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CITY OF BLACK DIAMOND, WASHINGTON

IN RE THE MATTER OF:
RESOLUTION 16-1069

FINDINGS AND CONCLUSIONS

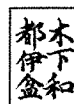
I. INTRODUCTION

The undersigned was hired as Emergency Interim City Attorney for Black Diamond on April 27, 2016, to handle emergent issues pending retention of a permanent City attorney. The emergent issues are related to a dispute over management of the City arising from Resolution 16-1069. [For purposes of clarity, the council rules in effect as of January 1, 2016 are referred to as “the council rules” or “council rule ___.” Resolution 16-1069 is referred to as R-1069.]

II. BACKGROUND

In January 2016, conflicts arose between three members of the Black Diamond City Council and the two other members and the Mayor over proposed rule changes set forth in Resolution 16-1069. City Attorney Carol Morris advised that the proposed changes were illegal. The City’s Insurer likewise objected to the rules and indicated it would not cover actions taken under those rules.

Upon the advice of City Attorney Morris, the Mayor declined to enforce Resolution 16-1069. As a result three members of the City Council voted to terminate Ms. Morris as



1 City Attorney. It is disputed if those three members had the authority to fire Ms. Morris, an
2 issue not addressed here.

3 At the first council meeting without a City attorney on April 21, 2016, there was
4 significant discord and disruption. Arguments over the agenda dominated and some
5 council members introduced actions not on any previously published agenda. The audio
6 recording captures the dysfunction that occurred. The Mayor promptly sought an interim
7 city attorney as required by law and the undersigned was retained to serve in that role until a
8 permanent City Attorney was retained on April 27, 2016.

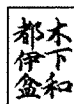
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10 The undersigned has 26 years of legal experience as a civil rights attorney focusing
11 upon government compliance with federal, state, and local laws. In addition, the
12 undersigned served in this same role for Black Diamond in 2009-10. When retained on
13 April 27 the undersigned did not know the Mayor or any of the Council members and had
14 no connection with any of the issues or parties to the disputes.¹

15
16 III. ISSUES PRESENTED

17 The City has ground to a halt due to the dispute over the rules. City Attorney Morris
18 prepared an 11-page memorandum detailing the reason R-1069 is illegal. The insurer
19 likewise agreed. Those opinions are based upon the R-1069 itself, without investigating the
20 manner in which R-1069 originated and was adopted. Nor do those memoranda address
21 the specific interplay with the Black Diamond Municipal Code.

22 Since appointment as Interim City Attorney, the undersigned has been provided,
23 unsolicited, numerous documents that raise significant legal concerns regarding the process
24 by which R-1069 came into being. Once the validity of the unsolicited documents was
25 confirmed, pursuant to the Attorney Rules of Professional Conduct and at the direction of
26

27 ¹ In fact, the undersigned's law practice is based in Auburn and the undersigned resides in Renton.



1 the Mayor, the undersigned began reviewing the origin and process of R-1069 from
2 inception to adoption. These findings based upon available information are herewith
3 presented.

4 IV. INFORMATION REVIEWED

5 The undersigned has reviewed:

- 6 ➤ Washington statutes;
- 7 ➤ Federal and state court decisions;
- 8 ➤ The Black Diamond Municipal Code;
- 9 ➤ The Council Rules;
- 10 ➤ R-1069;
- 11 ➤ Emails and other documents produced in response to citizen public disclosure
12 requests;
- 13 ➤ Transcripts from committee meetings;
- 14 ➤ The audio of the April 21, 2016 meeting (first hour);
- 15 ➤ Emails through the City server;
- 16 ➤ Correspondence from the Risk Pool (the City's Insurer);
- 17 ➤ Documents and information produced by Staff;
- 18 ➤ Legal memoranda of the prior City Attorney Carol Morris; and
- 19 ➤ Memoranda from attorneys retained by Council members Pepper and Morgan.

20 In addition, the undersigned has reviewed information from council members, the
21 Mayor, former City Attorney Morris, witnesses, staff, and citizens who have proffered
22 information.

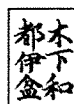
23 The findings herein are based upon a more likely than not basis, and are based upon
24 the evidence made available to date.

25 V. SUMMARY OF CONCLUSIONS

26 A. VIOLATION OF THE SUNSHINE LAWS.

27 The citizens of Washington enacted numerous "sunshine" laws, designed to end the
practice of backroom decisions shielded from the eyes of the public. Two of the primary
sunshine laws are the Open Public Meetings Act² and the Public Records Act.³

² RCW 42.30 et seq.



1 Documents obtained from the private email accounts of Council members Pepper,
2 Weber, and Morgan indicate that on a more likely than not basis, R-1069 was created in
3 violation of the Sunshine laws, with the intent of interfering with the government operations
4 of Black Diamond.

5 A comparison of the documents from their private email accounts with their City
6 email accounts indicate, on a more likely than not basis, that Council members Pepper,
7 Weber, and Morgan were attempting to hide their actions as council members in the
8 crafting and implementation of R-1069 and other resolutions.

9
10 The evidence indicates a pattern of collusion in decision making by Council
11 members Pepper, Weber, and Morgan outside of the eyes of the public, and a concerted
12 attempt to hide such activities.

13 Consequently, under the OPMA R-1069 is void *ab initio*, that is, void from inception.

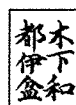
14 B. R-1069 WAS ENACTED FOR ILLICIT PURPOSES

15 The evidence indicates that the purpose of R-1069 is to stall governmental operations
16 and to interfere with the City upholding its obligations under law. Because the Mayor is
17 vested by statute with both the authority and duty to uphold the constitution, statutes, and
18 ordinances, the Mayor has a legal obligation to not enforce R-1069.

19 C. R-1069 VIOLATES STATE AND LOCAL LAW.

20 R-1069 illegally divests the Mayor of her duties imposed by State law. In addition,
21 R-1069 conflicts with the Black Diamond Municipal Code. Consequently, the Mayor has a
22 legal obligation to not enforce it.
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³ RCW 42.56 et seq.



VI. FACTS

1 Some of the information is from the private email accounts of Council members
2 Weber, Morgan, and Pepper in response to a public records request by a citizen. It was up
3 to the individual council members to comply with the request and on their own produce
4 responsive documents. It should be noted that there are inconsistencies in what has been
5 produced.⁴ Based on the evidence gathered to date:

7 A. PRE-COUNCIL MEETING DECISIONS BY THE MAJORITY

8 In December 2015, Council members Pepper and Morgan were meeting with non-
9 resident campaign supporters about changing the operation of the government in Black
10 Diamond. By December 30, 2015, Council members Pepper, Weber, and Morgan
11 apparently began “practicing” for something for the first council Meeting on January 7,
12 2016. Morgan then states to the group:

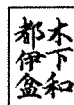
14 I think it might be smarter to just name me Mayor Pro Tem and go along
15 with the Council Committee appointments . . . then come up with a clean
16 copy of the “new council rules” after a citizen meeting and some support
17 public input.

17 *Id.*

18 On January 7, 2016, it appears Council members Pepper, Morgan, and Weber tried
19 to introduce a 40-page document without notice to the public, the Mayor, or other council
20 members. This effort failed because they did not know how to introduce the document.

22 The next day a flurry of emails commenced through the private email accounts of
23 Pepper, Morgan, and Weber about rule changes. The emails were entitled “The Rules Shall
24 Set You Free,” and “Outrageous!” For the next four days, emails shot back and forth with
25 numerous comments about the new rules. Many decisions were made by the three

26 _____
27 ⁴ The undersigned has reviewed hundreds of emails to date. A few are produced here for
example only.



1 privately, as evidenced by the plan to keep Councilmember Janie Edelman from any
2 chairmanships:

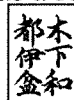
3 Also, **are we all still confirmed with resolve** to knock Janie out of any
4 chairmanship of any committee. . . .

5 From January 8 to January 12 (the deadline for resolutions for the January 21
6 council meeting), approximately 33 emails were exchanged on private email accounts
7 between Morgan, Weber, and/or Pepper regarding the rule changes and a special meeting
8 to get them adopted. Of note is that there were only a few emails, if any, on their City
9 emails accounts. However, they did use their City email accounts to communicate with the
10 Mayor and staff. This pattern continued after January 12.

11 Thus Morgan, Weber, and Pepper switched back and forth between their private
12 email accounts and their City ones, depending on the topic. For routine City issues and
13 communication with City Staff or the Mayor, the City email accounts were usually used.
14 When discussing the rules, special meetings, committees, appointments, and scripts
15 prepared by outsiders, the private email accounts were used.⁵

17 The email evidence is significant that Morgan, Pepper, and Weber were making
18 collective decisions about the rules and other City policy in secret. This action was
19 confirmed a document that emerged from an interesting Public Records Request made at
20 the May 5, 2016 Council meeting, wherein Robbin Taylor requested all the documents of
21 council members Pepper and Morgan on the dais. The Council members were directed to
22 not remove any items so the Clerk could gather them up, copy them, and have them
23 reviewed for privilege. Despite that instruction, at the end of the meeting Councilmember
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26 ⁵ In addition, documents were drafted to request a special meeting two days before the
27 regular one to adopt the new rules. Morgan, Weber, and Pepper worked in concert to
have this “special meeting” even though there was a regular meeting in two days.



1 Pepper was observed by a citizen cramming a few documents into her bag. The Mayor told
2 her to stop and retrieved them.

3 It turns out that one of the documents was entitled, "A Plan." The "Plan" has
4 Weber, Pepper, and Morgan agreeing to agree on each and every item: "When one says
5 something, the other 2 should speak up and offer agreement."

6 The Plain then lays out what they have already decided: Substitute the Agenda,
7 Amend the minutes, Reject the DKS claim, etc. Then there is agreement on how to get out
8 of Executive Session:

9
10 Adjourn the exec session if you are cross-examined. Say: "we are done with
11 this exec session, do you agree Pat, Erika, Brian?"

12 Had Ms. Taylor not requested Pepper's and Morgan's dais documents, this "plan"
13 would have never come to the light of day for the public.

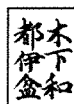
14 VII. AUTHORITY

15 A. VIOLATION OF THE SUNSHINE LAWS.

16 The purpose of the Open Public Meetings Act is to ensure that all conduct of elected
17 offices are "taken openly and that their deliberations be conducted openly. . . . The people
18 insist on remaining informed so that they may retain control over the instruments they have
19 created." *RCW 42.30.010.*

20 Upon enactment of the OPMA, the Attorney General issued an opinion as to its
21 scope and purpose, which was to "block evasive" maneuvers to hide discussions and
22 decision making by elected offices. *AGO 1971 no. 33.* The entire decision making process
23 was to be done openly before the public. *Id.*

24
25 The Washington Supreme Court adopted this interpretation from the outset: "We
26 believe that the purpose of the Act is to allow the public to view the decision-making process
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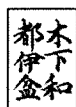
1 **at all stages.”** *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975).

2 Thus, any time a majority in any way comes to a collective decision outside of open
3 meetings, the OPMA is violated. *AGO 1971 no. 33; Wood v. Battle Ground School Dist.*, 107
4 Wn. App. 550, 562, 27 P.3d 1208 (2001). The majority need not be in the same location or
5 acting at the same time. *Id.* All that is needed is a collective decision by the majority, even
6 informally. *AGO 1971 no. 33.*

7 This broad interpretation is to prevent the kind of end runs and evasive techniques
8 we see here. *Id.* Here we have Council members Pepper, Weber, and Morgan using their
9 private email accounts to make decisions as a majority, while using their City email
10 accounts for routine city matters. This is exactly the kind of evasive technique that the
11 OPMA does not permit. Because R-1069 was concocted, drafted, discussed, and decided
12 upon by the Pepper, Weber, and Morgan, a majority, outside of the public deliberative
13 process, it is null and void. RCW 42.30.060.

14 Nor may subsequent adoption at a council meeting revive it. *Cathcart*, 85 Wn.2d at
15 107. In *Cathcart*, the Washington Supreme Court made short shrift of the claim that
16 subsequent adoption in an open meeting saved the decision made in violation of the
17 OPMA, because the purpose of the act is to allow the public to see the decision making
18 process “at all stages.” *Id.* Otherwise, the Court held, the purpose of the OPMA would be
19 violated. *Id.*

20 This remains the law: when any part of the process violates the OPMA, all actions
21 resulting from them “are a legal nullity.” *Mason County v. PERC*, 54 Wn. App. 36, 41, 771
22 P.2d 1185 (1989). Forty-five years ago the Attorney General pointed this out; the courts
23 adopted it; and it remains the law. As a result, R-1069 is null and void.
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1 B. R-1069 WAS ENACTED FOR ILLICIT PURPOSES

2 As set forth in the 6/2/16 memorandum regarding Committees, R-1069 cannot be
3 enforced because it was designed to and functions as an impediment to governmental
4 operations. The 6/2/16 memorandum is incorporated herein.

5 C. R-1069 VIOLATES STATE LAW.

6 1. *CITY COUNCILS MAY NOT LIMIT MAYORAL POWER.*

7 “Municipal authorities cannot exercise powers except those expressly granted, or
8 those necessarily implied from granted powers.” *Sundquist Homes Inc. v. Snohomish County,*
9 *140 Wn.2d 403, 410, 997 P.2d 915 (2000).* This is well-established law governing bodies
10 created by state power. *Moses Lake School Dist. v. Big Bend, 81 Wn.2d 551, 556, 503 P.2d 86*
11 *(1972).*

12
13 It has been established for over a hundred years that city councils are specifically
14 restricted from attempts to curtail or invade mayoral power:

15 The duties of mayors of towns of the fourth class are defined by statute; and
16 the town councils of such towns clearly are not authorized to amend such
17 statutes by adding to or taking from the duties therein provided for.

18 *Bothell v. Woody, 90 Wash. 501, 504, 156 P. 534 (1916).* Thus, where the Legislature grants
19 power to a mayor and not the council, the council may not interfere. *State v. Volkmer, 73*
20 *Wn. App. 89, 94, 867 P.2d 678 (1994).*

21 2. *THE COUNCIL MAY NOT IMPEDE THE MAYOR AS PRESIDING*
22 *OFFICER OF COUNCIL MEETINGS.*

23 R-1069 seeks to limit the Mayor’s authority as presiding officer of Council meetings,
24 attempting to take away the gavel. Yet the Mayor is authorized and directed by statute to
25 preside over the meetings and maintain order. The rule changes amending those duties are
26 invalid.



1 RCW 35A.12.100 also authorizes the Mayor to present city business to the Council
2 at council meetings for action. R-1069 seeks to take away that right by mandating agendae
3 approved only by two council members. Not only is there no authority for this process, it
4 violates RCW 35A.12.100.

5 3. *THE COUNCIL MAY NOT GRANT ITSELF THE RIGHT TO*
6 *CONTROL THE PRELIMINARY AGENDA.*

7 The issue of council agendae is mentioned only three times in statutes, under RCW
8 35A.22.288, RCW 35A.12.160, and RCW 42.30.077.

9 RCW 35A.22.288 and 35A.12.160 each require “the City”, not the city council, to
10 prepare a preliminary agenda. RCW 35A.12.010 defines the city as “an elected mayor and
11 an elected council.” Thus the “City” is comprised of both.

12 Therefore, the preliminary agenda needs to be developed by both the Mayor and the
13 Council. Under the council rules, the Mayor drafts the agenda and the council members
14 may add to it by timely submitting their items. The council rules strike the appropriate
15 balance between the Mayor and the Council.

16 R-1069, on the other hand, vests the council with agenda power the State has already
17 defined as belonging to both the Mayor and Council together. As such, R-1069 is invalid.

18 Nor does the claim that because the council can regulate its “internal” affairs, it can
19 divest the Mayor of her right to craft the preliminary agenda. “Internal affairs” is defined
20 by the statute in which it is referenced, i.e.
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23 The functions, powers, and duties of its officers and employees; within the
24 limitations imposed by vested rights, to fix the compensation and working
25 conditions of such officers and employees and establish and maintain civil
26 service, or merit systems, retirement and pension systems not in conflict with
27 the provisions of this title or of existing charter provisions until changed by
the people.



1 RCW 35A.11.020. This is distinct from external affairs, i.e., ordinances, laws, and contracts
2 that reach beyond city hall. The statute distinguishes those actions in a separate section
3 from internal affairs.

4 D. OTHER PROBLEMS WITH R-1069.

5 Many of the proposed changes of R-1069 are irrelevant to the functioning of
6 government. For example, nothing precludes council members from bestowing titles upon
7 themselves, provided that powers not granted by statute are not likewise bestowed.
8 Changing the parliamentarian is likewise irrelevant, since the Mayor as presiding officer can
9 consult with anyone of her choosing. These minor issues are within the prerogative of the
10 Council, and since they have no impact upon the function of the City, are not problematic.

11 VIII. CONCLUSION

12 Unfortunately the manner in which R-1069 came about, the divestment of power
13 from the Mayor, and the committee structure are very problematic. For the reasons set forth
14 above, R-1069 is void ab initio (invalid from the outset) as violative of the OPMA and
15 because it conflicts with state and local law.
16

17
18 RESPECTFULLY SUBMITTED on June 2, 2016.

19 *YVONNE KINOSHITA WARD LLC*

20
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