

No. 67095-6-I

---

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

---

BD LAWSON PARTNERS, LP and  
BD VILLAGE PARTNERS, LP

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT  
HEARINGS BOARD,

AND

TOWARD RESPONSIBLE DEVELOPMENT, et al.,

AND

CITY OF BLACK DIAMOND

---

BRIEF OF PETITIONERS

---

Nancy Bainbridge Rogers, WSBA No. 26662  
Andrew S. Lane, WSBA No. 26514  
Randall P. Olsen, WSBA No. 38488  
CAIRNCROSS & HEMPELMANN, P.S.

524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Telephone: (206) 587-0700  
Facsimile: (206) 587-2308  
Attorneys for Petitioners, BD Lawson Partners,  
LP and BD Village Partners, LP

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG -8 PM 4:48

**TABLE OF CONTENTS**

**I. INTRODUCTION.....1**

**II. ASSIGNMENTS OF ERROR .....2**

**III. STATEMENT OF THE CASE.....4**

**A. In 2010, the City approved Yarrow Bay’s Master Planned Development (MPD) Permits, finding the MPDs were consistent with the City’s 2009 comprehensive plan and development regulations.....4**

**B. For nearly twenty years, the City has been planning for significant urban growth such as Yarrow Bay’s MPDs.....5**

**C. The City’s development regulations and comprehensive plan were adopted in 2009, were not appealed, and are the valid codes and policies controlling the City’s growth. ....6**

**D. The City’s 2009 Ordinances contain detailed standards for submission and approval of MPDs. ....9**

**E. Yarrow Bay submitted MPD permit applications and complied with the procedural and substantive provisions of the City’s 2009 Ordinances and, therefore, the City approved The Villages and Lawson Hills MPD Permits.....11**

**F. Objecting Neighbors appealed the MPD Approvals to the Superior Court under LUPA and then appealed to the GMHB under the GMA; the Board ruled that it had jurisdiction. ....12**

**IV. ARGUMENT.....13**

**A. Standard of Review.....13**

**B. The Board’s assumption of jurisdiction exceeded its authority because it allowed an improper collateral attack on the City’s existing comprehensive plan and development regulations, adopted in 2009 .....16**

C.	<b>Washington law clearly defines the Board’s jurisdiction and the Board improperly extended its limited jurisdiction to the MPD Permits.....</b>	<b>25</b>
1.	<b>The Board cannot expand its Jurisdiction to include the MPD Permits. ....</b>	<b>25</b>
2.	<b>The Board exceeded its authority and violated RCW 36.70A.290(1).....</b>	<b>28</b>
3.	<b>Like many other land use permits, the MPD Permits approved a preliminary site plan and the Board ignored its own precedent to determine the site plan was a comprehensive plan amendment .....</b>	<b>30</b>
4.	<b>The MPD Permits are not development regulations because they do not supersede or replace the City codes .....</b>	<b>36</b>
5.	<b>The permit conditions imposed in the MPD Permits were not development regulations, but rather were permit conditions specifically authorized by City code and State law .....</b>	<b>38</b>
6.	<b>The Board should not have ignored applicable legal authority just because those cases involved environmental review using the planned action ordinance process.....</b>	<b>46</b>
7.	<b>The Board lacked jurisdiction to overturn the City’s review and approval process, which even the Board admitted resulted in exceptional public involvement .....</b>	<b>48</b>
V.	<b>CONCLUSION .....</b>	<b>48</b>

## TABLE OF AUTHORITIES

### Cases

<i>2101 Mildred LLC v. University Place</i> , No. 06-3-0022, 2006 WL 2644139 .....	47
<i>Alexanderson et al. v. Clark County</i> , 135 Wn. App. 541, 144 P.3d 1219 (2006) .....	31
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997) .....	26, 27
<i>Coffey v. City of Walla Walla</i> , 145 Wn. App. 435, 187 P.3d 272 (2008).....	25
<i>Davidson Serles &amp; Assoc. v. City of Kirkland</i> , 159 Wn. App. 616, 246 P.3d 822 (2011) .....	43, 44, 45
<i>Davidson Serles, et al. v. City of Kirkland et al.</i> , No. 09-3-0007c, 2009 WL 3309101 .....	43, 44
<i>In Re Electric Lightwave, Inc.</i> , 123 Wn.2d 530, 869 P.2d 1045 (1994).....	15, 28
<i>Johnson, et al v. King County</i> , No. 97-3-0002, 1997 WL 473533 .....	6
<i>Kent CARES v. City of Kent</i> , No. 02-3-0015, 2002 WL 31998488 .....	47
<i>King County v. Boundary Review Board</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993) .....	5
<i>Laurelhurst v. City of Seattle</i> , No. 03-3-0008, 2003 WL 22896421 . passim	
<i>Mader v. Health Care Authority</i> , 149 Wn.2d 458, 70 P.3d 931 (2003) .....	13
<i>Maranatha Mining, Inc. v. Pierce County</i> , 59 Wn. App. 795, 801 P.2d 985 (1990).....	25
<i>Marley v. Dep't of Labor &amp; Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	15
<i>North Everett Neighbor Alliance v. City of Everett</i> , No. 08-3-0005, 2009 WL 1356230 .....	30, 31
<i>Olmstead v. Dep't of Health, Medical Section</i> , 61 Wn. App. 888, 812 P.2d 527 (1991) .....	16
<i>Phoenix Development, Inc. v. City of Woodinville</i> , ___ Wn.2d ___, ___ P.3d ___, 2011 WL 2409635.....	23

<i>Servais v. Bellingham</i> , No. 0-2-0020, 2000 WL 1277014.....	31
<i>Shaw Family, LLC v. Advocates for Responsible Development</i> , 157 Wn. App. 364, 236 P.3d 975 (2010).....	27
<i>Skagit County Growthwatch v. Skagit County</i> , No. 04-2-0004, 2004 WL 1864634 .....	31
<i>Somers v. Snohomish County.</i> , 105 Wn. App. 937, 21 P.3d 1165 (2001) .....	19, 23
<i>Stevens County v. Futurewise</i> , 146 Wn. App. 493, 192 P.3d 1 (2008) .....	14
<i>Wenatchee Sportsmen Ass'n v. Chelan Cy</i> , 141 Wn.2d 169, 4 P.3d 123 (2000) .....	18, 19, 23
<i>West Main Assocs., Inc. v. City of Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986) .....	23
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 25 (2007) .....	19, 23, 26, 28

**Statutes**

RCW 34.05 .....	13
RCW 34.05.510 .....	13
RCW 34.05.518 .....	13
RCW 34.05.558 .....	13
RCW 34.05.570(3) .....	13, 14
RCW 34.05.570(3)(a) – (i) .....	13
RCW 34.05.570(3)(e) .....	15
RCW 36.70A.....	42, 45, 47
RCW 36.70A.030(4).....	26
RCW 36.70A.030(7).....	45
RCW 36.70A.040.....	45
RCW 36.70A.070.....	45
RCW 36.70A.080(2).....	29
RCW 36.70A.110.....	6
RCW 36.70A.110(1).....	5
RCW 36.70A.280.....	3, 8, 15
RCW 36.70A.280(1) .....	26, 27
RCW 36.70A.290(1).....	3, 28, 29
RCW 36.70A.290(2).....	8, 26
RCW 36.70A.320(1) .....	16
RCW 36.70B.....	38, 42, 45

RCW 36.70B.010.....	42
RCW 36.70B.020 .....	26, 27
RCW 36.70B.020(4).....	27, 28
RCW 36.70B.030.....	20, 23, 24, 45
RCW 36.70B.030(1).....	17
RCW 36.70B.030(2)(a).....	21
RCW 36.70B.030(2)(b).....	17
RCW 36.70B.030(3).....	17
RCW 36.70B.030(5).....	45
RCW 36.70B.030(c).....	17
RCW 36.70B.040.....	23, 45
RCW 36.70C.....	12
RCW 36.70C.020(2).....	27
RCW 36.70C.030(1).....	27
RCW 43.21C.....	10, 38
RCW 43.21C.031.....	46
RCW 43.21C.060.....	38, 41
RCW 58.17.....	42
RCW 58.17.033.....	42
RCW 58.17.110(2).....	42
RCW 58.17.120.....	42
RCW 58.17.130.....	42, 43
RCW 58.17.140.....	42
RCW 58.17.165.....	43
RCW 58.17.170.....	43

**Rules**

RAP 10.4(c).....	7, 8
------------------	------

**Codes**

BDMC 18.08.....	8
BDMC 18.08.030.....	passim
BDMC 18.08.060.....	8
BDMC 18.08.070.....	8, 10
BDMC 18.08.070.A.4.....	20
BDMC 18.08.200.....	8, 12, 20
BDMC 18.42.....	40
BDMC 18.44.....	40
BDMC 18.72.020(D).....	39
BDMC 18.76.060(C).....	39
BDMC 18.98.....	passim
BDMC 18.98.010(E).....	21

BDMC 18.98.020 – .100.....	7
BDMC 18.98.030 .....	9, 21
BDMC 18.98.030(A)(1).....	20
BDMC 18.98.040.....	9, 23
BDMC 18.98.040(A)(1).....	30
BDMC 18.98.040(A)(1)(f).....	21, 22
BDMC 18.98.040(A)(7).....	40
BDMC 18.98.060.....	34, 48
BDMC 18.98.060(B)(5),(6), and (7).....	10
BDMC 18.98.080.....	9, 36
BDMC 18.98.080 - .190 .....	10
BDMC 18.98.080(A) .....	39
BDMC 18.98.120.....	21
BDMC 18.98.120(A) – (F) .....	20
BDMC 18.98.120(E).....	20
BDMC 18.98.120(F).....	20
BDMC 18.98.120(F)(5) .....	40
BDMC 18.98.195.....	11

## I. INTRODUCTION

The Growth Management Hearings Board (“Board” or “GMHB”) has expanded its jurisdiction beyond the review of land use policies and implementing regulations and into the realm of ruling on the appropriateness of specific development projects. In doing so, the Board effectuated a collateral attack on pre-existing and unappealed land use policies and development regulations of the City of Black Diamond (“City”). The projects are two Master Planned Development (“MPD”) permits sought by BD Lawson Partners, LP and BD Village Partners, LP (collectively, “Yarrow Bay”). The Board summarily characterized the City’s approval of Yarrow Bay’s two MPDs not as permits approved under existing policies and regulations but as new policies and regulations. This baseless characterization created review authority over the projects that the legislature has never given the Board.

Land use planning to accommodate growth is mandatory. Planning for growth requires policy decisions that reflect a community's future vision. Creation of these policies and the regulations to implement those policies is a legislative process that may take years. Once those policy decisions are made, envisioned development can occur. While policy decision-making fully incorporates the political legislative process, subsequent permit decisions based on those adopted policies are protected from political pressure and are instead measured against the previously carefully-considered and adopted policies and regulations.

The courts, the legislature and the Board have made it abundantly

clear that the Board has jurisdiction over the adoption of land use policies and development regulations that implement those policies while the courts have jurisdiction over the approval of permit applications that are consistent with adopted policies. The Board's assertion of jurisdiction over the City's permit approvals must be rejected.

## **II. ASSIGNMENTS OF ERROR**

**Error A:** The Board's assumption of jurisdiction over City approvals of two MPDs was in error because it allowed an improper collateral attack on the City's comprehensive plan and development regulations, including review and approval procedures for MPDs.

**Issue 1:** The City's comprehensive plan and master planned development regulations, including review and approval procedures, were adopted through a legislative process in 2009, were not appealed, and exist as the foundation for future permit review. The City's approval of Yarrow Bay's two MPDs as consistent with the 2009 City policies and regulations was documented in the 2010 MPD Permit Approval Ordinances. Was the Board's assumption of jurisdiction over the 2010 Permit Approval Ordinances an improper collateral attack on the City's 2009 comprehensive plan and development regulations?

**Error B:** The Board erred by asserting jurisdiction over the MPD Permit Approval Ordinances.

**Issue 1:** RCW 36.70A.280 limits the Board’s jurisdiction. Did the Board improperly extend its limited jurisdiction to the MPD Permit Approval Ordinances?

**Issue 2:** RCW 36.70A.290(1) prohibits the Board from addressing issues not raised in the Petition for Review. Did the Board violate RCW 36.70A.290(1) when it concluded that the MPD Permit Approval Ordinances were *de facto* amendments to, or subarea plan elements of, the comprehensive plan, issues which were not raised in the Petition for Review?

**Issue 3:** The MPD Permit Approval Ordinances include approval of a preliminary site plan labeled a “Land Use Map.” Was it inconsistent for the Board to state that it looked beyond labels in characterizing the MPD Permit Approval Ordinances while simultaneously relying on the label “Land Use Map” as part of its justification for assuming jurisdiction?

**Issue 4:** Did the Board err when it concluded that the MPD Permit Approval Ordinances “replaced and superseded” City code provisions, when the Board’s conclusion relied on language from the MPD applications that had been abandoned and was expressly not approved by the City of Black Diamond?

**Issue 5:** Permit approvals augment existing land use controls by imposing more specific conditions governing future construction than are included in existing development regulations. Did the Board err in determining that the MPD Permit Approval Ordinances’ conditions “adopt[ed] a multitude of regulatory controls” and “added specificity to

the land use controls in the MPD Overlay” such that they were regulations, not permit conditions?

**Issue 6:** The Board refused to consider two relevant cases because they involved a different type of environmental review than the review used for the MPD Permit Approval Ordinances. Was it inconsistent and improper for the Board to summarily dismiss those jurisdictional arguments?

**Issue 7:** The Board found that the City’s process to review the MPD Permit Approval Ordinances was an “exceptional effort to involve the public through [the City’s] quasi-judicial process.” Did the Board err in accepting jurisdiction and then concluding that the City did not follow the City’s nearly identical legislative process for the amendment of comprehensive plans and development regulations?

### III. STATEMENT OF THE CASE

**A. In 2010, the City approved Yarrow Bay’s Master Planned Development (MPD) Permits, finding the MPDs were consistent with the City’s 2009 comprehensive plan and development regulations.**

On September 20, 2010, Yarrow Bay was granted approval by the Black Diamond City Council for two MPDs: (1) The Villages MPD, a residential and commercial development encompassing 1,196 acres of land; and (2) the Lawson Hills MPD, a residential and commercial development encompassing 371 acres of land.<sup>1</sup> These approvals will be referred to as the

---

<sup>1</sup> This case includes both Clerks Papers, designated herein as CP \_\_, and the GMHB’s Administrative Record, designated herein as AR \_\_. The Villages MPD was approved by City Ord. No. 10-946, AR 1290 – 1407, including AR 1782 the Land Use Map referenced

“MPD Permit Approval Ordinances.” All of the land within The Villages MPD and the Lawson Hills MPD is located inside the City of Black Diamond and, therefore, is within the City’s Urban Growth Area.<sup>2</sup> The MPD Permit Approval Ordinances include the City Council’s conclusions that The Villages and Lawson Hills MPDs each met the standards previously established in 2009 by the City’s controlling development regulations, which implement the City’s Comprehensive Plan.<sup>3</sup>

**B. For nearly twenty years, the City has been planning for significant urban growth such as Yarrow Bay’s MPDs.**

The 2009 Comprehensive Plan policies and development regulations that laid the framework for the City’s review of Yarrow Bay’s MPD Permits were the result of almost twenty years of legislative decisions. In the early 1990s, the first legislative decisions were litigated all the way to the Washington State Supreme Court.<sup>4</sup> In 1996, the City, King County, and prior property owners Plum Creek Timber and Palmer Coking Coal, entered into the Black Diamond Urban Growth Area Agreement (“BDUGAA”). The BDUGAA permitted annexation of additional lands now included within each MPD site for purposes of future urban development and assured

---

at AR 1293, Section 3. The Lawson Hills MPD was approved by City Ord. No. 10-947, AR 1173 – 1286, including AR 1783 the Land Use Map at AR 1176, Section 3. *See also*, AR 1295-1296, AR 1178 – 1179 (Finding of Fact 2).

<sup>2</sup> RCW 36.70A.110(1) (providing, in part, that a “City...shall be included within an urban growth area.”).

<sup>3</sup> *See e.g.*, AR 1324 – 1378 (Conclusions of Law, Villages MPD) and AR 1206 – 1257 (Conclusions of Law, Lawson Hills MPD).

<sup>4</sup> *See King County v. Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993) (upholding approval of annexation of 783 acres of land to the City of Black Diamond, subject to preparation and review of an environmental impact statement).

permanent protection of vast tracts of land as open space.<sup>5</sup> In 1996, King County adopted two ordinances related to the BDUGAA.

These County ordinances also resulted in litigation, this time in the form of appeals to the GMHB. One appeal of an ordinance authorizing execution of the BDUGAA was dismissed for failure to establish jurisdiction.<sup>6</sup> The other appeal of an ordinance establishing the unincorporated Urban Growth Area (“UGA”) was heard by the Board and resulted in a finding that with two limited exceptions the ordinance was in compliance with the Growth Management Act (“GMA”).<sup>7</sup> Subsequently, in compliance with the BDUGAA, the City processed three separate annexations, one in 2005 and two in 2009.<sup>8</sup>

**C. The City’s development regulations and comprehensive plan were adopted in 2009, were not appealed, and are the valid codes and policies controlling the City’s growth.**

The Comprehensive Plan and development regulations against which the MPD Permit Approval Ordinances were measured include the

---

<sup>5</sup> See AR 1319 – 1320 (Ordinance 10-946, Exhibit A, pp. 25-26, Finding 18.B), AR 1217 (Ordinance 10-947, Exhibit B, Conclusion 20).

<sup>6</sup> Ordinance 12534 did not adopt or amend the King County Comprehensive Plan, Zoning Map or other ‘development regulation’, but Petitioners claimed that the GMHB retained subject matter jurisdiction. The issue was not sufficiently briefed and consequently the GMHB found (in Conclusion No. 7) that petitioners abandoned that issue. *Johnson v. King County*, No. 97-3-0002, 1997 WL 473533 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. July 23, 1997) (Final Decision and Order).

<sup>7</sup> *Id.* at 17; The Board found (in Section VII) that the proposed Lake 12 Annexation Area (not part of the MPDs at issue here) did not comply with RCW 36.70A.110, and also remanded the Plan to the County with directions to account for the UGA acreage in the Plan’s Technical Appendix D.

<sup>8</sup> AR 2038 (describing the 2005 West Annexation, and the 2009 South Annexation), AR 2073 – 2074 (describing the 2005 West Annexation, and the later 2009 East Annexation). All annexations were completed before adoption of the MPD Permit Approval Ordinances and were not appealed.

following. First, the City adopted its 2009 Comprehensive Plan by Ordinance 09-908.<sup>9</sup> The Future Land Use Map in the 2009 Comprehensive Plan designated large areas of the City for Master Planned Developments by mapping lands with an “MPD Overlay.”<sup>10</sup> The Comprehensive Plan also revealed the significant future growth anticipated for the City by providing for mixed use commercial and residential development, including urban residential densities of a minimum of four dwelling units per gross acre on lands mapped MPD Overlay.<sup>11</sup> The Comprehensive Plan also included detailed chapters setting forth the City’s plan for road, water, and sewer infrastructure and the expectation that private MPD developers may construct or provide the funding source to pay for those capital facilities.<sup>12</sup>

Second, in 2009, the City amended and adopted Chapter 18.98 of the Black Diamond Municipal Code (“BDMC”);<sup>13</sup> these development regulations created an “MPD Permit,” and set the standards for that permit so as to implement the adopted Comprehensive Plan MPD policies.<sup>14</sup>

---

<sup>9</sup> AR 1962 – 1964 (Ordinance No. 09-908); *See, generally*, AR 1464 – 1742 (City Comprehensive Plan).

<sup>10</sup> AR 1571 (Future Land Use Map).

<sup>11</sup> AR 1485 – 1486 (Comp Plan); AR 1559 - 1560 (MPD Overlay policies); AR 1571 (Figure 5-1).

<sup>12</sup> *See, generally*, AR 1610 – 1665 (Transportation) and AR 1690 – 1713 and 1717 - 1727 (Utilities, Water, Sewer, and Stormwater). AR 1638 - 1639 lists transportation improvements and concludes with the notation that “new development, which necessitates the new roads, will contribute to the new roads. New development will also be responsible for providing on-site roads and circulation which is not identified in the TIP.” AR 1717 – 1724 lists all possible funding sources, including developer funded mitigation.

<sup>13</sup> AR 1973 – 1993 (Ordinance 09-897); Ch. 18.98 BDMC – Master Planned Development – is central to the issues on appeal and is therefore attached hereto pursuant to RAP 10.4(c) as Appendix A. All subsequent citations are to the code itself.

<sup>14</sup> *See* BDMC 18.98.020 – .100.

Third, the City adopted Ch. 18.08 BDMC which set procedures for processing permits.<sup>15</sup> BDMC 18.08.030 and .070 provide that any MPD Permit sought under the standards of Ch. 18.98 BDMC was required to be processed in a quasi-judicial manner. Fourth, the City adopted MPD Framework Design Standards and Guidelines.<sup>16</sup> The MPD Framework Design Standards and Guidelines set additional standards to be met by any proposed Master Planned Development project.<sup>17</sup> Combined, the 2009 Comprehensive Plan, Ch. 18.98 BDMC, Ch. 18.08 BDMC, and the MPD Framework Design Standards and Guidelines are referred to herein as the “2009 Ordinances.”<sup>18</sup>

The 2009 Ordinances were processed and adopted as comprehensive plan and development regulation amendments by the City of Black Diamond, appealable to the Growth Management Hearings Board under RCW 36.70A.280. The deadline to appeal the 2009 Ordinances was 60 days after publication of the adoption of those ordinances.<sup>19</sup> However, unlike the litigation triggered by the initial Black Diamond annexations in the early 1990s, and unlike the adoption of the BDUGAA in 1996, no one

---

<sup>15</sup> The City’s 2009 legislative enactments included many chapters of the Black Diamond Municipal Code. Chapter 18.08 is not in the Board record. However, this case presents issues requiring study of BDMC 18.08.030, .060, .070, and .200. Accordingly, copies of that text are attached hereto pursuant to RAP 10.4(c) as Appendix B.

<sup>16</sup> AR 2182 (showing June 18, 2009 adoption date); the complete MPD Framework Design Standards & Guidelines are at AR 2182 – 2199.

<sup>17</sup> *See e.g.*, AR 2188 (requiring an MPD to include multiple types of housing, and a variety of densities for housing development).

<sup>18</sup> The City adopted or updated many more codes and standards between 1996 and 2009. Where another code or standard is referenced, it is cited and included in the Appendix.

<sup>19</sup> RCW 36.70A.290(2).

appealed the 2009 Ordinances.<sup>20</sup>

**D. The City's 2009 Ordinances contain detailed standards for submission and approval of MPDs.**

The 2009 Ordinances set standards for an MPD Permit application and for approval. Those standards include the requirement that any lands mapped with an MPD Overlay in the Comprehensive Plan could only be developed pursuant to an MPD Permit.<sup>21</sup> Ch. 18.98 BDMC established extensive, specific MPD Permit application requirements including, but not limited to: (i) master plan drawings showing the types, locations, acreages, and densities of residential and nonresidential development; existing environmentally sensitive areas and their buffers, street locations, and sites for schools.<sup>22</sup>

The 2009 Ordinances also identify specific criteria for MPD Permit approval. For example, an MPD project must comply with all applicable policies, standards, and regulations; significant adverse environmental impacts must be mitigated; the project must have no adverse financial impact on the City; the project must include a mix of housing types; and the orientation of public building sites and design of major roads must take into consideration views of Mt. Rainier.<sup>23</sup>

The MPD Permit regulations also established design review

---

<sup>20</sup> The history and the City's adoption of regulations governing MPD permits was summarized in the Environmental Impact Statements for both The Villages and Lawson Hills MPDs. AR 29 – 34 (Foreword to Lawson Hills FEIS), and AR 608 – 613 (Foreword to The Villages FEIS).

<sup>21</sup> BDMC 18.98.030.

<sup>22</sup> BDMC 18.98.040.

<sup>23</sup> BDMC 18.98.080.

requirements; permitted uses and urban densities; the application of development standards from the MPD chapter and other chapters of the BDMC; open space requirements; recreation and trail requirements; street standards; stormwater management standards; and water and sewer standards.<sup>24</sup>

The MPD Permit regulations and BDMC 18.08.030 and .070 describe the quasi-judicial process for obtaining MPD Permit approval, including a pre-application conference with City staff; a public informational meeting; a planning commission informational meeting; a determination of completeness of the MPD Permit Application; State Environmental Policy Act (“SEPA”) review under Ch. 43.21C RCW; preparation of a staff report; open record public hearings before the hearing examiner; recommendation by the hearing examiner to the City Council with findings of facts, conclusions of law, and conditions of approval; and closed-record City Council review and action on the hearing examiner’s recommendation.<sup>25</sup>

The MPD Permit application requirements, approval criteria, development standards, and the MPD Permit review process the City adopted in 2009 is typical of permit review for large, phased development projects. Also typical for permit approvals, the MPD Permit regulations establish vesting for MPD Permits: “the MPD permit approval vests the applicant for fifteen years to all conditions of approval and to the

---

<sup>24</sup> BDMC 18.98.080 - .190.

<sup>25</sup> BDMC 18.98.060(B)(5),(6), and (7).

development regulations in effect on the date of approval.”<sup>26</sup> The 2009 Ordinances established the policy and regulatory framework for review of specific MPD Permit proposals.

**E. Yarrow Bay submitted MPD permit applications and complied with the procedural and substantive provisions of the City’s 2009 Ordinances and, therefore, the City approved The Villages and Lawson Hills MPD Permits.**

Upon adoption of the 2009 Ordinances, the City lifted a long-standing moratorium on development.<sup>27</sup> The development moratorium prohibited the acceptance of numerous types of project applications, including applications for MPD permits, subdivision permits, and planned unit development permits.<sup>28</sup> The City lifted the moratorium only after working “for many years” to adopt the policies and plans that would “make the City a model city, demonstrating excellent small city comprehensive urban land planning and development.”<sup>29</sup> With those policies and plans in place, Yarrow Bay’s MPD Permit applications for The Villages and the Lawson Hills projects could be processed. Over the course of more than five months, extensive public hearings were held before the City’s Hearing Examiner and then the City Council.<sup>30</sup> On September 20, 2010, a unanimous Council vote resulted in the MPD Permit Approval Ordinances.<sup>31</sup>

---

<sup>26</sup> BDMC 18.98.195.

<sup>27</sup> AR 1994 – 1996 (Black Diamond Ordinance 09-913).

<sup>28</sup> *Id.*

<sup>29</sup> AR 1995 (Ordinance 09-913, recitals).

<sup>30</sup> AR 1292.

<sup>31</sup> AR 1290 – 1294 (Ord. 10-946) and AR 1173 – 1177 (Ordinance 10-947).

**F. Objecting Neighbors appealed the MPD Approvals to the Superior Court under LUPA and then appealed to the GMHB under the GMA; the Board ruled that it had jurisdiction.**

Following the procedure set in BDMC 18.08.200, Toward Responsible Development, *et al.* (“TRD”) filed an appeal of the MPD Permit Approval Ordinances in Superior Court under the Land Use Petition Act, Ch. 36.70C RCW (“LUPA”).<sup>32</sup> Over thirty days later, TRD filed a Petition for Review to the GMHB, alleging that the MPD Permit Approval Ordinances were not permits but instead were development regulations.<sup>33</sup>

In the action before the Board, the parties filed dispositive motions on the issue of the Board’s jurisdiction and other matters. Yarrow Bay argued that because the MPD Permit Approval Ordinances were project permits consistent with the City’s Comprehensive Plan and development regulations, the Board was without jurisdiction to rule on the matter.<sup>34</sup> On February 15, 2011, the Board issued its Order on Motions, wherein the Board determined that it had jurisdiction over the MPD Permit Approval Ordinances and determined that the City’s approval process did not follow its adopted public participation procedures for GMA amendments.<sup>35</sup> Nevertheless, the Board also determined that continued validity of the MPD Permit Approval Ordinances did not represent a substantial interference with GMA goals, and therefore concluded that the MPD Permit Approval

---

<sup>32</sup> CP 31 at Section 9.5; the LUPA case is on hold in Superior Court.

<sup>33</sup> AR 3 (TRD’s Petition for Review at 3) (listing as TRD’s first issue “Whether the Hearings Board has jurisdiction over this petition, *i.e.*, whether the Ordinances create and/or amend development regulations as that term is defined in RCW 36.70A.030(7)?”).

<sup>34</sup> *See, e.g.*, AR 2169 – 2178, particularly, AR 2177: 20 – 2178:2.

<sup>35</sup> AR 2561 – 2589 (Board Order on Motions).

Ordinances were not invalid.<sup>36</sup>

On February 18, 2011, Yarrow Bay filed a Petition for Review of Agency Action in King County Superior Court appealing the Board's Order on Motions.<sup>37</sup> Under RCW 34.05.518, TRD sought a Certificate of Appealability from the Board in order to seek direct review in this Court.<sup>38</sup> The Board granted TRD's request and issued the Certificate of Appealability.<sup>39</sup> The parties then brought a Joint Motion for Direct Review of Yarrow Bay's appeal of the Board's Order on Motions. On June 14, 2011, this Court granted the motion.

#### IV. ARGUMENT

##### A. Standard of Review.

Decisions of the Growth Management Hearings Board are reviewed in accordance with the Administrative Procedure Act (Ch. 34.05 RCW). Pursuant to RCW 34.05.570(3), an appellate court may grant relief from an agency order in an adjudicative proceeding only if it determines that one or more of the standards in RCW 34.05.570(3)(a) – (i) are met. The appellate court is to apply these standards of review directly to the record before the agency.<sup>40</sup> In the instant matter, the following standards of

<sup>36</sup> AR 2586, lines 23 – 27 (“On these facts, the Board does not find that continued validity of the ordinances represents a substantial interference with Goal 11 of the GMA. Therefore, the Board declines to enter a Determination of Invalidity.”).

<sup>37</sup> CP 25 – 37 (Petition for Review of Agency Action).

<sup>38</sup> CP 88 – 93 (Application for Direct Review by Court of Appeals).

<sup>39</sup> CP 318 – 324 (Certificate of Appealability).

<sup>40</sup> RCW 34.05.510 and RCW 34.05.558; *Mader v. Health Care Authority*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003) (“In conducting our review of an administrative decision we sit in the same position as the superior court, applying the WAPA standards directly to the record before the agency.”).

RCW 34.05.570(3) apply:

\* \* \*

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

\* \* \*

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

The appellate court reviews an agency's legal conclusions *de novo*, with deference to the agency's interpretation of the statute it administers, while findings of fact are reviewed for substantial evidence.<sup>41</sup> With the exception of subsection (e), all the standards applicable to this case address questions of law, which the Court reviews *de novo*.

This case centers on the Board's lack of subject matter jurisdiction to render the February 15, 2011 Order on Motions. An agency lacks subject matter jurisdiction when it attempts to decide a type of controversy over

---

<sup>41</sup> *Stevens County v. Futurewise*, 146 Wn. App. 493, 502, 192 P.3d 1 (2008).

which it has no authority to adjudicate.<sup>42</sup> The Board’s subject matter jurisdiction (*i.e.*, the type of controversy the Board has authority to adjudicate) is strictly limited. The Board has no authority to hear and determine issues outside of those defined in RCW 36.70A.280. Because an agency’s authority is defined by statute, a challenge to the exercise of an agency’s authority is a question of law reviewed *de novo*.<sup>43</sup> Unlike an agency’s interpretations of a statute it administers, courts grant no deference to an agency’s determination of its own authority.<sup>44</sup> Accordingly, the Board’s determination of the scope of its own authority under RCW 36.70A.280 is entitled to no deference and the Court is free to substitute its judgment for that of the Board.

Outside of the legal issues which must be reviewed *de novo*, RCW 34.05.570(3)(e) imposes the substantial evidence standard for issues where the record does not support the Board’s decision. The substantial evidence test is whether the record contains “evidence in sufficient quantum to

---

<sup>42</sup> *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). In *Marley*, the Washington State Supreme Court reviewed the question of what a party must show to establish that an order from an agency is void. The Court held that a void judgment exists if the issuing tribunal lacks personal jurisdiction over the party or subject matter jurisdiction over the claim. The Court then carefully described the difference between when a tribunal has made an error of law and when it has acted without jurisdiction. The Court explained that an agency’s lack of authority to enter a given order does not mean it lacks subject matter jurisdiction. *Id.* at 539. Rather, “[s]ubject matter jurisdiction is the authority to adjudicate the type of controversy at issue.” *Id.* at 544. In other words, a tribunal with subject matter jurisdiction can exercise its authority and enter an erroneous order without losing subject matter jurisdiction but a tribunal without subject matter jurisdiction can enter no valid order except an order of dismissal; entry of any other order is void.

<sup>43</sup> *In Re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

<sup>44</sup> *Id.* at 540 (“[W]e do not defer to an agency the power to determine the scope of its own authority”).

persuade a fair-minded person of the truth of the declared premises.”<sup>45</sup>

**B. The Board’s assumption of jurisdiction exceeded its authority because it allowed an improper collateral attack on the City’s existing comprehensive plan and development regulations, adopted in 2009.**

Almost 20 years ago, the Black Diamond City Council began making legislative policy decisions to set the process and standards under which the MPD Permit Approval Ordinances were reviewed and approved. Those legislative decisions culminated in the 2009 Ordinances. The 2009 Ordinances were legislative enactments that amended the City’s Comprehensive Plan and development regulations. Adopted comprehensive plans and development regulations are presumed valid.<sup>46</sup> Despite the finality of the 2009 Ordinances, the Board’s Order on Motions found that the MPD Permit Approval Ordinances constituted subarea plans or development regulations, rather than permits, which determination effectively invalidated and overturned the 2009 Ordinances.<sup>47</sup> The Board’s action was an illegal collateral attack on the City’s adopted and un-appealed Comprehensive Plan and development regulations.

Washington law is clear that the “[f]undamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review” and that permits are

---

<sup>45</sup> *Olmstead v. Dep’t of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991).

<sup>46</sup> RCW 36.70A.320(1).

<sup>47</sup> See AR 2580 – 2581, lines 25 – 2 (Board Order on Motions) (“The Board concludes these ordinances constitute ‘the adoption or amendment of a comprehensive plan, subarea plan, or development regulations’ within the scope of the GMA”).

reviewed for consistency with those development regulations.<sup>48</sup> The applicable regulations “shall be determinative of the” types of land uses permitted on a site, “including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval has been satisfied.”<sup>49</sup> The adopted development regulations, or in the absence of applicable regulations, the Comprehensive Plan, are determinative of the “density of residential development in urban growth areas,” and the “availability and adequacy of public facilities” if the plan provided for funding of those facilities.<sup>50</sup> During permit review, there shall not be any reexamination of alternatives to the types of land uses permitted on a site, the density of residential development, and the availability and adequacy of public facilities.<sup>51</sup>

In a case involving a collateral attack on adopted plans and development regulations through appeal of a permit, the Washington State Supreme Court explained:

[A] comprehensive plan or development regulation’s compliance with the GMA must be challenged within 60 days after publication. Once adopted, comprehensive plans and development regulations are presumed valid. Thus, if a project permit is consistent with a development regulation that was not challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the GMA does not explicitly apply

---

<sup>48</sup> RCW 36.70B.030(1), RCW 36.70B.040.

<sup>49</sup> RCW 36.70B.030(2)(a), RCW 36.70B.040.

<sup>50</sup> RCW 36.70B.030(1) and (2)(b) and (c), RCW 36.70B.040.

<sup>51</sup> RCW 36.70B.030(3).

to such project permits and the GMA is not to be liberally construed.<sup>52</sup>

Because the GMA must be applied by the Court as written, the Court concluded that where a permit was consistent with the comprehensive plan, the only way the permit could violate the GMA is if the comprehensive plan itself violated the GMA and, therefore, any argument that the permit violated the GMA was a “disguised challenge” to the adequacy of the comprehensive plan itself, which is not allowed.<sup>53</sup> The courts have recognized that while the timing might be a “trap for the unwary,” the rule remains that appeals must be made to the Board within 60 days, “even without a specific project to trigger the inquiry.”<sup>54</sup> A later challenge is barred.

Similarly, in *Wenatchee Sportsmen Ass’n v. Chelan Co.*, Chelan County rezoned a large (one square mile) parcel of land in 1996 and the rezone was not appealed, but a subsequent 1998 plat approval was appealed under LUPA, and the petitioners challenged the plat approval’s consistency with the GMA.<sup>55</sup> The Court concluded: “[b]ecause the zoning requirements for the property were established by the [1996] rezone approval, the only reviewable question in this case is whether the [1998] project application complies with those zoning requirements,” and, therefore, the collateral attack on the 1996 rezone was prohibited as an

---

<sup>52</sup> *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007) (citations omitted).

<sup>53</sup> *Id.* at 614-16.

<sup>54</sup> *Somers v. Snohomish County*, 105 Wn. App. 937, 948-49, 21 P.3d 1165 (2001).

<sup>55</sup> 141 Wn.2d 169, 174-75, 4 P.3d 123 (2000).

untimely challenge.<sup>56</sup> Likewise, where the real claim in a LUPA appeal of a subdivision was that the zoning ordinance under which the subdivision was filed violated the GMA, the superior court lacked subject matter jurisdiction over the claim, which should have been timely brought before the Growth Management Hearings Board.<sup>57</sup>

Together, *Woods*, *Wenatchee Sportsmen Ass'n*, and *Somers* demonstrate the hierarchical, rather than parallel relationship between matters appealable under the GMA versus LUPA:

Comprehensive plans and development regulations provide the general structure for a local jurisdiction's site-specific decisions. ... The comprehensive plan and development regulations may be challenged for violations of the GMA before a GMHB within 60 days of publication. Subsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the comprehensive plan and development regulations. An adjacent property owner must challenge a local jurisdiction's site-specific decisions by filing a LUPA petition in superior court.<sup>58</sup>

Here, the time has long passed for the Board to have jurisdiction over the 2009 Ordinances. The MPD Permit Approval Ordinances were processed and approved as permits by the City and found consistent with the 2009 Ordinances.<sup>59</sup> The MPD Permit Approval Ordinances were appealable under LUPA and, in fact, TRD first filed such an appeal. It is only because TRD took the novel and entirely inconsistent action of filing a separate appeal to the Board that the Board had any opportunity to examine this

---

<sup>56</sup> *Id.*

<sup>57</sup> *Somers*, 105 Wn. App. at 948.

<sup>58</sup> *Woods*, 162 Wn.2d at 615-16 (citations omitted).

<sup>59</sup> *See*, AR 1324 (Conclusion of Law 3), AR 1206 (Conclusion of Law 3).

matter. But the heart of TRD's appeal to the Board was the time-barred contention that the adopted 2009 Ordinances did not set adequate standards for a Master Planned Development.<sup>60</sup>

The 2009 Ordinances set the RCW 36.70B.030 "foundation for project review" of specific Master Planned Development permits by (1) mapping certain lands with the MPD Overlay, and designating that the types of land uses permitted within an MPD included a mix of residential and non-residential uses, including residential uses that could extend to 30 dwelling units per acre, and that MPD uses must include those uses mapped in the Comprehensive Plan for parcels subject to the MPD Overlay,<sup>61</sup> (2) setting the minimum residential density at 4 dwelling units per gross acre,<sup>62</sup> and (3) determining the availability and adequacy of public facilities and assuring funding for those facilities.<sup>63</sup> The 2009 Ordinances also set the process that required quasi-judicial review of MPD Permits and an appeal under LUPA to Court.<sup>64</sup>

Upon adoption of the 2009 Ordinances, the public was on notice of

---

<sup>60</sup> AR 1999 – 2008 (TRD's Dispositive Motion) (stating that "the MPD designation [is] a 'placeholder' because it did not provide specific land use designations for any of the subject lands," and "The approved applications simply identify the process and standards that will apply when [] project-specific applications are filed later.").

<sup>61</sup> AR 1571 (Future Land Use Map); AR 1559 – 1560 (explaining MPD overlay and allowed uses); BDMC 18.98.120(A) – (F) (listing permitted uses and densities for an MPD project), BDMC 18.98.120(F) (authorizing up to 30 dwelling units per acre), BDMC 18.98.030(A)(1) (requiring an MPD permit to develop any property mapped with an MPD Overlay on the Future Land Use Map).

<sup>62</sup> AR 1235 – 1236 (Lawson Hills), AR 1354 (Villages); AR 1560 – 1561 (Comprehensive Plan); *See also* BDMC 18.98.120(E).

<sup>63</sup> *See* AR 1610 – 1665 (Transportation) and AR 1690 – 1713 and 1717 - 1727 (Utilities, Water, Sewer, and Stormwater), especially AR 1638 - 1639 and AR 1717 – 1724.

<sup>64</sup> Appendix B at BDMC 18.08.030, 18.08.070.A.4, BDMC 18.08.200.

the location of potential Master Planned Developments; the broad range of potential uses that could be allowed within a Master Planned Development; that additional details including the “types, generalized locations, acreages, and densities of proposed residential and nonresidential development” across an MPD project site would be disclosed in the MPD permit application drawings for approval with the MPD Permit; and that the process to approve a Master Planned Development was a quasi-judicial permit process.<sup>65</sup> Under RCW 36.70B.030(2)(a), the 2009 Ordinances established an MPD Permit as a type of land use approval, like a conditional use permit or special use permit. Like a conditional use permit, the MPD Permit standards were flexible.<sup>66</sup>

Despite the Boards’ summary conclusion to the contrary,<sup>67</sup> the Board’s Order on Motions authorized the collateral attack on the 2009

---

<sup>65</sup> AR 1962 – 1964 (Ordinance 09-908); AR 1485 – 1486 (Comp Plan); AR 1569 – 1570 (MPD Overlay policies); AR 1569 – 1570 (Table 5-1 showing future land use acreages); AR 1571 (Figure 5-1 - Future Land Use Map); AR 1974 – 1993 (adopting BDMC 18.98, which provided for broad uses for MPD zones); BDMC 18.98.120 (designating permitted uses and densities); BDMC 18.98.030 (requiring an MPD Permit); BDMC 18.98.040(A)(1)(f) (requiring master plan drawings that show the types and densities of uses on a drawing), BDMC 18.08.030 (requiring an MPD Permit to be processed in a quasi-judicial manner).

<sup>66</sup> See BDMC 18.98.010(E) stating “The purposes of the master planned development (MPD) permit process and standards set out in this chapter are to . . . Allow flexibility in development standards and permitted uses.”

<sup>67</sup> AR 2577, lines 15 – 17 (Board Order on Motions) (the Board concluded that “Yarrow Bay’s attempt to paint this challenge as a collateral attack on the 2009 ordinance is without merit” because “it is not the general [MPD] regulation adopted in 2009 that Petitioners object to” and citizens’ “presumed acquiescence in the earlier [MPD] ordinance doesn’t bar them from challenging subsequent ordinances that provide a Land Use Plan map and more specific level of detail about allowed uses and densities.”

Ordinances brought by TRD’s untimely appeal to the Board. TRD argued, and the Board expressly acknowledged, that the MPD Permit Approval Ordinances should be viewed as development regulations because they established basic land use categories and adopted a map specifying where those land use categories apply.<sup>68</sup> But the un-appealed 2009 Ordinances plainly required that a MPD Permit application include a set of drawings that, among many other detailed features, “show[]” the “types, generalized locations, acreages, and densities of proposed residential and nonresidential development” across an MPD project site.<sup>69</sup> The Board’s conclusion that the failure of TRD to appeal the 2009 Ordinances did not bar TRD from challenging the MPD Permit Approval Ordinance’s adoption of a “Land Use Plan map and more specific level of detail about allowed uses and densities”<sup>70</sup> necessarily allows a collateral attack on the 2009 Ordinances because inclusion of such a map and specific level of detail in an MPD Permit application is precisely what the 2009 Ordinances required.

The Board also found the City’s quasi-judicial process for the review and approval of MPD Permit Approval Ordinances improper. Yet, this quasi-judicial process is specifically required by the 2009 Ordinances at BDMC 18.08.030 and “a City is bound to follow its own ordinances”

---

<sup>68</sup> AR 2010, lines 18 – 19 (Petitioners’ Dispositive Motion); AR 2569, lines 21 – 23 and footnote 38 (Board Order on Motions).

<sup>69</sup> BDMC 18.98.040(A)(1)(f).

<sup>70</sup> AR 2577, lines 21 – 26 (Board Order on Motions).

setting a quasi-judicial process.<sup>71</sup> The Board also found that satisfaction of the City's MPD Permit application criteria results in the creation of regulatory controls, not a permit. But these MPD Permit application criteria, necessary for a complete application, are specifically set forth in the 2009 Ordinances at BDMC 18.98.040. Thus, the Board's decision both remands the MPD Permit Approval Ordinances and also effectively overturns the 2009 Ordinances which, again, were never appealed and must be presumed valid.

Under the Board's analysis, no applicant could submit an MPD Permit application that both satisfied the City's criteria for a complete application and fell on the project permit side of the jurisdictional dividing line. Indeed, according to the Board, reliance on and application of the 2009 Ordinances guarantees the City will violate the GMA. If the Board's Order on Motions is upheld, the City of Black Diamond will be forced to amend existing development regulations that have never been the subject of an appeal and that have never been found out of compliance with the GMA. RCW 36.70B.030 and .040, and the *Woods, Wenatchee Sportsmen Ass'n*, and *Somers* decisions absolutely prohibit such a collateral attack.

A collateral attack also must be prohibited as a matter of policy. "Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin."<sup>72</sup>

---

<sup>71</sup> *Phoenix Development, Inc. v. City of Woodinville*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 2409635 at 6 (June 16, 2011).

<sup>72</sup> *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

Here, Yarrow Bay relied on the 2009 Ordinances as the established rules to seek permits for the Lawson Hills and The Villages MPDs. As the developer and permit applicant, Yarrow Bay is subject to “virtually all the risk of loss” if the “fluctuating policy” effectuated by the Board’s decision is allowed to stand.<sup>73</sup>

For example, if the Board’s Order is allowed to stand, and the MPD Permit Approval Ordinances must be re-processed as legislative actions rather than permits, then the City of Black Diamond could alter the approval criteria for MPDs contrary to the established standards required by RCW 36.70B.030 and reflected in the 2009 Ordinances. The City could legislate that rather than a mix of residential and non-residential uses, only non-residential uses would be allowed. Any legislative action to alter the MPD requirements undermines Yarrow Bay’s substantial investment. No private developer would ever invest in any significant land development proposal if the approval process was legislative and failed to include established standards for project review as set forth in RCW 36.70B.030.

The Board’s decision is contrary to the GMA and the 2009 Ordinances, which established specific and flexible standards for the MPD Permit application review and approval process. The Board’s summary treatment of the issue of collateral attack calls into question whether a property owner could ever rely upon adopted and un-appealed permit

---

<sup>73</sup> *Id.* at 51 (citations omitted).

standards and review procedures. The Board’s action was outside its jurisdictional authority, resulted from unlawful procedure and an erroneous application of law, was not supported by evidence, and was arbitrary and capricious.

**C. Washington law clearly defines the Board’s jurisdiction and the Board improperly extended its limited jurisdiction to the MPD Permits.**

If this Court determines that the Board’s Order is not an illegal collateral attack on the 2009 Ordinances, then the Court still must reverse the Board’s Order because the Board lacked subject matter jurisdiction to review the MPD Permit Approval Ordinances. Those Approvals are permit approvals, not development regulations.

**1. The Board cannot expand its Jurisdiction to include the MPD Permits.**

Washington recognizes two different processes for two stages of land use planning and development: (1) policy decisions that reflect a community’s future vision for itself and (2) permit decisions that apply the policy decisions to proposed development.<sup>74</sup> Policy decision-making fully incorporates the political legislative process.<sup>75</sup> Permit decisions are measured against adopted policies and regulations and “community displeasure cannot be the basis of a permit denial.”<sup>76</sup>

“Under RCW 36.70A.280, the Board has a very limited power of

---

<sup>74</sup> See Ch. 36.70A RCW (“Growth management – planning by selected counties and cities”) and Ch. 36.70B RCW (“Local project review”).

<sup>75</sup> *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 441, 187 P.3d 272 (2008) (“case law ... has long recognized that comprehensive plan amendments are legislative in nature”).

<sup>76</sup> *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990).

review.”<sup>77</sup> In fact, the GMA must be strictly construed.<sup>78</sup> The Board has the limited power to determine only whether the adoption or amendment of comprehensive plans or development regulations complies with the GMA.<sup>79</sup> “Comprehensive plans” are a “generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to [the GMA].”<sup>80</sup> “Development regulations” are “the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.”<sup>81</sup>

Even more significant is what GMA development regulations are not. The GMA’s definition of “development regulation” expressly excludes permit applications: “A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.”<sup>82</sup> The MPD Permit

<sup>77</sup> *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 867, 947 P.2d 1208 (1997).

<sup>78</sup> *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007) (“...the GMA is not to be liberally construed.”) (citing *Skagit Surveyors & Eng’rs v. Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998), noting that the GMA “does not contain the requirement that it be liberally construed.”).

<sup>79</sup> RCW 36.70A.280(1) and RCW 36.70A.290(2). The Board also has jurisdiction over amendments to shoreline master plans and certain SEPA actions, but those matters are not relevant here.

<sup>80</sup> RCW 36.70A.030(4).

<sup>81</sup> RCW 36.70A.030(7).

<sup>82</sup> RCW 36.70A.030(7) (emphasis added).

Approval Ordinances are precisely the types of development approvals defined in RCW 36.70B.020 that are excluded from Board review.

Specifically, permits excluded from Board review are:

[A]ny land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.<sup>83</sup>

Consistent with these definitions, the Board “cannot render a decision on a specific development project.”<sup>84</sup>

The line between matters for which the Board has jurisdiction and matters for which the Board does not have jurisdiction is clear. The Board has jurisdiction to review legislatively-adopted new or amended comprehensive plans and development regulations. The Board does not have jurisdiction to review permit decisions which rely upon and are

---

<sup>83</sup> RCW 36.70B.020(4) (emphasis added). *See also*, RCW 36.70C.030(1) (providing that LUPA is “the exclusive means of judicial review of land use decisions, except that this chapter does not apply to: ... Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as . . . the growth management hearings board”); and RCW 36.70C.020(2) (defining land use decisions subject to LUPA as applications “for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, . . .; excluding applications for legislative approvals such as area-wide rezones and annexations.”).

<sup>84</sup> *Citizens for Mount Vernon*, 133 Wn.2d at 868. However, where a permit action is combined with an amendment to the comprehensive plan, the Board does have jurisdiction. *Shaw Family, LLC v. Advocates for Responsible Development*, 157 Wn. App. 364, 368, 236 P.3d 975 (2010) (holding that where application for a rezone was combined with request to amend the comprehensive plan to allow the rezone, the Board had jurisdiction because comprehensive plan amendments fall under RCW 36.70A.280(1)).

consistent with previously adopted comprehensive plans and development regulations. Here, the MPD Permit Approval Ordinances were site-specific land use permits required by the City of Black Diamond pursuant to the 2009 Ordinances, particularly, Ch. 18.98 BDMC. The MPD Permit Approval Ordinances address specific projects on specific sites, include a site-specific rezone,<sup>85</sup> are similar to the permit approvals of flexible planned unit developments, conditional uses, and site plan review, and they meet every other definition of permits.<sup>86</sup> The GMA is not to be liberally construed,<sup>87</sup> and the Board's determination that it had authority to exercise jurisdiction is not entitled to any deference.<sup>88</sup> The Board assertion of jurisdiction was outside its authority, its decision resulted from an erroneous application of law, was not supported by substantial evidence, and was arbitrary and capricious.

**2. The Board exceeded its authority and violated RCW 36.70A.290(1) by issuing an opinion on matters not presented for review.**

The Board's authority (when properly exercised) is strictly limited to matters alleged in a petition for review and listed in the prehearing

---

<sup>85</sup> All of The Villages MPD and the Lawson Hills MPD properties were mapped with the MPD Overlay. AR 1571 (Comprehensive Plan Future Land Use Map). The vast majority of The Villages property also was already zoned MPD; other portions of The Villages and Lawson Hills sites were zoned in various residential or commercial categories. AR 65 (City of Black Diamond Zoning Map with The Villages and Lawson Hills project site boundaries shown). The MPD Permit Approval Ordinances, Section 4, included a rezone of those portions of both project sites not yet zoned MPD, to the MPD zone, consistent with the MPD Overlay. See AR 1293, AR 1176.

<sup>86</sup> RCW 36.70B.020(4).

<sup>87</sup> *Woods, supra*, 162 Wn.2d at 614.

<sup>88</sup> *In Re Electric Lightwave, Inc.*, 123 Wn.2d at 540.

order.<sup>89</sup> Here, the Board’s Order on Motions concludes that the MPD Permit Approval Ordinances are “*de facto* subarea plans” or the “adoption or amendment of a comprehensive plan.”<sup>90</sup> By statute, a subarea plan is an optional element of a comprehensive plan.<sup>91</sup> But neither TRD’s Petition for Review to the Board nor the Board’s Prehearing Order presented the issue that the MPD Permit Approval Ordinances were Comprehensive Plan amendments, including subarea plans.<sup>92</sup>

Just as TRD’s Petition for Review and the Board’s Prehearing Order were limited to the allegation that the MPD Permit Approval Ordinances were development regulations, the Board’s decision should have been so limited. Moreover, because the MPD Permit Approval Ordinances are consistent with, rather than amend, the City’s comprehensive plan, they are permit decisions. The Board’s Order on Motions violates RCW 36.70A.290(1); all portions of the Board’s Order on Motions concluding that the MPD Permit Approval Ordinances were *de facto* comprehensive plan amendments or subarea plans, are outside the Board’s authority, an erroneous application of RCW 36.70A.290(1), fail to be supported by substantial evidence, are inconsistent with agency rule, and are arbitrary and capricious.

---

<sup>89</sup> RCW 36.70A.290(1), (“The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.”) (Emphasis added.)

<sup>90</sup> AR 2580 at lines 24 – 27.

<sup>91</sup> RCW 36.70A.080(2).

<sup>92</sup> AR 3 - 5 (TRD Petition for Review); AR 1442 – 1445 (Prehearing Order).

**3. Like many other land use permits, the MPD Permits approved a preliminary site plan and the Board ignored its own precedent to determine the site plan was a comprehensive plan amendment.**

The Board stated, correctly, that the name and process chosen for an action may shape the question of jurisdiction but not decide it.<sup>93</sup> However, the Board then erred by systematically determining that because the MPD Permit Approval Ordinances chose to label each MPD site plan a “Land Use Map,” the MPD Permit Approval Ordinances were comprehensive plan amendments.<sup>94</sup> If the Board had jurisdiction to consider this issue -- which it did not<sup>95</sup> -- the Board erred, and even misconstrued its own precedent.

The Land Use Maps<sup>96</sup> incorporated into the MPD Permit Approval Ordinances are site plans that locate the protected sensitive areas, the larger open space areas, the types of residential, commercial, and industrial development, and the major roads through each MPD site. These drawings were required in the MPD Permit applications.<sup>97</sup>

The Board misconstrued the analogies between prior decisions analyzing other types of master plans and Yarrow Bay’s MPDs. For example, the Board’s jurisdiction over a master plan in *North Everett Neighbor Alliance (NENA) v. City of Everett* was inextricably linked to the fact that the City of Everett combined proceedings and adopted a

---

<sup>93</sup> AR 2573:1-2.

<sup>94</sup> AR 2572 – 2577 (Board Order on Motions).

<sup>95</sup> See Section IV C.2, above.

<sup>96</sup> AR 1782, AR 1783.

<sup>97</sup> BDMC 18.98.040(A)(1). Other maps were included throughout the MPD Application.

comprehensive plan amendment, rezone, and master plan for the property all at the same time.<sup>98</sup> Here, there is only a site-specific rezone, consistent with the comprehensive plan with an MPD Permit Approval. There is no additional comprehensive plan amendment. Therefore, the *NENA* case is inapposite.

Similarly, the Board's reliance on *Alexanderson v. Clark County*<sup>99</sup> is misplaced. In *Alexanderson*, a "Memorandum of Understanding" (i.e., an agreement) between Clark County and the Cowlitz Tribe expressly conflicted with the County's comprehensive plan. In *Skagit County Growthwatch v. Skagit County*,<sup>100</sup> the County used an administratively-approved interpretation of code to change the comprehensive plan's land use map. Likewise, in *Servais v. Bellingham*,<sup>101</sup> a Memorandum of Agreement was used to "exempt" the applicant college from certain code requirements. In contrast, here, a permit process was used, not an agreement or code interpretation. As detailed below, no issue of express conflict, amendment, or exemption to the 2009 Ordinances exists.

The Board has previously seen attempted appeals of approvals similar to the MPD Permit Approval Ordinances and properly found it was without jurisdiction. In *Laurelhurst v. City of Seattle* ("*Laurelhurst I*"), the

---

<sup>98</sup> *N. Everett Neighbor Alliance v. City of Everett*, No. 08-3-0005, 2009 WL 1356230 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. April 28, 2009) (Final Decision and Order).

<sup>99</sup> 135 Wn. App. 541, 144 P.3d 1219 (2006).

<sup>100</sup> No. 04-2-0004, 2004 WL 1864634 (W. Wash. Growth Mgmt. Hrgs. Bd. June 2, 2004) (Order on Motions), 2004 WL 2368660 (Aug. 23, 2004) (Final Decision and Order).

<sup>101</sup> No. 00-2-0020, 2000 WL 1277014 (W. Wash. Growth Mgmt. Hrgs. Bd. Aug. 31, 2000) (Order on Dispositive Motion).

Board declined jurisdiction over a University of Washington Campus Master Plan (“UWCMP”) where no comprehensive plan amendment was needed and the master plan was permitted by existing comprehensive plan policies and development regulations.<sup>102</sup>

Like the MPD Permit Approval Ordinances here, the UWCMP was a detailed master plan that included “a ten year conceptual Master Plan and EIS that include the specific elements such as boundaries outlined by the [Seattle Municipal Code], zone designations, site-plan traffic, transportation, and development phases.”<sup>103</sup> Petitioners argued that the UWCMP was functionally a subarea plan.<sup>104</sup> Although the Board recognized the UWCMP was to be labeled and organized parallel to the structure of the city’s comprehensive plan, including “land use maps,” the Board nonetheless determined it was a site plan and not a subarea plan.<sup>105</sup>

The Board explained:

Such site plans may have varying degrees of specificity, depending upon how much detail is stipulated “up front” or reserved for later determination. It is not uncommon for a “preliminary” site plan approval, such as a Preliminary Planned Unit Development or Preliminary Subdivision, to describe the site development details with some particularity, with subsequent details determined in later phases of review. Only after this “site plan approval” are “construction permits,” such as grading and building permits, subsequently issued.

---

<sup>102</sup> *Laurelhurst v. City of Seattle*, No. 03-3-0008, 2003 WL 22896421 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. Jun. 18, 2003) (Order on Motions) (hereinafter “*Laurelhurst I*”).

<sup>103</sup> *Id.* at 3, Finding of Fact 9.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> *Id.* at 7-8.

Here the UWCMP functions as a “site plan approval.” It generally establishes the location, dimension, and function of major structures on the University campus. The fact that it does not constitute a “construction permit” in itself does not mean that it is a policy document (i.e., a subarea plan). Rather, it simply means that it is a “site plan approval” land use decision.<sup>106</sup>

Like the UWCMP, the MPDs approved by the MPD Permit Approval Ordinances address both up-front details and details reserved for later determinations. The Seattle comprehensive plan identified the University of Washington on its future land use map and included policies to ensure the community “plays an active role in the UW’s Campus Master Plan on subjects of mutual interest.”<sup>107</sup> Similarly, the Black Diamond Comprehensive Plan includes MPD policies and identifies the locations of the MPDs on its Future Land Use Map.<sup>108</sup>

The review process for the UWCMP and MPD Permit applications also are similar. Seattle’s existing development regulations provided very detailed review and approval criteria as well as a defined review and approval process.<sup>109</sup> Like the Major Institutional Ordinance (“MIO”) and overlay provisions in the Seattle Municipal Code, Black Diamond has a “Master Planned Developments” chapter in its Code.<sup>110</sup> Seattle’s MIO provided:

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at Findings of Fact 2, 3.

<sup>108</sup> AR 1485 – 1486 (Comp Plan); AR 1558 – 1560 (MPD Overlay policies); AR 1571 (Future Land Use Map).

<sup>109</sup> *Laurelhurst I*, *supra* note 102 at 3, Findings of Fact 4 – 10.

<sup>110</sup> *See*, Ch. 18.98 BDMC.

[The MIO e]stablishes the required elements and approval process for Major Institution Master Plans (MIMP). A MIMP is a site specific development plan for each individual university or hospital ... Major Institutions submit applications for approval of proposed MIMPs to the City in much the same way the landowners are required to submit applications for approval of other site-specific regulatory approvals such as site-specific rezones and Master Use Permit applications.<sup>111</sup>

Like Seattle's MIO, Black Diamond's 2009 Ordinances established the required elements and approval process for MPDs.<sup>112</sup> Both the Seattle and Black Diamond processes required a master plan to be submitted to the City Hearing Examiner, who conducted a public hearing prior to making a recommendation to the City Council, followed by a City Council public hearing and final decision.<sup>113</sup>

Neither the UWCMP nor the MPD Permit Approval Ordinances amended the cities' comprehensive plans. The UWCMP required a rezone consistent with Seattle's comprehensive plan and the MPD Permit Approval Ordinances also were accompanied by a rezone consistent with Black Diamond's Comprehensive Plan.<sup>114</sup> Nor is there any express conflict or exemption from existing development regulations. Instead, both the UWCMP and the MPD Permit applications were prepared in response to requirements of existing development regulations and were approved subject to additional conditions and standards that provide specificity for

---

<sup>111</sup> *Laurelhurst I, supra* note 102 at 11.

<sup>112</sup> BDMC 18.98.060.

<sup>113</sup> *Laurelhurst I, supra* note 102 at 3, Finding of Fact 10; BDMC 18.98.060.

<sup>114</sup> AR 1293, AR 1176 (Ordinances 10-946 and 10-947, Section 4).

future development, including detailed setback requirements, allowed uses, and specific requirements for landscaping, open space, parking standards, and design review requirements.<sup>115</sup>

Even though the UWCMP had some characteristics of a planning document and a zoning code, the Board recognized the true nature of the master plan – which was a site plan for a specific development proposal that addressed the specific requirements of existing comprehensive plan policies and development regulations and, therefore, was beyond the Board’s jurisdiction.<sup>116</sup> Like the UWCMP, the MPD Permit Approval Ordinances are site plans for specific development proposals that include the level of detail appropriate for a large, phased development and the level of detail required by the existing comprehensive plan policies and development regulations including the 2009 Ordinances.

As the Board points out, it is true that the MPD’s Land Use Maps site uses rather than buildings.<sup>117</sup> But the Board erred when it asserted that Yarrow Bay did not even argue that the Land Use Maps were site plans; in fact, Yarrow Bay expressly made that argument.<sup>118</sup> Moreover, the 2009

---

<sup>115</sup> *Laurelhurst I*, *supra* note 102 at 6; *see also* AR 1324 – 1378 (Ord. 10-946 Exhibit B – Conclusions of law), AR 1379 – 1407 (Ord. 10-946 Exhibit C – Conditions of Approval), AR 1206 – 1257 (Ord. 10-947 Exhibit B – Conclusions of law), AR 1258 – 1286 (Ord. 10-947 Exhibit C – Conditions of Approval).

<sup>116</sup> *Laurelhurst I*, *supra* note 102 at 10-11.

<sup>117</sup> AR 2576, lines 19 – 20 (Board Order on Motions).

<sup>118</sup> AR 2576, lines 20 – 2 (Board Order on Motions); AR 1957, lines 13 – 15 (Yarrow Bay’s Motion to Dismiss) (“[T]he MPD Permits approved by Black Diamond are site plans for specific development proposals that include the level of detail appropriate for a large, phased development and the level of detail required by existing comprehensive plan policies and development regulations.”).

Ordinances mandated the MPD site plans locate uses, roads, protected open space and the like – not lot lines or building footprints.<sup>119</sup> The Land Use Maps are site plans, just like a conditional use permit for a gravel mine would include a site plan locating different phases for the extraction, roadways, and an operations area for crushing and washing, but not set forth the footprint of a specific crushing machine.

Inexplicably, the Board’s Order on Motions acknowledges the *Laurelhurst I* decision, while stating that the Board “does not now address the question of whether the Master Plan issue in *Laurelhurst I* was wrongly decided.”<sup>120</sup> As this Court knows, the ability to rely on precedent-setting cases is fundamental to the ability of the citizens and business owners of this State to plan for the future. The Board’s apparent determination to effectively overturn its past decision in *Laurelhurst I*, by issuing an inconsistent Order on Motions in this case, as well as the Board’s failure to recognize the true nature of the MPD Permit Approval Ordinances and site plans, was beyond the Board’s authority, an erroneous interpretation of law, not supported by substantial evidence, and arbitrary and capricious.

**4. The MPD Permits are not development regulations because they do not supersede or replace the City codes.**

The MPD Permit Approval Ordinances did not amend the City’s Comprehensive Plan or development regulations, and the rezones associated

---

<sup>119</sup> BDMC 18.98.080.

<sup>120</sup> AR 2576, note 66 (Board Order on Motions).

with the MPDs are consistent with the 2009 Ordinances. Therefore, the MPD Permit Approval Ordinances fall squarely onto the permit side of the Board's jurisdictional line.

The Board initially reached its conclusion that the MPDs were “regulatory” and not “permits” by relying on language from Chapter 13 of The Villages MPD Permit Application, which the Board believed stated that the MPD Application would “prevail” over any conflicting City regulations.<sup>121</sup> However, the MPD Permit Approval Ordinances plainly show that Yarrow Bay withdrew all of Chapter 13 from its MPD Permit Applications for both The Villages and Lawson Hills, except for limited parts that did not conflict with the City's code.<sup>122</sup> Thus, the foundation of the Board's decision is wrong: the approved MPDs simply do not “supersede and replace city code provisions.”<sup>123</sup> The Board's decision on this point was outside its jurisdiction, was not supported by substantial evidence, and was arbitrary and capricious.

---

<sup>121</sup> AR 2575, lines 18 – 25 and footnote 62 (citing page 13-35 of the Villages MPD Application, part of Chapter 13).

<sup>122</sup> AR 1238 (Lawson Hills Conclusion of Law 51(A)), AR 1356 – 1357 (The Villages Conclusion of Law 51(A)). Specifically, Yarrow Bay asked for and the City did approve the sensible allowance to reduce impervious surfaces by sharing parking spaces between business and residential uses in the “Town Center” portion of the Villages property, as well leaving room for Yarrow Bay to seek administrative deviations to engineering standards for street and utility designs using the already adopted, existing deviation procedures.

<sup>123</sup> AR 2575, lines 18 – 25 and note 62 (Board Order on Motions).

**5. The permit conditions imposed in the MPD Permits were not development regulations, but rather were permit conditions specifically authorized by City code and State law.**

Next, the Board concluded erroneously that the MPD Permit Approval Ordinances are more “similar” to development regulations than to project permits.<sup>124</sup> The Board’s conclusion depended upon the following premise stated in the Board’s Order on Motions: “The [MPD] ordinances adopt a multitude of regulatory controls.”<sup>125</sup> To support its premise, the Board listed seven examples of “regulatory controls” that it believed were adopted by the MPD Permit Approval Ordinances.<sup>126</sup> In fact, all of the Board’s examples are normal permit conditions that quote directly or are consistent with existing, adopted codes, are mitigation conditions imposed under the State Environmental Policy Act, Ch. 43.21C RCW (“SEPA”),<sup>127</sup> or are permit conditions authorized by the 2009 Ordinances as expressly anticipated by the Local Project Review Act, Ch. 36.70B RCW.<sup>128</sup>

---

<sup>124</sup> AR 2580 (Board Order on Motions) (“[T]he Board concludes that the MPD ordinances are more similar to sub-area plans or to development regulations as defined in RCW 36.70A.030(7) than to project permits as defined in RCW 36.70B.020(4).”).

<sup>125</sup> AR 2580, lines 13 – 14 (Board Order on Motions).

<sup>126</sup> AR 2580, footnote 81 (Board Order on Motions).

<sup>127</sup> RCW 43.21C.060 provides, in part, that an: “action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished.”

<sup>128</sup> RCW 36.70B.030(5) provides: “Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under RCW 43.21C.060. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if

The following list shows (in italics) the Board’s examples of supposed new regulatory controls in the 2010 MPD Permit Approval Ordinances, along with corresponding references to the true sources of these conditions, which in all cases are traditional, independently authorized permit conditions, not new development regulations:

(1) “*Requiring subdivisions to be designed for alley-loaded residential lots in most cases (Villages Condition 142, Lawson Hills Condition 147)*” – This requirement is taken directly from the 2009 Ordinances, specifically the MPD Framework Design Standards and Guidelines.<sup>129</sup>

(2) “*Allowing no more than 150 residential homes with a single point of access (Villages Condition 27, Lawson Hills Condition 125)*” – This requirement is taken directly from the City’s 2009 adopted Engineering Design and Construction Standards (EDCS 3.2.02(D)).<sup>130</sup>

(3) “*Requiring native vegetation in street landscaping and parks (Villages Condition 122, Lawson Hills Condition 125)*” – This requirement is taken directly from the 2009 Ordinances, specifically BDMC 18.72.020(D) and BDMC 18.76.060(C), and the City’s MPD Framework Design Standards and Guidelines.<sup>131</sup>

(4) “*Creating Parking Standards for the Town Center (Villages Condition 148)*” – This is not the “creation” of a parking standard, but instead the granting of a specific request for a deviation from adopted standards pursuant to

---

applicable.” (Emphasis added.) *See also* BDMC 18.98.080(A), allowing approval of an MPD when “appropriate conditions are imposed so that the objectives of the [following] criteria are met.”

<sup>129</sup> AR 2188, Guideline 3.

<sup>130</sup> *See* Appendix C at EDCS 3.2.02(D).

<sup>131</sup> *See* Appendix D at BDMC 18.72.020(D) and BDMC 18.76.060(C); AR 2191 (Guideline 8), AR 2196 (Guideline 1).

the deviation process set forth in the 2009 Ordinances, specifically BDMC 18.98.040(A)(7) and 18.98.130.<sup>132</sup>

(5) “*Limiting the number of floors of residential use above ground level commercial (Villages Condition 146)*” – This limitation is established by the 2009 Ordinances, specifically BDMC 18.98.120(F)(5).<sup>133</sup>

(6) “*Creating a distinct land use category to recognize potential light industrial uses (Lawson Hills Condition 144)*” – This allowance is provided for in the 2009 Ordinances. Specifically, the City of Black Diamond allows light industrial uses in a number of their land use zones.<sup>134</sup> BDMC 18.98.120 allows a range of uses inside a Master Planned Development and requires a mix of residential and commercial uses. Therefore, this condition did not require the “creation” of a distinct land use category, but instead required the applicant to use a different label on its site plan where it intended to site light industrial uses instead of lumping such uses into the site plan’s general office category.

(7) “*Adopting special standards for stormwater management, water conservation, earth moving and grading (Villages Conditions 53, 60, 104, 107)*”

Condition 53 (water conservation plan): The 2009 Ordinances, specifically BDMC 18.98.040(A)(12) and 18.98.190(B) require an MPD application to submit a proposed water conservation plan. Condition 53 is a project mitigation condition directly meeting the requirements of the BDMC.

Condition 60 (stormwater management requirements): This condition is taken directly from the recommended

---

<sup>132</sup> AR 1980 – 1981(BDMC 18.98.040(A)(7)); AR 1238 (Lawson Hills MPD at Conclusion of Law 51), AR 1356 – 1357 (The Villages MPD at Conclusion of Law 51).

<sup>133</sup> AR 1989 (BDMC 18.98.120(F)(5)). N.B.: subsection “5” is erroneously labeled “e”.

<sup>134</sup> See e.g., chs. 18.42 and 18.44 BDMC, attached as Appendix E.

SEPA mitigation conditions.<sup>135</sup> This condition also derives from the 2009 Ordinances, specifically BDMC 18.98.180(A) and (D); BDMC 18.98.020(B) (low impact design technologies); and the City's Engineering Design and Construction Standards (EDCS at 4.1.02 and 4.1.04).<sup>136</sup>

Condition 104 (earth moving and grading): This condition is taken directly from the recommended SEPA mitigation conditions<sup>137</sup> and also is a requirement set forth in the City's 2009 Engineering Design and Construction Standards at Section 2.2.05.<sup>138</sup>

Condition 107 (avoid discharge of concentrated water flow): This condition is taken directly from the recommended SEPA mitigation conditions.<sup>139</sup>

Land use permits are approved every day in cities and counties in this State. Those land use permits are approved subject to conditions that quote and apply existing codes and standards, and that provide mitigation recommended under SEPA or required by other existing local codes.<sup>140</sup> Land use permits regularly add specificity and requirements that go beyond adopted development regulations. But the Board's Order on Motions converts MPD Permit *conditions* into regulatory controls because of the Board's view that the permit conditions added specificity that goes beyond the City's code.

---

<sup>135</sup> AR 858 – 859; both SEPA mitigation conditions pursuant to policies adopted under RCW 43.21C.060 and mitigation conditions anticipated by existing development regulations are expected and referenced in RCW 36.70B.030(5).

<sup>136</sup> See Appendix C.

<sup>137</sup> AR 861.

<sup>138</sup> See Appendix C.

<sup>139</sup> AR 861.

<sup>140</sup> See RCW 36.70B.030(5).

By characterizing permit conditions as regulatory controls, the Board's Order on Motions redraws the jurisdictional line between the Board and the courts so that the Board has jurisdiction over any land use permit that includes conditions governing future permits. That means that any preliminary subdivision,<sup>141</sup> or conditional use permit, or other precursor land use entitlement such as the MPD Permit Approval Ordinances, which will necessarily include *conditions* that apply to further define or limit future engineering, grading, and construction permits, is a regulation under the Board's Order on Motions. That is not the dividing line set by Ch. 36.70A RCW and Ch. 36.70B RCW, reflected in prior, binding Board decisions, and confirmed by the Courts.

As described in RCW 36.70B.010, the complexity of Washington's environmental laws and development regulations has led to a single proposal requiring multiple land use permits and reviews. The law allows an initial permit to be granted subject to conditions that control later permits. For example, a preliminary plat application under Ch. 58.17 RCW may be approved subject to conditions.<sup>142</sup> The preliminary plat then remains valid for a period of five (or seven) years, during which time detailed engineering and construction permits are obtained for roads, drainage, utilities, and then the construction of the infrastructure follows or bonds are posted to assure infrastructure construction.<sup>143</sup> The final plat

---

<sup>141</sup> See e.g., RCW 58.17.033, RCW 58.17.110(2), RCW 58.17.120.

<sup>142</sup> *Id.*

<sup>143</sup> RCW 58.17.130 and RCW 58.17.140.

cannot be recorded until either the completion of all necessary improvements in accordance with the preliminary plat conditions or the posting of a bond to guarantee such construction.<sup>144</sup> The same conditional approval process applies to other permit decisions specifically exempted from Board review like conditional use permits, site plan reviews, and planned unit developments. The conditions of approval attached to the first permit govern the subsequent applications and approvals for permits, but that fact does not convert the first permit from a permit to a development regulation. The Board erred by redrawing this distinct line when it asserted its authority over the MPD Permit Approval Ordinances.

The Board also erred in its interpretation and application of the jurisdictional dividing line described in the *Davidson Serles* case.<sup>145</sup> *Davidson Serles* is not instructive with regard to analyzing the MPD Permit Approval Ordinances. In the Board's decision regarding appeals of two of the six ordinances that had been adopted by the City of Kirkland, the Board explained:

On December 16, 2008, the Kirkland City Council took action to enable applications for three private developments to proceed in downtown Kirkland. Rather than conduct three site-specific plan amendments and rezones, the City opted to review the proposed amendments together as a legislative process. The City undertook a package of six ordinances. . . The two challenged here are Ordinance 4170 . . . and Ordinance 4171.<sup>146</sup>

---

<sup>144</sup> RCW 58.17.130, RCW 58.17.165, and RCW 58.17.170.

<sup>145</sup> AR 2569 – 2572 (Board Order on Motions); see *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 822 (2011).

<sup>146</sup> *Davidson Serles v. City of Kirkland*, No. 09-3-0007c, 2009 WL 3309101 at 4 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. October 5, 2009) (Final Decision and Order).

Since the City of Kirkland chose to undertake a legislative process to plan for the future development of three sites, including the Parkplace site, rather than to take site-specific permitting action for each property, it is hardly surprising that the Court of Appeals concluded that Kirkland's Ord. 4172 was a legislative adoption of development regulations.<sup>147</sup> Indeed, Ord. 4172, the design review ordinance that was the subject of the Court of Appeals decision, is described as “[a]dopting development master plan and design guidelines for Parkplace.”<sup>148</sup>

Ord. 4172 is analogous to the MPD Framework Design Standards and Guidelines<sup>149</sup> adopted as part of Black Diamond's 2009 Ordinances: both were adopted in legislative processes to guide future development, and both were subject to appeal to the Board. In both *Davidson Serles* and here, no timely appeal of the design guidelines was made to the Board. In *Davidson Serles*, the complaining neighboring property owners attempted to correct that omission by seeking a declaratory judgment, constitutional writ, or LUPA challenge by arguing the standards were a permit.<sup>150</sup> Here, the project opponents brought a collateral attack on the 2009 Ordinances by appealing the MPD Permit Approval Ordinances as regulations to the Board.

---

<sup>147</sup> *Davidson Serles*, 159 Wn. App. at 631.

<sup>148</sup> *Davidson Serles v. City of Kirkland*, No. 09-3-0007c, 2009 WL 3309101 at 18, footnote 6 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. October 5, 2009) (Final Decision and Order).

<sup>149</sup> AR 2182 - 2199.

<sup>150</sup> *Davidson Serles*, 159 Wn. App. at 623.

The *Davidson Serles* decision does analyze the dividing line between legislatively adopted development regulations and quasi-judicial permit review.<sup>151</sup> In that analysis, the *Davidson Serles* decision focused on the language of RCW 36.70A.030(7) defining development regulations as the “controls placed on development or land use activities.” But what the Board missed in its reliance on *Davidson Serles* is that *Davidson Serles* does not analyze how the permit conditions authorized by SEPA and local ordinances, and expressly anticipated by RCW 36.70B.030(5), differ from development regulations. As a result, *Davidson Serles* is not applicable to this case.

The definitions and dividing line set by Ch. 36.70A RCW and Ch. 36.70B RCW, combined with SEPA, provide for the following land use planning and permitting system: (1) legislative adoption of comprehensive plans,<sup>152</sup> (2) legislative adoption of development regulations,<sup>153</sup> (3) permit review, using the foundation laid by the comprehensive plan and development regulations to determine consistency as to the types of uses permitted on a site, the density of residential development, and the availability and adequacy of public facilities,<sup>154</sup> and (4) permit approval subject to mitigation conditions authorized under SEPA or local codes.<sup>155</sup> Here, the 2009 Ordinances were

---

<sup>151</sup> *Id.* at 629 – 631.

<sup>152</sup> RCW 36.70A.040 and .070.

<sup>153</sup> RCW 36.70A.040.

<sup>154</sup> RCW 36.70B.030 and .040.

<sup>155</sup> RCW 36.70B.030(5).

steps (1) and (2). The applications for The Villages and Lawson Hills MPDs were processed under step (3), and the MPD Permit Approval Ordinances were the result at the end of step (4).

The Board's determination that the MPD Permit Approval Ordinances were development regulations, not permits, failed to discern and apply the distinction between a permit approval with conditions that is consistent with adopted comprehensive plans and development regulations, and the adoption of development regulations themselves. The Board's decision was an erroneous interpretation of law, not supported by substantial evidence, arbitrary and capricious, and outside its jurisdiction.

**6. The Board should not have ignored applicable legal authority just because those cases involved environmental review using the planned action ordinance process.**

The Board flatly refused to consider two Board decisions cited to it as authority describing the nature of master planned projects.<sup>156</sup> The Board's refusal was based on the fact that those projects also included SEPA Planned Action Ordinances. But a SEPA Planned Action Ordinance ("PAO") is just a different type of SEPA review that can be applied to master plans.<sup>157</sup> That the SEPA review process differed does not alter the nature of the underlying master plan.<sup>158</sup>

---

<sup>156</sup> AR 2577 – 2578 (Board Order on Motions).

<sup>157</sup> RCW 43.21C.031. SEPA review for Lawson Hills and The Villages MPDs anticipated a possible future planned action ordinance, but none has been adopted. *See* AR 27 (Permits and Approvals List); AR 606 (Permits and Approvals).

<sup>158</sup> Alternatively, if the form of SEPA review does matter, then Yarrow Bay could seek to reprocess its MPDs together with a SEPA Planned Action Ordinance, and thereby insulate them from Board review.

The Board’s analysis in *Kent CARES* and *2101 Mildred* is instructive.<sup>159</sup> In *Kent CARES*, the petitioners challenged Kent Station, an expansive commercial and mixed-use development to be constructed over a large area. The City had previously adopted a subarea plan for the project, and the petitioners asserted that the PAO was a “pending revision” of the subarea plan, or was otherwise subject to Board review.<sup>160</sup> The Board determined that it lacked jurisdiction for a number of reasons, including that the Kent Station PAO implemented the City’s existing land use policies and development regulations, and the lack of reference in the PAO to its adoption pursuant to Ch. 36.70A RCW.<sup>161</sup> *2101 Mildred* includes similar findings that the PAO did not amend the City’s comprehensive plan or development regulations and made no reference to adoption pursuant to Ch. 36.70A RCW.<sup>162</sup> Like in *Kent CARES* and *2101 Mildred*, the MPD Permit Approval Ordinances implement rather than amend existing land use policies and development regulations, and the MPD Permit Approval Ordinances did not assert they were adopted pursuant to Ch. 36.70A RCW. Accordingly, the MPD Permit Approval Ordinances are also outside the statutory jurisdiction of the Board, and the Board’s refusal to consider these cases is an erroneous application of law.

---

<sup>159</sup> *Kent CARES v. City of Kent*, No. 02-3-0015, 2002 WL 31998488 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. November 27, 2002) (Order on Motions); *2101 Mildred LLC v. University Place*, No. 06-3-0022, 2006 WL 2644139 (Central Puget Sd. Growth Mgmt. Hrgs. Bd. August 17, 2006) (Order of Dismissal).

<sup>160</sup> *Kent CARES*, 2002 WL 31998488 at 3.

<sup>161</sup> *Id.* at 4 – 5.

<sup>162</sup> *2101 Mildred*, 2006 WL 2644139 at 4.

**7. The Board lacked jurisdiction to overturn the City’s review and approval process, which even the Board admitted resulted in exceptional public involvement.**

The Board’s errors in determining its jurisdiction led the Board to issue an erroneous determination that the MPD Permit Approval Ordinances were not processed using the GMA legislative public participation procedures. Yet, the Board recognized that the City made an “exceptional effort to involve the public through their quasi-judicial process.”<sup>163</sup> In short, the Board concluded that despite the extensive review process documented in BDMC 18.98.060, the City failed to provide enough public participation. For the reasons argued above, this determination was outside the Board’s authority, was also an erroneous application of the law, was not supported by substantial evidence and was arbitrary and capricious.

**V. CONCLUSION**

The Legislature enacted a clear dividing line. That line separates a city’s legislative adoption of comprehensive plans and development regulations from the review of permits which is conducted to assure development projects are consistent with adopted plans and regulations. That dividing line also separates the appellate jurisdiction, assigning review of comprehensive plans and development regulations to the Growth Management Hearings Board, and assigning review of permits to the Superior Courts. The Board’s February 15, 2011 Order on Motions

---

<sup>163</sup> AR 2584, lines 17 – 18 (Board Order on Motions).

moved that dividing line so as to substantially, and unlawfully, expand the Board's jurisdiction.

The Board's justification for moving the dividing line was the Board's view that Yarrow Bay's MPD permits were, instead, either comprehensive plan amendments or additional regulatory controls. But each rationale for that justification presented by the Board fails. First, the Board ignored that the statutory deadline for appeal of the 2009 Ordinances had passed, and issued a decision allowing a collateral attack and forcing reversal of those 2009 Ordinances. Next, in direct contravention of its guiding statute, the Board considered and decided a legal issue that was not even presented to it. The Board went on to ignore its own precedent that preliminary site plans for master planned projects are still permits even when they do not authorize construction. Then, the Board misread the record so as to determine that permit requests which had been abandoned were somehow approved. The Board continued by determining that a number of permit conditions were new regulations, when, in fact, those permit conditions were expressly authorized by, and consistent with, City code and State law. The Board also ignored applicable precedent for makeweight reasons. And the Board's illegal assumption of jurisdiction led to the conclusion that a five-month-long extensive public hearing process before both the City's Hearing Examiner and then the City Council failed to provide adequate opportunities for public participation.

The Board's assumption of jurisdiction over this case is entitled to no deference and was in error. This Court should reverse and remand to the Board to enter an order of dismissal for lack of subject matter jurisdiction.

DATED this 8<sup>th</sup> day of August, 2011.

CAIRNCROSS & HEMPELMANN, P.S.



Nancy Bainbridge Rogers, WSBA No.  
26662

Andrew S. Lane, WSBA No. 26514

Randall P. Olsen, WSBA No. 38488

524 Second Ave., Ste. 500

Seattle, WA 98104

Tel: (206) 587-0700

Attorneys for BD Village Partners, LP and  
BD Lawson Partners, LP

**Certificate of Service**

I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on August 8, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via legal messenger and email:

**Attorneys for Central Puget Sound Growth Management Hearings Board**

Attorney General of Washington  
Attn: Marc Worthy  
Licensing and Administrative Law Division  
800 Fifth Avenue, Ste. 2000  
Seattle, WA 98104  
Email: marcw@atg.wa.gov  
shirlel@atg.wa.gov  
lalseaef@atg.wa.gov

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 AUG - 8 PM 4: 49

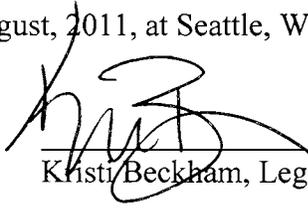
**Attorneys for City of Black Diamond:**

Bob Sterbank  
Michael R. Kenyon  
Kenyon Disend, PLLC  
The Municipal Law Firm  
11 Front Street South  
Issaquah, WA 98027-3820  
Email: bob@kenyondisend.com  
mike@kenyondisend.com  
margaret@kenyondisend.com

**Attorneys for Toward Responsible Development, et al.**

David A. Bricklin  
Bricklin & Newman, LLP  
1001 Fourth Ave., Ste. 3303  
Seattle, WA 98154  
Email: bricklin@bnd-law.com

DATED this 8<sup>th</sup> day of August, 2011, at Seattle, Washington.



---

Kristi Beckham, Legal Assistant

**APPENDIX  
TO PETITIONERS' BRIEF**

**APPENDIX A**

**TO**

**BRIEF OF PETITIONERS**

**APPENDIX A**

**Black Diamond, Washington, Code of Ordinances >> Title 18 - ZONING >> Chapter 18.98 - MASTER PLANNED DEVELOPMENT >>**

**Chapter 18.98 - MASTER PLANNED DEVELOPMENT <sup>[17]</sup>**

**Sections:**

- 18.98.005 - MPD zoning district created.**
- 18.98.010 - Master planned development (MPD) permit—Purpose.**
- 18.98.020 - MPD permit—Public benefit objectives.**
- 18.98.030 - MPD permit—Criteria for MPD eligibility.**
- 18.98.040 - MPD permit—Application requirements.**
- 18.98.050 - MPD permit—Required approvals.**
- 18.98.060 - MPD permit—Review process.**
- 18.98.070 - MPD permit—Environmental review (SEPA).**
- 18.98.080 - MPD permit—Conditions of approval.**
- 18.98.090 - MPD permit—Development agreement.**
- 18.98.100 - MPD permit—Amendments to an approved MPD permit.**
- 18.98.110 - MPD standards—Design review required.**
- 18.98.120 - MPD standards—Permitted uses and densities.**
- 18.98.130 - MPD standards—Development standards.**
- 18.98.140 - MPD standards—Open space requirements.**
- 18.98.150 - MPD standards—On-site recreation and trail requirements.**
- 18.98.155 - MPD standards—Sensitive areas requirements.**
- 18.98.160 - MPD standards—Transfer of development rights.**
- 18.98.170 - MPD standards—Street standards.**
- 18.98.180 - MPD standards—Stormwater management standards.**
- 18.98.190 - MPD standards—Water and sewer standards.**
- 18.98.195 - Vesting.**
- 18.98.200 - Revocation of MPD permit.**

**18.98.005 - MPD zoning district created.**

The master plan development (MPD) zoning district is created. No development activity may occur, or any application accepted for processing, on property subject to an MPD zoning designation, or for which the submittal of an MPD is required by a development agreement, unless it is done in accordance with the terms and conditions of a valid MPD permit or consistent with this chapter. Development activity shall include, but not be limited to, grading, clearing, filling, tree harvesting, platting, short platting, building or any other activity for which a city permit or other approval is required.

*(Ord. No. 897, § 1(Exh. A), 4-16-2009)*

**18.98.010 - Master planned development (MPD) permit—Purpose.**

The purposes of the master planned development (MPD) permit process and standards set out in this chapter are to:

- A. Establish a public review process for MPD applications;
- B. Establish a comprehensive review process for development projects occurring on parcels or combined parcels greater than eighty acres in size;
- C. Preserve passive open space and wildlife corridors in a coordinated manner while also preserving usable open space lands for the enjoyment of the city's residents;
- D. Allow alternative, innovative forms of development and encourage imaginative site and building design and development layout with the intent of retaining significant features of the natural environment;
- E. Allow flexibility in development standards and permitted uses;
- F. Identify significant environmental impacts, and ensure appropriate mitigation;
- G. Provide greater certainty about the character and timing of residential and commercial development and population growth within the city;
- H. Provide environmentally sustainable development;
- I. Provide needed services and facilities in an orderly, fiscally responsible manner;
- J. Promote economic development and job creation in the city;
- K. Create vibrant mixed-use neighborhoods, with a balance of housing, employment, civic and recreational opportunities;

- L. Promote and achieve the city's vision of incorporating and/or adapting the planning and design principles regarding mix of uses, compact form, coordinated open space, opportunities for casual socializing, accessible civic spaces, and sense of community; as well as such additional design principles as may be appropriate for a particular MPD, all as identified in the book *Rural By Design* by Randall Arendt and in the city's design standards;
- M. Implement the city's vision statement, comprehensive plan, and other applicable goals, policies and objectives set forth in the municipal code.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.020 - MPD permit—Public benefit objectives.**

A specific objective of the MPD permit process and standards is to provide public benefits not typically available through conventional development. These public benefits shall include but are not limited to:

- A. Preservation and enhancement of the physical characteristics (topography, drainage, vegetation, environmentally sensitive areas, etc.) of the site;
- B. Protection of surface and groundwater quality both on-site and downstream, through the use of innovative, low-impact and regional stormwater management technologies;
- C. Conservation of water and other resources through innovative approaches to resource and energy management including measures such as wastewater reuse;
- D. Preservation and enhancement of open space and views of Mt. Rainier;
- E. Provision of employment uses to help meet the city's economic development objectives;
- F. Improvement of the city's fiscal performance;
- G. Timely provision of all necessary facilities, infrastructure and public services, equal to or exceeding the more stringent of either existing or adopted levels of service, as the MPD develops; and
- H. Development of a coordinated system of pedestrian oriented facilities including, but not limited to, trails and bike paths that provide accessibility throughout the MPD and provide opportunity for connectivity with the city as a whole.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.030 - MPD permit—Criteria for MPD eligibility.**

- A. *Where required.* An MPD permit shall be required for any development where:
  - 1. Any of the property within the development is subject to an MPD designation on the Comprehensive Plan Future Land Use Map or an MPD zoning designation;
  - 2. The parcel or combined parcels to be included in a development total at least eighty gross acres; or
  - 3. Any of the property within the development is subject to a development agreement that requires an MPD permit to be obtained.
  - 4. Provided, however, the above provisions notwithstanding, any commercial area that is intended to be used to meet the economic objectives of an MPD and is geographically separated from the residential component of a proposed MPD may be approved through the site plan approval process of Chapter 18.16, subject to the following conditions:
    - a. The commercial area is included in an MPD application that has been determined to be complete and is identified in the application as being intended to meet the economic objectives of the MPD application;
    - b. The MPD design and development standards shall be applied, unless modified in accordance with the provisions of section 18.98.130(A);
    - c. The approved conditions shall include the requirements of section 18.98.080(A);
    - d. If the environmental review on the MPD permit application has not been completed, then, if determined appropriate, an environmental determination may be issued for the commercial area, provided the determination contains provisions that the commercial area shall still be considered for cumulative impact purposes, and appropriate additional mitigation requirements in the environmental review for the MPD application;
    - e. The provisions of the subsequent MPD approval shall apply to the site plan approval, including vesting, but only to the extent that they do not adversely impact complete building applications that have been submitted, or on-site infrastructure improvements that have already been permitted.
- B. *Eligibility.* Where not required under subsection (A) of this section the city may accept an MPD permit application, and process a development proposal as an MPD, only for contiguous properties that are in a single ownership, or if in multiple ownerships, specific agreements satisfactory to the city shall be signed by each property owner that place the properties under unified control, and bind all owners to the MPD conditions of approval.

1. All properties within its proposed MPD are within the city limits or within the PAA provided that, if a proposed MPD includes lands within the PAA, approval of the entire MPD will not be granted until such time annexation of unincorporated lands is completed.
- C. **Contiguity.** All properties to be included in an MPD must be contiguous, excepting those areas intended to be used for commercial purposes, other than neighborhood commercial.
- (Ord. No. 897, § 1(Exh. A), 4-16-2009)

### **18.98.040 - MPD permit—Application requirements.**

- A. **Application requirements.** All applications for approval of an MPD permit shall, at a minimum, include all of the information and documents set forth in this section.
1. A set of master plan drawings, drawn at a scale as determined by the director, showing:
    - a. Proposed open space, parks, recreation areas, trail networks, wildlife corridors, and perimeter buffers, and the intended ownership and acreage for each area;
    - b. Existing environmentally sensitive areas and their buffers, together with the reports, surveys or delineations used to identify their locations and areas for which development within a wetland, bog, stream or its related buffer is proposed and for which mitigation or buffer averaging will be required;
    - c. Proposed locations and preliminary street sections of all streets having a function higher than neighborhood access, and all pedestrian connections including trails; if the local access street section is intended to vary from the adopted city standard;
    - d. Proposed sites for schools and other public facilities required to serve the development;
    - e. Conceptual public utility plans (sewer, water, stormwater);
    - f. Types, generalized locations, acreages, and densities of proposed residential and nonresidential development;
    - g. Proposed sites for public transit facilities;
    - h. Any existing easements located upon the property;
    - i. Identify areas that will be protected from development by the requirements of Chapter 19.10 (sensitive areas ordinance).
  2. A map, drawn at a scale as determined by the director showing property boundaries and existing topography (five-foot contour intervals), areas of vegetation by type, other natural features, and existing structures.
  3. A legal description of the MPD property, together with a title report no more than thirty days old, disclosing all lien holders and owners of record.
  4. A projected phasing plan and development time schedule, regardless of intended ownership, for all development, including but not limited to housing, stormwater systems, sanitary sewer facilities, public water facilities, roads, trails, commercial (including required neighborhood commercial) areas, recreational facilities, and open space, including any off-site improvements.
  5. A completed SEPA checklist, with various environmental studies and SEPA documents. If the city and the applicant have agreed that an environmental impact statement will be prepared for the proposal, a checklist shall not be required.
  6. A comprehensive fiscal analysis disclosing the short and long-term financial impacts of the proposed MPD upon the city both during development and following project completion, including an analysis of required balance of residential and commercial land uses needed to ensure a fiscal benefit to the city after project completion, and including an analysis of personnel demands and fiscal short-falls anticipated during the development phase of the MPD together with recommended mitigations to ensure that the MPD does not negatively impact the fiscal health of the city, nor the ability of the city to adequately serve existing residents, provided that if an EIS will be prepared, the fiscal analysis may be prepared concurrently.
  7. A narrative description and illustrations of the MPD planning/design concept, demonstrating how the proposed MPD is consistent with the adopted MPD design standards, the comprehensive plan, all elements of Sections 18.98.010 and 18.98.020, and other applicable policies and standards. If deviations from these standards are proposed, the narrative shall describe how the proposed deviations provide an equal or greater level of public benefit.
  8. Typical cross-sections of all proposed street and trail types, including landscaping, pedestrian facilities, and any other proposed improvements within the right-of-way or trail corridors.
  9. A listing of all property owners of record within five hundred feet of the exterior boundaries of all parcels proposed to be included within the MPD (When one or more of the MPD property owners own property adjacent to but not included within the MPD, the five hundred feet shall be measured from the exterior boundary of this adjacent property.). The applicant shall update the list prior to each proposed public meeting or required public mailing, as requested by the city, in order to assure a current list of all required notices.
  10. A narrative description and illustrations of how street alignments and land uses in the proposed MPD will coordinate and integrate with existing adjacent development, and adjacent undeveloped properties.

11. A narrative description of proposed ownership and proposed maintenance program for all lands and facilities required to be shown on the master plan drawings by subsection (A)(1)(a) of this section.
  12. A proposed water conservation plan for the MPD pursuant to Section 18.98.190
  13. If applicable, a description of any mineral (or other resource) extraction operations proposed within the MPD, the timing and phasing of the proposed operation and reclamation of the land for subsequent proposed uses.
  14. Proof of proper notice for the public information meeting.
  15. A narrative description, with reference to the drawings required by subsection (A)(1)(a) above, of how the proposal will comply with the sensitive areas ordinance (Chapter 19.10);
  16. Proposed floor area ratios (FAR) for both residential and non-residential areas;
  17. A narrative description, with associated tables, showing the intended residential density, the number of development rights that are needed to meet the intended density, the number of development rights that are already associated with the property included within the proposed MPD boundaries, and the number of development rights that must be acquired to meet the intended density;
  18. If transfer of development rights are needed to attain proposed densities, a phase plan for the acquisition of development rights certificates shall be submitted, demonstrating that for each residential phase, no more than sixty percent of the proposed density is based upon the land area included in that phase. Prior to approval of implementing project actions (subdivision approval, site plan approval, etc.), the originals or documentation of the right to use development rights held in trust by the city pursuant to the terms of the transfer of development rights program (Chapter 19.24), shall be provided.
- B. The director shall have the authority to administratively establish additional detailed submittal requirements.
- C. The applicant shall pay all costs incurred by the city in processing the MPD permit application, including, but not limited to, the costs of planning and engineering staff and consultants, SEPA review, fiscal experts, legal services, and overall administration. A deposit in an amount equal to the staff's estimate of processing the MPD, as determined after the preapplication conference shall be required to be paid at the time of application, and shall be placed in a separate trust account. The city shall establish procedures for periodic billings to the applicant of MPD review costs as such costs are incurred, and may require the maintenance of a minimum fund balance through additional deposit requests.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.050 - MPD permit—Required approvals.

- A. *MPD permit required.* An approved MPD permit and development agreement shall be required for every MPD.
- B. *Consolidated review.* An MPD permit will be allowed as part of a consolidated permit action as authorized by RCW 36.70B. Consolidation shall not be allowed for comprehensive plan amendments. At the city's discretion, an MPD permit may be processed concurrently with amendments to the development regulations or interlocal agreements, provided that the applicant acknowledges in writing that they assume the risk of the MPD permit application being denied or otherwise conditioned as a result of final action on any requested amendment.
- C. *Implementing development applications.* An MPD permit must be approved, and a development agreement as authorized by RCW 36.70B completed, signed and recorded, before the city will grant approval to an application for any implementing development approval. An application for an MPD permit may be processed with amendments to the comprehensive plan, zoning code, inter-local agreements and land development permits associated with the MPD permit, such as forest practice permits, clearing and grading permits, shorelines permits, and permits required by other public agencies. The city shall not grant approvals to related permits before the granting of an MPD permit and recording of a development agreement except as provided in [Section] 18.98.030.A.4.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.060 - MPD permit—Review process.

- A. *MPD permit—Pre-application conference, public information meeting and planning commission informational meeting required.*
1. A pre-application conference between the MPD applicant or representative and staff is required before the city will accept an MPD permit application.
    - a. The purpose of this conference is for the applicant to familiarize the staff with the proposed MPD, and for the staff to review with the applicant the city's submittal requirements, anticipated staffing needs, and processing procedures for MPD permit approval. The goal is to identify the city's objectives and likely issues, and to eliminate potential problems that could arise during processing of the MPD permit application prior to formal processing on the MPD permit application.
    - b. The applicant or representative shall present the information required as part of the MPD application. The city's intent is that the conference occurs after site inventory and analysis has been substantially completed, but prior to the completion of detailed survey, architectural or engineering work on the proposal.

- c. A nonrefundable pre-application conference fee in an amount set forth in the adopted fee schedule resolution shall be paid before the pre-application conference will be scheduled.
  - d. If, at the pre-application conference, the city determines that it does not have adequate staff, space, or equipment, to process the application, then the applicant shall deposit with the city an amount sufficient for the city to hire the additional staff and/or consultants, and acquire the space and/or equipment necessary to process the application. The deposit must be made no less than four months or more than five months before the application is submitted. The public information meeting may not be scheduled until the deposit has been made. The city council may waive or shorten the four-month period if it is determined the necessary arrangements for staffing, space and equipment can be made in less than four months.
2. After the pre-application conference has been completed, a public information meeting shall be conducted by the applicant prior to acceptance of an MPD permit application.
- a. The applicant shall schedule and conduct a public information meeting regarding the proposed application. The public information meeting shall be conducted at City Hall, or at such other public location within the city that will accommodate the anticipated attendees. The applicant shall attend the meeting and provide information to the public regarding the proposed project, its timing, and consistency with the city's MPD code, the comprehensive plan, and other applicable city codes and regulations.
  - b. The public information meeting shall not be a public hearing, but shall allow for an informal exchange of comments between the applicant and the general public. Notice of this meeting shall be provided in the newspaper of record at least fourteen days in advance of the meeting and shall be mailed to the property owners identified in subsection A.4.e.(c) of this section.
3. After the public information meeting has been completed, a planning commission informational meeting shall be conducted. The planning commission information meeting is required before the city will accept an application for MPD permit approval.
- a. The planning commission information meeting will take place at a regular meeting of the commission. At this meeting, the applicant shall present the overall planning and design concept of the proposed MPD, and the commission shall provide preliminary feedback to the applicant regarding the consistency of this concept with the city's adopted standards, goals and policies. The planning commission may bring specific issues of interest or concern to the attention of the applicant.
  - b. While a public meeting, the purpose of the planning commission informational meeting is not intended for the receipt of comments from the public regarding the proposed MPD.
4. **MPD permit public review process.**
- a. **Completeness check and SEPA.** Staff shall review the MPD application for completeness and, once it is determined to be complete, provide the required notice of application. Staff will then initiate the SEPA process.
  - b. **Optional EIS scoping meeting.** If the responsible official makes a determination of environmental significance regarding an MPD application, staff may schedule and conduct an EIS scoping meeting. The applicant shall attend the meeting and provide information regarding the proposed project, scope, planning, timing, and the results of any relevant environmental studies performed by the applicant's consultants.
  - c. **Staff review.** At the conclusion of the SEPA process, staff will conduct its detailed review of the proposal. This review may include requesting additional information, or proposal revisions, from the applicant.
  - d. **Staff report.** The staff will prepare a written staff report to the hearing examiner. The completed staff report shall be sent to the hearing examiner and to the applicant at least ten calendar days prior to the public hearing.
  - e. **Hearing examiner public hearing.** The city's hearing examiner shall hold a public hearing on the MPD permit application. At least fourteen calendar days prior to the public hearing, the city shall provide notice of the hearing as follows:
    - (a) Publication in the city's newspaper of record;
    - (b) Posting of the proposal site, in at least three locations visible from public streets or rights-of-way;
    - (c) Mailing to owners of record of properties within five hundred feet of the perimeter of the proposed MPD per Section 18.98.040(A)(9); and
    - (d) Any person(s) formally requesting notice.
5. **MPD permit approval criteria.** The hearing examiner shall prepare recommended findings of fact, conclusions of law, and conditions of approval or a recommendation for denial for the city council's consideration, and shall transmit these to the city council within fourteen calendar days of the close of the public hearing unless the hearing examiner determines by written findings that a specified amount of additional time is necessary because the matter is of unusual complexity or scope or for other good cause. The examiner shall evaluate the MPD application and other evidence submitted into the record, to

determine if the application, when appropriately conditioned, meets or exceeds the approval criteria set forth in Section 18.98.080

6. **City council.** At its first regular meeting following the receipt of the hearing examiner's recommendations, the city council shall schedule a time for its consideration of the MPD. The council may:
  - a. Accept the examiner's recommendation;
  - b. Remand the MPD application to the examiner with direction to open the hearing and provide supplementary findings and conclusions on specific issues; or
  - c. Modify the examiner's recommendation. If modifying the examiner's recommendation, the council shall enter its own modified findings and conclusions as needed.
7. **Appeals.** The council's decision with regard to an MPD permit shall be the city's final action for the purpose of any and all appeals.

(Ord. No. 897, § 1(Exh. A), 4-16-2009; Ord. No. 935, § 2, 2-18-2010)

#### 18.98.070 - MPD permit—Environmental review (SEPA).

- A. Pursuant to the requirements of the State Environmental Policy Act (SEPA) and local SEPA regulations, the city shall determine whether an environmental impact statement is required for the MPD proposal. An application for an MPD permit shall include, at a minimum, a completed environmental checklist. Prior to or concurrent with application submittal, the city and the applicant may agree to prepare an environmental impact statement for the proposal.
- B. If desired by the applicant and deemed appropriate by the city, an MPD proposal may be designated by the city as a planned action pursuant to RCW 43.21C.031(2) and WAC 197-11-164 et seq.
- C. Implementing city permits and approvals, such as preliminary plats, building permits, and design reviews, shall be subject to applicable SEPA requirements.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.080 - MPD permit—Conditions of approval.

- A. An MPD permit shall not be approved unless it is found to meet the intent of the following criteria or that appropriate conditions are imposed so that the objectives of the criteria are met:
  1. The project complies with all applicable adopted policies, standards and regulations. In the event of a conflict between the policies, standards or regulations, the most stringent shall apply unless modifications are authorized in this chapter and all requirements of Section 18.98.130 have been met. In the case of a conflict between a specific standard set forth in this chapter and other adopted policies, standards or regulations, then the specific requirement of this chapter shall be deemed the most stringent.
  2. Significant adverse environmental impacts are appropriately mitigated.
  3. The proposed project will have no adverse financial impact upon the city at each phase of development, as well as at full build-out. The fiscal analysis shall also include the operation and maintenance costs to the city for operating, maintaining and replacing public facilities required to be constructed as a condition of MPD approval or any implementing approvals related thereto. This shall include conditioning any approval so that the fiscal analysis is updated to show continued compliance with this criteria, in accordance with the following schedule:
    - a. If any phase has not been completed within five years, a new fiscal analysis must be completed with regards to that phase before an extension can be granted; and
    - b. Prior to commencing a new phase.
  4. A phasing plan and timeline for the construction of improvements and the setting aside of open space so that:
    - a. Prior to or concurrent with final plat approval or the occupancy of any residential or commercial structure, whichever occurs first, the improvements have been constructed and accepted and the lands dedicated that are necessary to have concurrency at full build-out of that project for all utilities, parks, trails, recreational amenities, open space, stormwater and transportation improvements to serve the project, and to provide for connectivity of the roads, trails and other open space systems to other adjacent developed projects within the MPD and to the MPD boundaries; provided that, the city may allow the posting of financial surety for all required improvements except roads and utility improvements if determined to not be in conflict with the public interest; and
    - b. At full build-out of the MPD, all required improvements and open space dedications have been completed, and adequate assurances have been provided for the maintenance of the same. The phasing plan shall assure that the required MPD objectives for employment, fiscal impacts, and connectivity of streets, trails, and open space corridors are met in each phase, even if the construction of improvements in subsequent phases is necessary to do so.
- 5.

The project, at all phases and at build-out, will not result in the lowering of established staffing levels of service including those related to public safety.

6. Throughout the project, a mix of housing types is provided that contributes to the affordable housing goals of the city.
  7. If the MPD proposal includes properties that are subject to the Black Diamond Urban Growth Area Agreement (December 1996), the proposal shall be consistent with the terms and conditions therein.
  8. If the MPD proposal includes properties that were annexed into the city by Ordinances 515 and 517, then the proposal must be consistent with the terms and conditions therein.
  9. The orientation of public building sites and parks preserves and enhances, where possible taking into consideration environmental concerns, views of Mt. Rainier and other views identified in the comprehensive plan. Major roads shall be designed to take advantage of the bearing lines for those views.
  10. The proposed MPD meets or exceeds all of the public benefit objectives of [Section] 18.98.020 and the MPD purposes of [Section] 18.98.010(B) through (M).
  11. If the MPD project is adjacent to property already developed, or being developed as an MPD, or adjacent to property which is within an MPD zone, then the project is designed so that there is connectivity of trails, open spaces and transportation corridors, the design of streetscape and public open space amenities are compatible and the project will result in the functional and visual appearance of one integrated project with the adjacent properties subject to an MPD permit or, if not yet permitted, within an MPD zone.
  12. As part of the phasing plan, show open space acreages that, upon build-out, protect and conserve the open spaces necessary for the MPD as a whole. Subsequent implementing approvals shall be reviewed against this phasing plan to determine its consistency with open space requirements.
  13. Lot dimensional and building standards shall be consistent with the MPD Design Guidelines.
  14. School sites shall be identified so that all school sites meet the walkable school standard set for in the comprehensive plan. The number and sizes of sites shall be designed to accommodate the total number of children that will reside in the MPD through full build-out, using school sizes based upon the applicable school district's adopted standard. The requirements of this provision may be met by a separate agreement entered into between the applicant, the city and the applicable school district, which shall be incorporated into the MPD permit and development agreement by reference.
- B. So long as to do so would not jeopardize the public health, safety, or welfare, the city may, as a condition of MPD permit approval, allow the applicant to voluntarily contribute money to the city in order to advance projects to meet the city's adopted concurrency or level of service standards, or to mitigate any identified adverse fiscal impact upon the city that is caused by the proposal.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.090 - MPD permit—Development agreement.**

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. This agreement shall be signed by the mayor and all property owners and lien holders within the MPD boundaries, and recorded, before the city may approve any subsequent implementing permits or approvals (preliminary plat, design review, building permit, etc.).

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.100 - MPD permit—Amendments to an approved MPD permit.**

An applicant may request an amendment to any element or provision of an approved MPD. All applications for amendments shall be deemed either "minor" or "major." An amendment application shall be considered minor if it meets all of the following criteria:

- A. Would not increase the total number of dwelling units in an MPD above the maximum number set forth in the approved MPD permit or reduce the number by more than ten percent;
- B. Would not increase the total floor area of nonresidential uses by more than ten percent;
- C. Would not decrease the minimum, or increase the maximum density for residential areas of the MPD beyond density ranges approved in the MPD permit;
- D. Would not decrease the approved amount of open space or recreation space;
- E. Would not increase any adverse environmental impact, provided that additional environmental review may be required to determine whether such change is likely to occur;
- F. Would not adversely impact the project's fiscal projections to the detriment of the city;
- G. Would not significantly impact the overall design of the approved MPD; and
- H.

Would not significantly alter the size or location of any designated open space resulting in a lowered level of service and does not reduce the total amount of required open space.

- I. Minor amendments may be approved administratively in accordance with the procedure set forth in the MPD development agreement, where applicable. Any amendment application that is not "minor" shall be deemed to be major. The final determination regarding whether an amendment is "minor" or "major" shall rest with the director, subject to appeal to the hearing examiner. Applications for major modifications shall be reviewed by the same procedures applicable to new MPD permit requests. The city, through the development agreement for the approved MPD, may specify additional criteria for determining whether a proposed modification is "major" or "minor", but the criteria listed in this section cannot be modified or reduced in a development agreement.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.110 - MPD standards—Design review required.**

- A. *Design standards.* The MPD master plan and each subsequent implementing permit or approval request, including all proposed building permits, shall be consistent with the MPD design standards that are in effect at the time each application is determined to be complete.
- B. *Design review process.*
  1. *MPD permit.* The hearing examiner shall evaluate the overall MPD master plan for compliance with the MPD design standards, as part of the examiner's recommendation to the city council on the overall MPD permit.
  2. *Implementing permits or approvals—Residential subdivisions.* Each residential subdivision that is part of an approved MPD shall be reviewed at the time of preliminary plat review for compliance with the city's MPD design standards. This review shall include typical elevations, and exterior material samples for the single-family residences and other structures to be built on the subdivided lots. This review shall be merged with the hearing examiner's review of the preliminary plat.
  3. *Implementing permits or approvals—Short subdivisions (short plats).* Short subdivisions (short plats) within an approved MPD shall be reviewed by the director for compliance with the city's MPD design standards as required in [subsection] (2) above.
  4. *Implementing permits or approvals—Residential building permits.* Staff shall administratively review residential building permit applications in approved and recorded subdivisions and short subdivisions for consistency with the MPD design guidelines.
  5. *Implementing permits or approvals—Other building permits.* All other structures shall be reviewed by the director for compliance with the MPD design standards. The director shall make a decision on the proposal's compliance with the MPD design standards and adopt findings, conclusions and, where applicable, conditions of approval. Building permit applications that are found to be not consistent with the approved design standards shall be rejected, subject to appeal to the hearing examiner.
  6. *Future project consistency.* The decision-maker shall not approve a preliminary plat or short plat, or issue a building permit or site plan review approval for a parcel located within an MPD, unless the city has found that the proposal is consistent with applicable MPD design standards.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### **18.98.120 - MPD standards—Permitted uses and densities.**

- A. MPDs shall include a mix of residential and nonresidential use. Residential uses shall include a variety of housing types and densities.
- B. The MPD shall include those uses shown or referenced for the applicable parcels or areas in the comprehensive plan, and shall also provide neighborhood commercial uses, as defined in the comprehensive plan, sized and located to primarily serve the residential portion of the MPD.
- C. The MPD shall, within the MPD boundary, or elsewhere within the city, provide for sufficient properly zoned lands, and include sufficient incentives to encourage development as permit conditions, so that the employment targets set forth in the comprehensive plan for the number of proposed residential units within the MPD, will, with reasonable certainty, be met before full build-out of the residential portion of the MPD.
- E. Property that is subject to a preannexation agreement, development agreement or annexation ordinance conditions relating to residential density will have as its base density the minimum density designated in such agreement or ordinance. All other property will have as its base density the minimum density designated in the comprehensive plan.
- F. The council may authorize a residential density of up to twelve dwelling units per acre so long as all of the other criteria of this chapter are met, the applicant has elected to meet the open space requirements of Section 18.98.140(G), or otherwise is providing the open space required by Section 18.98.140(F), and the additional density is acquired by participation in the TDR program. In any development area within an MPD, for which the applicant has elected to meet the open space requirements of Section 18.98.140(G) or is otherwise meeting the open space requirement of [Section] 18.98.140(F), an effective density of development up to a maximum of eighteen dwelling units per gross acre may be approved, so long as the total project cap density is not

exceeded and the development, as situated and designed, is consistent with the provisions of [Sections] 18.98.010 and 18.98.020. A MPD may include multi-family housing at up to thirty dwelling units per gross acre, subject to the following:

1. Areas proposed for development at more than eighteen dwelling units per gross acre shall be identified on the MPD plan; and
  2. Identified sites shall be located within one-quarter mile of shopping/commercial services or transit routes; and
  3. The maximum building height shall not exceed forty-five feet; and
  4. Design guidelines controlling architecture and site planning for projects exceeding eighteen dwelling units per gross acre shall be included in the required development agreement for the MPD; and
  5. Residential uses located above ground floor commercial/office uses in mixed use areas within a MPD are not subject to a maximum density, but areas subject to the maximum building height, bulk/massing, and parking standards as defined in the design guidelines approved for the MPD. No more than two floors of residential uses above the ground floor shall be allowed.
- G. Unless the proposed MPD applicant has elected to meet the open space requirements of Section 18.98.140(G), or is otherwise meeting the open space requirements of Section 18.98.140(F), the following conditions will apply, cannot be varied in a development agreement, and shall preempt any other provision of the code that allows for a different standard:
1. Clustering of residential units shall not be allowed;
  2. Residential density shall not exceed four dwelling units per acre in any location;
  3. The lot dimension requirements of [Section] 18.44.040 shall be met.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.130 - MPD standards—Development standards.

- A. Where a specific standard or requirement is specified in this chapter, then that standard or requirement shall apply. Where there is no specific standard or requirement and there is an applicable standard in another adopted city code, policy or regulation, then the MPD permit and related development agreement may allow development standards different from [those] set forth in other chapters of the Black Diamond Municipal Code, if the proposed alternative standard:
1. Is needed in order to provide flexibility to achieve a public benefit; and
  2. Furthers the purposes of this chapter and achieves the public benefits set forth in Section 18.98.010; and
  3. Provides the functional equivalent and adequately achieves the purpose of the development standard from which it is intended to deviate.
- B. Any approved development standards that differ from those in the otherwise applicable code shall not require any further zoning reclassification, variances, or other city approvals apart from the MPD permit approval.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.140 - MPD standards—Open space requirements.

- A. Open space is defined as wildlife habitat areas, perimeter buffers, environmentally sensitive areas and their buffers, and trail corridors. It may also include developed recreation areas, such as golf courses, trail corridors, playfields, parks of one-quarter acre or more in size, pocket parks that contain an active use element, those portions of school sites devoted to outdoor recreation, and stormwater detention/retention ponds that have been developed as a public amenity and incorporated into the public park system. An MPD application may propose other areas to be considered as open space, subject to approval. It shall not include such space as vegetative strips in medians, isolated lands that are not integrated into a public trail or park system, landscape areas required by the landscape code, and any areas not open to the public, unless included within a sensitive area tract as required by Chapter 19.10
- B. Natural open space shall be located and designed to form a coordinated open space network resulting in continuous greenbelt areas and buffers to minimize the visual impacts of development within the MPD, and provide connections to existing or planned open space networks, wildlife corridors, and trail corridors on adjacent properties and throughout the MPD.
- C. The open space shall be located and designed to minimize the adverse impacts on wildlife resources and achieve a high degree of compatibility with wildlife habitat areas where identified.
- D. The approved MPD permit and development agreement shall establish specific uses for open space within the approved MPD.
- E. The approved MPD permit and development agreement shall establish which open space shall be dedicated to the city, which shall be protected by conservation easements, and which shall be protected and maintained by other mechanisms.
- F. An approved MPD shall contain the amount of open space required by any prior agreement.
- G. If an applicant elects to provide fifty percent open space, then the applicant may be allowed to vary lot dimensions as authorized elsewhere in this chapter, cluster housing, and seek additional density as authorized in Section 18.98.120(F).

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

**18.98.150 - MPD standards—On-site recreation and trail requirements.**

- A. An MPD shall provide on-site recreation areas and facilities sufficient to meet the needs of MPD residents, exceeding or at a minimum consistent with levels of service adopted by the city where applicable. This shall include providing for a coordinated system of trails and pedestrian linkages both within, and connecting to existing or planned regional or local trail systems outside of the MPD.
- B. The MPD permit and development agreement shall establish the sizes, locations, and types of recreation facilities and trails to be built and also shall establish methods of ownership and maintenance.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

**18.98.155 - MPD standards—Sensitive areas requirements.**

- A. The requirements of the sensitive areas ordinance (Chapter 19.10) shall be the minimum standards imposed for all sensitive areas.
- B. All development, including road layout and construction, shall be designed, located and constructed to minimize impact of wildlife habitat and migration corridors. This shall include minimizing use of culverts in preference to open span crossings.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

**18.98.160 - MPD standards—Transfer of development rights.**

- A. All proposed transfers of development rights shall be consistent with the TDR program (Chapter 19.24). An MPD permit and development agreement shall establish the TDR requirements for a specific MPD. Maximum allowable MPD residential densities can only be achieved through participation in the city's TDR program as a receiving site.
- B. Property that is subject to a preannexation agreement, development agreement or annexation ordinance conditions relating to residential density will have as its base density the density designated in such agreement or ordinance. All other property will have as its base density the minimum density designated in the comprehensive plan.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

**18.98.170 - MPD standards—Street standards.**

- A. Street standards shall be consistent with the MPD design guidelines, which may deviate from city-wide street standards in order to incorporate "low impact development" concepts such as narrower pavement cross-sections, enhanced pedestrian features, low impact stormwater facilities, and increased connectivity or streets and trails. Any increased operation and maintenance costs to the city associated therewith shall be incorporated into the fiscal analysis.
- B. The street layout shall be designed to preserve and enhance views of Mt. Rainier or other views identified in the city's comprehensive plan to the extent possible without adversely impacting sensitive areas and their buffers.
- C. The approved street standards shall become part of the MPD permit approval, and shall apply to public and private streets in all subsequent implementing projects except when new or different standards are specifically determined by the city council to be necessary for public safety.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

**18.98.180 - MPD standards—Stormwater management standards.**

- A. The stormwater management system shall enhance the adopted standards that apply generally within the city, in order to implement the concepts in Sections 18.98.010(C), (H), and (L), 18.98.020(B) and (C), and 18.98.180(C). The stormwater detention system shall be publicly owned. Provided, in non-residential areas, the use of private vaults and filters may be authorized where: (1) the transmission of the stormwater by gravity flow to a regional system is not possible and (2) there is imposed a maintenance/replacement condition that requires vault filters to be regularly inspected and maintained by the property owner.
- B. The stormwater management system shall apply to public and private stormwater management systems in all subsequent implementing projects within the MPD, except when new or different standards are specifically determined by the city council to be necessary for public health or safety, or as modified as authorized in Section 18.98.195(B).
- C. Opportunities to infiltrate stormwater to the benefit of the aquifer, including opportunities for reuse, shall be implemented as part of the stormwater management plan for the MPD.
- D. The use of small detention/retention ponds shall be discouraged in favor of the maximum use of regional ponds within the MPD, recognizing basin constraints. Ponds shall be designed with shallow slopes with native shrub and tree landscaping and integrated into the trail system or open space corridors whenever possible.

Small ponds shall not be allowed unless designed as a public amenity and it is demonstrated that transmitting the stormwater to a regional pond within the MPD is not technically feasible.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.190 - MPD standards—Water and sewer standards.

- A. An MPD shall be served with public water and sanitary sewer systems that:
1. Employ innovative water conservation measures including metering technologies, irrigation technologies, landscaping and soil amendment technologies, and reuse technologies to reduce and/or discourage the reliance upon potable water for nonpotable uses including outdoor watering.
  2. Are designed in such a way as to eliminate or at a minimum reduce to the greatest degree possible the reliance upon pumps, lift stations, and other mechanical devices and their associated costs to provide service to the MPD.
- B. Each MPD shall develop and implement a water conservation plan to be approved as part of the development agreement that sets forth strategies for achieving water conservation at all phases of development and at full build-out, that results in water usage that is at least ten percent less the average water usage in the city for residential purposes at the time the MPD application is submitted. For example, if the average water usage is two hundred gallons per equivalent residential unit per day, then the MPD shall implement a water conservation strategy that will result in water use that is one hundred eighty gallons per day or less per equivalent residential unit.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.195 - Vesting.

- A. Except to the extent earlier terminated, modified by the provisions of this chapter, or as otherwise specified in the conditions of approval, the MPD permit approval vests the applicant for fifteen years to all conditions of approval and to the development regulations in effect on the date of approval.
- B. Vesting as to stormwater regulations shall be on a phase by phase basis.
- C. Vesting as to conditions necessary to meet the fiscal impacts analysis criteria required by Section 18.98.060(B) (6)(c) shall only be for such period of time as is justified by the required updated analysis.
- D. Building permit applications shall be subject to the building codes in effect at the time a building permit application is deemed complete.
- E. The council may grant an extension of the fifteen year vesting period for up to five years for any phase so long as the applicant demonstrates with clear and convincing evidence that all of the following are met:
1. The phase approval has not been revoked in accordance with the provisions of Section 18.98.200
  2. The failure to obtain the implementing entitlement approval for the applicable phase is a result of factors beyond the applicant's control;
  3. The granting of an extension will not adversely impact any of the purposes or public benefit provisions of this chapter; and
  4. The city has not adopted ordinances of general application that impose a more stringent development standard than those in effect for the phase for which a time extension is requested or, in the alternative, the applicant agrees to comply with the more stringent standard.

Any request for an extension shall be considered as a major amendment to the MPD. The council may impose such additional conditions to the phases as it deems appropriate to further the purposes and public benefit objectives of the MPD code in light of the number of years that have passed since the original MPD permit approval and taking into consideration the effectiveness of the existing permit conditions in meeting those purposes and public benefit objectives.

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

#### 18.98.200 - Revocation of MPD permit.

The city council may amend or revoke any or all conditions of MPD approval, after public hearing and notice under the following circumstances:

- A. If the MPD permit allowed for phasing and the implementing action (i.e., final plat approval, site plan approval, etc.) for the development of the next phase has not been approved within five years of the approval of the previous phase or, in the case of the first phase, from the original MPD approval and an extension of said phase has not been previously granted. An extension may be granted for up to an additional two years on such additional conditions as the council determines are necessary in order to assure that the extension does not adversely impact the intent and purpose of the initial MPD approval.
- B. A condition of the MPD approval has been violated and the violation has not been corrected after sixty days notice of the violation unless said violation can be corrected through the use of a duly posted performance or maintenance bond provided at the time of MPD approval.
- C.

A violation of an MPD condition of approval that cannot be corrected, such as the destruction of wetlands or removal of trees and vegetation that was specifically prohibited and cannot be restored to their original state within sixty days.

- D. The MPD permit has been approved for more than five years and the city council finds that further development will present a threat to the public health, safety and welfare unless the amendment or revocation is implemented; provided, however, the city shall first determine that the condition cannot be amended in order to eliminate the threat to the public health, safety or welfare before it revokes the permit approval.

The above provisions notwithstanding, the vacation and/or amendment of the MPD approval shall not affect previously approved building permits.

- E. If the MPD permit is revoked for undeveloped phases, the parcels for which the permit is revoked cannot be developed without a new MPD permit being obtained, even if the revoked parcels are less than the minimum acreage required by Section 18.98.030

(Ord. No. 897, § 1(Exh. A), 4-16-2009)

---

**FOOTNOTE(S):**

<sup>(17)</sup> Editor's note— Ord. No. 897, § 1(Exh. A), adopted April 16, 2009, amended Ch. 18.98 in its entirety to read as herein set out. Former Ch. 18.98, §§ 18.98.005—18.98.200, pertained to similar subject matter, and derived from Ord. 796, §§ 1, 2, 4, adopted 2005; Ord. 779, § 2 Exh. 1 (part), adopted 2005.  
(Back)

**APPENDIX B**

**TO**

**BRIEF OF PETITIONERS**

**APPENDIX B**

**18.08.030 - Decision types.**

There are six types of decisions that may be made under the provisions of this title. The types are based on who makes the decision, the amount of discretion exercised by the decision making individual or body, the level of impact associated with the decision, the amount and type of public input sought, and the type of appeal opportunity. This chapter sets forth procedural requirements for applications, decisions, and appeals. Decision criteria and additional standards for specific permit types and for GMA legislative decisions are set forth in Chapter 18.12. Decision types are summarized below; not all permits are listed.

Decision Type	Decision Maker(s)	Types of Permits
Type 1—Ministerial	Director	Lot line adjustment Building permit Final short plat Shoreline exemptions Temporary use permits Use interpretation
Type 2—Administrative	Director	Accessory dwelling unit Administrative conditional use Administrative variance Binding site plan Sensitive area reasonable use exception Formal code interpretation Preliminary short plat Site plan review
Type 3—Quasi-Judicial	Hearing Examiner	Conditional use permit Plat alteration or vacation Preliminary plat Shoreline substantial development, conditional, use or variance Variance Sensitive Areas exceptions
Type 4—Quasi-Judicial	Hearing Examiner/City Council	Development agreements Master Planned Development Rezoning (site specific)
Type 5—Legislative	Planning Commission/City Council	Comprehensive Plan amendments (text or map) Area-wide rezoning Zoning Code text amendments
Type 6—City Council	City Council	Final Plat LID/ULID final assessment rolls

If a proposal requires multiple permits with decisions of different types (e.g., site plan approval and conditional use permit, Type 2 and Type 3), the higher type process applies to the entire proposal. Refer to Section 18.08.130.

(Ord. No. 909, § 2 (Exh. A), 6-18-2009; Ord. No. 948, § 5, 10-7-2010)

**18.08.060 - Quasi-judicial decisions—Type 3.**

- A. Type 3 decisions are made by the hearing examiner following an open record public hearing and involve the use of discretionary judgment in the review of each specific application.
- B. Type 3 decisions require public notice as set forth in Section 18.08.120
- C. For each Type 3 decision, the department shall forward a recommendation to the hearing examiner regarding whether the proposal is consistent with applicable regulations and policies and whether the proposal should be approved, approved with modifications or conditions, or denied. The examiner shall issue a written decision including findings, conclusions, and conditions, if any.
- D. The director may require an applicant to participate in a public meeting to provide information and take public comment before the department forwards a recommendation to the hearing examiner.
- E. A Type 3 decision may be appealed to Superior Court, except that a Type 3 decision on a shoreline application may be appealed only to the State Shorelines Hearings Board. (See also Section 18.08.200 regarding consolidated permit processing and appeals.)
- F. The following decisions, actions, and permit applications require a Type 3 decision:
  - 1. Preliminary plats;
  - 2. Conditional use permits;
  - 3. Shoreline substantial development, conditional use permit or variances;
  - 4. Plat alterations or vacations;
  - 5. Variances; and
  - 6. Sensitive areas exceptions.

(Ord. No. 909, § 2 (Exh. A), 6-18-2009; Ord. No. 948, § 8, 10-7-2010)

**18.08.070 - Quasi-judicial decisions—Type 4.**

- A. Type 4 decisions are made by the city council following a closed record hearing based on a recommendation from the hearing examiner. Type 4 decisions proceed in the same way as Type 3 decisions, except that:
  - 1. The hearing examiner makes a recommendation to the city council rather than makes a decision;
  - 2. The city council holds a closed record hearing to consider the recommendation from the hearing examiner. Only parties of record who testified at the hearing examiner hearing may speak at the closed record hearing; however, testimony is limited to discussion about the recommendation from the hearing examiner. All argument and discussion must be based on the factual record developed at the hearing examiner open record hearing;
  - 3. The city council shall decide the application by motion and shall adopt formal findings and conclusions approving, denying, or modifying the proposal; and
  - 4. Appeal of the city council decision is to the Superior Court.
- B. Type 4 decisions require public notice as set forth in Section 18.08.120
- C. The following decisions, actions and permit applications require a Type 4 decision:
  - 1. Rezones (site specific);
  - 2. Development agreements; and
  - 3. Master planned developments.

(Ord. No. 909, § 2 (Exh. A), 6-18-2009; Ord. No. 948, § 9, 10-7-2010)

**18.08.200 - Appeal structure.**

**Table 18.08.200-1 provides a summary of the appeal structure for Type 1—6 applications.**

**Table 18.08.200-1 Summary of Appeal Structure**

<b>Process Type</b>	<b>Decision maker</b>	<b>Appeal to</b>	<b>Further appeal</b>
Type 1	Director	Hearing Examiner	N.A.
Type 2	Director	Hearing Examiner	Court
Type 3, except shoreline applications	Hearing Examiner	Superior Court	Court
Type 4 and 6	City Council	Superior Court	N.A.
Type 5	City Council	Growth Management Hearings Board (GMHB)	Court
Type 3 Shoreline application	Hearing Examiner	Shorelines Hearings Board	Court

Note that a consolidated permit process may change the initial decision maker for Type 2 shoreline applications and for Type 3 applications consolidated with Type 4 applications.

**(Ord. No. 909, § 2 (Exh. A), 6-18-2009; Ord. No. 948, §§ 18, 19, 10-7-2010)**

**APPENDIX C**

**TO**

**BRIEF OF PETITIONERS**

**APPENDIX C**

**CITY OF BLACK DIAMOND**

**ENGINEERING DESIGN AND  
CONSTRUCTION STANDARDS**

**PREPARED BY:**

**PACWEST ENGINEERING, LLC**

Leonard L. Smith, PE/PLS  
Christine J. Smith, PE  
L. Brandon Smith, PE  
Erik P. Martin, PE

**APPROVED BY:**

**CITY OFFICIALS & STAFF**

Howard Botts, Mayor  
Gwendolyn Voelpel, City Administrator  
Seth Boettcher, Public Works Director  
Dan Dal Santo, Utilities Supervisor

**CITY COUNCIL MEMBERS**

Bill Boston  
Geoff Bowie  
Kristine Hanson  
Leih Mulvihill  
Rebecca Olness

**Adopted by Council Ordinance No. 09-915, Date June 25, 2009**

4. The temporary storm drainage facility shall be designed using an approved hydrograph method.

### **2.2.05 SPECIAL PERMISSION FOR WINTER WORK**

Any project with exposed soil, or that will be worked from October 1st to March 31st, shall prepare a Winterization Plan for review by the City Engineer. Where erosion risks are significant the city may not allow construction after October 1<sup>st</sup> or before March 31<sup>st</sup>. The plan shall at the minimum contain the following information:

1. Purpose
2. Property location
3. Property description
4. Contacts – including name, title, organization, and phone number of person or persons responsible for maintaining the project site
5. Temporary Erosion and Sediment Control (TESC) plan
6. Inspection and monitoring schedule
7. Maintenance and repair responsibility
8. A stockpile of TESC materials and their location
9. Inspection Report Form
10. Site Specific BMP's (Best Management Practices)
11. The amount of work area susceptible to erosion
12. The maximum amount of active work area.

## **2.3 LAND CLEARING**

### **2.3.01 PURPOSE**

The following establishes the requirements for land clearing. These requirements do not supersede nor are they intended to be inconsistent with any landscaping requirement.

1. Clearing shall not unreasonably or contribute to erosion, landslides, flooding, siltation, or other pollution as determined by the City Engineer.
2. Clearing shall contain reasonable provisions for the preservation of natural features, vegetation, sensitive areas, and drainage courses.
3. Clearing shall be conducted so as to expose the smallest area of soil for the least amount of time.
4. If the clearing is to include the removal of ground cover, a TESC plan may be required.

with the standard specifications. The new asphalt will be feathered back over existing asphalt to provide for a seal at the saw cut location and the joint sealed with Grade AR-4000W paving asphalt. A sand blanket shall be applied to the surface to minimize "tracking" of same.

5. All local access streets shall require sawcut and sealing of all joints.
6. All arterials and collectors shall require tapered grinding/inlay for all joints
7. Compaction of subgrade, rock, and asphalt will be in accordance with the WSDOT standard specifications.
8. Form and subgrade inspection by the City is required before pouring concrete. A minimum twenty-four hours notice is required to be provided to the City for form inspection.
9. Testing and sampling frequencies will be as described in Section 3.3.12.

## **3.2 ROADWAY DESIGN**

### **3.2.00 GENERAL**

Street design must provide for the maximum loading conditions anticipated. The width and grade of the pavement must conform to specific standards set forth herein for safety and uniformity.

### **3.2.01 FUNCTIONAL CLASSIFICATION**

City streets are divided into Principal arterial, Minor arterial, Collector, Neighborhood collector, and local access streets in accordance with regional transportation needs and the functional use each serves. Function is the controlling element for classification and shall govern right-of-way, road width, and road geometrics. New streets will be classified by the City Engineer.

### **3.2.02 DESIGN STANDARDS**

The design of public streets and roads shall depend upon their type and usage. The design elements of city streets will conform to City standards as set forth herein. See the table of Minimum Street Design Standards.

- A. Alignment: The layout of streets shall provide for the continuation of existing arterial and collector streets in adjoining subdivisions or of their proper projection when adjoining property is not subdivided.

Local access streets, which serve primarily to provide access to abutting property, shall be designed to discourage through traffic.

- B. **Grade:** Street grade should conform closely to the natural contour of the land. The minimum allowable profile grade for roadways with a gutter shall be .5%. The minimum allowable profile grade for roadways without a gutter shall be .7%. The maximum grade varies depending on the functional classification of the roadway. See table of Minimum Street Design Standards.
- C. **Width:** The pavement and right-of-way width depend upon the street classification. The table of Minimum Street Design Standards shows the minimum widths allowed. Pavement widths will be measured as shown on Standard Plans for each street classification.
- D. A single point of access shall serve no more than 150 units, except on an interim basis up to 300 units where a future point of access will be extended.

**MINIMUM STREET DESIGN STANDARDS**

DESIGN STANDARD	ARTERIALS		COLLECTORS		LOCAL ACCESS		
	PRINC. ART.	MINOR ART.	COLLECTOR	NGBHD. COLL.	INDUS.	COMM.	RESIDENTIAL
Average Daily Trips	15,000 +	10,000 – 20,000	5,000 – 10,000	1,000 – 5,000	0-1,000	0-1,000	0-1,000
Design Speed (mph)	35 – 45*	35 – 45*	25 – 30*	25 – 30*	25	25	25
Min. Right-of-Way	60'-100'	54' (2 lane) 66' (3 lane)	60'-72'	70'	50'	60'-68'	48'-60'
Min. pavement Width (face of gutter to face of gutter)	38'-62'	30' (2 lane) 40' (3 lane)	28' (2 lane) 40' (3 lane)	28' (width depends on storm water design)	28'	36'	32' parking both sides; 28' parking one side; 22' no parking
Number of Lanes	3 - 5	2 - 3	2 – 3	2	2	2	2
Traffic Lane Widths	13' - 14' 12' TWLT lane	14' – 15' 12' TWLT lane	14' 12' TWLT lane	14'	14'	11'	9' - 10' (w/ parking); 11' (no parking)
Parking Lane	None	None	None	None	None	Both Sides	No, One Side, Both Sides
Min. / Max. Grade	.5% - 8%	.5% - 8%	.5% - 10%	.7% - 10%	.5% - 8%	.5% - 10%	.5% - 12%
Planting Strip	0' - 10', both sides	4' – 6', both sides	8', both sides	4' both sides	7', both sides	none	6', both sides
Curb	Curb & Gutter, both sides	Curb & Gutter, both sides	Curb & Gutter, both sides	Curb, both sides	Curb & Gutter, both sides	Curb & Gutter, both sides	Curb & Gutter, both sides
Sidewalks	6' Conc. sidewalk both sides	6' Conc. sidewalk both sides	5' Conc. sidewalk both sides	5' Asphalt sidewalk both sides	5' Conc. sidewalk	10.5' Conc. Sidewalk both sides	5' Conc. sidewalk

Cul-De-Sac Radius	N/A	N/A	N/A	N/A	N/A	N/A	45'
Intersection Curb Radius	35'	35'	35'	25'	25'	25'	25'
Bicycle Facilities	Shared Roadway						
Street Lighting	Yes						

\* Specific Design speed shall be identified by the City's Public Works Director.

**3.2.03 NAMING**

The developer must check with the Public Works Department regarding the naming of streets. This should be done at the time the project submittal. The Community Development Department will ensure that the name assigned to a new street is consistent with policies of the City.

**3.2.04 SIGNING AND STRIPING**

Street signs are defined as any regulatory, warning, or guide signs. The developer is responsible for providing all street signs. Street signs will comply with the latest edition of the *U.S. Department of Transportation Manual on Uniform Traffic Control Devices* (MUTCD).

Street signs shall be located at the Northeast Corner of each intersection. Street designation signs, including poles and hardware, will be provided and installed by the developer. Street designation signs will display street names or grid numbers as applicable.

Thermoplastic pavement markings shall be in conformance with the latest edition of the *U.S. Department of Transportation Manual on Uniform Traffic Control Devices* (MUTCD). Pavement markings shall be completed by the developer.

Signage and channelization plans shall be a separate sheet as part of the engineering plan submittal.

**3.2.05 RIGHT-OF-WAY**

Right-of-way is determined by the functional classification of a street. See Minimum Street Design Standards Table for additional information.

Right-of-way requirements may be increased if additional lanes, pockets, transit lanes, bus loading zones, operational speed, bike lanes, utilities, schools, or other factors are proposed and/or required by the City Engineer.

## **CHAPTER 4 – STORM DRAINAGE**

---

### **4.1 GENERAL**

#### **4.1.01 GENERAL**

The purpose of these requirements is to provide the design criteria necessary to help preserve the City of Black Diamond's water courses; to minimize surface and ground water quality degradation; to control the sedimentation in creeks, streams, rivers, ponds, lakes, and other water bodies; to protect adjacent and downstream property owners from increased runoff rates which could cause erosion and flooding; to ensure the safety of the City of Black Diamond's streets and right-of-way; and to decrease drainage-related damage to both public and private property.

Compliance with these standards does not alleviate the design engineer from using sound professional engineering practices. The design criteria contained herein are the equal to or exceed State standards. Special conditions may require more stringent requirements.

#### **4.1.02 STORM DRAINAGE GENERAL PLAN NOTES**

The following is a listing of General Notes that should be incorporated on storm drainage plans. All the notes on the list may not pertain to every project. The Engineer should include only those notes that are relevant to the project and may omit non-relevant notes. If additional notes are needed for specific aspects, they should be added after the General Notes.

Storm Drainage General Notes:

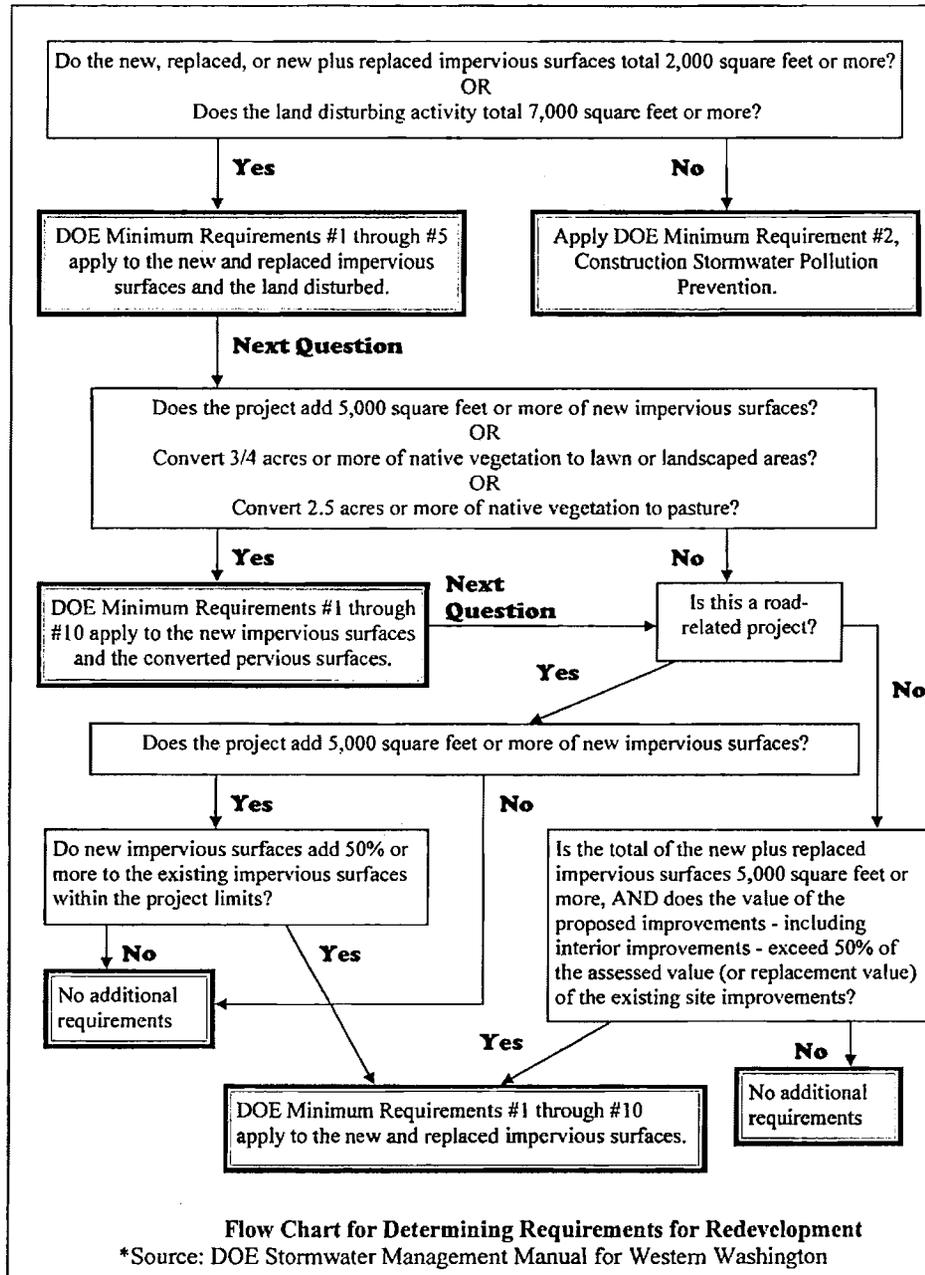
1. All work shall conform to City of Black Diamond Standards, the Stormwater Management Manual for Western Washington by the Department of Ecology, and the WSDOT Standard Specifications.
2. Temporary erosion / water pollution measures shall be required in accordance with the Stormwater Management Manual for Western Washington by the Department of Ecology and as follows:
  - a. Soil erosion and water pollution/flood control plans shall be submitted to the City, approved by the City, and implemented by the contractor prior to disturbing any soil on the site. Submittal and approval of these plans shall preclude any construction activity on the site.

- b. All permanent storage and retention/detention areas used as part of the temporary erosion control and water pollution / flood activities and conveyance system shall be cleaned of all silts, sand, and other materials following completion of construction and the permanent facilities shall then be completed including permanent infiltration areas. If an infiltration pond is to be used on a temporary basis for a sediment control pond, a protective layer of fine soil as determined by an engineer shall be installed in order to protect the infiltrative capacity of the ultimate underlying soil
3. Compliance with all other permits and other requirements by the City of Black Diamond and/or other governing authorities shall be required.
4. A preconstruction meeting shall be held with the City prior to the start of construction.
5. All storm mains and retention/detention areas shall be staked for grade and alignment by an engineering or surveying firm capable of performing such work, and currently licensed in the State of Washington to do so.
6. Storm drain pipe shall meet the following requirements:
  - a. Polyvinyl Chloride: PVC pipe shall conform to ASTM D 3034, SDR 35 or ASTM F 789 with joints and rubber gaskets conforming to ASTM D3212 and ASTM F4777.
  - b. Plain Concrete: Plain concrete pipe per WSDOT Standard Specifications.
  - c. Reinforced Concrete: Reinforced concrete pipe per WSDOT Standard Specifications.
  - d. Ductile Iron: Ductile iron pipe shall conform to AWWA C151 Class 50 and have a cement mortar lining conforming to AWWA C104. All pipes shall be joined using non-restrained joints which shall be rubber gaskets, push on type or mechanical joint, conforming to AWWA.
  - e. Polyethylene: PE smooth wall pipe per Advanced Drainage Systems (ADS) N-12 (bell and spigot), or City approved equal, constructed per WSDOT Standard Specifications.
7. Special structures, oil/water separators and outlet controls shall be installed per plans and manufacturers recommendations.
8. All disturbed areas shall receive permanent erosion control in the form of vegetation establishment such as grass seeding or hydroseeding. A means shall be established to protect the permanent storm drain system prior to establishment of the permanent erosion control measures. This method shall be included in the soil erosion and water pollution/flood control plans.
9. Provide traffic control plan(s) as required in accordance with MUTCD.

10. Call underground locate line 1-800-424-5555 a minimum of 48 hours prior to any excavations.
11. Storm drain pipelines shall be installed to the far property line(s) to serve adjacent tributary areas as may be warranted. They shall be appropriately sized to accommodate flows as further identified herein. Pipes shall be designed to facilitate a minimum 2.5 feet/second flow unless otherwise approved by the City Engineer.
12. All storm water pipes shall be pressure tested between catch basins and TV inspected.
13. Natural surface water shall bypass all retention and detention storm systems.

#### **4.1.03 THRESHOLD REQUIREMENTS**

The requirements outlined in these standards shall apply to projects meeting the threshold requirements as outlined in the following two flowcharts as taken from the DOE Stormwater Management Manual for Western Washington.



**4.1.04 DESIGN STANDARDS**

All storm drainage improvements shall be designed and constructed in conformance with the “Stormwater Management Manual for Western Washington”, as published by the Department of Ecology and as modified by these Black Diamond Standards.

Additionally, the following general requirements shall be met in developing a storm drainage system:

1. Storm drainage entering the subject property shall be received at the naturally occurring locations, and storm drainage exiting the subject property shall be discharged as near as possible to the natural locations or to adjacent public facilities with adequate energy dissipation within the subject property to mitigate downstream impacts. Natural surface water shall bypass all retention and detention systems.
2. The design storm peak discharge from the subject property shall not be increased by the proposed development. Retention or detention systems shall be utilized to accomplish this requirement.
3. Storm drainage quantity and quality control measures are required for new improvements.
4. The entire storm system shall be analyzed for the 100 year storm plus 10% and a flow path must be established that will not damage property or the environment to a point of safe storm water outfall. An emergency cross drainage agreement may need to be secured or established.
5. In general, the lowest on-site storage elevation shall be higher than the hydraulic grade line of the receiving off-site storm drainage system. The hydraulic elevation of the receiving system shall be based on the 100 year design storm or as determined by the City, if a specific elevation is known.
6. The finished floor elevation of buildings shall be indicated on the plans and shall conform to the more restrictive of:
  - a. A minimum of 1' above the maximum high water elevation indicated in the detention or retention system design and a minimum of 6" above the overflow design elevation, or
  - b. In compliance with the City's established flood regulation requirements.
7. No individual lot or development shall be allowed to drain uncontrolled storm drainage from more than 600 square feet of impervious surface area across driveways into the public right-of-way.
8. In areas with soils that have high infiltration rates or are located within an aquifer protection area, liners or impermeable barriers may be required to be incorporated with storm drainage system designs.
9. All projects shall execute with the City a standard Stormwater Easement and Maintenance Agreement for the site's private storm drainage facilities. The easement shall be approved by the City and executed by the owner prior to the issuance of occupancy permits for the development.
10. All non-single family roof drains shall be directed into the site storm drainage detention or retention system or other discharge point as applicable. Water

collected from foundation drains shall not be discharged into storm water detention or retention systems. Piped conveyance systems shall be a minimum of 6" diameter and contain cleanouts as necessary. All piped conveyance lines shall be connected to the storm drainage detention or retention system at catch basins or other maintenance access points. Piped conveyance lines from roof drains shall have a minimum of 1% slope. Runoff shall be discharged by one of the following methods:

- a. Discharged into an on-site infiltration system.
  - b. Discharged into a private collection pipe that would be connected to a public drainage system at a catch basin. For new plat developments a series of private collection systems, each serving as many lots as feasible, shall connect to the public system. Such systems shall be located within private drainage easements.
  - c. Alternative low impact development designs will also be considered.
11. Single-family home sites shall provide a means for collection and discharge of water from roof, foundation drains, and driveway. The storm drainage pipe shall be 4" minimum diameter with a minimum 1% slope. Runoff shall be discharged by one of the following methods:
- a. Discharged into an on-site infiltration system.
  - b. If soils do not allow an on-site infiltration system, then discharge into a private collection pipe that would be connected to a public drainage system at a catch basin.

#### **4.1.05 PUBLIC STORM FACILITY EASEMENTS**

A stormwater easement is required for the placement, operation, and maintenance of storm facilities on private property.

Public stormwater easements shall meet the following minimum requirements:

1. Public stormwater easements shall extend a minimum of 7.5' to each side of the centerline of the storm pipe and 7.5' beyond the outside extremity of a storm facility or twice the depth of the storm pipe, whichever is greater.
2. Public stormwater easements shall be reviewed by the City and then recorded at King County prior to acceptance of the public storm system.
3. Building setback requirements:
  - a. 5' minimum from covered parking

**APPENDIX D**

**TO**

**BRIEF OF PETITIONERS**

**APPENDIX D**

### **18.72.020 - Landscape plan.**

- A. A landscape plan that shows the landscape improvements required by this chapter shall be prepared and submitted for approval under the site plan review procedures of this title.
- B. Exemption. Landscaping standards do not apply to residential uses within the, R4 and R6 zones, except that all undeveloped areas of exempt properties shall be landscaped and continually maintained or retained in a natural undisturbed state.
- C. Landscaping plans for any residential project of greater than twelve dwelling units or any commercial or industrial development of greater than ten thousand square feet in building area or one-half acre of site size shall be prepared by a professional landscape architect licensed in the State of Washington or by a Washington state nurseryman;
- D. New landscaping materials shall include species native to the coastal regions of the Pacific Northwest or non-invasive naturalized species that have adapted to those climatic conditions, in the following amounts: seventy-five percent of groundcovers and shrubs; and fifty percent of trees.
- E. At least sixty percent of new landscaping materials shall consist of drought-tolerant species.
- F. Existing vegetation may be used to augment new plantings to meet the standards of this chapter.
- G. The director may waive or reduce any requirement(s) of this chapter if:
  - 1. The remodel of an existing building results in the expansion of floor area that is ten percent or less of the existing floor area; or
  - 2. An expansion of a use results in no modifications (except normal maintenance and repair of the structure) to the outdoor area of the site.
- H. Alternative Landscaping Plan. The requirements of this chapter may be modified to encourage better landscaping design as follows:
  - 1. A request for approval of an alternate landscaping shall be submitted and accompanied by a landscape plan as required above;
  - 2. An application for an alternative landscaping plan shall include a description of the superior site development that an alternative landscape design will produce, including identification of the specific public benefit to be gained.
  - 3. An alternative plan shall only be approved during site plan review if supported by written findings of public benefit and that the total area of landscaping shall be equal to or exceed that created by adherence to the standard requirements of this chapter.

(Ord. No. 909, § 2 (Exh. A), 6-18-2009)

## 18.76.060 - Site design standards.

- A. Development Setback. All development shall maintain a minimum twenty-five-foot setback for all buildings, structures and property improvements such as parking lots, except for approved road, driveway and utility crossings. With the approval of the director, the development setback may be reduced to twenty feet for one-half of the principal street frontage, with the remaining frontage setback to thirty feet.
1. Retention of Significant Vegetation. Where existing trees and significant vegetation exist within the development setback, they should be retained as determined appropriate by the director. Setback areas where existing trees and significant vegetation is sparse may require re-vegetation with native species, as determined by the director. Vegetation within a setback area that is required to remain may be pruned and/or removed only if necessary to ensure proper sight visibility for traffic safety, to remove safety hazards or dying/diseased vegetation, or for other good cause. In all cases, it shall be unlawful to top or severely prune any tree within the development setback unless determined necessary by the director for purposes of protecting existing overhead utility lines or other safety considerations.
  2. Allowed Uses and Activities Within the Development Setback. For sites with an underlying non-residential zone designation or that are planned for non-residential use as part of a master planned development, limited portions of the development setback may be used for public plazas with seating, sidewalk café outdoor seating areas, and similar uses and activities. Signage shall be limited to directional signage and to monument signs as allowed herein. Other minor accessory features of the development may be included within the setback if compatible with the purpose of the setback or essential to the identification of the development, subject to the approval of the director. Maximum encroachment for all uses within the development setback (other than for signage) is five feet.
  3. Exceptions to Development Setback for Scenic View Shed Protection. When the application of the development setback requirement of this chapter would have the practical effect of screening from view important scenic sites, natural qualities or historic qualities, the director may modify these provisions so that views of such sites or qualities are retained. The intent of this provision is to preserve lines of sight to view distant scenery from scenic corridors. In requiring the modification, the director shall impose such other conditions as are necessary to mitigate the effect of the deviation to ensure the purpose and intent of the overlay district is met. Any modification that is allowed or imposed under this provision shall be supported by written findings setting forth the factual reasons supporting the modification.
- B. Access. All development within the gateway corridor overlay district shall provide for internal vehicle and pedestrian connectivity to abutting properties, including the opportunity for shared driveway access. Only one access point to SR 169 or the Auburn-Black Diamond Road shall be allowed for every three hundred feet of frontage. Access shall be designed and constructed to accommodate future shared access when abutting properties are developed. The director may allow a reduced distance between access points if access to an existing lot would not be possible due to lot size, topographical or

other conditions, and there is no reasonable way to provide access through adjoining properties.

- C. Landscaping Plan. A landscaping plan shall be submitted with all applications for development, showing all existing and proposed features, including existing significant trees and other relevant features. Significant trees should not be removed unless their removal is necessary for placement of a structure or approved parking or access corridor, or as otherwise as approved by the director. In general, native plant materials are required, although the use of ornamental plant materials may be approved if planted in a naturalistic manner and allowed to develop in their natural form. The landscape plan must also demonstrate pedestrian connectivity within the development, to the required multi-modal path, and to future access roads and path systems. These landscaping requirements are in addition to any landscaping required in the underlying zone.
1. Tree Requirement. In addition to the preservation of significant trees, all development shall provide an additional two trees, with an expected height at maturity of at least thirty feet, per each twenty linear feet of road frontage along either SR-169 or Auburn-Back Diamond Road. These trees shall be a planted within the development setback in a staggered or clustered configuration to ensure maximum canopy development when not in conflict with scenic view protection. These trees shall be a mixture of both native evergreen and deciduous trees, with deciduous trees preferred near buildings to allow for winter solar access. Trees shall have a minimum caliper of three inches at planting, as measured two feet from base of tree.
  2. Screening. If the required development setback does not provide adequate screening of parking lots and service and loading zones from the public right-of-way, there shall be additional landscaping, walls, fences, hedges, shrubbery and/or earthen berms to provide the screening of utilities and loading areas.

(Ord. No. 909, § 2 (Exh. A), 6-18-2009)

**APPENDIX E**

**TO**

**BRIEF OF PETITIONERS**

**APPENDIX E**

## Chapter 18.42

### BUSINESS/INDUSTRIAL PARK – B/IP

**Sections:**

<b>18.42.010</b>	<b>Intent.</b>
<b>18.42.020</b>	<b>Permitted Uses.</b>
<b>18.42.030</b>	<b>Conditional Uses.</b>
<b>18.42.040</b>	<b>Development Standards.</b>
<b>18.42.050</b>	<b>Additional Requirements</b>

**18.42.010 Intent.**

It is the intent of this section to:

- A. Provide areas for the development and growth of non-retail businesses engaged in high technology and software development, research and development, general office, wholesale, distribution and limited manufacturing activities to expand the community's economic and employment base;
- B. Promote concentrated, master-planned developments with cohesive design elements for architecture, landscaping, and circulation; development with high-visual quality and park-like site characteristics; functional and aesthetic compatibility with adjacent uses and neighborhoods; and enhanced opportunities for walking, biking and transit; and
- C. Insure a mix of complementary support uses, including technical consulting, personnel and productivity support services, and limited retail and service uses to support the principal business/industrial uses and reduce off-site vehicle trips to access business support services.

**18.42.020 Permitted uses.**

- A. Office, research and technology and light manufacturing activities that do not create significant noise, emissions, risk of explosion or release of hazardous materials, or air or water pollution ;
- B. General Office, including call centers and other customer service communication centers;
- C. Research and Development;
- D. Technology, biotechnology and medical equipment;
- E. Light Manufacturing, providing all production and storage activity is conducted indoors;
- F. Wholesaling;
- G. Business Support Services, such as technology services and support, copy centers, and eating and drinking establishments to serve the occupants of the business park. The total gross floor area of such uses is not to exceed twenty percent (20%) of the total project gross floor area and a 5,000 gross square feet maximum for any individual use;
- H. Child care including nursery schools and day care centers integrated within a master-planned development;
- I. Utilities, below-ground;
- J. Private schools; and

- K. Other Uses.
  - 1. Accessory uses as provided in Chapter 18.50.
  - 2. Temporary uses as provided in Chapter 18.52.

**18.42.030 Conditional uses.**

The following uses may be allowed by Conditional Use Permit in accordance with Chapters 18.08 and 18.12:

- A. Adult-oriented businesses, consistent with the requirements of Chapter 18.60;
- B. Religious institutions.
- C. Essential public facilities including secure community transition facilities;
- D. Major institutions;
- E. Parks and open space whether public and private;
- F. Public Uses / Facilities;
- G. Utilities, aboveground;
- H. Entertainment / Culture facilities;
- I. Parking structures not associated with a primary, permitted use.

**18.42.040 Development standards.**

- A. Development Standards:
  - 1. Minimum lot size: One and one-half (1.5) acres.
  - 2. Floor Area Ratio (F.A.R.): 1.0.
  - 3. Maximum allowed height: forty-five (45) feet.
  - 4. Minimum Front Yard Setback: Forty (40) feet.
  - 5. Minimum Side Yard: Thirty (30) feet, and one additional foot for each foot of height above thirty-five (35) feet if abutting a residential zone.
  - 6. Minimum Rear Yard: Thirty (30) feet, and one additional foot for each foot of height above thirty-five (35) feet if abutting a residential zone.
  - 7. Maximum Impervious Surface Coverage: 75 percent (75%).
- B. Parking and Loading.
  - 1. Off-street parking shall be provided in accordance with Chapter 18.80.
  - 2. One off-street loading area shall be provided for each twenty thousand (20,000) square feet of building area, sufficient in size and location so as not to interfere with customer parking areas.
  - 3. Buildings, parking spaces and loading areas are to be so arranged as to make it unnecessary to back out into the public right-of-way to leave the site.
  - 4. There shall be no loading area within 100 feet of any residential zone.
- C. Landscaping.
  - 1. Landscaping shall be provided pursuant to Chapter 18.72.
  - 2. Development shall also comply with the tree preservation requirements of BDMC 19.30.
- D. Signs. Regulation of signs is provided for in Chapter 18.82.
- E. Lighting. Lighting shall comply with the requirements of Chapter 18.70.

**18.42.050 Other requirements.**

- A. All development within the B/IP zone shall comply with applicable environmental performance standards of Chapter 18.78, the site plan review requirements of Chapter 18.16, and the design review requirements of Chapter 18.76.

## Chapter 18.44

### INDUSTRIAL DISTRICT – I

#### *Sections*

<b>18.44.010</b>	<b>Purpose.</b>
<b>18.44.020</b>	<b>Permitted Uses.</b>
<b>18.44.030</b>	<b>Conditional Uses</b>
<b>18.44.040</b>	<b>Development Standards</b>
<b>18.44.050</b>	<b>Additional Requirements</b>

#### **18.44.010 Purpose.**

The intents of this section are to:

- A. Provide areas for the development and growth of general manufacturing and other industrial activities to contribute to the community's economic health, provide employment opportunities for residents, and generate tax revenues to support the provision of public services;
- B. Keep industrial activities within reasonable scale and consistent with the character of the city;
- C. Protect industrial areas from such other uses as may interfere with the purpose and efficient functioning of such areas;
- D. Protect residential and other non-industrial areas from adverse or damaging impact of any kind emanating or resulting from industrial areas; and
- E. Provide standards for development of industrial areas.

#### **18.44.020 Permitted Uses**

- A. Heavy manufacturing.
- B. Light Manufacturing,
- C. Research and Development
- D. General office associated with a primary manufacturing use.
- E. Wholesaling;
- F. Warehousing and Distribution;
- G. Business Support Services including eating establishments primarily serving the immediate work force; the total gross floor area of such uses shall not exceed twenty percent (20%) of the total district area and a 5,000 gross square feet maximum area for any individual use;
- H. Utilities;
- I. Public Uses / Facilities;
- J. Private schools; and
- K. Other Uses:
  - 1. Accessory uses as provided in Chapter 18.50.
  - 2. Temporary uses as provided in Chapter 18.52.

**18.44.030 Conditional uses.**

The following uses may be allowed by Conditional Use Permit in accordance with the requirements of Chapters 18.08 and 18.12:

- A. Adult-oriented businesses, consistent with the requirements of Chapter 18.60;
- B. Major institution;
- C. Essential public facilities;
- D. Automobile wrecking yards.

**18.44.040 Development standards.**

- A. Development Standards:
  - 1. Minimum site area: five (5) acres.
  - 2. Floor Area Ratio (F.A.R.): 1.0.
  - 3. Maximum allowed height: fifty (50) feet.
  - 4. Minimum Front Yard Setback: twenty (20) feet.
  - 5. Minimum Side and Rear Yard Setback: Twenty-five (25) feet, or fifty (50) feet if abutting a residential zone, provided that there are no required setbacks along a property line abutting another I-zoned property.
  - 6. Maximum Impervious Surface Coverage: 90 percent.
- B. Parking. Off-street parking shall be provided in accordance with Chapter 18.80.
- C. Landscaping.
  - 1. Landscaping shall be planned and provided in accordance with Chapter 18.72.
  - 2. Development shall also comply with the tree preservation requirements of BDMC 19.30.
- D. Signs. Regulation of signs is provided in Chapter 18.82.
- E. Lighting. Lighting shall comply with the requirements of Chapter 18.70.
- F. Storage and exterior displays.
  - 1. Required landscaping or buffer areas shall not be used for storage of any sort.

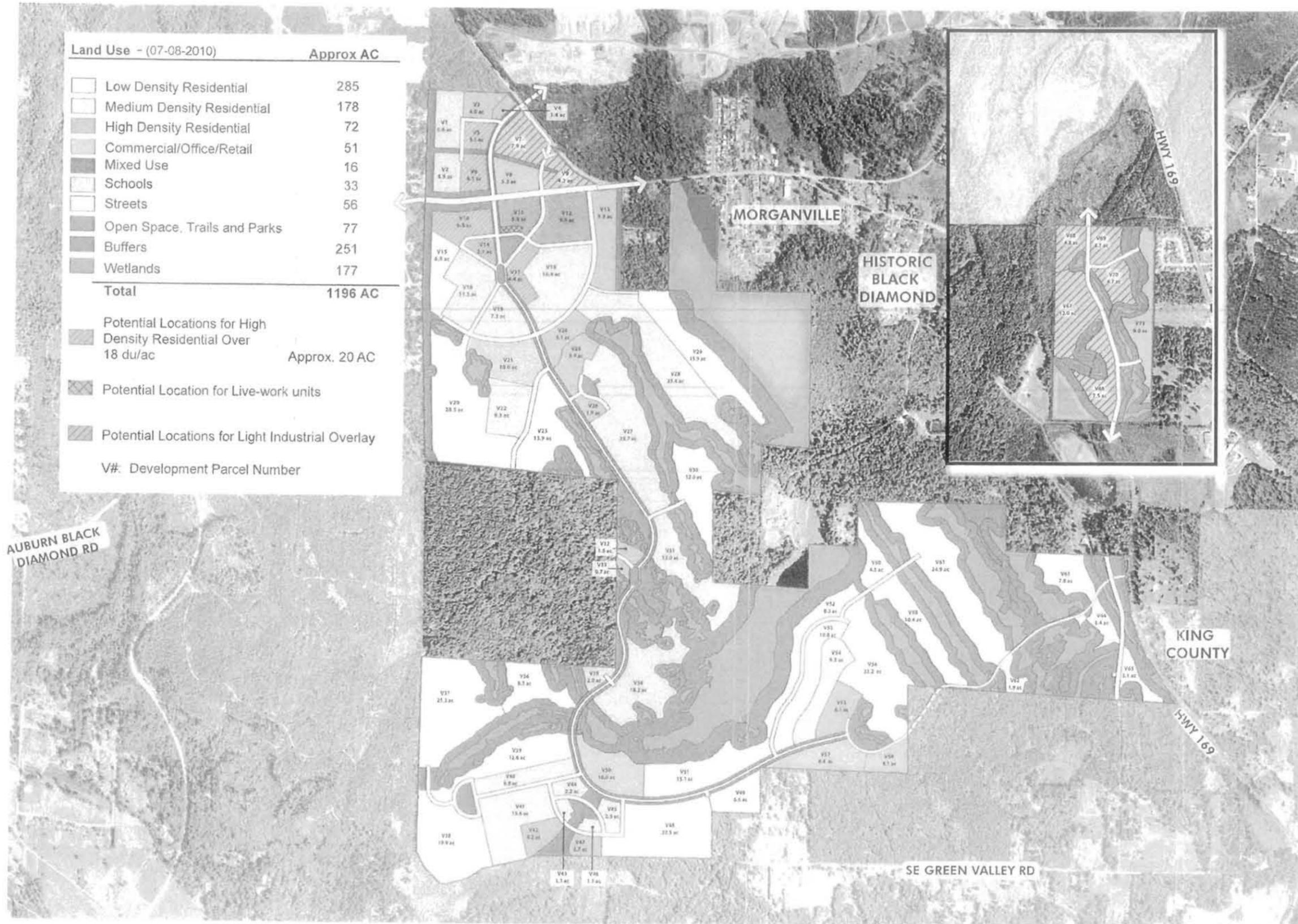
**18.44.050 Other requirements.**

- A. All development shall comply with applicable environmental performance standards of Chapter 18.78, the site plan review requirements of Chapter 18.16 and design review requirements of Chapter 18.76.

**APPENDIX F**  
**TO**  
**BRIEF OF PETITIONERS**

**APPENDIX F**

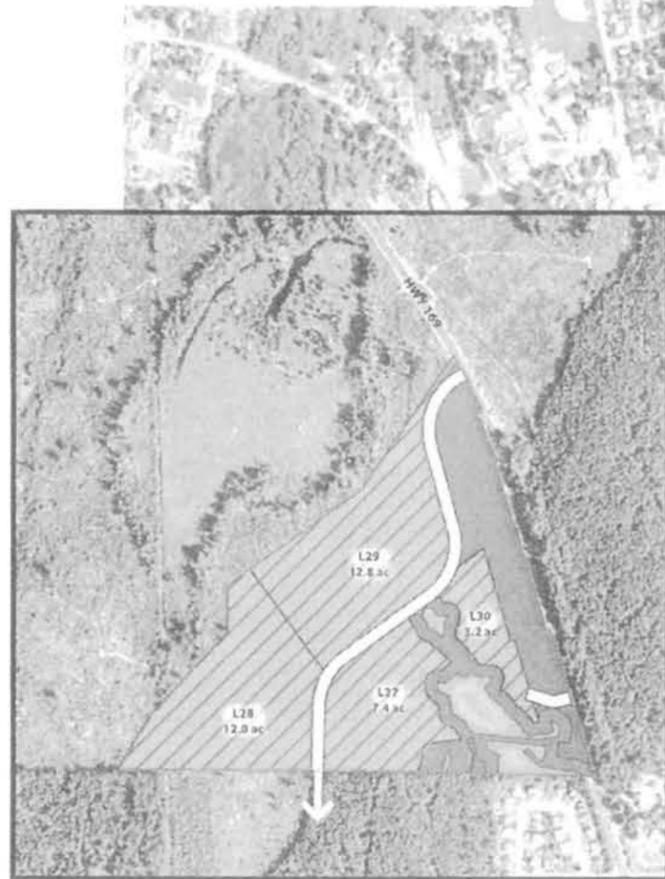
FIGURE 3-1. LAND USE PLAN



Land Use - (07-08-2010)	Approx AC
Low Density Residential	285
Medium Density Residential	178
High Density Residential	72
Commercial/Office/Retail	51
Mixed Use	16
Schools	33
Streets	56
Open Space, Trails and Parks	77
Buffers	251
Wetlands	177
<b>Total</b>	<b>1196 AC</b>
Potential Locations for High Density Residential Over 18 du/ac	Approx. 20 AC
Potential Location for Live-work units	
Potential Locations for Light Industrial Overlay	
V#: Development Parcel Number	

00 1787

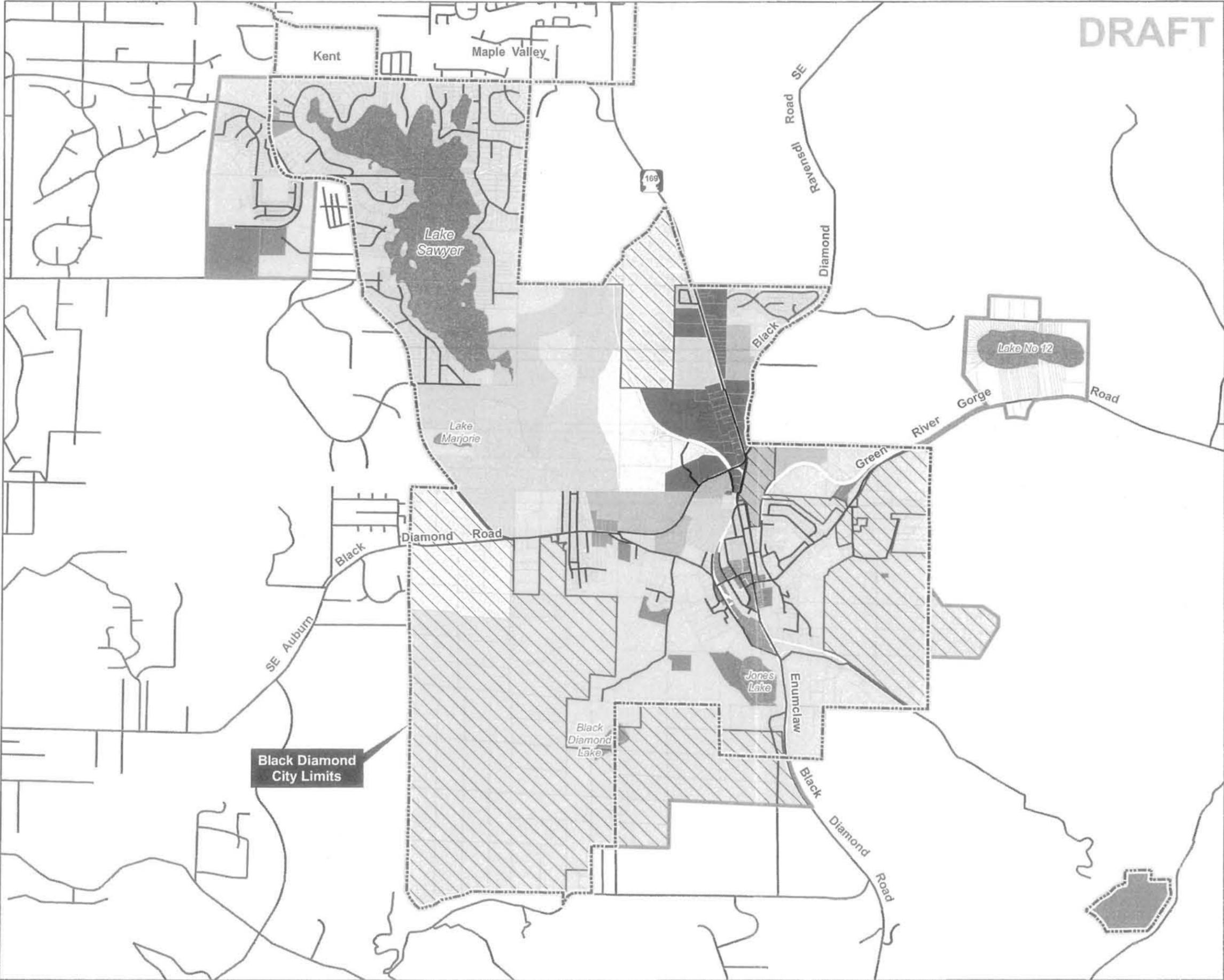
Land Use - (07-08-2010)	Approx AC
Low Density Residential	79
Medium Density Residential	63
High Density Residential	17
Commercial/Office/Retail	35
Schools	10
Streets	23
Parks, Trails and Open Space	99
Buffers	29
Sensitive Areas	16
<b>Total</b>	<b>371 AC</b>
Potential Locations for High Density Residential Over 18 du/ac	Approx. 4 AC
L#: Development Parcel Number	
Potential Locations for Light Industrial Overlay	



DRAFT

Figure 5-1

City of Black Diamond Future Land Use Map



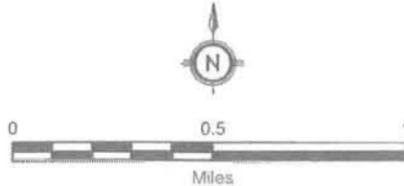
- City Limits
- Potential Annexation Area
- Road
- Master Planned Development Overlay
- Future Land Use**
- Urban Reserve
- Low Density Residential
- Medium Density Residential
- Mixed Use
- Business Park & Light Industrial
- Neighborhood Commercial
- Town Center
- Community Commercial
- Industrial
- School
- Park
- Public
- Water

**NOTES:**  
 Any parcel of 80 acres or more that develops is required to go through the Master Plan Development (MPD) process identified in BDMC 18.98.

Some residentially-designated properties with an MPD overlay have a basic density entitlement of either 1 or 2 dwelling units per acre, pursuant to either the Black Diamond Urban Growth Area Agreement or pre-annexation agreements. A maximum of 4 dwelling units per acre may be attained with the Transfer of Development Rights pursuant to City Code.

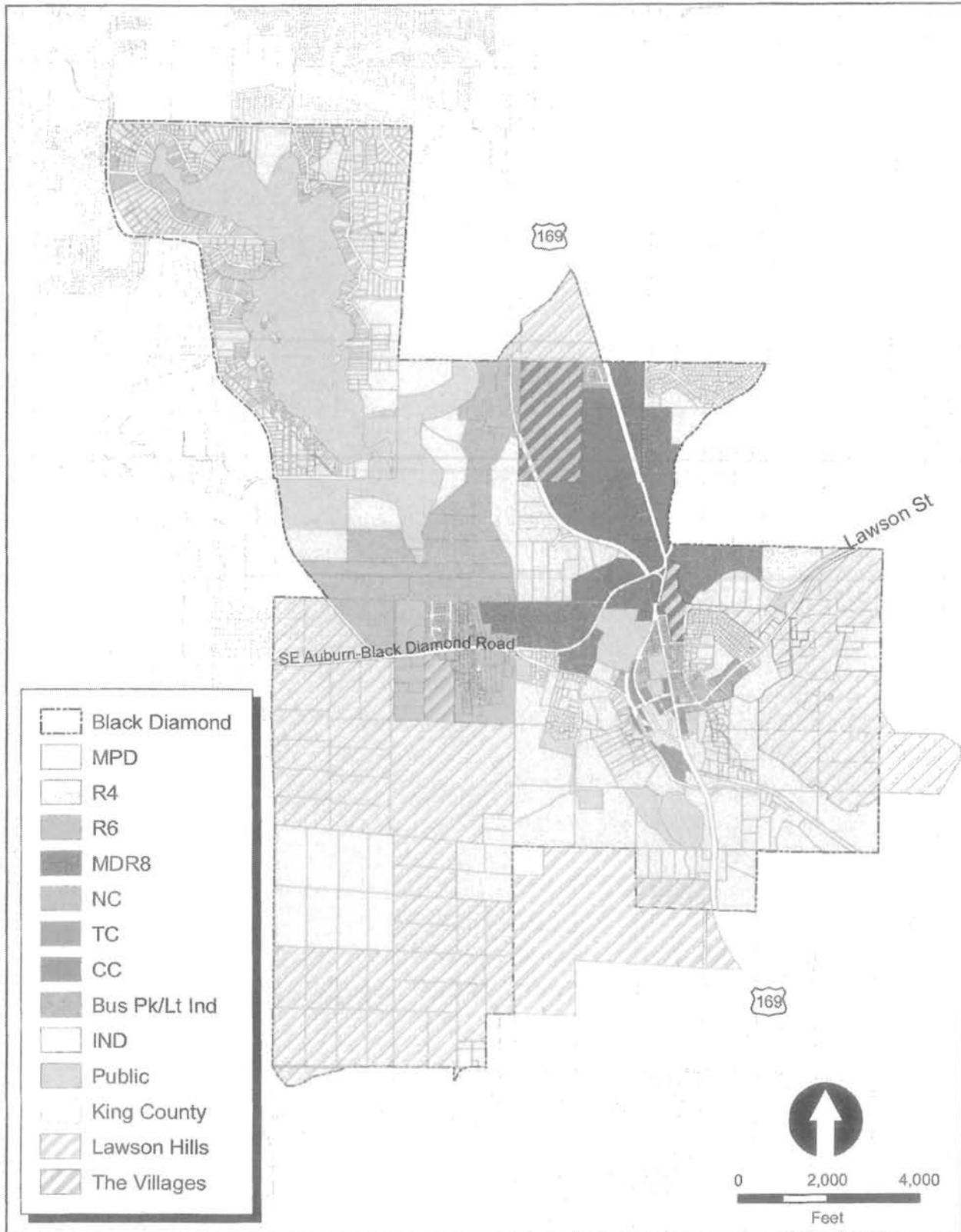
Sources: King County (2007); City of Black Diamond (2006)

Map Prepared: December 2008



**ICF Jones & Stokes**  
 an ICF International Company

Exhibit 3-1  
City of Black Diamond Zoning



Exhibits in this EIS are intended to provide a general graphical depiction of built and natural environment conditions and may not be accurate to the parcel level.

AR 65