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Memorandum from CH& Re: Plat 2C Infrastructure and  
Concurrency; Draft Temporary Access and Utility  
Easement; Draft Covenant Not to Sue;  
Revised Plat 2C schematic site plan  
October 9, 2014



MEMORANDUM

COMMUNITY DEVELOP.  
OCT 09 2014  
RECEIVED

**To:** City of Black Diamond  
**From:** Nancy Bainbridge Rogers and Randall Olsen  
**Re:** Plat 2C Infrastructure and Concurrency  
**Date:** October 8, 2014

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I. INTRODUCTION

Pursuant to letters exchanged between the City and Yarrow Bay, in August and September, the City is concerned about “concurrency” for utilities and roads intended to serve Plat 2C. In support of its position, the City provided Yarrow Bay a copy of a general article prepared in 2013, by the City Attorney, entitled “Subdivisions – Recent Developments in Concurrency, Expiration of Approval, Completion and Maintenance of Public Improvements.”

From review of the letters and the City Attorney's article, Yarrow Bay believes the City may have one or more of the following concerns that are hindering continued processing of the Plat 2C application. One possible issue is that the City may be taking the position that Yarrow Bay must have already constructed and operational utilities and roads extending to a boundary of Plat 2C lands before the City can recommend approval. Another possible concern is not with physical construction, but with whether water, sewer, stormwater, and road capacity can be deemed to be “available” at this time, such that a finding of “appropriate provisions” can be made under RCW 58.17.110(2) and City Code. A third possible concern is the asserted risk that if the City approves a preliminary plat today, the City will be forced to approve a final plat later, even though the City lacks a formal reservation system to assure water<sup>1</sup> and sewer are physically available when a later building permit application is filed, and that the lack of physical availability will result in a lawsuit against the City.

The following memorandum provides our analysis as to why the City should conclude that appropriate provisions for all utilities exist at this time, that full physical construction is not required prior to preliminary plat approval, and that while the risk of any later lawsuit over

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<sup>1</sup> As the City is aware, Covington Water District has asserted that it, and not the City, should be the water service provider for certain property in The Villages MPD. Plat 2C, however, is not within that disputed water service area. The City will be the water service provider for the Plat 2C property.

denial of a building permit is small, Yarrow Bay can eliminate that risk entirely by recording a covenant on title confirming that in the event utility capacity becomes unavailable, and a building permit application is denied, no lawsuit will be filed.

## II. ANALYSIS

### A. **The State Subdivision Act, Black Diamond Municipal Code, and Case Law all support approving preliminary plats with conditions to assure adequate provisions are made for potable water, streets, and other facilities and improvements at the time of final plat approval.**

The Subdivision Act, Ch. 58.17 RCW (the "Act") governs the subdivision of land in Washington state. Chapter 17 BDMC ("Code") governs the processing and approval of subdivisions in the City of Black Diamond.

A "preliminary plat" is the conceptual approval plan, which forms the basis for the approval or disapproval of the final plat.<sup>2</sup> In contrast, a "final plat" is "the final drawing of the subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in [the Act] and in local regulations adopted under [the Act]." RCW 58.17.020(5); *see also* BDMC 17.08.010. Consequently, preliminary plats require a lower threshold of detail than do final plats, which require more detail because they are the final representations of the subdivision and they must contain all elements and requirements set forth in the Act and local regulations.

In the City of Black Diamond, fourteen "criteria must be met to approve any subdivision." BDMC 17.15.020(A). The Code explicitly states that these criteria do not need to be met at that the time of preliminary plat approval. Rather, any or all of the fourteen criteria "may be met by conditions imposed by the hearing examiner as conditions of approval." BDMC 17.15.020(A); *see also* BDMC 17.15.010 (authorizing the examiner to determine that the plat should be "approved with conditions"). Each of the criteria that the City includes in the preliminary plat as conditions of final plat approval must be met before the City Council can approve the final plat. RCW 58.17.110(2); BDMC 17.20.060(B) (stating that the City Council cannot approve the final plat until "there is conformance with all terms of the preliminary plat approval.").

Two of the criteria that must be met prior to final plat approval, and which can be made a condition of preliminary plat approval, are the determinations of whether: (1) "concurrency exists for all utilities and transportation system improvements prior to occupancy of any structures;" and (2) "appropriate provisions are made for all relevant matters, including, but not limited to, the public health, safety and general welfare, open spaces, storm drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and school grounds." BDMC 17.15.020(A)(7) and (3).

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<sup>2</sup> The Act and Code both define "preliminary plat" to mean "a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of [the Act]. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision." RCW 58.17.020(4); *see also* BDMC 17.08.010.

The City appears to read the Supreme Court decision of *JZ Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011) as requiring the City to make its determination about whether all utilities and transportation system improvements and appropriate provisions exist at the preliminary plat approval stage. But nothing in *Knight* requires the local government to assure that these improvements and facilities are in place at the time of preliminary plat approval. To the contrary, *JZ Knight* supports all of the statutory, Code, and case law cited in this memo, which confirm that the City can approve the preliminary plat with conditions assuring that the requirements in RCW 58.17.110(2) and BDMC 17.15.020(A) will be met before the final plat is approved.

In *JZ Knight*, the Supreme Court of Washington held that Knight, an owner of property 1,300 feet away from a proposed subdivision, had standing to challenge the preliminary plat approval for a subdivision because the City failed to include a condition in the preliminary plat approval that required a showing of adequate provisions for potable water at the time of final plat approval. Instead, the City approved the preliminary plat with a condition stating that “[t]he applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit...” *Id.* at 331 (emphasis added).

The dispute ultimately reached the Supreme Court, which re-instated and affirmed the Superior Court’s decision which found the “and/or” provision to be an erroneous interpretation of law and ruled that the City was required to “make findings of ‘appropriate provisions’ for potable water before final plat approval and cannot delay the showing until the building permit stage.” *Id.* at 333. In doing so, the Supreme Court made the distinction between conditioning the preliminary plat to make a showing at the time of final plat approval, versus potentially later at the time of building permit applications, because of the importance of preliminary plat approval within the process for approving new subdivisions. In discussing requirements for preliminary plat approvals, the Court stated that the applicant for a preliminary plat “must make a threshold showing that the completed development is able to comply with applicable zoning ordinances and health regulations.” *Id.* at 343-44. The Court’s holding in *JZ Knight* supports all of the law discussed in this memo—i.e., the City may approve preliminary plats with conditions requiring a determination prior to final plat approval that appropriate provisions are made for utilities and transportation systems, as well as for public improvements and potable water, drainage ways, streets, and other services and facilities.

In addition to the Supreme Court holding that preliminary plats may be conditioned to assure that “appropriate provisions” under RCW 58.17.110(2) are met at the final plat approval stage, the Court of Appeals also has encouraged local governments to attach such conditions to preliminary plat approvals rather than to deny proposed plats in order to avoid potential problems that *might* prevent final plat approval later. For example, in *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (1984), studies showed that the applicants’ subdivision would increase accidents on an already hazardous road. Rather than deny the proposed plat, the city attached a condition to its approval of the preliminary plat which required the widening of a county road, but the condition was subject to the road being annexed to the city or the county agreeing to the improvements, whichever occurred first. The applicants’ appealed and

challenged this condition as overreaching, but the Court disagreed, instead approving of the municipality's efforts to try to find a solution to the access and hazardous road problems by means of conditions attached to the preliminary plat approval. The Court explained:

...Port Angeles had only two alternatives. It had to find a way to mitigate the effects on the two roads, or it had to deny the Millers' application. It is more sensible to permit a municipality to deal positively with problems like these than to require it to avoid the problems by denying the developments.

*Id.* at 912-13. The City's own Code calls for concurrency as to all utilities and transportation system improvements to be determined "prior to occupancy of any structures," not prior to preliminary plat approval. *See* BDMC 17.15.020(A)(7). Yarrow Bay is not asking for the determination to be delayed that far out in time, but only that the City should follow the guidance of the Act, Code, and case law—i.e., to provide expeditious review of the preliminary plat, to approve the preliminary plat with any necessary conditions to be met at the final plat approval stage, and to deal positively with any potential problems by adding such conditions to the approval rather than denying the preliminary plat based upon hypothetical, unlikely scenarios.

**B. Under the Local Project Review Act, the City already has determined that "appropriate provisions" and adequate public facilities have been made when it adopted the City's Comprehensive Plan assuring appropriate provisions by identifying needed facilities and providing methods for funding them.**

The Local Project Review Act, was part of the 1995 Land Use Regulatory Reform Act (ESHB 1724, codified in Chapter 36.70B RCW). It requires all counties and cities to provide for integrated project review, which provides a more streamlined permit and environmental review process by reducing duplication and paperwork.

One method of streamlining project review is RCW 36.70B.030(2), which provides that if a City's development regulations or comprehensive plan provide for funding of public facilities, then "such applicable regulations or plans shall be determinative of the...[a]vailability and adequacy of public facilities identified in the comprehensive plan." In other words, if the City's comprehensive plan identifies roads and potable water supplies needed to serve future development and the plan provides for funding sources to provide such roads and water supplies, then the plan's provisions are determinative of the availability of roads and potable water supplies. Those determinations cannot be revisited at the project review level—e.g., at review of a preliminary plat application.

In compliance with GMA requirements, Black Diamond's Comprehensive Plan includes a capital facilities plan element, including an inventory of existing capital facilities, proposed future needs, and at least a six-year plan that will finance such capital facilities. *See* RCW 36.70A.070(3). The City of Black Diamond Comprehensive Plan at Section 8.1.1 (Purpose of Capital Facilities Element) states:

The GMA contains requirements pertaining to the concept of concurrency, which mandate that the City adequately demonstrate within this plan that public utilities and modes of transportation will be available to support growth at the time such development (growth) occurs. Thus, the financial planning section included herein (as required by GMA) identifies a financial program for implementing this set of compiled improvements.

As outlined in the table below, the City’s Comprehensive Plan and development regulations explicitly describe the appropriate provisions and related funding sources for water, sewer, stormwater, transportation, parks, and schools.

<b>Water</b>	<p>“A complete hydraulic analysis of the system has been completed as part of updating the Water System Comprehensive Plan. The City currently has the storage capacity and water supply capacity to provide for approximately another 10,500 residential connections. Projects recommended for the 6-year funding program are shown in Table 8-12.”<sup>3</sup></p> <p>Table 8-12 provides that improvements for the Villages Phase 1 (including the already approved preliminary plat Phase 1A) and Phase 2 (including Plat 2C), the 6-year funding plan is for the developer to pay for the needed improvements.</p> <p>The City’s Water System Comprehensive Plan also states that the developer of The Villages Phase 1 is to pay for water system improvements needed to serve The Villages Phase 1.<sup>4</sup></p>
<b>Sewer</b>	<p>New sewer improvements to increase sewer capacity are described at Section 8.10.3, and call for sewer improvements to be funded by the developer of The Villages MPD.</p> <p>The City’s General Sewer Plan confirms that the developer of The Villages will fund sewer improvements to serve the MPD.<sup>5</sup></p>
<b>Stormwater</b>	<p>“A capital improvement plan is under development as part of the comprehensive stormwater planning. The projects that are needed to serve growth will be included in the City’s capital planning just as recognition of the future facility. However, the projects supporting future development will not be included as City-funded projects. It is expected that each developer will provide for stormwater treatment and detention as needed for its projects. Given that much of the City will be developing as MPDs, the City preference for regional storm facilities can be coordinated with the developers through the permitting and development approval process. The</p>

<sup>3</sup> Comprehensive Plan at 8.9.2 (Water System – Future Needs).

<sup>4</sup> Water System Comprehensive Plan at Table 10.3.

<sup>5</sup> General Sewer Plan at 10.2 (“According to the Development Agreement approved by the City Council, the developer will fund and construct the needed capacity additions independent of the existing City sewer system.”)

	<p>majority of the projects listed in the Capital Improvement Plan are maintenance projects replacing old, rusted out culverts.”</p> <p>Table 6.01 of the City’s Comprehensive Storm and Sewer Plan describes the capital improvement projects planned for The Villages and Lawson Hills MPDs. As shown on the Table, those projects are to be “Developer Funded.”</p>
<b>Open Space and Parks</b>	<p>The City’s development regulations establish that the MPD lands themselves will need to provide necessary recreation areas and facilities:</p> <p>“An MPD shall provide on-site recreation areas and facilities sufficient to meet the needs of MPD residents, exceeding or at a minimum consistent with levels of service adopted by the city where applicable. This shall include providing for a coordinated system of trails and pedestrian linkages both within, and connecting to existing or planned regional or local trail systems outside of the MPD.”<sup>6</sup></p> <p>“The MPD permit and development agreement shall establish the sizes, locations, and types of recreation facilities and trails to be built and also shall establish methods of ownership and maintenance.”<sup>7</sup></p> <p>The MPDs also are required to include a “phasing plan and timeline for the construction of improvements and the setting aside of open space”<sup>8</sup></p>
<b>Transportation infrastructure</b>	<p>The City is not “fiscally responsible” for the costs associated with transportation improvements required by new development.<sup>9</sup></p> <p>Table 7-12 of the City’s Comprehensive Plan lists the funding source for new roads as “Development.”</p>
<b>Schools</b>	<p>The Black Diamond Municipal Code requires that school sites be identified and provided for by The Villages MPD and provides that school needs may be met by a separate agreement.<sup>10</sup></p>

Thus, under RCW 36.70B.030, the City of Black Diamond has determined that potable water supplies, sewer, stormwater, transportation infrastructure, parks, open space, and schools will be available and adequate to serve Plat 2C. The City cannot revisit those determinations at the project review level—i.e., during review of the preliminary plat for Plat 2C.

<sup>6</sup> BDMC 18.98.150(A).

<sup>7</sup> BDMC 18.98.150(B).

<sup>8</sup> BDMC 18.98.080(A)(4).

<sup>9</sup> Comprehensive Plan, p. 7-36.

<sup>10</sup> BDMC 18.98.080(A)(14).

*Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 256 P.3d 295 (2011) illustrates how, pursuant to RCW 36.70B.030, local governments cannot second guess determinations made in their development regulations and comprehensive plans. In *Fire District No. 21*, Whatcom County had enacted a code provision that stated that “No subdivision...shall be approved without a written finding that...All providers of water, sewage disposal, schools, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.” *Id.* at 428. When development applications were filed with the county, the fire district, concerned about its ability to provide an adequate level of service, refused to issue letters confirming that adequate capacity existed or that arrangements had been made to provide adequate services. The county then approved the applications in absence of the required letters and the fire district appealed.

Ultimately, the case reached the Supreme Court of Washington, which held that “[t]he County cannot, during project review, revisit its decision to assign to the Fire District the authority to determine concurrency.” *Id.* at 429 (citing RCW 36.70B.030(1)). The Court also considered whether the county’s comprehensive plan had determined whether fire protection services were available, and concluded that it did not because even though the plan identified needed improvements to meet the anticipated population growth, the plan failed to provide for sources of funding for such improvements. *Id.* at 430 (citing RCW 36.70B.030(2)(c) and explaining “Absent provision for necessary funding, the comprehensive plan cannot be considered determinative of the availability of fire protection services.”).

As *Fire District No. 21* makes clear, RCW 36.70B.030 takes away the City of Black Diamond’s discretion to undo determinations it already has made in its Comprehensive Plan and development regulations. Here, the City’s Comprehensive Plan and development regulations have determined that potable water supplies, sewer, stormwater, transportation infrastructure, parks, open space, and schools will be available and adequate to serve Plat 2C because developer funding is required to assure the availability and adequacy of those facilities. As a result, the City cannot deny the preliminary plat for Plat 2C based upon a determination that appropriate provisions will not be made for “open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds.” Any such determination by the City would violate RCW 36.70B.030. The City cannot now revisit its adopted Comprehensive Plan and development regulations. The City may, however, include a condition in the preliminary plat approval that requires the facilities to be constructed and connected to Plat 2C, or bonded for, prior to final plat approval. Yarrow Bay proposes the following condition: “Roads and streets, and water, stormwater, and sanitary sewer facilities to serve future homes within Plat 2C shall be constructed, or a performance bond shall be posted, prior to recording the final plat.”

**C. The Development Agreement for The Villages MPD independently assures the availability and adequacy of roads, utilities, and other public facilities needed to serve Plat 2C.**

In addition to the support from the Act, the Code, and case law, Plat 2C also is governed by the Development Agreement for the Villages. That document provides independent assurances that appropriate provisions will be made for public facilities. Specifically, Section 11.7 (emphasis added) provides:

The sequencing of Implementing Projects, Implementing Approvals, construction completeness and City acceptance of facilities shall be confirmed by the Designated Official, who shall make a finding within each staff report for proposed preliminary plats or binding site plans within The Villages MPD whether required infrastructure and amenities have been scheduled to meet the demands of the future occupants of that specific plat or binding site plan.

Consistent with BDMC 17.15.020(A)(7), requiring concurrency at the time of occupation, the underlined language above confirms that at the preliminary plat stage the City must determine only whether required infrastructure and amenities have been scheduled to meet demands of future occupants. It does not require the City to determine that infrastructure and amenities are constructed and available prior to approval of a preliminary plat. This sensible approach conforms with the requirements of the Act, the Code, and case law.

Section 11.7 is consistent with all the rest of the relevant sections from the Development Agreement for The Villages. For example:

- Section 4.10 declares the City's agreement that "as designed and with full implementation of all mitigation measures," the Villages MPD build-out will "fully and adequately mitigate the probable significant adverse environmental impacts of The Villages MPD" and that "through such mitigation measures, provisions will be made for: (i) the facilities needed to serve new growth as a result of the Villages MPD within the City..."
- Section 6.2 includes the obligation: "Adequate roadway capacity shall be provided by the Master Developer within the Project Site to provide reasonable access to all Development Parcels" and then sets the standards for how adequate road capacity is determined.
- Section 7.2.1 includes the statement "Any Implementing Project application process that calls for a certificate of water availability shall be satisfied by reference to this Agreement. Improvements necessary to provide water service to each Implementing Project must be provided by the Master Developer consistent with this Agreement, and the MPD Conditions of Approval."<sup>11</sup>
- Section 7.2.1 also notes that water "[c]onnections are allowed up to the point of existing capacity as arranged for in the [WSFFA]" and "[i]f there are insufficient

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<sup>11</sup> By letter dated June 16, 2014, the City also confirmed that water is available.

facilities or capacity to serve some or all of a proposed Implementing Project, then the Designated Official may require the Master Developer to obtain such additional water supply capacity and/or design and construct new water mains... or such other facilities necessary to serve the Implementing Project.”

- Section 7.3.1 includes the statement “Any Implementing Project application process that calls for a certificate of sewer availability shall be satisfied by reference to this Agreement.”<sup>12</sup>
- Section 7.4.1 calls “For each proposed Implementing Project, a storm drainage report providing for preliminary sizing of facilities must be provided that evaluates the proposal and specifies the facilities necessary to meet the standards in the Black Diamond [ED&CS] and the Development Agreement.” Then, “[w]hen constructing an Implementing Project, the Master Developer” is required to comply with certain standards. In addition, and without an express reference to the time of construction of the Implementing Project itself, “construction” of stormwater facilities “may be required by the Designated Official to ensure that the facilities necessary to serve an Implementing Project are in place or will be provided.”
- Section 11.2 contains the City’s express agreement to the language in Exhibit K, including that Exhibit K includes a phasing order for development that “is not intended to be absolute and represents likely phases based on current market conditions.” In addition, the City expressly agreed that, “In general, the infrastructure necessary for each phase for each MPD is dependent on the infrastructure built in preceding phases for that MPD.” Accordingly, the Development Agreement provides that “infrastructure and timing of Development different from the MPD Phasing Plan ... may be proposed... without an amendment to the MPD Permit Approval of this Agreement.”
- Section 11.2 also contains the requirement found in Conditions 29 and 164, for submittal and approval of “a more detailed implementation schedule of the Regional Facilities supporting that Phase.”
- Section 11.3 is directed at phasing and construction of Regional Facilities. However, the section broadly states that the “capacity of existing transportation, water, sewer, stormwater and Park systems serving a specific Implementing Project proposal must be evaluated during the development review process for that Implementing Project.” And, “[i]f, based on an Implementing Project specific evaluation, there are insufficient infrastructure facilities or capacity to serve some or all of the specific Implementing Project, infrastructure improvements necessary to provide adequate capacity shall be required as a condition of that project.”<sup>13</sup>

<sup>12</sup> By letter dated June 16, 2014, the City also confirmed that sewer is available.

<sup>13</sup> With respect to the availability and adequacy of sewer facilities for Plat 2C, in a letter dated May 20, 2014, Senior Project Engineer at Triad Associates, Thomas P. Matt, explained that King County Metro has reported that the Black Diamond Pump Station and Black Diamond Trunk Line have capacity to serve approximately an additional 1,150 ERUs, and he confirmed that the 1,150 ERUs is sufficient to serve both the 921 sewer ERUs required for The Villages MPD Phase 1A preliminary plat (previously approved) and the 203 sewer ERUs needed

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These and other express provisions in the Development Agreement establish clear standards and specific timing for coordinating infrastructure and other improvements to accommodate each plat and implementing project contained in The Villages. Similar to BDMC 17.15.020(A)(7), the Development Agreements call for the City to confirm that infrastructure and amenities are scheduled to meet demands at the time of occupancy, not prior to processing or approving the preliminary plat. The City must move forward toward approval of the preliminary plat with conditions, as necessary, to assure infrastructure is properly constructed or bonded for at the time of final plat approval.

**D. The practical realities of platting and development require that supporting infrastructure, including offsite infrastructure improvements, be built after Preliminary Plat approval, to be completed prior to Final Plat approval.**

The City's position that all supportive infrastructure (i.e., roads, water pipes, etc.) must first be built to the edge of the proposed plat before even the preliminary plat may be approved is at odds with the practical timelines for how the platting and construction processes unfold. For example, whenever an off-site water line must be extended any distance to reach a newly proposed subdivision, the first step is approval of the preliminary plat with a finding that water will be available at the time of final plat, together with a condition to build the water line prior to final plat approval.<sup>14</sup> The second step is construction of that water line (together with all other infrastructure). The third step is the application for final plat approval, which is then approved because a showing can be made that the condition to build the water line was met.

Other than potential model homes which are constructed earlier and may not have operational utilities, after the final plat is approved, the next step is building permits for the new lots. After approval of building permits, new homes are then constructed, and are actually connected to the water line (and other infrastructure), such that the new homes are habitable. The habitable homes are then sold and new families move in to the new neighborhood.

By approving a preliminary plat with conditions requiring infrastructure construction and other necessary improvements, the City can list all of the things the developer must do before the City will approve the final plat application. This multi-step process gives the developer certainty as to what must be achieved to obtain final plat approval, while also giving the City assurance that it need not give final approval until all of the preliminary plat conditions have been met. The City's position that the supportive infrastructure adjacent to the plat must be built before the preliminary plat may be approved, undermines the clarity and incentives of the normal process of preliminary plat approval, with conditions.

In this case, Yarrow Bay currently controls the development of both Plat 2C and the adjacent, already approved Phase 1A plat. As a result, the City should not be concerned with whether necessary infrastructure will be constructed to the edge of Plat 2C. To the extent the

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to serve Plat 2C. In other words, the total sewer capacity of 1,124 ERUs needed to serve both Phase 1A and Plat 2C is less than the stated existing available capacity of 1,150 ERUs. Given King County Metro and Triad Associates' engineers conclusions, the City should conclude that adequate provisions will be made for Plat 2C's sanitary sewer needs, and the City should approve the preliminary plat.

<sup>14</sup> This first step is supported by the courts decisions in *Miller* and *JZ Knight* discussed above.

City is concerned that ownership of Plat 2C will change, the City should approve the preliminary plat for Plat 2C with a condition requiring Yarrow Bay to grant an easement over the Phase 1A property in order for any new owner to construct necessary improvements to the edge of Plat 2C. A draft of this easement has been submitted to the City concurrent with this memorandum.

**E. Yarrow Bay offers to enter into a covenant not to sue in order to mitigate the City's perceived risk of a potential lawsuit because of its inability to provide water or sewer facilities at the time applications for building permits are filed.**

As explained in the introduction above, the City appears to be concerned that there is a risk that if the City approves a preliminary plat today, the City will be forced to approve a final plat later, even though water and sewer might not be available at an even later point in time when a building permit application is filed, which could result in a lawsuit against the City. Yarrow Bay is confident that water and sewer will be available when building permits are applied for, and also recognizes that if some as-yet unknown problem arises with access to water and sewer, there would be no possibility of constructing a habitable and saleable home, making application for a building permit pointless. Therefore, Yarrow Bay is willing to enter into a covenant not to sue the City in order to mitigate the City's perceived risk. Provided with this memo is a proposed Covenant Not to Sue, which can be recorded on title, so as to become binding on the heirs, devisees, successors and assigns of the Plat 2C property. With the Covenant Not to Sue in place, the City's concern about a potential lawsuit should be eliminated and no longer any justification for denial of the Plat 2C preliminary plat application.

### III. CONCLUSION

The Subdivision Act, the Black Diamond Municipal Code, the Local Project Review Act, the Development Agreement for The Villages, and case law from the Washington State Supreme Court and Court of Appeals all support the City approving the preliminary plat for Plat 2C with conditions requiring adequate provisions for streets, utilities, and other facilities prior to approval of the final plat. Additionally, the practical realities of the platting and development process also support approval of the preliminary plat with conditions requiring necessary improvements prior to final plat approval. Finally, Yarrow Bay is willing to enter into a covenant not to sue the City in the unlikely event that water and sewer are not available at the time of applications for building permits. For all these reasons, the City should approve the preliminary plat for Plat 2C with conditions that will assure compliance with state statute and City Code requirements.



After recording, return to:  
 Cairncross & Hempelmann, P.S.  
 524 Second Ave., Suite 500  
 Seattle, Washington 98104  
 Attn: Nancy Bainbridge Rogers

COMMUNITY DEVELOP.  
 OCT 09 2014  
 RECEIVED

<b>Document Title</b>	Covenant Not to Sue
<b>Reference Number of Related Document</b>	N/A
<b>Grantor</b>	BD Village Partners, L.P., a Washington limited partnership
<b>Grantee</b>	City of Black Diamond, a non-charter code city in the state of Washington, operating under the provisions of Chapter 35A RCW
<b>Abbreviated Legal Description</b>	
<b>Tax Parcel Numbers</b>	

**COVENANT NOT TO SUE**

THIS COVENANT NOT TO SUE (“**Covenant**”) is made this 8<sup>th</sup> day of October, 2014, by BD Village Partners, L.P., a Washington limited partnership (“**Covenantor**”).

**RECITALS**

- A. Covenantor is the Owner of certain real property situated in the City of Black Diamond, King County, Washington, as such property is more specifically described on **Exhibit A**, which is attached hereto and incorporated herein by this reference (the “**Real Property**”).
- B. Covenantor has filed with the City of Black Diamond (“**City**”) an application for preliminary plat approval (Application No. PLN13-0027) in order to subdivide the Real Property (“**Preliminary Plat Application**”).
- C. The City has expressed concerns that if it approves Covenantor’s Preliminary Plat Application and then later approves Covenantor’s final plat application, but roads, streets, stormwater, water, or sewer facilities are not available to serve the subdivided lots at the time Covenantor or Covenantor’s successors or assigns apply for building permits, then the City may be at risk of a lawsuit by Covenantor or Covenantor’s successors or assigns

for failing to grant building permits based upon the unavailability of necessary roads, streets, or stormwater, water, or sewer facilities.

- D. Covenantor desires to execute this Covenant in order to mitigate the City's liability concerns so that the City will process and issue a decision on Covenantor's Preliminary Plat Application.

### AGREEMENT

NOW, THEREFORE, in consideration of the City's processing and issuance of a decision on Covenantor's Preliminary Plat Application, Covenantor covenants and agrees as follows:

1. Recitals incorporated. The Recitals set forth above are incorporated herein by this reference.
2. Covenantor's release, waiver, and covenant not to sue the City. Covenantor hereby waives and releases the City from, and covenants not to commence suit regarding, any and all claims, causes of action or damages due to refusal to process, or denials of applications for, building permits due solely to the unavailability of roads, streets, stormwater, water, or sewer facilities required to serve the Real Property.
3. Termination of Covenant. This Covenant shall automatically terminate and shall be of no further force or effect if at any time the City by act or omission obstructs or impedes the provision of roads, streets, stormwater, water, or sewer facilities to the Real Property, or takes any other action, either on its own or by instructing, encouraging, or aiding an action by a third party, which obstructs, impedes, or otherwise frustrates the provision of roads, streets, stormwater, water, or sewer facilities to the Real Property.
4. Binding effect. This Covenant is intended to and shall run with the land and shall be binding upon Covenantor and Covenantor's heirs, successors, and assigns.
5. Governing Law. This Covenant shall be governed by and construed in accordance with the laws of the state of Washington.
6. Effective Date. This Covenant shall become effective on the date of recording.

**BD VILLAGE PARTNERS, L.P.**, a Washington limited partnership

By: Yarrow Bay Development LLC, a Washington limited liability company, its General Partner

By: BRNW, Inc., a Washington corporation, its Member

By: \_\_\_\_\_  
Brian Ross, President

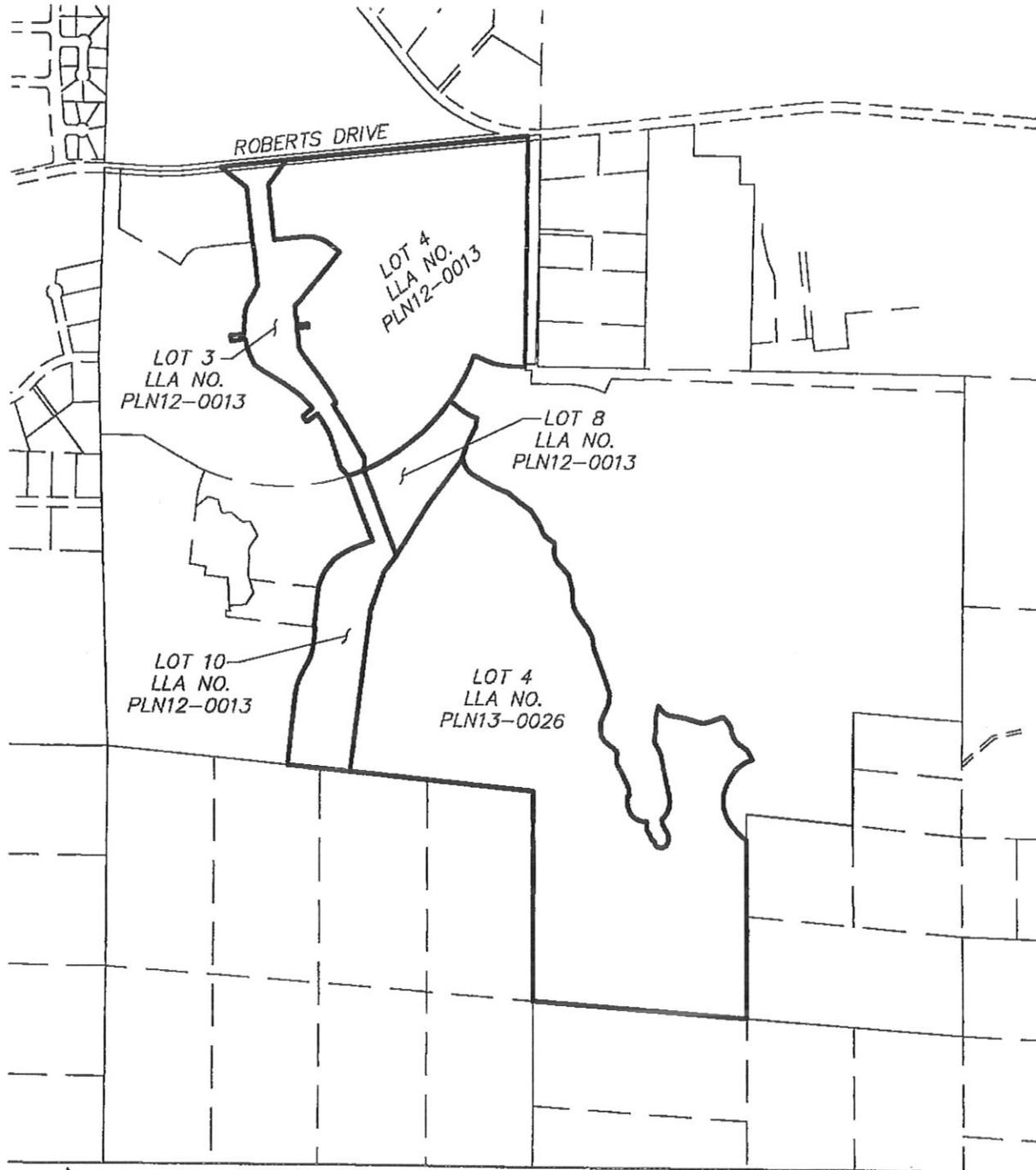


**EXHIBIT A**

**Legal Description of Real Property**

THE VILLAGES  
EXHIBIT A-1  
BURDENED PARCELS

TRIAD JOB # 10-001  
SEPTEMBER 17, 2014



12112 115th Avenue N.E. Kirkland, Washington 98034-6929  
425.821.8448 - 800.488.0756 - Fax 425.821.3481  
[www.triadassociates.net](http://www.triadassociates.net)

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**EXHIBIT B**

**BENEFITTED PARCEL**

*See Attached*

**EXHIBIT B  
PHASE 2 PLAT C ACCESS AND UTILITY EASEMENT  
BENEFITTED PARCEL LEGAL DESCRIPTION**

**SEPTEMBER 17, 2014  
TRIAD JOB NO. 10-001**

**BENEFITTED PARCEL:**

PROPOSED LOT 3 OF CITY OF BLACK DIAMOND LOT LINE ADJUSTMENT NUMBER PLN13-0026, LOCATED IN THE NORTHWEST QUARTER, THE SOUTHWEST QUARTER AND THE SOUTHEAST QUARTER OF SECTION 15 AND THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 22, ALL IN TOWNSHIP 21 NORTH, RANGE 6 EAST, W.M., IN KING COUNTY, WASHINGTON.

WRITTEN BY: ARJ  
CHECKED BY: MSH



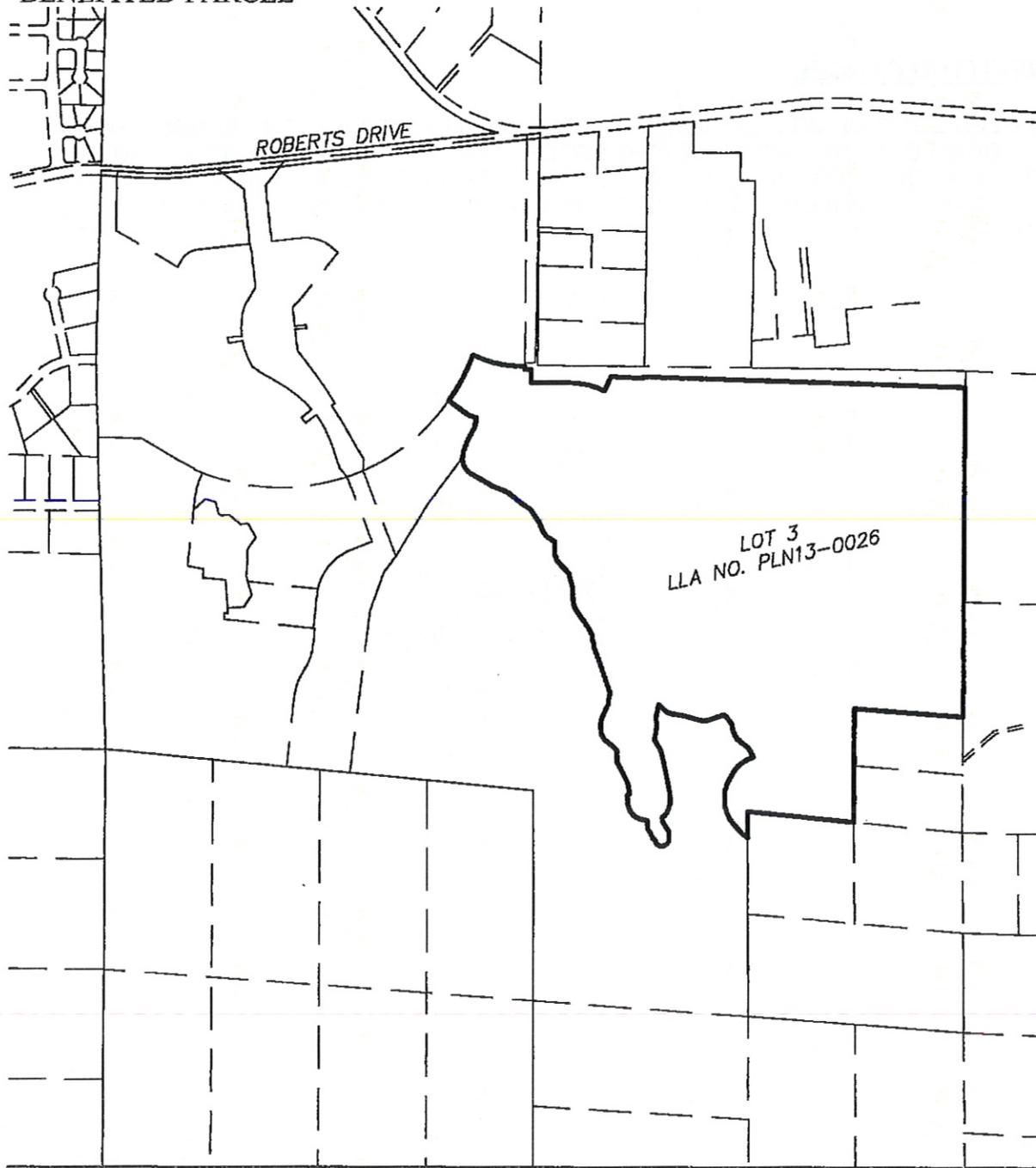
S:\PROJECTS\05336\CORRSPNC\SEC 15 and Preliminary Plat\Preliminary Plat\October 2013 V28-V29 Preliminary Plat\Legals and Exhibits for Easement Through 1A Benefitting 2C\14-0917 10-001 Exhibit B Benefitted Parcel Phase 2 Plat C Access and Utility Easement.docx  
12112 115<sup>th</sup> Avenue NE Kirkland, Washington 98034-6929  
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THE VILLAGES  
EXHIBIT B-1  
BENEFITED PARCEL

TRIAD JOB # 10-001  
SEPTEMBER 17, 2014



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WHEN RECORDED RETURN TO:

Megan Nelson  
Yarrow Bay Holdings LLC  
10220 NE Points Drive, Suite 310  
Kirkland, Washington 98033

COMMUNITY DEVELOP.  
OCT 09 2014  
RECEIVED

**Document Title:** TEMPORARY ACCESS AND UTILITY EASEMENT

**Grantor:** BD Village Partners, LP

**Grantee:** BD Village Partners, LP

**Legal Description of Burdened Parcels:** Ptn of NW ¼ lying southerly of the centerline of Auburn-Black Diamond Rd, a ptn of the SW ¼ and a ptn of the SE ¼, all in Section 15, Township 21 North, Range 06 East, W.M. TOGETHER WITH a portion of the NE ¼ of Section 22, Township 21 North, Range 06 East, W.M.

**Legal Description of Benefitted Parcel:** Ptn of the SW ¼ and SE ¼ of Section 15, Township 21 North, Range 06 East, W.M. TOGETHER WITH a ptn of NE ¼ of Section 22, Township 21 North, Range 06 East, W.M.

**Assessor's Tax Parcel Nos.:** Benefitted Parcel: Ptn of 1521069108, 152069096, and 2221069004.  
Burdened Parcels: 1521069099, 1521069100, 1521069106, 1521069102 and ptn of 1521069108, 1521069096, 2221069004 and 2221069053.

**Reference Nos. of Documents Released or Assigned:** N/A

**TEMPORARY ACCESS AND UTILITY EASEMENT**

This Temporary Access and Utility Easement ("Easement") is made this \_\_\_\_ day of \_\_\_\_\_, 2014, by BD Village Partners, LP, a Washington limited partnership ("Grantor") for the benefit of that certain real property legally described in Exhibit B attached hereto and by this reference incorporated herein (the "Benefitted Parcel").

**RECITALS**

A. Grantor is the current owner in fee of that certain real property legally described in Exhibit A attached hereto and by this reference incorporated herein (the "Burdened Parcels").

- B. BD Village Partners, LP, a Washington limited partnership (“Grantee”), is the current owner in fee of the Benefitted Parcel.
- C. Grantee has submitted a preliminary plat application (Black Diamond PLN 13-0028<sup>27</sup>) (hereinafter “Plat 2C”) affecting the Benefitted Parcel. In order to satisfy the City of Black Diamond’s concerns about appropriate provisions for sewer, water, storm drainage, and roads to Plat 2C, Grantor hereby agrees to record a temporary access and utility easement across the Burdened Parcels until such time as permanent utilities and roads are accessible to the Benefitted Parcel at approximately the intersection of Plat 2C’s Tract 926 and Willow Ave SE. *SEPA*

In consideration of the covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

#### AGREEMENT

1. Grant of Temporary Easement. Grantor hereby grants to Grantee a nonexclusive, temporary easement over, under, along, across, upon and through the described lands in the County of King, State of Washington, as legally described and shown on Exhibit A attached hereto (the “Temporary Easement”) for access and construction of the Utilities (as defined herein). The Utilities are defined as: (i) the roadway, storm drainage, water, sanitary sewer and dry utility improvements depicted in the plan set entitled: “Ring Road, The Villages, Phase 1A – Schedule B – Road and Utility Plans, Willow Ave SE to SE Dogwood Street” (Permit #PUB 13-0019); (ii) the utility access drive, storm drainage, water, sanitary sewer and dry utility improvements as depicted in the plan set entitled: “CCA/CCB, The Villages, Phase 1A – Schedule C- Road and Utility Plans, Villages Parkway SE” from Station 8 + 00 to Station 14 + 50” (currently under review by the City of Black Diamond); (iii) the storm drainage water quality and infiltration pond improvements as depicted in the approved Villages Phase 1A preliminary plat (PLN11-001) within The Villages MPD Parcel V23; (iv) the sanitary sewer lift station depicted in the approved Villages Phase 1A preliminary plat (PLN11-001); (v) the water main extension as depicted in the plan set dated 7/25/14 and entitled “Pipeline Road, The Villages, Offsite Water Main Extension Plans (750 and 850 Pressure Zones)” (currently under review by the City of Black Diamond); (vi) the staging and stockpile area as depicted in the plan set entitled “The Villages MPD Staging and Stockpile Area” under permit numbers PUB14-0030, PLN14-0024 (SEPA) and PLN 13-026 (Tree Removal) (currently under review by the City of Black Diamond); (vii) the wheel wash, access, and employee parking as depicted in the western portion of “The Villages Phase 1A – Schedule A Clearing Grading & TESC Plans” (PUB13-0009); (viii) access to temporary water installed across the northern portion of The Villages MPD Parcels V12 and V13; and (ix) the road and utility improvements from the northern end of The Villages Phase 1A - Schedule B – Road and Utility Plans Willow Ave SE- SE Dogwood St. (PUB 13-0019) to connect to Roberts Drive and construct improvements as depicted on “The Villages Roberts Drive Frontage Improvement Plans” (PUB13-005). The Temporary Easement granted herein is nonexclusive, and Grantor retains and reserves all other rights

with respect to the Burdened Parcels, including, without limitation, the right of ingress, egress, access, and construction together with the right to grant further nonexclusive easements for ingress, egress and access over, upon and across the properties owned by Grantor, or its successors or assigns, and to construct, reconstruct, maintain, repair, and replace the Utilities.

2. Purpose. The purpose of the Temporary Easement granted herein is to ensure the ability to appropriately provide water, sewer, storm drainage and roads to Plat 2C and the Burdened Parcels.
3. Relocation. Upon written notice to the owners of the Benefitted Parcel, Grantor shall have the right to permanently or temporarily relocate the Temporary Easement; provided, however, that any relocation of the Temporary Easement shall satisfy the same purpose as the Temporary Easement contemplated herein.
4. Use. The Grantee shall be entitled to use the Temporary Easement for legal access to and from the Benefitted Parcel and construction of the Utilities if necessary to provide Plat 2C with appropriate utility service.
5. Term. This agreement shall take effect on the date first written above. For the purpose of the Benefitted Parcel, this Easement shall automatically terminate absolutely and forever at such time as permanent Utilities are accessible to the Benefitted Parcel at approximately the intersection of Plat 2C's Tract 926 and Willow Ave SE or ten (10) years after the date of recording of this Easement, whichever occurs first.
6. Binding Effect. The covenants and obligations contained in this Easement are not personal, but shall run with the land and be binding upon and inure to the benefit of the respective heirs, personal representatives, transferees or successors in interest.
7. Non-Merger. It is intended that the rights and obligations created by this Easement shall NOT be affected by merger of title and similar doctrines that would terminate the rights and obligations created hereby and, therefore, they shall NOT automatically terminate or be extinguished by reason of existing or future common ownership of the properties described herein.
8. Captions. The captions and paragraph headings contained in this Easement are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Easement, nor the intent of any provision hereof.
9. Governing Law. This Easement shall be governed by and constructed in accordance with the laws of the state of Washington.



**EXHIBIT A**  
**BURDENED PARCELS**

*See Attached*

**EXHIBIT A  
PHASE 2 PLAT C ACCESS AND UTILITY EASEMENT  
BURDENED PARCELS LEGAL DESCRIPTIONS**

**SEPTEMBER 17, 2014  
TRIAD JOB NO. 10-001**

**BURDENED PARCELS:**

LOTS 3, 4, 8 AND 10 OF CITY OF BLACK DIAMOND LOT LINE ADJUSTMENT NUMBER PLN12-0013, AS RECORDED SEPTEMBER 6, 2012 IN VOLUME 291 OF SURVEYS, PAGES 66-73 UNDER KING COUNTY RECORDING NUMBER 20120906900006, LOCATED IN THE NORTHWEST QUARTER AND THE SOUTHWEST QUARTER OF SECTION 15, TOWNSHIP 21 NORTH, RANGE 6 EAST, W.M., IN KING COUNTY, WASHINGTON;

TOGETHER WITH PROPOSED LOT 4 OF CITY OF BLACK DIAMOND LOT LINE ADJUSTMENT NUMBER PLN13-0026, LOCATED IN THE SOUTHWEST QUARTER AND THE SOUTHEAST QUARTER OF SECTION 15 AND THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 22, ALL IN TOWNSHIP 21 NORTH, RANGE 6 EAST, W.M., IN KING COUNTY, WASHINGTON.

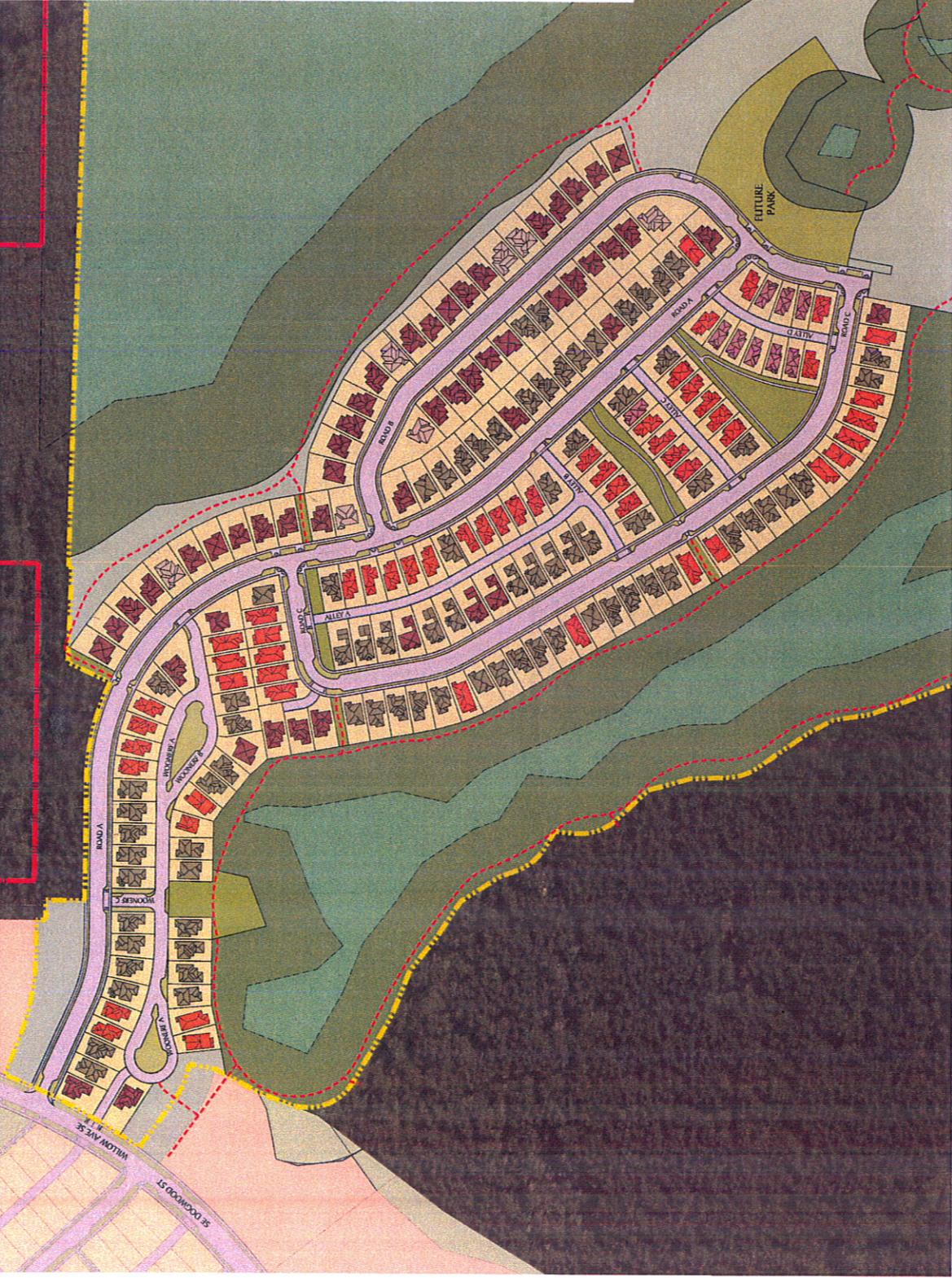
WRITTEN BY: ARJ  
CHECKED BY: MSH



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### Conceptual Demonstration of How Residential Design Guidelines May Be Met

Design Guidelines apply to development within The Villages, including the future home designs that will be proposed on the Lots in Plat 2C. This diagram demonstrates just one of many design concepts for future homes that could be built on the Lots which design concept would meet the Design Guidelines listed below. There are many other options that may be designed, and specific compliance with the applicable Design Guidelines can only be measured at the time that building permit applications are made.

Lot Sizes and Front Yard Setbacks (See The Villages Master Planned Development Development Agreement, Exhibit H - MPD Project Specific Design Standards and Guidelines, Chapter 4 - Residential Design Standards and Guidelines, page 18, Site Design, Lot Sizes and Front Yard Setbacks.)

- Corner lots side yard setback on the street side shall be at least 5' wider than interior lots. Excluding oversized corner lots within a block, any row of lots over 400 feet long shall have at least one lot of different width per every six houses.
- The differing lot may be wider or narrower, but shall vary in width by at least 5 feet.
- Varied front yard setbacks shall be applied to 20% of homes on each side of the street on each block. Offsets shall be an increase of no less than 33% of the standard front yard setback.

Street Loaded Garages (See The Villages Master Planned Development Development Agreement, Exhibit H - MPD Project Specific Design Standards and Guidelines, Chapter 4 - Residential Design Standards and Guidelines, page 20, Site Design, Street Loaded Garages.)

- The face of the garage must be back a minimum of 6 feet from the face of the living area or porch elevation (at columns) and at least 20' from street.

#### Legend

- 25' Home / 35' Lot
- 30' Home / 40' Lot
- 35' Home / 45' Lot
- 40' Home / 50' Lot
- 45' Home / 55' Lot

# The Villages - Preliminary Plat 2C



COMMUNITY DEVELOPER  
OCT 8, 2014  
PLAT CASE # 1402

SCALE: 1" = 100'

