BEFORE THE HEARING EXAMINER FOR THE CITY OF BLACK DIAMOND

Phil Olbrechts, Hearing Examiner

RE: Clearing and Grading Permit Appeal PUB13-0009 and PLN13-0015	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

INTRODUCTION

The appellant appeals the issuance of a clearing and grading permit for the Villages Phase 1A Preliminary Plat. Issuance of the clearing and grading permit is sustained and the appeal is denied.

As has been the case in all other phases of the Villages and Lawson Hills master plan permit reviews, time has been a major issue. The appellant in this case has taken the strategy of not pursuing any of her appeal issues on the grounds that she did not have sufficient time to prepare. The appellant requested a continuance just a few days before the hearing and again on the day of the hearing. Both requests were denied. From the evidence presented by the applicant and the City of Black Diamond ("City"), it ultimately does not appear that there was any merit to any of the appellant's claims. However, since the appellant did take the extreme measure of essentially abandoning her appeal on the premise of insufficient time, the issue of the continuance will be addressed at length in these introductory comments. The intent of including these comments is to provide for a public explanation of why the continuance was denied and also to provide some guidance to future hearing participants on how to use their time optimally to prepare for a hearing.

The appellant based her continuance request in part on the basis that information and/or preparation was required of her in advance of the hearing for which she had inadequate time to prepare. In point of fact only one very minor amount of information was required before the hearing date. The appellant was required to disclose her witnesses the Friday before the Monday appeal hearing. The appellant was notified of this requirement six days in advance of the hearing and was told two days in advance that only those witnesses disclosed would be allowed to testify. There was absolutely nothing overly burdensome or prejudicial in such a requirement. Clearly, if the appellant had been prepared to present her case, she would have known who she was going to use as witnesses one working day before the hearing.

If the appellant was delayed in her preparation because of delays in record request responses, she could have asked for a continuance weeks in advance instead of the Thursday prior to the Thursday hearing. The appellant filed her appeal on August 6, 2013. A notice of the hearing date was issued on August 27, 2013, almost a full month before the September 23, 2013 hearing date. Requesting a continuance for the first time on the Thursday before the Monday hearing date under these conditions when asserted problems with record requests were known well before was not reasonable under the circumstances.

The appellant was also advised in advance of the hearing to be prepared to address two legal issues on the day of the hearing that were raised in the applicant's motion to dismiss, filed the Tuesday before the appeal hearing. As noted by the applicant, there was no requirement that the examiner or the applicant provide any advance notice of legal issues that may arise during the hearing. Clearly, however, due process would require the examiner to leave the record open for any complicated issues raised during an appeal hearing that in all fairness demand additional time for research and argument. Due process did not require additional time for the two legal issues addressed during the hearing of this case. The two legal issues were narrow and involved no contested facts. Most important, it would only have taken a brief consultation with a land use attorney to assess the merits of the issues. One of the two legal issues (regarding the examiner's authority to consider SEPA issues) was not complicated. The other issue was not much more ambiguous. The appellant used a land use attorney to request a continuance at the time she was already aware of the two legal issues. It would have taken less time for that attorney to address the legal issues than writing the request for continuance. Had the attorney communicated any ambiguity in the two legal issues that necessitated additional time for response, the appellant would have found the examiner very accommodating.

A third issue was raised by the examiner by email the Saturday before the hearing date. The issue dealt with whether or not conditions of subdivision approval had to be completed prior to the issuance of a clearing and grading permit. Had the issue been raised for the first time during the hearing itself, the most appropriate response for any request for additional time would have been at most the granting of a one hour recess to prepare an oral response. The issue involved a straightforward interpretation of some conditions that didn't involve any contested facts or a need for legal research. The advance notice of the issue provided to the appellant was a fair accommodation.

The examiner's initiation of prehearing correspondence and the requirement to disclose witnesses was done in pursuance of Hearing Examiner Rule of Procedure 2.06, which requires hearings to be conducted expeditiously and hearing participants to make every reasonable effort to avoid delay. The need for efficiency in the master plan hearings is more than an abstract objective. It is a critical requirement of the hearing process that is just as necessary for the protection of project opponents as it is for the applicant. The information involved in the master plan review process is so massive that it generates administrative records that are cost prohibitive for all hearing participants to manage, whether it be for purposes of project defense or project challenge. Although the scale of information in this specific proceeding wasn't particularly voluminous, it certainly is from a cumulative perspective as all of the hearings involved are considered together. Given these challenges, all parties need to make a special effort to focus the issues on what needs to be resolved.

There was room for improvement in the conduct of all the parties to this proceeding to provide for a more efficient hearing. The appellant's refusal to disclose witnesses (or advise that she wasn't going to present any witnesses) was not productive and brought into question the motives of the appeal. It is noteworthy that in contrast the City and the applicant disclosed exhibit lists prior to the hearing with no request to do so. It would be naïve to believe that project opponents are not at least partially motivated to kill a development project by tactics based upon creating delay and increasing review expense. However, project opponents in the master plan review

process have maintained a high level of credibility by focusing on issues that have ultimately lead to significant improvements in the master plan developments. That credibility was lacking in this appeal, but of course it is within the realm of possibility that the appellant could have brought forth something of significance had she presented her case.

The staff and the applicant could also have improved efficiency and cooperation by submitting the staff report and prehearing motions more than a few days prior to the appeal. Although there are no rules that mandate an earlier submittal, it is clear that hearing efficiency is a major issue for both the City and the applicant. If the City and applicant are truly serious about providing for a more efficient hearing system, they need to get their staff reports and prehearing motions out early enough so that other parties have more time to respond to them. It is understandable that the applicant had to wait for the staff report to file its motion to dismiss, but many of the legal issues could have been raised separately further in advance. The examiner too should include the option for prehearing conferences in the rules of procedure and work with staff in ensuring that hearing participants are advised of the availability of this process.

Those closely involved in the master plan permitting process may feel that the request for a continuance in this appeal was handled more strictly than in prior master plan proceedings. The difference in treatment is simply based upon the fact that this is the first time there was no compelling justification for a continuance. Prior proceedings dealt with huge amounts of information and complicated legal issues that necessitated volumes of legal argument. Those factors amply justified pushing the law as far as it could possibly go to provide a fair amount of time for preparation and argument. In contrast, there was nothing in this proceeding that suggested any reasonable basis for additional time. The applicant's rights to a fairly expeditious proceeding are just as important as an opponent's right for a reasonable opportunity to prepare. A continuance request involves a balancing of those competing interests. The balance was clearly in favor of the applicant in this proceeding.

ORAL TESTIMONY

Note: *This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary for this final decision. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner or an indication of what information is significant to this decision.*

Ms. Harp, the appellant, had previously asked for a continuance via e-mail, which the Hearing Examiner had denied, but at the start of the hearing she asked a second time for a continuance, and she presented a document with her reasoning.

In response, Ms. Nelson, representing the applicant, argued that the person who files an appeal knows the issues for which he or she files that appeal, and the fact that Ms. Harp did not do that does not mean she can put that burden on the applicant. Also, Ms. Harp cannot ask to change the date of the hearing on the day of the hearing; she should have made known earlier that this date wasn't a good one for her. Also, the content of the motion is only twenty pages; it is only eighty-

two pages due to exhibits that are attached, thus the length of the motion should not be a reason to delay the hearing.

Mr. Sterbank added that these contentions on the day of the hearing are inappropriate. With respect to the comment about the review of the file, the applicant first came in to view the file on September 11, and two days following the city received a public records request that is broad. The appellant tagged a number of documents that day and was provided copies of every document she requested. The only reason the city's response to the records request is not complete is that the city had requested clarification on the breadth of the request. With respect to the publication of the staff report, the staff report was e-mailed to the applicant and to the appellant at 4:49 p.m. on Monday, September 16. As is consistent with Black Diamond City code requirements, the day on which the staff report was e-mailed counts as one of the five working days in advance of the hearing. Also, Mr. Sterbank said this request for continuance appears to be based on the claim that the appellant is unrepresented, thus needs assistance, yet this motion for continuance looks as though legal counsel drafted it.

The Hearing Examiner denied the request for a continuance.

Ms. Nelson stated that for Issue A the appellant said the clearing and grading permit should not have been issued while the appeals were pending on the master plan permit and the development agreement approval. But under Washington law, land use approvals are effective while pending appeal, and in this case they were approved by the city council, upheld by a superior court, and were appealed to the court of appeal. Under RCW 36.70C.100, the land use permits continue to be effective during the pendency of the appeals before the Court of Appeals.

Ms. Nelson stated that Issue A was also concerned with restoration bonds, but restoration bonds are a requirement already of the clearing grade permit as issued. There are two bonds required; one is a restoration bond specifically noted as the third bullet point in the clearing grade permit, and the other is a restoration bond for trees, which is noted in the seventh bullet point, because a tree removal permit is required for the clearing grade permit. Thus that request from the appellant had already been satisfied by the terms of the permit itself.

Ms. Nelson testified that Issue B was related to the SEPA appeal, but the Hearing Examiner lacks jurisdiction over a SEPA appeal. This might be confusing to somebody who is not a land use attorney, but the clearing and grading permit is part of the proposal for the preliminary plat 1A. The fact that those are the same proposal is noted in several different documents. One is the environmental checklist, which notes that the clearing grade permit is expected for the proposal. A second is in the examiner's decision upholding that, the examiner describes the proposal as including site preparation and grading and also adds conditions that specifically go to the clearing grade activities. When a jurisdiction is working on the same proposal, the SEPA rules, specifically WAC 197-11-600, require that the city shall adopt that same SEPA decision unchanged, and it does not require the issuance of a new determination. Also, WAC 197-11-680 states that the only administrative appeals available under SEPA are for a threshold determination and for a final environmental adequacy determination. There is not an administrative appeal available for the same proposal decision, thus the examiner does not have jurisdiction to rule on the lack of environmental rule that is alleged by the appellant.

Ms. Nelson stated that the third issue is in regards to the specific SEPA preliminary plat 1A conditions. The question is whether or not those conditions should be considered in the appeal. There are seven conditions, but only two require something before the clearing grade permit is issued, thus only two should be considered in the appeal before the examiner today, PP 1A Conditions 3 and 55. As for those two conditions, the questions before the examiner are binary; they require a yes or no answer. The first is whether the proponents included a wetland buffer management plan, which Ms. Nelson stated they did and that it was approved. The second question is whether the applicant obtained the required NPDS permit, and Ms. Nelson stated that they did. That NPDS permit is attachment F to the pre-hearing brief. The substance of those two conditions is not before the Hearing Examiner today because the appellant did not question the substance in the appeal and because the substance is not part of the authority granted to the Hearing Examiner under section 15.04.230 or chapter 2.30 of the Black Diamond Municipal Code. Also, the NPDS permit itself has its own appeal period in it; the Hearing Examiner does not have authority to look at that issue.

Ms. Nelson stated that the last issue to address is a perceived internal conflict in chapter 15.28.090. The second paragraph on page 2 of the appeal, citing 15.28.090, says that City Code requires a clearing grade permit be consistent with the clearing and grading chapter of the Code. The applicant stated that there is no such requirement in the Code. The conflict the Hearing Examiner raised related to something else, which is authority granted to staff to issue decisions on clearing grade permits, but this is different from a requirement in code that requires compliance with those purposes. There are no application criteria for the staff to address as to whether or not you meet the 15.28.010 purposes. A clearing grade permit is a Type 1 decision under City Code, which is a ministerial permit. Discretion is not there for the staff to look at the purposes set out in 15.28.010. According to 18.0.8.040, Type 1 decisions are based on compliance with specific, non-discretionary, and/or technical standards that are clearly numerated in the City Code. Thus, this perceived conflict is outside the scope of the appellant's appeal statement and is also contrary to what the scope of a Type 1 decision is.

With respect to whether the plat conditions have been satisfied or not, the Hearing Examiner asked why Ms. Nelson believes the notice of appeal does not address the sufficiency of compliance when the appeal states on page 2 that "it does not appear that any or all of these preconditions have been satisfied." The Hearing Examiner asked whether that was a broad enough statement to encompass addressing the sufficiency of compliance.

Ms. Nelson stated that the admission of the appellant that there was no review of the file prior to the appeal being filed, that there was no knowledge those documents existed, means that the sufficiency of those documents cannot be contested by the appellant. Ms. Nelson added that 15.28 requires that an appellant raise the specific issues that he or she appeals, thus the appellant cannot use blanket statements to cover everything he or she might want to appeal.

Mr. Sterbank noted that, with respect to the language in the appeal, the statement "any or all" refers to the number rather than to the substance. Also, the documents in question were submitted in July, thus the appellant could have seen them, looked at their substance, and put a

more specific statement in the appeal than a blanket "any or all of these preconditions" statement.

As far as what the Code says about criteria for issuing a clearing grade permit, Mr. Sterbank stated that the first sentence in 15.28.090 gives the administrator the authority to modify, to approve, to approve with conditions, or to deny but is not meant to impose the purposes as additional criteria for the permit. The second sentence in 15.28.090 is consistent with the clearing grade permit as a ministerial permit, which underscores that the issue today is not a question of compliance with the general purposes but of compliance with the criteria set forth in the code for issuance of a clearing grade permit. With respect to the notice of appeal statement, Mr. Sterbank reiterated what Ms. Nelson said about the face that a placeholder appeal is not allowed; city code requires a specific appeal.

Ms. Harp decided not to respond.

The Hearing Examiner ruled that PP1A preliminary plat approval had to be treated as a valid and active permit approval because the stay provided by Chapter 36.70C provides the exclusive means to stay a land use approval pending judicial appeal. The examiner noted that the adequacy of the restoration bond was still live in the appeal. The examiner ruled that he had no jurisdiction to consider the adequacy of environmental review under the State Environmental Policy Act ("SEPA"). SEPA appeal issues are limited to the validity of a threshold determination and the adequacy of a final environmental impact statement. Neither action was I involved in the issuance of the clearing and grading permit. The Hearing Examiner ruled that the only conditions the hearing can address are those linked to approval of the clearing grade permit, PP 1A Conditions 3 and 55. The Hearing Examiner ruled that they would take evidence on the allegations regarding noncompliance with the purpose clause.

Mr. Sterbank stated that City Code says that only someone who is specifically affected or injured by a proposed action has standing to bring an appeal. The requirement is in BDMC 15.04.230, which is the appeal provision in chapter 15. Mr. Sterbank stated that there was no evidence in the notice of the appeal that the appellant has standing under this requirement. Ms. Harp stated that she was not certain how far she lived from the clearing/grading area, but she lives where Morgan Street meets Roberts Drive. Mr. Sterbank said that location was about half a mile from the clearing/grading area. Ms. Harp stated that this clearing grade permit affects her because the permit affects everyone in Black Diamond.

The Hearing Examiner entered the e-mails between the parties as Exhibit 8. Ms. Nelson objected to the inclusion of e-mails from David Brickland in the record since he is not the attorney for the appellant and has no standing to submit anything to the record. The Hearing Examiner allowed the e-mails from Mr. Brickland to be included since he was, in fact, representing Ms. Harp for the limited purpose of requesting a continuance.

Ms. Harp stated that she was not prepared to respond at this time.

Ms. Nelson asked that the case be dismissed, considering that Ms. Harp has not offered any evidence. According to 15.042.30, the appellant bears the burden of proof, and in this case the

appellant has not met that burden. Mr. Sterbank stated that he agreed that the case should be dismissed. The primary substantive documents that disclose the reasons for issuance of the permit are in the record as part of the staff report, and there is more than enough substantive basis for the Hearing Examiner to rule on that alone. Additionally, the appellant has not been able to prove standing. Ms. Harp stated that she had no response to the motion for dismissal. The Hearing Examiner denied the motion to dismiss, noting that the appeal was primarily based upon assertions of the applicant's failure to act as required by permitting conditions and code requirements and that in order to complete the record it would be helpful to present some prima facie evidence that actions were taken as required.

Mr. Sterbank suggested that the applicant show the Hearing Examiner how the applicant has, in fact, met the criteria, and the Hearing Examiner agreed. Ms. Nelson stated that based on the Hearing Examiner's prior motion the only two conditions that needed to be explained are PP1A conditions 3 and 55. Condition 3 is that the proposal shall submit a wetland buffer vegetation management plan prepared in accordance with BDMC 19.10.230 F for review and approval prior to issuance of any site development permits for lands adjacent to wetland buffers. The wetland buffer vegetation management plan submitted and approved is contained as Exhibit 6 to the staff report. Staff approved the plan on July 18, 2013, and Ms. Nelson submitted an e-mail to prove this. The e-mail from Stacy Welsh, Community Development Director, to Angela Hill was admitted as Exhibit 9. Based on the submittal and the approval of that plan, Ms. Nelson stated that PP 1A Condition 3 has indeed been met.

Ms. Nelson testified that condition 55 says that prior to approval of the first clearing grade permit the applicant shall provide written confirmation from the Department of Ecology that an NPDS permit is not required for any work in PP 1A or alternatively that the applicant shall acquire any required NPDS permit. There are two documents to note regarding satisfaction of that condition. One is an e-mail from the Department of Ecology that is included as Exhibit 4 of the staff report. In the e-mail, Ecology confirmed for Mr. Williamson that an individual NPDS permit is not required for any work in PP1A. Additionally, the applicant submitted for general construction NPDS coverage, which was issued on June 18, 2013, and is included as Attachment F to the pre-hearing motion. It had a thirty-day appeal period and was not appealed.

Ms. Nelson stated that the next issue to address was whether or not the clearing grade permit is consistent with the purposes of the clearing grade chapter of the Code. She stated that there is no consistency with the purposes required for permit review. Instead, staff found that the clearing grade permit meets all the conditions of the clearing grade chapter of the Code, 15.28, and the appellant has not provided any specific evidence to contradict the staff. Additionally, the pre-hearing motion from the applicant notes that several conditions are imposed on the clearing grade permit, which is set forth on sheet 11 as well on sheet 15. These conditions deal with subjects like erosion control, construction plans, root protection zones, etc.

Ms. Nelson stated that the fifth allegation raised on page 2 in the appeal notes that, because the City Code prohibits issuance of a clearing grade permit until after any federal or state permits from the same work have been issued, the fact that a NPDS permit has not yet been approved means that issuing this permit was premature. Ms. Nelson stated in response that the NPDS

permit has been issued, or coverage has been granted for PP 1A, which she discussed earlier with respect to PP1A condition 55.

Ms. Nelson said that the last paragraph of the appeal statement cites BDMC 15.28.120 to claim that the city code requires conditions for things like slope, erosion control, ground preparation, fill material, and drainage. In response, Ms. Nelson stated that section 15.28.120 does not require specifically that a clearing grade permit contain the conditions that are set forth in 15.28.120. The city also required a note on sheet 1 of the clearing grade permit that specifically states, "This permit is subject to Black Diamond Municipal Code chapter 15.28." This means that the clearing grade permit does contain these conditions with reference to chapter 15.28. There are numerous conditions listed throughout the permit but contained primarily on sheets 11 and 15 that deal with slope, erosion control, ground preparation, fill material, and drainage. For example, one condition requires two fulltime erosion control specialists, ground preparation is included in the section on construction, and drainage is addressed on nearly every sheet.

Mr. Sterbank stated that the city wanted to add brief testimony from Stacy Welsh, who is the community development director for the City of Black Diamond.

Ms. Welsh stated that she was on staff when the city reviewed the clearing and grading permit, and she was also on the permit review team. She is familiar with the document on the wetland buffer vegetation management plan, and she stated that the city approved the document based on technical review and expertise from a consultant, Jason Walker. The city reviewed the conditions related to erosion, ground preparation, etc. that were included in the clearing grade permit with respect to the criteria stated in 15.28.120, and the city approved the permit with those criteria in mind. In her understanding, the permit complies fully with the conditions in 15.28.120. She stated that one condition in the permit does in fact address required bonding with respect to BDMC 15.28, and the condition meets the requirements. The applicant will not be able to proceed with the clearing grade permit before the bonds are submitted to the city.

Ms. Welsh stated additionally that there were substantive reports are in the record; sheet 11 lists four reports under "these reports include" and sheet 16 references a tree inventory report. The Hearing Examiner admitted these reports as Exhibit 10.

Mr. Sterbank asked for a stamped face page and a listing of the documents that were provided to the appellant in response to the records request to be added to Exhibit 7 and these additional documents were admitted as part of Exhibit 7.

EXHIBITS

Exhibit 1: Appeal
Exhibit 2: Staff report with attachments[1]
Exhibit 3: Applicant's motion to dismiss
Exhibit 4: Applicant witness and exhibit list.
Exhibit 5: City's witness and exhibit list

[1] The staff report refers to its attachments as "exhibits". To avoid confusion with the "exhibits" of this decision, the exhibits to the staff report are referred to as attachments.

Exhibit 6: Harp continuance request
Exhibit 7: Harp records request and City response
Exhibit 8: Prehearing e-mails between the parties
Exhibit 9: E-mail from Stacy Welsh to Angela Hill on July 18, 2013
Exhibit 10: The four substantive reports referenced in sheets 11 and 16 of attachment 3 to the staff report.

FINDINGS OF FACT[2]

Procedural:

1. Applicant . BD Villages Partners, LP.

2. Appellant. Carol Lynn Harp.[3]

3. Permitting Chronology. The subject clearing and grading permit is for the site preparation of Villages Phase 1A Preliminary Plat ("PP1A"), one of the subdivisions implementing the Villages Master Plan Development ("MPD"). The MPD and associated development agreements ("DA") were approved by the Black Diamond City Council on September 20, 2010 and December 12, 2011 respectively. Both approvals were ultimately appealed to superior court. The MPD was sustained by King County Superior Court by decision dated August 27, 2012. The superior court decision has been appealed to the Washington State Court of Appeals, which is still reviewing the appeal. The status of the judicial appeal of the DA is unclear, but the appellant's assertion that an appeal of the DA is still pending is uncontested. No stay or any other injunctive relief has been requested from or issued by any reviewing court on the processing and implementation of the MPD and DA. PP1A was approved by the hearings examiner on December 10, 2012. That decision was not appealed. The subject clearing and grading permit was issued on July 24, 2013. The appellant filed an appeal to the clearing and grading permit on August 6, 2013.

4. Hearing. The Hearing Examiner conducted a hearing on the application at 10:00 am at the Black Diamond City Council Meeting Chambers on September 23, 2013.

Substantive:

5. Appeal Description. Ms. Harp's appeal asserts that the master plans are invalid during the pendency of judicial appeals, that its environmental review is inadequate and that the permit fails to comply with PP1A permit and SEPA conditions and applicable clearing and grading development standards.

6. Environmental Review. As noted at p. 4-5 of the staff report, Ex. 2, the City has decided to use the EIS used for PP1A to meet its SEPA responsibilities for the clearing and grading permit. The City notes that the EIS for the Villages MPD was formally adopted for PP1A and this adopted document in turn was used for the clearing and grading permit. The City determined it was authorized to use the Villages EIS without a new threshold determination and

[2] Some portions of the findings of fact may incorporate conclusions of law as necessary to avoid confusion. In particular, FOF No. 11 contains several conclusions of law.
[3] The appeal was also signed by Rebecca Sullivan, but she withdrew as an appellant prior to the appeal hearing.

without a formal adoption because the clearing and grading authorized by the subject permit was included in the PP1A proposal and its associated environmental review.

7. Wetland Buffer Vegetative Management Plan. As noted in the staff report, the City has reviewed and approved a wetland buffer vegetative management plan for PP1A.

8. NPDES permit. The applicant has acquired written confirmation from the Washington State Department of Ecology that it has acquired all required NPDES permits for its clearing and grading permit, as noted by letter from DOE in attachment F to the applicant's Motion to Dismiss, Ex. 3.

9. Compliance with Purposes of Clearing and Grading Requirements. The appellant has not established by a preponderance of evidence that the clearing and grading permit fails to minimize adverse stormwater impacts, protect water quality, minimize habitat loss and/or protect environmentally sensitive areas. The aforementioned impacts of the proposed clearing and grading are extensively addressed by conditions of the clearing and grading permit, the Villages EIS and the conditions of PP1A, the Villages MPD and the Villages DA. The appellant has not specifically identified how any of these impacts are inadequately addressed by existing permit and environmental review conditions. There is nothing in the administrative record that would reasonably suggest that these impacts are inadequately addressed.

10. Compliance with Performance Standards of Clearing and Grading Permits. The appellant has not established by a preponderance of evidence that the proposal fails to meet the requirements of BDMC 15.28.120. As noted in the staff report, staff has determined that the proposed clearing and grading meets all conditions and standards imposed by BDMC 15.28.120. As shown in the clearing/grading card and the clearing and grading plans, att. 1 and 3 to the staff report, the applicant's clearing and grading is proposed and conditioned to address erosion control, best management practices, site restoration and bonding, slope stability, site hazards, site safety, insurance, ground and surface water protection, and hours of operation. Further, the proposal is conditioned to comply with Chapter 15.28 BDMC in sheet 1 of the technical plans (att. 3 to the staff report), which includes BDMC 15.28.120. Against the staff's detailed review of the application and the numerous measures taken to ensure compliance with BDMC 15.28.120, the appellant has not cited any specific instance of noncompliance. For these reasons, the appellant has clearly not met her burden of proof.

11. Restoration. The second paragraph of the appeal asserts that in lieu of prohibiting any clearing and grading until appeals of the MPD and DA are resolved there should be a permit condition requiring restoration if the MPD and DA are invalidated and that this requirement should be secured by a restoration bond. In point of fact a restoration bond is required for the proposal. The proposal is also sufficiently conditioned to ensure that the bond can be used to restore the property in case the Villages MPD and/or DA become invalidated on appeal.

A restoration bond covering the full costs of restoration is required in the conditions of the clearing and grading permit. See third bullet, p. 2, att. 1 to staff report. However, there is no apparent express condition that requires restoration of the site if the MPD and DA permits are invalidated or the applicant otherwise abandons the project. Both the City and the applicant don't address this issue, despite the fact that such a condition is specifically called out in the

appeal. Also of concern is the fact that BDMC 15.28.100(B) suggests that the purpose of the restoration bond is limited to covering the cost of conformance with permit conditions and there is no mention in BDMC 15.28.100 of requiring restoration in case of project abandonment or termination.

The standards applicable to the permit application may well have been better served by a condition that expressly requires full restoration of the site should the applicant abandon or terminate the project for any reason, including the invalidation of the MPD and/or DA by the Court of Appeals or a higher court. For a number of obvious reasons, such a condition can be justified as necessary to assure compliance with the standards of Chapter 15.28 BDMC. However, the proposal is conditioned to comply with Chapter 15.28 BDMC (see sheet 1 of technical plans, att. 3 to staff report), and many of the Chapter 15.28 requirements can be interpreted as requiring restoration should the project become abandoned. This appeal decision interprets the clearing and grading permit condition requiring compliance with Chapter 15.28 BDMC as authorizing staff to require restoration to the extent necessary to assure compliance with Chapter 15.28 should the project become abandoned or terminated for any reason. This interpretation is necessary for the resolution of this appeal and should be considered binding on the future administration of the clearing and grading permit should it not be timely appealed.

CONCLUSIONS OF LAW

1. Authority of Hearing Examiner: Appeals of Type 1 decisions such as clearing and grading permits are subject to review by the hearing examiner. See BDMC 18.08.210(B). The appellant has the burden of proof in administrative appeals. See BDMC 18.08.220(D).

2. Validity of Master Plan Approvals During Pendency of Judicial Appeal. In paragraph 2 of the Ms. Harp's appeal, she asserts that the MPD and associated DA are not valid because they are currently under appeal. The MPD and DA are still considered valid because they are under no current ruling of invalidity by any appellate body. The fact that they are currently under appeal does not change that status. RCW 36.70C.100 provides essentially the exclusive means for staying a development permit approval while it is under appeal. *See Kelly v. Chelan County*, 167 Wn.2d 867, 871 (2010); *Pinecrest Homeowner's Ass'n v. Cloniger & Assocs*, 151 Wn.2d 279, 288 (2004). No stay was applied for or granted on the MPD or DA.

3. Adequacy of Environmental Review. In paragraph 3 of Ms. Harp's appeal, she asserts that the environmental review for the clearing and grading was inadequate because it was based solely upon the Villages EIS[4], which is several years old. As noted in Finding of Fact ("FOF") No. 6, the City made no threshold determination for the clearing and grading permit. Rather, the City simply decided to use the Villages EIS without any formal adoption. The City's decision to use the Villages EIS without an adoption or threshold determination is not subject to appeal to the Examiner. WAC 197-11-680(3)(a)(iii) limits administrative appeals of SEPA decisions to threshold determinations and the adequacy of an EIS. Since neither decision was involved in this case, the examiner has no jurisdiction to consider the adequacy of environmental review.

[4] "EIS" is an acronym for an environmental impacts statement.

4. Subdivision Conditions Applicable to Clearing and Grading Permit. Ms. Harp's appeal asserts noncompliance with several PP1A conditions of approval. Only two of those conditions are subject to review in this appeal. This is because those two conditions are the only conditions that are required to be satisfied prior to the issuance of a clearing and grading permit. The two conditions that are subject to review are PP1A condition 3, which requires a vegetative management plan "prior to the issuance of any site development permits for lands adjacent to wetland buffers" and PP1A condition 55, which requires NPDES compliance "prior to the approval of the first clearing or grading permit". Some other conditions require compliance prior to "any clearing or grading" or the like, but this language refers to actual work on the ground as opposed to the permits that authorize it. The issuance of a clearing and grading permit does not authorize work to be done that is not compliant with PP1A conditions of approval any more than issuance of a clearing and grading permit would authorize work that is noncompliant with the City's noise regulations or any other applicable requirements. If clearing and grading work is commenced prior to full compliance with all PP1A conditions requires compliance prior to clearing and grading work, the City will be able to initiate an enforcement action under BDMC 8.02.020(L) *et. seq.*, which authorizes code enforcement against work done in violation of permit conditions.

5. Compliance with PP1A Conditions 3 and 55. The applicant has submitted and acquired approval of a vegetative management as required by PP1A condition 3 as determined in FOF No. 7. The applicant has acquired written confirmation from the Washington State Department of Ecology that it does not need any NPDES permit for PP1A as required by PP1A condition 55 as determined in FOF No. 8.

6. Compliance with Purposes of Clearing and Grading Permit. In paragraph 5 of her appeal, Ms. Harp asserts that the clearing and grading permit as issued fails to satisfy the purposes of clearing and grading regulations. It is doubtful that the purpose clause of the clearing and grading regulations, BDMC 15.28.090, serves as an independent source of permitting authority for clearing and grading permits. It is unnecessary to reach that issue since it is fairly clear, as determined in FOF No. 9, that the appellant has not established by a preponderance of evidence that the purposes have not been met.

7. Acquisition of NPDES Permit. In paragraph 6 of her appeal, Ms. Harp asserts that the City has not acquired an NPDES permit as required by an unspecified City code provision. As previously determined, no additional NPDES permit is required for the proposal.

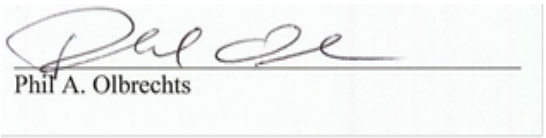
8. Compliance With BDMC 15.28.120. In paragraph 7 of her appeal, Ms. Harp asserts noncompliance with BDMC 15.28.120, which sets the primary set of standards for approval of clearing and grading permits. It is concluded that the clearing and grading permit application is consistent with BDMC 15.28.120. As determined in FOF No. 10, the appellant has not cited to any one specific instance of noncompliance with BMDC 15.28.120, while staff has found complete compliance and the permit application and supporting materials address in detail all of the issues identified in BDMC 15.28.120. In the absence of any specific assertions of noncompliance and none apparent from the record, no conclusion can be drawn that there is any violation of BDMC 15.28.120.

9. Standing. During the hearing the examiner noted that the parties would be given the opportunity to address the issue of standing. Such an opportunity is no longer necessary since the appeal has been denied in its entirety[5].

DECISION

As outlined in the Findings of Fact and Conclusions of Law above, none of the grounds for appeal raised by the appellant justify reversal or modification of the City's decision to approve the subject clearing and grading permit. For these reasons the approval of the clearing and grading permit is sustained and the appeal is denied in its entirety.

Dated this 7th day of October, 2013.



Phil A. Olbrechts

Hearing Examiner
City of Black Diamond

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short and procedures strictly construed. Anyone wishing to file a judicial appeal of this decision should consult with an attorney to ensure that all procedural requirements are satisfied.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

[5] It is recognized that the interpretation in FOF No. 11 could have been avoided if the appeal had been dismissed outright on the basis of standing (if, of course, the appellant actually did lack standing). It is assumed that the City and applicant probably already agree with the FOF No. 11 interpretation anyway, or in the alternative that they would find the costs and additional delay to brief standing are not worth avoiding the FOF No. 11 interpretation. If these assumptions are incorrect, the City and applicant are invited to request reconsideration for an opportunity to argue standing. This footnote is only directed at the City and applicant, since the appellant would derive no benefit from arguing standing, other than creating additional delay to the project.