

**CONFIDENTIAL  
M E M O R A N D U M**

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**DATE:** January 19, 2016  
**TO:** Black Diamond Mayor and City Council  
**FROM:** Carol Morris, Morris Law, P.C., City Attorney  
**RE:** **Proposed Changes to Council Rules**

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The following are my comments on the proposed resolution amending the Council Rules. I have also forwarded this Memo to the City's insurance pool (AWC RMSA) for review of the highlighted text (for the pool's review/comments on whether the proposed changes would affect the City's insurance coverage).

In general, it appears that the drafters of this resolution apparently believe that the City Council's actions are constrained in only two ways – the Council Rules of Procedure and Robert's Rules. This is a false assumption. The Mayor and City Council are required to follow all local, state and federal laws applicable to Black Diamond, as an optional code municipal corporation, governed by chapter 35A RCW.

As just one example, the drafters of the Council amendments may believe that by removing Rule 16.5 ("Councilmembers shall not attempt to change or interfere with the operating rules and practices of any City department"), that they now have eliminated any bar to their ability to change or interfere with City departments or staff. This is not true. The Mayor is the "chief executive and administrative officer of the city, in charge of all departments and employees . . . and shall have general supervision of the administration of city government and all city interests." RCW 35A.12.100. Adoption of a resolution with language contrary to state law doesn't change state law or allow the Council to interfere with the workings of City departments.

In another example of a proposed rule that may have been added with the misunderstanding that a resolution could change state or federal law, Section 9 of the Council Rules has been amended to add language requiring that the City Attorney review ordinances before adoption but is silent as to the need for any City Attorney review of resolutions for adoption. (The Councilmembers who drafted the proposed rules did not ask the City Attorney for review of the resolution in

which the changes to the Council Rules are proposed, and have pushed for immediate passage, apparently to prevent such legal review.) This change may or may not have been intentional (due to a mistaken belief that because resolutions are for the adoption of policy, not law, attorney review is not required). However, the adoption of policy could still result in liability to the City. As the Washington Supreme Court held:

Municipal liability for [42 U.S.C.] Section 1983 purposes attaches when the municipality acts through official policy. . . . An act undertaken by a municipal legislative body is an act of the municipality.

*Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 968, 954 P.2d 250. 42 U.S.C. Section 1983 is a federal statute which allows damages to be awarded to a plaintiff against a municipality when the plaintiff's federal constitutional rights have been violated.

The facts and eventual result in *Mission Springs* are also important for the Council to understand, given the proposed expanded scope of authority of the Council Committees. *Mission Springs* was a lawsuit brought against the City of Spokane, the City Councilmembers and the City Manager for damages under state (RCW 64.40.020) and federal law (42 U.S.C. Section 1983). In *Mission Springs*, a developer had received planned unit development (PUD) approval for 790 apartment units located in 33 separate buildings. *Id.*, 134 Wash. 2d at 953. In order to receive this approval, the developer was required to submit information about the increase in traffic from the new development, and this information was considered at the time the PUD was approved. *Id.*, at 954. The court noted that this development was vested with the right to build out the planned improvements in the PUD for a period of five years after the date of approval.

During the period in which the developer was vested, it applied for a grading permit to start work. The City's building official briefed the Council on the fact that because it met the code requirements, he was ready to issue the permit. The Council decided to discuss this grading permit at a regular meeting, AND notified project opponents that it would be on the agenda. After a discussion by the Councilmembers of the project, one Councilmember asked the City Attorney what would happen if they directed the Building Official not to issue the permit. *Id.*, at 955. The City Attorney advised them that it would be a violation of law, but the Council ignored his advice and voted to withhold the permit until a traffic study had been prepared. Six weeks later, the traffic study was complete and presented to Council. Several months later, based on the results of the study, the Council rescinded its motion and the grading permit issued. *Id.*, at 954.

The developer sued the City, the City Councilmembers and City Manager in their official capacities, and also individually sued the Councilmembers (and their spouses) who voted to delay the grading permit. *Id.*, at 958. The developer sought money damages and the Washington Supreme Court held that all – the City, City Manager, Councilmembers in their official capacity and certain Councilmembers in their individual capacities (and their spouses), were liable for

damages because the developer's statutory and constitutional rights were violated. This occurred when the Councilmembers voted to delay the grading permit, because the developer met all requirements for issuance. There was no authority, statutory or otherwise, that allowed the City to delay issuance. In its decision to impose liability on the City, the Council in its official capacity, certain individual Councilmembers, their spouses and the City Manager, the court found the Council's action "irrational," which was:

further dramatized by the overt rejection of advice by the City's own attorney in favor of a defiant course of action well summarized by the comment: 'We have the opportunity to put a stop to this and let's just see what happens. Let's see how confident they [the developers] are. If they bring suit, we can always turn around and issue the permit, that's an option still open to us.'

*Id.*, at 970. Obviously, this strategy didn't work because the Court awarded damages against all of the defendants, even though the permit eventually issued.

The reason I have included a brief description of this case in this memo is to provide an illustration of a situation in which the City Council decided to interfere with the staff's activities and the procedures adopted by law for the processing of permits. It is a good example of a situation in which a city council thought that they had the authority to take whatever action they pleased, as long as a motion was made and the motion passed.

The following are my comments on the individual amendments to this draft resolution:

2.2 As a housekeeping matter, the Council may wish to consider referencing Section 3.1 here, so that everyone understands that a procedure has been established to provide notice to the public of preliminary agendas and agendas of Council meetings, as required by law. The City is required by RCW 35A.12.160 to establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for forthcoming council meetings. "Such procedures may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement." *Id.* This is one of the reasons that the City should not be scheduling special meetings on matters that are non-urgent and which involve regular business matters.

2.2 Currently, the Mayor approves the Council meeting agenda. An amendment is proposed to change this to the Mayor Pro Tempore and the Council President (there is no Council President currently, and nothing in the Rules address the appointment of a Council President or his or her duties, other than by recent amendments to the rules as noted in the January proposed changes.)

The Mayor Pro Tem has no authority unless the Mayor is absent or disabled. Pursuant to RCW 35A.12.065:

Biennially at the first meeting of a new council, or periodically, the members thereof, by majority vote, may designate one of their number as mayor pro tempore or deputy mayor for such period as the council may specify, **to serve in the absence or temporary disability of the mayor;** or, in lieu thereof, the council may, as the need may arise, appoint any qualified person to serve as mayor pro tempore in the absence or temporary disability of the mayor. . . .

In RCW 35A.12.110, the following appears: “Meetings of the council shall be presided over by the mayor, if present, or otherwise by the mayor pro tempore, or deputy mayor if one has been appointed.”

In Section 13 of the Council Rules, state law is reflected: “The Mayor Pro Tempore shall serve in the absence or temporary disability of the Mayor.”

The point here is that pursuant to RCW 35A.12.100, the “mayor shall be the chief executive and administrative officer of the city, in charge of all departments and employees . . . He or she shall . . . have general supervision of the administration of city government and all city interests.”

As stated by the Washington courts:

Where the enabling legislation under which a municipal or quasi-municipal corporation derives its power confides legislative or discretionary functions in particular officials or boards, such functions may not be delegated to others. . . . Unless the enabling legislation provides otherwise, however, those in whom such functions repose may delegate to others the performance of duties of a purely ministerial or administrative nature.

*Roehl v. Public Utility District No. 1 of Chelan County*, 43 Wash.2d 214, 241, 261 P.2d 92 (1953) (emphasis added). Here is the rule as described by a leading authority on municipal corporations:

. . . the duties and powers imposed upon the mayor, designated departments and officers are considered in the nature of public trusts and cannot be delegated or surrendered to other officers or departments, or to other persons.

2A McQuillin, *The Law of Municipal Corporations*, Section 10.46 (3d ed). Therefore, the Council has no authority to pass a resolution which purports to strip the Mayor of his/her duties as established in state law (RCW 35A.12.100), and transfer them to the Mayor Pro Tem (who has no duties at all under state law unless and until the Mayor is absent or disabled).

The Mayor makes the decisions regarding the agenda based on staffing needs and the City budget. Members of the Council may propose agenda items according to Rule 3.1, but the Mayor makes the final decision on the matters that appear on the agenda.

There is nothing that prevents the Council from appointing a “Council President,” but this Council President can’t usurp the Mayor’s authority as the presiding officer of the City Council meetings, or as otherwise provided in state law.

2.9 Here, there is a proposal to eliminate the Mayor’s authority to cancel meetings, which should not be adopted because it is contrary to law. In this amendment, three members of the Council have the sole authority to cancel meetings. Elimination of the mayor’s authority in this respect is inconsistent with RCW 35A.12.100 (The Mayor “shall have general supervision of the administration of city government and all city interests.”) This presents a conflict between the administrative and legislative branches of government, given that the legislative branch has the authority to decide on the matters appearing on the City Council agenda for action.

Consider a recent example, where a joint meeting was scheduled with the City Council and the Planning Commission on the subject of the City’s comprehensive plan amendments. These amendments are overdue – state law required that the City adopt them by June 30, 2015. There are significant consequences to the City for failure to timely adopt comprehensive plan amendments as required by the Growth Management Act. These sanctions may include the State’s withholding of the portion of revenues that the City is entitled to receive under the motor vehicle tax and other taxes. RCW 36.70A.340(2). It could also result in a temporary bar to the City’s authority to collect the real estate tax. RCW 36.70A.340(3). However, this joint meeting was cancelled by three members of the Council, without explanation, and without regard to the fact that these amendments were overdue – and that further unnecessary delay places the City at risk for noncompliance with GMA, which could result in sanctions. While the Planning Commission held its meeting and reviewed the comprehensive plan amendments, two of the Councilmembers who called for the cancellation of the meeting appeared at the meeting.

3.1 According to the proposed resolution which appoints committee members (this was submitted on or about 1/12/16 by three councilmembers), there will be three Councilmembers on each Council Committee. In other words, the proposal is that a majority of the Council will attend Committee meetings. This means that the City staff would have to provide public notice of each of these meetings in the same way as a special Council meeting is noticed (or regular meeting). RCW 42.30.080.

The proposed amendment also states that the Council Committees will be voting and making “do-pass” recommendations on matters to be placed on the Council agenda. If a majority of the Council is acting in these Council Committees, a “do pass” could be construed as final action, so there is need to place it on the Council agenda. For example, if a resolution is being considered by the Council Committee, which is comprised of a majority of the Councilmembers, a “do pass” means that the resolution has passed and is effective on the date of such passage. If it is then forwarded to the City Council at a regular meeting, what would be the requested action?

In addition, if the Council plans to take final action at these Committee meetings, the City Attorney would have to be in attendance.

3.5.4 A proposed amendment eliminates the Mayor's ability to schedule presentations at a Council meeting. Instead, the Mayor Pro Tem and Council President will have the authority to determine presentations and the length of same. Again, this is inconsistent with state law and the Mayor's (or Presiding Officer, which could include the Mayor Pro Tem if the Mayor is absent or disabled) ability to preside over the meeting. RCW 35A.12.100.

This amendment is also unneeded. If any Councilmember wishes to schedule a presentation, all they need to do is schedule it according to Section 3.1 of the Rules.

3.6 A proposed amendment allows "members of the audience to comment on any matter related to City business during the Public Comment period."

There are many actions taken by the City Council requiring a public hearing. This process is outside of the public comment period. At the outset of the public hearing, the Presiding Officer opens the public hearing and after public testimony on the subject of the public hearing, it is closed. Then the Council takes action. If there is an appeal or lawsuit regarding this action, a transcript of the public hearing is prepared, not the public comment period. So, a person's testimony during the public comment period (if not duplicated during the public hearing) may not be reflected in the record, because his/her comments were made at the wrong time. This is the reason that every city I have ever worked with informs the public at the outset of the meeting, that during the public comment period, they may provide comment on anything that is not on the Council agenda. Because there are two comment periods (one at the beginning of the meeting and another at the end), members of the public have the ability to comment on agenda matters during the 2<sup>nd</sup> one.

3.7 No problem with these changes. At a regular meeting, the Council can always make a motion to remove an item on the consent agenda and place it on the regular business agenda anyway.

3.19 No problem with the Council voting on adjournment.

3.20 No problem with the amendment to the rule on recess.

4.3 No problem with this amendment regarding "reordering" other than the language. It should read: "A majority of the Council may reorder items on the agenda." This is an option already available to the Council.

The following language should be added to the duties of the Presiding Officer in 4.2: "Without the necessity of a vote thereon, the Presiding Officer may present matters before the Council for discussion." This again relates to the fact that the Mayor (who is the Presiding Officer unless absent or disabled) "has general supervision of the administration of city government and all city

interests.” RCW 35A.12.100. In addition, the Mayor “**shall report to the council concerning the affairs of the city and its financial and other needs and shall make recommendations for council consideration and action.**” As a result, the Council can’t adopt rules that would have the effect of preventing the Mayor from presenting matters in furtherance of her statutory duties.

5.3 No problem with the elimination of “cross-examination,” as long as the drafters of these amendments understand that by eliminating this term, that they still will not be able to “cross-examine” any individual or staff member. This section just includes a **non-exhaustive** list of what can’t be done.

7.1 There is no problem with appointing the City Clerk the parliamentarian. However, if this language is adopted, the Council still needs to understand that this section deals with procedures – not law. In other words, there may be other factors that the City Council needs to consider during its meetings than procedure and Roberts Rules. For example, if the Council adopts an ordinance in a meeting, the ordinance will be signed immediately thereafter and sent to the City’s official newspaper for publication. A Councilmember can’t make a motion at the subsequent Council meeting to rescind or reconsider this ordinance because it has been passed. However, an amendment to the ordinance could be proposed.

7.2.4 No problem with this new language, except that it requires everyone to look up RCW 35A.12.100. My suggestion would be that the language of Rule 8.4 be added here.

7.2.11 No problem.

9.1 Ordinances. This language is inconsistent with law to the extent that it prevents the Mayor from placing an ordinance on the agenda and ensuring timely adoption. For example, there are times when an ordinance must be adopted on an emergency basis. RCW 35A.12.100 provides that the Mayor “has general supervision of the administration of city government and all city interests.” If this language has been added in order to prevent the Mayor from placing an emergency ordinance on the Council agenda, it is inconsistent with law. It is also inconsistent with law because the Mayor Pro Tem has no duties unless the Mayor is absent or disabled.

9.1 Resolutions. Resolutions are effective upon adoption. If they are to be referred to a committee with a majority of Council members who will vote to “do pass,” there is no reason to forward them to a regular Council meeting. Final action has been taken. Also, from this language it appears that the Council has no intention of obtaining legal review of resolutions prior to adoption, which is definitely a problem.

10.1 No problem with the elimination of the language that requires members of the public to fill out a speaker sign in sheet during the public comment period.

10.2 Again, the language in this section is inconsistent with law and doesn't make sense. It states: "The Council may adjust the time restrictions when warranted by special circumstances and after approval of a majority of Councilmembers present." By law, the Mayor presides over the Council meeting. RCW 35A.12.100. This section, as written, allows the Council to vote to adjust the time restrictions. The new amendment does the same thing because the Council can't adjust the time restrictions unless it acts with a majority of Councilmembers present.

11.1.3 Same comment as above. The Presiding Officer makes the decision whether to allow additional time. If a member of the Council disagrees, he/she may make a motion, and if it passes, then additional time is given. These changes are confusing and contrary to law.

11.1.7 Same comment as above. The Mayor presides over the meeting or hearing. RCW 35A.12.100. If the Mayor asks the Council to modify the procedures, then the Council can vote either yea or nay.

13 There is no need for a Council President, given the limited duties (or duties that are inconsistent with law) in the amended rules.

15.1 Here, the City Attorney is required to attend a meeting of the Council and Council Standing Committee if requested by a Council Standing Committee Chair or any three Councilmembers. First, this is inconsistent with law. The Mayor "shall see that all laws and ordinances are faithfully enforced and that law and order is maintained in the city and shall have general supervision of the administration of city government and all city interests." RCW 35A.12.100. Therefore, the Mayor decides when the City Attorney will attend a Council meeting. The Council cannot pass a resolution which purports to strip the Mayor of his/her duties as established by law.

If one Councilmember, or a majority of Councilmembers, could prevent the City Attorney from attending one or more City Council meetings, there is the possibility that the City would not receive legal advice. *See*, Attorney General Opinion No. 1997 No 7, in which the Washington Attorney General provides the opinion that "The city council lacks the authority to require that legal services will be provided only at its discretion."

The City is required to appoint a City Attorney. RCW 35A.12.020. If the City Council acts without legal advice or contrary to legal advice, there could be significant consequences to the City. To answer the question whether amendments to the Rules would affect the City's insurance coverage (if the Council members had the ability to prevent the City Attorney from attending Council meetings), this memo has been provided to the pool.

For the reasons set forth above, the language which purports to prevent the City Attorney from providing legal advice, except when requested by a Councilmember, should be eliminated. If the Councilmembers proposing this decide to proceed with this amendment, they should also contact their individual insurance agent to find out whether they have the necessary coverage.

Under RCW 35A.12.010, the Mayor submits the budget to the Council and reports to the Council concerning the City's financial and other needs. The Mayor is "in charge of all departments and employees." This means that the Mayor makes the decision on staffing a Council meeting or any other event that might require the City Attorney's presence, because the Mayor must control expenses under the budget for legal expenses.

15.2 Same comment as above regarding staff attendance at Council Committee and regular Council meetings. The Mayor makes the decision on staffing because the Mayor is in charge of employees, staffing and the budget. The language in this section which purports to allow the Council to direct attendance of staff and therefore manage the day to day operations of the City's departments, is contrary to law. The Council has no authority to pass a resolution which purports to strip the Mayor of his/her duties established by law (here, RCW 35A.12.100).

16.5 Here, the Councilmembers drafting this Resolution have eliminated the following: "Councilmembers shall not attempt to change or interfere with the operating rules and practices of any City Department." This language needs to remain – there is a discussion on pages 1-2 of this Memo to explain the rationale. Also, the Council's attempt to interfere with the day to day workings of the City would be contrary to state law (RCW 35A.12.100), which establishes that this authority lies with the Mayor, and this authority cannot be surrendered or transferred to the City Council. Again, consider the example of a Council's interference with the staff provided on pages 1-3 of this Memo (*Mission Springs*).

18.1.1 The drafters of this Resolution have established a process for Council Committees that will involve a significant increase in staff workload and cost to the City. For example, because the Council Committees will now be comprised of a majority of Councilmembers, additional notice would have to be provided to the public of the meetings. Preliminary and final agendas would have to be prepared. The City Attorney would need to attend all of these Committee meetings, because the presence of three Councilmembers at the meetings means that action and final action could be taken. These Committees are apparently to be scheduled for weekday evenings, which means that staff would have to attend all of these evening meetings. The City Attorney might be required to attend all of the evening meetings, in addition to the City Council meetings.

While the Council may certainly appoint their Committees, the decision whether to continue with the process to allow Council Committees under these circumstances lies with the Mayor, because she is in charge of City staff and the budget. As stated repeatedly above, the Council can't adopt a resolution purporting to strip the Mayor of her authority established in state law (RCW 35A.12.100).

18.1.3(d) Here, the following language appears: "at the discretion of the Chair, recommendations on resolutions and ordinances may be 'signed out' of the Committee with the

signatures of at least a majority of the Committee members and forwarded to the full Council.” It is not clear what the words “signed out” mean.

18.14(a) In this section, the drafters of this resolution propose that the Budget, Finance and Administration Committee will perform its duties without City staff. The language in this section which provides that the Committee will work “in conjunction with City staff” and “in coordination with the finance and administration departments” has been eliminated. This is contrary to law, if this Committee intends to somehow assume the authority in state law that has been vested in the Mayor (as the “chief administrative officer” in chapter 35A.33 RCW) or the clerk/finance director in chapter 35A.33 RCW). The City Council does not have the authority to adopt a resolution which purports to amend state law and assign the duties of the Mayor and City staff to the Council in matters relating to the budget and the financial matters of the City. Under RCW 35A.12.100, “The mayor shall be the chief executive and administrative officer of the city, in charge of all departments and employees . . . and shall have general supervision of the administration of city government and all city interests.”

18.14(b) Here, the drafters of this resolution describe the powers of the Growth Management, Land Use and Community Services Committee, by also eliminating any language which would indicate any intent to work “in conjunction with staff.” It appears that the drafters also believe that they can expand the authority of this Committee into quasi-judicial matters, contrary to the Black Diamond Municipal Code. The following language has also been added: “Unless prohibited by the BDMC or other law, the Committee shall consider matters related to project permit review, Development Agreements and the MDRT.” Nothing in the BDMC allows any Council Committee – or the Council, for that matter – to consider quasi-judicial applications or applications subject to project permit review. Again, the drafters of this resolution should review the explanation of the *Mission Springs* case, which explains the problems that could arise if the Council or a few members of the Council, decide to act beyond the scope of their authority.

18.14(c) Same comments as above with regard to the Government Operations and Administration Committee. The language indicating that the Committee works “in conjunction with City staff” has been eliminated. Language has been added which purports to expand the City Council’s authority – “The Government Operations and Administration Committee shall consider issues related to the operations and administration of City departments and shall consider . . .” However, the Mayor is the only official with the authority over “all departments and employees . . . and shall have general supervision of the administration of city government and all city interests.” RCW 35A.12.100. The Mayor’s authority arises from state law, and cannot be surrendered or delegated to three Council members passing a resolution.

21.2 In this section of the existing Council Rules, there is the directive that the Mayor and City Council must keep confidential all materials and verbal information provided to them during executive session. However, the language in the existing Rules allows release of this information after consultation with the City Attorney, if it is decided that the release will not

violate the confidentiality of the executive session or some other “legal exemption or legal privilege.” This language has been changed to add: “provided that this provision does not apply to verbal information or written materials that are not authorized by the Open Public Meetings Act RCW 42.30 to be discussed in executive session.”

This language must be eliminated. It purports to allow individual Councilmembers to decide without consultation with the City Attorney, that the Councilmembers may communicate to the public “verbal information or written materials,” just because that individual Councilmember believes that the discussion or documents were not authorized by the OPMA. Not only is this extremely risky behavior, it also ignores the fact that the OMPA is not the only law that applies to release of confidential or executive session discussions/materials. *See*, RCW 5.60.060(2).

Executive sessions are confidential and the matters discussed are confidential. Under RCW 42.23.070(4), no Councilmember can disclose information that was discussed or distributed in an executive session. This prohibition also applies to confidential memos from the City Attorney sent to all Councilmembers, regardless of whether or not there was an executive session. Any Councilmember seeking to test whether or not state law can be effectively amended by this resolution should be aware that there are many adverse consequences that could result from such disclosure. As stated in RCW 42.23.050: “In addition to all other penalties, civil and criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.” Disclosure of confidential information could also compromise the City’s position in a lawsuit or other proceeding, and expose the City and the individual Councilmembers to liability. Finally, a Councilmember disclosing confidential information contrary to legal advice (or acting without legal advice) jeopardizes the City’s insurance coverage in a claim or lawsuit.

If you have any questions about the above, please let me know.

cc: Roger Neal, Program Director, AWC-RMSA