69414-6

69414-6

NO. 69414-6-I

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

TOWARD RESPONSIBLE DEVELOPMENT, et al.,

Appellants,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

BRIEF OF RESPONDENT CITY OF BLACK OF DIAMOND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

REGULATIONS AND RULES

I. INTRODUCTION

This case involves appellant Toward Responsible Development's ("TRD") longstanding opposition to development of certain former Plum Creek Timber Company property located in the City of Black Diamond – the very property that our Supreme Court recognized in 1993 was "destined for development."[1]

Some parties of record to TRD's land use petition below began the litigation campaign in 1996, when they filed petitions to the Growth Management Hearings Board challenging the foundational, multi-party open space preservation agreement that serves as the building block for the development at issue in this case. TRD then took up the mantle in 2009, when it opposed the approval by the Black Diamond City Council of two Master Planned Development ("MPD") Permits, one for The Villages and the other for Lawson Hills. TRD has challenged the MPD Permits in multiple fora, including proceedings before the City's Hearing Examiner, the Growth Management Hearings Board, Federal District Court, King County Superior Court, this Court, and the Washington Supreme Court. TRD's appeal of the MPD Permits has been briefed and is awaiting oral argument before this Court in Case No. 69418-9-I ("MPD Permits Appeal").

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[1] *King County v. Boundary Review Board*, 122 Wn.2d 648, 665, 860 P.2d 1024 (1994).

Meanwhile, TRD likewise challenged two related development agreements ("DAs"), again in multiple fora. Like the MPD Permits, the DAs had also been approved by the Black Diamond City Council after multi-day hearings, first before the Hearing Examiner and then before the City Council. The DAs serve as the means by which to implement the terms of the two MPD Permits. While TRD did go through the motions of filing a Land Use Petition Act ("LUPA") petition challenging the development agreements in superior court, TRD functionally abandoned its appeal ("DAs Appeal"). It insisted on seeking a stay of the entire case and, when its requests were denied, refused to pay for the administrative record despite an express statutory requirement to do so. Ultimately, the Hon. Patrick Oishi dismissed TRD's land use petition, but not until after providing TRD with three separate chances to pay for the administrative record and, even then, only after TRD itself conceded on the record that dismissal was appropriate.

Now, TRD argues that Judge Oishi abused his discretion by not granting a stay, even though this Court has likewise denied a TRD request for stay *identical* to the request Judge Oishi denied. TRD also argues that Judge Oishi erred in dismissing the case due to TRD's failure to pay for the record, even though TRD itself conceded below that dismissal of its land use petition was appropriate. TRD openly acknowledges that it does

not want to actually litigate the DAs Appeal, and that litigation of it will be unnecessary or even impossible. As TRD puts it, the DAs Appeal will be moot regardless of the outcome of its MPD Permits appeal in Case No. 69418-9-I. Paradoxically, though, TRD seeks nonetheless to continue the DAs Appeal in *this* case, apparently in order to serve as a form of "placeholder." In TRD's words, "this appeal will still serve the nominal purpose of providing TRD a judicial venue to request invalidation of the Development Agreements." Opening Brief at 19-20.

In essence, TRD seeks to preserve for itself all the benefits of an appeal – continued delay of project construction, and an opportunity to someday request relief – without the inconvenience or cost of actually having to the litigate its case on the merits.

TRD's misplaced criticism of Judge Oishi's rulings should be rejected. In its Opening Brief, TRD falls well short of satisfying the applicable "abuse of discretion" standard of review. No legal basis exists for TRD's request to preserve its DAs Appeal – unlitigated – solely as a means for TRD to resist a potential future vesting argument by MPD developer Yarrow Bay.

Importantly, TRD's underlying land use petition (the foundational pleading in this case) *never* challenged the DAs on the ground that they were based on invalid, underlying MPD permits. Given that omission, this

case in its original form provides no basis for the relief that TRD ultimately seeks. And, in any event, TRD never litigated the merits of its land use petition below; instead, the case was dismissed based on TRD's refusal to pay for the administrative record as required by statute.

No sound basis exists to keep TRD's DAs Appeal on life support solely in order to provide a vehicle for relief that was never requested. To do so would fly in the face of the express purpose of the Land Use Petition Act, which is to establish "uniform, *expedited* appeal procedures . . . in order to provide consistent, predictable, *and timely judicial review*." RCW 36.70C.010 (emphasis added).

The Court should reject TRD's appeal, and affirm Judge Oishi's decisions below in their entireties.

II. RE-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

TRD raises three assignments of error, claiming that Judge Oishi erred in denying TRD's: (1) Motion to Stay (2) Motion for Reconsideration, and (3) Motion to Adjust Case Schedule. TRD's Opening Brief presents two related issues for review.

The City reframes the issues as:

A. Whether Judge Oishi properly exercised his discretion, and correctly utilized the Court's inherent authority to control its own docket,

in denying TRD's motion to stay a case that TRD itself concedes is moot?

B. Even if TRD's appeal is not moot, whether Judge Oishi properly exercised his discretion by dismissing the case after TRD conceded that dismissal was appropriate?

The clear answer to both issues is "Yes."

III. RE-STATEMENT OF THE CASE

The facts of this case are set forth in detail in the City's Answer to Motion for Discretionary Review. Certain salient facts bear repeating, however, and are set forth below.

A. TRD's Opposition to Urban Growth.

After a 15-year planning effort, in 2009 the City Council adopted a Comprehensive Plan ("Comp Plan" or "Plan") that included a Future Land Use Map designating large areas of the City broadly for Master Planned Developments (MPDs).[2] At the same time, the City also enacted MPD development regulations, which were then codified in chapter 18.98 of the Black Diamond Municipal Code ("BDMC"). *Id.* at 681. The MPD development regulations served to "update the procedures, requirements, and standards relating to application for, approval of, and amendment to the conditions attached to [an MPD]." *Id.*, *quoting* Ord. No. 09–897. The

[2] The described facts are as set forth in *BD Lawson Partners, LP, et al. v. Central Puget Sound Growth Management Hearings Board*, 165 Wn. App. 677, 680-81, 269 P.3d 300 (Div. I 2011), *rev. denied* 173 Wn.2d 1036, 277 P.3d 669 (2012).

MPD development regulations also created an MPD zoning district (BDMC 18.98.005), set the standards and the permit process for the review of future MPD permit applications (BDMC 18.98.060), and adopted certain statements of public policy (BDMC 18.98.010). *Id.*, *citing generally* BDMC 18.98.005–.080. The MPD development regulations go on to broadly define the allowable land uses in the MPDs: "MPDs shall include a mix of residential and nonresidential use. Residential uses shall include a variety of housing types and densities." *Id.*, *quoting* BDMC 18.98.120(A).

When the current property owners, BD Lawson Partners and BD Villages Partners (collectively, "Yarrow Bay"), applied for MPD Permits, TRD and its members vigorously opposed permit issuance. TRD's opposition was based primarily on its disagreement with the size and scale, or "density," of the proposed projects. TRD prosecuted this density-based challenge even though no one – not TRD, any of its individual members, or anyone else – had ever challenged the City's Comprehensive Plan and MPD development regulations, despite the fact that the Plan and MPD regulations *expressly* set forth the public policy direction of the City Council to allow in Black Diamond large Master Planned Developments of the type that TRD now opposes.

In pursuit of its goal to keep urban development like the MPDs out

of Black Diamond, TRD initially challenged the City's 2010 issuance of the MPD Permits before the Central Puget Sound Growth Management Hearings Board ("Growth Board"). TRD's central challenge asserted that the MPD Permits were not actually permits subject to the courts' Land Use Petition Act ("LUPA") jurisdiction under RCW 36.70C, but rather that the MPD Permits constituted development regulations subject to invalidation by the Growth Board. *Id.* at 682.

The reason for TRD's strategy was clear: If that argument had carried the day, Yarrow Bay would have no vested rights to develop under the MPD development regulations and TRD could have asked the City to revisit the adopted comprehensive plan provisions and development regulations regarding MPD development – including the provisions that authorized the density about which TRD now complains. The Growth Board initially did rule for TRD, but this Court reversed the Growth Board on direct appeal, largely on the basis that TRD's appeal constituted an impermissible collateral attack upon the adopted and unchallenged Comp Plan and MPD development regulations. *Id.* at 690.

B. TRD's Opposition to the MPD Development Agreements.

TRD re-initiated its collateral attack on the urban size and density of the MPDs when it opposed the MPD Development Agreements. The purpose of the two DAs, which were required by the express terms of the

City's MPD development regulations, is to incorporate the terms of the underlying MPD Permit approvals and record them against the property, so that the MPD Permit conditions would "run with the land" and bind potential successor property owners and builders. BDMC 18.98.090. Like the MPD Permits, the Development Agreements were also the subject of two lengthy hearings, one before the City's Hearing Examiner and the other before the City Council. TRD's members again vigorously opposed approval. As with the MPD Permits, opponents of the DAs targeted the size, density, and number of dwelling units approved in the MPD Permits. One document admitted into the record by the Hearing Examiner clearly states:

> *Our goal is to see a significant reduction in the MPD proposed density / scale from the proposed 6,050 dwelling units to be more consistent with the King County Growth Management Act standards of 1,900 new households for the City of Black Diamond. More importantly, we envision using the Development Agreement as a tool* that requires phased incremental growth balanced throughout the 20 year GMA guidelines whose impacts can be measured to determine the prudent extent of any further build out.[3]

[3] *See* App. D-50 – D-55 to City's Answer to Motion for Discretionary Review (Diamond Coalition website documents) (emphasis added). These documents, from the Diamond Coalition's website, were admitted over the objections of TRD member Cynthia Wheeler, who is listed as the Diamond Coalition's Secretary-Treasurer at App. D-54. Ms. Wheeler is also one of the individually named petitioners on the Land Use Petition.

From this starting point, DA opponents insisted upon and were granted generous opportunities to re-argue both orally and in writing many of the same facts and issues previously used by TRD at the MPD Permit hearings.[4] Consistent with his decision on the MPD Permits, the Hearing Examiner understandably recommended approval of the DAs to the City Council. After allowing similarly generous opportunities for oral and written advocacy, the City Council likewise approved the MPD Development Agreements in the fall of 2011.[5]

TRD again appealed, filing the instant land use petition in superior court. CP 1-14. TRD's Land Use Petition raises a plethora of specific issues, some 35 in total.[6] Notably – especially for purposes of TRD's Motion to Stay and its appeal here of the denial of that Motion – the Land Use Petition does *not* challenge the Development Agreements on the basis that they incorporate the terms of MPD Permits that TRD had previously

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[4] *See, e.g.*, CP 16-17 (Ordinance 11-971, approving Lawson Hills DA) ("Hearing Examiner heard over 20 hours of testimony and admitted 273 exhibits totaling over 3,500 pages during open record hearing on Development Agreements).

[5] CP 17-18 (Ord. 11-971 approving Lawson Hills DA) (detailing 9.5 hours of oral argument heard by Council, and acceptance of 67 additional exhibits totaling 1,069 pages containing the written submissions from parties of record); CP 829-852 (Exhibit list). TRD suggests that because the Development Agreements were issued more than a year after the MPD Permits, TRD was precluded from challenging them together with the MPD Permits. TRD Opening Brief at 7, n.8. Given TRD's trip to the Growth Board in the MPD Permit Appeals, there was more than sufficient time for TRD's DA appeal to have "caught up" and been consolidated with the MPD Permit Appeals. TRD, though, made every effort to prolong and delay the DA approval process, and it was TRD's own delay that prevented the DAs from being combined with the MPD Permit Appeal, not the fact that the approvals occurred separately.

[6] CP 7-13, ¶¶ 7.1 – 7.20; ¶ 7.20 includes 15 separate sub-issues.

appealed. Instead, the Land Use Petition challenges the DAs only on other issues.[7]

TRD, however, resisted litigating this land use petition below. It first requested (and the parties agreed to) a stay until the superior court issued its decision on TRD's land use petition challenging the MPD Permits. That initial stay order provided that the parties would set an initial hearing before the Superior Court on the underlying DA LUPA matter within three weeks of the superior court's order in the MPD Permit LUPA matter.[8] In September, 2012, after Judge Oishi had considered and denied TRD's MPD Permit LUPA petition[9] - and as required by the terms of the initial stay order - Yarrow Bay moved to set a new case schedule in the DA LUPA case. CP 608-620.

TRD opposed Yarrow Bay's motion, and moved instead to continue the stay of proceedings, raising virtually the same arguments it now offers to this Court. CP 497. Yarrow Bay and the City opposed a continued stay. Judge Oishi heard oral argument on TRD's motion to

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[7] TRD's Opening Brief argues that the land use petition does assert "that if the MPD Ordinances are struck down as a result of the first appeal (the MPD Ordinances Appeal), then the Development Agreements (which implement the MPD Ordinances) must be rescinded, too." Opening Brief at 7-8. TRD cites page 8 of the Land Use Petition, which argues only that the development agreements were adopted using what the Growth Board had determined was an illegal procedure. CP 7-8 (Land Use Petition at 7-8, ¶¶ 7.1 and 7.2. Of course, this Court *reversed* the Growth Board, thus nullifying TRD's allegations in paras. 7.1 and 7.2.

[8] CP 476 (Agreed Order dated March 1, 2012 at 2-3, ¶ 3).

[9] CP 541-48 (Findings of Fact, Conclusions of Law and Order Denying Land Use Petition).

continue stay on September 24, 2012. He denied the motion[10] and, on the record, stated that he found credible Yarrow Bay's allegations that it would suffer prejudice by virtue of additional delay in resolving the DA LUPA petition.[11] Judge Oishi then granted Yarrow Bay's motion to set a new case schedule, which included a date for the City to file the complete administrative record. CP 759-60. TRD sought reconsideration, which was denied. CP 801. TRD then filed a Notice of Discretionary Review, but failed to serve either the City or Yarrow Bay. CP 797-800.

Wholly unaware that TRD was pursuing an interlocutory appeal in this Court, and operating under the November 5, 2012 deadline to produce the administrative record set forth in Judge Oishi's order granting Yarrow Bay's motion to set a new case schedule,[12] the City provided TRD with an estimate of approximately $6,000.00 for the cost to copy the full record. CP 864. As the petitioner, TRD is expressly responsible for the initial payment of the cost of the record under RCW 36.70C.100. Given the substantial volume of the oral and written comments of TRD members and others, as well as the length of the multi-day hearings conducted by first the Hearing Examiner and then the City Council, the full record is of course substantial.

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[10] CP 757-58.
[11] CP 685-86 (Declaration of Brian Ross at 2-3).
[12] CP 760.

Continuing its delay strategy, TRD refused to pay for the cost of the full administrative record. The City invited TRD to stipulate to shorten the record in the manner provided by RCW 36.70C.110(2), given that a substantial part of the record's bulk was due to TRD members' submissions and testimony. TRD initially declined to even consider stipulating to a shortened record. When it later agreed to consider the City's reasonable invitation, TRD was unable to come to an agreement with Yarrow Bay.

After three separate motions to dismiss (CP 806, 954 and 1096), and the continued interim opportunities for TRD to simply satisfy its statutory obligation and pay for the administrative record, the trial court dismissed TRD's appeal. CP 1126-27. Judge Oishi's order of dismissal plainly states that "TRD's failure to timely pay means dismissal of this case is warranted pursuant to RCW 36.70C.110(3)." Judge Oishi additionally noted, "Further, *TRD, in its response to the third motion to dismiss, concedes that dismissal is warranted* to allow issues to be resolved by the Court of Appeals." CP 1127 (emphasis added); *see also* CP 1107-09 (TRD Response to Motion to Dismiss).

In its pleadings to Judge Oishi, and at pages 11-12 of its Opening Brief here, TRD implied that its lead counsel's trial schedule in an unrelated matter was responsible for TRD's inability to either negotiate an

agreement to shorten and pay for the administrative record below, or to prepare TRD's brief on the merits. CP 902. TRD rejected a suggestion that TRD's lead counsel's law partner could negotiate regarding a reduction in the administrative record or prepare the opening brief.[13] TRD appealed. TRD's Notice of Appeal references the trial court's order of dismissal, as well as the order below denying TRD's motion to stay.

In its Motion to Stay presented to Judge Oishi and this Court, and at page 15 of its Opening Brief here, TRD's counsel has represented that if TRD is unsuccessful in the MPD Permit Appeal, TRD will dismiss this appeal. This Court should hold TRD and its individual members to that promise.

IV. ARGUMENT

A. Standard of Review.

For the several reasons set forth below, the orders entered below by the Hon. Patrick Oishi and challenged by TRD here are reviewed by this Court under the abuse of discretion standard.

Initially, TRD's motion for stay and its related motion for reconsideration both relied on *King v. Olympia Pipeline*, 104 Wn. App. 338, 16 P.3d 45 (Div. I 2000). In *King*, this Court expressly held that a

[13] CP 947 (Reply in Support of Motion to Adjust Case Schedule at 3) ("While the undersigned has not reviewed the record in this matter yet, his years of work on this case puts [sic] him far ahead of [law partner] Ms. Newman in being able to digest the record in a speedy fashion, analyze issues and write briefs.").

trial court's decision on a motion to stay is reviewable "only" for abuse of discretion:

> A court's determination on a motion to stay proceedings or grant a protective order is discretionary, *and is reviewed only for abuse of discretion. A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons.*

King, 104 Wn. App. at 348. The application of the "abuse of discretion" standard to a request for a stay of proceedings is based upon the trial court's inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.*" *King*, 104 Wn.2d at 350, *quoting Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936) (emphasis added). TRD carries a heavy burden in attempting to satisfy the "abuse of discretion" standard. "Even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (Div. III 2010).

TRD next argues for a stay based on RCW 36.70C.090, which permits the trial court to adjust the date for the hearing on the merits of a

LUPA petition upon a "showing of good cause." TRD concedes that the application of this standard also vests the trial court with "broad discretion,"[14] which further supports "abuse of discretion" as the applicable standard of appellate review here.

Finally, Judge Oishi's decision to dismiss TRD's land use petition after TRD failed (for the third time) to pay for the administrative record is also reviewable under the abuse of discretion standard. *Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn App. 417, 434, 62 P.3d 912 (Div. II 2003) (trial court's decision not to assess record preparation costs against permit applicant under RCW 36.70C.110(4) not an abuse of discretion); *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 260, 108 P.3d 805 (Div. II 2005) (In a case involving dismissal of a LUPA petition, "We review a trial court's order of dismissal for an abuse of discretion").

As conceded in TRD's Opening Brief, under RCW 36.70C.110(3) "petitioners are responsible for paying the costs of the local jurisdiction's record of decision, and failure to pay such costs is grounds for dismissal." Opening Brief at 10, n.9 (*citing* RCW 36.70C.110(3)). The language of

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[14] CP 420 (Motion to Stay Proceedings at 4, n.2, *citing Marine Power and Equip. v. Dept. of Trans'n*, 107 Wn.2d 872, 875, 734 P.2d 480 (1987)). TRD's Opening Brief likewise relies upon *Marine Power*. TRD Opening Brief at 13, n. 11. In *Marine Power*, the Supreme Court affirmed the trial court after finding that it did not abuse its discretion. 107 Wn.2d at 881.

the statute – "is grounds for dismissal of the petition" – indicates that, virtually by definition, dismissal for failure to timely pay falls within the trial court's discretion.

B. Judge Oishi Properly Exercised His Discretion When He Denied TRD's Motions for Stay and for Related Reconsideration.

Several factors support this Court affirming Judge Oishi's orders below.

First, TRD's abuse of discretion argument centers on TRD's claim that this case is moot. While TRD made this "mootness" argument to the trial court,[15] TRD's Motion for Discretionary Review does not allege that Judge Oishi's rejection of the mootness argument constitutes an abuse of discretion.

Second, in order to demonstrate an abuse of discretion, TRD was required to present to this Court a complete record (including transcript) of the trial court's decision, in order to demonstrate that the trial court inappropriately balanced or weighed the facts in coming to its decision. *Minehart*, 156 Wn. App. at 466 (Defendants failed to provide Court of Appeals with transcript or written ruling to enable Court to assess challenges to ruling on allowable scope of expert testimony). Here, while TRD argues that the trial court erred in balancing the benefits of a stay

[15] CP 732, 770-71; TRD Opening Brief at 18.

against prejudice to the responding parties (TRD Opening Brief at 20), TRD has affirmatively chosen *not* to provide this Court with a transcript of Judge Oishi's ruling. (Statement in Lieu of Statement of Arrangements). Without such a record, TRD cannot satisfy its burden of demonstrating that Judge Oishi abused his discretion.

Third, TRD's claim of mootness undercuts rather than supports its request for a stay of its appeal. If this appeal is indeed moot under any circumstance, and (as TRD argues) if litigating it "would be a complete waste of the parties' and the courts' resources,"[16] then Judge Oishi correctly dismissed it. "It is a general rule that, *where only moot questions or abstract propositions are involved, . . . the appeal . . . should be dismissed.*" *Hart v. Dept. of Social & Health Services*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (emphasis added), *quoting Sorenson v. Bellingham,* 80 Wash.2d 547, 558, 496 P.2d 512 (1972).[17] This Court has determined previously that no cognizable right exists to maintain an otherwise moot lawsuit, even if the moot case would assist the parties in avoiding the preclusive effect of another, related lawsuit pending in

[16] TRD Opening Brief at 14.

[17] While there are exceptions to the general rule calling for dismissal of moot cases, TRD does not argue for their applicability. Moreover, those exceptions could not apply where, as here, the appellant itself describes prosecution of its own appeal as "a complete waste of the parties' and the courts' resources." More particularly, exceptions to the mootness doctrine allow an appellate court to retain an appeal that has become moot after the trial court ruling. *Westerman v. Cary,* 125 Wn.2d 277, 286–87, 892 P.2d 1067 (1994). They do not provide grounds for concluding that a trial court abused its discretion in dismissing claims admitted to be moot by an appellant.

federal court. *Harbor Lands v. City of Blaine*, 146 Wn. App. 589, 592-93, 191 P.3d 1282 (Div. I 2008). As this Court emphasized, a party's attempt to continue an otherwise moot action for such a purpose is "a misuse of the state court system and an abuse of the citizens whose tax payments fund our courts." *Id.* at 593-94. This appears to be *precisely* the result TRD urges here (albeit with the related case pending in state, not federal, court): it asks this Court to maintain, but then stay, a lawsuit that TRD itself argues is moot, solely to avoid the potentially preclusive effect that would result from TRD's own, knowing decision declining to challenge the DAs on their merits.

Fourth, even assuming that mootness would not warrant dismissal, fatal flaws exist in TRD's mootness claim. For example, TRD asserts that it has agreed to drop its DA LUPA case if this Court affirms the issuance of the MPD Permits in Case No. 69418-9-I. TRD's assertion (not a CR 2A agreement) in this case, however, would bind only TRD, and may not stop the individually named land use petitioners below (who are not identified in the Notice of Appeal as appellants) from later claiming a right to continue the fight.[18] And while TRD also argues that if the Court overturns the MPD Permits, the DA LUPA Appeal will be moot "because

[18] It would seem a simple matter for the individual land use petitioners to submit a signed stipulation to this Court, committing to forego pursuit of the DA LUPA appeal if TRD's appeal of the MPD Permits is unsuccessful, but none have done so.

the Development Agreements cannot stand if the MPD Permit approvals are invalidated," TRD withdraws this concession a few pages later, admitting that "TRD does not believe the effect of voiding the MPD Permits on the Development Agreements would be automatic; a court order would still be required to invalidate the Development Agreements." TRD Opening Brief at 19. TRD cannot have it both ways; the case is either moot, or it is not.

Fifth, TRD is simply incorrect in its argument that, whenever 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 Opening Brief at 16. TRD leans first on *Responsible Urban Growth Group ("RUGG") v. City of Kent*, 123 Wn.2d 376, 390, 868 P.2d 861 (1994). In *RUGG*, the Supreme Court invalidated a building permit that had been issued in reliance on a zoning ordinance that was later overturned for statutory and due process notice violations. 123 Wn.2d at 389. In affirming invalidation of the building permit in that case, however, the Supreme Court did *not* hold that invalidation was proper merely because it somehow naturally "flowed" from the city's initial violation. Instead, the Court focused on the plain terms of the petition for writ of certiorari, in which the petitioner citizens' group had *expressly* requested "permanent injunctive relief against any action by

defendants in reliance upon or under the authority of the challenged ordinance or otherwise without compliance with established law." *Id.* at 390.

As the Court concluded, "RUGG had already requested injunctive relief in its petition and, therefore, SDM was apprised of the possibility that any development made pursuant to ordinance 2837 would be enjoined and proceeded with construction at its own risk." *Id.* at 389-90. In *RUGG*, then, building permit invalidation was not some preordained consequence of the zoning ordinance's flaws; rather, it was the direct result of the successful petitioner's express request for injunctive relief.[19]

TRD's land use petition in the MPD Permits Appeal, however, contains no such request for prospective injunctive relief, even though RCW 36.70C.100 expressly authorizes a land use petitioner to request it. Nor did TRD's land use petition in this DA LUPA Appeal request that the DAs be invalidated due to their reliance on the MPD Permits – as TRD's expressly admits.[20] Consequently, *RUGG* simply does not apply here.

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[19] In addition, this Court may have cast some recent doubt on *RUGG*'s continued viability in the post-GMA and post-LUPA era, but declined to specifically rule whether *RUGG* and other pre-GMA cases were overruled or repealed. *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 663 n.26, 291 P.3d 278 (Div. I 2013), *rev. granted Town of Woodway v. BSRE Point Wells, LP*, __ Wn.2d __ (June 4, 2013).

[20] TRD Opening Brief at 18 ("It is true, as Yarrow Bay and the City have previously argued to this Court, that TRD did not specifically ask this Court to elaborate on the effect of voiding the MPD Permits on the Development Agreements.").

Other cases cited by TRD are not land use cases[21] and/or do not apply for other reasons. For example, the general principle TRD cites, that judicial decisions are applied both prospectively and retroactively (to cases arising before the decision is made), comes into play only where a judicial decision's application is "*not barred by procedural requirements or res judicata* . . . ."[22]

Here, LUPA requires a petitioner to challenge a land use decision within 21 days, or forego any future challenges to any component of that decision. RCW 36.70C.040(3). Given that, LUPA's procedural requirements actually *do bar* the application of the MPD Permit Appeal decision to the DA Appeal, especially in light of TRD's deliberate and knowing decision declining to litigate its challenge to the Development Agreements. TRD admits as much, citing LUPA's 21-day limitations period and pointing out that "TRD could not have waited to challenge the Development Agreements until after the MPD Permits Appeal is resolved." TRD Opening Brief at 19.[23] While TRD wishes to keep the

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[21] *See, e.g., U.S. v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 834-85 (8th Cir. 1992) (involving criminal convictions).

[22] *Robinson v. City of Seattle*, 119 Wn.2d 34, 76, 830 P.2d 318 (1992), *quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 115 L.Ed.2d 4891 (1991) (emphasis in original).

[23] *See also Spice Development v. Pierce County*, 149 Wn. App. 461, 467, 204 P.3d 254 (Div. II 2009) ("[i]f a party fails to file a LUPA petition within 21 days of a land use decision or, alternatively, terminates a timely filed LUPA petition (and does not refile within the required time period), the statute bars any further judicial review of the land use decision . . . .").

shell of the DA LUPA Appeal alive in order to "serve the nominal purpose of providing TRD a judicial venue to request invalidation," TRD's failure to comply with LUPA's foundational requirements precludes that relief. TRD's own failure to allege proper grounds for relief, failure to pay for the record, and failure to brief the case on schedule are the cause of the dismissal of TRD's case below and likewise prevent TRD from bringing this DA LUPA Appeal within the ambit of this Court's prospective ruling in the separate MPD Permits Appeal. As the Supreme Court recently emphasized:

> An appellate court must not disturb judgments or rulings except insofar *as is necessary to properly resolve the particular claims the parties have presented on appeal* . . . The scope of a given appeal *is determined by the notice of appeal* . . . ."

Clark County v. Western Washington Growth Management Hearings Board, 177 Wn.2d 136, 143, 144, 298 P.3d 704 (2013) (emphasis added).

TRD's position that Judge Oishi abused his discretion by not properly taking into account TRD's mootness argument should be rejected in every respect. This Court should affirm Judge Oishi's denial of the requested stay and denial of the associated request for reconsideration.

C. Judge Oishi Properly Exercised His Discretion When He Dismissed TRD's DA Land Use Petition Based On TRD's Refusal to Pay for the Record and On TRD's Concession That Dismissal Was Warranted.

This Court should also affirm Judge Oishi's dismissal of TRD's DA land use petition. Despite being given three separate opportunities by Judge Oishi to do so, TRD refused to pay for the administrative record. In that case, the Legislature has expressly authorized dismissal of a LUPA petition as an appropriate remedy. RCW 36.70C.110(3). While Judge Oishi was not *required* to utilize the statutory remedy of dismissal, his *choice* to utilize an express statutory remedy cannot constitute an abuse of discretion.

Such would be true under any circumstances, but it is particularly true where, as here, TRD itself agreed that dismissal was warranted. CP 1126-27. While TRD may well desire future appellate court guidance, its admission that dismissal was warranted precludes any reasonable argument that Judge Oishi abused his discretion. Notably, TRD's sole argument here in its Opening Brief does *not* allege or argue that dismissal for its failure to pay for the record was an abuse of discretion. TRD Opening Brief at 21. TRD's challenge to dismissal may properly be rejected on this ground alone.

TRD does argue that, had the case been stayed, TRD would not have needed to spend money on the administrative record. *Id.* TRD's claim of limited financial resources does not excuse its failure to pay for the administrative record. Under LUPA, a challenger is *obligated* to pay. RCW 36.70C.110(3). TRD could have saved its resources by refraining from creating a voluminous record. Or, it could have limited the number of issues it raised in the land use petition, and then stipulated to elimination of unnecessary portions of the record. It did neither. While TRD also argues that it is "likely" that issues in this case could be resolved as "facial challenges to the Development Agreement," its land use petition is not limited to "facial challenges." CP 7-13. And, in any event, TRD may not utilize a belated "facial challenges" strategy to deprive respondents of portions of the record that support *their* claims.

Judge Oishi's dismissal of TRD's land use petition, based on TRD's failure to pay for the record as well as TRD's express admission that dismissal was warranted, falls squarely and easily within the broad range of his discretion. Judge Oishi's orders should be affirmed.

D. The City Should Be Awarded Its Attorneys' Fees and Costs.

This Court should award the City its attorneys' fees pursuant to RCW 4.84.370, which mandates an award of attorneys' fees and costs to the substantially prevailing party on appeal before the court of appeals of a

decision by a city to issue a development permit involving a site plan or similar land use approval or decision. Here, the City Council's adoption of ordinances approving The Villages and Lawson Hills MPD Development Agreements have already been upheld by the Superior Court. Under RCW 4.84.370(2), Black Diamond is the prevailing party and is entitled to its attorney fees and costs.

V. CONCLUSION

TRD seeks to use the state court system to keep alive an appeal that it has deliberately chosen not to litigate on the merits. The law not only fails to guarantee such flexibility to TRD, it affirmatively frowns upon such efforts. Judge Oishi acted well within the breadth of his discretion in denying TRD's multiple requests for a stay, and in subsequently dismissing TRD's DA LUPA Appeal. This Court should affirm.

RESPECTFULLY SUBMITTED this 3rd day of July, 2013.

KENYON DISEND, PLLC

By _____

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Attorneys for Respondent City of
Black Diamond

DECLARATION OF SERVICE

I, Mary Swan declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 3rd day of July, 2013, I served a true copy of the foregoing *Black Diamond's Response Brief* on the following counsel of record using the method of service indicated below:

Attorneys for Petitioners: David A. Bricklin Bricklin & Newman, LLP 1001 Fifth Avenue, Suite 3303 Seattle, WA 98154	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: bricklin@bnd-law.com
Attorneys for BD Lawson Partners, LP and BD Village Partners, LP: Nancy Bainbridge Rogers Cairncross & Hempelmann, P.S. Law Offices 524 Second Avenue, Suite 500 Seattle, WA 98104-2323	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: NRogers@Cairncross.com
Attorneys for Maple Valley: Jeffrey A. Taraday Lighthouse Law Group, PLLC 1100 Dexter Avenue N., Suite 100 Seattle, WA 98109	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: jeff@lighthouselawgroup.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of July, 2013, at Issaquah, Washington.

Mary Swan