

Brenda Martinez

From: Justin Wortman <jwortman@oakpointe.com>
Sent: Wednesday, February 04, 2015 8:56 AM
To: Brenda Martinez
Cc: Colin Lund

Brenda,

Here is Phil's email.

Thanks,
Justin

From: Phil olbrechtslaw@gmail.com [olbrechtslaw@gmail.com]
Sent: Tuesday, February 03, 2015 9:37 PM
To: Kristen Bryant
Cc: Andy Williamson; Nancy Rogers
Subject: Re: Request for Review of Comment Submitted but not addressed

Ms. Bryant,

I am unable to provide you with any useful information regarding your request for review. Any explanation I provide of how my decision addresses the logging road could be used to interpret the decision, which in turn could change its meaning during the appeal period. The meaning of the decision needs to be set upon its issuance so that potential appellants are not blind-sided by a new interpretation in the middle of the appeal period. I would have no qualms in correcting and re-issuing the decision if there were some "ministerial" type mistake such as a missing page or draft text that was inadvertently left in the decision. However, a response to your logging road question would involve an explanation of how the decision does or doesn't address the road, which is an interpretation that, as mentioned previously, could change how the decision is interpreted while the 21 day appeal clock continues to run. Your request could normally be handled through a request for reconsideration, but the Black Diamond Municipal Code and the hearing examiner rules of procedure don't include any express authorization for reconsideration. Whether there would be any implied right to reconsideration is legally ambiguous. You should consult with your attorney if that is an action you would like to pursue.

I have cc'd the city and applicant so that the principal parties of the case are notified of our communication. I also request that Mr. Williamson add this email to the on-line set of exhibits for PP2C.

From: Kristen Bryant <kristenbry@gmail.com>
Date: Friday, January 30, 2015 at 1:38 PM
To: "Phil olbrechtslaw@gmail.com" <olbrechtslaw@gmail.com>
Subject: Request for Review of Comment Submitted but not addressed

Hello Examiner Olbrechts,

Attached is a Request for Review of Comment Submitted but not addressed.

thank you for your consideration,

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Kristen Bryant

Request for Review of Comment Submitted but not addressed

RE: Black Diamond "The Villages" Preliminary Plat 2C

From: Kristen Bryant and William and Karen Bryant

Date: Jan 30, 2015

To: Hearing Examiner Olbrechts

A careful review of the Hearing Examiner decision on Plat 2C (dated January 28) finds that one of the issues submitted was not addressed. This is a request that the Examiner review the issue and consider creating an addendum to the ruling that addresses the issue.

Note: I am aware that the appeal deadline starts on the date of the issuance of the Hearing Examiner decision. I would like to state that I would not consider a response to this request grounds for changing the appeal date.

The Hearing Examiner's decision does not address the comments made regarding the logging road on the north end of wetland E1 being considered as the hydrologic boundary, or ecological break, for the wetland¹. Comments were made in a number of submittals:

1. Exhibit 55, the document with the heading "Comments from Review of Plat 2C Documentation, Submitted by: Kristen Bryant and on behalf of William and Karen Bryant, Date: December 11, 2014. Comment on page 3 headed, "Buffer on the north portion of wetland E1 is incorrect."
2. Wetland expert testimony from Diane Brewster dated December 19, 2014. Posted on the city website as "K Bryant-Wetland Expert Testimony.pdf" (without an exhibit number), page 8 in the exhibit, titled, "Wetland E1 Buffer Issues of Concern."
3. Testimony from Exhibit 87, Brian Derdowski, headed "Black Diamond Villages Plat 2C Comments – Substantive", pages 23 and 26.
4. Exhibit 2, page 7, Sheet PP1
5. Oral Testimony by Kristen Bryant on Dec 11.

Copied on the following pages are the portions of the record listed above:

¹ The only reference to this issue in the Hearing Examiner decision seems to be on page 6 where it states:

(2) Buffer Averaging Will Not Adversely Affect Wetlands. Buffer averaging was approved by the mayor pursuant to Ex. 30a for several small areas for development, as follows: the buffer is reduced 182sf for Lots 156 and 157; at 373sf for Lots 147 and 140; 1,366sf for Lots 134-141; and 196sf for Lots 129-131. The total buffer reduction at these locations is 2,117sf. The total buffer area added in compensation is 26,222sf. Numerous public comments contested the validity of this decision, in particular where a buffer was reduced to accommodate a logging road. As concluded in COL No. 16, the examiner has no jurisdiction to evaluate the validity of the mayor's decision. The mayor's determination under the averaging criteria that the averaging will not reduce wetland functions or functional performance must be taken as a verity. [emphasis added]

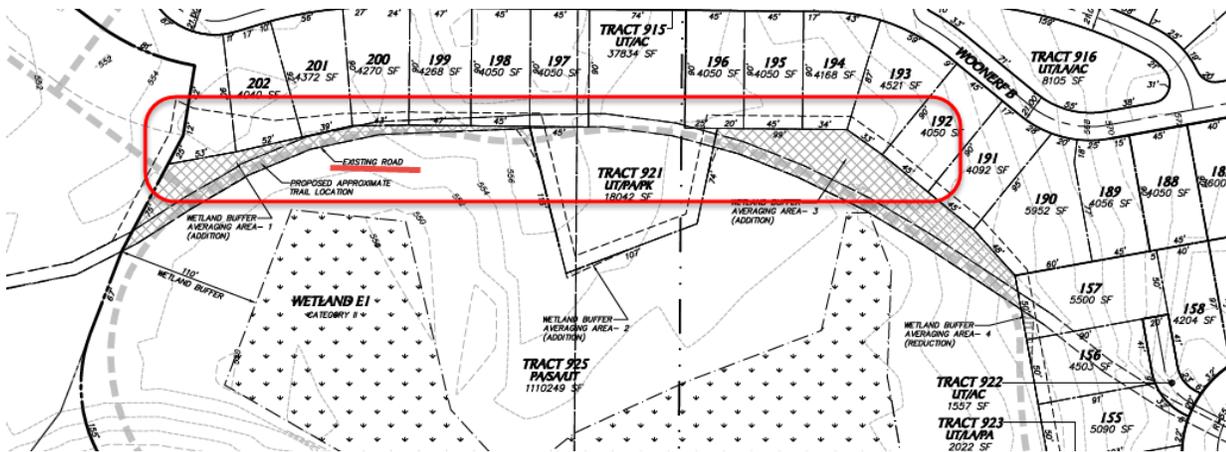
Buffer averaging does not reduce, but actually increases the buffer in the vicinity of the logging road. Therefore, we noted that this does not address certain public comments on the logging road. We understand that the Hearing Examiner considers the Mayor's decision regarding buffer averaging to be final. We are not contesting that determination.

Exhibit 55's comment headed "Buffer on the north portion of wetland E1 is incorrect":

Buffer on the north portion of wetland E1 is incorrect.

This buffer does not follow Black Diamond Municipal Code or follow wetlands standards from the Department of Ecology.

A portion of the map showing the buffer in question. This was taken from plat drawing 06-PP1.pdf.



The thick grey dashed line shows a trail and buffer edge. The averaging plan shows buffer the applicant marks as "added" to the north of this trail. In fact, this is much smaller than the required buffer.

Here is an excerpt from "The Villages MPD Phase 2 Plat C-Wetland Review" dated March 31, 2014 from Perteet,

Memorandum



To: Stacey Welsh, Community Development Director, City of Black Diamond
From: Jason Walker, ALSA, PWS, Environmental Manager, Perteet Inc.
Doug Gresham, PWS, Lead Ecologist, Perteet Inc.
Date: March 31, 2014
Re: The Villages MPD Phase 2 Plat C-Wetland Review

Perteet states:

4. The following items pertain to wetland buffers:
 - a. It was agreed in our July 25, 2012 memo for The Villages Phase IA that the buffer for Wetland E1 may stop at the logging road pursuant to BDMC 19.10.230 from information provided by the applicant and due to the disturbance frequency of the road that was verified by City staff. For Wetlands E7, E8, and E10, the logging road is not distinct in the field, does not appear to have the same disturbance frequency, and would not serve as an ecological break; therefore, this code provision would not apply. Revise the Phase 2 Plat C drawing sheets to indicate the full standards buffer widths for Wetlands E7, E8, and E10.

(Note that the city's online posting currently omits the above by leaving out page 3 of the Perteet letter.)

http://ci.blackdiamond.wa.us/Depts/CommDev/planning/The%20Villages%20Preliminary%20Plat%20Phase%202%20Plat%20C_112514/Exhibits%20-%20Scanned%20Version/28c.%20Wetland%20Rpt%20Review.pdf

Comment: The underlined portions above demonstrate that the wetlands reviewer did not visit the logging road in question. They relied on city staff who are not wetlands experts. Had the visit been done, it would be shown that the road is not solid-surface, and relatively little work would be needed to restore the vegetation to make this a functioning buffer.

The reviewer also mis-stated BDMC. BDMC 19.10.230 Wetland buffers , section E states:

E.

Measurement of wetland buffers. All buffers shall be measured from the wetland boundary as surveyed in the field. The width of the wetland buffer shall be determined according to the wetland category. The required buffer should be extended to include any adjacent regulated wildlife habitat area, landslide hazard areas and/or erosion hazard areas and required buffers. Buffers shall not be extended across existing human features that functionally and effectively separate the potential buffer from ecological functions of the resource, and shall include hardened surfaces including improved roads or other lawfully established structures or surfaces, or the developed portions of lots, under separate ownership, lying between the habitat area and the subject property, unless restoration of buffer functions on such property is or may reasonably be expected to be the subject of a permit condition or an adopted public plan. The buffer for a wetland created, restored, or enhanced as compensation for approved wetland alterations shall be the same as the buffer required for the category of the created, restored, or enhanced wetland. Only fully vegetated buffers will be considered....

Comment [K1]: The underlined portions note that you cannot apply this condition to a surface that is not a hardened surface or improved road. These old trails are neither.

Comment [K2]: There is every reasonable expectation that this old road on this property would be restored. The preliminary plat should not be approved unless this portion of BDMC is adhered to by requiring a condition for restoration of the buffer over the logging road on E1, and full buffer width for E1 is put in place.

We asked Dr. Sarah Cooke, a wetlands expert who has testified in Black Diamond before, about the use of such a road being a stopping point for a wetland buffer. Dr. Cooke wrote:

“A logging road is not a buffer under any scenario. I don't know of any jurisdiction that would allow for a logging road as a buffer edge- it certainly is not Best Available Science. Logging roads have no positive functional attributes. If anything they are detrimental because they are unvegetated and often contribute sediment to runoff when rain hits their bare surface. It is very common to have the drainage ditches along logging roads discharge directly into creeks/streams. “

If the road really were a solid surface separating the road from ecological functions of the buffer, then the applicant would not add buffer averaging north of it (see map). In truth, there is no separation and the ecological function needed is the much wider 110' buffer.

Action Requested: Require the full buffer width on the north portion of wetland E1, and restoration of the vegetation.



DATE: December 19, 2014

TO: Kristen Bryant, William Bryant, and Karen Bryant
Black Diamond, WA

RE: Wetland E1 Buffer Issues of Concern
Public Hearing on Yarrow Bay Plat 2C

Dear Ms, Bryant,

Per your request, I have reviewed your comments on the reduced buffer widths at the north end of Wetland E1 and concur with your statements.

Regarding the **BDMC 19.10.230** on Wetland buffers, it is true that an abandoned logging road does not constitute a human made feature the functionally and effectively separates the buffer from Wetland E1. There is no asphalt or infrastructure that stopped wildlife from using the area. It is common practice based on Best Available Science to simply remove an abandoned gravel road and restore the buffer in situations like this one. There is no reasonable explanation as to why an abandoned, non-asphalt road is being used as an excuse for reducing the buffer width.

In the Wetland Rating System for Wetlands in Western Washington, the Washington State Department of Ecology defines an Ecological Break as a human made structure with high intensity, such as dense residential areas, parks, heavily used roads, sidewalks, or driveways. The structure must have regular human use to qualify as an ecological break. These have negative impacts on habitat due to noise, light and toxic runoff. None of these are currently present in the Wetland E1 buffer.

City code (BDMC 19.10.210(B)3b) states that "Category II wetlands have significant value based on their function as indicated by a rating system score of between fifty-one and sixty-nine points. They do not meet the criteria for category I rating but occur infrequently and have qualities that are difficult to replace if altered." Making the existing abandoned road into the trail that is expected to be used frequently by people and their pets not only cuts off the wetland from its buffer, it also exposes the wetland to high intensity use. Wetland E1 needs to have the entire 110-ft buffer due to the increased density of housing and the proposed trail through the buffer. In addition, the trail needs to be moved to the outer 50% of the buffer with removal of the abandoned road and restoration of the buffer along the section of removed road per BDMC 19.10.210(B)3a-e.

Respectfully,

A handwritten signature in blue ink that reads 'Diane Brewster'.

Diane Brewster
Professional Wetland Scientist, Cert # 1721

[The way this document is written, the public comment is in bold blue, the other text is staff report text]

From page 23:

D. Other wetlands—Standard buffer widths. The standard buffer widths presume the existence of a relatively intact mature native vegetation community (relative density of twenty or greater) in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity. If the vegetation is inadequate, then the buffer width shall be increased or the buffer shall be planted to maintain the standard width. The minimum buffer requirements assume that adjacent land use meets the conditions outlined in section 19.10.220(D), in accordance with the Department of Ecology's Guidance on Wetlands in Washington State (2005), Volume 2 - Protecting and Managing Wetlands, Appendix 8C (Moderate Intensity Land Use). Required standard wetland buffers based on wetland category are as follows:

STAFF RESPONSE: The existing conditions on the subject site provide relatively intact vegetation in the buffer zones so the standard buffers were applied to each wetland based on its classification (see table at beginning of this section of the staff report). **Some wetlands have been degraded, with one buffer bisected by an existing gravel road. The wetland analysis submitted by the applicant did not document the extent of degraded buffer areas.**

From page 26:

"The additional buffer areas include an existing road within the required buffer. Under BDMC this area would already be designated as buffer area and subject to restoration."

