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From: Kristi Beckham <KBeckham@Cairncross.com>
Sent: Monday, December 29, 2014 4:53 PM
To: Nancy Rogers; MDRT User; Andy Williamson; 'olbrechtslaw@gmail.com'
Subject: RE: Yarrow Bay Reply materials, Plat 2C PLN 13-0027 (Email 3a2 of 3)
Attachments: Pages from Pages from scan_20141229154717 Reduced File Size Part 3a2.pdf

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Attached is email 3a2.

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From: Kristi Beckham
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)

Attached is email 3a1.

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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,

CH& Nancy Bainbridge Rogers

Attorney

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the Internal Revenue Code or (b) to promote, market, or recommend to another party any transaction or matter addressed herein. Please be advised that if you use a public or employer-provided computer or workplace device or system, then there is a risk that your email correspondence may be disclosed to your employer or other third party.

1 System Plan indicates the area as served by the Covington Water District (Ex. 50). In its
2 response to testimony, the City asserted that it is not the jurisdiction of the Hearing Examiner to
3 make a determination as to appropriate water service (Ex. 218). Furthermore, the City asserted,
4 Covington Water District does not hold a franchise to install water supply infrastructure in this
area. Lastly, the City argued, the City's adopted Comprehensive Water System Plan, approved
by the County, indicates that the City would provide water service to this area.

5 **Examiner Response:** *The COAs do not require that the water purveyor be correctly identified*
6 *in the DA, nor is it necessary to address water system requirements at this level of project*
7 *review. However, there are provisions in the DA that would conflict with the jurisdiction of the*
8 *Covington Water District if the District does in fact have jurisdiction over part of the MPD*
9 *project area. The language proposed by the Applicant falls short of remedying the situation,*
10 *since it still leaves DA provisions that could not be enforced against the Covington Water*
11 *District. For example, DA Section 7.2.2 requires that project water facilities comply with City*
12 *design standards and that they become part of the City's system upon completion. This provision*
13 *would require modification as well to allow for Covington Water District's possible service to*
14 *part of the MPD. In order to more globally address any conflicts with the Covington Water*
15 *District, it is recommended that the following sentence should be added to Section 7.2 of the DA:*
16 *"The DA shall not apply within the Covington Water District to the extent that this section*
17 *unlawfully conflicts with the authority of the Covington Water District."*

18 5. Diamond Springs Water Association. In their comments on the MPDs, the Diamond
19 Springs Water Association asserted that the Villages MPD would pose a potential hazard to their
20 clean water supply and would impact their wellhead protection area. See exhibit 142 and the
21 verbal testimony of Ms. Angela Jennings.

22 **Applicant Response:** In response to this issue, the testimony of Mr. Curtis Koger was provided,
23 a licensed professional geologist (Ex. 211). His response asserted that no significant impact is
24 expected to the Diamond Spring Wellhead Protection Area. He cited The Villages EIS as well as
25 supporting technical reports. Attached to Mr. Koger's exhibit is a report by Associated Earth
26 Science, which stated that the Diamond Springs Water Association water sources were
documented in the technical report attached to the EIS and that those sources are hydraulically
separated from The Villages and the area of potential effects.

27 **Examiner Response:** *See discussion under Concern 2 above regarding private wells. As*
28 *discussed therein, impacts to springs, aquifers, and sources of water (wells) were analyzed and*
29 *presented in Appendix D of the Villages EIS (pp. 7-8 through 7-12). As described in the*
30 *attachment to Ex. 211, the Diamond Springs Water Association sources were included in that*
31 *discussion and not only are impacts not expected, but those water sources are hydraulically*
32 *separate from the Villages area, precluding any possible impact. No concerns from the*
33 *Diamond Springs Water Association were raised prior to the DA hearings. Regardless, the EIS*
34 *considered potential impacts to the wellhead protection areas as part of the analysis of impacts*
35 *to all water sources (EIS, Appendix D). Pursuant to the EIS and FOF 19, impacts to wells and*
36

1 *wellhead areas will not be significant. Therefore, there does not appear to be any compelling*
2 *reason to seek supplemental conditions on this issue.*

3 7.3 Sanitary Sewer Design Standards

4 1. Sewer Supply. Several exhibits questioned whether there is adequate sewer capacity
5 to serve buildout of the MPDs. See exhibits 68, 108, 117, 120, 197, and 205. Aside from
6 general statements that sewer is inadequate, the following comments were made:

- 7 a. Additional details as to the reliability and feasibility of the peak flow storage
8 facility are required prior to approval of the DAs and there is no basis for DA
9 7.3.1, that sewer is available for the project (Ex. 68). Similarly, a commenter
10 stated that permission from property owners whose property will be crossed by
11 new sewer lines must be secured prior to approval of the DAs, namely the Palmer
12 Coking Coal property (ex 117). See Concern 3 above for a response to this
13 comment.
- 14 b. Certificates of sewer availability should be required of all future implementing
15 projects prior to approval (Ex. 108, 197, and 205).

16 **Applicant Response:** In response to item (b) above, the Applicant stated that no law or
17 regulation prevents the approval of a development agreement without such certificates and that
18 language in the DAs requires that sewer service be available prior to approval of implementing
19 projects (Ex. 209). In Ex. 215, Bob Ervin, an engineering consultant for the City, pointed out
20 that the City has an agreement with King County requiring King County to accept sewage from
21 Black Diamond and build facilities as necessary to accept the sewage. Add that he also concluded
22 that the details of design can be deferred to project implementation.

23 **Examiner Response:** *DA 7.3.1, stating that the DA provides for sewer availability, should be*
24 *stricken. The necessity and meaning of the section is unclear and could be construed as a*
25 *preemptive finding that sewer will be available for all implementing projects at any time. While*
26 *the EISs conclude that adequate sewer will be available at some point in time for MPD*
development (Villages EIS, p. 3-49; Lawson Hills EIS, p. 5-6), nothing in the EISs or elsewhere
in the record suggests that adequate sewer will be available at any time that an implementing
project application is filed.

The uncertain timing of sewer availability arises from the City's dependence upon Metro to
provide sewer service. An agreement between the City and the Municipality of Metropolitan
Seattle (referred to as "Metro") regarding sewer service (Ex. 215, Ex. D) allows the City to
connect local sewer collection infrastructure to the Metro system and to transmit locally
generated wastewater to Metro for treatment. Metro, in exchange, is required to construct
whatever sewer facilities are necessary to treat the sewage. However, the agreement does not
require King County to build the sewer facilities within any specified time period, providing
merely that the City's facilities shall connect to those of King County at such time as King
County's facilities become available. See Ex. 215, Ex. D, Section 4. Consequently, there is no

1 *guarantee that adequate sewer will be available whenever the Applicant decides to apply for an*
2 *implementing project. As to requests for more detail in the location and design of sewer*
3 *facilities, the COAs do not require the DAs to address this issue and there is no compelling*
4 *reason to engage in that level of detail at the MPD/DA level of review. As noted in Mr. Ervin's*
5 *declaration, an engineer testifying for the City, those specific design issues can be effectively*

6 *addressed at project review.*
7 *As to needing permission for the location of sewer lines, that also can be addressed at project*
8 *review. If any significant alterations to the proposed location of sewer lines would be necessary*
9 *because necessary permissions are not acquired, that can be addressed in an MPD amendment.*

7.4 Stormwater Management Standards

10 1. Stormwater Infrastructure Outside the UGA. Several exhibits concerned the proposed
11 Regional Stormwater Facility proposed by the MPDs for a location outside the Urban Growth
12 Area. See exhibits 3-13b, 115, 117, 196, 212, and 259 as well as verbal testimony by Mr. Steve
13 Hiester and Mr. Paul Reitenbach. Concerns were raised regarding direct impacts to rural areas
14 as well as growth inducing effects resulting from the installation of urban infrastructure
15 (stormwater facilities) in a rural area outside the UGA. It was stated in at least two exhibits that
16 placement of such a facility outside the UGA would violate the Growth Management Act.

17 **Applicant Response:** The Applicant responded to this issue in exhibit 139. They argued that the
18 City does not have the legal ability to prevent a property owner from filing an application,
19 especially in another jurisdiction (in this case, King County). Additional response was given by
20 the Applicant and their expert consultants in exhibits 209 and 212, indicating that the proposed
21 location for the stormwater facility is ideal e due to topographic, geologic, geographic,
22 hydrologic, and economic considerations. In a rebuttal of Ex. 212, the Greater Maple Valley,
23 Four Creeks, and Upper Bear Creek Unincorporated Area Councils (the UAC) stated that while
24 the concerns of topographic, geologic, geographic, hydrologic, and economic considerations are
25 valuable, they are not the only concerns to be addressed for the location of the regional
26 stormwater facility (see Ex. 259).

Examiner Response: *The EIS for the Villages MPD described the off-site regional stormwater*
facility, described generally on page 3-53 of the EIS and shown graphically on EIS Exhibit 3-25.
As shown, this regional facility would be located outside the incorporated City boundary to the
west of the MPD (Villages EIS, Ex. 3-25). As described for all stormwater infrastructure, the
direct environmental effects resulting from construction and operation of stormwater
infrastructure was found by the EIS to be effectively managed by application of the current
Stormwater Management Manual (Villages EIS, p. 3-59 and pp. 4-41 to 4-43). Indirect impacts
of the MPD were addressed by the EIS as well, finding that indirect impacts were not significant,
but noting that extension of urban roads to connect with rural roadways is not consistent with
County policy (Villages EIS p. 5-15). No mention is made of the growth-inducing impact of
placing a stormwater basin outside the UGA, as cited by the commenters above. Chapter 6 of
the EIS stated that application of the 2005 Stormwater Management Manual for Western

1 *Washington ("the 2005 Stormwater Manual") would mitigate any direct impacts of the proposed*
2 *stormwater system.*

3 *Two COAs from the Villages recognize that the stormwater facility may be located outside of city*
4 *limits. COA 63 requires an agreement with King County for long-term City ownership of*
5 *stormwater facilities located outside City Limits (the regional stormwater facility).d COA*
6 *78 requires the Applicant to obtain any necessary permits from King County and the submission*
7 *of engineering for the regional stormwater facility to the City for approval regardless of their*
8 *jurisdiction over the facility.*

9 *The proposal to locate the Regional Stormwater Detention facility outside of the City's urban*
10 *growth area was subject to a significant amount of discussion during the MPD hearings. The*
11 *location of that facility has been recognized and at least implicitly approved by the City Council*
12 *in the MPD COAs, which anticipate its location outside the UGA. The only new issue raised in*
13 *the DA hearings is that the location could induce urban growth outside of the urban growth*
14 *area. That is largely a GMA issue, which is a consideration when land use regulations are*
15 *adopted, as opposed to when they are implemented. Unless King County's review permit review*
16 *criteria directly authorize the consideration of urbanizing impacts, King County probably won't*
17 *have the authority to make this issue a significant factor in its permit review⁴. If this is a*
18 *concern to the Council, it can have the City Attorney provide an evaluation of whether King*
19 *County could deny development permits on the basis of GMA considerations. However, even if*
20 *King County were to prohibit the development of schools outside in its rural areas, the Applicant*
21 *then has the option to build within the City's urban growth area.*

22 2. Phosphorous and Lake Sawyer. A major concern on the proposed stormwater system
23 was the discharge of phosphorous to Lake Sawyer. See exhibits 3-13p, 81, 87, and 198 as well as
24 the verbal testimony of Steve Pilcher, Nancy Rogers, and Robert Rothschilds. Areas of concern
25 included:

- 26 a. Mitigation is not fully described in the DAs;
- 27 b. Annual sampling of phosphorus outflow should be required by the DAs;
- 28 c. Monitoring of phosphorus should continue for "a few years" after project
29 completion – according to Ex. 87 monitoring should continue beyond five years
30 after project occupation as it will take more than five years for pollution effects to
31 "show up;"
- 32 d. Descriptions of actions to be conducted in the case that the MPDs do not meet the
33 "no net increase in phosphorus" to Lake Sawyer requirement, DA Section 7.4.3,
34 should be included in the DAs;

35
36 ⁴ This assumes that the MPDs do not qualify as land use regulations themselves. If they do, as currently ruled by the
GMA Hearings Board, the location of the stormwater facility as a GMA issue may very well be a valid consideration
before the Hearings Board.

1 e. Inconsistencies were identified between the drainage report by the *Drainage*
2 *Report on Lake Sawyer Flooding and Project Effects and the Estimated Total*
3 *Phosphorous Loading from the Completed MPDs* report (the “*Total Phosphorous*
Report”, namely that different drainage area sizes were used.

4 **Applicant Response:** According to the Applicant, as a result of negotiations to develop the DAs
5 they conceded to a requirement that the MPDs would result in “no net increase” in phosphorous
6 loading (Ex. 139).

7 Regarding item d. above (Ex. 245), the Applicant countered that the variable nature of any
8 possible shortfall in phosphorous control, coupled with the complex nature of stormwater
9 control, precluded the inclusion of specific remedial actions that would be taken in the case that
10 phosphorous exceeded the “no net increase” quantity. Furthermore, they stated, the language of
11 the COAs and the DAs allowed the City to determine the amount of remedial action that would
12 be required.

13 Regarding item e. above (Ex. 245), the Applicant provided rebuttal in the form of a
14 memorandum from Mr. Alan Fure. Mr. Fure is a public engineer and an expert in water and
15 stormwater management. Mr. Fure rebutted the assertion of Mr. Sperry that inconsistencies exist
16 between the *Drainage Report on Lake Sawyer Flooding and Project Effects* (provided by Ex.
17 139, attachment 9) and the Total Phosphorous Report, and thus the amount of phosphorous that
18 would reach Lake Sawyer is understated. According to Mr. Fure, the two reports had different
19 purposes and thus included different assumptions in the analysis. The *Drainage Report on Lake*
20 *Sawyer Flooding and Project Effects* considered the effect of infiltration that would occur in
21 certain basins, whereas the Total Phosphorous Report did not, nor was it required to for the
22 purposes of that particular report. As such, Mr. Fure asserted, comparison between the two
23 reports is not feasible and perceived inconsistencies between the two reports does not represent
24 evidence that one or the other report is invalid.

25 **City Response:** Verbal testimony given by the Mr. Steve Pilcher supported the idea that the
26 phosphorus impacts of the project on Lake Sawyer are not significant and would be consistent
with existing regulations/plans/etc.

Examiner Response: *Phosphorous impacts to Lake Sawyer are documented in extensive detail*
in the EISs as well as FOF 7 of the MPDs. Phosphorous impacts were a major concern during
the MPD/EIS hearings and the City ultimately concluded in FOF 7 that phosphorous impacts fell
within phosphorous guidelines enacted by DOE, expressed in terms of Total Maximum Daily
Load, TMDL. As a result of recent measurements of phosphorous loading to Lake Sawyer, the
Applicant has agreed to incorporate a “no net increase” of phosphorous to Lake Sawyer, as
required by DA Section 7.4.3(A). This standard exceeds the TMDL required by DOE. In
voluntarily assuming the “no net increase” standard, the Applicant also proposed its own
monitoring plan for the standard, added to Ex. O of the DAs as a February 25, 2011 memo from
Alan Fure and hereinafter referenced as the “Fure monitoring plan”. Ex. O also contains a

1 monitoring plan for all other COA water quality standards, hereinafter referenced as the
2 "Kindig monitoring plan".

3 For clarity, the following conclusions are referenced directly to the comments above:

- 4 a. Mitigation required by the COAs, including detailed information on monitoring and
5 phosphorous controls mandated for future implementing projects, is included in the
6 body of the DAs (Sections 7.4.3 and 7.4.4) as well as in Exhibit O of the DAs at a
7 level of detail sufficient for MPD/DA review.
- 8 b. The monitoring plan described in Exhibit O of the DAs includes a requirement that
9 the total phosphorous entering the stormwater system be monitored annually,
10 addressing the commenters concerns.
- 11 c. The Fure plan clearly requires the monitoring to extend. According to Exhibit O of
12 the DAs, monitoring of phosphorous inflow will continue for a period of five years.
13 However, it is unclear in the Kindig monitoring plan (DA Ex. "O") when this term of
14 monitoring begins. If it would begin upon completion of a stormwater feature, it's
15 conceivable that construction of homes and other features that would feed stormwater
16 to that structure could continue for a longer period than five years, potentially
17 rendering the results of the monitoring moot. It is recommended that the monitoring
18 period of the Kindig plan be clarified to extend for at least five years beyond the
19 completion of all development that discharges water into the stormwater facility
20 subject to monitoring. As for the request that monitoring extend beyond five years
21 after project occupation, there is no technical or expert evidence which would
22 indicate that this is necessary.
- 23 d. It is agreed that the proposed monitoring plans lack timelines and enforcement
24 mechanisms. These themes should and can be required to be in the DA. V COA 73
25 and LH COA 76 require the DAs to include stormwater monitoring plans. COA81/85
26 requires that the Master Developer modify existing practices and facilities and/or
provide for other mitigation measures to respond to any situation where monitoring
indicates that phosphorous outflow exceeds the maximum value. In implementing
these requirements, the DAs provide no timeline for compliance or any enforcement
mechanism for the City. It is recommended that the DAs impose deadlines for
remedial phosphorous mitigation and also provide enforcement mechanisms for the
City to compel compliance. The City can compel the Applicant to agree to such terms
as they relate to enforcement of DOE TMDL standards because the COAs require the
DAs to include a monitoring plan and to specify actions to be taken should
monitoring reveal that stormwater standards are not met. It should be noted,
however, that The Applicant can only be required to terms that monitor and enforce
the stormwater standards imposed by the COAs. The COAs only impose the DOE
TMDL standard for phosphorous. Consequently, the Applicant must agree to any

1 *monitoring or enforcement standards that would apply to its voluntarily assumed “no*
2 *net increase” standard.*

- 3 *e. The expert testimony of Mr. Fure credibly addresses the inconsistencies cited by Mr.*
4 *Rothschilds. Further, any inconsistencies will become moot since the monitoring*
5 *plan requires the Applicant to off-set any phosphorous loading that exceeds TMDL*
6 *standards.*

7 3. Surface Water Quality. A large number of exhibits concerned surface water quality
8 impacts from the MPDs. Twenty-three of these comments were form letters submitted by the
9 Sierra Club on behalf of private citizens (Ex. 80, 82-86, 88-93, 100-106, 112, 114, 134, and 140).
10 The remaining seven commenters were individually submitted (Ex. 3-13f, 3-13q, 44, 56, 116,
11 and 117 as well as the verbal testimony of Angela Jennings). The surface water quality impacts
12 fell into a few areas, including:

- 13 a. General statements that water quality would be significantly impacted. See the
14 form letters plus Ex. 3-13f, 116, 117.
- 15 b. Runoff and stormwater infrastructure impacts to surface waters. See Ex. 3-13f,
16 56, 117, and the testimony of Ms. Angela Jennings.
- 17 c. Impacts to surface waters from infrastructure installation/operation (e.g. sewer
18 lines), namely the locating of sewer lines parallel to and within stream buffers.
19 See Ex. 3-13f. While the commenter does not specify the route in question, it
20 appears that Route B shown on Figure 7.3 of the Lawson Hills DA follows a
21 stream.
- 22 d. Additional/expanded surface water mitigation requirements, including the need
23 for a water quality monitoring plan and monitoring of water quality beyond
24 buildout of the MPDs and expanded use of Low-Impact-Development practices.
25 See Ex. 3-13f, 56, and 117.

26 **City Response:** The City stated in their response to surface water quality issues that compliance
with the 2005 Stormwater Manual will adequately protect surface waters from impacts related to
runoff and stormwater (Ex. 3-13q). Furthermore, the City asserted, the locations of roadways,
sewer facilities, stormwater facilities, etc. has been designed in order to avoid sensitive areas
such as wetlands. It is the opinion of the City that application of the 2005 Stormwater Manual,
coupled with required compliance for implementing projects with the Sensitive Areas Ordinance
will address any surface water quality concerns.

Specifically regarding item C above, the City asserted that the sewer line shown parallel to a
stream represents an existing system. As such, no new impact would occur (3-13q).

Examiner Response: *According to the EISs for both MPDs, most surface water quality impacts
of the MPDs could be mitigated by application of the 2005 Stormwater Manual. Remaining*

1 impacts were addressed by additional measures specific to certain water bodies (e.g. Lake
2 Sawyer), but overall the 2005 Stormwater Manual was found to be sufficient to address water
3 quality impacts (Villages EIS, pp. 6-7 to 6-8; Lawson Hills EIS, p. 6-9). AS discussed in FOF 7,
4 the project incorporates certain low-impact development principals which would prevent
5 significant water quality impacts, specifically including those generated by stormwater. Several
6 requirements for the protection and monitoring of water quality were included in the decisions
7 for both MPDs (Villages COAs 60, 66-68, 70-71, 82, 85; Lawson Hills COAs 62, 69-70, 73-74,
8 64, 86).

9 While several commenters stated concerns with surface water quality issues, most of a general
10 nature and few with specific concerns, no new technical information or expert testimony has
11 been presented that wasn't already presented during the MPD/EIS hearings. The issues of
12 concern are also heavily mitigated and no need for additional mitigation at this level of review is
13 apparent.

14 In the case of the sewer route located parallel to a stream (item c. above), the line already exists
15 so no new impacts are anticipated. Even if additional work on the line were necessary, the
16 City's sensitive area regulations would address any impacts. The City Council has determined
17 that the sensitive areas ordinance is adequate to protect streams and other sensitive area
18 impacts by the adoption of COA 149, which requires that sensitive area impacts be addressed
19 through the sensitive areas ordinance at project implementation.

20 Regarding the request for additional stormwater monitoring requirements (item d. above), as
21 discussed for phosphorous impacts, the DAs contain extensive mitigation and monitoring
22 requirements. As identified in DA Section 7.4.5, the Kindig monitoring program referenced in
23 the phosphorous discussion also applies to temperature, turbidity, conductivity and dissolved
24 oxygen. As previously discussed, the EIS has concluded that stormwater impacts are adequately
25 mitigated. As further identified in the phosphorous discussion, the DA should include timelines
26 and enforcement mechanisms. With these recommended additions to the DAs, the record shows
no need to provide for additional mitigation at this level of review.

27 4. Flooding and Sawyer Lake. A number of exhibits related to perceived flooding
28 hazards at Lake Sawyer due to increased runoff from the MPD project areas. See exhibits 67,
29 198, 215, 248, and 258 as well as the verbal testimony of Mr. Jack Sperry. Unspecified concerns
30 with flooding on Lake Sawyer were also included in the form letters sent by the Sierra Club on
31 the behalf of commenters (Ex. 80, 82-86, 88-93, 100-106, 112, 114, 134, and 140). Aside from
32 general statements of concern regarding flooding, Mr. Sperry provided lengthy calculations of his
33 own regarding potential water rise (Ex. 67). Other concerns were stated that existing flow
34 constrictions downstream of the lake's weir prevent drainage of the lake at times of high water.

35 **Applicant Response:** The Applicant provided repeated expert rebuttal of the commenters'
36 concern (Ex. 139, 209, 215, and 258). Aside from the multiple declarations from the Applicant's
engineers and water experts, the Applicant argued that the project opponents were only qualified
to give personal testimony, not expert testimony in this matter.

1 **City Response:** The City argued that the flooding impact has been addressed in the EISs and
2 that it is not the jurisdiction of the Hearing Examiner to reopen this issue in regards to approval
of the DAs (Ex. 218).

3 **Examiner Response:** *FOF 8 of the MPDs clearly and unequivocally determined that the MPDs*
4 *would not create any flooding impacts to Lake Sawyer. There was no new information presented*
5 *in the DA hearings that would lead to a different conclusion, except for some lay person*
6 *calculations presented by Mr. Sperry. The record does not provide a compelling reason to seek*
supplemental conditions to address Lake Sawyer flooding.

7 *Mr. Sperry did provide a lengthy analysis of his own calculations and evidence arguing for a*
8 *higher flooding potential than original described, including repeated assertions that downstream*
9 *flow, past the weir at the end of the Lake, was constricted and a contributing factor not*
originally factored into the EISs and previous analyses. Repeated rebuttals by two experts (Ex.
123, 215) supported the original analysis and found Mr. Sperry's analysis to be incorrect.

10 *In regards to downstream flow, it was the findings of both that while it appeared that flow*
11 *ceased during flood events, it continued in a manner that is not visible and thus the observation*
12 *of locals (including Mr. Sperry) that the flow "stopped."*

13 5. Runoff Quantity and Impacts to Adjacent Properties. Four exhibits expressed general
14 concerns about stormwater impacts to downstream properties. See exhibits 44, 56, 124, and 135.
15 Some gave anecdotal examples of prior impacts, including logging activities and similar
development in other locations. (Several comments regarded additional details needed for the
DAs regarding runoff quantities. These are addressed under Concern 3 above.)

16 **Applicant Response:** The Applicant responded to concerns about stormwater by referring to
17 the standards of the 2005 Stormwater Manual, calling them "the most stringent standards that can
be applied" (Ex. 209).

18 **City Response:** The City responded to similar concerns about stormwater, but limited to
19 phosphorous concerns, by referring to the 2005 Stormwater Manual as well (see Concern 9
above).

20 **Examiner Response:** *No new information was presented on stormwater impacts beyond what*
21 *was already considered at the MPD/EIS hearings. The EISs prepared for the MPDs included*
22 *discussion of impacts related to stormwater quality and quantity. It was the conclusion of the*
23 *EIS that the application of the 2005 Stormwater Manual and the use of Low Impact Development*
24 *(LID) technology would be adequate to address any stormwater issues (Villages EIS, pp. 3-59, 4-*
25 *29; Lawson Hills EIS, pp. 3-55, 4-38). FOF 7.M reflects this conclusion, in that LID is found to*
reduce stormwater impacts. Given the absence of any new information, the extensive mitigation
required by the 2005 stormwater manual and the prior determinations of adequacy, there does
not appear to be any compelling reason to seek supplemental conditions on this issue.

1 6. Additional Mitigation/Requirements. A number of exhibits requested expanded/more
2 stringent mitigation and requirements than originally mandated from the projects in order to
3 address perceived stormwater and water quality issues. Most requested new mitigation or
4 requirements not previously discussed during original approval of the MPDs. See exhibits 3-13f,
3-13p, 3-13q, 113, 132, 253, and the verbal testimonies of Mr. Dan Streiffert, Ms. Kristen
Byrant, and Ms. Patricia Sumption. New/expanded requirements requested included:

- 5 a. Use of reclaimed water where feasible;
- 6 b. A new City staff position to handle infrastructure inspections;
- 7 c. Creation and enforcement of a stormwater runoff plan;
- 8 d. Unspecified additional measures to protect groundwater quality;
- 9 e. Prohibition of grading between October 1 and April 1;
- 10 f. Maintenance of the water system in as “natural” a state as possible;
- 11 g. More advanced stormwater control technology;
- 12 h. Stronger review standards and required reviews for each phase;
- 13 i. Use of “lowest impact technologies” to avoid water quality impacts to surface
14 waters (see Concern 10 above); and
- 15 j. A general perception that overall stormwater mitigation is inadequate or that
16 mandated measures will fail. One commenter included the following requested
17 requirements:
 - 18 i. Collection of fees from the developer to pay for “potential” stormwater
19 corrective measures;
 - 20 ii. A provision in the DAs allowing the City to halt construction in the case
21 that problems with the stormwater system/improvements are identified;
22 and
 - 23 iii. A provision in the DAs allowing the City to call for more stringent
24 controls during approval of implementing projects.

25 **Applicant Response:** The Applicant argued that reopening prior findings and requiring
26 additional mitigation/regulation above those called for in the conditions of approval and Findings
of the MPD permit approvals is not appropriate and not within the jurisdiction of the Hearing
Examiner when considering the DAs (Ex. 209).

1 **City Response:** The City responded to some of these issues in exhibit 3-13q, stating that the
2 additional requirements are not called for in the 2005 Stormwater Manual, adopted by the City,
and that use of the Manual is adequate to address any stormwater impacts that could occur.

3 **Examiner Response:** *The EISs for the MPDs addressed issues of stormwater and water quality,
4 both surface water and ground water. Mitigation was developed and described in the EISs and
that mitigation was incorporated into the MPD approvals as Conditions of Approval (Ordinance
5 10-946 and 10-947). Furthermore, the COAs for both MPDs include several measures to protect
6 surface and ground water as well as to retain the natural water cycle as much as is practical
7 (Villages COAs 60-65, 67, 68, 70-71, 73-74, 80, 82, 85 and their equivalents in the Lawson Hills
COAs).*

8 *No new information was presented to merit supplemental conditions for additional
9 stormwater/water quality mitigation. The COAs for both MPDs include a substantial number of
10 requirements for the protection of water quality, both on the surface and below the ground, as
11 well as general protective measures and adaptive management options in the case that
12 environmental advantages are identified in the future. The 2005 stormwater manual and other
applicable regulations will provide for extensive mitigation at project level implementation. As
such, there is no compelling reason to seek supplemental DA terms to address these impacts. for
these projects.*

13 7. Stormwater/NPDES Standards Timing. Stormwater goals and standards should be
14 strengthened and should be applied to each implementing project, not just by “phase.” See
15 exhibit 138 and 139. (Note: strengthened stormwater standards are addressed in Concern 13
above and are not discussed further here.)

16 **Applicant Response:** The Applicant rebutted the argument in exhibit 139, stating that vesting
17 stormwater requirements by phase, not by project, is consistent with Conditions of Approval nos.
18 75 (The Villages) and 78 (Lawson Hills) of the MPD permit approvals (Ordinances 10-946 and
10-947).

19 **Examiner Response:** *COA 75/78 of the DAs concerns only the size of storm ponds, not
20 stormwater standards as the Applicant asserted. There are two provisions of the DAs, in Section
21 7.4.4, to which the commenter’s comments could apply. One is Section 7.4.4.A.1, which applies
any new stormwater standards adopted by the City prior to buildout only to the start of the next
22 phase, not any phase currently under construction. The other is Section 7.4.4.A.2, which applies
any current NPDES permits in effect by phase. As with stormwater standards, a phase under
23 construction would not be required to meet the requirements of any new NPDES permit, only
new phases that have not yet begun.*

24 *BDMC 18.98.195(B) requires that vesting of stormwater regulations shall occur on a phase by
25 phase basis. Any different scheme would be considered to conflict with, as opposed to
26 supplement, this requirement. The phase vesting requirement is set by city code can cannot be
modified in the DAs.*

1 8. Construction Activity and Erosion. Peter Rimbo (Ex. 3-13e) discussed MPD COL
2 104, 105 and 110 with respect to construction season earth moving and grading, stream and bank
3 stabilization, and the overall grading plan.

4 **Examiner Response:** *Mr. Rimbo is commenting on MPD conditions that have already been*
5 *adopted by the Council. The conditions in question involve review typically conducted during*
6 *project implementation and there is no indication from the record that any supplementation is*
7 *necessary in the DAs.*

8 8.0 Sensitive Areas Standards

9 8.1 Sensitive Areas Ordinance Applicability

10 1. Enhancement of Open Space. Two exhibits raised the issue that the Development
11 Agreement failed to meet key requirements of BDMC 18.98.020, specifically the “preservation
12 and enhancement of the physical characteristics (topography, drainage, vegetation,
13 environmentally sensitive area) of the site.” See Exhibit 113 (Bortleson) and Exhibit 117
14 (Schmidt). Mr. Schmidt’s assertion is that the Development Agreement does not provide for the
15 enhancement of vegetation or environmentally sensitive areas.

16 **Examiner Response:** *The MPD COLs determined that the MPDs meet the requirements of*
17 *BDMC 18.98.020. The accuracy of the COLs cannot be revisited in the DA hearings and the*
18 *COAs do not require that the DAs further address the issue. The City’s SAO already provides*
19 *for extensive protection of environmentally sensitive areas and open space will protect other*
20 *natural features. If the Council believes that additional protective measures are necessary, it*
21 *can attempt to negotiate supplemental conditions that do so with YB.*

22 2. Bald Eagle Protection. Four exhibits concerned the protection of the American Bald
23 Eagle and Bald Eagle habitat, in particular nests and roosts. See exhibits 230 and 231, submitted
24 by Jacqueline Paolucci Taescher and Robert Taescher. (Exhibit 11, also submitted by Ms.
25 Taescher, expressed similar concerns.) Exhibit 69 provides additional information previously
26 submitted by Angela Taescher during the EIS process, in particular concerns over preservation of
large trees (potential nesting sites) and night roosts. In summary, the concern is that the MPD
and DA do not provide inadequate protection for eagle roosting and nesting sites, especially
during earth-moving and building periods.

Applicant Response: The Applicant noted the “disclosure and discussion” of an off-site eagle
nest near Lake Sawyer in the Villages FEIS, p 4-74. The Applicant responded in Exhibit 245
(point 2, page 53) that testimony by DFW staff indicated bald eagles do not nest at the subject
site. However, this same testimony also noted that “as the habitat’s landscape changes, there is
always the possibility that protected species, like a bald eagle, will take up residence.” Should a
bald eagle nest or roosting site be established at any time during site preparation or construction
under the DA, the relevant state and federal laws would still be in effect – they are not in any way
negated or circumvented by the approval of the MPD or DA.

1 The Applicant's rebuttal in Ex 209, p 43 provides an example of how this protection could come
2 into effect:

3 "In order to clear merchantable timber from the property, YarrowBay must file for a
4 Forest Practice Application (FPA) with the Department of Natural Resources (DNR).
5 WAC Title 222-20 requires DNR to coordinate and cooperate with Washington
6 Department of Fish & Wildlife (WDFW) in the review of the FPA. If WDFW has reason
7 to believe that priority habitat or protected species may be threatened by the activity,
8 WDFW must inform DNR. Similarly, the applicant of an FPA is directed to work with
9 WDFW to identify critical habitats as identified by the board (WAC 222-30-020(10)). If
10 the applicant did not comply with either WDFW direction, or the conditions imposed on
11 the permit by DNR, DNR can take corrective action and enforcement pursuant to WAC
12 222-46, which includes halting work and assessing fines."

9 **Examiner Response:** *The City Council already considered bald eagle protection during MPD
10 and EIS review and there has been no new information provided suggesting bald eagle
11 protection needs to be addressed in the DAs. The Applicant's assertions here are correct. Bald
12 eagle habitat is protected in the Sensitive Areas Ordinance, BDMC 19.10.310(B)(2). Any
13 impacts to bald eagle habitats would therefore be addressed during project implementation.
14 Finally, LH MPD COA 153 and V MPD COA 149 both provide that impacts to sensitive areas
15 will be addressed at project implementation on a case by case basis.*

14 3. Continuous Wildlife Corridor. Bortleson (Exhibit 113) asserted the Constraints Map
15 (Exhibit G) needs to show a continuous wildlife corridor from the western boundary to northern
16 boundary (The Villages) in order to meet V COA 125. Harris (Ex 140) also commented on the
17 lack of connectivity of proposed wildlife corridors. King County (Ex 3-13b) also noted that
18 plans for the Northern Corridor directly contradict other MPD documents (FEIS 3-71) and city
19 code, especially BDMC 18.98.140(B), "Natural open space shall be located and designed to form
20 a coordinated open space network ... provide connections to existing or planned open space
21 networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD."
22 Erika Morgan (Ex 143) restated previous testimony that her private property at the east end of
23 Black Diamond Lake on the eastern border of the MPD was apparently to serve as a wildlife
24 corridor, yet was totally unsuitable for such use. Dan Streiffert, representing the Sierra Club, also
25 noted the lack of sufficient connectivity in verbal testimony and Ex 56. Susan Dawson offered
26 verbal testimony that designated wildlife corridors were insufficient to make up for habitat
destruction.

22 **Applicant Response:** YB responded that Constraints Map does show 300 foot wildlife corridor
23 extension from western edge of core-stream-wetland Black Diamond Lake complex to the
24 western edge of the MPD site. YB contends that this extension is all that is required by V COA
25 125 (Ex. 209).

25 **Examiner Response:** *V MPD COL 53 concludes that the MPDs satisfy the requirements of
26 BDMC 18.98.140(B) and the constraints map depicts a 300 foot wildlife corridor as required by*

1 *V COA 125. However, concerns identified above suggest some problems with the corridor*
2 *system proposed for the MPDs. Any fish and wildlife habitat boundaries agreed to the Council*
3 *under V COA 155 must comply with the City's sensitive areas ordinance. It is recommended that*
4 *staff provide the Council an explanation, based upon the record, of whether the wildlife*
5 *corridors comply with the City's Sensitive Areas Ordinance and that the corridor boundaries be*
6 *revised as necessary if they do not. The suitability of some of the areas designated for wildlife*
7 *corridors, as addressed by Ms. Morgan above, should also be addressed. If the corridors are*
8 *consistent with the City's sensitive area ordinance requirements, the Council can probably only*
9 *add additional corridor requirements in the DA with the voluntary agreement of YB."*

7 *The lack of delineated FWCA on the constraints map contributes to the inability to determine the*
8 *adequacy of the wildlife corridors; in addition to the two extensions being provided by YB, the*
9 *SAO-designated FWCA should be shown on the constraints map. The HE suggests that City staff*
10 *prepare a map showing the FWCA's defined in the SAO along with the King County Wildlife*
11 *Habitat Network. This map would be similar to combining Figure 4-2 in the Black Diamond*
12 *Comprehensive Plan with Exhibit 4-10 in the V FEIS.*

11 **4. Wildlife and Habitat Protection Plan.** Bortleson (Exhibit 113) asserts that the wildlife
12 corridors are insufficient, and that a Wildlife and Habitat Preservation Plan should be included in
13 the DA. Guidelines for the size, placement, and connections with on- and off-site habitats should
14 be done in consultation with King County and other agencies with region-wide wildlife
15 networks. Bortleson cites BDMC 18.98.155(B), 18.98.010(C) and 18.98.140(C) as authority for
16 this request. Sierra Club (Ex 56) also endorsed a Wildlife and Habitat Preservation Plan, and
17 stated that the DA fails to provide a high degree of connectivity with the wildlife corridor
18 winding through Black Diamond Lake with no coordinated use of non-wetland habitat. Erika
19 Morgan (Ex 143) also supported the need for a Plan to coordinate the MPDs with the City's
20 Comprehensive Plan. Pat Pepper (verbal testimony) also endorsed a wildlife habitat protection
21 plan.

18 **Applicant Response:** In Ex. 209, YB responded that the City Council found that MPDs
19 satisfied the wildlife criteria at COL 6, COL 54, and COL 61 of the MPD Permit Approval
20 Ordinances (Nos. 10-946 and 10-947).

20 **Examiner Response:** *As discussed in the previous Examiner response, the adequacy of the*
21 *wildlife corridors in relation to the City's Sensitive Areas Ordinance should be addressed by*
22 *staff.*

23 **5. Fish & Wildlife Habitat Conservation Areas.** One exhibit noted that Fish & Wildlife
24 Habitat Conservation Areas (FHCWA) were not shown on the Constraints Map (Exhibit G). See
25 Ex. 3-13e (Rimbos, et. al). Bortleson (Ex 113), in comments related to (5) above, also noted that
26 the Development Agreement makes no direct mention of wildlife corridors in DA 8.2.2, yet
states that the Fish and Wildlife Habitat Conservation Areas are deemed final and complete
through the term of the agreement. Bortleson questioned if a wildlife corridor is intended to
overlay the Black Diamond Lake wetland buffer; if so, an expansion of the core wetland complex

1 of at least 300 feet is recommended east of the Lake. This would fully meet the intent of V COA
2 125 and meet BDMC 18.98.140(C). Erika Morgan (Ex 143) also noted the failure of YB to show
3 Fish and Wildlife Habitat Conservation Areas on the Constraints Map.

4 **Applicant Response:** YB offered no specific response to Ex 3-13e. The response in (3) above
5 would seem to apply here as well.

6 **Examiner Response:** *The Examiner offers the same recommendations for this issue as for the
7 constraint map as discussed in the Examiner Response to (3) above.*

8 6. Impact on Fish Habitat. Karen Walter, Watersheds and Land Use Team Leader for
9 the Muckleshoot Tribe (Ex 13-f,w), made several comments on the potential impact of the MPD
10 Development Agreements on the Tribe's treaty protected fisheries resources. Most of these
11 comments relate to water quality and surface water management issues and are summarized in
12 that section. Two issues are addressed here:

13 a. DA 8.4 Alterations of wetlands and streams – The FEIS lack sufficient details and
14 there are no details provided in the DAs. During the EIS process, the Tribe was
15 informed that these concerns would be addressed during the MPD permit review
16 process.

17 b. DA 9.3 Sensitive areas and buffers – Trails should be located outside of stream
18 and wetland buffers since they reduce buffer functions for ecological processes
19 and habitat.

20 **Applicant Response:** In Ex. 3-13q, YB responded that as regards alterations of wetlands and
21 streams, the MPDs have been designed to minimize sensitive area impacts where ever possible.
22 Roadways and utilities have been sited and designed to use existing stream crossings and avoid
23 wetlands to the maximum extent. Any MPD Implementing Project that will result in impacts to
24 sensitive areas or buffers will be subject to the review and mitigation standards of the Sensitive
25 Areas Ordinance. As regards trails, YB responded that all future MPD Implementing Projects –
26 including trails and recreation facilities – will be subject to the SAO (Ex. 209).

Examiner Response: *The City's Sensitive Areas Ordinance was adopted and found by the
Council using best available science to adequately protect fishery resources. If the Council
wishes to add additional mitigation measures to the DA, it will probably need the voluntary
agreement of YB.*

7. General Loss of Habitat. Several exhibits expressed general concerns over the loss of
wildlife habitat. See Ex 44 (Brazier), Ex 56 (Sierra Club), Ex 69 (Taeschner), Ex 81 (Stern), Ex
107 (Davis), Ex 122 (Gibson), Ex (140) Harris. Verbal testimony relating to loss of habitat
quantity and quality was provided by Jacqueline Taeschner, Robert Taeschner, Susan Dawson,
and Brock Deady.

1 **Examiner Response:** *The COAs do not require the DA to address wildlife impacts beyond*
2 *adopting fish and wildlife sensitive area boundaries. There is no new information beyond that*
3 *already addressed above that suggests that additional protection is warranted. If the Council*
4 *wishes to add additional protective measures to the DA it will have to get the voluntary*
5 *agreement from YB.*

6 8.2 Sensitive Areas Determinations

7 1. Adequacy of Constraint Map. Several exhibits questioned the adequacy of the
8 constraint map, in particular the scale, level of accuracy, and level of detail. See Exhibits 197
9 (Schmidt), Exhibit 40 (Derdowski), Oral Testimony & Exhibit 150 (Cooke). Derdowski
10 expressed concern that the constraint map was not sufficiently detailed to depict sensitive areas
11 adequately, especially considering the mapped boundaries are deemed final and complete
12 regardless of detailed surveys and construction level review in the future. Mr. Derdowski also
13 asserted that Section 4.1 amends the land use map outside of the MPD process, and that sensitive
14 areas and buffers may be changing. Expert witness Dr. Sarah Cooke, in verbal testimony, stated
15 that she did not believe that the constraint maps provide sufficient detail to allow approval of the
16 Development Agreements.

17 **Applicant Response:** The Applicant responded that the boundaries and categories of sensitive
18 areas shown on the constraint map (Exhibit G) of each development agreement are based on field
19 data as presented in The Villages and Lawson Hills FEIS. Section 2.3.2 of both Development
20 Agreements provides that a full scale version of the map be kept on file with the City. Section
21 4.1 of the Development Agreements does not amend the land use plan (Figure 3-1) and does not
22 alter the sensitive area buffer widths applicable to the MPDs. The approved Land Use Plans for
23 each development are included in Exhibit L of each Development Agreement. Sensitive area
24 buffer widths, as established by the Sensitive Areas Ordinance, are shown on the Constraint
25 Maps (Exhibit G) of each Development Agreement. Buffer areas and buffer widths in some
26 areas are shown with greater accuracy than on earlier site plans. Buffers may only be modified
from those shown in Exhibit G if allowed by and in compliance with the City's Sensitive Areas
Ordinance and sought together with an implementing project application.

In response to various deficiencies raised by Dr. Cooke, the applicant submitted testimony from
Scott Brainard, WRI.(Exhibit 210) Brainard concludes that the Constraint Maps are consistent
with BDMC 19.10.210(B)(1), provide sufficient detail to meet the requirements of BDMC
19.10.230 and make accurate review decisions when future Implementing Permit applications are
submitted to the City.

The Applicant offered this response in summary:

“To the extent Ms. Cooke believes the Constraints Maps in Exhibit "G" and the
Development Agreements fail to protect wetland resources because of an alleged lack of
detail based on failure to include lot lines and building footprints, she is overlooking the
way the City of Black Diamond requires MPD Development to be constructed. Future
applications will be made for subdivisions and binding site plans to divide the MPDs'

1 Development Parcels into buildable lots. Those applications are required by both State
2 law and City code to include surveys. Those surveys will reflect the surveyed wetland
3 boundaries shown on the Constraints Maps in Exhibit "G" (which again, exists as a multi-
4 page plan set at a much more legible scale in the City's offices). Thus, the MPDs' wetland
5 areas will be protected."

6 **Examiner Response:** *It was not possible for the Examiner to view the constraint maps in the*
7 *limited time to prepare this decision, given only one copy of the maps is available can only be*
8 *viewed at City Hall. The maps were not presented during the hearings and they were too small*
9 *to be subject to any meaningful review on the City's website. It is recommended that staff make*
10 *the maps available for City Council review and explain to the Council, based on information*
11 *contained in the record, the level of detail provided in the maps. In reviewing the maps the*
12 *Council should keep in mind that the DAs are fixing most of the sensitive area boundaries for 15*
13 *to 20 years. In that time frame the boundaries must be precise enough to establish the*
14 *boundaries for project level development. If the boundaries do not meet this degree of precision,*
15 *the Council should require that they be redone or provide that the boundaries set by the DAs are*
16 *only approximate and shall be delineated at project level review.*

17 2. Early Delineation and Freeze of Wetlands Delineation. Several exhibits were
18 concerned with the provisions of Section 8.2 of the Development Agreements that "freeze"
19 wetland determination by deeming the wetland delineations and types final and complete. See
20 Exhibits 3-13e (Rimbos, et. al), Exhibit 40 (Derdowski). Mr. Derdowski expressed concern that
21 sensitive areas, especially wetlands, change over time and that the level of existing review was
22 not as detailed as a project level review. He further expressed the opinion that the "freeze"
23 would result in "profound SEPA problems since new data could not be considered." Expert
24 witness Dr. Sarah Cooke, in verbal testimony, stated that if a new assessment were required at
25 each stage that wetlands would be better protected.

26 **Applicant Response:** The applicant responded that the fixing of sensitive area boundaries is
consistent with The Villages Conditions of Approval 155 and Lawson Hills Condition 159,
which state that "[o]nce the mapped boundaries of the sensitive areas have been agreed to, the
Development Agreement shall include text that identifies that these areas are fixed." With the
exception of certain mine hazard areas, YB asserted that all sensitive areas described in Section
8.2 of the Development Agreements received a full analysis and delineation matching the level of
work conducted for site-specific permitting. Various appendices to the FESI and Exhibits to the
Development Agreement describe in detail the work conducted. The applicant further responded
that Mr. Derdowski failed to cite any specific provisions of state law, the BDMC, or federal and
state regulatory agency rules that would preclude the City from fixing the sensitive area
boundaries now.

Examiner Response: *V COA 155 and LH COA 159 provide that once sensitive area boundaries*
are agreed upon, they "shall" become fixed in the DA. The Council cannot do anything that
conflicts with this provision. However, given the permanence of the boundaries the Council

1 *should not agree to any boundaries unless they are as accurate as any boundaries that would be*
2 *expected for an implementing project.*

3 3. Review of Wetlands Delineation. Several exhibits expressed concern that sensitive
4 area delineation, and in particular wetland delineation, had not been subject to complete and
5 required reviews. See Exhibit 3-13 (Rimbos, et. al.), Exhibit 138 (Derdowski), Ex. 139, att. 1
6 (Brainard), Exhibit 150 (Cooke), Exhibit 270 (Cooke). Dr. Sarah Cooke, a wetlands ecologist,
7 testified both verbally and in declarations that the wetlands delineation was inadequate and
8 should have been reviewed by both the US Army Corps of Engineers (Corps) and the
9 Washington State Department of Ecology (DOE).

10 **Applicant Response:** In response to the concerns raised by Dr. Cooke, the applicant offered
11 detailed rebuttal comments in Ex. 210 by Scott Brainard, a wetland scientist from Wetland
12 Resources, Inc. (WRI). In his comments, Brainard stated that the boundaries had been delineated
13 by his firm and then subjected to peer review from the City's consultant, Parametrix. He noted
14 that both his firm and Parametrix looked at individual wetland flags, data, and wetland ratings
15 forms and deemed them accurate. He further stated that the City's regulations do not require
16 wetland boundary review by either the Corps or DOE. Brainard continued that both WRI and the
17 applicant fully understand that if wetland impacts are proposed as a part of any individual
18 development activity, preconstruction notification will be required by the Corps, and that this
19 process will involve the Corps and DOE reviewing the delineated wetland boundaries, Sensitive
20 Area Studies, and Mitigation Plans.

21 In Ex. 270, Dr. Cooke called into question the accuracy of several statements pertaining to third
22 party review. Dr. Cook noted that Parmetrix had acknowledged in its technical report, "Two
23 biologists visited most of the accessible wetlands on the property." In Dr. Cooke's opinion, this
24 does not constitute a thorough review that would be necessary for mapping wetlands whose
25 boundaries would be without dispute for the next 15 to 20 years. Dr. Cook also asserted that YB
26 had used an outdated manual to delineate the wetlands and the manual currently adopted by the
Washington State Department of Ecology ("DOE") would yield different results. In Ex. 270, Dr.
Cook also asserted that the wetland boundaries could have been much larger if the relationship of
the wetland to off-site wetlands had been considered. She quoted from some comments from
Parametrix that suggested that the some of the MPD wetlands are part of a larger system.

Mr. Brainard responded in Ex. 272 that the DOE has issued an advisory that the new manual
should yield the same results as the manual employed by YB. Mr. Brainard explained that the
current manual does not adopt new delineation criteria but only changes the procedures to assess
compliance with the criteria. In Ex. 272 Mr. Brainard also referenced his comments in Ex. 139,
att. 1, where he cites to field verified studies that show that the wetlands apparently referenced by
Dr. Cook in her assertion that certain wetlands may be associated with off-site wetlands are in
fact isolated wetlands.

Examiner Response: *The City Council is encouraged to review the declarations of Dr. Cooke
and Mr. Brainard, given the permanence of the proposed sensitive area boundaries. All of the*

1 wetland experts involved in this issue are highly credible. In the end, deference must be provided
2 to the findings of Parametrix, as they served as the only neutral reviewers in the process. The
3 Examiner finds the delineations to comply with City regulations, subject to the verification of a
4 couple issues as identified below. If the Council has any concerns on the accuracy of the
delineation, it could certainly require in the DA that the wetland boundaries be subject to further
verification by Parametrix or another third party reviewer.

5 Dr. Cook and Mr. Brainard (on behalf of YB) had a significant disagreement on what
6 delineation manual applied to the project. The City regulations to which the MPD vests governs
7 the delineation criteria and methods for wetland boundaries. BDMC 19.10.210(A) requires that
8 wetland must be delineated in accordance with the requirements of RCW 36.70A.175, 90.58.380
9 and the Washington State Identification and Delineation Manual (1997). RCW 90.58.380
10 requires DOE to adopt by rulemaking wetland delineation manuals. Consequently, YB would be
11 required to use the delineation manual that was adopted by DOE at the time YB vested its MPD
12 applications. In her declarations Ms. Cook indicates that the current DOE manual wasn't
13 adopted by DOE until March, 2011. City staff should verify this, but it does appear that the
14 DOE manual employed by YB was the version adopted by DOE at the time YB vested its MPD
15 applications. If the incorrect manual was used, the Council should require use of the proper
16 manual.

17 Another point of disagreement was apparently whether on-site wetlands are associated with off-
18 site wetlands and this association could affect wetland boundaries. As noted above, Ms.
19 Brainard referenced some Parametrix comments that apparently suggest on-site wetlands are
20 associated because they are headwater wetlands. Mr. Bainard does not address the Parametrix
21 comments directly, but instead cites to field verified studies that conclude that the on-site
22 wetlands are isolated. It is unclear from the exchange of declarations between Dr. Cook and Mr.
23 Bainard if they are discussing the same wetlands and what significance the Parametrix
24 comments referenced by Dr. Cook have in that discussion. For the closed review by the Council,
25 the parties should clarify these points using the information in the record. If there is any
26 reasonable doubt that the buffer widths are inaccurate due to associations with off-site wetlands,
the Council should require further review by Parametrix or some other third party reviewer.

Dr. Cook and Mr. Brainard devoted a large portion of their declarations discussing the need for
regulatory approval by the Army Corps of Engineers and DOE. That is largely a nonissue
because the MPDs will have to comply with DOE and Army Corps requirements whether
addressed in the DAs or not. If Army Corps/DOE requirements result in a widening of buffers,
YB will have to acquire an amendment to the MPD to accommodate those buffers and impacts of
the change in those boundaries will be fully addressed through that amendment process.

4. Accuracy of the EIS. In Ex. 270 Dr. Cooke disputed the accuracy of the science used
in the EIS for wetland impacts.

Examiner Response: The opportunity to challenge the adequacy of the EIS was provided during
the MPD hearings, at which days of expert testimony from some of the most qualified experts in

1 the state was considered at length by the Examiner and the City Council for a wide range of
2 impacts addressed in the EIS. The Examiner issued a final ruling on the adequacy of the EIS in
3 2010. That ruling cannot be contested this proceeding.

4 5. Off-site Wetlands and Regional Hydrology. See Exhibit 3-13e (Rimbos, et. al.),
5 Exhibit 113 (Bortleson), Exhibit 150 (Cooke), Exhibit 259 (Bortleson). Dr. Sarah Cooke, in
6 Exhibit 150, expressed concern that insufficient work had been done on assessing impacts to
7 groundwater systems. She noted that alterations in base flows could have serious impacts on
8 protected wetlands.

9 **Examiner Response:** *The COAs do not require the DAs to address groundwater or wetland
10 impacts beyond establishing wetland buffers. Any additional mitigation required of YB in the
11 DAs would require the consent of YB. Consent would also probably be required for any
12 mitigation that exceeds that required by the City's Sensitive Areas Ordinance, since the Council
13 determined that the Ordinance provides adequate protection for environmentally sensitive areas
14 as dictated by best available science.*

15 6. LH Northern Triangle Wetland. In Exhibit 3-13, attachment 2, King County
16 Department of Natural Resources and Parks noted a wetland buffer affects the western edge of
17 the Northern Triangle (see "Sensitive Areas Map – North Triangle" on the final page of the WRI
18 wetland study). This buffer is also repeated in the Lawson Hills EIS in Exhibit 2.2, but does not
19 appear in Figure 10-3.

20 **Examiner Response:** *The Lawson Hills MPD DA S 2.3.2 notes the existence of a wetland off-
21 site to the west of the North Triangle that was not fully delineated as of the date of the
22 agreement. The WRI Wetlands report notes that this is a Category I wetland that will require a
23 150 foot buffer. The Constraints Map needs to be updated to reflect the location of the wetland
24 and the buffer before an Implementing Project can be approved.*

25 7. Functions and Integrity of Buffers. Several exhibits addressed concerns with the
26 functions and integrity of buffers. See Exhibits 143 (Morgan), 150 (Cooke), 214 (Bryant), oral
testimony (Cooke). Bryant asserted that the applicant's use of Issaquah Highlands as an
example of a project using early fixed wetland boundaries ignored the fact that the Issaquah
Highlands wetlands protection was a failure. Exhibit 214 included a presentation by Dr. Cooke
showing these alleged failures, many resulting from fallen or removed trees in wetland and
riparian buffers.

Applicant Response: In Ex. 258, YB submitted testimony from Daniel Ervin, Project Engineer
for the Issaquah Highlands MPD. Mr. Ervin rejected the idea that the use of fixed boundaries
would lead to failure to protect wetlands. Mr. Ervin stated that "the fact that trees were coming
down in windstorms had nothing to do with the fact that the wetland buffers, were fixed by the
Development Agreement. Mr. Ervin also noted that the protections applied to wetland critical
areas subject to the Issaquah Highlands Development Agreements were determined based on a
mitigation program that included preservation of large tracts of open space, and not a surveyed

1 delineation based on sensitive area biological characteristics. In addition, the Issaquah Highlands
2 tracts are governed only by the Development Agreement, while the Black Diamond MPDs will
3 have the full protection of the underlying Sensitive Areas Ordinance.

4 **Examiner Response:** *As noted previously, the City's Sensitive Areas Ordinance has been*
5 *determined by the City Council to adequately protect wetlands. If the Council chooses to exceed*
6 *the mitigation required by that ordinance, it will probably need to get voluntary consent from*
7 *YB.*

8 8. Degradation and Encroachment into Sensitive Areas. Several commentators were
9 concerned that Development Agreement provisions would allow excessive encroachment and
10 degradation of sensitive areas. See Exhibit 3-13 (Rimbos, et. al.), Exhibit 40 (Derdowski), and
11 Exhibit 205 (Derdowski). Mr. Derdowski asserted that Section 9.3 of the development
12 agreements would allow trails, crossings and encroachments into sensitive areas as a blanket
13 provision, in violation of the BDMC and other laws.

14 **Applicant Response:** YB responded that Section 9.3 does not authorize such a “blanket
15 provision”, but only allows encroachment within sensitive areas if placement is consistent with
16 the Sensitive Areas Ordinance (BDMC 19.10) and appropriate mitigation is identified per the
17 ordinance.

18 **Examiner Response:** *As noted by YB, use of sensitive areas for various encroachments is only*
19 *authorized to the extent permitted by the Sensitive Areas Ordinance. As previously discussed, if*
20 *the Council wants to exceed the protections of the Sensitive Areas Ordinance it will need*
21 *agreement from YB.*

22 9. Buffer Width Not Consistent with Protocols. Dr. Sarah Cooke, in verbal testimony,
23 noted wetlands ratings and buffer widths on the constraints map are not consistent with Black
24 Diamonds sensitive areas maps as required by Section 8.2.1. As an example, she noted the large
25 wetlands system running from Jones Lake to Black Diamond Lake. Black Diamond code would
26 require a 250 foot buffer for this wetland system, but the Development Agreements only assign a
60 or 110 foot buffer. In Exhibit 143, Erika Morgan notes that marker indicating the “setback”
(buffer) along the south side of Black Diamond Lake is near the edge of a cliff leading down to
the lake, and indicates that there should be a setback from the cliff, even if there weren't a lake
below. Ms. Morgan estimates this “cliff” as an “80 degree slope that raises (sic) at least 110
feet”.

Examiner Response: *Due to technical difficulties an addendum will be forthcoming to address
this issue.*

10. Requirements of COAs and DA Contents. The majority of comments provided on
erosion and siltation centered on details and mitigation called for by the COAs not being present
or evident in the DAs. See Exhibits 3-13e. 56, 113, 117, 132, 139, 143, 209, 250, and 269. The
concerns were separated out by COA as follows:

- 1 a. COA 71 requires that the MPDs include an erosion and sediment control plan
2 including strict erosion control measures and a detailed emergency response plan
3 in the case that mitigation fails;
- 4 b. COA 104 prohibits grading during the “wet season” per BDMC requirements;
- 5 c. COA 105 requires in some instances that stream banks shall be protected from
6 disturbance;
- 7 d. COA 110 requires an overall grading plan prior to the submission of the first
8 implementing project.
- 9 e. COA 112 requires that stormwater and groundwater shall be managed to prevent
10 slope instability.
- 11 f. COA 117 requires that structural measures such as silt fences and temporary
12 sediment ponds be used to avoid discharging sediment into wetlands and other
13 critical areas.
- 14 g. COA 119 regulates stormwater outfalls to avoid impacts to environmentally
15 sensitive resources.

16 **Applicant Response:** YB responded to these comments in two separate exhibits, Ex. 139 and
17 209. However, their answer was largely the same for all cases, stating that the COAs do not
18 require the DAs implement the COAs, rather that these requirements will be enforced upon
19 submittal of implementing proposals to the City. Regarding grading in the “wet season,” YB
20 argues that there are stipulations in the City’s Engineering Design and Construction Standards
21 and COA 104 to allow for wet season grading activities, provided certain requirements are met.

22 **Commenter Rebuttal:** In exhibit 269, Mr. Bortleson responded to YB’s responses, stating that
23 while he understands COAs 104, 110, 112, 71, and 119 do not directly encumber the DAs, he
24 requests that the information he originally requested in Ex. 113 be included for the purposes of
25 specificity and for informative purposes.

26 **Examiner Response:** *None of the COAs identified above require that they be implemented into
the DAs. The Council would need to acquire voluntary approval from YB to include them.*

11. Additional Mitigation and Requirements. A number of commenters requested
additional requirements and/or mitigation for perceived erosion effects of the projects. See
exhibits 56, 117, 132, 139, 150, 205, 210, 250, and 254. The individual requests included the
following:

- a. Sensitive areas should not only be field marked, but also protected by temporary
barriers and silt fencing (Ex. 40 and 138);

- b. The DA's should include a Wetland Preservation Plan detailing construction mitigation via fencing and other protective methods (Ex. 56);
- c. Greater measures than silt fencing for slopes and streams should be required (Ex. 117);
- d. Erosion control plans should be reviewed by a third party prior to approval (Ex. 132 and 250);
- e. Grading during the wet season should be required to adhere to a pre-development monitoring plan (Ex. 132 and 250);
- f. The DAs should include specific requirements for erosion and wetland/buffer impacts, not just state the requirement that they occur (Ex. 150);

Exhibit 150 (item f.) was provided by Ms. Sarah Cooke, a certified Professional Wetland Scientist.

Applicant Response: YB responded to the issue of silt fencing and barriers in Ex. 139, stating that these measures were not listed specifically because implementing projects must be consistent with the City Engineering Design and Construction Standards Sections 2.2.02.6, 2.3.01.2, and 2.6.2, which require "appropriate fencing and erosion controls" for any projects in the vicinity of sensitive areas. The original commenter, Mr. Derdowski, rebutted in Ex. 205, stating that the City Engineering Design and Construction Standards do not sufficiently detail monitoring and corrective actions for damage to sensitive areas.

Regarding the requested inclusion of erosion impacts to wetlands and buffers (item f. above), Scott Brainard, a certified Professional Wetland Scientist, responded to the commenters concerns in Ex. 210, stating that application of the City's SAO would be adequate to address any impacts to wetlands from erosion.

Examiner Response: *FOF 13 states that application of the City's SAO will be adequate to address any impacts to wetlands from the MPD. With the exception of Ex. 150, the concerns expressed by the commenters are personal opinions and do not provide any new information that has not already been considered in the MPD and EIS approvals. Regarding Ex. 150, Dr. Cooke's argument is based on the idea that the EISs and the MPD COAs are inadequate to address wetland impacts, including those from erosion and siltation. The adequacy of the EIS and COAs cannot be challenged in this proceeding, but her comments are relevant to the extent that the Council may wish to pursue voluntary agreement from YB for additional DA conditions. All of the issues addressed by the commentators above are already regulated by City development standards that have been presumably that have been found by the Council to be adequate and have been presumably applied to development projects throughout the City. The deficiencies cited by the commentators are not specific to any unique attributes of the MPDs but address the adequacy of the City's standards in general. If the City sees need to revise its development standards, it exempt the standards from DA vesting requirements to the extent they*

1 address erosion control and subsequently investigate additional requirements that, when
2 adopted, would apply to any subsequently vested MPD implementing projects.

3 12. Sensitive Areas and the DAs. One commenter, Mr. Peter Rimbois, stated in Ex. 3-13e
4 that the DAs should address and identify sensitive areas, including erosion hazard areas, in DA
5 8.2.

6 **Examiner Response:** *DA 8.2 requires that sensitive areas be identified and marked in the field
7 at the time of construction consistent with the City's sensitive areas ordinance. BDMC
8 19.10.020 and 19.10.120 require a sensitive areas permit review for any permits that would
9 occur within or adjacent to sensitive areas. BDMC 19.10.130.A requires the submittal of a
10 sensitive areas report with any such permit application. BDMC 19.10.130.D.2.a requires that a
11 sensitive area report contain a map to scale showing sensitive areas and their buffers. As such,
12 sensitive areas will be mapped and identified at the implementing project stage, as required by
13 the SAO.*

14 13. Landslides Caused by Erosion. Ms. Alice Baird asserts in Ex. 57 that the impacts of
15 erosion leading to slope failure must be addressed for the MPDs prior to approval of the DAs.

16 **Examiner Response:** *Ms. Baird has not provided any new information beyond what was
17 already considered during the original EISs preparation and MPD approvals. MPD FOF 14
18 states that no evidence beyond personal opinion was provided that the MPDs would result in
19 significant landslide impacts and that application of the SAO would be adequate to address
20 landslide hazards. COA 112 requires that stormwater and groundwater be managed to avoid
21 increases in overland flow and infiltration that could lead to slope failure. The potential for
22 landslides to occur as a result of erosion appears to have been addressed, but if the Council
23 concludes differently it can seek voluntary agreement from YB for additional DA requirements.*

24 14. Wet Season Definition. Ms. Erika Morgan states in Ex. 143 that the term "wet
25 season" is too vague as it regards grading restrictions, and that a fixed date for such a season
26 ignores differences in ground conditions in any given year.

Examiner Response: *The term "wet season" appears in COA 104, however the COA
specifically references Engineering Design and Construction Standards 2.2.05. That section
states that work between October 1 and March 31 requires a winterization plan approved by the
City Engineer. As such, the dates of the "wet season" are established and cannot be changed.
However, Engineering Design and Construction Standards 2.2.05 also states that the City
Engineer cannot approve work in those dates where erosion risks are "significant." Therefore,
if actual ground conditions at a given time indicate that significant erosion could occur, the City
Engineer cannot not allow grading. Consequently, it appears that the commentator's concerns
are addressed, but the Council can request YB to voluntarily agree to additional mitigation if it
finds a need to do so.*

15. MPD-Wide Consideration of Impacts. Ms. Llyn Doremus, licensed hydrogeologist,
states in exhibits 144 and 254 that consideration of stormwater mitigation at the implementing

1 project stage is inappropriate given the scale of the MPDs and the fact that the EISs were
2 “general” in nature and did not include adequate specificity of analysis. She goes on to say that
3 the DAs general statements of guidelines and goals is inadequate and that specific calculation of
and mitigation for stormwater effects should be included in the DAs.

4 **Examiner Response:** *Stormwater impacts, including erosion, were addressed in the MPD EISs*
5 *(V EIS, pp. 3-58 to 3-60, 4-10; LH EIS, pp. 3-54 to 3-55, 4-10). FOF 7.J found that the MPDs*
6 *would comply with the DOE Stormwater Manual as required by the BDMC. Furthermore, FOF*
7 *13 and 14 found that the SAO would address any impacts to wetlands or stormwater effects*
8 *which could cause erosion and landslide. The findings are not in dispute, nor has Ms. Doremus*
9 *provided any new technical information that would indicate that stormwater impacts that were*
10 *previously unaddressed would occur. As for her assertion that the DAs should include specific*
11 *mitigation measures, see Concern 1 above.*

9 8.3 Alteration of Geologically Hazardous and Landslide Hazard Areas

10 1. Mapping of Mine Hazards. Several exhibits voiced issue with the clause in DA 8.2.3
11 stating that the maps of mine hazards are final and complete. See Exhibits 3-13e, 3-13n, 34, 45,
12 113, 124, 143, and 249 as well as the verbal testimony of Mr. Steve Pilcher, Dr. Chris Breeds,
13 Ms. Pat Pepper, Ms. Cindy Wheeler, and Ms. Carol Lynn Harp. Commenters mentioned
14 possible missing information due to small mines (Ex. 3-13e), recommended the use of “earth
15 scanning” technology to find unknown mines (Ex. 143), and pointed out that some areas on the
16 hazard map (DA Exhibit G) were marked “approximate” (Ex. 249). One exhibit was submitted
17 by Dr. Chris Breeds, president of SubTerra, Inc., a geotechnical engineering firm (Ex. 45). Dr.
18 Breeds stated that mine hazards would be significant and suggested additional requirements for
19 the MPDs, including additional subsurface exploration and peer-review of mine hazards
20 analyses. Dr. Breeds further stated “freezing” the maps as they are now ignores that fact that
21 actual mine hazards may exist in different areas than currently mapped and that hazard areas are
22 known to change as subsurface conditions shift. Dr. Breeds stated that mapping of low-hazard
23 areas would not likely require additional mitigation as those areas are well marked. His concern
24 was with the moderate- and high-hazard areas.

25 Most of the exhibits cited above stated similar concerns that freezing the mine hazards mapping
26 at this point, without additional mine hazard information, could cause an unanticipated mine-
related hazard.

27 **Applicant Response:** The Applicant responded to this issue with additional testimony provided
28 by Mr. James Johnston, a geotechnical consultant (Exhibit 139, attachment 4). As part of Mr.
29 Johnston’s rebuttal of these arguments (above), additional language was proposed for DA 8.2.3,
30 allowing that some mapped zones were not certain and the classification of those areas might
31 change as an exception to the “classification” of mine hazard areas. The modified text is as
32 follows (shown in strikethrough/underline format):

33 Mine hazard areas for The Lawson Hills MPD were evaluated in the EIS's Appendix D
34 and are shown on the Constraints Maps. These ~~Subject to the exceptions~~ described below,

1 these mine hazard areas for The Lawson Hills MPD as surveyed on 7/27/09, including the
2 High Mine Hazard area buffer which the Master Developer mapped to protect even
3 though such a buffer is not required in the City's Sensitive Areas Ordinance, BDMC19.10
4 (Exhibit "E"), are deemed final and complete through the term of this Agreement.
5 Pursuant to Condition of Approval No, 159 of the MPD Permit Approval, except as
6 provided below, if during construction it is discovered that the actual boundary is smaller
7 or larger than what was mapped, the mapped boundary shall prevail.

8 As of the time of execution of this Agreement, the mine hazard area boundaries for the
9 following areas have been generally agreed to by the Designated Official, but additional
10 subsurface exploration and analysis is necessary in order to further evaluate: (1) the
11 location and extent of the Macks Mine hazard area near the northern end of the Project
12 Site; (2) the mine hazard boundary for the McKay Section 12 Surface Mine and older
13 underground mines beneath it; and (3) the width of the Moderate Mine Hazard zone
14 above the Lawson Mine. Additional work to identify the Macks Mine hazard zone, the
15 McKay Section 12 area, and the width of the Moderate Mine Hazard area for the Lawson
16 Mine was described in the MPD materials as to be conducted pursuant to the standards
17 set in the City's Sensitive Areas Ordinance, BDMC19.10 (Exhibit "E"). That work will be
18 conducted together with Implementing Project applications involving Development in or
19 near these locations, and will define the nature and extent of those mine hazard areas.
20 Once the boundaries of (1) the location and extent of the Macks Mine hazard zones near
21 the northern end of the Project Site; (2) the location of the hazard zone for the McKay
22 Section 12 Surface Mine and older underground mines beneath it; and (3) the width of the
23 Moderate Mine Hazard above the Lawson Mine have been agreed to, these boundaries
24 shall also be fixed.

25 Finally, based on the level of surface exploration, historical document review, and mine
26 exploration work conducted at the Project Site, it is unlikely that any new mine hazard
27 areas will be discovered outside those areas mapped and referenced in this section.
28 However, in the event that a new mine hazard area is discovered during Development,
29 that area will be assessed and protected pursuant to the City's Sensitive Areas Ordinance,
30 BDMC19.10 (Exhibit "E"). Any additional work provided with Implementing Project
31 applications shall be reviewed by an independent qualified third-party reviewer as part of
32 the MORT review process described in Exhibit "N", at the Implementing Project
33 applicant's expense, to perform peer review of mine hazard reports.

34 **City Response:** Mr. Steve Pilcher of the City testified the establishment of sensitive areas
35 boundaries now was appropriate because they had been thoroughly analyzed in the EISs.

36 **Examiner Response:** *As discussed by the exhibits above, mine hazard mapping was conducted
37 as part of technical studies prepared for the Lawson Hills EIS (Appendix D). However, the
38 original reports regarding mine hazard areas expressed limitations to the analysis for some
39 mines (including the Macks Mine) based on property access and other factors (EIS Appendix D).*

1 FOF 15 states that the findings of the EIS are sufficient and that any mine hazards will be
2 adequately addressed by application of the City's Sensitive Areas Ordinance (SAO). Four COAs
3 were included which dealt with mine hazards, stating that additional mitigation may be required
4 in moderate mine hazard areas (to be evaluated at the implementing project stage), mandating
5 the use of flexible utility lines above mine hazard areas, designation of severe mine hazard areas
6 as open space and requiring that roads and utilities avoid these areas as much as is feasible,
7 required conformance with BDMC 19.10 (Sensitive Areas), and a requirement that homeowners
8 in hazard areas sign a release indemnifying the City from any liability related to mine hazards
9 (Villages COAs 114-116, Lawson Hills COAs 114-118).

7 The DA language in question not only states that the mine hazards areas are deemed "final and
8 complete" but also includes a stipulation that if the "actual" boundary is smaller or larger than
9 what was mapped, the mapped zone will prevail.

9 According to FOF 15, mine hazards have been sufficiently addressed. The EIS indicated specific
10 areas of mine hazards consistent with the technical studies. However, substantial areas of
11 uncertainty were included in the mine hazards reports appended to the EIS. The technical
12 reports as well as the expert testimony of Dr. Breeds indicate that additional borings and study
13 are required in order to determine if the mine hazards areas are accurate. The issue as to
14 whether portions of known mines have collapsed or not, a variable which directly affects the
15 area of potential hazard, is unresolved. Experts have argued both sides of that issue. Further
16 contributing to this uncertainty is the expert testimony by Dr. Breeds, which states that illegal
17 coal mining may have occurred in the project vicinity and such mines would not be mapped.

15 As described above, modification of Section 8.2.3 of the Lawson Hills DA has been proposed by
16 the project proponents, requiring additional exploration of mine conditions and hazards in the
17 same areas of uncertainty identified in the original technical reports and referred to by Dr.
18 Breeds. This additional exploration is to result in "final" maps for mine hazard areas, which,
19 upon agreement by both the City and YB that they are adequate, will become fixed. The Hearing
20 Examiner recommends the Council adopt YB's suggested changes to the DA.

19 While comments have been received that the fixing of hazard area maps in the DA is
20 inappropriate, COA 159 fixes the mapped boundaries of sensitive areas once they have been
21 agreed to. As for the comment from Dr. Breeds that peer-review of future mine hazards studies
22 should be conducted for the MPDs; the funding agreement attached to the DAs as Ex. N allows
23 the City to hire consultants for peer review per their discretion. Furthermore, the changes to the
24 DA proposed by the project proponents specifically calls for peer review of mine hazard studies.

23 The revised conditions proposed by YB go a long way in addressing the issues raised by Dr.
24 Breeds by (1) requiring further investigation in all the areas to which Dr. Breeds stated he had a
25 concern; and (2) requiring reapplication of the Sensitive Areas Ordinance if any new mine
26 hazards are discovered during "Development". It appears that YB probably intended this term
to denote any time during development of the MPDs, but it could be construed as only allowing
mine hazards to be re-delineated when a hazard is discovered while actually out in the field

1 *undertaking a construction activity. In order to remove any ambiguity, "development" should be*
2 *replaced by "during the term of this Agreement." The language proposed by YB should also be*
3 *clarified to provide that no implementing project within an affected area will be approved until*
4 *agreement is reached on the mine hazard boundaries and that if a new "or more severe" mine*
5 *hazard area is discovered that there will be a reevaluation of the sensitive area boundary.*

6 *With the replacement of the term "Development" as suggested above, the Hearing Examiner*
7 *recommends the Council adopt the revisions suggested by YB.*

8 2. Mitigation and Requirements. A few exhibits regarded additional or expanded
9 mitigation and/or requirements that should be included in the DAs. See exhibits 3-13e, 107, 117,
10 and 143. Comments included:

- 11 a. What mitigation is available for mine hazards?
- 12 b. "Checkpoints" should be set at every stage and for every approval for the MPDs,
13 including the DAs, which require that mine safety concerns be addressed.
- 14 c. Required setbacks from mine hazard areas.
- 15 d. Required establishment of the "largest possible" buffers between land uses and
16 mine hazard areas.

17 **Applicant Response:** In regards to setbacks (items c. and d. above), YB stated setbacks are
18 included in the DAs, as shown on Exhibit "G" of the DAs (see Ex. 209).

19 **Examiner Response:** *As discussed under Concern 1 above, the protection of mine hazard areas*
20 *by the use of buffers is and will continue to be subject to extensive review and assessment. The*
21 *issue of mine hazard areas has been subject to significant review and YB has agreed to modify*
22 *the DAs to require more analysis and mitigation as outlined in Concern 1. FOF 15 indicated*
23 *(among other assertions) that application of the City's Sensitive Areas Ordinance, used to set the*
24 *permanent buffers addressed in Concern 1 above, will ensure that issues related to mine*
25 *hazards are adequately addressed. The comments summarized in this concern did not provide*
26 *any new information that would suggest that any additional mitigation is necessary.*

27 3. Expansion Parcels and Mines. Two exhibits concerned section DA 10.5.2, stating
28 that because the addition of expansion parcels is allowed as a minor amendment, such an action
29 could incorporate unidentified mine hazard areas, such as the "Lake 12 Area," without applying
30 normal project review to those areas, including SEPA. See Exhibits 3-13e and 3-13i.

31 **Applicant Response:** A similar concern (not related to mines) was stated by Exhibit 71. In their
32 response to that exhibit, YB cites DA 10.5.1 (see Examiner response below).

33 **Examiner Response:** *DA 10.5.1 provides that the addition of any expansion parcels will*
34 *require a minor or major amendment, as required by the MPD regulations, that the review*

1 process will involve the submission of updated constraints map and will trigger additional SEPA
2 review. The amendment process will involve a full assessment of mine impacts pursuant to the
3 City's sensitive areas ordinance. No additional protections appear necessary at this time. V
COA 134 and 162 require the DAs to detail the application process for addition of expansion
parcels, so the City may reasonably require additional provisions to be added if it chooses.

4 4. Sensitive Areas and the DAs. One commenter asked why DA 8.2 does not include
5 mine hazards in the discussion of sensitive areas standards. See exhibit 3-13e.

6 **Examiner Response:** *Section 8.2.3 of the DAs specifically addresses mine hazards.*

7 5. Unspecified General Statements. Three exhibits concerned general statements about
8 mine hazards without giving any specific concerns or adding significant new data. See Exhibits
9 96 and 143 and the verbal testimony of Ms. Johna Thompson. These general comments are
summarized in the following:

- 10 a. Support for "all testimony" with concerns about abandoned mine shafts (Ex. 96);
- 11 b. Dismissing mine hazards will result in significant safety impacts to the City and
12 its residents (Ex. 143); and
- 13 c. Support for the project and an assertion that the project proponents' have
14 adequately researched and addressed mine hazard impacts (Ms. Johna Thompson).

15 **Examiner Response:** *The adequacy of mine hazard mitigation has already been discussed.*

16 6. Release Forms. Exhibit 37 included a statement that requiring the signing of release
17 forms by future residents of the MPDs, indemnifying the projects from litigation related to mine
18 hazards, indicates that such hazards are significant and violates the requirements of RCW
36.70b.170(4). Ms. Cindy Wheeler, the author of Ex. 37, also gave verbal testimony to this
19 effect. However, she referenced potential issues with a different state statute, RCW 36.70b.104
[sic].

20 **Applicant Response:** YB stated in Ex. 139 that the signing of these release forms is a
21 requirement of COA 116 for the Villages and COA 118 for Lawson Hills. Furthermore, the
22 project proponent points out that the releases indemnify the City, not the developer or the project
proponents, from liability associated with mine impacts, as Ex. 37 asserted.

23 **Examiner Response:** *YB is correct in that V COA 116 and LH COA 118 requires these waivers.
24 As for the first RCW mentioned by the commenter, RCW 36.70b.170(4) states that a development
25 agreement "shall reserve authority to impose new or different regulations to the extent required
26 by a serious threat to public health and safety." The DAs include language in Section 15.1 to
this effect, consistent with the requirements of the RCW.*

1 7. Open Space and Mine Hazard Areas. One commenter stated that buffers required for
2 mine hazard areas should not count towards open space. See exhibit 197.

3 **Applicant Response:** In their response to this concern (Ex. 139), YB points out that
4 environmentally sensitive areas and their buffers are included in the definition of “open space”
5 provided by the Municipal Code (BDMC 18.98.140.A). Furthermore, they assert COA 116 for
6 the Lawson Hills MPD allows the designation of these areas as open space.

7 **Examiner Response:** *LH COA 116 states that the most severe mine hazard areas shall be
8 designated as open space. As The Villages MPD does not include any severe mine hazard areas,
9 the approval for that MPD does not include such a COA. Additionally, BDMC 18.98.140.A
10 expressly states that MPDs may designate “environmentally sensitive areas” and their buffers as
11 open space. It goes on to say that such areas do not have to be integrated into a public trail or
12 park system, as long as the area is required by the Sensitive Areas Ordinance (which includes
13 mine hazard areas). As such, the response of YB is correct and the designation of buffers as
14 open space cannot be revised in the DA.*

15 8. Schools and Mines. One commenter asked whether schools are planned within mine
16 hazard areas. See Exhibit 125.

17 **Examiner Response:** *According to Exhibit 4-6 of the Villages EIS, and compared to Exhibit A
18 of the DA, all of the areas identified for school construction in the Villages MPD are well outside
19 identified mine hazard areas. As for the Lawson Hills MPD, the proposed school site lies outside
20 (though adjacent to) a severe mine hazard areas.*

21 9. Classification of Mine Hazards and the BDMC. In her verbal testimony, Ms. Pat
22 Pepper asked that the moderate mine hazard areas identified in DA 8.2.3 be reclassified as severe
23 areas in the event that new information becomes available, pursuant to the definitions of such
24 areas in BDMC 19.10.430.

25 **Examiner Response:** *The proposed new language for the DA presented in Concern 1 as revised
26 by YB and the Examiner should address the concerns of Ms. Pepper.*

8.4 Hazardous Tree Removal

1 1. Tree Removal. Several exhibits concerned about removal of trees and the associated
2 visual impact that would occur. See exhibits 3-13e, 124, 126, 209, and 252. The stated concerns
3 break down into three issues: (1) contesting the removal of hazard trees in open space areas as
4 they provide habitat; (2) concern for the overall impact of removing a large number of trees
5 during construction; and (3) concern that the removal of trees in development setbacks will have
6 visual impacts.

7 **Applicant Response:** The Applicant responded to concerns regarding removal of trees in
8 development setbacks, citing the requirements of BDMC 18.72.030 which, in the case vegetation

1 in the setbacks are removed, requires planting of “dense, evergreen vegetation to provide a visual
2 screen.” The Applicant did not respond to the remaining issues.

3 **Examiner Response:** *Regarding the removal of hazard trees, V COA 86 and LH COA 87*
4 *require that the DA include a process for “selectively” removing hazard trees while retaining*
5 *the function of a native forest. DA Section 8.4 provides a process and rationale for removal of*
6 *hazard trees, including the ability to leave removed hazard trees as snags and deadwood for the*
7 *purpose of providing habitat. The concerns of the public appear to be addressed, but the*
8 *Council is free to require reasonable additional DA terms since the COAs require the DAs to*
9 *address hazardous tree removal.*

10 *Regarding the overall removal of trees and their visual effects, the visual effects of tree removal*
11 *were addressed in the EISs and no mitigation was proposed (V EIS, pp. 3-65 through 3-67; LH*
12 *EIS, pp. 3-61 through 3-64). Furthermore, the City’s tree preservation ordinance regulates the*
13 *removal of trees. Regarding the removal of trees in development setbacks, BDMC 18.72.030*
14 *only requires a dense evergreen vegetated screen between residential and non-residential uses.*
15 *As the commenter’s property is residential, and as the project uses adjacent to his property are*
16 *residential, the requirements of BDMC 18.72.030.F.2 would not apply. However, the MPDs will*
17 *conform to the tree preservation ordinance (FOF 20) requiring that trees in buffers and open*
18 *space be retained (BDMC 19.30.060.C.2). Furthermore, DA 4.5 requires that development on*
19 *parcels adjacent to areas outside the MPDs conform to the City’s MPD Framework Design*
20 *Standards and Guidelines (the “MPD Design Standards”). The MPD Design Standards include*
21 *a requirement that multi-family and non-residential uses include a minimum 25-foot “dense*
22 *vegetative buffer” when located along the MPD boundary. The commenter’s property is located*
23 *adjacent to a proposed high-density residential area, ensuring that such a buffer will be included*
24 *(V DA Appendix A).*

25 *As discussed above, the City’s regulations, MPD COAs and proposed DA provisions provide*
26 *significant protection against the impacts of tree removal and fully implement the requirements*
27 *of the V COA 86 requirement to include a process for removal of hazardous trees within the DA.*
28 *The Council is free to require other hazardous tree removal conditions that it reasonably*
29 *considers are necessary to the DA. As to conditions affecting the removal of other trees, the*
30 *Council would need to acquire voluntary approval from YB.*

21 9.0 Parks, Open Space and Trail Standards

22 9.1 Overall Open Space Requirement

23 1. Total Amount of Open Space and the 50% Requirement. Several comments in the
24 public testimony and a number of exhibits expressed concern about the amount of open space,
25 and in particular if the amount of Open Space was consistent with the 50% requirement as
26 indicated in the Black Diamond Comprehensive Plan (5-14 MPD overlay criteria 7), BDMC
18.98.140(F), and the MPD Framework and Design Standards and Guidelines (General
Principles and Site Planning (B) Using Open Space as a Design Element, p4). See Exhibits 15
(McElroy), 56 (Sierra Club), 117 (Schmidt), 143 (Morgan) and 209 (Nelson), Exhibits 199, 239

1 (Edelman), verbal testimony Jay McElroy, Dan Streiffert, Pat Pepper, Gil Bortleson, Cindy
2 Wheeler, Sheila Hoefig.

3 Nelson asserted that DA 2.2 shows the amount of space needed to comply with the 50%
4 requirement, but that the values shown were less than those indicated in FOF 18. Edelman
5 (Exhibit 199) took exception to the applicant's statements about the relationship of previous
6 open space agreements to the YB's obligations.

7 **Applicant Response:** YB responded at length (Ex. 139), stating both MPD open space
8 percentages were approved as part of the MPD (DA Exhibit L and LH MPD COA 145). BDMC
9 18.98.140(A) defines open space to include "environmentally sensitive areas and their buffers."
10 Only portions of the MPDs are subject to the 50% Open Space requirements contained in BDMC
11 18.98.020. Open space percentages of the MPD areas subject to prior agreements are governed
12 by the specific provisions of those agreements. DA 2.2 describes the amount of Open Space that
13 each MPD must provide based on the City's Open Space and the requirements of prior
14 agreements.

15 The Applicant cited Exhibit 8, their guide to development. The MPDs are subject to the
16 requirements of prior open space agreements plus the 50% open space requirement for those
17 portions of the MPDs not subject to the prior agreements. Open Space within the MPD
18 perimeters is not the only Open Space that is being protected and preserved as a result of the
19 MPDs. The Villages MPD and Lawson Hills MPD will provide 505 acres and 153.3 acres,
20 respectively, of Open Space within their perimeters. Open Space provided for The Villages
21 exceeds the amount required by the DA. When taken together, the total amount of Open Space
22 that has been dedicated or will be dedicated associated with the MPDs is 1895.3 acres, or 67% of
23 all MPD-related land being retained as Open Space.

24 **Examiner Response:** *V MPD COL 57 and 58 and LH COL 57 and 58 determined that the open
25 space proposed in both MPDs satisfies prior agreements and the 50% requirement of BDMC
26 18.98.140(F). That issue can no longer be revisited.*

27 2. Location, Type and Boundaries of Open Space. Several exhibits were concerned that
28 the location, type, and boundaries of Open Space were too easily changed, resulting in a risk of
29 loss of Open Space values. See Exhibit 10 (Taylor), Exhibit 73 (Morgan), Exhibit 113
30 (Bortleson), Exhibit 143 (Morgan), Exhibit 75 (Edelman), Exhibit 117 (Schmidt.), verbal
31 testimony Les Dawson. Some were concerned that Open Space changes need public input and
32 should be subject to the Major Amendment process.

33 **Applicant Response:** YB responded that Open space boundary modifications require a Minor
34 Amendment to the MPD Permit Approval and shall not modify Open Space requirement in Sec
35 9.1 of the Development Agreements. BDMC 18.98.100 (D) and (I) contemplated minor
36 amendments to open space, provided minimum threshold amount is not decreased and locations
are not significantly altered. Approval of Minor Amendment is a Type 2 decision under BDMC
18.08.125; see Sec 12.6.1(A) of Development Agreements.

1 Development Parcel acreage can only be changed with an Implementing Project application,
2 subject to noticing requirements in BDMC 18.08.120-.180; see Sec 12.6.1 of the DA.

3 **Examiner Response:** *As recommended in 1(b) of the land use issue of concern, the Examiner*
4 *is recommending that the any changes in the boundaries to any land use boundaries in the Land*
5 *Use Plan, including open space boundaries, be subject to districts that result in a change of*
6 *more than 5% are subject to an MPD amendment. Similar to what was concluded in land use*
7 *issue of concern 4b, the DA 4.4.4 allowance for open space boundary changes by minor*
8 *amendment will not result in any significant impacts if 4.4.4. is clarified to provide that the*
9 *change can only be processed as a minor amendment if it meets all the requirements in BDMC*
10 *19.98.100(E), which includes the requirement that the amendment not increase any adverse*
11 *environmental impacts.*

12 3. Additional Open Space – Lawson Hills. One exhibit expressed concern that DA 9.1
13 did not comply with LH MPD COA 145, which stated that an additional 14.8 acres of Open
14 Space shall be added to the LH MPD Land Use Plan by the DA or that the DA provide a plan for
15 its inclusion. See Exhibit 61 (Edelman). Mr. Edelman further argued that Section 9.1 of the
16 Development Agreement falls short of this requirement and the footnote to Table 9-1 fails as a
17 “plan”.

18 **Applicant Response:** In its response in Exhibit 209, YB notes that 9.1 provides the plan
19 required by Condition 145 by designated Parcels L1 and L2 to be designated as open space
20 (which total 5.5 acres) and that LH DA 9.1 requires the remaining 9.3 acres required by COA
21 145 is accounted for by the following language in 9.1: “Each Implementing Project on the
22 Lawson Hills Main Property shall account for how much Open Space has been provided
23 throughout the MPD, how much Open Space is being proposed with the Implementing Project,
24 and how much remaining Open Space is required to be provided. When the final Implementing
25 Project is proposed, all remaining Open Space shall be provided prior to approval of the final
26 Implementing Project.”

18 **Examiner Response:** *The plan leaves the potential for YB to defer adding the remaining 9.8*
19 *acres to a final implementing project that does not have any property suited to accommodate*
20 *quality open space of that size. DA 9.1 should be revised to provide that in the specified project*
21 *by project review of open space needs the City may require an earlier implementing project to*
22 *accommodate the open space if there is a potential that property suited for open space will not*
23 *be available in later implementing projects.*

22 9.2 Park and Open Space Plan

23 1. Park Construction Timing/Phasing. Several exhibits expressed concerns over the
24 timing of park construction in DA 9.2. See Exhibit 10 (Taylor), Exhibits 40, 138 (Derdowski).
25 Brian Derdowski in Exhibit 40 noted that Section 9.2 delays the construction of parks until
26 Certificates of Occupancy are issued for 60% of each Phase (30% of Phase 3). Derdowski
asserted this provision violates the BDMC (no citation provided) and is “extremely poor policy.”

1 **Applicant Response:** In Ex. 209, YB noted the Derdowski assertion overlooks the additional
2 requirement that parks are required to meet level of service standards. Section 9.2 provides that
3 the Master Developer may elect to build parks in advance of the triggers in the subsection. DA
4 9.2 stated, "Parks within each Phase of [the] ... MPD shall be constructed or bonded prior to
5 occupancy, final site plan or final plat approval of any portion of the Phase, whichever occurs
6 first, to the extent necessary to meet park level of service standards for the Implementing
7 Approval or Project."

8 **Examiner Response:** *DA 9.2 requires that parks be completed or bonded prior to occupancy,
9 final site plan or final plat approval, whichever occurs first. As noted by YB, the 60%/30%
10 occupancy requirement only applies to bonded park improvements. DA 9.2 mirrors the
11 requirements of V and LH COA 97, except that V and LH COA 97 don't identify when bonded
12 park improvements must be constructed. Consequently, the Council is not tied down to the
13 60%/30% DA proposal and can negotiate alternative timing. However, the COAs do not
14 expressly defer the issue of timing to the DAs so it is debatable whether the Council can require
15 YB to agree to alternative timing. The Council may wish to negotiate an outside time limit, such
16 as the earlier of 60%/30% or two years.*

17 2. Bonding v. Construction, Implementation Plan. Exhibit 73 (Hoefig) raised two
18 additional concerns related to bonding and in-lieu payments. Ms. Hoefig asserted that DA 9.2 is
19 inadequate and needs to be: (i) clarified to understand if the intent is to have parks constructed
20 and bonded or constructed or a bond issued in-lieu of construction, and (ii) revised to require an
21 implementing development plan from the City (emphasis added) in regards to all lump-sum
22 payments in-lieu. Taylor (Exhibit 10) and Hoefig (Exhibit 73 and verbal testimony) expressed
23 concern that there was no overall implementing plan or timetable for city construction.

24 **Applicant Response:** YB responded that The Villages Conditions of Approval 95 and 96 and
25 Lawson Hills Conditions 96 and 97 require that parks and trails be "constructed or bonded prior
26 to occupancy, final site plan, or final site approval, whichever occurs first." The conditions
require construction or bonding, but not both. Section 9.2 of the Development Agreements
provides that "parks within each phase . . . shall be constructed or bonded prior to occupancy,
final site plan or final plat approval of any portion of the Phase, whichever occurs first, to the
extent necessary to meet level of service standards for the Implementing Approval or Project . . .
Parks must be completed when the Certificates of Occupancy or final inspection has been issued
for 60% of the dwelling units located within ¼ mile of a given park in any Phase." The effect is
that the Development Agreement is more restrictive than the Conditions of Approval.

Examiner Response: *This is no ambiguity in the DAs about bonding verses "in lieu" payments.
DA 9.2 clearly addresses bonding for deferred construction.*

9.3 Sensitive Areas and Buffers

1. Vegetative Buffers. In Ex. 126 Tom Hanson stated that he would like to see
vegetation retained in MPD perimeter setbacks. He has a home along the setback.

1 **Applicant Response:** The Applicant responded they have voluntarily offered to provide a 50-
2 foot wide vegetative buffer on the eastern boundary of The Villages MPD Development Parcel
3 V13. See p. 14-15 of the Guide (Exhibit 8) and Exhibit A of the Development Agreement. The
4 Applicant stated their plan is to leave existing vegetation on the Project Site where feasible and
5 practical. Should there be a necessity to remove existing vegetation, landscaping would be
6 provided consistent with BDMC 18.72.030, which requires dense, evergreen vegetation to
7 provide full visual screening.

8 **Examiner Response:** *Natural vegetation is retained along large portions of the MPD perimeter
9 in MPD open space and that the remaining perimeter is subject to setbacks of varying widths.
10 The Hanson property is one of several on the northeast portion of the main MPD site where a
11 35-foot buffer is required and the applicant has offered a 50-foot buffer. YB has addressed the
12 concerns of Mr. Hanson. If the solution is acceptable to the Council, it should be incorporated
13 into the DA.*

14 9.4 Non-Sensitive Open Space

15 1. Inclusion of Wetlands, Sensitive Areas, and Stormwater Facilities in Open Space.
16 Exhibit 117 (Schmidt) objected to the inclusion of sensitive areas in open space acreage, arguing
17 that the MPD Overlay in Black Diamond Comprehensive Plan, June 2009, at 5-14, lists as
18 designation criteria 7 that: “at least 50% of the MPD site is devoted to open space uses, which
19 may include recreational amenities.” As recreational amenities are not allowed in sensitive areas,
20 these areas should not be included as Open Space. Exhibit 138 (Derdowski) asserted that Section
21 9.4 would allow stormwater facilities to be considered Open Space, even if inundated 9 months
22 of the year, and that this violated the intent of the BDMC.

23 **Applicant Response:** YB responded that BDMC 18.98.140(A) defines open space to include
24 “environmentally sensitive areas and their buffers.” The DA cannot be found noncompliant for
25 complying with the City’s code. As to stormwater facilities, BDMC 18.98.140(A) allows
26 stormwater detention/retention ponds to be counted as Open Space, provided they “have been
developed as a public amenity and incorporated into the public park system.” V MPD COA 69
and LH MPD COA 71 specifically require that stormwater facilities must be “suitable for active
recreational use during at least 3 months of the year” to be considered by the City to be Open
Space.

27 **Examiner Response:** *The Applicant is correct that sensitive areas may qualify as open space,
28 since BDMC 18.98.140(A) expressly allows this. BDMC 18.98.140(A), as a zoning code
29 provision, would supersede any conflicting comprehensive plan provision. Citizens of Mount
30 Vernon v. City of Mount Vernon, 133 Wn.2d 861 (1997). As to stormwater detention/retention
31 ponds qualifying as open space, V MPD COA 69 and LH MPD COA 71 set the parameters for
32 open space designation and they cannot be revisited. However, they do provide discretion to
33 include a nonexclusive number of factors in designating open space areas. This leaves room for
34 the Council to treat inundated areas differently than those that are not. In general the Council
35 probably doesn’t want to require added amenities for areas that are more frequently inundated.*

1 *There are other options. For example, the DA could provide that if a retention/detention facility*
2 *is inundated for more than six months out of the year it may only qualify as active open space if*
3 *it is adjoined by highly developed active space that is dry year round, such as a tennis or*
4 *basketball court.*

9.5 Recreation and Useable Open Space Standards

5 1. Open Space Credit for Lake Sawyer Park. In oral testimony and Exhibit 73, Sheila
6 Hoefig expressed concern that the provisions of DA 9.5.3, “appear to have opened the back door
7 for the take-over of the Lake Sawyer Regional Park (LSRP).” The LSRP is currently
8 undeveloped and, with the exception of the boat launch, used passively. Ms. Hoefig further
9 stated the Development Agreement contemplates giving the Developer Open Space credit for
10 offsite replacement and that if such placement was at the LSRP, it would allow publicly owned
land to meet the developer’s obligation to purchase open space. Use of LSRP as a heavily used
active park was not anticipated in the FEIS. Ms. Hoefig requested the Development Agreement
be modified to prohibit use of LSRP for Open Space credit.

11 **Applicant Response:** In Ex. 209, YB responded that DA 9.5.2 does not authorize the Developer
12 to receive Open Space credit for Lake Sawyer Park. The Master Developer may, with the
13 consent of the City, construct Recreational Facilities in Lake Sawyer Park that would count
toward the Recreational Facilities requirements as set forth in Table 9.5 of both Development
Agreements.

14 **Examiner Response:** *The Hearing Examiner agrees DA 9.5.2 does not authorize YB to acquire*
15 *an open space credit for the construction of active recreational facilities on LSRP. The Council*
16 *is not required to maintain the LSRP as passive because it was assessed as passive in the EIS.*
17 *Changes to the LH MPD proposal could trigger additional environmental review, such as an EIS*
18 *addendum, but the decision as to whether and what additional review is necessary is left to the*
19 *City’s SEPA responsible official and is not subject to review by the Examiner or Council. The*
20 *COAs leave room for the Council to require that the DA exclude LSRP as a receiving site for*
21 *Recreational Facilities.*

22 2. Level of Service Standards. Exhibit 40 (Derdowski) expressed concern that the level
23 of service (LOS) for recreational facilities is based on population generation rates that are
24 unsubstantiated and standards that are not suitable for the Master Planned Developments.

25 **Applicant Response:** The Applicant responded that parks and recreation LOS standards were
26 directly derived from adopted standards in the City’s Park and Open Space Plan (12/18/2008).
Population rates were included in the FEIS, previously deemed adequate. (See Exhibits 1-4 of
Chapter 1 of each FEIS.)

Examiner Response: *The population generation rates used in S 9.5.4 are the same rates used*
in Appendix A of each FEIS and serve as a credible, consistent estimate for assessing
compliance with LOS standards.