

May 5, 2016

**Privilege Communication Subject to the Attorney-Client Privilege**

Black Diamond City Council  
City of Black Diamond  
24301 Roberts Drive  
PO Box 599  
Black Diamond, WA 98010

Re: Council Rules of Procedure  
Council Termination of the Contract with Morris Law

Dear Members of Council:

This firm was hired by the Council to provide the Council legal advice in connection with the controversy relating to the termination of the professional services agreement with Morris Law and regarding the revised rules of procedure for the Council. The following constitutes our legal opinion regarding these matters. In forming these opinions, we have been guided by our understanding of the law and our experience with state and local government.<sup>1</sup> We have attempted to provide objective legal advice regarding the issues we have been asked to analyze. No attempt has been made to support the desires or views of any member of the Council or a faction of the Council. As evidenced below, there are areas we agree with various changes in the revised rules and areas where we disagree with them.

**Legal Framework**

Black Diamond ("City") is a "noncharter code city" under the law. The Black Diamond Municipal Code ("BDMC") adopted that classification in §1.08.010. Accordingly, the City is governed by provisions of Washington law and the various laws adopted by ordinance contained in BDMC § 1.08.010, makes clear that the City elected to retain its mayor-

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<sup>1</sup> Phil served for 16 years in the Washington State Senate as a Justice of the Washington Supreme Court, and Tom served as the Assistant Chief of the Civil Division of the Prosecuting Attorney's office in Snohomish County working in close contact with the Snohomish County Council.

council plan of government. Such a system contemplates a more traditional separation of powers analysis as the City has determined to retain distinct executive, legislative, and judicial branches of government. *See generally, Carrick v. Locke*, 125 Wn.2d 129, 134-40, 882 P.2d 173 (1994). Also, as a result of that election, the basic Washington law code provisions relating to the City are contained in RCW 35A.12 et seq. However, other provisions of Washington law also relate to the City. The following is the legal framework to be considered in regard to the issues addressed herein.

RCW 35A.12.190 states:

The council of any code city organized under the mayor-council plan of government provided in this chapter shall have the powers and authority granted to the legislative bodies of cities governed by this title, as more particularly described in chapter 35A.11 RCW.

Thus, under this section, the powers of the Council are “more particularly described” in the proceeding chapter of RCW 35A.11 et. seq.

RCW 35A.11.020 entitled “Powers vested in legislative bodies of noncharter and charter code cities” gives sweeping powers to the Council as the City’s legislative body. It provides in applicable part:

The legislative body of each code city shall have the power to organize and regulate its internal affairs within the provisions of this title and its chapter, if any, and to define the functions, powers, and duties of its officers and employees ...

Such body may adopt and enforce ordinances of all kinds relating to, and regulating its local or municipal affairs and appropriate to the good government of the city ...

The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law.

Under this provision, any question as to the power of the Council is resolved in favor of Council power unless that power is specifically denied it by law. There is no doubt that under this provision, the Council has the power to organize and regulate its internal affairs and agendas. It has the power to define the powers, functions, and duties of its officers and

employees. Thus, Council has the power to adopt rules of procedure relating to the exercise of its legislative function and to make any provision desired in those rules, unless prohibited by law from doing so.

The power of the Council to determine its own rules is also specifically recognized for cities with a mayor-council form of government. RCW 35A.12.120 provides in relevant part:

The council shall determine its own rules and order of business, and may establish rules for the conduct of council meetings and the maintenance of order.

In addition, RCW 35A.11.010 specifically provides that the power to contract is a legislative function. It notes in applicable part:

Each city governed under this optional municipal code, whether charter or noncharter, ...and, by and through its legislative body, such municipality may contract and be contracted with ...

Because the City elected to have a mayor-council form of government, Washington law related to the mayor and other officers must be considered. RCW 35A.12.020 entitled "Appointive officers -Duties - Compensation" states:

The appointive officers shall be those provided for by charter or ordinance and shall include a city clerk and a chief law enforcement officer. The office of city clerk may be merged with that of a city treasurer, if any, with an appropriate title designated therefor. Provision shall be made for obtaining legal counsel for the city, either by appointment of a city attorney on a full-time or part-time basis, or by any reasonable contractual arrangement for such professional services. The authority, duties, and qualifications of all appointive officers shall be prescribed by ordinance, consistent with the provisions of this title, and any amendments thereto, and the compensation of appointive officers shall be prescribed by ordinance, PROVIDED, That the compensation of an appointed municipal judge shall be within applicable statutory limits.

This section provides for two or three city officers: clerk, chief law enforcement officer, and a treasurer whose job may be merged with that of the city clerk. The section provides for the appointment of a full-time or part-time city attorney. If so appointed, compensation is set by ordinance.

This statutory section also provides an alternative to the appointment of a city attorney. Legal services may be obtained "by any reasonable contractual arrangement for such professional services." Thus, contracting for legal services, as the City did, is allowed. However, because of the use of the word "or" before the provision for legal services by contract, the language indicates that procuring legal services by contract is an alternative to having an appointive office of city attorney.

RCW 35A.12.090 entitled "Appointment and removal of officers - Terms" states:

The mayor shall have the power of appointment and removal of all appointive officers and employees subject to any applicable law, rule, or regulation relating to civil service. The head of a department or office of the city government may be authorized by the mayor to appoint and remove subordinates in such department or office, subject to any applicable civil service provisions. All appointments of city officers and employees shall be made on the basis of ability and training or experience of the appointees in the duties they are to perform, from among persons having such qualifications as may be prescribed by ordinance or by charter, and in compliance with provisions of any merit system applicable to such city. Confirmation by the city council of appointments of officers and employees shall be required only when the city charter, or the council by ordinance, provides for confirmation of such appointments. Confirmation of mayoral appointments by the council may be required in any instance when qualifications for the office or position have not been established by ordinance or charter provision. Appointive offices shall be without definite term unless a term is established for such office by law, charter, or ordinance.

This section indicates that the mayor has the power of removal of certain city officials. However, this power of removal is circumscribed. It only relates to "appointive officers" and employees subject to the authority of the mayor. This section also provides for an indefinite terms of office for appointive officers unless changed by law or ordinance. Thus, a contract for legal services with a time duration does not comport with this statutory provision relating to appointive officers, indicating such an arrangement does not create an appointive office of city attorney.

RCW 35A.12.100 entitled "Duties and authority of the mayor-Veto-Tie-breaking vote" states in relevant part:

The mayor shall be the chief executive and administrative officer of the city, in charge of all departments and employees, with authority to designate assistants and department heads... He or she 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... The mayor shall preside over all meetings of the city council, when present, but shall have a vote only in the case of a tie in the votes of the councilmembers with respect to matters other than the passage of any ordinance, grant, or revocation of franchise or license, or any resolution for the payment of money.... He 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.

The Council is not a department of city government. It is its legislative branch, a separate coordinate branch of city government. The Mayor is the chief officer of the executive branch of government. However, under separation of powers, each branch of government controls its internal affairs separate and is distinct from the other branches of government. When presiding over a Council meeting, the mayor acts as its presiding officer. It is often the case that an executive official presides over a legislative body. The Vice President presides over the U.S. Senate. The Lt. Governor presides over the State Senate. However, just because an executive officer has a presiding role, it does not diminish the authority of the legislative assembly to control its own internal affairs. The provisions of RCW 35A.11.020 and 35A.12.120 make that clear. The Mayor's role in acting in a legislative capacity is very circumscribed. Being able to vote when there is a tie (a power allowed to the Vice President and Lt. Governor) is limited by RCW 35A.12.100 and the Mayor cannot vote on ordinances, grants, revocations of franchises or licenses, or resolutions for the payment of money. This narrow role for the Mayor, coupled with the express grant of power to the legislative body to control its own internal affairs and adopt rules by two statutes, indicates that the general power granted to the Mayor to administer the City does not extend to an ability to control the legislative branch of government. Also, under the RCW 35A.12.100, the Mayor's role is to make recommendations to the Council. The role is not described as giving the Mayor the power to decide what recommendations the Council must adopt or consider.

In addition to these statutory provisions. BDMC § 2.08.040 provides:

The council shall have the power to assign to any appointive officer any duty which is not assigned by ordinance to some other specific officer; and shall determine disputes or questions relating to the respective powers or duties of officers.

The clerk is an appointive office. The clerk has the duty to prepare the Council agenda. The ability of the Council to control its own agenda is discussed below. However, if there is a dispute or questions relating to what the clerk should prepare for the agenda, then under this provision of the BDMC the Council, not the Mayor, decides the issue. Under RCW 35A.12.100, the Mayor "shall see that all laws and ordinances are faithfully enforced." The Mayor's duty is to "faithfully" enforce this ordinance and to respect the determination of the Council.

With these general background statements of applicable Washington law in mind, we turn to the specific controversy on which you asked for our opinion.

### **Revised Rules of Procedure**

There is no doubt Washington law gives the Council the right to determine its own rules, procedures, and order of business. RCW 35A.12.120 and 35A.11.020 so provide. Such a provision is entirely consistent with long held principles of law that legislative bodies have the right to regulate their own internal affairs.<sup>2</sup> RCW 35A.11.020 specifically provides that the Council has the right to define the functions, powers and duties of its officers. Under Council Rule 4.1.1, the Mayor is its presiding officer. But the Council has the power to define the functions, powers, and duties of that office in relation to its own internal activities.

In fulfillment of those powers, the Council has the right to change or amend its rules of procedure. Rule 2.2, before being amended, provided that the Council agenda was subject to Mayor's approval. That approval or refusal to approve an agenda would be subject to a right of appeal to the Council. However, the refusal of the Mayor to approve an agenda for the Council to consider amendments to its rules of procedure effectively would

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<sup>2</sup> We recognize that the Council employs Roberts' *Rules of Order* to govern its internal activities. We strongly suggest that Council Members review Reed's *Parliamentary Rules*, a volume employed by many legislative bodies to govern their internal affairs.

allow the Mayor to control whether or not rules could be considered that would change the role of the Mayor as presiding officer. This has, or could have, the effect of denying Council its statutory right to regulate its internal affairs. Accordingly, it is our opinion that the Mayor cannot refuse or fail to approve a place on the Council agenda for consideration the adoption or amendment of rules of procedure.

The broad statutory powers given to the Council to manage its internal affairs, would allow the approval of the agenda under Rule 2.2 to be placed in the Mayor Pro-Tempore and Council President. While state law provides that a Mayor Pro-Tempore only acts in the absence of the Mayor (RCW 35A.12.065), we are unaware of any law prohibiting the Council from creating a position of Council President in addition to that of Mayor Pro-Tempore. The rules of procedure should specifically provide for the creation of the position of Council President if the Council desires to do so. The grant of authority to the Council allows it to create its own officers and proscribe the duties of those officers. RCW 35A.11.020. While statute provides that the Mayor is the presiding officer, there is no statute that specifically provides that the Mayor/Presiding Officer controls the agenda of the legislative assembly. Control of the agenda is intrinsic to controlling the internal affairs of the Council, a matter statute gives to Council alone. Saying what is on the agenda may affect staffing needs and budgets does not mean the Mayor therefore gets control. If an agenda item will affect staffing and budget, the Mayor may appropriately bring those matters to the Council's attention. Ultimately, approval of the budget rests with the Council. The Council may wish to consider making a reference to Rule 3.1 which provides for the preparation of an agenda in 2.2. If the Council wishes to avoid the issues as to who "approves" the agenda, the Rules could be changed to simply state the Council, upon motion, and majority vote, shall approve the agenda with additions and deletions provided any additions are properly noticed as required by law.

The power to control its own agenda also allows the Council to divest the Mayor of the power to reorder items on the agenda as is proposed in amendment to Rule 4.3. The Council may also specify who is to act as Parliamentarian under proposed amendment to Rule 7.3, changing the designation from Mayor to City Clerk.

In addition to these changes, the following proposed changes to the rules of procedure are discussed since they have already been commented upon by the former City Attorney.

The revised changes to the rules of procedure providing that the Mayor has the right to vote in the case of a tie in accordance with RCW 35A.12.100 is acceptable since it comports with the statutory requirements.

Issues have arisen in regard to appointments to committees. This is an internal matter relating to the internal organization of the Council. Accordingly, it is within the power of the Council to specify how such appointments are made.

We are aware that having three members of Council serve on a committee has some special legal requirements. Because three persons is a majority of Council, special attention must be paid to requirements of the Open Public Meetings Act. RCW 42.30. The Act's requirements are triggered at any point that the governing body of a public agency has a meeting as defined by the Act. RCW 42.30.090. As a committee of Council, it is a "governing body" when it "acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). If the committee takes any "action," it is subject to the Act. The definition of "action" is quite broad under Washington law. See AGO 2010 No. 9. Accordingly, commensurate with the aforementioned AGO, public notice and following the other requirements of the Open Public Meeting Act should be given *both* for the committee meeting and also as a meeting of the Council. Rule 18.1.3a should be clarified to provide notice for both the committee and the Council to insure compliance with the Open Public Meeting act.

While there is a proper concern as to whether the action of a three-person committee could constitute "final action" by the Council, this concern can be overblown. Legislative bodies sometimes move to consider matters as a Committee of the Whole, with every member of the body serving on the committee. That does not constitute final action. Final action does not occur until the bill or proposed ordinance is considered by the entire legislative body. That makes sense because although a matter may receive a three-person vote in committee, a member of Council could change his or her mind depending on what is learned after the committee meeting and during Council debate. To better protect the City's interest, we suggest that the rules specifically provide that any matter considered by a committee that receives a "do-pass" recommendation is NOT final action by the Council and that final action does not occur until the matter is passed by a majority of the Council as a whole. We also recommend that the rules include a provision that no committee or chair

of a committee can bind the City or make public statements as to what constitutes City policy.

The revised amendments to Rule 3.5.4 relate to presentations. Two-week notice is a good idea, was not mandatory previously, and does allow for better planning. Instead of arguing about whether the Mayor or someone else needs to approve the presentation, the Council may simply want to use the language in the last sentence that upon motion and approval of a majority of Councilmembers present at the meeting, the Council may authorize presentations and may determine their length.

Care must be taken in regard to revised Rule 3.6, not to confuse a general public comment period for items not on the agenda with specific matters where public comments become part of the record for legal reasons. A reference to Section 11 would improve clarity here.

Revised Rule 7.1 provides the City Clerk shall be the parliamentarian. That is legally acceptable. The section also provides that Robert's *Rules of Order* will govern. As noted *supra*, the Legislature uses Reed's *Parliamentary Rules*. The Council may wish to utilize these since they are probably better designed for legislative bodies.

Revised Rule 9.1 removes the mandatory review of ordinances by the City Attorney. It replaces it with language that the City Attorney "should" review ordinances. Since ordinances are laws adopted by the City, we suggest keeping the mandatory review procedure.

Revised Rule 9.1 is silent about review by the City Attorney. Resolutions can constitute City policy. Review by the City Attorney is suggested, at least as to resolutions that could affect City policy and potential legal liability.

Revised Rule 15.2 purports to designate what meetings the City Attorney attends and when the City Attorney may provide legal advice. The Council cannot control what legal advice the City Attorney provides. Instead of having this rule create problems relative to the role of the City Attorney, it is recommended that the City Attorney, of his or her deputy, attend full Council meetings and other types of meetings as necessary and have this specified in the contract for legal services.

Revised Rule 15.3 purports to direct City staff as to attendance at meetings. The Council does not have supervisory authority over City staff.

It is recommended this provision be removed. It is suggested the former language be used with the addition of Council committee meetings.

Revised Rule 16.4 removes the words "or influence" City staff. This change is probably warranted since "influence" is a broad, vague term that any inquiry could cause certain individuals to claim it was impermissible "influence." The Council may wish to insert "direct" in its place. See next discussion.

Revised Rule deleting the old 16.5 is not recommended. The Council's role is legislative and it acts as a policy maker. It is legally dangerous to have Council or members of it attempt to interject themselves into the running of City departments that fall under the Mayor's jurisdiction. While the deletion does not permit that, the deletion might be construed as authorizing that.

Revised Rule 18.1.1 has established a process to allow the appointment of committees. That is an internal matter of organization of the Council. The Mayor has no role in deciding or continuing the committees as adopted by Council. Increased staffing and cost are matters that the Mayor may appropriately bring before Council to be addressed.

Revised Rule 18.1.3(d) references resolutions being "signed-out." It is not clear what that means. If the term is to be used, it should be defined. "Approved" might be the more operative term.

Revised Rules 18.1.4(a)(b)(c) all remove language the committees work "in conjunction with City staff." Obviously to be effective, the committees should work with City staff. However, the deletion is appropriate in that its inclusion intimates the Council is controlling staff. Language suggesting the committees should work with appropriate staff who could assist the committee might be considered with the proviso that the Council is not directing or controlling staff.

Revised Rule 18.1.4(b) appears to allow the Committee to conduct quasi-judicial matters. This cannot be done commensurate with Washington law. Quasi-judicial matters are for the entire Council. Restoring the language relating to quasi-judicial is recommended. Similarly, the language allowing a committee to consider project permit review, development agreements and MDRT is concerning while recognizing prohibitions by law, why Council would act in these areas is not clear nor is it clear how the determination is made as to what was

prohibited by law. Greater clarity is recommended here. If the Council wishes to enter that arena, it should consider appropriate ordinance changes defining its role, provided they comply with Washington law.

Revised Rule 21.2 is not recommended. Disclosing information from Council executive sessions could impose personal liability on a member of Council, and possibly cause the City to incur legal liability. Also, the language suggests that members of the Council can individually determine what information is appropriate to executive session. These are legal determinations best left to the City Attorney.

Finally, we suggest that the rules have a specific provision allowing a majority of Council to amend them and that any proposed amendments shall be included on the agenda.

### **Termination of the Contract with the City Attorney**

A question has arisen as to whether the Council or the Mayor has the right to terminate the contract with the City Attorney, formerly Morris Law. As noted above, RCW 35A.12.020 provides that the City must "shall" make provision to obtain legal counsel. The City has two options to obtain legal counsel. It can do so either (1) by appointment of a full-time or part-time city attorney *or* (2) by any reasonable contractual arrangement. If it is by appointment, the compensation must be provided for by ordinance. *Id.* Unless changed by law or ordinance, appointive offices shall be without definite terms. RCW 35A.12.090.

Attorney General's Opinion 1997 No. 7 construed RCW 35A.12.020, the most relevant statutory provision here. That opinion makes a distinction between appointing a city attorney or providing for legal services by contract. It states: "the city council's authority to enter a contract for legal services depends on whether the city charter or city ordinances provide for an appointed officer position for the city's attorney or provide that a contract will be entered."

The City does not have a charter. Thus, there is no charter provision providing for the appointment of a city attorney. The BDMC does not provide for the appointment of a city attorney either. The BDMC provides for other appointive officers, such as the clerk/treasurer, city administrator, hearing officer, and municipal judge. Thus, it appears that the City has elected not to provide for a city attorney by appointment. If

the City had an ordinance providing for appointment of a city attorney, then the power to appoint and remove would reside with the Mayor. However, having no charter or ordinance providing for appointment and entering into a contract for such services clearly indicates that the City has obtained legal services by the alternate method, by contract.

In originally entering into the contract with Morris law, the Council passed a confusing resolution. Resolution 14-934 in its Whereas clauses states the Council has confirmed the Mayor's appointment of Morris Law. However, the Resolution authorizes the Mayor on behalf of the City to execute the professional services agreement with Morris Law. Subsequently, the Council passed Resolution 14-989 authorizing the Mayor to execute an amended professional services agreement. Thus, the Council again acted to procure legal services for the City by contract.

The contract with Morris Law also indicates the relationship was a contractual one and does not constitute an appointment as City Attorney in the statutory sense contained in RCW 35A.12.020. The City Attorney is described as a "consultant." The agreement does not have a specified term, but allows termination upon notice for various periods. Having a notice requirement is not commensurate with an unfettered right of the Mayor to remove an appointed officer as provided for in statute. The agreement is silent as to who may act for the City in terminating the contract. However, the contract also provides for an indemnification/hold harmless of the City by the "consultant," § 9, a requirement the consultant have insurance, § 10, a right to assign or subcontract with permission of the City, § 12, and that the consultant and subconsultants are "independent contractors," § 12. All of these provisions are not consistent with an appointive office of the City, but are consistent with obtaining legal counsel pursuant to contract.

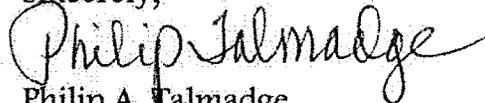
In light of the fact there is no ordinance relating to the termination of the contract, it is our opinion the right to terminate the contract rests with the Council. This is commensurate with RCW 35A.11.010 and RCW 35A.11.020 which vest in a city council the broad authority to "contract and be contracted with." The Attorney General's Office has opined: "The general authority to contract on behalf of the city includes the authority to negotiate the terms of the contract. Unless restrictive language is contained in the city charter or ordinances, nothing in the state constitution or the general law limits the council's ability to specify the duration of the contract or its ability to state the council retains the right to terminate the contract." 1997 AGO No. 7.

Moreover, even if the City Attorney claims it is an appointive position and not a contractual one, BDMC § 2.08.040 provides in relevant part: "The council ... shall determine disputes or questions relating to the powers or duties of officers." This indicates that the Council retains broad power to determine disputes or questions and has the right to determine whether the City Attorney is an appointive officer subject to removal only by the Mayor or is simply providing legal services by contract.

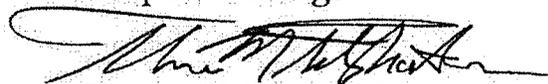
Thus, it is our opinion that the Council had the right to terminate a contract for legal services. We recommend in any future resolution that no reference be made to any mayoral appointment and that the contract specify a definite term and that Council has the right to terminate the contract. Including such provisions comports with the opinion of the Attorney General's Office.

If there are further questions, we are happy to answer them for you.

Sincerely,



Philip A. Falmadge



Thomas M. Fitzpatrick