MEMORANDUM

DATE: November 9, 2015

TO: Black Diamond Mayor and Council

FROM: Carol Morris, Morris Law, P.C., City Attorney

RE: **General Facilities Charges – Development Agreements**

The Mayor has informed me that members of the public are asking why the City decided not to implement the provisions of the Development Agreements on the subject of the General Government Facilities Charges.

I. Background.

A. Development Agreements. Section 13.9(A) of the Development Agreements between the City and Yarrow Bay for The Villages and Lawson Hills Master Planned Developments require the City to "commission a study regarding general governmental facilities based, at a minimum, on the Black Diamond Comprehensive Plan that are necessary for the City to conduct its municipal business ('General Government Facilities Plan') in order to establish mitigation fee rates for such improvements." The study was to be commissioned by the City following execution of the Development Agreements, and had to be complete within 12 months thereafter. It was to be funded through the MPD Funding Agreement. Once the City adopted a fee schedule, the developer was to pay the GFC at the rate adopted by the City in the GFC fee schedule. If the City did not adopt the GFC fee within three years from the execution of the Development Agreement, then the Developer had no obligation to pay the mitigation fees (set forth in subsection (i), which was the fee established in the Agreement that would be in effect until the City adopted a GFC fee schedule). The remainder of Section 13.9 is not relevant to this discussion. According to Ordinance No. 11-970 and 11-971, the Development Agreements were effective December 12, 2011, so three years from execution of the Development Agreements is December 12, 2014, extended 11 months by a minor amendment to 11/12/15.

B. Working Draft of the GFC Plan. The City commissioned the study leading to a Working Draft General Government Facilities Plan (March 12, 2014). This study was performed

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by Makers and Henderson Young & Company. In response to this draft, the Developer submitted a memorandum from Development Planning and Financing Group (DPFG), dated March 19, 2015, which described "several areas of concern" with regard to the methodology used by the authors of the Plan. In addition, the Developer's attorney, Nancy Rogers of Cairncross Hempelman, alleged that "the Facilities Fee Plan is fundamentally flawed and we strongly urge the City not to adopt it."

C. Interim City Attorney Memo. On March 14, 2014, the City obtained a confidential memorandum from its Interim City Attorney, Steve DiJulio, on the GFC Plan.

D. Revised GFC Plan. On March 26, 2014, Makers and Henderson Young & Company presented the City with a "Preview of General Government Facilities Mitigation Fee," the "General Government Facilities Plan."

E. Deadline for Adoption of GFC Plan. The City determined that based on Section 13.9 of the Development Agreements, the GFC Plan had to be complete within 12 months after the study was commissioned, or April 13, 2014. The attorneys representing the Developer attended the City's public hearings/meetings and informed the Mayor and Council that the City was not required to adopt the GFC Plan before April 13, 2014. As a compromise position, and one that the City thought would satisfy the concerns of Yarrow Bay and would meet the deadline in the Development Agreements, the City adopted Ordinance 14-1026 on April 3, 2014.

F. Ordinance 14-1026. In Ordinance 14-1026, the City specifically stated that the March 26, 2014 GFC Plan was a "first step toward the implementation of a government facilities mitigation fee plan," and that the City had not completed its review, consideration, discussion or evaluation of the plan. The GFC Plan was not adopted in order to use it to impose GFC fees on development, but in Section 1 of the Ordinance, the City expressed its desire to only "review, evaluate, consider and discuss this Plan, as one of the initial steps toward adoption of a General Facilities Mitigation Fee."

G. City Attorney Memo. On April 17, 2014, the City Attorney, Carol Morris, wrote a confidential memo to the Mayor and Council, responding to the issues raised by the Developer's consultant and attorneys on the GFC Plan.

H. Lawsuit and Appeal On May 22, 2014, the Developer filed a lawsuit against the City based on the GFC Plan. In addition, the Developer filed an appeal of Ordinance 14-1026 and the GFC Plan with the Growth Management Hearings Board. In this lawsuit and appeal, the Developer alleged that the GFC Plan contained fundamental errors and that the methodology and proposed fees in the Plan violated RCW 82.02.020 and the Constitution.

I. Dismissal of Lawsuit and Appeal. On October 21, 2014, the superior court agreed with the City Attorney's arguments and dismissed the lawsuit based on the City's argument that the Developer's challenge to the GFC Plan was premature. The court did not make any decision

as to whether or not the Developer's claims were true. The GMA Board appeal was also dismissed for similar reasons.

J. Cost of GFC Study. The City of Black Diamond paid $182,243.04 to Makers and Henderson Young & Company for their work on the GFC Plan and related documents. Of this amount, the Developer reimbursed the City $161,873.04, apparently refusing to reimburse the City for the final $20,370.00 based on its claim that the GFC Plan was "fundamentally flawed." Once the lawsuit was dismissed in the City's favor, the City did not have funds to commission a new GFC study. No GFC fee could be adopted without the factual support of a GFC study, and the Developer would have to fund a new GFC fee study. When approached, the Developer made it very clear that it would not fund another GFC study unless the Developer had more involvement in the process.

II. New GFC Plan?

The City discussed a revision of the GFC Plan with representatives from Makers; one that would take into account several legal issues raised by the attorneys. These discussions were not fruitful.

City staff then considered what would have to be included in a new GFC Plan, so that it could withstand a challenge. Here is a brief explanation of one of the biggest problems that arose with the GFC Plan.

First, state law requires that fees imposed on development are invalid unless they are "reasonably necessary as a direct result of the proposed development." RCW 82.02.020. The Washington courts have held that cities can't impose conditions (like fees) under RCW 82.02.020 "for required improvements that would relieve a pre-existing deficiency." *Benchmark Land Co. v. City of Battle Ground,* 146 Wash.2d 685, 695, 49 P.3d 860 (2002).

The "Facility Requirements and Gap Analysis" in the GFC Plan shows that there are 33.1 full-time equivalent (FTE) employees in Black Diamond to serve the existing population. (This appears on page 8 of the GFC Plan, March 26, 2014). In the City's 2009 Comprehensive Plan, the City established a recommended level of service for administrative facilities as 330 square feet of space per each FTC. (*See,* Section 8.3.3 of the 2009 Comprehensive Plan.) The size of the existing city hall, police, public works shop and public works storage facilities are shown in the Gap Analysis as totaling 17,793 square feet. (*Id.*)

The City's consultants admitted that there is a pre-existing deficiency (stating that "existing facilities do not meet space standards"). According to the City's consultants, the "requirement to serve the existing population is 46,072 square feet. (*Id.).*

The City's consultants further asserted that 126 FTE's will be needed to serve the future 19,200 residents, and the facilities space requirement for this future population will be 96,942 square

feet. However, the City's consultants did not explain how the identified deficiency was addressed in their calculation of the GFC fee for the construction of facilities that would be 96,942 square feet in size.

The City's consultants claimed that the City's adopted Comprehensive Plan's level of service is a "planning guideline" and that "the City may . . . develop a series of work plans . . . revising and adjusting LOS standards to balance services with the ability to provide them. (Questions and Answers about Black Diamond's General Government Facilities Plan, Answer to Question 11, p. 4.) The City Attorney disagreed, because RCW 36.70A.120 requires that the City "perform its activities and make capital budget decisions in conformity with its comprehensive plan."

The GFC fee was calculated by the City's consultant as $5,800 per housing unit and $2.80 per square foot of commercial space. (Preview of General Government Facilities Mitigation Fee, March 26, 2014, p. 1.) In their explanation for the methodology behind this fee calculation (which appears on page 5 of the Questions and Answers document), it appears that the consultants calculated the fee based on their experience and a number of other factors, including their review of a comparable city's **proposed, not constructed** public works facilities.

Bottom line, if the City adopted a GFC fee, the City would need to show that the fee addressed pre-existing deficiencies. In addition, the City would have to demonstrate why a GFC fee calculated on a facilities space **requirement** of 96,942 square feet (or any other number) satisfied RCW 82.02.020 as "reasonably necessary as a direct result of the proposed development."

There are also issues relating to nexus and proportionality to be considered, in light of existing case law. The Washington courts have rejected the argument that a city could meet the test in RCW 82.02.020 through a legislative determination of some general "need" to impose mitigation a consequence of development. *Citizen's Alliance for Property Rights v. Sims,* 145 Wash. App. 649, 187 P.3d 786 (2008). Here is the language from the *Citizens' Alliance* case describing what must be shown to meet this test:

> RCW 82.02.020 mandates that a government imposing requirements . . . demonstrate that the restriction is 'reasonably necessary *as a direct result of the proposed development or plat.*' Our supreme court has repeatedly held that this statute requires 'that development conditions must be tied to a specific, identified impact of a development on a community. The plain language of the statute does not permit conditions that are reasonably necessary for *all* development, or *any potential* development.' Rather the statute specifically requires that a condition be 'reasonably necessary as a direct result of *the proposed development.*

Citizens' Alliance, 145 Wash. App. at 664 (emphasis in original). *See also, Trimen v. King County,* 124 Wash.2d 261, 877 P.2d 187 (1994).

Another problem was that there are no reported court cases involving a GFC fee. So, it was difficult for the City Attorney to predict how a court would analyze a challenge to the GFC fee.

III. Hire a new consultant and prepare a new GFC Plan?

Based on the above, the City realized that it would have to commission a new study for the GFC fee if it decided to impose the GFC fee. Before starting down this path, the City decided to find out how other cities in Washington calculated their GFC fees and whether their fees had been challenged.

Keep in mind that the Growth Management Act adopted a statutory framework for cities and counties to impose impact fees (RCW 82.02.050 through 82.02.090). However, GMA impact fees can only be imposed for public streets and roads, publicly owned parks, open space and recreation facilities, school facilities and fire protection facilities. RCW 82.02.090(7). It does not allow any local government to impose impact fees for city halls, public works facilities and the like. So, any GFC fee would have to be based on the State Environmental Policy Act (SEPA).

We learned that the only city in the State of Washington with a GFC fee was Issaquah. However, when City staff called the planning staff in Issaquah to learn how their GFC program worked, the City learned that no fees were collected under the GFC program. No public facilities have been constructed in Issaquah from such fees. We also learned that the Issaquah GFC was authorized under SEPA, not in a development agreement using the procedure outlined in a development agreement similar to that signed by Black Diamond.

IV. Conclusion.

After considering all of the above (including two legal opinions from two different attorneys), the Mayor and Council decided not to pursue the commission of another GFC Plan, for the purpose of imposing GFC fees. Instead, the Mayor and Council decided it was more prudent, at least at this point in time, to consider the construction of new governmental facilities using the same methods and legal avenues used by every other local government agency in the State of Washington.