69414-6

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 69414-6-I

TOWARD RESPONSIBLE DEVELOPMENT,

Appellant,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

REPLY BRIEF OF TOWARD RESPONSIBLE DEVELOPMENT

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I. INTRODUCTION

The Superior Court abused its discretion when it denied the stay requested by Toward Responsible Development (TRD) in TRD's Land Use Petition Act appeal of the Development Agreements ("DA LUPA Appeal"). The Court's decision to deny the stay was manifestly unreasonable and was based on untenable grounds. Every single factor presented to the court pointed overwhelmingly in favor of staying the matter.

The outcome of a pending appeal before this Court, *Toward Responsible Development v. City of Black Diamond*, Case No. 69418-9-I, (hereinafter referred to as the "MPD LUPA Appeal") will resolve the issues presented in the DA LUPA Appeal. As a result, litigation of the issues presented in the DA LUPA Appeal would have been a complete waste of the Court's time and resources, as well as the parties' time and resources. If the MPD Permits are approved, TRD will not pursue the DA LUPA appeal. If the MPD Permits are reversed, the approximately 30 issues presented in the DA LUPA appeal will be moot. In that case, the solitary issue presented to the Court will be a request to reverse the Development Agreements on the grounds that they cannot stand when the MPD Permits have been declared illegal.

On top of that, there would have been no prejudice to Yarrow Bay if the stay had been granted. Indeed, TRD continues to be baffled over why Yarrow Bay refused to stipulate to a stay of that matter. It is more than obvious from the response briefs that Yarrow Bay can claim no prejudice from a stay. Resolution of the DA LUPA Appeal before the resolution of the MPD LUPA Appeal would have had no effect whatsoever on whether Yarrow Bay's project could proceed or whether it would be free of "uncertainties of pending litigation." Resolution of the DA LUPA Appeal before resolution of the MPD LUPA Appeal would have accomplished nothing in terms of "freeing the project from the uncertainties of pending litigation." The MPD LUPA Appeal will determine the fate of Yarrow Bay's development and the MPD LUPA Appeal will resolve the issues presented in the DA LUPA Appeal.

On the other hand, denial of the stay, if not appealed, would have forced the non-profit citizens group, TRD, to come up with funds to pay costs for the production of an administrative record and attorneys fees for extensive litigation that everyone knew was completely unnecessary. It seems like Yarrow Bay's opposition to the stay may have been motivated by an effort to take advantage of its deeper pockets and to bleed TRD by forcing it to litigate an appeal of the Development Agreements before the

appeal of the MPD Permits had been decided. Litigation of these issues that are so significant to the community of Black Diamond has been, and continues to be, extraordinarily costly and TRD is a community group that relies on grassroots support for this litigation. CP 630, 634.

II. AUTHORITY

A. Standard of Review

As TRD explained in its Opening Brief, courts have the inherent authority to stay proceedings where the interests of justice so require. Opening Brief of Toward Responsible Development (Jun. 3, 2013) ("TRD Op. Br.") at 13. *See also King v. Olympic Pipeline Company,* 104 Wn. App. 338, 350, 16 P.3d 45 (2000). In addition, when a case is filed pursuant to the Land Use Petition Act (LUPA), ch. 36.70C RCW, the court is required to provide expedited review of the matter absent a showing of good cause. RCW 36.70C.090. As has been established by the briefing, the Superior Court's decision on the motion is reviewable only for an abuse of discretion. *King*, 104 Wn. App. at 348.

1. TRD was not obligated to produce a transcript of the Superior Court's oral informal statements during oral argument

As a preliminary matter, the City of Black Diamond argues that this Court cannot review the Superior Court's denial of TRD's motion for

a stay because TRD has not produced transcripts of the proceedings below. *See* City Br. at 16. In support, the City cites *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 232 P.3d 591 (2010). But the City's reliance on *Minehart* is misplaced.

It is a long-established rule that "a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. . . . *It has no final or binding effect.*" *Feree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963) (emphasis added). As such, oral decisions are relevant *only* to interpret "written findings and conclusions," and then, only if the written findings and conclusions are ambiguous. *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). Here, the Superior Court did not make any findings or conclusions when it entered the order denying the stay. Instead, the order simply recited the pleadings before the Superior Court and then unambiguously denied TRD's motion. *See* CP 757. There is nothing to interpret, and any oral statements by the Superior Court would be irrelevant to this appeal.

Minehart does not contradict this authority. There, the Court of Appeals for Division III held that it could not review an evidentiary ruling by the superior court because the defendant failed to provide *any* record the ruling (i.e., the defendant failed to provide the appellate court with

transcripts, *and* failed to provide a copy of the superior court's order). *See Minehart*, 156 Wn. App. at 466. Because it was given *no* record of the superior court's decision, the Court of Appeals naturally declined to rule on the issue.[1] But that is not the situation here. This Court has before it all the pleadings and evidence that were before the Superior Court. And it has the Superior Court's order denying the stay. This Court faces no barrier to reviewing the Superior Court's decision.

B. The Superior Court Abused Its Discretion When It Denied TRD's Request for a Stay

In this case, every factor presented to the Court points overwhelmingly in favor of staying the matter and the Court's decision to deny the stay was manifestly unreasonable and was based on untenable grounds.

1. Proceeding with litigation of this matter would not have been an efficient use of judicial resources

There can be no dispute that proceeding with litigation of the issues presented in TRD's appeal of the Villages and Lawson Hills Development

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[1] Not surprisingly, the *Minehart* opinion does not even indicate what the precise issue was that the defendant was appealing. Instead, the opinion refers to the issue generally as "the scope of expert witness testimony." *Minehart*, 156 Wn. App. at 466. The opinion does not clarify, for example, whether the issue had to do with relevance, character, expert qualifications, or whether the issue would even be helpful to the jury. Because there was *no* record on appeal in *Minehart*, it is entirely possible that the court declined to rule because it did not even know what issue it was being asked to rule on.

Agreements before the MPD LUPA Appeal is resolved would have been a waste of judicial time and resources. As is demonstrated below, neither Yarrow Bay nor the City of Black Diamond effectively rebut this fact.

a. TRD will not pursue the DA LUPA Appeal if the MPD Appeal is unsuccessful

First, TRD has made it clear that if the Court of Appeals upholds the Superior Court decision in the MPD LUPA Appeal, TRD will not pursue this DA LUPA Appeal. If that happens, then the parties and the court would have wasted significant time and resources litigating the issues presented in the DA LUPA Appeal.

Yarrow Bay suggests that TRD could and would still move forward with litigation of the issues presented in this appeal despite the promise made otherwise. Yarrow Bay Br. at 19. This is, according to Yarrow Bay, because TRD has not entered into a CR 2A stipulation. *Id.* CR 2A requires that an agreement between the parties be made in open court on the record or in writing before a Superior Court will regard the agreement. But Yarrow Bay fails to recognize that the promise made by TRD is as binding, if not more binding, than a CR 2A stipulation. TRD has submitted this promise in writing under oath of its attorney. CP 726, 734. This statement has been

made under penalty of perjury. It is hard to imagine having anything more binding than that.

b. If the MPD LUPA Appeal is successful, the only remaining issue in this appeal will be a request that the Development Agreements be invalidated on the grounds that the MPD Permits are invalid

TRD's arguments concerning the mootness of this appeal have been confused beyond recognition by Yarrow Bay and Black Diamond. To clarify: the MPD Permit Appeal will moot the approximately 30 plus issues that are presented in the DA LUPA Appeal. If the MPD Permits are upheld, TRD will not pursue litigation of the issues in the DA LUPA Appeal as was explained above. If the MPD Permits are reversed, the roughly 30 issues presented will become moot. In this latter circumstance, TRD would still have one issue: invalidation of the Development Agreements on the grounds that the MPD Permits have been invalidated. The solitary request presented to the Court will be to reverse the Development Agreements on the grounds that they cannot stand when the MPD Permits have been declared illegal.

Yarrow Bay argues "if TRD truly believed litigating the DA LUPA appeal was a waste, then TRD simply could have withdrawn and dismissed its appeal." Yarrow Bay Br. at 15. This statement is proof of how Yarrow Bay has missed the point of the stay request. This may also reveal what the

Superior Court judge failed to recognize. If TRD withdraws and dismisses its DA LUPA appeal today, TRD will lose its legal right to present the single issue that it is preserving as we wait for the MPD Permit decision.

If a person challenging a land use decision does not file a land use appeal pursuant to the Land Use Petition Act, ch. 36.70C RCW, within 21 days of issuance of the land use decision, then the decision itself is final and cannot be challenged. *See, e.g., Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005). TRD reserved its right to challenge the Development Agreements by filing a timely land use petition in Superior Court. The only reason that TRD has kept this appeal in Court and the only reason that TRD cannot dismiss the appeal voluntarily today is to protect a single issue: the invalidity of the Development Agreements if the MPD Permits are reversed. (In fact, this single issue cannot even be litigated *until after* the MPD Permit decision is issued.)

c. <u>The Development Agreements must be invalidated if the MPD Permits are reversed</u>

Yarrow Bay's suggestion that Development Agreements may somehow remain valid upon a reversal of the MPD permits stretches the imagination. *See* Yarrow Bay Br. at 20. Perhaps Yarrow Bay is hoping that the complicated nature of land use law will obfuscate the issue enough to

make this assertion believable. As long as this litigation is pending, there is no possible outcome that would have the Development Agreements survive if the MPD Permits are declared to be invalid.

To understand the connection, it is important to understand the relationship between MPD Permits and Development Agreements. Black Diamond has a zoning district within the city limits that is referred to as the "Master Plan Development (MPD) Zoning District." BDMC 18.98.005. No development activity may occur on property within this type of zone unless an MPD permit is obtained. *Id.*

An approved MPD permit and Development Agreement is required for every project in the MPD Zoning District. BDMC 18.98.050(a). Development Agreements implement the terms and conditions of the MPD Permits and are used to address and establish development standards, mitigation requirements, vesting provisions, and review procedures that will apply to MPDs. BDMC 18.66.020.

The Black Diamond Code states:

> The MPD conditions of approval shall be incorporated into a development agreement as authorized by RCW 36.70B.170. This agreement shall be binding on all MPD property owners and their successors, and shall require that they develop the subject

> property only in accordance with the terms of the MPD approval.

BDMC 18.98.090. Thus, the MPD permit and Development Agreement for a single project are inextricably linked to each other.

That is true in this case. The Villages Development Agreement and the Lawson Hills Development Agreement each state that they are required to incorporate the conditions of approval of the underlying MPD permits approved in Ordinance 10-946 ('The Villages MPD Permit Ordinance') and Ordinance 10-947 ("the Lawson Hills MPD Ordinance"). CP 88, 257. The Development Agreements expressly state that they are being adopted to implement the terms and conditions of the MPD Permits for those projects. *Id.* They make it clear that the subject property can be developed only in accordance with the terms of the MPD Permit approval. CP 88-89, 257-258. The Development Agreements establish the development standards, mitigation requirements, vesting provisions and review procedures that will apply to the MPD Permits.

The issues that are presented in the DA LUPA Appeal are inextricably linked to the issues that are presented in the MPD Permit appeal. TRD challenges the Development Agreements on the grounds that they were based on inadequate Environmental Impact Statements. CP 8. In the MPD

Appeal, TRD challenged the adequacy of those same Environmental Impact Statements. The DA LUPA Appeal challenges the terms and conditions of the Development Agreements associated with traffic impacts, noise impacts, and other impacts, which are implementing the MPD Permits. CP 7-14. Many of the issues presented challenge the Development Agreements as being inconsistent with the requirements of the MPD Permits. CP 11-13.

If the Court of Appeals reverses the Superior Court decision, the MPD Permit's foundation for the Development Agreements will no longer exist. The Development Agreements being appealed in this case simply cannot stand if the MPD Permits approvals are reversed.

d. A ruling on the MPD Permits Appeal will apply retrospectively to this appeal

As explained in TRD's Opening Brief, if the MPD Permits are held unlawful and void, so too must the Development Agreements. *See* TRD Op. Br. at 16–17. This flows from a fundamental principle of law: when a court declares an action unlawful, it must apply the ruling both prospectively and retrospectively. *Id.* at 16. For example, once a court invalidates an agency action, the holding must be applied to *all cases*, regardless of when the underlying facts arose. *Id.* There is no shortage of

authority for this rule.[2] Just as a court cannot issue advisory opinions, "it may not issue a decision for less than all seasons, [or] for some citizens and not others." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (1995); *accord Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). A court cannot decide, on an *ad hoc* basis, whether its decision will be applied only to case before it—a practice known as "selective prospectivity." *Lunsford*, 166 Wn. 2d at 275.

Applying this rule here, a ruling in our MPD Permits Appeal will apply with equal force to this appeal of the Development Agreements. And because the validity of the Development Agreements depends on the validity of the MPD Permits, a favorable ruling in the MPD Permits

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[2] *See e.g. Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009); *Robinson v. City of Seattle*, 119 Wn. 2d 34, 76, 830 P.2d 318 (1992); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 114 L.Ed.2d 481 (1991); *U.S. v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384–85 (8th Cir. 1992). Applying this rule (which Washington has adopted), several federal courts have held that once an agency action is vacated or voided, it cannot be used to defend any other case—the world is as if agency *never* undertook the challenged action. *See e.g. Olympic Forest Coalition v. U.S. Forest Serv.*, 556 F. Supp. 2d 1198, 1205 (W.D. Wash. 2008) (where the Forest Service's 2004 Record of Decision was vacated, the agency "was required to conduct analysis as if the 2004 ROD had never been adopted."); *Nat'l Fuel Gas Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C.Cir. 1995) (plaintiffs not allowed to rely on FERC order vacated after underlying events took place); *Envt'l Def. v. Leavitt*, 329 F.Supp. 2d 55, 64 (D.C. Cir. 2004) (holding that while agency previously complied with a date-certain deadline for promulgating rules, vacatur "presented a situation wherein [the agency] had failed to promulgate regulations in accordance with [an] express deadline.").

Appeal (*i.e.*, one that invalidates and voids the MPD Permits) will dispose of this appeal, too. Such is the nature of a court ruling.

The City and Yarrow Bay offer no credible response to our argument. For example, both cite to this Court's recent decision in *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013), *rev. granted Town of Woodway v. BSRE Point Wells, LP*, --- Wn. 2d --- (June 4, 2013). *See* City Br. at 20 n. 19; Yarrow Bay Br. at 21. But *Town of Woodway* does not diminish our argument. In *Town of Woodway*, this Court addressed the issue of whether decisions by the Growth Management Hearings Board have retroactive effect when the Legislature has said clearly that they do not. *See Town of Woodway*, 172 Wn. App. at 659 (*quoting* RCW 36.70A.302(2)). Thus, the case dealt with the effect of an *administrative* order under a very specific (and very clear) statute. *Town of Woodway* has nothing to do with the fundamental rule that *court* orders have both prospective and retrospective effect.[3]

The City also makes a number of confusing arguments that because we did not ask for an injunction against the Development

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[3] Nor did *Town of Woodway* overrule the many Washington cases holding that once a court holds agency action invalid, it is void *ab initio*. *See Town of Woodway*, 172 Wn. App. at 663 n. 26 (collecting cases). As we explained in our Opening Brief, the voiding of the MPD Permits, as we requested in the MPD Permits Appeal, would provide yet another reason to conclude that resolving that appeal will resolve this case, too. *See* TRD Op. Br. at 17.

Agreements in the MPD Permits Appeal, they cannot be invalidated here. *See* City Br. at 17–21. Much of the City's argument focuses on *Responsible Urban Growth Group ("RUGG") v. City of Kent*, 123 Wn. 2d 376, 868 P.2d 861 (1994). We cited *RUGG* in our Opening Brief because it illustrates the principle that "when a court holds an agency action unlawful, it is proper to invalidate other actions that pre-date the court's ruling but that flowed from the agency's initial violation." TRD Op. Br. at 16.

The City tries to distinguish *RUGG* on exceedingly superficial grounds. It says we must, like the appellants in *RUGG*, seek to enjoin future agency action in the first lawsuit, or else we cannot have it voided in a later lawsuit. This argument is odd given that the court in *RUGG* affirmed relief that appellants did not specifically ask for. The trial court *voided* the permit, it did not simply issue an injunction (hence the court's inquiry about whether the appellant's request for relief was "broad enough" to cover the relief actually given). *See RUGG*, 123 Wn. 2d at 390. Here, as in *RUGG*, our request for relief asks that the Development Agreements be invalidated because they are based on illegal MPD Permits. *See* CP 8, 14 (¶¶ 7.2, 8.1). That too is "broad enough" for purposes of this appeal, and the City cites no authority that we must

challenge the Development Agreements indirectly in the MPD Permits Appeal, rather than directly in this appeal.

The City also argues that a ruling in the MPD Permits Appeal would apply retroactively to this case only if this case is not precluded by *res judicata* or other procedural bars. *See* City Br. at 21. We agree, but the argument is irrelevant. This case is not barred by *res judicata*. Nor is it barred by LUPA (we timely challenged the Development Agreements within 21 days). Indeed, that is the very reason that TRD cannot dismiss the appeal now. The City's irrelevant argument notwithstanding, and as discussed extensively above and in our Opening Brief, a favorable ruling in the MPD Permits Appeal will be dispositive of this appeal one way or the other.

e. Litigation of the issues presented in the DA LUPA Appeal would require extraordinary effort and cost

Contrary to Yarrow Bay's contention otherwise, briefing the issues presented in the DA LUPA appeal would require an extraordinary effort on the part of the parties. The issues presented below were numerous, the administrative record massive, and the factual background complicated.

The Hearing Examiner's open record hearing on the Villages and Lawson Hills Development Agreements spanned six days during which the

Examiner heard over 20 hours of testimony. CP 16, 146. The Examiner admitted a total of 273 exhibits totaling over 3,500 pages during the course of the hearing. CP 17, 147. The Examiner ultimately issued two recommendations: one for the Lawson Hills Development Agreement and the other for The Villages Development Agreement. CP 17, 147. Each recommendation was 113 pages long. *Id.*

After that, the City Council held a closed record hearing over a span of nine days during which it heard and considered oral argument by parties of record for 9.5 hours. CP 17-18, 147-148. The City Council received a total of 67 exhibits totaling 1,069 pages containing the written submissions from parties of record, City staff, and the applicant. CP 18, 148.

TRD's Land Use Petition challenging the Development Agreements, presented approximately 35 legal issues for review. CP 7-13. A few issues concerning process and notice were voluntarily dismissed by TRD as a result of Yarrow Bay's Motion to Dismiss Certain Claims and Limit Issues, but the majority of issues remained. CP 623. (Yarrow Bay's contention that there were only "limited issues" remaining in the DA LUPA Appeal is misleading).

If litigation on the roughly 30 or so legal issues presented in the DA LUPA Appeal for review had proceeded before the Superior Court, an

administrative record with transcripts of 15 days of hearings before the Hearing Examiner and City Council, decisions totaling likely over 500 pages with attachments and exhibits, and thousands of pages of additional documents would have been copied for each of the parties and submitted to the Court. The parties would have spent an enormous amount of time reviewing this administrative record, conducting legal research, and preparing briefs containing argument on the approximately 30 legal issues that are presented in the DA LUPA Appeal. The court would have been required to review the complicated and voluminous record and issues. The parties and the court would have been obligated to address all of these issues despite that they will be moot as soon as the MPD Permit Appeal is decided.

Yarrow Bay attempts to compare the amount of time that the parties have spent on the stay issue so far with the amount of time that would have been spent on litigation of the DA LUPA Appeal. That comparison is unfair for two reasons. First, review of the Superior Court's decision must be based on the circumstances present at the time of that decision. Looking at that period in time, the parties would have saved considerable time and resources if the court had granted the stay. Second, there simply can be no comparison to the cost of seeking a stay to the cost of litigating the issues that will be made moot by the MPD Permit Appeal decision. The latter would far

exceed the former. TRD would not have requested a stay if that were not the case.

f. The timing and forums of TRD's legal challenges are irrelevant and were outside of TRD's control

TRD does not have a so-called "litigation strategy" regarding Yarrow Bay's projects, nor has TRD "caused extraordinary delay or inefficiencies" as was suggested by Yarrow Bay and the City.[4] TRD has simply responded to illegal actions taken by the City within the timeframes and in the forums that are dictated by state and local law for these enormous projects. The timing and forum of TRD's LUPA appeals has been dictated by the 21 day LUPA deadline for filing appeals of each separate land use decision combined with the timing of approvals of Yarrow Bay's MPD permits, the timing of the adoption of the Development Agreements, and other issues that were outside of TRD's control. TRD also sought relief before the Growth Management Hearings Board and the Superior Court,

[4] Black Diamond spends a considerable amount of time presenting irrelevant and unsupported description of TRD's so-called "opposition to urban growth." City Br. at 5-13. Notably, the description of TRD's "vigorous" opposition and other actions and positions are followed by few, if any, citations to the record. While TRD disagrees with the characterization and history presented by the City, TRD does not address this herein because it is largely irrelevant to the question presented to the Court.

because that is what the law required them to do to protect their rights in light of the character of the issues presented by the project approvals.[5]

More importantly, the timing of the MPD Permit Appeal and other legal challenges is irrelevant to the question of whether litigating the DA LUPA Appeal would be a waste of judicial resources. The question presented to the Court with this appeal is whether a stay of this appeal would eliminate wasted costs, time, and resources of the Court and the parties when the issues presented will be resolved by another case. As is demonstrated elsewhere herein, a stay would have had that effect and should have been issued.

2. Yarrow Bay would have suffered no prejudice if the matter had been stayed

Noticeably absent from Yarrow Bay's brief is any serious attempt to demonstrate that it would be prejudiced by a stay. Instead, Yarrow Bay relegates the issue to a single paragraph of its brief, and copies nearly verbatim from a declaration that was not even before the Superior Court.

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[5] Filing appeals of local government actions as both GMA challenges with the Growth Management Hearings Board and as a LUPA challenge in superior court is done commonly, when the nature of the local government's decision is unclear. *See, e.g., Davidson Serles & Assoc. v. City of Kirkland,* 159 Wn. App. 616 (2011); *Woods v. Kittitas Cy.* 162 Wn.2d 597 (2007); *Feil v. Eastern Washington Growth Management Hearings Board,* 172 Wn.2d 367 (2011). Indeed, in this case, not only did TRD believe that the MPD ordinances were planning level decisions that had to be appealed not in superior court, but to the hearings board, the Growth Management Hearings Board agreed. While the court of appeals later reversed, the Board's decision demonstrates the ambiguity in this area of the law and the prudence of filing in both forums to protect the clients' right to appeal.

See Yarrow Bay Br. at 8–9. This cursory discussion fails to show that Yarrow Bay would suffer any harm by a ruling in TRD's favor.

For example, Yarrow Bay alleges that "the specter of this appeal of the Development Agreements (as well as the pending appeal regarding the MPD Permits) severely limits [it's] ability to enter into contracts with contractors and builders to help construct the MPDs." Yarrow Bay Br. at 8. In support, Yarrow Bay cites CP 686 (a declaration submitted below by Yarrow Bay's Brian Ross).[6] But that declaration fails to support Yarrow Bay's allegation. It simply reports that Mr. Ross feels that "there are homebuilders who are simply not even talking to Yarrow Bay . . . because of the Spector of this pending litigation, as well as the pending appeal of the MPD Permits." CP 686, ¶ 10. Notwithstanding Mr. Ross's unsubstantiated feelings, there is simply no evidence in the record that homebuilders or other contractors are avoiding him. As Yarrow Bay admitted candidly below, Mr. Ross "has absolutely no way to prove this negative proposition." CP 667.

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[6] As discussed in the text below this note, CP 686 does not support Yarrow Bay's allegation of harm. Instead, the quotation from Yarrow Bay's brief is a nearly verbatim copy of a second declaration that Mr. Ross filed with this Court *after* the Superior Court denied our request for a stay. *Compare* Yarrow Bay Br. at 8 *with the* Declaration of Brian Ross in Support of Yarrow Bay's Response Opposing Appellants' Motion to Stay Appeal (March 29, 2013) at ¶ 9. Under RAP 9.1, the latter declaration is not properly before this Court at this stage of the proceedings.

There is a good reason why Yarrow Bay cannot prove that its projects are being held up—it is moving forward with them full steam ahead. TRD did not request an injunction against subsequent permitting phases in its MPD LUPA Appeal. Yarrow Bay Br. at 5. As such, Yarrow Bay has applied for and received subdivision approval for The Villages. *Id.* (It did so notwithstanding its prior, unsubstantiated argument that we would interfere with that process. *See* CP 686, ¶ 11.) And most recently, Yarrow Bay applied for and received a clearing and grading permit for The Villages.[7] Like Mr. Ross's unsubstantiated fears that homebuilders are avoiding him, there simply is no evidence that this or any other appeal is holding up Yarrow Bay's development plans.

Even if Yarrow Bay could prove that TRD is holding up its development plans, it cannot prove, and does not attempt to prove, that

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[7] We request that the court take judicial notice of the information on the City of Black Diamond's "Citizens Connect" website, which reports that the City of Black Diamond issued a clearing and grading permit on April 19, 2013. *See* http://permits.ci.blackdiamond.wa.us:81/Citizen/Citizen_Home.aspx (click on "Click to Search" under the heading "Search for a Permit," then search ID Number PUB13-0009).We understand that the clearing and grading permit was not before the Superior Court below. However, Yarrow Bay relied, in this appeal, on a declaration submitted after the Superior Court rendered its decision. *See* Yarrow Bay Br. at 9. *See also* Note 6, *infra*. That declaration contains allegations of harm that were not before the Superior Court, including that we are interfering with Yarrow Bay's ability to enter contracts. *See* Declaration of Brian Ross in Support of Yarrow Bay's Response Opposing Appellants' Motion to Stay Appeal (March 29, 2013) at ¶ 8–9. Should this Court consider the declaration on the merits of this appeal, we ask that the record be supplemented to show that Yarrow Bay is moving forward with its plans unhindered.

TRD is holding it up with *this* appeal. As TRD stated in our Opening Brief and in our briefing below, whatever "cloud of doubt" might be hanging over the projects is due to our appeal of the MPD Permits (*i.e.*, the permits that actually approved The Villages and Lawson Hills projects). *See* TRD Op. Br. at 20; CP 730–31. This is especially so in light of our binding stipulation to drop this appeal should we lose the MPD Permits Appeal. Our stipulation guarantees that Yarrow Bay will not be hindered any longer than it would take for it to prevail in the MPD Permits Appeal. And if Yarrow Bay loses the MPD Permits Appeal, the alleged cloud of doubt will continue regardless of the status of this appeal.

Finally, Yarrow Bay complains that it is prejudiced by having to pay the City's expenses in implementing the MPD Permits. *See* Yarrow Bay Br. at 5, 8. But Yarrow Bay's costs will be no greater if this appeal is stayed. In fact, a stay of this litigation would actually save costs for Yarrow Bay by avoiding having to pay attorney's fees for Yarrow Bay and the City of Black Diamond to litigate issues that will be made moot by a decision in the MPD Permit Appeal. Indeed, while Yarrow Bay chides us for pursuing this appeal (and increasing Yarrow Bay's costs as a result), Yarrow Bay could have avoided these costs for both parties by agreeing to a stay. Yarrow Bay cannot claim prejudice by a situation that it created.

C. The Superior Court Abused Its Discretion When It Dismissed TRD's LUPA Appeal Because That Dismissal Was a Result of the Court's Error in Denying the Request for a Stay

Yarrow Bay and the City argue that the Superior Court did not abuse its discretion when it dismissed TRD's DA LUPA appeal after TRD failed to comply with three separate court orders to pay the costs of the administrative record as required by statute. Yarrow Bay's Br. at 22. Had the Superior Court granted TRD's Motion for Stay, the case never would have progressed to the point of requiring TRD to pay for the administrative record. *See* CP 630, 634. Therefore, the dismissal was unwarranted.

In addition, as TRD made clear in its response to the second motion to dismiss, TRD's attorney, David Bricklin, was consumed by a jury trial in another matter when the second and third motions to dismiss were filed and it was unfair to TRD to require that any other attorney in the firm attempt to negotiate and finalize the contents of the enormous administrative record when they had no experience on the merits of the case. CP 1071-1073. As TRD explained, the case was extremely complicated and there were decisions concerning the massive record that could be made by none other than David Bricklin based on his experience and knowledge about the case to date. *Id.* Considering that TRD's Opening Brief wasn't due until February 1, 2013, it made no sense for Yarrow Bay to demand that the

record issues be resolved before Mr. Bricklin's trial had ended. *Id.* TRD requested that the date for payment of costs be set for sometime in January, 2013 to allow for Mr. Bricklin's involvement. This would not have changed the briefing schedule and would not have prejudiced Yarrow Bay or the City since the first brief due was TRD's Opening Brief. (i.e. the record would have been prepared and submitted long before respondents' briefs were due.)

Disregarding that request, the Court set a new date following Yarrow Bay's second motion to dismiss requiring that the costs for the record be paid by November 26, 2012, which was during Mr. Bricklin's trial. TRD had exhausted all of its arguments by the time Yarrow Bay filed its third motion to dismiss and believed that the Superior Court had abused its discretion in a manner that was unfair to TRD.

D. Attorneys' Fees Are Not Appropriate in this Case

Yarrow Bay and the City request that the Court award attorneys' fees pursuant to RCW 4.84.370. An award of attorneys' fees under RCW 4.84.370 is not proper in this case.

That provision states:

> Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or supreme court of a

> decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370. Thus, the Court may award attorney's fees only if the prevailing party prevailed on the land use decision. RCW 4.84.370 allows fees only if the government agency's decision is upheld by both the superior court and the court of appeals. Here, neither the Superior Court nor this Court will have considered the City's decision on the Development Agreements. Instead, the issue presented is solely whether the matter should be placed on stay. This Court is reviewing a decision by the Superior Court to deny a stay request. This is not an appeal of a determination on the land use decision. Attorneys' fees should not be awarded in this matter.

III. CONCLUSION

For the foregoing reasons, TRD respectfully requests that the Court reverse the Superior Court's decision denying TRD's motion to continue stay of proceedings and remand to the Superior Court with an order to stay the pending resolution of the related appeal captioned *Toward Responsible Development, et. al. v. City of Black Diamond, et. al.*, Case No. 69418-9-I.

Dated this 5th day of August, 2013.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____

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TRD\Appeals\69414-6-I\Reply Brief

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TOWARD RESPONSIBLE DEVELOPMENT, et al. Appellants, v. CITY OF BLACK DIAMOND, et al., Respondents.	NO. 69414-6-I (King County Superior Court Cause No. 11-2-44800-2 KNT) DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, ANNE BRICKLIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for Toward Responsible Development herein. On the date and in the manner indicated below, I caused the Reply Brief of Toward Responsible Development to be served on:

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