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MEMORANDUM

TO: Mayor Carol Benson
CC: City Council; City Clerk
FROM: Yvonne Kinoshita Ward, Attorney at Law
DATE: June 2, 2016
RE: Committees under Resolution 16-1069

I. ISSUE

In January 2016, Resolution 16-1069 was proposed to amend the Council rules. The validity of 16-1069 is subject to a separate memorandum. Separate from the issue of R-1069's validity, the changes to committees therein are illegal under state and local law for several reasons.

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. INFORMATION REVIEWED

In analyzing the legality of R-1069, I have reviewed:

- Washington statutes;
- Federal and state court decisions;
- The Black Diamond Municipal Code;
- The Council Rules;
- R-1069;
- Emails and other documents produced in response to citizen public disclosure requests;
- Transcripts from committee meetings;
- Emails through the City server;
- Correspondence from the Risk Pool (the City's Insurer);
- Documents and information produced by Staff;
- Legal memoranda of the prior City Attorney Carol Morris; and
- Memoranda from attorneys retained by Council members Pepper and Morgan.

III. BACKGROUND

The Council Rules established five standing committees consisting of no more than two council members each. Rule 18.1.2, 18.1.4. Under the rules, the Mayor appoints the members. Committees would publicly meet during City business hours when staff was available and would report to the Council and public at regularly scheduled Council Meetings and Work Sessions.

IV. PROPOSED CHANGES

Resolution 16-1069 adds a committee, makes each committee consist of three council members, and places the appointment of committees within the Council itself.

Nothing precludes the Council from adding committees or amending how its members are appointed as long as such decisions are made consistent with the Open Public Meetings Act (OPMA) and other laws. However, making the committees consist of three members violates the Black Diamond Municipal Code (BDMC) and the OPMA and therefore it is illegal.

V. ILLEGALITY

A. BECAUSE R-1069 CONVERTS COMMITTEE MEETINGS TO CITY COUNCIL MEETINGS, IT VIOLATES THE BDMC.

1. *CONVERTING THE COMMITTEES TO COUNCIL MEETINGS.*

In 2010 the Attorney General's Office issued an opinion that if committees consist of a quorum of a City Council and discuss City business, it is a City Council meeting and must comply with all laws governing such meetings. *AGO 2010 No. 9 (2010)*. Therefore, because the Black Diamond City Council consists of five positions, by making the committees consist of three members, the committees are converted into Council meetings and all laws which apply to Council meetings are triggered. *Id.*

2. *RESOLUTION 16-1069 VIOLATES THE BLACK DIAMOND MUNICIPAL CODED REGULATING COUNCIL MEETINGS.*

RCW 35A.12.110 requires that regular Council meetings be established by the City. The City of Black Diamond, through its City Council, opted to set its meetings by ordinance at BDMC 2.04.010. This ordinance establishes Council meetings for the first and third Thursday of each month and work sessions for the second Thursday of each month. The ordinance does not authorize additional regular meetings.

As the Council has been repeatedly advised, resolutions cannot conflict with or amend ordinances; the only way to amend or change an ordinance is by ordinance. No ordinance

authorizes the Council to create additional Council meetings as part of a committee structure.

B. R-1069 VIOLATES THE BDMC AS TO STAFF TIME.

R-1069 sets committee meetings in the evenings and requires staff attendance. As stated by R-1069's author, under R-1069 "the Department Heads . . . go to go to the Committee Meetings as well." *2/11/16 Government Operations Meeting; R-1069 at § 15.3*. This conflicts with ordinance because, by ordinance, the City's hours of operation are limited as follows:

- Monday through Friday, 8:30 a.m. to 5:00 p.m.; and
- Regularly Scheduled Council and Work Sessions, as set forth above.

BDMC 2.06.010; 2.04.010.

The Council cannot require Staff to attend to City business outside of the above hours unless authorized by separate contract negotiated through its representatives. Current contracts do not give the Council such authority. Thus R-1069 revisions regarding committees are illegal on this basis as well.

In addition, RCW 35A.12.100 vests administration of the City, including staff, with the Executive Branch. As a Mayor-Council form of government, the Executive Branch is managed by the Mayor. The Council, as the Legislative Branch, may only set policy and enact ordinances; it is not allowed to micromanage the administration charged with implementing those policies. This is the separation of powers doctrine, codified in statute. The attempt to direct and manage staff is a clear violation of that statute.

C. R-1069 IS AN UNFUNDED MANDATE IN VIOLATION OF THE BDMC AND STATE LAW.

In addition to R-1069's staffing requirements, Council Rule 2.4 requires the City Clerk to take the minutes of all council meetings and R-1069 maintains this requirement. In addition, Rule 15.2 requires the City Attorney to attend all Council meetings. Nor may a council member's preference to avoid legal advice at meetings displace this requirement; State Law requires the City to have a City Attorney. Since the primary duty of the City Attorney is to ensure the City complies with all federal, state, and local laws, the City Attorney's presence at Council meetings is critical regardless of a council member's preference otherwise.

According to an analysis by the Finance Department, R-1069 would at a minimum cost the City over \$288,000.00 in additional expenses that would not be incurred under the Council Rules. This increased cost is not allowed in the budget. State law does not authorize the City Council to expend funds for which there is no budget. Nor does the Black Diamond Municipal Code authorize the Council to mandate operations for which there is no budget;

nor is the Council allowed to place the City into debt. Because R-1069 imposes over a quarter million dollars on the taxpayers without lawful authority, it is illegal.

D. R-1069 IMPROPERLY DELEGATES QUASI-JUDICIAL MATTERS.

R-1069 seeks to grant to committees quasi-judicial powers. This violates Washington statutes that set specific notice, participation, communication, and other legal parameters for quasi-judicial proceedings, which require strict compliance.

E. R-1069 PROPOSES USING COMMITTEES FOR AN IMPROPER PURPOSE BY INTERFERING WITH THE CITY'S ABILITY TO COMPLY WITH ITS LEGAL OBLIGATIONS.

The City has legal obligations established by State law. For example, citizens have the right to public services such as police, courts, prosecutors, etc. Citizens also have the right to other services for which it pays, such as public works, coordination with the building of an elementary school, street lights, etc. Vendors likewise have rights to payment when they provide basic services.

R-1069 proposes a committee structure and rules that sends virtually every single decision of the City to Committees. Of significant concern is the intent behind this proposal, which is to allow these decisions to in effect "die" in committee as established by the recordings of the new committee meetings and other documents:

Now the committee also has the authority to keep [matters] in committee . . . That's a very important power of the Committee.

2/11/16 Government Operations Committee Meeting.

And this has been the effect. The R-1069 Committees have not approved key yet routine public safety expenses, including:

- 911
- Gas for Police Cars
- Repairs for Police Cars
- Police Records Services
- Enumclaw Jail
- Police phones, copiers, and police station power bills

See Miller Report, 5/19/16.

Nothing authorizes a committee to deny payment of bills the City lawfully incurred. According to the Washington Supreme Court, this violates the state and federal constitutions. *Ruano v. Spellman*, 81 Wn.2d 820 (1973). In addition, the intrusion of the

legislative branch into the executive gives rise to Due Process claims. *Mission Springs Inc. v. Spokane*, 134 Wn.2d 947 (1998).

Thus, the R-1069 committee structure should not be enforced given its interference with City's efforts to comply with its legal obligations.

F. R-1069 PROPOSES USING COMMITTEES FOR AN IMPROPER PURPOSE BY INTERFERING WITH THE CITY'S ABILITY TO OBTAIN FUNDING AND COMPLETE NECESSARY INFRASTRUCTURE AND PUBLIC WORKS PROJECTS.

By referring matters to Committees instead of the regularly scheduled City Council Meetings where the public expects full discussion of the issues, the City is now behind on key projects and stands to lose significant funding in grants and other projects. The unnecessary delay has impeded numerous key City projects as set forth in Exhibit B. Those delayed projects include:

- Building inspections, including inspection of an elementary school;
- Obtaining a DOE Stormwater Grant;
- Transportation Modeling Contract;
- Recycling Contracts;
- Upgraded street lights from Puget Sound Energy (for free);
- The Jones Lake Road Overlay Contract;
- Culvert replacements
- Water Quality Grants.

These are significant public health and safety issues now languishing in Committees.

The intent to obstruct is supported by evidence showing that three Council members, in violation of the OPMA and other laws, secretly determined committee memberships and their chairs before R-1069 was even proposed. Documents in early January show communication between R-1069's authors and Council members Pepper, Morgan, and Weber meeting and conferring about the new rules. One document even states:

Also, **are we all still confirmed** with resolve to knock Janie [councilmember Edelman] out of any chairmanship of any committee. . . .

Because the R-1069 committee structure place administrative control with the Council and interferes with the administration of city business, it is illegal.

VI. CONCLUSION

Separate from the issue of R-1069's legality as a whole, based upon the foregoing the R-1069's committee structure independently violates the state law and the Black Diamond Municipal Code.

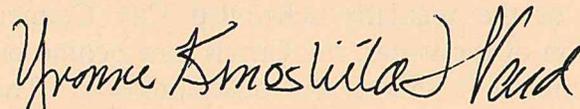
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VII. YOUR OPTION UNDER THE LAW

Under RCW 35A.12.100 as Mayor you are obligated to “see that all laws and ordinances are faithfully enforced.” Because R-1069’s committee structure is facially illegal, it cannot be enforced. And given the specific facts on how R-1069 came into being and its impact to date, to enforce the committee structure would give rise to significant legal liability for which the insurer indicates it will not cover.

Very truly yours,

YVONNE KINOSHITA WARD LLC

A handwritten signature in black ink that reads "Yvonne Kinoshita Ward". The signature is written in a cursive style with a large initial "Y".

Yvonne Kinoshita Ward
Attorney at Law