Tracey Redd

From: Kristi Beckham <KBeckham@Cairncross.com>
Sent: Monday, December 29, 2014 4:52 PM
To: Nancy Rogers; MDRT User; Andy Williamson; 'olbrechtslaw@gmail.com'
Subject: RE: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 3a1 of 3)
Attachments: Pages from Pages from scan_20141229154717 Reduced File Size Part 3a1.pdf

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Attached is email 3a1.

CH& **Kristi Beckham**
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From: Kristi Beckham
Sent: Monday, December 29, 2014 4:35 PM
To: Nancy Rogers; 'MDRT User'; 'Andy Williamson'; 'olbrechtslaw@gmail.com'
Subject: RE: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 3 of 3)

I am resending the attachment to Email 3 of 3 in two parts, 3a and 3b. We received bounce backs because of the file size. Attached is Part 3b.

Thank you.

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From: Nancy Rogers
Sent: Monday, December 29, 2014 4:22 PM
To: 'MDRT User'; 'Andy Williamson'; 'olbrechtslaw@gmail.com'
Cc: Kristi Beckham
Subject: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 3 of 3)

Dear Mr. Examiner and MDRT Team and Mr. Williamson:

Yarrow Bay's reply materials are in three parts: (1) a 22 page memo, (2) the full PP1A decision (December 2012), and (3) the attached PDF containing the Hearing Examiner's Recommendation of Approval for The Villages Development Agreement (September 2011), together with a Department of Ecology Guidance Document (April 2005), and a memo from Transpo (December 2014). Please let me know if you do not receive all parts or have any trouble opening.

We will also be filing the separate reply materials on January 9 after we review the City's response, due Jan 7.

Thank you,

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ATTACHMENT

City of Black Diamond Hearing Examiner's Recommendation of Approval for The Villages Development Agreement (September 2011)

BEFORE THE HEARING EXAMINER FOR
THE CITY OF BLACK DIAMOND

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

I. Overview

For those who want to go straight to the point, the Examiner recommends approval of the development agreements if the revisions recommended in Section VIII of this recommendation are incorporated into the development agreement. Section VII contains a detailed summary and analysis of the concerns expressed by the public at the hearings, along with numerous suggestions and options to address those concerns. Section VII is arranged in order of Development Agreement sections.

As with the Master Plan Developments, the citizens of Black Diamond have undergone tremendous effort to ensure that the development agreements protect their community. The public provided over 3,500 pages of written testimony and over 20 hours of verbal testimony. Their input and suggestions will result in the substantial improvement of those agreements. Yarrow Bay ("YB") has been very cooperative in addressing concerns expressed by the Hearing Examiner during the hearings on issues such as mine hazards and ambiguous development agreement terms, and in providing detailed responses to all of the concerns raised by the public. Both the public and YB have served as invaluable resources in ensuring that the development agreements fully implement the Master Plan Development conditions of approval.

This is a unique hearing examiner recommendation because most of the issues brought up by the public and addressed in the DAs are subject to the discretionary contractual and policy authority of the Council. The Council has wide discretion as to what it can include in the development agreements and the public has corresponding wide latitude in suggesting what they'd like to see in the development agreements. There are few legal standards to govern this discretion and the

Examiner has little business in making recommendations on policy choices to the Council. As a result, a primary focus of this recommendation is to organize and evaluate the information provided by the public so that the Council has an accessible means of making informed choices on the huge record of information provided by its constituency. This recommendation organizes the information provided by the public according to the chapters of the proposed development agreements. This information is located at Section VII of this recommendation. For each issue of concern to the public, the recommendation identifies what options and what authority the Council has to address the issue. Council authority to address each issue usually falls into one of four categories: (1) the Council is required to revise the development agreement ("DA"); (2) the Council can compel the YB to agree to a revision to the DA; (3) the Council can only revise the DA with the YB's voluntary agreement; or (4) the Council is prohibited from revising the DA. Most issues require the voluntary agreement of the YB to be addressed in the DA.

Council discretion in negotiating a development agreement is wide because its contents are not limited to any permitting criteria. The development agreement can address any conceivable master plan development impact. The only significant limitation on content is that the development agreements cannot be approved unless they implement the master plan conditions of approval as required by those conditions. As a result, the development agreements serve as a powerful opportunity for the Council to look at the impacts of the master plan developments as a whole to ensure that they will develop as intended and that all impacts are adequately mitigated.

Although the scope of a development agreement is not much in doubt, the Council's leverage to compel YB to agree to various agreement terms is not so straightforward. The City's master plan regulations require the execution of the development agreements that implement the master plan conditions of approval. The regulations further provide that the City cannot approve any implementing development permit applications for a master plan development until a development agreement is executed and recorded. If the City Council can refuse to approve a development agreement for any reason it chooses, as argued by some at the hearings, the Council can use the threat of withholding approval to require YB to agree to add almost anything it wishes to the development agreements. If the Council is required to approve the development agreements if they reasonably implement the master plan development conditions of approval, the Council's leverage is substantially diminished. In that case it will need YB's consent for any terms not reasonably necessary to implement the master plan conditions of approval.

This recommendation is written with the premise that the City Council must approve the development agreements if they reasonably implement the master plan development conditions of approval. The law on whether the Council actually has that responsibility is far from clear. If the Council would like to include a term in the development agreement that is not necessary to implement the conditions and that YB is not willing to accept, exploring the option of withholding approval is worth investigating with the City Attorney. Under the premise that the Council is required to approve a development agreement, this recommendation distinguishes between "implementing" and "supplementary" conditions. Implementing conditions are those development agreement terms that are necessary to implement the conditions of approval. The Council can

withhold approval of the development agreements if YB refuses to agree to them. Supplementary conditions are conditions that are not necessary to implement the master plan conditions of approval. The Council cannot withhold approval of the development agreements if YB refuses to accept supplementary conditions. The Examiner advised the public both in his prehearing orders and during the hearings that implementing conditions were far more likely to be incorporated into the DAs than supplementary conditions. A large portion of the public testimony is still devoted to supplementary conditions.

Although the Council arguably doesn't have the leverage to compel the inclusion of supplementary conditions into the DAs, in many instances it can still impose them as a permitting requirement pursuant to its authority under the Washington State Environmental Policy Act ("SEPA"). As with the authority to withhold approval of the development agreements, the authority of the City to use SEPA is also far from clear. Its authority is complicated by the fact that many permitting and environmental decisions have already been made and arguably cannot be revisited. The authority to impose SEPA requirements is much more solid than the authority to withhold agreement to the DA for compelling compliance with most supplemental conditions, but the Council will always be better off exploring mutual agreement before engaging the SEPA option.

The relevancy of supplementary conditions has been a major point of disagreement between the Examiner and the City and YB. The City and YB have strenuously objected to any testimony related to supplementary conditions, on the premise that City regulations only require the development agreements to implement the master plan conditions of approval. This was despite the fact that City staff and YB had already negotiated supplementary conditions into the proposed development agreements considered at the hearings. In later briefing the City acknowledged that the development agreements can include supplementary conditions, but still argued that testimony on supplementary conditions is irrelevant if YB objects to it.

Since YB must agree to any supplemental conditions, its objections to testimony about them is a valid consideration in assessing relevancy. However, another important consideration is that this is a closed record review process. If the Examiner excludes testimony on a supplemental condition, the Council is prevented from re-opening the hearing to consider that testimony. Even though YB may indicate it's not agreeable to a supplemental condition during the hearings before the Examiner, the conditions may still be a priority for the Council. The Council may want to try to negotiate a deal with YB to agree to the supplementary condition, or require the condition either under the State Environmental Policy Act or by taking the position that it can withhold approval of the development agreements for any reason it chooses. The Examiner chose not to close the door on any testimony related to supplemental conditions, so that all options for the Council remained intact during their stage of review.

In reviewing this recommendation the Council should realize that its regulations required the Examiner to put together a recommendation within 10 working days[1] of the close of the record.

[1] It's also worth mentioning that the City's ten day requirement is not mandated by state law. RCW 35A.63.170 requires Examiner decisions to be issued within ten days, not recommendations. RCW 35A.63.170 clearly

Given the huge record of the development agreement hearings it was a monumental challenge to review, organize, evaluate and prepare a written recommendation for all of this information at the rate of hundreds of pages of written testimony per day. Given more time the Examiner could have prepared an annotated version of the development agreements that contained an evaluation of every section of the development agreements. Given more time the Examiner could also have further consolidated and organized the testimony summaries. Given more time the Examiner could have written more detailed findings of fact and conclusions of law. There was no reasonable opportunity to do that. The priority in this recommendation was to ensure that all significant concerns of the public were addressed and that the development agreements implement the master plan conditions of approval. That priority has been met.

II. Acronyms and Definitions

Implementing Condition: A development agreement term that is required by the conditions of approval of the Lawson Hills and Villages master plan development approvals.

Supplementary Condition: A development agreement term that is not required by the conditions of approval of the Lawson Hills and Villages master plan development approvals.

DA: Development agreement.

MPDs: The Villages and Lawson Hills Master Plan Developments.

MPD COA: An MPD condition of Approval.

MPD COL: An MPD conclusion of Law.

MPD FOF: An MPD finding of fact.

V: Villages

LH: Lawson Hills

YB: Yarrow Bay, used generically for BD Villages Partners, LP and BD Lawson Hills Partners, LP.

III. Testimony

A summary of the verbal hearing testimony, color coded as to topic, is attached as Exhibit A.

IV. Exhibits

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distinguishes between recommendations and decisions in its requirements. It's unlikely a court would interpret the ten day rule as applying to recommendations as well.

An exhibit list for documents admitted into the hearing record is attached as Exhibit B.

V. Procedural Summary

The Examiner held a prehearing conference on May 23, 2011. At that time the hearings for the development agreements were scheduled for June 27, 2011. The prehearing conference was held during the day and concerned citizens filled the City Council chambers to capacity. Numerous persons testified that the June 27, 2011 hearing date did not provide sufficient time to review the development agreements and its arguably voluminous exhibits. Particularly compelling was that a final draft of the development agreements was not yet available for review. For these reasons the Examiner struck the prehearing date and ordered that the hearings could not be scheduled any earlier than 30 days from the date that a final draft of the development agreements were posted on the City's website. Staff posted final drafts of the agreements on June 10, 2011 and scheduled the hearings to commence on July 12, 2011. Several pre-hearing motions and concerns were filed requesting further postponement of the hearings due to the high volume of information and issues to review. In a pre-hearing order issued June 30, 2011 the Examiner left the hearing date as is but, since the City has not delayed the hearing date for any significant amount of time, authorized two weeks from the close of the verbal portion of the hearings for written comment with a one week response time and two day reply time.

Hearings were held over four evenings and two days. The general public testified on the evenings of July 11-14, 2011 and all day on July 16, 2011. Limited expert testimony was presented all day on July 21, 2011. Members of the general public were given ten minutes each to speak. Persons could cede their time to another speaker if they were present at the hearing to do so. Speakers had the option to schedule their speaking time in advance. Most speakers reserved time near the end of the hearings. Many of those speakers read from prepared statements and were unwilling to submit their statements into the record because they were still works in progress. It was apparent that many Black Diamond residents were struggling with the timeframes they were given to present their testimony. YB and on at least one occasion even the City objected strenuously to any requests for additional time.

A particularly difficult procedural issue in this case was the setting of time limits for expert testimony. The Examiner is sensitive to the fact that the citizen group that wanted to present expert testimony, SAVE, had spent a considerable amount of volunteer money for its experts and that it felt the testimony was of critical importance to the review process. The Examiner issued an order on July 14, 2011 that severely limited the scope of verbal expert testimony. The order limited most verbal expert testimony to the issue of whether the terms of the development agreements adequately implement the MPD conditions of approval. This restriction was imposed in light of the debatable relevence of the proposed expert testimony, the high cost of accommodating it and the fact that extensive opportunity for providing expert testimony on the impacts asserted in the testimony had been provided during the MPD hearings. The costs of accommodating expert testimony are high because they typically take an extensive amount of hearing time, necessitate the presence of

attorneys and usually necessitate expert rebuttal. Although the scope of the verbal expert testimony was limited during the hearing, there was no such restriction placed upon expert written testimony. Testimony provided in writing does not cause as much hearing expense or delay as verbal testimony and for those reasons is more easily accommodated into the hearing process.

VI. General Conclusions of Law

1. Authority. BDMC 18.08.030 provides that development agreements are subject to a Type 4 review process. BDMC 18.08.070 provides that in a Type 4 review process the hearing examiner is required to conduct a public hearing and make a recommendation to the City Council. The City Council reviews the recommendation in a closed record review.

2. Quasi-Judicial Role of Examiner. In order to maximize fairness and equal participation to all hearing participants, the Examiner conducted himself as a quasi-judicial decision maker. This may or may not be required by the law, but it is most consistent with the tasks assigned to him. The tasks of an Examiner, as defined by his contract with the City and traditionally exercised, generally include an objective application of law to facts and the conduct of a hearing process that provides for fair and equal participation. This role is in line with the definition of a quasi-judicial proceeding, which is a proceeding that involves a determination of legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. RCW 42.36.010. The role is also in contrast to the alternative: acting in a legislative/policy making capacity. Legislative/policy choices in the land use arena are essentially value choices on the future development of the Black Diamond community. A hearing examiner is in no better position to make value choices in this regard than Black Diamond's elected representatives and its citizens.

The quasi-judicial/legislative distinction is of significance to the development agreements because they incorporate both modes of decision making. As discussed in Conclusion of Law No. 8 below, Black Diamond regulations require that the development agreements implement the MPD conditions of approval. Under the quasi-judicial definition, MPD conditions of approval are laws, so the analysis of whether the development agreements implement them is a quasi-judicial determination. This is especially true given that the determination of consistency with COAs will often involve an application of MPD code criteria. In contrast, the development agreement can also include negotiated terms that are not necessary to implement MPD conditions of approval or any legal requirements. These are the value choices previously referenced and are clearly done in the legislative/policy making role of the City Council.

As previously noted, the Examiner's role is limited to quasi-judicial decision making. In this regard the Examiner will provide the Council with detailed recommendations on whether the proposed development agreements implement the MPD conditions of approval as required by BDMC 18.98.090. However, a significant portion of the public testimony addressed supplemental conditions. True to his quasi-judicial role, the Examiner will avoid making any recommendations on the supplementary conditions, beyond identifying any legal issues (such as consistency with the City's comprehensive plan) that may apply to those issues and providing information that will help

the Council make an informed decision. In this regard, any comments or conclusions made on the advisability of supplementary conditions should not be construed as findings of fact or conclusions of law.

3. Relevance/Scope of Hearings. The scope of the development agreement hearings is broad and encompasses permitted land uses, mitigation measures, development conditions, vesting periods and all other elements identified as development standards in RCW 36.70B.180(3). The scope is broad only because the issues that can be voluntarily addressed by the YB and the City are broad. The development agreement process arguably can only compel the YB to implement the conditions of approval of the approved master plans.

The YB and City argue that the scope of the hearing is primarily limited to implementing the conditions of approval of the master plans. The Black Diamond and state regulations do not support this position. BDMC 18.98.090 does provide that a development agreement shall implement MPD conditions of approval. However, nothing in this provision states that the development agreement shall be limited to this function. Indeed, the DAs proposed by the City and YB contain several terms that are not necessary to implement the MPD COAs. RCW 36.70B.170-230, which governs development agreements, also does not limit development agreements to implementing conditions of approval. Those statutes are notably silent on the scope of development agreements, merely providing that "*a development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.*' *See* RCW 36.70B.170(1). RCW 36.70B.170(3) defines a development standard to include development restrictions such as permitted uses, mitigation measures, development conditions, vesting and "*any other appropriate development requirement or procedure*".

4. Entitlement. The scope of what can be included in the development agreements should not be confused with what can be required as opposed to requested from the YB. Brian Derdowski made a compelling argument during the DA hearings that the City has no obligation to agree to a DA because the state law that authorizes DAs contemplates that they are voluntary agreements. Black Diamond, however, has altered the voluntary nature of development agreements by mandating them for master planned developments in BDMC 18.98.090.

It is questionable that a court would allow a City to "undo" an MPD approval with the refusal to approve a DA that reasonably contains all necessary implementing conditions. This position becomes even more tenuous if the MPD approval is considered an entitlement. In that situation, the rejection of a DA that reasonably contains all necessary implementing conditions would essentially convert the entitlement of an MPD to a discretionary policy decision.

Mr. Derdowski turns this situation on its head, arguing that since a DA is a pre-requisite to the development of an MPD, and since DAs are completely voluntary, the MPDs must be voluntary as well. That is certainly one factor to consider, but that may not be enough to overcome all of the factors that support a finding that the MPDs are an entitlement, including the detailed review criteria that are typically associated with permit review and the classification of the DA as a Type 4 quasi-judicial decision.

Washington courts do not use the term "entitlement" in assessing development rights. Functionally, the term "entitlement" is defined in this recommendation as development applications that entitle a developer to damages and/or decision reversal in circumstances where the application complies with all permitting criteria but is still denied the permit. If the MPDs and DAs don't meet this definition of entitlement, the Council can refuse to agree to any DA for any rational reason and there would be no liability consequences or potential for their decision to be overturned.

Unfortunately, the law is very unclear in several respects as to whether the MPD approval qualifies as an entitlement. The first place one would look is the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW, which authorizes a court to reverse the denial of a "land use decision" if the permit complied with all permitting criteria. A "land use decision" does not encompass the review of development regulations by the Growth Management Hearings Board. *Coffee v. City of Walla Walla,* 145 W. App. 435 (2008). As the Council knows, the Central Puget Sound Growth Management Hearings Board has ruled that the MPDs are development regulations subject to their jurisdiction. The GMA review process arguably does not create an entitlement because the Hearings Boards do not have the authority to compel a City to approve a development regulation proposed by a private citizen, only to determine whether regulations adopted by the City are consistent with the GMA. *See* RCW 36.70A.300.

The current GMHB ruling on the MPDs supports Mr. Derdowski's position, but there are other laws at play as well. If the MPDs qualify as a permit under Chapter 64.40 RCW, YB would be entitled to damages for wrongful denial of its permit. If the MPDs qualify as a property interest under federal civil rights statutes, 42 USC Section 1983, YB could be entitled to compensation of its federal constitutional rights for wrongful denial of its MPD applications. There is no clear case law that addresses these issues either way for the unique combination of legislative and quasi-judicial characteristics of master plan development applications.

To compound matters, even purely legislative decisions can be reversed by a court if they are highly irrational. More technically a legislative decision must not be arbitrary or capricious, meaning it may not be willful and unreasonable action, without consideration and regard of facts or circumstances. *Tacoma v. Zimmerman,* 119 Wn. App. 738 (2004). In this case the record is replete with rational reasons to deny the MPDs, such as inadequate school funding, uncertain funding of state road facilities and transportation/environmental issues related to separation from major employment centers. Usually those reasons would suffice, but the City in this case is in a disadvantage because it made several contrary findings in its MPD approvals. Given the City's position that everything was fine with the MPDs when it approved them, a court may be inclined to find that the City acted "without consideration and regard of facts or circumstances" in reversing itself by refusing to agree to a DA that reasonably implements MPD COAs.

In short, no one with any reasonable degree of certainty can predict whether or not a court would find the MPDs to qualify as an entitlement. In this recommendation the Examiner takes the conservative route of treating the MPDs as an entitlement for purposes of differentiating between situations where the City can threaten to withhold DA approval if YB doesn't agree to a condition (for implementing conditions) and where it cannot (for supplementary conditions). If the Council finds itself in a position where YB will not agree to a supplementary condition and there is no other avenue for requiring it, it can certainly consider taking the position that the MPD/DAs are not entitlements and withhold approval on that basis.

5. SEPA Substantive Authority. Another critical legal ambiguity imbedded in this case is the authority of the City Council to impose conditions under the Washington State Environmental Policy Act, Chapter 43.21C RCW ("SEPA"). SEPA can be used unilaterally by the City Council to impose conditions outside of the DA. It can serve as a means of requiring YB to comply with conditions it would not agree to within the DA. However, the use of SEPA to address evidence that has already been considered at the MPD hearings is doubtful. If the Council chooses to exercise its SEPA authority to impose additional conditions on the MPD proposals, a conservative approach would be to limit that authority to issues that have been delegated to the DA by the COAs and only in cases where compelling information justifies the mitigation that hadn't been considered during MPD review. Other restrictions to SEPA authority also apply, as discussed below.

The exercise of SEPA authority in this case is different from what the Council and public have probably experienced in SEPA review. In the majority of permitting situations, SEPA mitigation measures are imposed in one of two scenarios: (1) as part of a mitigated determination of significance, used to reduce impacts so that an environmental impact statement is not required; or (2) adopted from the conditions recommended in an environmental impact statement, as was done in approval of the MPDs of this case. The authority to impose mitigation under SEPA goes well beyond these two scenarios. RCW43.21C.060 provides that "any governmental action may be conditioned or denied" pursuant to SEPA. (emphasis added). So long as the conditions in RCW 43.21C.060 are satisfied, the City can condition approval of the DAs under SEPA. This gives the City Council broad authority to unilaterally impose additional requirements upon the YB beyond many of the limitations that apply to the development agreement process. The Council also needs to recognize that the authority to impose SEPA mitigation is highly discretionary, i.e. a court probably won't force the Council to impose SEPA mitigation measures if someone demonstrates significant adverse impacts. At most, it appears that the Council is subject to the deferential arbitrary and capricious standard for declining to impose mitigation. *See* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* Section 18.01(3) (2002).

As previously noted, RCW43.21C.060 attaches some strings to the exercise of SEPA authority, outlined as follows:

a. The mitigation measures must be related to specific, adverse environmental impacts clearly identified in the environmental impact statements of the MPDs. WAC 197-11-660(1)(b).

b. The mitigation measures must be based upon SEPA policies adopted by the City of Black Diamond. WAC 197-11-660(1)(a).

c. The mitigation measures must be reasonable and capable of being accomplished. WAC 197-11-660(1)(c).

The first two requirements will usually be easily met for the DAs. The EISs for the MPDs covers almost every conceivable environmental impact so it should generally not be difficult to link a proposed condition to EISs. The City has also adopted very broad and comprehensive documents as its SEPA policies, including its comprehensive plan, zoning ordinances and shoreline ordinance. *See*

BDMC 19.04.240. It generally will not be difficult to find a policy basis for imposing a condition. The one area above that may prove to be a significant obstacle is the requirement that the conditions be reasonable. In its constitutional analysis of permitting requirements, which under takings and due process encompasses the concept of reasonableness, Washington courts have strictly limited permitting requirements to proportionately mitigating impacts caused by the development. *See, e.g., Isla Verde Intern. Holdings, Inc. v. Camas*, 99 Wn. App. 127 (1999). Since the DA is only required to address the issues delegated to by the MPD COAs, SEPA authority can arguably only be used to mitigate those issues, i.e. impacts caused by the implementing conditions. The City certainly couldn't use its SEPA authority to mitigate MPD wide impacts when reviewing a three lot short plat within the MPDs. The same reasoning would apply to the DA, although as previously discussed DAs can at least potentially address any development impact.

Beyond the express limitations on the exercise of SEPA authority identified above, there is the somewhat open legal issue of to what extent SEPA can be used to revisit past decisions. The necessity of SEPA mitigation was already extensively reviewed in the MPD review process. The FEISs suggested comprehensive mitigation measures and the Council have already determined what MPD-wide SEPA measures are necessary to mitigate MPD impacts. The question arises; can the City impose additional mitigation to address the same concerns, arguments and information provided at the MPD hearings? Does SEPA actually allow the same issues to be brought over and over again, a distinct possibility for the MPDs because of their numerous levels of permitting review?

The available case law on the issue suggests that these multiple reviews are to be tolerated in deference to the regulatory gap filling role assumed by SEPA. SEPA overlays and supplements all other state laws and mandates governmental bodies to consider the total environmental and ecological factors to the fullest in deciding major matters. Adams v. Thurston County, 70 Wn.2d 471, 475 (1993). The most recent case that addresses the issue of whether prior land use decisions preclude the exercise of SEPA is *Quality Products, the Thurston County Board of Commissioners*, 139 Wn. App. 125 (2007), the County Commissioners denied a special use permit application on the basis that a proposed gravel mining operation would adversely affect the Black River and was therefore inconsistent with the permit criteria that the project would not cause substantial adverse impacts to the environment. The YB argued that the Commissioners were barred from making this determination because the SEPA responsible official had already determined that the proposal would not have a probable significant adverse environmental impact in issuing a SEPA mitigated determination of non-significance. The court rejected this argument, pointing out that the MDNS did not constitute approval of the project and that the YB had to comply with all applicable permitting requirements. The court also found it significant that information on impacts to the Black River had not been presented to the County when it issued its MDNS but that it was presented and considered by the County Commissioners for their decision to deny the special use permit application. 139 Wn. App. at 141. *Quality Products* shows that even though review issues in SEPA may be the same as the permit to which it attaches, SEPA and its permit must still be assessed independently, i.e. even though the Council could or should have mitigated all MPD-wide environmental impacts in its MPD approvals, this doesn't prevent the Council from reassessing those same environmental impacts though its SEPA substantive authority in the DA review. It must be noted, however, that the *Quality*

Products court found it significant that the information used by the Commissioners to deny the special use permit hadn't been considered in the prior SEPA review. This suggests that the courts may want to see new information in order to validate SEPA authority on matters that could have been addressed in earlier permit review.

Quality Products is a unique case in that it's the only SEPA opinion that addresses whether a permitting decision can affect the exercise of SEPA authority. In contrast there have been a number of cases where SEPA mitigation has been upheld even though it departs from prior legislative decisions. One of the earlier examples is *Victoria Tower Partnership v. Seattle*, 59 Wn. App. 592 (1990), where the court upheld a SEPA mitigation reducing the proposed height of an apartment building, even though the proposed height was consistent with the height adopted in Seattle's zoning code. One could argue that just as in *Victoria Tower*, the City Council may have found some impacts acceptable in its MPD approvals (analogous to Seattle's zoning restrictions on building height), but upon closer inspection at DA review additional mitigation through SEPA is necessary.

Of course, the distinguishing feature in *Victoria Tower* is that the Council didn't have the apartment complex proposed by the developer when it approved the building heights in its zoning code. In this case the Council is looking at the same project in the DAs that it mitigated in its MPD approvals. Under those circumstances, the court's reference to new information in the *Quality Products* case could be an important factor. If the Council chooses to use its SEPA substantive authority, it should try to limit that exercise to circumstances where information was not presented in the MPD hearings below. That is one of the reasons that the topic summaries below often identify whether information is new as opposed to a repeat of what was produced at the MPD hearings.

6. Limitation on Supplementary Authority. A limitation on supplementary authority that plays a prominent role in the analysis below is that supplemental conditions must be consistent with the MPD approvals. YB can voluntarily agree to reduce the development rights it acquired from the MPD approvals or take on more responsibility than required by the approvals, but it can't agree to terms that contradict the MPD approvals. For example, if the MPD approvals require monitoring of phosphorous levels at Lake Sawyer five times per year, YB can agree to a DA term requiring monitoring six times per year because that still complies with the five time requirement. YB could not agree to a DA term mandating a 2 du/acre density for its implementing projects, because the MPD COAs require a minimum of 4du/acre.

7. Review Criteria. BDMC 18.98.090 provides the only City code standards for approval of a DA. It requires that the COAs shall be incorporated into a DA. Surprisingly, it doesn't appear that any DA clause requires compliance with all COAs, beyond the contract recitals that the DA will ensure that development will be subject to the COAs. One of the recommendations for revision in Section VIII will be to have a clause expressly providing that all MPD development shall be subject to the COAs. BDMC 18.98.090 also requires that the DA shall be recorded and binding on all MPD property owners and their successors. These requirements are met by the provisions of DA 15.1. The most significant standards governing DA compliance are the COAs themselves. Numerous COAs defer MPD permitting compliance issues to the DA. Most of the recommendations for revision in Section VIII are based upon the determination that the DA does not adequately fulfill the requirements of the DA. As identified in Section VIII, the DAs will adequately implement the COAs if the recommended revisions are satisfied. With the recommended revisions adopted, all requirements of BDMC 18.98.090 are fulfilled.

VII. Issues of Concern

Arranged according to development agreement section:

3.0 Prior Agreements

3.1 Effect of Development Agreements

1. Status of Prior Agreements. Two persons voiced concern that earlier progress made through the Black Diamond Urban Growth Area Agreement and the Black Diamond Area Open Space Protection Agreement might not be carried forward under the new agreements. See Exhibits 3-13a (Paulsen) and 3-13c (Cascade Land Conservancy).

Applicant Response: YB stated the MPD open space percentage areas are in compliance with the agreements referenced above (Ex. 139).

Examiner Response: *YB asserts that the agreements have been satisfied and there is nothing in the record to the contrary. The COAs do not require the DA to address the prior agreements. Despite this DA 3.1 provides that the terms of the DA shall supersede any conflicting provisions in the prior agreements as between the City and YB. The City has no obligation to DA 3.1 because it is not required by the COAs. If the Council would like to ensure that the prior agreements remain fully enforceable, they can refuse to agree to DA 3.1. It should be recognized, however, that the terms of the open space agreement will still remain fully enforceable to the extent that they involve third parties who are parties to the agreements. Of course, if the open space agreements have been fully performed DA 3.1 wouldn't make any difference on their enforceability. If the Council has any reservations about DA 3.1it should get a briefing from the City Attorney on what impact it would have on any agreement terms that are still enforceable and how the prior agreements may conflict with the DAs if the obligations as to the City and YB remain intact.*

4.0 Land Use and Project Elements

OVERVIEW

As the Council knows from its review of the MPD, density is a major issue with the MPD proposals. The Council has conclusively set a minimum density of four units per acre in its MPD approvals. It cannot be re-visited in the DA hearings.

Land Use concerns focus primarily on neighborhood commercial within the residential areas, the precision of boundaries of Exhibit L (the Land Use Map), the mix of uses allowed particularly the inclusion of attached units and Accessory Dwelling Units, building height, setbacks, design standards, changing property boundaries, specificity of commercial use square footage , and general opposition to the MPDs.

BACKGROUND

The City's MPD regulations do not regulate bulk, dimensional and use standards traditionally addressed in zoning districts, such as height, setbacks and permitted, conditional and prohibited uses. These details are left to the MPDs and their implementing DAs. As of adoption of the MPDs, the Council has approved the number of dwelling units and amount of commercial space allowed for each MPD, a land use plan map, and a general description of land use categories assigned to the uses depicted on the map that includes some bulk and dimensional standards. V MPD 146 adopted design standards for high density residential use and the COAs also provide requirements for other limited land use issues as well. The DA is the last opportunity the Council has to specify zoning-type standards for MPD development. The DA proposes more detailed bulk and dimensional standards. It also includes a "Design Concept and Land Use Plan", DA Ex. L, which is the equivalent of a Zoning Map with approximate use boundaries and a "Conceptual Site Plan", which conceptually identifies the location of lots and roads.

GENERAL CONCERNS

1. Density is Too High. Seven persons wrote in Ex. 40, 44, 98, 113, 118, 129, and 197, that they were highly opposed to the densities proposed for the MPDs, stating that the densities would cause significant infrastructure problems and that existing Black Diamond residents would have to pay to fix them.

City Response: Bob Sterbank in Ex. 218 states that distilled to its essence, the project opponents' is a collateral attack upon the City Council's 2009 policy decisions to adopt an MPD density standard of a minimum of 4 units per gross acre. These policy decisions are beyond the reach of the Examiner's limited jurisdiction concerning the DAs.

Examiner Response: *LH COA 136 and V COA 131 require a minimum density of 4 du/acre for all implementing projects. All of the requests for lower project densities directly contradict these approved conditions. The Council cannot adopt any DA provisions that would require the lower densities requested above. Theoretically, the Council could ask YB to commit in the DA to not submit any implementing project applications for portions of its project area without violating the approvals, but it is not likely YB would agree to any such arrangement.*

2. Miscellaneous Land Use Issues.

a) Residential use above commercial use. In Ex. 3-13e Peter Rimbos noted that V MPD COA 146 requires that no more than two floors of residential uses above ground floor commercial/office uses are allowed and that this requirement is not in the DA.

b) Alley Loading. In Ex. 3-13i and Ex. 74 Peter Rimbos and Larry Baird questioned why V MPD COA 142, which requires detached dwelling units to be alley loaded, is not addressed in the DA.

c) Preserving views of Mt. Rainier. In Ex 3-13e Peter Rimbos questioned why V MPD COA 147 which requires the orientation of public building sites and parks to preserve and enhance views of Mt. Rainier are not reflected in the DAs.

d) Green Technology. In Ex. 3-13e Peter Rimbos questioned why V MPD COA 143 which requires CC&Rs and green technologies is not reflected in the DAs. Specifically, Homeowners Association conditions, covenants and restrictions (CCRs) or the Architectural Review Committee shall review, but shall not preclude, the use of green technologies such as solar panels.

e) FAR Standards. In Ex. 126 Peter Rimbos questioned why V MPD COA 145 which requires FAR standards is not reflected in the DAs.

Examiner's Response: *V MPD COA 142, 143, 145, 146 and 147 are not required to be included in the DA beyond a general reference that the MPDs are subject to them. All COAs apply to the MPDs whether or not they are included in the DAs and are enforceable. However, BDMC 18.98.090 does require that the MPD conditions of approval shall be incorporated into a DA, suggesting that all COAs should be referenced in the Agreement. This does not require that each condition be repeated verbatim or even summarized, but the DA should provide that YB agrees to comply with all COAs, which it does not as proposed. The Hearing Examiner recommends a general clause requiring conformance to all COA provisions be added to the DA.*

3. Lack of Specificity in Land Use Restrictions. In Ex. 117 Lisa Schmidt and Derdowski (Ex. 40) noted V MPD COA 128 provides that "Approval of the design concept and land use plan (Chapter 3) shall be limited to the plan map (Figure 3-1). All other specifics shall be resolved through the Development Agreement process." They asserted this condition is not met, because all other specifics are not resolved in DA.

Examiner Response: *The general level of detail in the land use restrictions proposed in the DA is sufficient to ensure that project impacts are not deferred to project level review in such a manner that they can no longer be adequately addressed. The level of detail of the land use restrictions is commensurate with those found in zoning ordinances. Specific issues with lack of specificity have been separately addressed in this recommendation.*

4.1 MPD Site Plan

1. Procedural. In Ex. 205 Mr. Derdowski argues that YB wants the DA recognized as a rezone but doesn't want the DAs to be subjected to the same criteria as any other legislative decision.

Examiner Response: *Mr. Derdowski is arguing a variant on what was successfully argued before the Growth Management Hearings Board in the appeals of the MPDs. As the Council is aware, the hearings board ruled that the MPDs are development standards and should have been subject to the public review process that applies to the adoption of development standards. The same argument could apply to the DA as well. The COAs require the DAs to address the zoning standards to which Mr. Derdowski refers. The Examiner has no authority to address the validity of the COAs.*

2. Contiguous Properties. Four commentators noted in Ex. 3-13e, Ex. 3-13iEx 75 and Ex 117) assert that the MPDs violate BDMC 18.98.030(C), which they interpret as requiring all non-commercial properties in the MPDs to be contiguous. The Villages has a unique parcel of about nine acres associated with the isolated commercial area known as the "North Property." In Ex. 32 Robert Edelman notes that BDMC 18.98.030(C) requires all MPD properties to be contiguous except for commercial properties other than neighborhood commercial. He noted the Villages non-contiguous commercial area also known as the "North Property" or Parcel B included a strip of high density residential. This is about 9 acres and would contain approximately 200 DUs. This area is non-contiguous to the MPD and is not intended for commercial purposes. Therefore this land use violates the municipal code.

Applicant Response: In Ex. 139, the Applicant responded the Villages MPD Permit Approval (Ord. No. 10-946) at Condition of Approval No. 128 expressly approves the Villages "Land Use Map" and the Land Use Map included multi-family residential uses on a portion of Parcel B. Because the terms of the MPD Permit Approval's conditions cannot be challenged, this issue cannot be raised or decided in the Development Agreement proceeding. There is no need or basis to revise this exhibit of the Development Agreements.

Examiner Response: *As noted by YB, the City Council has approved the Land Use Plan, which includes the land uses to which Mr. Edelman objects. The issue cannot be issued with amending the MPD approvals. The location of the commercial and non-commercial areas has been approved by the adoption of the Future Land Use Map in LH COA 132 and V COA 128. Those map designations cannot be revisited without amendment to the MPD approvals.*

3. Legend of Land Use Plan. In Ex. 75, R. Edelman noted LH MPD COA 151 requires that prior to DA approval the legend on the approved land use plan must be clarified to differentiate between wetlands, their associated buffers, other critical areas and open space, trails and parks and to incorporate the additional required open space area. Edelman notes this has not been done.

Examiner Response: *The legend does not differentiate between various land uses as required by LH MPD COA 151. This should be done before DA approval as required by Condition 151. In the alternative, the City may be able to amend out the requirement as a minor amendment prior to DA approval.*

4.2 Total Number of Dwelling Units

1. Clustering of Units. The Muckleshoot Tribe (Exhibit 3-13f) expressed a concern that the high densities of the developed portions of the MPD sites would make it difficult to retain trees.

Applicant Response: In Ex. 3-13q, YB responded that the MPDs provide clustering of units to retain large contiguous forested and open space areas. As a result of this significant benefit, there is less opportunity to retain existing trees and vegetation in development areas due the clustered style of development. All future MPD implementing projects will be subject to the City's Tree

Preservation Ordinance as codified in BDMC Chapter 19.30 and significant tree inventories will conducted on a project by project basis. The Black Diamond Municipal Code at Section 18.72.020(E) establishes the sixty percent (60%) requirement for native and non-native naturalized plant species that are drought tolerant.

Examiner Response: *The Examiner concurs in the YB response. Further, there is little room to provide for more vegetative retention within the confines of the MPD approvals. As previously discussed, the MPD approvals require a minimum of four units per acre and also limit development to a relatively small portion of the overall project area via approval of the Land Use Plan. These minimum densities and the Land Use Plan cannot be modified by the DA even if YB were willing to do so. Consequently, the Council has few options to retain more trees and/or vegetation. If this is a priority for the Council, it could confer with staff as to what options are available within the confines of the MPD approvals to add further restrictions to the tree protection ordinance and other vegetation retention measures.*

2. Accessory Dwelling Units. In Ex. 40, Brian Derdowski asserted that the units were not included in the MPD permit approval and not evaluated in the EIS and should be excluded. In Ex. 117, in response to YB comments, Lisa Schmidt said the problem is not due to what they are, but to the fact they were not counted in the EIS, which therefore under reports the impact. She asserts that changes to population have huge environmental impacts, as well as implications in such areas of concern as water supply

Applicant Response: YB (Ex. 139) responded that the ADUs were approved by reference of the Council adopted portions of its land use application.

Examiner Response: *LH MPD COA 132 and V MPD COA 128 limit the total number of dwelling units for each MPD. ADUs are defined as dwelling units by BDMC 18.56.010, which is incorporated by reference in to the DA definition of ADU. Consequently, ADUs should be applied to the total number of dwelling units allowed for each MPD.*

3. YB Approval of ADUs. In Ex. 10, Ron Taylor took issue with DA 4.7.3, which prohibits any property owner within the MPDs from submitting an ADU application to the City without the approval of YB. Mr. Taylor stated this section unduly restricts property owners from exercising a right that should belong to them.

Examiner Response: *The City Attorney can provide an opinion to the Council on the validity of this provision if that is a concern. As an alternative to this provision YB can simply subject ADU applications to its prior approval in its CC&R's. This alternative would remove any need for the City to be involved in the issue.*

4. Attached/Detached Dwelling Units. In Ex 3-13e, Peter Rimbos noted that the Villages MPD application proposed approximately 3,600 detached single family homes and 1,200 attached single-family homes but that the DA authorizes 3,600 single family units composed of single family detached, courtyard homes, duplex, triplex and fourplexes units in addition to 1,200

multifamily units. Lisa Schmidt stated in Ex. 117 that per DA 4.2 (Total Number of Dwelling Units), "single family residential" in the FEIS was based on detached single family and was not approved for the DAs interpretation of attached housing or cottages as listed in this section of the DAs. She stated either housing needs to be redefined, or an updated FEIS needs to be performed.

Applicant Response: In Ex 139 YB stated that contrary to Mr. Rimbos assertions, the BDMC, the MPD Framework Design Standards and Development Guidelines, and the COAs contemplate attached housing within the MPDs. In Ex. 189, YB generally objects to this comment and other comments made by Ms. Schmidt on the grounds that no SEPA appeal is pending. There is no specific response to the issue.

Examiner Response: *The MPD approvals do not hold YB to the mix of attached and detached single family homes it proposed in its MPD application. However, the V MPD COA 128 does authorize the Council to set the specifics of the project's land use standards in the DA. Consequently, the Council can, within its land use policy making discretion, require that the DAs adhere to the attached/detached numbers proposed in the MPD applications. Mr. Rimbos did not assert that the same discrepancy existed for the LH approvals, but the same reasoning would apply to that MPD if it does.*

As to Ms. Schmidt's assertions, the EIS projections are actually higher than proposed by the DAs because the EIS bases its projections on detached single family homes, which have more persons per dwelling unit and a higher trip count than those in attached dwellings.

5. "Target" Dwelling Unit Counts. In Ex 3-13e Peter Rimbos expressed concern the number of dwelling units assigned to each MPD phase in V DA Table 4-8-4 are only identified as approximate "targets" in V DA 4.8.

Applicant Response: In Ex. 218 Bob Roberts responds the Examiner should reject opponents' invitation to rewrite the development agreements in pursuit of unreasonable specificity.

Examiner Response: *The City does not elaborate on Mr. Rimbos argument specifically, rather it is lumped in with other arguments and some important details are overlooked. The Council can require a more precise allocation of dwelling units per phase if it so chooses, such as requiring a DA amendment if the targeted amount is exceeded by more than 5%. The Council may find that more rigorous phase caps are not necessary, given that (as recommended) the Land Use Plan sets the location of the dwelling units, there's an overall cap of dwelling units and there bulk and dimensional standards limit how the dwelling units can be developed.*

6. Affordable Housing. In Ex. 3-13e Peter Rimbos stated the DA does not provide for sufficient specificity on meeting the affordable housing requirements of V MPD COA 138.

Examiner Response: *V MPD COA 138 requires the DA to provide for a phase by phase analysis of affordable housing to ensure that housing provided at affordable housing prices. V DA 11.8 requires the City to do the affordable housing analysis after each phase as required by V MPD COA 138. However, V COA 138 also requires that specifications for MPD affordable*

housing "shall be determined" as a result of the phase by phase analysis while DA 11.8 only requires that the City "may" set specifications for affordable housing for on-going or upcoming phases. While it is recognized that COAs do not require the setting of affordable housing caps at every phase, nothing in the DAs reflects the COA requirement that affordable housing requirements are mandatory at some point during MPD implementation. DA 11.8 should be clarified that affordable housing requirements "shall" be adopted at some point in MPD review and that these requirements may include specified affordable housing measures to apply to implementation projects.

4.3 Total Amount of Non-Residential Development

1. Commercial Split. In Ex. 3-13 Peter Rimbos and Ex. 74Larry Baird note that e LH COA 140 and V COA 136 require the DAs to include a commercial split (commercial, office and industrial) in the DA and the DAs do not address this requirement.

Examiner Response: *The DAs do address the commercial split. V DA 4.3 outlines the commercial split for the Villages MPD: 325,000 square feet of commercial space, 450,000 of office and light industrial with a maximum of 200,000 square feet for light industrial. LH DA 4.3 provides similar information.*

2. Nursery. S. Von Walter commented in Ex. 3-13m that a nursery, one the quality of Molbaks would attract customers for miles around, and make some of the "grumblers" about the MPD growth a little less grumpy.

Examiner Response: *YB is free to place a nursery on its commercially designated properties. Beyond this, portions of the MPDs have been assigned residential and other uses that could not accommodate a nursery use without an MPD amendment.*

3. Commercial Areas. In Ex. 3-13e, Peter Rimbos cited V MPD COA 137 and that it requires that all commercial/office uses (other than home occupations and identified live/work areas) shall only occur on lands so designated. He asserts this requirement should be included in the DAs.

Examiner Response: *The DA contains a Land Use Plan Map, Ex. L, designates commercial areas. This Map limits the areas to which commercial areas can be located as required by V MPD COA 137.*

4.4 PD Site Plan Amendments

1. Minor Amendments. Lisa Schmidt (Ex. 117) claimed that the community should be allowed to consider "minor" changes, because even minor changes can result in heavy impacts (it is unclear in her testimony whether Schmidt was speaking to the DAs or MPDs). In the context of minor amendments, Schmidt stated the City should exercise the right to enforce strict standards where applicable, citing BDMC 14.04.330 – "Director may modify minimum requirements." She reasoned this chapter presents minimum standards for achieving the City's

goals, and that the Director has the authority to increase requirements to protect the public interest on the bases of reports pertaining to threatened water quality, erosion, habitat destruction, protection of uninterruptible services and endangerment to property. In addition, Schmidt spoke to "minor" vs. "major" amendment language, and due to lack of specificity it is unclear.

Applicant Response: The Applicant argued through the MPD approval ordinances, the Council found the MPD consistent with the City's code, the Comprehensive Plan and the GMA (Ex. 189).

Examiner Response: *The review process and standards for the MPDs are governed by BDMC 18.98.100 and cannot be varied by the DA. Minor amendments of the DA are governed by DA 10.4.2, which provides that a minor amendment is a change to the DA that does not materially change the intent and policy of the DA. Minor amendments are subject to the approval of the Mayor and the decision to classify the amendment as minor are appealable to the Examiner. To provide for some public oversight over the minor amendment process, the DA could require that all decisions to classify an amendment as minor be posted on the City's website so that the public has an opportunity to appeal them. Since provisions on the amendment process are a necessary part of DA implementation, the Council can withhold approval of the DAs if it cannot reasonably agree with YB on this issue.*

2. Density Category Increases. In Ex. 117, Lisa Schmidt expresses concern with DA 4.4.I, which authorizes YB to shift MPD residential land use categories (i.e. MPD-L, MPD-M and MPD-H) up or down one level of intensity through a minor amendment to the DA. She asserts that these density should not qualify as a minor amendment, because they effect changes in mitigation, available resources, and the analysis of the FEIS.

Applicant Response: In Ex.209 YB stated V MPD COA 132 and LH MPD COA 137 expressly approved the proposed shift in land use categories provided that the requirements outlined in BDMC 18.98.100 for minor amendments are met.

Examiner Response: *Any minor amendments would ultimately still have to comply with BDMC 18.98.100(A), which prohibits minor amendments that increase the total number of dwelling units authorized for the MPD and would not increase any environmental impacts, amongst other restrictions. Ms. Schmidt did not provide any examples of how allowing the density changes authorized by DA 4.4.1 would change any of the mitigation analysis done for the MPDs nor is any such impact apparent from the minor nature of the amendments, given the restrictions that apply to minor amendments.*

3. Too Much Latitude. In Ex. 10, Ron Taylor asserted LH DA 4.4.4 and 9.2 provide far too much latitude to park and open space boundaries. Vicki Harp expressed similar concerns in Ex. 3-13i. Mr. Taylor asserts that the boundaries can be moved anywhere at any time at the discretion of the developer. Similarly, Lisa Schmidt in Ex. 117 felt that changes in open space boundaries should be processed as major as opposed to minor amendments. And similar to the foregoing comment regarding 4.4.4, parcels can change in size and shape without notification.

Applicant Response: In Ex 209 YB states that contrary to Mr. Taylor's assertions, open space boundary modifications require a minor amendment and shall not modify the overall Open Space requirement set forth in DA 9.1.

Examiner Response: *LH DA 4.4.4 allows changes to open space boundaries by a minor amendment to the MPD so long as the total amount of open space required of the MPD is still satisfied. This amendment process is implicitly required by code, where BDMC 18.98.100(D) generally allows the use of the minor amendment process for open space boundary changes that do not decrease the total amount open space approved for the MPD. Since the DA must be consistent with the City's code, it cannot be used to modify city review processes. However, BDMC 18.98.100(E) also provides that an amendment only qualifies as minor if it doesn't increase any environmental impacts, amongst other restrictions. In order to provide for consistency between the DA and the City's code, it is recommended that LH DA 4.4.4 provide that amendments to open space boundaries shall be processed as a minor amendment so long as all the requirements of 18.98.100 are met. The safeguards of 18.98.100 should ensure that any changes in open space boundaries will not create any adverse impact environmental resources or otherwise adversely affect the public interest.*

DA 9.2 provides only approximate locations of parks. However, the DAs and COAs contain a detailed level implementation of the City's level of service standards, including minimum distances from residents to park facilities and precisely what type and number of facilities, such as parks and basketball courts, are required for each MPD. See, e.g. LH DA Table 9.5. This level of detail is sufficient to ensure that the MPDs will provide parks that satisfy the City's level of service standards.

4.5 Interface with Adjoining Development

1. Interface with Adjoining Development. In exhibit 3-13e Mr. Peter Rimbos questioned why DA 4.5 doesn't include buffers between uses inside the MPD to provide a community that is visually connected through a continuous network of buffers as required by BDMC 18.98.140.B. Mr. Derdowski (Exhibit 40) noted the stipulation in DA 4.5 that it only applies to adjacent "developed" properties but ignores adjacent undeveloped properties.

Applicant Response: Regarding Mr. Derdowski's objection that DA 4.5 applies only to areas where adjacent properties are already developed, YB proposed the following textual modification to the section, shown in strikethrough/underline:

When an Implementing Project application for a Development Parcel along the Project Site perimeter is submitted, and the abutting property outside the MPD to such Development Parcel is already developed on that submittal date not owned by the Master Developer, then the Development Parcel is subject to the section of the MPD Framework Design Standards and Guidelines entitled "Interface with Adjoining Development," which provides guidelines to ensure a transition between the Development within The Villages MPD that abuts Development outside the Project Site but within the City limits.

Mr. Derdowski responded to this proposed revision in Ex. 205, stating that removing YBs responsibility for interface mitigation for all properties save those owned by YB is inappropriate. In their response to Mr. Derdowski (Ex. 245), YB pointed out that Mr. Derdowski misunderstood their intent; the revision applies interface mitigation to all adjacent properties, not only developed properties as the original text stated.

Examiner Response: *Regarding Mr. Rimbos' assertion that interface buffers are required within the MPD by BDMC 18.98.140(B), the Council has already determined that the MPDs comply with BDMC 18.98.140(B) as approved by the MPD ordinances. In its authority to impose land use controls in the DA through V COA 128, the Council could reasonably require the buffers requested by Mr. Rimbos to be included in the DA, if interface buffers within the MPD development are not already required within the MPD by the City's design standards. As for Mr. Derdowski's original objection that interface guidelines would only apply to developed adjacent parcels, the modified language proposed by YB does in fact extend interface guidelines to undeveloped parcels, addressing his concern.*

4.6 Expansion Parcels

1. Construction/Field Office. Robbin Taylor (Ex. 77) testified DA 4.7.1 allows for the use of existing structures on MPD property to be used as construction/field offices, even though streets may not be adequate to handle the traffic generated by them. Ms. Taylor focused her concern about an existing construction office located off of Botts Drive.

Applicant Response: The Applicant stated the testimony was irrelevant to this proceeding (Ex. 189).

Examiner Response: *The Council is free to remove or revise DA 4.7.1 as it reasonably sees fit. DA 4.7.1 already does subject the field offices to City approval, giving the City the ability to restrict the intensity of the field offices to prevent traffic and other problems.*

2. Public Review. Karen Walter of Muckleshoot Tribes inquired in Ex. 3-13f whether expansion parcels would be subject to public review.

Applicant Response: YB in Ex. 3-13q cited DA 2.5. The addition of Expansion Parcels to the MPDs is governed by Sections 10.5 and 12.6.1 (C) of the revised Draft Development Agreement. The Master Developer's request to add an Expansion Parcel must include the location of proposed land use categories and open space and sensitive areas (see Section 10.5.1(C) & (F)(d)). Public notice of the Master Developer's request to add an Expansion Parcel is required per Section 12.6.1(C). The City shall also require SEPA review prior to the addition of any Expansion Parcel to the MPDs (see Section 10.5.2). Any SEPA appeals are governed by RCW Chapter 43.21 C.

Examiner Response: *Public review would be required as outlined in the YB response.*

4.7 Additional Use Standards

1. Conceptual Site Plan. In Ex. 117 Lisa Schmidt also identified problem with the lack of specificity in the MPD conceptual site plan, DA Exhibit A. She noted that DA Sec. 4.1 provides that the lot layouts, building footprints, parking and circulation areas shown on conceptual site plan are only conceptual and may be modified pursuant to Implementing Projects (e.g., subdivisions and binding site plans) without an amendment to the DA.

Applicant Response: In Ex. 209, YB responded pursuant to V MPD COA 132 and LH MPD COA 137 residential land use categories can be adjusted one category up or down through an administrative approval process provided they also otherwise meet the requirements for minor amendments outlined in BDMC 18.98.100.

Examiner Response: *Ms. Schmidt again raises a valid point. If the conceptual site plan can be altered to any degree at the discretion of YB, there is no point in including it in the DA. It's inclusion only misleads the public into expecting a particular site design to which YB has no obligation to adhere. The site plan has utility as an example of what YB could do with the property, but it has no regulatory utility and should not be in the DA unless the Council provides some level of compliance with it. The MPD standards in the BDMC do not appear to require a conceptual site plan. The Council should make sure that the locations of streets are identified in the DA that have a classification greater then neighborhood collector as anticipated by BDMC 18.98.040(A)(1)(c), but beyond this the conceptual site plan does not appear to be required or necessary. The site plan should be removed[2] from the DA unless the Council requires some level of compliance with the plan.*

2. Land Use Map - Neighborhood Commercial. There were six comments regarding the land use map. In Ex. 13-3(e) Peter Rimbos stated that the 40,000 square foot neighborhood commercial uses authorized by DA 4.7.2 are not compatible with the residential use districts in which they're proposed.

Background: V MPD COA 128 and LH MPD COA 132 authorize "corner-style neighborhood" commercial uses in the MPDs residential land use categories. The COAs require the DAs to define those uses. DA 4.7.2 authorizes all uses allowed in the City's Neighborhood Center zoning district, which includes supermarkets and grocery stores up to 40,000 square feet.

Applicant Response: In Ex. 208 YB responds that V MPD COA 128 and LH MPD COA 132 state "corner-style neighborhood" commercial uses may only be allowed in residential land use categories through a minor amendment processes. DA 4.7.2 limits grocery stores to 40,000 square feet.

Examiner Response: *Whether or not to allow grocery stores up to 40,000 square feet in residential areas is purely a policy choice for the Council. The Council should keep in mind that*

[2] The site plan is also used to set the approximate boundaries of open space areas as outlined in LH DA 4.4.4, but it appears that the Land Use Plan Map. DA Ex. L, could be used for this purpose.

the neighborhood commercial uses authorized for the MPD residential districts by the DAs are uses reserved for a commercial district in its Zoning Code. The only regulatory control over the placement of these uses in the residential districts is the DA requirement for a minor amendment. If the Council chooses to retain the neighborhood commercial uses proposed by the DAs, it may wish to subject those uses to a conditional use approval process in addition to minor amendment approval. Since the DAs specifically identify the approval process for neighborhood commercial uses, it is reasonable to conclude that the COAs did not anticipate the DAs to add another review process and YB would have to voluntarily agree to any additional review process.

3. Land Use Plan. In Ex. 117, Lisa Schmidt addressed DA 4.4.8, which adopts the Land Use Plan for the MPDs, the equivalent of the City's Zoning Map in its Zoning Code. Ms. Schmidt noted that the Land Use Plan shown in Exhibit "L" was not a specifically surveyed map and that the acreage of any Development Parcel may be increased or decreased concurrent with the City's processing of an Implementing Project application without an amendment to the MPD Permit Approval or this Agreement. This needs to include a limit to the possible inaccuracies mapped in order to remain in compliance with the MPD.

Applicant Response: DA 4.4.8 does not alter the land use map, but merely recognizes the approximate nature of the stated acreages and provides a process to adjust the acreage of a given Development Parcel to adapt to realities on the ground. In no case may the adjustment of any parcel's acreage increase the total dwelling units or commercial square footage (Ex 139).

Examiner Response: *Ms. Schmidt has a valid concern over the uncertainty of the size of these use districts. Zoning Maps tend to have significantly more precise boundaries, but this is largely because they can use existing roads and the lots of developed subdivisions as boundaries. It would be somewhat of an unnecessary burden to require YB to survey the boundary lines and then have to accommodate its development proposals to those artificial boundaries, especially when topographical features and other site constraints may make the boundaries impractical for various types of development at the implementing stage. It is recommended that the DA require conformance to the proposed Land Use Plan at the level of detail depicted in the plan, with the added requirement that the "approximate acreage" assigned to each category in the legend of the Plan may not be altered by more than 5% without an MPD amendment.*

4.8 Process to Track Total Dwelling Units and Floor Area

1. Accuracy of Phase Unit Counts. In Ex. 117 Lisa Schmidt stated LH DA Table 4-8-4 Target Unit Count by Phase gives a total dwelling unit count of 1085 for phase 1A and 1B. The MPDs listed 880.

Applicant Response: In Ex.189 there is a general objection to Ms. Schmidt's statements that she lacks authority to change any MPD condition, but there is no specific response to this issue.

Examiner Response: *The numbers of units per phase listed in the LH application were not adopted into the MPD approvals and do not need to be followed in the DAs. The MPD LH Application (12/31/09) lists on page 9-4 and 9-5 a total of 1050 units in Phase 1, not 880. There*

is a minor discrepancy of 35 units in the count between the DA and the MPD for phase 1. There is no discrepancy in the total count for all of the phases.

5.0 Bulk, Landscape and Sign Standards

5.1 DRC Review Required for Design Guidelines and Standards

1. Design Standards. In Ex. 3-13e Peter Rimbos asserts that the DA doesn't include project specific design standards as required by V MPD COA 135.

Examiner's Response: *Project-specific standards are outlined in the DAs as Exhibit H.*

2. Property Boundaries. There were four comments regarding property boundaries. In Ex. 3-13i, Vicki Harp expressed concerns about the MPD design standards as they relate to adjoining development.

Examiner Response: *DA 4.5 requires MPD perimeter development to comply with the section entitled "Interface with Adjoining Development" of the MPD Framework Design Standards and Guidelines. Given the comprehensive nature of these design standards, the Council may not be able to impose additional requirements through the DAs without the consent of YB.*

5.2 Dimensional Standards

1. Setbacks. In Ex. 74 and 126 Larry Baird and Peter Rimbos noted that Table 5-2-1 in LH DA authorizes front yard setbacks of 10 feet yet the BDMC 18.30.040 requires a 20 foot setback for a minor street and 25 feet for a major street.

Examiner Response: *BDMC 18.30.040 only applies to the R-4 and R-6 zoning districts. Given the open space and other amenities of the MPD district, the comparatively smaller setbacks are justifiable from a policy standpoint. As a policy decision, the width of the setbacks is largely left to the reasoned discretion of the Council. In the MPD approvals the Council did not adopt the setbacks proposed by YB in its land use application so it is free to require setbacks of greater width in the DA if it so chooses.*

5.4 Signage Standards

1. Signage. On the subject of signage, Robin Taylor (Ex. 77) challenged the final sentence of DA Sec. 5.4.3, which provides that the City may enforce sign standards adopted by the Design Review Committee. Ms. Taylor argued that the City has no authority to enforce privately adopted sign standards.

Applicant Response: The Applicant responded specifically to Ms. Taylor's concerns by noting the DA specifically allow the City to enter onto the MPD property and enforce private signage issues at the City's discretion. The Applicant further noted the MPD sign programs will comply with the City's applicable code, BDMC 18.82.060(B) and (C) (Ex. 139).

Examiner Response: *Ms. Taylor makes a valid point. DA. 5.4.3 authorizes a private committee (the design review committee) to formulate sign standards and then the City to enforce those standards. Sign standards qualify as development standards that must be approved by ordinance by the City Council. See RCW 35A.63.100. A privately adopted sign standard would not be a legally adopted City regulation. The City cannot enforce legally invalid standards. The City Council has several options to correct the situation. It could have the DA provide that the City would have the authority to adopt any sign standards of the design review committee and that those standards would not be subject to the vesting provisions of the DAs. Note that the City Council could not otherwise apply those standards to the MPDs because the DA vests the sign code in effect on June 28, 2009, per DA 15.1. Another option would be to exempt the sign code entirely from vesting or to limit the exemption to specific types or categories of signs, such as signs located in residential areas.*

5.5 Landscape Standards

1. Landscaping Installation. Mr. Brian Derdowski expressed concerns with language in DA Section 5.5.7 in Exhibit 40 and 138, as well as his verbal testimony. He asserted Section 5.5.7 would allow the developer to delay installation of landscaping for up to three years resulting in visual impacts.

Applicant Response: YB responded to this issue in exhibit 139, stating that DA 5.5.7 in fact requires bonding to ensure that landscaping is maintained for three years. They do agree that DA 5.5.8 would allow a delay in landscaping installation. However, they argue that such an allowance was negotiated with the City expressly to prevent impacts to that landscaping from continuing construction in the vicinity.

Examiner Response: *DA Section 5.5.7.B discusses maintenance requirements for three years as YB asserts. Likewise, DA 5.5.8 allows a six-month delay in landscaping installation for parking lots (if bonded) and an unspecified delay for landscaping in right-of-ways (again, if bonded.). There are no COAs or Findings of the MPDs which apply to this issue. Likewise, landscaping requirements of the BDMC do not include allowances for delay.*

While DA 5.5.8 allows for delays in the installation of certain landscaping, required bonds will ensure that the landscaping is constructed at some point. Furthermore, no new information has been provided that such delays will have any significant visual impact other than in one commenter's personal opinion. As an implementation of land use standards through V COA 128, the Council is free to require additional reasonable landscaping standards if it so chooses.

2. Mast-Producing Species in Landscape Plans. Brian Derdowski (Exhibit 40) asserted that V and LH S 5.5.2 fail to establish the standards for mast-producing species required by the MPD permit approval requirements.

Applicant Response: YB responded that DA 5.5.2 requires that prior to the approval of any landscape plan for an Implementing Project, the City's Director of Natural Resources and Parks

must review such plan for compliance with FEIS mitigation measures that protect mast producing species (Ex. 139).

Examiner Response: *V MPD COA 124 and LH MPD COA 129 requires landscaping plans shall include mast-producing species and "other native, preferred vegetation as may be specified in the development agreement" to be used to mitigate for reduced food sources resulting from habitat reductions when adjoining wetlands buffer or for wetland enhancement plantings. The COAs further require the DAs shall specify a process by which such landscape plans are reviewed by the City's Director of Natural Resources and Parks. The DAs incorporate this requirement without much further detail and do not identify "other, native preferred vegetation" as authorized by the COAs. It is not apparent from the record why any additional implementation details are necessary, but since the implementation plan is expressly authorized by the COAs the Council is free to add implementation measures to the DA it finds reasonably necessary.*

3. Wildlife Forage Preferences. Bortleson (Exhibit 113) asserted the Compliance Matrix (Staff Report, June 2011) does not indicate V MPD COA 123 has been addressed, and the DA needs to detail plant species selection as wildlife forage preference for enhancement areas. V MPD COA 123 states, "Wildlife forage preferences shall be of primary consideration in plant species selection for enhancement areas."

Applicant Response: YB responded this COA requires no action in the DA. Compliance with the condition will be reviewed by City Staff at the time an implementing Project application is submitted for approval (Ex. 209).

Examiner Response: *The COAs do not require the DA to address the requirements of V COA 123. The Council would have to acquire the voluntary agreement of YB to implement V COA 123 in the DA.*

4. Landscaping Plans. Bortleson (Exhibit 113) and Morgan (Exhibit 143) asserted the DAs are insufficient because they fail to provide for a review of landscape plans by the Director of Natural Resources.

Applicant Response: YB responded in Ex. 209 that MPD S 5.5.2 does "specifically require landscaping plan review by the Director of Natural Resources prior to approval".

Examiner Response: *DA 5.5.2 requires landscape approval by the Designated Official, not necessarily the City's Director of Natural Resources and Parks as asserted by YB. The Designated Official must review the landscape plan with the Director of Natural Resources and Parks to consider compliance with V MPD COA 124 and LH MPD COA 129 to ensure that the plans contain mast producing species as discussed in a prior Examiner response above. Within its authority to require add land use restrictions to the DAs under V COA 128, the Council can require the Director of Natural Resources and Parks to approve the landscape plans if consistent with City code.*

7.0 Water, Sewer and Stormwater Utility Standards

7.1 General Requirements

1. Infrastructure Details. Several exhibits concerned a perceived lack of detail in infrastructure plans, including stormwater, water supply, and sewer. See exhibits 3-13p, 3-13q, 52, 68, 75, 108, 113, 117, 144, 215, and 253 as well as the verbal testimonies of Ms. Nancy Rogers, Mr. Dan Streiffert, Ms. Peggy Sperry, Mr. Steve Heister, Ms. Patricia Stumpton, and Ms. Melanie Gauthier. Opponents to the MPDs state that sufficient detail is not available for the Hearing Examiner to determine that the conditions of approval for the MPDs and the mitigation requirements of the FEISs have been met. Specific concerns include:

a. Timing of storm drainage reports;

b. Timing of future stormwater infrastructure improvements;

c. Location, specific designs, and constraints (e.g. critical areas) of the proposed regional stormwater facility;

d. Specific designs of stream outfalls and other stormwater controls;

e. Exact location and type of all stormwater infrastructure;

f. Exact location and type of all water supply infrastructure;

g. Specific measures related to stormwater quality and quantity;

h. Sufficient detail to show consistency with the Municipal Code;

i. An overall grading plan (stormwater runoff details);

j. Description of standards for sewer design, consistent with King County requirements;

Other commenters simply mentioned general desires that the DAs include greater detail for infrastructure development.

Applicant Response: In its response to this issue, the Applicant pointed out that the detail provided in the DAs is sufficient for the Hearing Examiner to find those documents adequate and complete and that final design/location/timing of such improvements is a function of later implementing project approvals, not the DAs (Ex. 209).

City Response: Mr. Daniel Ervin, the City's Engineering Consultant, added that the language in the DA is sufficient to retain the City's control on the final placement and design of future infrastructure improvements in order to ensure that these improvements are adequate and meet the requirements of the conditions of approval for the MPDs, regardless of the specifics provided

in the DAs (Ex. 215). The City supports the position of the Applicant and further adds that many of the requests for additional details are addressed by existing conditions to the MPD approvals (Ex. 218).

Examiner Response: *The level of detail in the DAs is consistent with that required by the MPD COAs. COAs related to stormwater management include LID practices, restrictions on roof/drainage types, and compliance with NPDES permits, and allowances for deviations from stormwater facilities listed in the EISs (Villages COAs 58, 67-68, 70, 77; Lawson Hills COAs 55, 69-70, 73, 80). The requirements of COA 58/55 are addressed in Section 7.2.5 of the DAs. The requirements of COA 67/69 are addressed in Section 7.4.4.A.6. The requirements of COA 68/70 are addressed in Section 7.4.4.A.3. The requirements of COA 70/73 are addressed in Section 7.4.4.A.2. The requirements of COA 77/80 are addressed in Section 7.4.2. The requirements of all these COAs have been met.*

Regarding concerns 3a through 3g and 3i above, these requests for additional details in the Development Agreements are based largely on implied disbelief that the environmental and other effects of the MPDs have been adequately addressed. However, no new technical data or expert testimony has been provided (save for that discussed in the other concerns here) that would indicate that the City's original approval of the MPDs was inappropriate. The concerns raised here are matters that can be addressed through the City's stormwater regulations at project implementation and do not need to be addressed at DA review.

As for concerns expressed by Ms. Gauthier, asking for a description of standards for sewer design consistent with King County requirements, the DAs address sewer standards specifically in Section 7.3.2. 7.3.2 expressly provides that Black Diamond design standards do not apply to sewer facilities within King County jurisdiction. Further, no sewer infrastructure is planned by the MPDs outside the City's incorporated boundary, save for limited collection lines serving houses in the portion of the Lawson Hills development that lies outside the City limits. There is nothing in the record to suggest that KC standards may create inconsistencies with the proposed sewer plan that necessitate further elaboration of design in the DA, nor would it be reasonably expected that the difference in regulations would create such a problem. No additional specificity in sewer design is recommended for the DAs.

2. Infrastructure Standards Deviations. Two exhibits concerned language in the DAs allowing deviation from engineering standards and substitution of other stormwater infrastructure than that described previously for the MPDs. See exhibits 3-13e and 117. Commenters were concerned that this would preclude public input on the approval of such changes.

Examiner Response: *The DAs allow deviations from engineering standards only as already authorized in the City's adopted Engineering Design and Construction Standards. This is an existing process that has not been modified by the DAs.*

As for substitution of infrastructure, V MPD COAs 66 and 77 allow for deviation from the City's Comprehensive Plan and the facilities described in the EIS when other technologies are

available that are functionally equivalent. Similarly, the LH MPD includes COA 80, which stated the same. Section 7.4.2 of the DAs allows alternate means of achieving stormwater service through a Utility Permit when justified by a technical analysis and risk assessment. This language is consistent with the deviations authorized by COAs 77 and 80. No revision to the language is recommended.

3. Infrastructure Inspections. Section 7.1.5 of the DAs, requiring inspection of infrastructure improvements within one business day of the request for inspection. See exhibits 117, 138, 139, and 197. The commentators stated this requirement is inappropriate and places an undue burden on the City.

Applicant Response: The Applicant responded to this issue in exhibit 139, arguing that the one day requirement was negotiated with the City and that the City was the proper entity to determine if that was adequate, not the commenter.

Examiner Response: *The Examiner agrees City staff is free to determine whether it wants to assume this type of responsibility. It should be recognized that a large portion of the concerns raised during the DA hearings could only be considered because the DAs provide an opportunity for the Applicant to agree to mitigation it would otherwise not be compelled to provide. The same applies to the City. By providing "extras" such as providing for expeditious reviews, it is in a better position to negotiate extras from the Applicant. It should also be noted that the provision in question, DA Section 7.1.5, only requires that "the City shall make a reasonable effort" to conduct the inspection within a day. As qualified, 7.1.5 does not set an unreasonable burden on the City.*

4. Water Quality Review Committee. Cindy Wheeler asserted in verbal testimony that the Water Quality Review Committee required by COA 85 is required to provide input on the DAs.

Applicant Response: In its response to this issue (Ex. 139), the Applicant stated it intended to form the committee within 30 days of the approval of the DAs.

Examiner Response: *COA 85 (The Villages) and 86 (Lawson Hills) do not require or authorize the committee to provide input on the contents of the DAs.*

7.2 Water System Standards

1. Private Water Systems. Five exhibits dealt with perceived potential impacts to private water systems adjacent to the MPDs. See exhibits 3-13h and 78 as well as verbal testimony by Mr. Max Beers, and Mr. Gil Bortleson. Concerns centered on water quality impacts to those property owners whose water sources are located in the vicinity of the MPDs and concerned both stormwater impacts to those groundwater sources (runoff from construction) and long term water quality impacts related to infiltration of pollutants into the sources of those private water systems.

Applicant Response: In their response to this issue (Ex. 212), the Applicant stated that the original EISs for the MPDs found that impacts to adjacent private water systems would not be significant and that it is inappropriate to reopen this issue for the DAs, as supported by the Findings of Fact. This issue was addressed by the City in the original EISs and MPD approvals.

Examiner Response: *Potential impacts to springs, aquifers, and sources of water (wells) were analyzed and presented in Appendix D of the Villages EIS (pp. 7-8 through 7-12). It was the finding of that report that no measurable impact would occur to ground water resources and no additional mitigation was required. This conclusion was further documented in the EIS and FOF 19 of the Villages and Lawson Hills MPD approvals, which expressly stated that the MPD would avoid any risk of adverse impact to private wells and springs. The same analysis and conclusions were recorded for the Lawson Hills MPD permit approval (Ordinance 10-947, FOF 19; Lawson Hills EIS, Appendix D, pp. 71, 73).*

The concerns expressed over the proposed project consist of personal testimony by local residents and anecdotal evidence and do not provide any new information that wasn't already considered by the City in approving the MPD. Conversely, the City's finding of no significant impact to water systems, including private wells and springs, is based on technical reports and analysis provided during the preparation of the two EISs for the MPD permits. The MPD conditions do not require that private wells be addressed in the DAs. The Council would have to acquire agreement from the developer to further protect the private wells in the DAs.

2. Water Supply. Several concerns were raised by commenters in regards to adequate water supply to the MPDs. See exhibits 3-13f, 3-13q, 117, 120, and 197 as well as the verbal testimony of Ms. Melanie Gauthier. Comments centered on a number of issues, including:

a. General belief that water supply is inadequate (Ex. 120, et al.). Certificates and/or other additional "proof" showing adequate water supply should be required prior to approval of the DAs (Ex. 117, 138, et al.).

b. Perceived inconsistencies in population projections for the MPDs between the FEISs and the DAs preclude a finding of adequate water supply (Ex. 197).

c. New wells within the MPD areas should not be allowed (Ex. 3-13f).

d. More specific information is required in the DAs regarding the Water Supply and Facilities Funding Agreement (testimony of Ms. Melanie Gauthier).

e. Additional detail as to the location and design of reservoirs on the MPD sites is required as well as the location/status of additional sources of water (ex 117).

Applicant Response: The Applicant responded to the assertion that adequate water supply is available; stating that water supply was available by right (Ex. 3-13f). The Applicant responded to the new wells concern in exhibit 3-13q, stating that water supply rights are currently held for the MPDs via the Water Supply and Facilities Funding Agreement (WSFFA) and that they do not

intend to install any new wells. Any water that could not be served by their existing rights would be purchased from the County via the Tacoma intertie (Ibid.).

Examiner Response: *Both EISs found that the City's current water entitlement (both springs and the Tacoma intertie) were more than adequate to serve the MPDs (Villages EIS, p. 3-37; Lawson Hills EIS, p. 3-36). FOF 19 of both MPD approvals identifies the sources of water supply but makes no determination that water supply is adequate. More important, neither the EIS nor the MPDs conclude that water will be available at the time project permit applications will be submitted for approval.*

The DAs contain specific information regarding water availability in Section 7.2.1, including reference the rights to 1.08 million gallons per day granted to the Applicant by the "Three Party Agreement" between Plum Creek Land Company, Black Diamond Associates, Ltd., and Palmer Coking Coal Company (dated August 8, 2003). Furthermore, the DAs currently state, connections are allowed via the WSFFA until such time as that capacity is reached. Lastly, the DAs include the statement: "Any Implementing Project application process that calls for a certificate of water availability shall be satisfied by reference to this Agreement."

No State or local law, including MPD permitting standards, requires that the DA certify adequate water supply. As such, requiring that the DAs not be approved without "proof" that adequate water exists is inappropriate. This would include the exact location and design of reservoirs, the possible requirement for new wells, or a description or analysis of the WSFFA. As for the assertion that population projections have bearing on water usage, this issue is moot. Standard City and County practice for water adequacy determinations utilize Equivalent Residential Units, not population. ERUs are a function of overall single-family water usage in the City, divided by the number of single-family connections (Black Diamond Water System Plan, p. 3-2).

It is recommended that the Council remove the provisions in DA 7.2.1 that nullify any project level requirements for certificates of water availability. As previously noted, no findings have been made in the MPD/EIS hearings that water will be available at the time of project implementation. The EIS only concludes that water will ultimately be available for project build out, but makes no assurance that water and supporting facilities will be available as implementing project applications are filed. Also, RCW 36.70B.170(1) requires DA provisions to be consistent with local development standards. If any Black Diamond regulations require a certificate of water availability at project implementation, this requirement cannot be waived by the DA.

3. Water Conservation. Several exhibits requested additional requirements for water conservation and mitigation in the DAs. See exhibits 3-13e, 52, 117, 139, and 218 as well as verbal testimony by Ms. Peggy Sperry. Comments included the following:

a. DAs should "ensure" that water savings targets are met prior to approval of the DAs (Ex. 52). Inadequate details are provided to ensure 10 percent water use

reductions required by the BDMC and conditions of approval 55 (Lawson Hills) and 53 (the Villages).

b. Water reduction measures should be required regardless of whether the MPDs meet the mandated 10 percent reduction in water usage (testimony of Ms. Peggy Sperry).

c. Monitoring water conservation/usage at the completion of 500 homes is inappropriate as those homes may be unoccupied. Monitoring at 500 occupied homes would be more effective (Ex. 3-13e, 52, 117 and testimony of Ms. Peggy Sperry). In exhibit 3-13e, the commenter went further, asking that the water usage be averaged over six months, rather than taken for one peak week.

Applicant Response: The Applicant responded directly to the testimony of Ms. Sperry in Ex. 139 by proposing additional language for Section 7.2.6 of the DAs[3]. These requested changes are shown below in underline/strikethrough:

> Pursuant to Condition of Approval No. 54 of the MPD Permit Approval, following the City's issuance of a certificate of occupancy for or final inspection of the 500th Dwelling Unit, a representative block of homes, representing 5% of the total (25 Dwelling Units), will be selected by the Designated Official from the different home types.
>
> . . .
>
> If the data results show water use of any particular Phase has not been reduced by at least 23 GPD (10% below the City's current existing City use standard of 230 GPD), then an updated mitigation plan reasonably acceptable to the City will be developed by the Master Developer at that time to bring the future Development within the required standard and to offset any excess water usage from prior Development that did not meet this standard.

City Response: The City gave a general response to those wishing the hearing examiner add additional conditions or requirements for the MPDs via the Development Agreement process (Ex. 218). Their argument is that the Hearing Examiner does not have jurisdiction to revise or request revision to the City's adopted conditions of approval for a given project.

Examiner Response: *Before responding to citizen concerns on water conservation, a major flaw in the conservation plan needs to be addressed. The Water Conservation Plan proposed by the Applicant has conservation targets that are probably substantially higher current average water use. If the Applicant achieves its conservation targets, MPD residents will be using water at a rate that is more than 10% above the rate of usage by other Black Diamond residents. The Applicant's conservation plan has been expressly approved in COA 53/55. However, the COAs provides some room for the City Council to set conservation targets that actually conserve water.*

[3] Note, Ex. 139 incorrectly refers to Section 7.2.5, but the text quoted is from 7.2.6, which is referenced herein.

The approved water conservation plan sets conservation targets that are considerably above the historical water use of Black Diamond residents. P. 8-3 of the Applicant's MPD applications and DA 7.2.5 set the baseline usage figure as 230 gpd per ERU. DA 7.2.5 requires the Applicant to reduce that 230 gpd to 207 gpd to meet the 10% water conservation reduction requirement. The 230 gpd figure is taken from the City's Water System Plan, where it is used to project future water needs. The water system plan acknowledges that the 230 gpd figure is a conservative (high) amount. The average gpd per ERU for water system users for 2005-2007 in the water system plan is 187 gpd per ERU. This was the most current historical data available in the plan. In short, the 10% "reduction" required of the Applicant in its water conservation plan is more than 10% higher than the average daily use of the City's water system, at least as computed from 2004-2007.

Although the water conservation plan proposed by the Applicant is expressly approved in COA 53/55, the Applicant's plan does not have to be construed as setting a conservation target of 203 gpd as set by the DA. COA 53/53, using the language of BDMC 18.98.190(B), requires that the DA shall address "the impacts if the required savings targets of 10% less than the average water use in the City by residential uses at the time the MPD was submitted are not achieved". It is noteworthy that the quoted language does not use the 230 gpd figure proposed by the Applicant for a conservation baseline, but still refers back to the "average water use" baseline required by BDMC 18.98.190(B). Consequently, it is reasonable to interpret COA 53/53 as not including the Applicant's use of 230 gpd as a baseline in the approval of its conservation plan. Further, it is obviously absurd to conclude that 230 gpd qualifies as "average water use" for purposes of water conservation, when a 10% "reduction" is still more than 10% above historical average use. It is recommended that an accurate average use be used as a conservation baseline, either as computed in the water system plan or more current data reflecting actual average use at the time the Applicant submitted its MPD applications. The conservation measures proposed by the Applicant may well not be sufficient to meet this more accurate 10% reduction goal, so it will have to update its conservation plan after the effectiveness of its plan has been monitored as required by COA 53/55.

As to Ms. Sperry's comment that the Applicant's conservation plan should reduce employ conservation measures even if it meets the 10% target, COA 53/56 have expressly approved the Applicant's conservation plan and the plan provides identifies what measures are mandatory (generally those measures specifying water conservation plumbing fixtures) and what measures are discretionary (generally outdoor measures such as limiting the amount of lawn). The mandatory provisions remain in place even if the 10% target is reached. Beyond this, the discretionary measures cannot be converted to mandatory use in the DA unless authorized by the Applicant.

As to Ms. Sperry's comments on adequacy of monitoring, the DA provides a reasonable mechanism whereby the City can require an updated conservation plan, subject to approval of the City, which requires additional measures to bring the MPDs within the required 10% conservation target.

As to the concern that monitoring includes only occupied dwellings, it appears that the commenters are of the impression that while the trigger for the monitoring is 500 occupied dwellings, the sample selected for that monitoring might include unoccupied homes. This is an issue with verbiage, not the actual requirement. It is recommended that the wording of this requirement be modified to make it clear that homes selected for the sample should be occupied homes. As for the revisions requested by the Applicant, they would move the trigger for monitoring back to the issuance of a certificate of occupancy. Since there can be a time lag between the issuance of that certificate and the actual occupancy of a given home, it is recommended that those changes not be made.

4. Covington Water Service Area. Several exhibits concerned the possible conflict between the City and the Covington Water District regarding water service to a 98-acre portion of the Villages MPD. See exhibits 25, 50, 52, 75, and 108 as well as verbal testimony by Mr. Steve Pilcher, Mr. Max Beers, Ms. Peggy Sperry, and Ms. Gwenn Maxfield. Exhibit 75 stated that the Hearing Examiner cannot find that the DAs satisfy the V MPD COA 46 through 54 until the water service boundary issue is resolved (Ex. 75).

Applicant Response: In their response to this issue, the Applicant provided language for a new Section 7.2.7 of the Villages DA to address the fact that the City may not be the proper water purveyor for part of the project (Ex. 139). The Applicant goes on to state that the City will provide a request for the same language – though no such City support for the new language provided by the Applicant has been received by the Hearing Examiner. Likewise, neither the Covington Water District nor any other commenter has responded to the proposed changed to the DA language.

The changes for the Villages DA consist of the following new text to be inserted immediately following Section 7.2.6:

> Section 7.2.7
>
> This Agreement governs MPD Development and, as such, nothing in this Agreement shall have any effect on, nor constitute legal support for, any right of either the Covington Water District to provide water service to that portion of the MPD Development lying within Covington Water District's water service area boundaries as shown in the South King County Coordinated Water System Plan (SKCCWSP), or the City of Black Diamond to provide water service to that same area as shown in the City's Water System Plan.
>
> All MPD Development that is located within Covington Water District's water service area boundaries and that is ultimately connected to and physically served by Covington Water District facilities shall comply with the District's adopted standards, procedures and system extension requirements for water service and connection to District facilities.

City Response: According to the City, this dispute is currently under negotiation (verbal testimony of Mr. Pilcher and Ex. 218). However, the South King County Coordinated Water