at the applicant's cost;
- e. Comparison of available capacity with proposed development impacts.

3. The Director shall determine if the capacity of the City's transportation facilities, less the capacity which is reserved, can be provided while meeting the level of service performance standards set forth in the City's comprehensive plan, and if so, shall provide the applicant with a transportation CRC. The Director's determination will be based on the

application materials provided by the applicant, which must include the applicant's proposed mitigation for the impact on the City's transportation facilities.

C. Water.

1. In performing the concurrency evaluation for water, and to prepare the water CRC, the Director shall determine whether a proposed development can be accommodated within the existing or planned capacity of the City's water system. This shall involve the following:

- a. A determination of anticipated total capacity at the time the proposed impacts of development occur;
- b. Calculation of how much of that capacity will be used by existing developments and other planned developments at the time the impacts of the proposed development occur;
- c. Calculation of the available capacity for the proposed development;
- d. Calculation of the impact on the capacity of the proposed development, minus the effects of any mitigation provided by the applicant; and
- e. Comparison of available capacity with proposed development impacts.

2. The Director shall determine if the capacity of the City's water facility, less the capacity which is reserved, can be provided while remaining within the City's permitted water rights for withdrawal volume, and if so, shall provide the applicant with a water CRC.

D. Sewer.

1. In performing the concurrency evaluation for sewer, and to prepare the sewer CRC determination, the Director shall determine whether a proposed development can be accommodated within the existing or planned capacity of the City's sewer system. This shall involve the following:

- a. A determination of the anticipated total capacity at the time the proposed impacts of development occur;
- b. Calculation of how much of that capacity will be used by existing developments and other planned developments at the time the impacts of the proposed development occur;
- c. Calculation of the available capacity for the proposed development;

d. Calculation of the impact on the available capacity for the proposed development, minus the effects of any mitigation provided by the applicant; and

e. Comparison of available capacity with proposed development impacts.

2. The Director shall determine if the capacity in the City's wastewater treatment plant, less the capacity which is reserved, can be provided while remaining within the City's NPDES permit for discharge volumes and levels, and if so, shall provide the applicant with a sewer CRC.

E. Lack of Concurrency.

1. Transportation. If the director determines that the proposed development will cause the LOS of a City-owned transportation facility to decline below the standards adopted in the transportation element of the City's comprehensive plan, and improvements or strategies to accommodate the impacts of development are not planned to be made concurrent with development, a transportation CRC and the underlying development permit, if such an application has been made, shall be denied. Upon denial, the applicant may perform one of the following:

a. Appeal the findings of the traffic report in accordance with Section _____; or

b. Offer alternative data and/or perform an independent traffic impact analysis at the applicant's sole expense in support of alternative conclusions. Any study shall be in accordance with Section _____; or

c. Modify the development proposal to lessen the traffic impacts and/or identify voluntary transportation improvements as mitigation to be provided by the applicant at the applicant's cost and re-apply for capacity review. Re-application shall require repayment of the traffic report preparation fee in accordance with Section _____; or

d. Withdraw the CRC application.

2. Water and Sewer. If the Director determines that there is no capacity available in the City's water system to provide water and/or capacity in the City's wastewater treatment plant for a proposed project, and improvements or strategies to accommodate the impacts of development are not planned to be made concurrent with development, the Director shall deny the water and/or sewer CRC. The City has the discretion to deny the underlying development application for lack of potable water, depending on the applicant's ability to provide water for the proposed project from another source.

18.18.013 Purpose of Capacity Reservation Certificate.

A. A transportation CRC is a determination by the Director that: (1) the proposed development identified in the CRC application does not cause the level of service on a City-owned transportation facility to decline below the standards adopted in the transportation element of the City's comprehensive plan; or (2) that a financial commitment (embodied in a development agreement) is in place to complete the necessary improvements or strategies within six (6) years. Upon issuance of a transportation CRC, the Director will reserve transportation facility capacity for this application until the expiration of the underlying development permit or as otherwise provided in Section _____. Although the CRC may identify the number of projected trips associated with the proposed development, nothing in this Chapter (including the trip transfer procedures) shall imply that the applicant "owns" or has any ownership interest in the projected trips.

B. A water CRC is a determination by the Director that: (1) the proposed development identified in the CRC application does not exceed the City's existing water rights or the limits of any state-issued permit, or (2) that a financial commitment (embodied in a development agreement) is in place to complete the necessary improvements or strategies within six (6) years. Upon issuance of a water CRC, the Director will reserve water capacity for the application until the expiration of the underlying development permit or as otherwise provided in Section _____.

C. A sewer CRC is a determination by the Director that: (1) the proposed development identified in the CRC application does not exceed the City's existing NPDES permit limits or the existing capacity in the City's wastewater treatment plant, or (2) that a financial commitment (embodied in a development agreement) is in place to complete the necessary improvements or strategies within six (6) years. Upon issuance of a sewer CRC, the Director will reserve sewer capacity for the application until the expiration of the underlying development permit.

D. The factors affecting available water or sewer capacity or availability may, in some instances, lie outside the City's control. The City's adoption of this Chapter relating to the manner in which the City will make its best attempt to allocate water or sewer capacity or availability does not create a duty in the City to provide water or sewer service to the public or any individual, regardless of whether a water or sewer CRC has issued. Every water availability certificate and water and sewer CRC shall state on its face that it is not a guarantee that water and/or sewer will be available to serve the proposed project.

18.18.014 Procedure for capacity reservation certificates. After receipt of a complete application for a CRC, the Director shall process the application in accordance with this Chapter and issue the CRC or a denial letter.

18.18.015 Use of reserved capacity. When a CRC and a development permit issues for a project, the CRC shall continue to reserve the capacity unless the development permit lapses or expires without issuance of a certificate of occupancy.

18.18.016 Transfer of reserved capacity. Reserved capacity shall not be sold or transferred to property not included in the legal description provided by the applicant in the CRC

application. The applicant may, as part of a development permit application, designate the amount of capacity to be allocated to portions of the property, such as lots, blocks, parcels or tracts included in the application. Capacity may be reassigned or allocated within the boundaries of the original reservation certificate by application to the director. At no time may capacity or any certificate be sold or transferred to another party or entity to real property not described in the original application.

18.18.017 Denial letter. If the Director determines that there is a lack of concurrency under the above provisions, the Director shall issue a denial letter, which shall advise the applicant that capacity is not available. If the applicant is not the property owner, the denial letter shall also be sent to the property owner. At a minimum, the denial letter shall identify the application and include the following information:

- A. For roads:
 - 1. An estimate of the level of the deficiency on the transportation facilities;
 - and
 - 2. The options available to the applicant such as the applicant's agreement to construct the necessary facilities at the applicant's cost.
- B. For water:
 - 1. The options available to the applicant, such as private water supplies or other water purveyor services; and
 - 2. The options available to the applicant such as the applicant agreement to construct the necessary facilities at the applicant's cost.
- C. For sewer. The options available to the applicant such as a temporary septic system (if allowed by law) which the applicant would install and agree to remove at his/her own cost when sewer capacity became available in a development agreement.
- D. For all. A statement that the denial letter may be appealed if the appeal is submitted to the City Engineer within ten (10) days after issuance of the denial letter, and that the appeal must conform to the requirements in Section 18.18. _____. Any appeal of a denial letter must be filed according to this section, prior to issuance of the City's decision on the underlying development application. If an appeal is filed, processing of the underlying development application shall be stayed until the final decision on the appeal of the denial letter.

18.18.018 Notice of concurrency determination.

- A. Notice of the concurrency determination shall be given to the public together with, and in the same manner as, that provided for the SEPA threshold determination for the underlying development permit, unless the project is exempt from SEPA, in which case notice shall be given in the same manner as a final decision on the underlying development permit

without any accompanying threshold determination. In the case of an approved CRC, any mitigation identified by the applicant to be provided by the applicant at the applicant's cost shall be included in the SEPA threshold determination or underlying permit decision (if categorically exempt from SEPA).

B. If a denial letter is not timely appealed, the underlying permit application will be processed and in most instances, will result in a denial. If a denial letter is appealed, any mitigation or conditions included in the appeal decision shall be included in the SEPA threshold decision or underlying permit decision (if categorically exempt from SEPA).

18.18.019 Expiration of CRC and extensions of time.

A. Expiration. If a certificate of occupancy has not been requested prior to the expiration of the underlying permit or termination of the associated development agreement, the Director shall convert the reserved capacity to available capacity for the use of other developments. The act of requesting a certificate of occupancy before expiration of the CRC shall only convert the reserved capacity to used capacity if the building inspector finds that the project actually conforms with applicable codes. If a complete underlying project permit application is expired as provided for in Section ____, the Director shall convert any reserved capacity allocated to the underlying project permit for use by other developments.

B. Extensions for Road Facilities. The City shall assume that the developer requests an extension of transportation capacity reservation when the developer is requesting a renewal of the underlying development permit. No unused capacity may be carried forward beyond the duration of the transportation CRC or any subsequent extension.

C. Extensions for Water or Sewer. The City shall not extend any water or sewer CRC. If the developer submits an application for an extension of the underlying permit, the applicant shall submit a new application for a concurrency determination for water or sewer under this Chapter.

D. If a CRC has been granted for a rezone or comprehensive plan amendment, the CRC shall expire when the development agreement for the comprehensive plan or rezone terminates. If there is no associated development agreement, the CRC shall expire within five years after the CRC approval anniversary date.

18.18.020 Appeals. Upon receipt of an appeal of the denial letter, the Director shall handle the appeal as follows:

A. A meeting shall be scheduled with the applicant to review the denial letter and the application materials, together with the appeal statement.

B. Within fourteen (14) days after the meeting, the Director shall issue a written appeal decision, which will list all of the materials considered in making the decision. The appeal decision shall either affirm or reverse the denial letter. If the denial letter is reversed, the

Director shall identify the mitigation that the applicant proposes to provide at the applicant's cost, which will be imposed on the application approval in order to achieve concurrency.

C. The mitigation identified in the appeal decision shall be incorporated into the City's SEPA threshold decision on the application.

D. The appeal decision shall state that it may be appealed with any appeal of the underlying application or activity, pursuant to Section _____.

18.18.021 Concurrency administration and procedure.

A. "Capacity" refers to the ability or availability of water in the City's water system. "Capacity" refers to the ability to treat effluent in the City's wastewater treatment plant to the levels and volume limits in the City's NPDES permit. "Capacity" also refers to the ability or availability of road facilities to accommodate users, expressed in an approximate unit of measure, such as LOS for road facilities. "Available capacity" represents a specific amount of capacity that may be reserved by or committed to future users of the City's water or sewer system or road facilities.

B. There are two capacity accounts to be utilized by the Director in the implementation of this Chapter for water, sewer and transportation. These accounts are:

1. The available capacity account; and
2. The reserved capacity account.

Capacity is withdrawn from the available capacity account and deposited into a reserved capacity account when a CRC is issued. Once the proposed development is constructed and an occupancy certificate is issued, the capacity is considered "used." Each capacity account of available or reserved capacity will experience withdrawals on a regular basis. Only the Director may transfer capacity between accounts.

18.18.022 Annual reporting and monitoring.

A. The Director is responsible for completion of annual transportation, water and sewer capacity availability reports. These reports shall evaluate reserved capacity and permitted development activity for the previous 12-month period, and determine existing conditions with regard to available capacity for road, sewer and water facilities. The evaluations shall report on capacity used for the previous period and capacity available for the six-year capital facilities and utilities element of the City's comprehensive plan, six-year transportation plan for road facilities, based on LOS standards, and the sewer and water comprehensive plans. Forecasts shall be based on the most recently updated schedule of capital improvements, growth projections, water rights, annual water withdrawal volumes, limits of the NPDES permit, public road facility inventories, and revenue projections, and shall, at a minimum, include:

1. A summary of development activity;
2. The status of each capacity account;

3. The six-year transportation plan;
4. Actual capacity of selected street segments and intersections and current LOS;
5. Recommendations on amendments to CIP and annual budget, to LOS standards, or other amendments to the transportation element of or to the comprehensive plan;
6. Existing water rights and annual withdrawal volumes; and
7. Limits in the City's NPDES permit and finding of available capacity in the City's wastewater treatment plant.

B. The findings of the annual capacity availability report shall be considered by the Council in preparing the annual update to the capital improvement element, any proposed amendments to the CIP and six-year TIP, and shall be used in the review of development permits and capacity evaluations during the next period.

C. Based upon the analysis included in the annual capacity availability reports, the Director shall recommend to the City Council each year any necessary amendments to the CIP, TIP, utilities and/or water element of the comprehensive plan, and comprehensive plan. The Director shall also report on the status of all capacity accounts when public hearings for comprehensive plan amendments are heard.

18.18.023 Road LOS monitoring and modeling.

A. The City shall monitor level of service standards through an annual update of the six-year transportation plan which will add data reflecting development permits issued and trip allocations reserved.

B. A new trip allocation shall be assigned for each traffic analysis zone, based on the results from the traffic demand model used by the City, to ensure that the City is achieving the adopted LOS standards described in this Chapter and the transportation element of the comprehensive plan.

C. Amendments to the trip allocation program that exceed the total aggregate annual trip allocation per zone for any given year shall require an amendment to the comprehensive plan. Monitoring and modeling shall be required and must include anticipated capital improvements, growth projections, and all reserved and available capacity.

18.18.024 Traffic Impact Analysis standardized format. Attached to Ordinance No. ___ and incorporated herein by this reference is the standardized format required for the developer's independent traffic impact analysis. The impact analysis may be completed at the time of submittal of the original application or upon denial of a transportation CRC application.

Section 2. Publication. This Ordinance shall be published by an approved summary consisting of the title.

Section 3. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 4. Effective Date. This Ordinance shall become effective five days after publication as provided by law.

PASSED by the Council and approved by the Mayor of the City of _____, this ____th day of _____, 2015.

CITY OF

Mayor

ATTEST/AUTHENTICATED:

City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

City Attorney

FILED WITH THE CITY CLERK:
PASSED BY THE CITY COUNCIL:
PUBLISHED:
EFFECTIVE DATE:

ORDINANCE NO:

DRAFT