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BEFORE THE HEARING EXAMINER FOR
THE CITY OF BLACK DIAMOND

MDNS SEPA Threshold Determination
Appeal and Villages Preliminary Plat
Phase 1A
(PLN11-0001 and PLN11-0002)

PRE-HEARING ORDER II

INTRODUCTION

The schedule and procedural rules outlined below apply to the MDNS SEPA Appeal and to a limited extent, the preliminary plat application. Paragraph Q directly addresses the procedures for the preliminary plat hearing and the rest of the order addresses SEPA appeal procedures. For ease of reference, this prehearing order adds to Prehearing Order I by track change.

I. Evidence Relied Upon

Evidence relied upon for this pre-hearing order is as follows:

- A. Testimony of pre-hearing conference held October 5, 2011.
- B. Pre-hearing motions dated 9/27/2012 by Megan Nelson (Applicant) and 10/3/2012 by Cindy Proctor (Appellant).
- C. Responses to Pre-hearing motions filed by Megan Nelson and Cindy Proctor.
- D. Replies submitted by the City, Cindy Proctor and Yarrow Bay.
- E. Pre-hearing emails involving all SEPA appeal parties.

II. Rulings

1 A. Consolidation. The SEPA appeal will be consolidated with the preliminary plat
2 hearing as required by WAC 197-11-680.

3 B. Email Distribution. Given the tight timeframes involved in this proceeding, emails
4 are the easiest and most efficient form of communication for all parties involved. The email
5 addresses the Examiner has to this point are listed below. All documents required by this Order
6 should be emailed to all the email addresses below. Documents will be considered timely submitted
7 if emailed on the date required. The due date for any documents sent by email is 4 pm of the date
8 due. All parties can be contacted through the email list identified below.

9 Hearing Examiner's Office

10 Phil Olbrechts:
11 Emily Terrell: emilyterrell@live.com

12 City of Black Diamond

13 Steve Pilcher: SPilcher@ci.blackdiamond.wa.us
14 Brenda Martinez: BMartinez@ci.blackdiamond.wa.us
15 Mike Kenyon: mike@kenyondisend.com
16 Bob Sterbank: BOB@kenyondisend.com

17 Applicant

18 Nancy Rogers: NRogers@Cairncross.com
19 Megan Nelson: mnelson@yarrowbayholdings.com
20 Chris Lund: clund@yarrowbayholdings.com

21 Appellant

22 Cindy Proctor: proct@msn.com
23 Gil Bortleson: gbortles@aol.com
24 Robert Edelman: bobedelman@comcast.net
25 Erica Morgan: smilemeadow@tx3.net
26 Peter Rimbos: primbos@comcast.net
 Jack Sperry: jacksperry@comcast.net
 Cynthia Wheeler: cincity63@comcast.net
 William Wheeler: wbwheeler@comcast.net

27 C. Hearing Date. The SEPA Appeal and Preliminary Plat Phase 1A hearing will
28 commence on November 1, 2012 pursuant to the public notice issued by City staff. The hearing
29 was scheduled as ordered by the Examiner at the October 5, 2012 pre-hearing conference. The
30 hearing will be scheduled to continue on dates that facilities are available, preferably on consecutive
31 calendar days except for Sundays. The day and time as well as location of the continued hearings
32 will be announced at the close of each hearing day. Hearing dates will initially run consecutively
33 from November 1 through November 3, 2012 (a Saturday). If necessary and if facilities are
34 available the hearings will continue on November 5, 2012, preferably in the evening (assuming the
35 SEPA appeal portion of the hearing is completed) and every subsequent evening thereafter until the

1 hearings are completed. Staff shall schedule the first three days of hearing as quickly as possible
2 and notify all parties of the SEPA appeal of the hearing times. The public notice for the hearing
3 shall advise that the SEPA portion of the appeal will be held on November 1 and 2, 2012 and that it
4 is anticipated that public testimony on the preliminary plat applications will commence on
5 November 3, 2012.

6 D. Rules of Procedure. The Rules of Procedure adopted during the MPD hearings will
7 remain in effect, except for minor changes to Rule 2.05. The first modification to Rule 2.05 is that
8 service of all documents will be deemed complete upon the receipt of the document by the City as
9 opposed to the date the document is deposited in US mail facilities. Pursuant to an agreement by all
10 parties at the October 5, 2012 pre-hearing conference, all documents and correspondence served by
11 fax or email must be submitted by 4 pm to be deemed complete. A copy of the Rules of Procedure
12 should be posted with this prehearing order. Any order issued by the Examiner shall supersede any
13 conflicting Rule of Procedure.

14 E. Time and Page Limits. In the SEPA appeal portion of the hearing, the Applicant,
15 Appellant and staff will each have one hour each to make initial presentations and one hour each to
16 make rebuttal/closing presentations. These time limits do not include the presentation of evidence.
17 Briefs shall be limited to fifty pages. As there has only been one appeal filed, the Appellant will be
18 limited to one opening brief.

19 F. Exhibit and Witness Lists. Exhibit and witness lists are a fairly standard feature for
20 hearings of this complexity. Without them it would be very difficult to comply with permit
21 processing deadlines, since the Examiner would have to give the parties additional time to respond
22 to witnesses and exhibits that are first introduced at the hearing. The lists will be required for the
23 SEPA appeals, as specified in the schedule below. Witness lists should include a summary of the
24 testimony to be provided by each witness along with a general estimate on the length of the
25 testimony. The time estimates are just for scheduling purposes. Witnesses will not be bound to the
26 estimates. No witnesses other than those identified on witness lists will be allowed to testify at the
27 appeal hearings. Only exhibits identified in the exhibit lists will be admitted into the administrative
28 record except those submitted in response to exhibits identified in the exhibit lists. Expert witness
29 exhibits will be submitted in writing as opposed to audio recordings or video. In order to avoid
30 duplication of exhibits in exhibit lists, the City shall submit a "core exhibit" that identifies the
31 primary documents involved in the SEPA and preliminary plat review that is likely to be used by
32 most parties.

33 G. Hearing Format. The November 1, 2012 hearing will commence with opening
34 comments from the Hearing Examiner. The SEPA Appeal portion of the hearing will immediately
35 follow and commence with a presentation from the Appellant followed by the Appellant's
36 presentation of evidence. Following the Appellant's presentation, the Applicant will provide their
37 opening remarks and present evidence. Finally, the City Staff will present their opening remarks
38 and evidence. No public comments will be taken during the SEPA portion of the hearing. Once all
39 opening remarks and initial evidence has been presented for the SEPA Appeal, the Appellant will
40 provide their rebuttal. Cross-examination of experts will occur at the conclusion of each expert's

1 testimony. Only the Appellant, Applicant and City Staff shall testify and/or participate in the SEPA
2 appeal portion of the hearing.

3 Subsequent to the SEPA appeal portion of the hearing, the preliminary plat portion of the
4 consolidated hearing will commence.

5 H. Cross-Examination. During the SEPA appeal portion of the hearing only all
6 witnesses will be subject to cross-examination, including lay witnesses. This is a departure from
7 prior procedural rulings, where cross-examination of lay witnesses was not allowed.

8 I. Schedule. The following schedule applies:

9 October 17, 2012.

City's core exhibit list due.

10 October 19, 2012

All SEPA Appeal Opening Pre-Hearing Briefs,
11 Witness Lists, Exhibit Lists and Curriculum
Vitae of expert witnesses due.

12 October 23, 2012

All Pre-Hearing Motions and Requests for
13 Clarification due.

14 October 26, 2012

Rebuttal Briefs to SEPA Appeal Opening Briefs
15 due.

16 October 30, 2012

All Responses to Pre-Hearing Motions due.

17 October 31, 2012

Reply briefs to SEPA Appeal opening briefs due.

18 All Exhibits due. Three copies of exhibits may
19 be left at City Hall (by 4 pm) if not practical to
20 email. Only responsive exhibits allowed for
21 SEPA appeals after this date. Parties must
22 provide three copies of all responsive exhibits,
23 unless the exhibits are first presented in an
24 authorized email exchange with the SEPA
25 parties and hearing examiner.

26 November 1, 2012

Hearing commencing with SEPA Appeal.

27 J. Public Records Request. The Appellants submitted a public records request to the
28 City dated October 9, 2012. The Appellants believe that some of the responsive documents may
29 pertain to their SEPA appeal. The City has responded that it will take up to twelve business days to
30 provide the requested documents. The Appellants may supplement their exhibit list with any
31 documents pertaining to their SEPA appeal that they receive from their records request after

1 October 16, 2012. The Appellants will have up to three calendar days from the day of receipt of
2 documents to submit a supplemented exhibit list to all other SEPA appeal parties and the hearing
3 examiner. Within that same three days the Appellants shall also submit to all SEPA parties and the
4 examiner any requests to extend portions of the prehearing schedule necessary to accommodate any
5 additional pertinent SEPA appeal information received from the public records request.

6 K. Miscellaneous. All SEPA appeal parties will be allowed to object to evidence when
7 it is submitted during the SEPA appeal portion of the hearing. Failure to do so will be considered a
8 waiver of objection.

9 Non-expert witnesses will not be subject to cross-examination. Requests for clarification
10 can be made through the hearing examiner.

11 "Party" as used in this order refers to all hearing participants.

12 L. Public Comment On SEPA Appeal. The general public will be allowed to comment
13 on SEPA appeal issues during the preliminary plat portion of the hearing. As noted previously, the
14 general public will not be allowed to participate in the SEPA appeal portion of the hearing.

15 The laws pertaining to public participation in the SEPA appeal are ambiguous and possibly
16 conflicting. BDMC 18.08.220(c) provides that administrative appeals shall be limited to the city,
17 the appellant(s) and the applicant. However, 18.08.210 is arguably limited in scope to the appeal of
18 Type 1, 2 and 3 decisions. SEPA threshold determinations are not expressly classified as Type 1, 2
19 or 3 decisions. SEPA threshold decisions are specifically governed by BDMC 19.04.250, which
20 states that it constitutes the exclusive administrative appeal process to appeal a SEPA decision.
21 BDMC 19.04.250 does not address whether the public can participate in a SEPA appeal hearing.
22 Arguably, the consolidation requirements of WAC 197-11-680 require the allowance for public
23 comment on SEPA appeal issues.

24 If the public were not allowed to directly address the SEPA appeal issues, they could easily do so by
25 expressing their concerns in terms of preliminary plat criteria. The preliminary plat criteria are
26 broad enough to include any issues covered by SEPA. SEPA hearing consolidation requirements
would require the examiner to consider all evidence in the record, including preliminary plat
testimony, in evaluating the SEPA appeal. Given the ambiguity/conflicts in SEPA participation
requirements, rather than engage in the ruse of disguising SEPA testimony in the form preliminary
plat testimony, the public will be authorized to address SEPA appeal issues during general public
comment on the preliminary plat. **In order to maintain the integrity of the schedule and page
limits that apply to the SEPA briefing in this order, no written comments will be allowed from
the general public on SEPA appeal issues.**

M Posting of Exhibits. At the prehearing conference the City argued that it did not
have the resources or personnel to post all hearing exhibits and recordings on the City's website.
The posting of exhibits is highly encouraged, but not required given the time and expense. The City
should be aware, however, that not posting the exhibits may cause delays in the hearing process.
All hearing participants will be given whatever time is reasonably necessary to access and review
hearing exhibits.

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2 N. Appellant Representative. Robert Edelman is designated as the
3 representative of the Appellants. A single representative is required by Hearing Examiner Rule of
4 Procedure 3.05 and is also implied from the fact that a single appeal was filed. He shall be
5 responsible for the distribution of emailed documents to anyone participating as an Appellant who
6 does not have an email address identified in Paragraph I of this Order. The Appellant is free to
7 replace Robert Edelman with any other designated representative at any time prior to the hearing
8 provided that notice is first provided to all other parties via the email list below. In its hearing
9 presentation, the Appellant may assign different persons to different issues and witnesses, provided
10 that not more than one person may be involved in the questioning or cross examination of any one
11 witness.

8 O. Scope. The scope of the SEPA appeal hearing is limited to whether the
9 proposal creates probable, significant adverse impacts. The impacts at issue are those identified in
10 the written appeal. The scope may be further limited or expanded from rulings made in the
11 prehearing motions.

11 P. Transcripts. The parties shall be responsible for acquiring their own
12 transcripts. Transcripts received and/or prepared by the City shall be subject to disclosure as
13 required by the Public Records Act, Chapter 42.56 RCW. As with prior hearings, the Examiner
14 requests (but does not require) copies of the transcript from the Applicant in order to expedite the
15 preparation of the decision.

15 Q. Preliminary Plat Portion of Hearing. The rules of procedure have not been
16 addressed in any detail for the preliminary plat portion of the hearing because the general public has
17 not been invited to participate in the deliberations leading to this prehearing order. However, in
18 order to provide the public some advance notice of what rules will apply to them, the rules that have
19 been applied in prior Villages/Lawson Hills hearings shall apply to the preliminary plat portion of the
20 hearings as follows:

- 19 1. The Rules of Procedure shall apply as outlined in Paragraph D of this Order.
- 20 2. Verbal comments shall be limited to ten minutes per person excluding the Applicant and
21 City. Persons may cede their entire ten minute allocation to another speaker, provided
22 they are present at hearing to cede their time. Persons who have a disability that
23 prevents them from being present at the hearing need not be present to cede their time.
24 The maximum time that any speaker may testify during the public comment portion of
25 the hearings is one hour total.
- 26 3. No time limits shall apply to the opening presentations of the Applicant and City, since
they must address what could be potentially hours of testimony provided by the general
public. The time for expert witness rebuttal may be limited in advance to provide parity
with the amount of time given to opposition expert testimony.
4. Expert witnesses will be subject to cross-examination. Lay witnesses will not be subject
to cross-examination. Clarification questions may be asked through the examiner for
lay witnesses.

- 1 5. The hearing format for the preliminary plat portion of the hearing will be, in order of
2 presentation: (1) City opening and evidence; (2) Applicant opening and evidence; (3)
3 general public; (4) City rebuttal and closing; (5) Applicant rebuttal and closing.
4 6. Post-hearing briefing, if any, and page limits on written comments, if any, will be
5 addressed at the hearing.
6 7. Hearing participants should supply three copies of any exhibits presented during the
7 preliminary plat portion of the hearing.

8 R. This order will be posted at the City's website by .October 26, 2012.

9 ORDERED this 15th day of October, 2012.

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11 Phil A. Olbrechts
12 Hearing Examiner for Black Diamond
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