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Public Comment: Cindy Proctor (email messages and
letter with attachments "a" through "k" are available
on request)
July 1, 2014)

July 1st, 2014
Acting SEPA Responsible Official
Community Development Department
City of Black Diamond PO Box 599 Black Diamond, WA 98010

Subject: MDNS SEPA Threshold Determination for PLN13-0028
Public SEPA MDNS/Plat Comments: Cindy Proctor 2950 Sun Mountain DR Enumclaw 98022

Schools

There has been a material change in the underlying conditions of facts that bring the entire project into non-compliance with the conditions of approval (COAs) and the mitigation agreement.

The Comprehensive School Mitigation Agreement (CSMA) states that Pursuant to RCW 58.17.110 and City Municipal Code Title 17 and Chapter 18.98, as a part of Master Plan Development and subdivision approval, the City is required to ensure that appropriate provisions are made for schools and school facilities necessary to serve the residential subdivisions that will be part of the Projects including the siting of all proposed school sites and sidewalks and safe access to schools.

Pursuant to Chapter 43.21C RCW and its implementing regulations, the City is required to consider and may require mitigation for probable adverse environmental impacts of the Projects on the built environment.

The Parties agreed that adequate school facilities to serve the Projects would be necessary to preserve the existing quality of life in the City, to ensure the appropriate provision of schools and school programs through the District, and to create viable and livable communities within the Projects.¹

It does not appear that the City of Black Diamond is tracking the required milestones within the CSMA, one of the key documents for mitigation and school adequacy. Additionally there have been material changes that compromise the validity of the CSMA as an agreement that provide adequate mitigation.

During the EIS the City and the Applicant argued that environmental review related to the seven school sites was premature because the school sites were only identified and *not*

¹ CSMA

delineated. The City’s consultant agreed that the additional 70 acres of rural school sites would have an impact and that they had not been analyzed.² Now an implementing project is triggering project review at the same time that all underlying appeals are exhausted thus requiring that all elementary school(s), middle school(s) and High School must be delineated and their impacts analyzed.³

“6.1.1 No later than thirty (30) days after the approval of the MPD for the first of the Projects and the expiration of the appeal period related to such approval without any appeal, or if an appeal is made, when the appeal is finally resolved (without any further possibility of appeal) in a manner that upholds the Developer's right to proceed with the Project as contemplated in the MPD application, the Developer shall delineate boundaries and create a legal description for each Identified School Site, with such boundaries and legal descriptions consistent with the Depictions in Exhibits D.1, E.1, F.1, G.1, H.1, I.1, and N.1.”

The FEIS did not address the proposed school sites in rural areas; the timing of the PP2C and the triggering of the CSMA critical milestones, at a minimum, should require a supplemental SEIS and should be done for delineated sites not in the initial FEIS review to determine the ongoing impact on student accessibility, fiscal impact to the school, and adequate school siting. Three important facts have changed since the programmatic CSMA was executed, they are as follows:

1. **Rural school sites are no longer permitted.** The CSMA included proposed siting based on acreage and proposed locations; three of rural schools sites are no longer allowed at the site consistent with the CSMA due to the recent King County School Siting Task Force siting recommendations that was unanimously approved (of which ESD Superintendent Mike Nelson signed off on.)⁴

School Site Enumclaw A & D [CMSA Middle School site 1 and Elementary School D]:

1a. Find alternative site/s in the UGA

1b. Place all school buildings and impervious surfaces on the *urban* side of the UGB and place ball fields/playfields on the *rural* side of the UGB.

Site specific (1a): This joint site lies on the south-eastern boundary of the Black Diamond UGA and a master-planned development (MPD) that has yet to be constructed. The identified need of the school district is associated primarily with the population projections of the MPD and with students residing outside of the MPD but in the northern part of the district; the sites are planned for an

² FEIS Hearing, Graham testimony, p 944:10-25

³ CSMA p 16, 6.1.1

⁴ <http://www.kingcounty.gov/elected/executive/constantine/initiatives/school-siting-task-force.aspx>

elementary and a middle school. The fee title to both sites is held by the developer, with the district's property interest recorded as an encumbrance on title, and would only be conveyed to the school district if the MPD materializes. The Task Force recommends that no sewer be extended to the rural portion of the site and that the City of Black Diamond and county work with the developer and the school district to site all schools associated with the MPD completely within the UGA. The Black Diamond City Council supported this solution in a resolution passed 3-1-12. The Black Diamond City Council previously approved the Comprehensive School Mitigation Agreement identifying Enumclaw Sites A, B, and D as agreed-upon school sites.

- a. *Site specific (1b): The Enumclaw School District and the developer have identified as an alternative to 1a the placement of a portion of the proposed school-related facilities on rural lands. If attempts to site each of these schools fully within the UGA are unsuccessful, alternative 1b may be contemplated. Alternative 1b consists of siting all school buildings, storm water detention and other support facilities, and all parking and impervious surfaces within the UGA and limiting any development in the adjacent rural area to ball fields/playfields. The Task Force further recommends maintaining significant forest buffers between the ball fields/playfields and adjacent rural lands including the Black Diamond Natural Area. Recommendation of this urban/rural alternative by the Task Force is meant to address the unique circumstances of the Enumclaw A & D sites and is not to be construed as a precedent for locating schools on adjacent rural lands. Consequently, it is not recommended for any other sites.⁵*

School Site Enumclaw B [CMSA Middle School site 2]:

1b. Find alternative site in the UGA

*1c. Site specific: The site is in the rural area west of the Black Diamond UGA and a master-planned development (MPD) that has been approved but is yet to be constructed. The identified need of the school district is associated with the population projections of the MPD; the site is planned for a middle school. The fee title for the site is held by the developer, with the district's property interest recorded as an encumbrance on title, and would only be conveyed to the school district if the MPD materializes. **The Task Force recommends that no sewer be extended to the site and that the City of Black Diamond and the county work with the developer and the school district to site schools associated with the MPD in the UGA.**⁶*

In 2012 the School Siting Task Force recommendations were embodied in King County's Countywide Planning Policies (CPPs). The CPPs provide a countywide vision and serve as a framework for each jurisdiction to develop its own comprehensive plan, which must be consistent with the overall vision for the future of King County. CPPs DP- 50, PF- 12, PF- 18,

⁵ School Siting Task Force Final Report and Recommendations, March 31, 2012, p. 16

⁶ School Siting Task Force Final Report and Recommendations, March 31, 2012, p. 17

and PF- 19 contain specific school siting policies and references to the School Siting Task Force Final Report and Recommendations. The entire Final report is provided as Appendix 5 to the 2012 King County CPPs (as amended December 3, 2012).

Furthermore, when ESD Superintendent Michael Nelson testified at a recent hearing he stated the following about school siting, "We knew it was a master planned development. We wanted school sites that were designated in neighborhoods, not on the outskirts of -- of the development."⁷

2. **Fiscal assumptions on proposed commercial revenue have materially changed.** The CSMA contemplated ESD obtaining approval of a land transfer of the North Triangle which is solely commercial revenue-producing land (the North Triangle)⁸; however on October 3, 2013 a hearing regarding the Transfer of Territory from Tahoma School District to Enumclaw School District by the Puget Sound Education School District (PSESD) unanimously denied the land transfer request, primarily because it was a money grab by the ESD from the Tahoma School District. I have attached as an exhibit the PSESD transcripts and highlighted many sections, however here are some key excerpts from the official transcripts that reflect the following changes of adequacy from the ESD:

- a. **ESD School Board President Cassell testified** "We feel a really strong responsibility toward the people who elect us to represent them. And one of the aspects of this whole master planned development that is most likely going to be a challenge is to pass the laws that are necessary to build the schools that we will need to support our students... The revenue would not go to our -- their own children for the businesses that they would be frequenting. And I think that's -- that's a problem for us passing bonds. It's a potential issue that would carry forward in the future."⁹
- b. **ESD Superintendent Michael Nelson testified** "And we come to you with a very genuine request of why we feel this parcel of land should be transferred to our school district, because it's our responsibility to take care of the kids that are going to be part of this MPD."
- c. **ESD Attorney Hoge testified**, "So, you know, these students that we aren't sure we're going to be able to serve, are deeply involved. And they wouldn't be there but for the master planned community that includes the North Triangle."¹⁰

⁷ PSESD Transcripts Pg. 12 Ln:6

⁸ FEIS specifically noted that the ESD would not have access to potential tax revenue in regards to the north triangle. It was clearly called out on page (11) of the April 9, 2009 Technical Memorandum prepared by XXX as part of its Master Plan Developments (MPDs) FEIS. (Ex X) The fact that the north triangle lay within the TSD was also clearly called out on within the body of the EIS.

⁹ PSESD Transcripts Pg. LN 16 14:25 Pg. 17 LN 12:16

¹⁰ PSESD Transcripts Pg. 73 LN 20:23

- d. **TSD Attorney Ganson testified** “There is no authority for this proposition that this process can be used to obtain child-free and therefore obligation-free but revenue-rich property from a neighboring school district.”¹¹

Ganson: “In their submissions, Enumclaw refers to a concern about the costs of housing these new students that will be coming to Enumclaw School District by virtue of these MPDs as something that will fall on the taxpayers residing in the Enumclaw School District. And that may be true. However, Tahoma would point out that that's really the bargain Enumclaw School District made when it signed on to its mitigation agreement with the developer, Yarrow Bay. And the proposition that it therefore falls on Tahoma School District's citizens and taxpayers to shore up Enumclaw School District's ability to pay for this need to house new students is really preposterous. Why should it fall on the taxpayers of the Tahoma School District to address this burden that is very local to the Enumclaw School District and the City of Black Diamond?”¹²

Ganson: “Now, Enumclaw School District may well -- it appears to have a significant issue to grapple with in terms of funding. But we've heard -- we've heard them be pretty frank, to their credit, that a big part of this proposal is to be able to sell the ability to pass bonds to their voters, not only in Black Diamond, but down in Enumclaw. I would be concerned too.”¹³

3. **New environmental conditions related to the elementary school site C.** The 180 day environmental and contingency waiver period of the ESD has been triggered for all proposed school sites. YB was required to provide all reports and documents necessary for the ESD to perform an adequate due diligence; however one school site (Lawson Hills site C) is in/near a mine hazard area and environmental considerations have changed since the MPD/DA approvals. The John Henry Mine located within a ¼ mile of the Lawson Hills MPD has requested to restart operations with the Office of Surface Mining Reclamation and Enforcement (OSMRE) and blasting times are scheduled between 10 am to 4 pm (school hours.)¹⁴ Additional SEPA review related to the geotechnical concerns and noise concerns related to the mine opening have not been done. The ESD must make the decision within the next 180 days which may not coincide with any Lawson Hills MPD plat reviews. The City must be constantly monitoring changes in environmental conditions on a plat-by-plat and division by division basis and on the whole CSMA.

Condition MPD Ordinance includes the following requirements:

- 1) The applicant shall enter into a separate school mitigation agreement.

¹¹ PSESD Transcript Pg. 45 LN 7:10

¹² PSESD Transcripts Pg. 45 13:25, 46 LN 1:4

¹³ PSESD Transcripts Pg. 66 LN 18:25 Pg. 67 LN 1:2

¹⁴ OSM and PCC Blast Notice

- 2) The agreement shall be approved by both the City and the School District.
- 3) The agreement shall be incorporated into the Development Agreement by reference.
- 4) The agreement shall provide adequate mitigation of impacts to school facilities.

These new facts clearly reflect a material change to the initial proposed mitigation. It is anticipated by this Citizen, that the Applicant (YarrowBay--YB) and the City will once again assert no further SEPA review at each plat/subdivision level is required as they noted in the previous SEPA briefings for PP1A:

The Applicant (YB) asserted that “the Comprehensive School Mitigation Agreement prohibits any further environmental review, based on Paragraph 3.1 of the Agreement that states that the Agreement constitutes “full, total, complete and sufficient mitigation” for school impacts and further that the City agrees that it will not seek or impose any additional mitigation measures or impact fees.”

However, the Hearing Examiner has already addressed this assertion in the PP1A decision.¹⁵

“The Applicant cannot circumvent the requirements of SEPA by a contractual arrangement with the City. There are no SEPA statutes that authorize such an arrangement. RCW 43.21C.240 authorizes a City to forego SEPA review upon a determination that its development regulations adequately mitigate environmental impacts, but no such determination has been made in this case.

Further, RCW 43.21C.240 (2) requires that this determination be made “in the course of project review”. It is debatable that the Agreement, which is not a development agreement governed by Chapter 36.70B or any development regulation adopted under Chapter 36.70A RCW, would qualify as a document executed “in the course of project review”.

Additionally as a condition of approval the Hearing Examiner ruled:

“Finally, a condition of approval will require staff to consider the impacts of dividing final plat approval into divisions and condition the divisions as necessary to ensure that the connectivity of all infrastructure requirements is not adversely affected and that the sequencing will not adversely affect school mitigation. It is not immediately apparent how dividing final plat approval will impair the Applicant’s obligations to provide mitigation under the CSMA, but if the SEPA Appellants or the District have any specific concerns they can relay them to staff for their review of any proposed divisions.”¹⁶

In addition, the recent Towards Responsible Development (TRD) Court of Appeals decision found that a supplemental EIS is required at each phase as new facts become available:

The approved deferred environmental review applies to those aspects of construction that can only be adequately analyzed after additional detail is known. This includes construction

¹⁵ PP1A Hearing Examiner Decision dated 12/11/2012, p. 40

¹⁶ Ibid, p. 104

traffic impacts, traffic queue lengths at not yet constructed intersections, and the potential for an alternate, on-site stormwater pond location. When this information becomes available, Yarrow Bay must comply with all SEPA requirements and provide a supplemental EIS that quantitatively assesses the secondary and cumulative impacts on the entire affected area and identify the costs of mitigating them.¹⁷

The Citizens should not have to re-raise the issue to the SEPA-Responsible Official and City staff reviewing the impacts of division-by-division approval on the schools at every step/every plat/subdivision; this should be automatic, as compliance is required at each project review under the law RCW 43.21C.240(2).

The City Staff and the SEPA-Responsible Officials cannot abdicate their responsibilities for compliance merely because there is a Tri-Party (CSMA). Although the authority to raise issues from the CSMA is granted to all signatories, the Citizens must rely on the City of Black Diamond to track compliance with the myriad of SEPA/COAs/Permit agreements and conditions and the fluid nature of items that cannot be vested, such as school adequacy and safety.

The Applicant cannot hide behind programmatic and hypothetical sites any longer as the MPDs are moving forward at a rapid pace and the CSMA critical milestones are being triggered. Based on the three material changes described above it is premature to move forward with a MDNS and SEIS should be done in the area of fiscal, environmental and actual school siting requirements.

The City of Black Diamond and the Hearing Examiner are bound by the legal standards of, RCW 43.21C.240 (2), RCW 58.17.110 and City Municipal Code Title 17 and Chapter 18.98; the COAs, and additional SEPA requirement upheld by the Hearing Examiner and the Court of Appeals.

¹⁷ Unreported court of appeals decision, *Toward Responsible Development v. City of Black Diamond*, No. 69418-9-1 (Jan. 27, 2014) at p. 12