

67095-6

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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

REPLY BRIEF OF PETITIONERS

2011 SEP 28 PM 3:55
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

Yarrow Bay¹ agrees – this is not a difficult case. The City’s 2009 Ordinances adopted a comprehensive plan and development regulations creating standards and a permitting process for Master Planned Developments (“MPDs”). The 2009 Ordinances were not timely appealed. Following those rules, Yarrow Bay applied for two MPD Permits for The Villages and Lawson Hills project sites. Because Yarrow Bay’s MPD applications complied with the standards in the 2009 Ordinances, the City approved them by enacting the MPD Permit Approval Ordinances in 2010.²

Early in the review of the MPD Permit applications, TRD agreed that the Villages and Lawson Hills were “projects” and that Yarrow Bay was applying for “permits.” Consistent with that position, TRD ultimately appealed the MPD Permit Approval Ordinances under chapter 36.70C RCW, the Land Use Petition Act (“LUPA”), to the Superior Court. LUPA governs the appeal of any land use decision that is a “project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used.”³ But TRD also took the novel step of arguing that the MPD Permit Approval Ordinances were not “project permits,”

¹ Consistent with Yarrow Bay’s Brief of Petitioners, Petitioners BD Lawson Partners, LP and BD Village Partners, LP are referred to, collectively, as “Yarrow Bay.” Respondent Growth Management Hearings Board is referred to as the “GMHB” or “Board.” Respondent Toward Responsible Development, *et al.* and its individual members is referred to as “TRD.” The City of Black Diamond is sometimes referenced as “the City.”

² To provide clarity for this Court’s analysis, Yarrow Bay distinguishes the two sets of ordinances by using the term “2009 Ordinances” to reference the City’s previously adopted comprehensive plan and development regulations, and the term “MPD Permit Approval Ordinances” when referencing the 2010 actions of the City of Black Diamond approving The Villages and Lawson Hills projects.

³ RCW 36.70A.020(2)(a).

but were development regulations, and filed a separate appeal to the Board. The Board's Order on Motions agreed with TRD's second appeal and characterized the MPD Permit Approval Ordinances as development regulations, instead of permits. The Board erred.

The Board lacks subject matter jurisdiction over the 2009 Ordinances, because they were not timely appealed. The Board lacks subject matter jurisdiction over the MPD Permit Approval Ordinances because they are project permits, not development regulations. The Board's Order on Motions transformed site-specific project review and approval into a political, legislative process.⁴ Yarrow Bay seeks to maintain the *status quo*, where land use policy is the product of the legislative process, and project review remains "free of the 'fluctuating policy' of legislative bodies."⁵ This case is simple because Yarrow Bay asks this Court to confirm the *status quo*: that Yarrow Bay and the City followed the rules established by the 2009 Ordinances, to properly obtain and approve two MPD permits, subject to conditions as allowed by law. The City joined Yarrow Bay's arguments.

TRD's Brief of Respondents⁶ fails to respond to most of the arguments and analysis presented in Yarrow Bay's Brief of Petitioners. This Reply will rebut TRD's most significant mischaracterizations, referring to Yarrow Bay's Brief of Petitioners whenever possible. This Court should reverse the Board's

⁴ Washington courts have expressly rebuked such legislative shell games in the land use context. *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) ("Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.").

⁵ *Id.* at 53.

⁶ Hereafter, the TRD Brief of Respondents is referred to as "TRD Brief."

Order on Motions, and remand to the Board for entry of an order denying TRD's appeal for lack of subject matter jurisdiction.

II. REPLY STATEMENT OF THE CASE

TRD asserts: "None of these facts are in dispute."⁷ That is not true. First, the MPD Overlay and MPD zone are not "placeholders" for future legislative zoning actions.⁸ Because adopted comprehensive plans and development regulations are presumed valid under RCW 36.70A.320(1), and are the foundation for project review under RCW 36.70B.030, there is no such thing as "placeholder" zoning or "placeholder" Future Land Use Map ("FLUM") designations.

The City's FLUM designated a substantial amount of land with the "MPD Overlay," and its 2009 Zoning Map zoned some of the MPD Overlay lands as MPD, and zoned other areas for different residential and non-residential designations.⁹ All of the land within The Villages and Lawson Hills project sites is designated MPD Overlay on the FLUM.¹⁰ Over 160 acres of land in the MPD Overlay are not owned by Yarrow Bay and, therefore, were not subject to nor affected by the MPD Permit Approval Ordinances.¹¹ Lands

⁷ TRD Brief, p. 17.

⁸ TRD Brief, p. 2.

⁹ The City's adopted zoning map is shown on a figure from the Environmental Impact Statement, which also outlines the location of The Villages and Lawson Hills sites. AR 65, Appendix F to Brief of Petitioners.

¹⁰ See Appendix F to Brief of Petitioners, and compare the outline of the MPD Overlay areas shown on AR 1571 (Future Land Use Map) to the outlines of The Villages and Lawson Hills projects shown on AR 65.

¹¹ *Id.* Compare AR 1571 to AR 65. There is a quarter section of land (160 acres) on the west side of the City mapped on the FLUM with the MPD Overlay, and zoned MPD, that is not part of The Villages project site, and a linear strip of land adjoining the southern border of the Lawson Hills site designated MPD Overlay, and zoned R4, but not part of the Lawson Hills project site.

designated MPD Overlay on the FLUM can only be developed with “[a]n MPD permit.”¹² Accordingly, Yarrow Bay sought MPD Permits, as other landowners may do in the future.

The MPD Permit application requirements adopted in the 2009 Ordinances called for “narrative” discussion about a number of items, including the design concept, and also allowed narrative requests for variances from other adopted standards if certain criteria were met.¹³ TRD asserts as fact that large sections of narrative from Chapters 3 and 13 of each MPD permit application are City-adopted “text amendments” to the City’s development regulations.¹⁴ But the record is clear that each MPD Permit Approval Ordinance is “limited to the terms and conditions set forth in the City Council’s written decision, and does not include approval of any other portion of the MPD set forth in the application.”¹⁵ Thus, TRD’s argument that there are “text amendments” in the first 16 pages of Chapter 3 of the MPD Permit Applications is simply not true – City Council approval of Chapter 3 was limited to the “description of categories (beginning on page 3-18),” the cap on the amount of development allowed, and “target densities (Table 3-2).”¹⁶ TRD likewise incorrectly asserts that Chapter 13 of the MPD Permit Applications was approved to create a new

¹² BDMC 18.98.030(A)(1). Chapter 18.98 BDMC is Appendix A to the Brief of Petitioners.

¹³ *See, e.g.*, BDMC 18.98.040(A)(7) and BDMC 18.98.130.

¹⁴ TRD Brief, pp. 9-12.

¹⁵ AR 1379 (The Villages), AR 1258 (Lawson Hills).

¹⁶ AR 1402-03 and AR 1282 (Condition of Approval No. 128 for The Villages and No. 132 for Lawson Hills).

permitting process, or to supersede existing code.¹⁷ The only part of Chapter 13 approved by the City was a reduced parking standard in the Town Center for Villages.¹⁸

Next, TRD takes three quotations out of context. First, TRD cites an off-hand statement by City Staff that the MPD proposal was “similar to a ‘subarea plan’.”¹⁹ An off-hand analogy does not convert one thing into another simply because the two things are thought to be “similar.” As even TRD conceded,²⁰ the issues presented to the Board did not include whether the MPD Permit Approval Ordinances were subarea plan amendments. Thus, the statement by City staff is not relevant to this Court’s analysis.

TRD repeatedly uses a quote to allege that Yarrow Bay conceded the MPD Permit Approval Ordinances were regulatory guidelines and development standards: “...the MPD process is intended to be a comprehensive review process that sets the guidelines and requirements against which future development will be measured. . . .”²¹ Nothing in that quote concedes that the MPD Permit Approval Ordinances are anything other than site-specific permits that did not include construction. In greater context:

A Master Planned Development (MPD) permit is a general land use approval ... The City chose to require the development of property ...

¹⁷ See, AR 1379 (The Villages), AR 1258 (Lawson Hills) (Condition of Approval No. 1). The only reference to Chapter 13 of the MPD Permit Applications included in the MPD Permit Approval Ordinances is at The Villages Conclusion of Law 51 at AR 1357 (Lawson Hills, COL 51 at AR 1238) and The Villages Condition 148, AR 1404 (Lawson Hills, Condition 152 at AR 1284).

¹⁸ Brief of Petitioners, p. 37 and note 122.

¹⁹ TRD Brief, p. 15.

²⁰ TRD Brief, p. 24, note 11.

²¹ TRD Brief, pp. 15 – 16, citing AR 2344.

to begin with an MPD approval in order to provide public benefits that are not typically available through conventional development... An MPD does not actually give approval for construction, rather the MPD process is intended to be a comprehensive review process that sets the guidelines and requirements against which future development will be measured. See City Ordinance No. 09-897, BDMC 18.98.005 and BDMC 18.98.050... [Following MPD Approval, further] review will happen during the subdivision and engineering process.”²²

Notably, BDMC 18.98.005 mandates that MPD development must occur pursuant to the “terms and conditions” of an MPD permit, which is simply another way to say “guidelines and requirements.”

Most importantly, at the time of Yarrow Bay’s statement, TRD agreed that the MPDs were project permits. TRD’s members argued to the City’s Hearing Examiner that the MPDs were the “underlying permits” upon which SEPA²³ Environmental Impact Statements (“EISs”) were required, and that the EISs “for these projects” failed to include adequate detail, and that the “Project Was Not Adequately Described.”²⁴

TRD’s final misleading quote is that the City Hearing Examiner concluded that the “MPD review qualifies as a nonproject action.” In fact, the Examiner did not deem the MPDs to be either “project” or “non-project” actions;²⁵ but classified the MPD Permits as “hybrid actions” which required a “level of detail [in the EIS that] is expected to be comparatively high for project specific impacts.”²⁶ Unless TRD wants to concede applicability of its past

²² AR 2344.

²³ The State Environmental Policy Act, chapter 43.21C RCW is referred to as “SEPA.”

²⁴ AR 1849:24 – 25, AR 1850:1 – 12, AR 1854:4 – 7, AR 1858:8 – 20 (emphasis added).

²⁵ The SEPA regulations, at WAC 197-11-704, classify actions as either “project” actions which “directly modify” the environment – i.e., involve construction – or “non-project actions” which are purely planning documents.

²⁶ AR 2345.

position that the MPD Permits were project permits for SEPA, none of these quotes are determinative of the nature of the MPD Permit Approval Ordinances.

Finally, TRD's "summary" of the facts²⁷ is corrected here:

(1) The MPD Permit Approval Ordinances are for two project sites,²⁸ which include non-contiguous land pursuant to BDMC 18.98.030.

(2) The MPD sites are 36% of the City's total land acreage.²⁹

(3) The 2009 Ordinances planned for substantial growth, including population growth from about 4,000 to 17,000 persons by 2025.³⁰

(4) The MPD Permit Approval Ordinances included a site-specific rezone of some lands not already zoned MPD within each project site to MPD, and did not re-zone all eligible lands mapped MPD Overlay to MPD.³¹

(5) Under the 2009 Ordinances, an MPD "shall include a mix of residential and nonresidential uses;" and "residential uses shall include a variety of housing types and densities."³² Housing types were to include "single family, detached, on various sized lots," "single family, attached, including duplexes, townhouses . . . , rowhouses . . . [and] courtyard houses, [as well as]

²⁷ TRD Brief, pp. 17 – 19.

²⁸ See AR 65, AR 1782, AR 1783.

²⁹ The City includes 4,300 acres, and the project sites are 1,567 acres. AR 64, AR 1139.

³⁰ AR 1513 – 14.

³¹ AR 1293 (The Villages), AR 1176 (Lawson Hills). However, as stated in Section 4 of each MPD Permit Approval Ordinance, the rezones were not necessary. AR 1293 (The Villages), AR 1176 (Lawson Hills). Under the 2009 Ordinances, all lands within The Villages and Lawson Hills were mapped with the MPD Overlay and could only be developed with an MPD Permit.

³² BDMC 18.98.120(A).

cottage houses [and] apartments.”³³

(6) As required by BDMC 18.98.120(A) and BDMC 18.98.080(A)(6), the MPD Permit Approval Ordinances include a variety of residential densities to assure a mix of housing types and affordability.³⁴

(7) Each MPD Permit Approval Ordinance included a site plan that, as required by BDMC 18.98.040(A)(1)(f), showed the “types, generalized locations, acreages, and densities of proposed residential and non-residential development.”³⁵

(8) Like any other initial land use entitlement, each MPD Permit Approval Ordinance included a permit condition authorizing “all other specifics [to] be resolved through the Development Agreement process;” i.e., a subsequent, additional permit process.³⁶ In addition, the items misquoted and summarized by TRD³⁷ are permit conditions, not development regulations.³⁸

In short, the MPD Permit Approval Ordinances are site-specific land use decisions, consistent with the City’s adopted comprehensive plan policies and development regulations,³⁹ including the 2009 Ordinances.

³³ MPD Framework Design Standards & Guidelines, AR 2182 – 2199. These Standards are cited throughout the Reply, and are included as Appendix A.

³⁴ AR 2505 (The Villages Table 3-2), AR 2079 (Lawson Hills Table 3-2).

³⁵ AR 1782 (The Villages), AR 1783 (Lawson Hills).

³⁶ AR 1402 – 03 (The Villages, Condition 128), AR 1282 (Lawson Hills, Condition 132).

³⁷ TRD Brief, pp. 19-20.

³⁸ Brief of Petitioners, pp. 38-43.

³⁹ Contrary to TRD’s arguments at TRD Brief, pp. 28-29, the City Council has concluded the MPDs are entirely consistent with the 2009 Ordinances, including the comprehensive plan. *See* AR 1324-1378 (The Villages), AR 1206-1257 (Lawson Hills).

III. REPLY ARGUMENT

A. Standard of Review

TRD invites the Court to make two novel interpretations of the legal standard of review. First, notwithstanding the State Supreme Court's directive to "not defer to an agency the power to determine the scope of its own authority,"⁴⁰ TRD invites the Court to do the opposite and follow the Board's own guidance.⁴¹ Second, TRD concedes that the Washington Courts have stated that the GMA is to be strictly construed and acknowledges that the GMA is not entitled to liberal construction.⁴² TRD nonetheless invites the Court to apply a rule of "neutral construction" to the GMA. The Court should decline TRD's invitations.

B. **The 2009 Ordinances adopted the foundation for permit review, setting the parameters for MPD Permit applications, and the nature of permit conditions. The Board's Order authorizes an illegal collateral attack on those adopted and previously unchallenged 2009 Ordinances.**

Because the effect of the Board's Order on Motions was to render impossible any MPD Permit approval using the 2009 Ordinances, the Board's Order on Motions effectuated a collateral attack on the 2009 Ordinances.⁴³ TRD made no attempt to distinguish this case from any of the collateral attack cases analyzed by Yarrow Bay (*Woods v. Kittitas County, Wenatchee*

⁴⁰ *In re Electric Lightwave*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

⁴¹ TRD Brief, pp. 21-22.

⁴² TRD Brief, p. 22 text and note 10, citing *Spokane County v. City of Spokane*, 148 Wn. App. 120, 125, 197 P.3d 1228 (2009).

⁴³ Brief of Petitioners, pp. 16-25.

Sportsmen Ass'n v. Chelan Cy, and *Somers v. Snohomish County*).⁴⁴ Instead, TRD argues that there is no collateral attack because the words of TRD's petition to the Board "questioned compliance with the substantive standards in chapter 18.98 BDMC."⁴⁵ If that were true, then the Board had no jurisdiction over this case; there is no doubt that an appeal arguing that a land use decision failed to meet adopted development regulations shall be reviewed only by Courts under LUPA.⁴⁶

Three weeks prior to the filing of TRD's Response Brief, the Washington Supreme Court once again affirmed the prohibition against collateral attacks in *Feil v. E. Wash. Growth Mgmt. Hrgs Bd.*⁴⁷ In *Feil*, the Washington State Parks and Recreation Commission ("Parks") sought and obtained approval from Douglas County to develop a 5.1 mile trail next to the Columbia River. Douglas County Code required Parks to obtain a "recreational overlay (R-O) district permit" and "site development permit."⁴⁸ Like TRD in this case, the Orchardists appealed the permit decision to both the Superior Court under LUPA and to the Eastern Washington Growth Management Hearings Board ("EWGMHB").

⁴⁴ See Brief of Petitioners, pp. 17-25 and RAP 10.3(b).

⁴⁵ TRD Brief, p. 47. Notably, TRD does not assert noncompliance with chapter 18.08 BDMC (the review and approval process), or the MPD Framework Design Standards & Guidelines that are also part of the 2009 Ordinances.

⁴⁶ RCW 36.70B.040 (requiring a determination of consistency for project permits with development regulations), see also RCW 36.70C.020 (defining land use decisions appealable under LUPA).

⁴⁷ ___ Wn.2d ___, ___ P.3d ___, 2011 WL 3612298 (August 18, 2011).

⁴⁸ *Id.* at *2.

The Orchardists argued that the permit was, in effect, an amendment to the County comprehensive plan because it allowed a recreational use to overlay land otherwise zoned for agricultural uses. Likewise, TRD has argued that the MPD Permit Approval Ordinances are amendments to Black Diamond's development regulations. The EWGMHB properly concluded that it lacked subject matter jurisdiction to review the permit because the trail is a site-specific project. The Washington Supreme Court agreed.

Citing *Woods*,⁴⁹ the *Feil* Court framed the question simply: "whether the decision to approve the R-O district permit was a site-specific land use decision. If it was, the EWGMHB lacked jurisdiction to review that decision."⁵⁰ The Court looked to the County's existing code:

In our view, the answer plainly lies in Douglas County Code (DCC) 18.12.060, which states that "[d]istrict overlays are generally applied to site specific proposals on an individual property or a group of properties. Not every property in which the overlay district may be applied will meet the minimum provisions and policies set forth in the comprehensive plan." That county code section additionally provides that the "purpose of the district overlay designation established within the DCC is to implement comprehensive plan policies that identify recreational activities or special opportunities for achieving public benefits by allowing uses that differ from the specific provisions set forth within the applicable zoning district."

...

This project, which permits application of a district overlay to a site-specific proposal on an individual property, is a site-specific land use decision. We conclude that, under the GMA statutory scheme, the EWGMHB did not erroneously interpret

⁴⁹ *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007).

⁵⁰ *Feil*, __ Wn.2d __, __ P.3d __, 2011 WL 3612298 (August 18, 2011).

or misapply the law when it determined that it did not have jurisdiction to review this site-specific decision.⁵¹

The Court noted that the Orchardists could have appealed the regulations creating an R-O district permit to the Board within 60 days.⁵² But after the 60-day window had expired, their only recourse was a LUPA challenge to the compliance of the site-specific projects with the County's comprehensive plan and development regulations.⁵³

Here, this Court is faced with the same issue: whether the MPD Permit Approval Ordinances, which approve site-specific proposals and implement the 2009 Ordinances are site-specific land use decisions. Under *Feil*, (and *Woods v. Kittitas County*, *Wenatchee Sportsmen Ass'n v. Chelan Cy*, and *Somers v. Snohomish County*) the answer is yes. Like the Orchardists in *Feil*, TRD is collaterally attacking the City's adopted, unappealed, and valid comprehensive plan and development regulations. TRD could have appealed the 2009 Ordinances. TRD did not and its sole recourse is its pending LUPA appeal. The Board's Order on Motions should be reversed.

C. Board lacks subject matter jurisdiction over project permits.

1. The MPD Permit Approval Ordinances include a Site Plan, not a Zoning Map, and each project is located on a single site in a single ownership.

TRD concedes labels are not important – substance is.⁵⁴ But TRD relies on a label - “Land Use Maps” – to argue that the site plans approved for

⁵¹ *Id.* at *5 (emphasis added) (internal citations omitted).

⁵² *Id.* at *5.

⁵³ *Id.* (citing *Woods*, 162 Wn.2d at 616); *see also*, RCW 36.70A.290(2).

⁵⁴ TRD Brief, pp. 27 – 31.

The Villages and Lawson Hills are zoning maps.⁵⁵ The sharp contrast between the two can be seen by simply comparing the Lawson Hills “Land Use Map” site plan to the City’s Zoning Map.⁵⁶ The Zoning Map reflects that the North Triangle was entirely zoned “MPD,” and the main property for the Lawson Hills project was largely zoned R4, with the westernmost-portion zoned MDR8. With the MPD Permit Approval Ordinances, all those lands are now zoned MPD. One has no idea from the Zoning Map what the land looks like or, practically speaking, how it can be developed.

In contrast, the “Land Use Map” provides a site-specific development design. Sensitive areas and buffers have been identified for protection. Parks, trails and open space are located to maximize public benefit given the topography and geography of the site. For example, the park inside Parcel L15 at the southeast corner of the project site is so located to provide views to Mt. Rainier. The major road system has been located to avoid the sensitive areas, accommodate the topography, and provide access to the development parcels and parks. A site for a future school is shown. The types and densities of proposed residential and nonresidential development are sited on the plan, including site-specific design details such as buffering neighboring existing uses from the higher density residential development planned for Parcel L5 with lower density residential development on Parcel L4, and open space. These are all elements of the “master plan drawings” required with an MPD

⁵⁵ TRD Brief, pp. 8 – 9.

⁵⁶ AR 1782 (The Villages site plan), AR 1783 (Lawson Hills site plan), AR 65 (zoning map).

Permit application.⁵⁷ This level of design work required a phenomenal investment of time and effort by professional architects, civil engineers, wetland scientists, geologists, landscape designers, and more. A zoning map contains none of that site-specific assessment or detail.

TRD next mistakenly argues that a “site plan” is synonymous with a “binding site plan” as defined in chapter 58.17 RCW.⁵⁸ Not only has the Board previously recognized site plans in *Laurelhurst v. City of Seattle* that are not binding site plans under chapter 58.17 RCW,⁵⁹ but the Washington Real Property Deskbook expressly warns of the potential for confusion regarding the phrases “site plan” and “binding site plan”:

In addition to binding site plans as an alternative method of land division [under chapter 58.17 RCW], many local jurisdictions require approval of a “site plan” . . . as a separate approval with its own procedural and substantive requirements. Often, and unfortunately, such a site plan approval is referred to as a “binding site plan.” . . . In addition to being known as a “binding site plan,” this process may be referred to as a “site plan approval” or a “master site plan” or some other similar term.⁶⁰

“Master plan drawings” were required for the MPD Permit applications.⁶¹ As

⁵⁷ BDMC 18.98.040(A).

⁵⁸ TRD Brief, pp. 43 – 44.

⁵⁹ See Yarrow Bay Brief, pp. 31-36. TRD has not responded to Yarrow Bay’s arguments on this point.

⁶⁰ Edward W. Kuhrau, Washington Real Property Deskbook at §90.4 (1997 & Supps. 2000 - 02).

⁶¹ BDMC 18.98.040(A)(1) requires a number of items be mapped. Some of those items are included on the Land Use Map site plans, including some of the proposed open space and parks, the existing environmentally sensitive areas and buffers, proposed locations for major roads, and proposed sites for schools. Other matters were shown on different maps contained in the MPD Permit applications. Complete copies of the MPD Permit applications were provided to the Board, but the Board apparently lost them. See AR 2531-32 (Order from Board requesting MPD Applications), AR 2555 (letter from City

the Deskbook continues, there “is very little that can be said about site plan approvals in general. The instances in which they will be required, the procedures and standards of review, and the substantive effect of such approvals are determined by the provisions of the local ordinance in question.”⁶² Here, pursuant to the 2009 Ordinances, the substantive effect of the approval of the MPD Permit Approval Ordinances, including the “Land Use Maps,” was a site-specific approval for a project permit.

TRD next argues that “where land use decisions impact multiple sites, they are considered to be legislative enactments. This is true even if there are only two ‘multiple sites.’”⁶³ However, *Raynes v. Leavenworth* does not support TRD’s argument. In *Raynes*, a property owner submitted an application to amend the text of the zoning ordinance to permit RV parks in all of the Tourist Commercial (“TC”) District (i.e., a legislative area-wide rezone). There were five parcels within the TC District that met the minimum acreage requirement to qualify for RV park use, but only two had a reasonable potential for generating RV park conditional use permit applications. The area-wide rezone of all parcels in the TC District was approved.

A complaining neighbor, Raynes, appealed and argued that the appearance of fairness doctrine had been violated. But because the appearance of fairness doctrine only applies to quasi-judicial proceedings like site-specific

enclosing requested MPD Applications), Record Index at 5 (Record Index showing MPD applications were received by Board but are not in the Board’s file).

⁶² Edward W. Kuhrau, Washington Real Property Deskbook at §90.4 (1997 & Supps. 2000 - 02).

⁶³ TRD Brief, p. 45, citing *Raynes v. Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992).

rezones⁶⁴ and not to legislative actions like area-wide rezones, Raynes was forced to argue that even though the text amendment was adopted through legislative action, it was in effect a quasi-judicial site-specific rezone of the two parcels (exactly the opposite of the argument TRD makes in this case). The Court disagreed, holding that the zoning amendment was a legislative area-wide rezone.

Raynes stands for the proposition that a text amendment to the zoning code, which applies equally to all properties in the zoning district, is a legislative action, even if the practical effect is to permit a use on only two parcels. Here, the MPD Permit Approval Ordinances affect only specific properties in single ownership.⁶⁵ They have no effect on all of the lands eligible to be rezoned to MPD due to location within the FLUM's MPD Overlay.⁶⁶ By definition, the MPD Permit Approval Ordinances cannot be area-wide re-zones because they do not apply equally to all eligible lands. As in *Feil*, the MPD Permit Approval Ordinances are a "site-specific proposal on individual property, [which] is a site-specific land use decision."⁶⁷ The Board's Order on Motions which concludes otherwise should be reversed.

⁶⁴ RCW 42.36.010.

⁶⁵ BD Lawson Partners, LP owns the Lawson Hills project site, and BD Village Partners, LP owns The Villages project site. Both project sites include a large number of existing parcels. Those existing parcel lines can be seen on the City's Zoning Map, AR 65, and on the Future Land Use Map, AR 1571.

⁶⁶ See pp. 4-5 and note 11, *supra*.

⁶⁷ *Feil, supra*, at *5.

2. **The Board’s limited jurisdiction does not extend to the firm and flexible permit terms and conditions of the MPD Permit Approval Ordinances.**
 - a. **The MPD Permit Approval Ordinances are project permits which are consistent with both the firm and the flexible standards set by the 2009 Ordinances.**

It is undisputed that the Board’s jurisdiction is limited to review of only legislative comprehensive plans and development regulations.⁶⁸ TRD argues that any decision a city makes regarding development is legislative, including: the location of different uses on a mixed-use development site, building setbacks, and other terms and conditions that are typically applied in project permits.⁶⁹ The dividing line between the adoption of GMA development regulations and project permit approvals is defined by chapters 36.70A and 36.70B RCW.⁷⁰ The Board moved that dividing line, so that the “foundation of project review” required by RCW 36.70B.030, and the obligation to measure permit consistency against adopted regulations described in RCW 36.70B.040 lose all meaning.

In part, TRD’s arguments supporting the Board assume the use of outdated Euclidean zoning.⁷¹ As explained in Rathkopf’s *The Law of Zoning and Planning*:

[T]raditional or “Euclidean” zoning divides municipalities into rigid districts. Each district or zone is dedicated to a particular

⁶⁸ RCW 36.70A.280.

⁶⁹ See TRD Brief, pp. 25 – 27.

⁷⁰ Brief of Petitioners, pp. 1-2, 25-28, 45-46.

⁷¹ The United States Supreme Court approved of the constitutionality of zoning ordinances in the landmark case of *Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

purpose, either residential, commercial, or industrial. This type of zoning has the benefit of ... providing a definite and predictable pattern for developers and purchasers of land. However, the certainty of Euclidean zoning came at a price; '[t]raditional zoning has the virtue of certainty and the handicap of rigidity.' While zoning regulations were developed to control the blight and decay that were prevalent in urban communities, their unintended effect has been to create 'cookie cutter' developments where all the houses are similar in architectural style, setbacks, and yard sizes.

Modern zoning ordinances have been enacted as a reaction to the deficiencies of traditional zoning. These ordinances strive to meet society's current development needs by affording greater flexibility in zoning patterns. Planned unit development (PUD) is one technique adopted by municipalities to remedy the defects in traditional zoning theory and practice.⁷²

Flexible approaches to development are permitted under Washington law, where project permits are defined as including, but not limited to planned unit developments, conditional uses, and site plan review.⁷³ The City embraced the modern, non-Euclidean approach when it adopted the 2009 Ordinances for MPDs, which include express reference to flexibility in BDMC 18.98.010(E) and (L), and in the MPD Framework Design Standards and Guidelines which include specific flexible standards such as front yard setbacks which vary from 5 to 15 feet.⁷⁴ The 2009 Ordinances include both firm standards⁷⁵ as well as flexible standards.⁷⁶ Those un-challenged regulations set the foundation for review and approval of the MPD Permit Approval Ordinances.

⁷² 5 Rathkopf, *The Law of Zoning and Planning*, §88.1 (2005) (internal citations omitted).

⁷³ RCW 36.70B.020(4).

⁷⁴ Appendix A, AR 2183 (explaining the guidelines are "intended to...provide an amount of flexibility"), AR 2198 (discussing residential design standards).

⁷⁵ Brief of Petitioners, pp. 6-11.

⁷⁶ *See, e.g.*, Appendix A, AR 2198 (Residential Building Design guidelines).

b. The MPD Permit Approval Ordinances include conditions. Development regulations do not become new amendments to development regulations when they are repeated as permit conditions.

The Board wrongly characterized development conditions that repeated existing code requirements as new development regulations.⁷⁷ TRD dismisses that argument, stating: “the issue is not their source, but their nature.”⁷⁸ This is senseless. Repeating the requirements of an existing regulation as a permit condition changes neither its source nor its nature. A regulation does not transform to new or amended regulations when listed as a permit condition.

TRD further argues that applying existing code criteria does not mean the MPD Permit Approval Ordinances are permits.⁷⁹ The Legislature determined otherwise when it decided “Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review,”⁸⁰ and in declaring that projects are measured against “development regulations adopted under chapter 36.70A RCW.”⁸¹ TRD’s analogy to the relationship between laws and the Constitution is baseless.

c. Washington law expects permit conditions, like those found in the MPD Permit Approval Ordinances, to include additional site-specific protections.

TRD makes no attempt to rebut Yarrow Bay’s analysis of *Davidson*

⁷⁷ Brief of Petitioners, pp. 38-41.

⁷⁸ TRD Brief, p. 40.

⁷⁹ TRD Brief, pp. 40-43.

⁸⁰ RCW 36.70B.030(1).

⁸¹ RCW 36.70B.040(1).

Serles v. City of Kirkland.⁸² And neither do the other cases cited by TRD help it here.⁸³ *City of Seattle v. Yes for Seattle* was a challenge to an initiative to set new permit application criteria and change the city's vesting scheme.⁸⁴ "The parties agreed that [the initiative was] legislative."⁸⁵ *Alexanderson v. Board of Clark County Commissioners* does not stand for the proposition that any additional or supplemental controls – regardless of how they are adopted – amend development regulations.⁸⁶ Rather, the County entered into an agreement with an Indian tribe to provide services if the Bureau of Indian affairs approved the tribe's application for trust status.⁸⁷ Neither *Yes* nor *Alexanderson* offers any useful analysis of the difference between legislative policy making and project conditions. TRD cites no applicable case law, because this is an issue answered by statute.

State law sets a sequence for legislative action, followed by site-specific permitting.⁸⁸ Site-specific permit conditions are expressly anticipated during project review by RCW 36.70B.030, and, as to MPD Permits, permit conditions were called out in the 2009 Ordinances (*see* BDMC 18.98.005 - .080). Logically extended, TRD's unsupported legal argument would mean that a City could never impose a site-specific condition that went beyond code or refined code to apply to specific site features. For example, WAC 173-060-

⁸² 159 Wn. App. 616, 246 P.3d 822 (2011). *See* Brief of Petitioners, pp. 43-46.

⁸³ TRD Brief, pp. 28 and 34,

⁸⁴ *Yes*, 122 Wn. App. 382, 390-91, 93 P.3d 176 (2004).

⁸⁵ *Id.* at 307.

⁸⁶ TRD Brief, p. 28 note 12; 135 Wn.2d 541, 144 P.3d 1219 (2006).

⁸⁷ *Alexanderson*, 135 Wn.2d at 543 - 545.

⁸⁸ Brief of Petitioners, pp. 45-46.

050(3) exempts from maximum permissible noise standards “[s]ounds originating from temporary construction sites as a result of construction activity.”⁸⁹ But in the MPD Permit Approval Ordinances, an extensive condition is imposed to mitigate construction noise, tied to the neighbors of specific development parcels on each project site.⁹⁰ Under TRD’s erroneous analysis, no such condition could be provided in a permit—regardless of the protections it provides to neighboring property owners.

The Board’s Order on Motions erred in converting permit conditions to regulatory controls, and should be reversed.

d. The MPD Permit Approval Ordinances do not supersede standards in the 2009 Ordinances.

TRD claims that the MPD Permit Approval Ordinances “supersede any conflicting standards in the Code,” and that even if that were not the case, “the same concept is included in the Code which remains in effect (*see e.g.*, BDMC 18.98.130.B).”⁹¹ As explained in Section II above, this is false – none of Chapter 13’s proposed procedures were adopted, nor was the term allowing the MPD Permit Approval Ordinances to “supersede any conflicting standards in the Code.” The variance criteria of BDMC 18.98.130 were the vehicle by which the requests contained in Chapter 13 were made. But since the variances were denied, the continuing effect of BDMC 18.98.130 is irrelevant -- except to demonstrate that TRD is collaterally attacking the 2009 Ordinances. The

⁸⁹ BDMC 8.12.040(c) echoes the State law exemption. See Appendix B.

⁹⁰ AR 1392 (The Villages, Condition 44), AR 1270 (Lawson Hills, Condition 41).

⁹¹ TRD Brief, p. 37; The Board’s Order on Motions at 15, AR 2575, similarly makes this mistaken assumption.

Board's Order on Motions was not supported by substantive evidence and should be reversed.

D. Even if the Board had Jurisdiction over the MPD Permit Approval Ordinances, the Board Erred in Concluding that the City's Process for Considering and Approving the Ordinances Violated the GMA Public Participation Requirements.

Even if the Board had jurisdiction to review the MPD Permit Approval Ordinances, the Board erred by summarily concluding that the City's MPD Permit public process failed to comply with GMA public participation requirements. The City conducted an extensive public process that exceeded GMA requirements.⁹²

The 2009 Ordinances established the specific, quasi-judicial public process for MPD review.⁹³ "[T]he City is bound to follow its own [quasi-judicial permit process] ordinances."⁹⁴ It is undisputed that the City followed this process to the letter and the Board made no determination that this process failed to satisfy the requirements of the GMA.⁹⁵ Rather than summarily conclude the wrong process was followed, the Board was required to have evaluated the process that the City did follow against the substance of the GMA's public participation requirements.⁹⁶

⁹² The particulars of the City's public process leading up to adoption of the MPD Permit Approval Ordinances are summarized in the MPD Permit Approval Ordinances at AR 1290-94 (Ord. 10-946) and AR 1173-77 (Ord. 10-947).

⁹³ BDMC 18.98.060 and 18.08.030.

⁹⁴ *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 836, 256 P.3d 1150 (2011) (City was required to follow quasi-judicial rezoning approval process, which made rezoning necessarily quasi-judicial).

⁹⁵ AR 1290-94 (Ord. 10-946) and AR 1173-77 (Ord. 10-947).

⁹⁶ *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 353-54, 190 P.3d 38 (2008) (Board is required to defer to local government discretion and evaluate local circumstances as required by RCW 36.70A.110(2),

The public process the City followed easily satisfies GMA requirements. RCW 36.70A.020(11) contains the goal that cities should “Encourage the involvement of citizens in the planning process” Likewise, RCW 36.70A.035 requires “notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals”⁹⁷ And, RCW 36.70A.140 requires a city to establish:

a public participation program identifying procedures *providing for early and continuous public participation The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.*

(Emphasis added). It is impossible to reconcile the Board’s findings that, on the one hand, the City “did an *accomplished, exceptional effort to involve the public,*”⁹⁸ that afforded “*extensive opportunities for MPD public participation*”⁹⁹ of which “Petitioners fully availed themselves,”¹⁰⁰ with the Board’s conclusion on the other hand that the City did *not* “*Encourage the involvement of citizens* in the planning process”¹⁰¹ The Board’s conclusion is even more puzzling given its conclusion that “notice was given as to the MPDs *beyond that required for GMA amendments.*”¹⁰²

therefore, Board erred in failing to provide that deference to Thurston County’s chosen process and applying instead the Board’s own “bright line” rule of 25% to evaluate the land market supply factor used in calculating County’s UGA).

⁹⁷ RCW 36.70A.035(1)(a) – (e) list some “examples of reasonable notice procedures.”

⁹⁸ AR 2585.

⁹⁹ AR 2586.

¹⁰⁰ AR 2586.

¹⁰¹ RCW 36.70A.020(11).

¹⁰² AR 2584 (emphasis added).

Under the process favored by the Board, one single public hearing before the Planning Commission was required. No requirement existed for additional public hearing or opportunity to address the City Council *at all*.¹⁰³ The process used by the City included two public information meetings, a planning commission meeting with feedback to the applicant, an open record public hearing over five weeks before the City's hearing examiner,¹⁰⁴ a closed record hearing before the City Council which extended over three weeks, and then five weeks of Council deliberations.¹⁰⁵

TRD also argues that the City should have utilized the public process applicable to legislative, development regulation amendments. As indicated in its Order, however, the Board has long held that "there is no requirement for individual contact between citizens and elected officials under GMA public participation."¹⁰⁶ The Board's conclusion in this respect, as well as its order remanding for compliance, must be reversed.

¹⁰³ BDMC 18.08.080(B).

¹⁰⁴ The Hearing Examiner provided each person at least 10 full minutes to testify verbally. AR 1206 ("Members of the public were given ten minutes each to testify before the Hearing Examiner, and parties of record who so testified or submitted written Comments were also provided ten minutes each to present argument to the City Council during its closed record hearing.") The Hearing Examiner acknowledged that the ten-minute limit was "actually a pretty long time," and "a lot longer than most people would impose." AR 2246 – 47. The Examiner also indicated that speaking time limits were "pretty easy to get around if you want to," by submitting unlimited written comments. *Id.*

¹⁰⁵ See BDMC 18.98.060, and AR 1290 – 1294 and AR 1173 – 1177, detailing the process followed for each MPD Permit Approval Ordinance.

¹⁰⁶ AR 2585 (Order on Motions at 25); see also *Robison v Bainbridge Island*, No. 94-3-0025, 1995 WL 903163 at 21 (May 4, 1995) (Final Decision and Order) (explaining that "face-to-face confrontation and verbal exchange with elected officials" is not required by the GMA).

IV. CONCLUSION

TRD's characterization of *Dry Creek Coalition* and *Karpinski* is wrong, non-responsive to Yarrow Bay's Brief and these issues were already briefed on the Motion to Accelerate Review.¹⁰⁷ Yarrow Bay's continued pursuit of permit applications does not undermine State law or this Court's decision, nor is the still pending and over one-year long process for Development Agreements proceeding at a "breakneck pace." The Legislature already decided in RCW 36.70A.302 that without a finding of "invalidity," developers are entitled to file applications under challenged regulations. The alternative would be a *de facto* moratorium on all permit applications during an extended appeal, which could bring economic development to a halt.

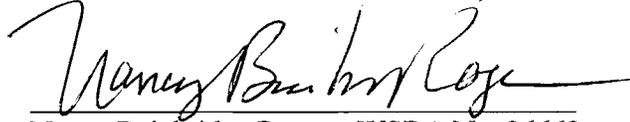
As stated at the outset, this is not a difficult case. The Villages and Lawson Hills projects are site-specific proposals. The MPD Permit Approval Ordinances documented that The Villages and Lawson Hills proposals were consistent with the 2009 Ordinances.¹⁰⁸ The approved permit conditions are just that: permit conditions, not regulatory controls. TRD's challenge belongs in its pending LUPA appeal. The Board's Order on Motions must be reversed and the Board directed to issue an Order dismissing TRD's petition for lack of subject matter jurisdiction.

¹⁰⁷ TRD Brief, pp. 49 – 50. See Reply on Motion to Accelerate Review, August 17, 2011.

¹⁰⁸ See AR 1324 - 1378 and AR 1206 - 1257 (Conclusions of Law reviewing consistency with the 2009 Ordinances, including the Comprehensive Plan, Chapter 18.98 BDMC, and the MPD Framework Design Standards and Guidelines).

DATED this 28th day of September, 2011.

CAIRNCROSS & HEMPELMANN, P.S.

A handwritten signature in black ink, appearing to read "Nancy Bainbridge Rogers", written over a horizontal line.

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Certificate of Service

I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on September 28, 2011, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

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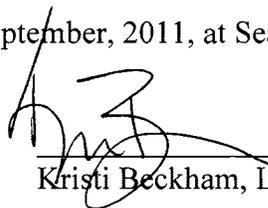
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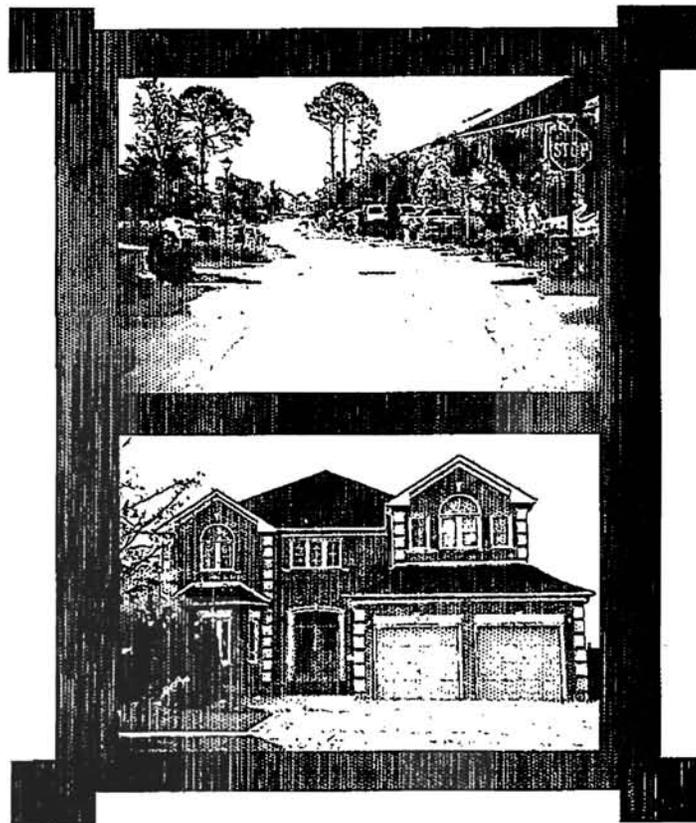


Kristi Beckham, Legal Assistant

APPENDIX
TO REPLY BRIEF OF PETITIONERS

APPENDIX A
TO
REPLY BRIEF OF PETITIONERS

BLACK DIAMOND DESIGN GUIDELINES
for
Master Planned Development
Framework Design Standards & Guidelines



Adopted June 18, 2009

Introduction and Purpose

The Master Planned Development (MPD) Framework Design Standards and Guidelines are intended to provide guiding principles for the overall design of MPD applications within the City. These guidelines are to be followed in consideration of an MPD at both the initial and subsequent phases of approval. It is anticipated they will be supplemented by additional guidelines and standards that are developed when more specific plans for phased development are proposed. Those guidelines may be initially drafted by the MPD developer for consideration by the City prior to eventual adoption as part of a development agreement. As such, these guidelines are not intended to address all potential aspects of future development, but to provide an overall framework upon which additional guidelines may be added to in the future.

The more specific guidelines that are included at this time reflect important issues to the community which need to be carried forth in future amendments.

The statements contained herein are intended to be standards and guidelines, rather than prescriptive rules, and thereby provide an amount of flexibility. Any decision regarding strict application of any guideline contained herein will be made by the City Council as part of its consideration of granting overall MPD approval.

General Principles & Site Planning

3

GENERAL PRINCIPLES AND SITE PLANNING

A. Environmentally Sustainable

Intent

To provide resource-efficient site design which includes consideration for saving trees, constructing on-site stormwater retention/infiltration features, and building orientation to maximize passive solar heating and cooling.

Guidelines

1. Implement a construction waste management plan to reduce construction waste. Consider life-cycle environmental impacts of building materials.
2. Incorporate energy saving techniques into all aspects of building's design and operation.
3. Maximize water conservation by maintaining or restoring pre-development hydrology with regard to temperature, rate, volume and duration of flow; use native species in landscaping; recycle water for on-site irrigation use.
4. Use measure that can mitigate the effects of potential indoor air quality contaminants through controlling the source, diluting the source, and capturing the source through filtration.
5. Reduce overall community impacts by providing connectivity from the project to the community; by incorporating best management practices for stormwater management; by creating useable public spaces such as plazas and parks; and by protecting important community-identified viewsheds and scenic areas.
6. Grading plans shall incorporate best management practices with phased grading to minimize surface disturbance and to maintain significant natural contours.

General Principles & Site Planning

4

B. Using Open Space as an Organizing Element

Black Diamond has a specific history and setting that involves varied topography, an agricultural past, forested areas, mining, and a small town scale. Care should be taken to reflect these patterns in master planned developments. In addition, the MPD chapter of Black Diamond's Municipal Code requires that fifty percent (50%) of the total land area of an MPD be maintained as open space. Proper design and integration of this open space into a development is very important.

Guidelines

1. All master planned developments shall include a wide range of open spaces, including the following:
 - a. Sensitive environmental features and their buffers
 - b. Greenbelts
 - c. Village greens
 - d. Parks and school playgrounds
 - e. Public squares
 - f. Multi-purpose trails

These features should be deliberately planned to organize the pattern of development and serve as center pieces to development cluster, not merely as "leftover" spaces.
2. Open spaces shall be linked into an overall non-motorized network through sidewalks, trails and parkways. The overall network shall be delineated at initial MPD approval and implanted through subsequent plats and permit approvals.
3. Stands of trees as an element of open space.

Due to the propensity of severe wind events in the Black Diamond area, an MPD should incorporate the preservation of larger rather than smaller stands of native trees.



General Principles & Site Planning

5



C. Integrating Development with Open Spaces

Intent

To allow for an efficient use of land, lower the cost of infrastructure and construction, protect environmentally sensitive areas, and maintain a small town "village" character within an MPD. Development is to be integrated with networks of preserved natural features and developed open space for both passive and active recreational uses.

Guidelines

1. Use of conventional, suburban-style subdivision design that provides little common open space shall be avoided.
2. Groupings of primarily residential development of approximately 400-600 units should be contained generally within a quarter mile radius to support walking, bicycling and future transit service. Development clusters shall be surrounded by a network of open space with a variety of recreational uses (including trails) to provide connections between clusters.
3. Methodology for Planning Development in clusters.
 - a. environmentally sensitive areas to be protected (including streams, wetlands, steep slopes, wildlife corridors, and their buffers) shall be identified, mapped and used as an organizing element for design;
 - b. areas for development of housing and commercial development shall be indicated;
 - c. streets and public spaces (as well as sites for public facilities such as schools, fire stations and other civic structures) shall be identified;
 - d. lots and groups of lots with various ownerships (i.e. fee simple by occupant, condominium, single ownership apartments, etc) shall be integrated with one another throughout all phases of a project;
 - e. views of Mt Rainier and other desirable territorial views shall be identified and integrated into site planning to maximize viewing from public spaces (streets, trails, parks, plazas, etc.).

General Principles & Site Planning

6

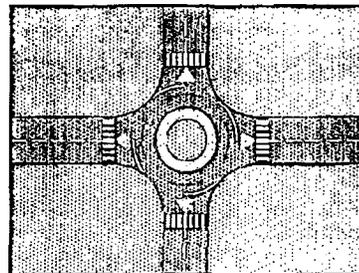
D. Ensuring Connectivity

Intent

To promote ease of mobility and access within all portions of the development.

Guidelines

1. Pedestrian Connectivity
 - a. Similar to a traditional small town, services and common spaces shall be easily accessible to residents on foot. Off-street pedestrian trails are to be provided as a network throughout the development. Pedestrian connections shall be provided where cul-de-sacs or other dead-end streets are used.
2. Street Connectivity
 - a. The system of streets shall demonstrate a high degree of both vehicular and pedestrian connectivity, allowing residents and visitors multiple choices of movement. Isolated and dead-end pockets of development are not desired.
 - b. Cul-de-sacs shall be avoided unless there are no other alternatives.



General Principles & Site Planning

7

E. Mixing of Housing

Intent

To encourage a diversity of population and households within Black Diamond through a range of choices in housing types and price.

Guidelines

1. MPD's shall include various types of housing, such as:
 - a. Single Family, detached, on various sized lots
 - b. Single Family, attached:
 - duplexes
 - townhouses (semi-attached)
 - row houses (attached, common walls)
 - courtyard houses
 - c. Cottage housing
 - d. Apartments
 - e. Accessory Dwelling Units
2. Each cluster of development shall include a variety of unit types and densities.
3. For Single Family developments, alley access to garages is desired. Direct driveway access to streets should only occur if there are no other alternatives.
4. Large apartment complexes and other repetitive housing types are discouraged. Apartments should replicate features found in Single Family Residential areas (i.e. garages associated with individual units, individual outdoor entries, internal driveway systems that resemble standard streets, etc.).



General Principles & Site Planning

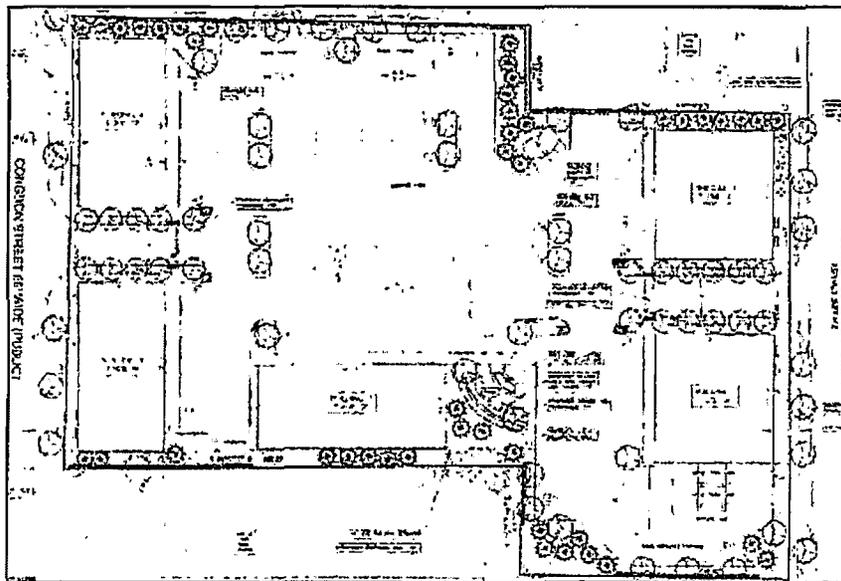
F. Creating Neighborhood Civic/Commercial Centers

Intent

To conveniently concentrate services and activities to serve multiple residential clusters.

Guidelines

1. Civic/Commercial Centers shall be located to serve groupings of clusters as well as pass-by traffic in order to support an array of shops and services.
2. Such centers shall be anchored by a public green space and, ideally, a public building such as a school or meeting hall.
3. Upper story housing above retail or commercial space is strongly encouraged within Civic/Commercial Centers.



General Principles & Site Planning

9

G. Interface with Adjoining Development

Intent

To ensure a transition in development intensity at the perimeter of MPD projects.

Guidelines

1. Where individual lot residential development is located along the boundary of an MPD, lot sizes shall be no less than 75% the size of the abutting residential zone or 7200 sq. feet, whatever is less.
2. Multi-family and non-residential land uses should include a minimum 25 ft wide dense vegetative buffer when located along the boundary of an MPD.
3. When there is no intervening development proposed, a minimum 25 ft wide dense vegetative buffer should be provided between main entrance or access routes into an MPD and any adjoining residential development.

A. Streets

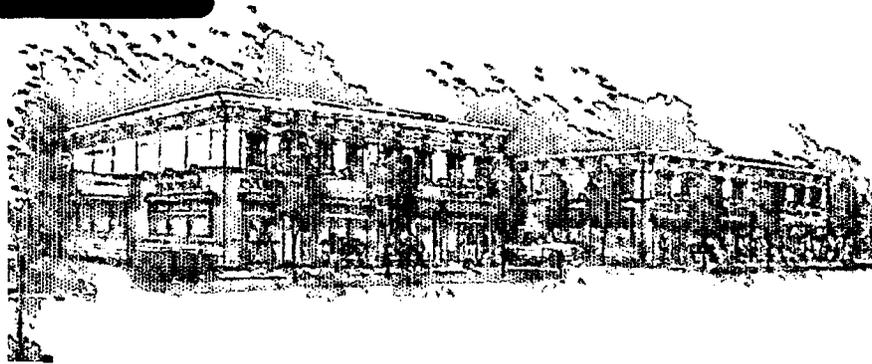
Intent

To establish a safe, efficient and attractive street network that supports multiple choices of circulation, including walking, biking, transit and motor vehicles.

Guidelines

1. Connectivity
 - a. The street layout shall create a network that promotes convenient and efficient traffic circulation and is well connected to other existing City streets.
2. Design
 - a. The layout of streets should relate to a community-wide focal point.
 - b. A consistent overall landscape theme should be utilized, with variations provided to indicate passage through areas of different use, densities, topography, etc.
 - c. Limit the use of backyard fences or solid walls along arterial streets.
3. Reduced Pavement Widths
 - a. Pavement widths should be minimized to slow vehicular speeds and maintain an area friendly to pedestrians and non-motorized users.
4. Low-Impact Design
 - a. Stormwater runoff should be reduced through "natural" techniques: flush curbs, bio-filtration swales, use of drought-tolerant vegetation within medians and planting strips, etc.
5. Traffic calming methods should include:
 - Roundabouts
 - Traffic Circles
 - Chicanes
 - Corner bulbs
6. Lanes and Alleys
 - a. Access to rear residential garages and commercial loading and service areas shall be available through lanes and alleys.
7. Non-motorized Circulation
 - a. All streets shall include either sidewalks or trails on at least one side of the street. Design streets to be "bicycle" friendly.
8. Street Landscaping
 - a. All streets shall include native and/or drought-tolerant vegetation (trees, shrubs and groundcover) planted within a strip abutting the curb or edge of pavement. Native and/or drought-tolerant vegetation shall also be used within all medians.
9. On-Street Parking
 - a. Curbside parallel parking shall be included along residential streets. Parallel or angle parking should be included within non-residential areas.

Circulation



B. Sidewalks

Intent

To provide safe, continuous pedestrian linkages within the street right-of-way.

Guidelines

1. **Width**
 - a. The minimum clear pathway shall generally be between 5 ft and 8 ft, depending upon adjacent land uses and anticipated activity levels.
2. **Lighting**
 - a. All lighting shall be shielded from the sky and surrounding development and shall be of a consistent design throughout various clusters of the development.
3. **Furnishings**
 - a. Street furnishings including seating, bike racks, and waste receptacles shall be located along main streets in Civic/Commercial areas.
 - b. Furnishings serving specific businesses (outdoor seating) will require a building setback and shall maintain a minimum passable width of the sidewalk.
 - c. Mailbox stations shall be designed to be architecturally compatible with the development in which they are located.



C. Walkways and Trails

Intent

To provide safe, continuous pedestrian linkages throughout and sensitive to the project site, open to both the public and project residents.

Guidelines

1. Location
 - a. Walkways and trails shall be integrated with the overall open space network as well as provide access from individual properties. Trail routes shall lead to major community activity centers such as schools, parks and shopping areas.
2. Width
 - a. Not less than 8 feet wide to allow for multiple modes of use.
3. Materials
 - a. Walkways connecting buildings and hardscaped common spaces shall have a paved surface.
 - b. Trails throughout the development and connecting to larger landscaped common spaces shall be of at least a semi-permeable material.



Site Design

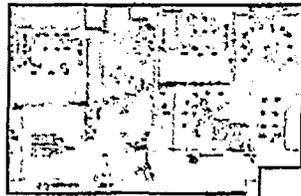
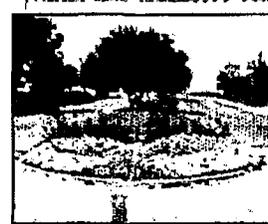
A. Cluster Development

Intent

To ensure that development is compatible with the small town character currently found within Black Diamond.

Guidelines

1. Larger groupings of development should be divided into smaller neighborhood clusters of approximately 50 dwelling units that are defined by open space.
2. Clustering
Within projects, higher density residential development shall be designed to have a village-like configuration. This includes elements such as:
 - a. Houses of varying sizes, styles, and form;
 - b. The maximum number of attached units shall not be more than twelve within a single structure.



Site Design

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B. Neighborhood Common Space

Intent

To provide a variety of usable and interesting open space that supports an active community.

Guidelines

1. Amount
 - a. In general, within higher density residential and commercial development, a minimum of 1% of the lot area plus 1% of the building area should be the amount of area set aside for common space, exclusive of other required landscaping.
2. Location
 - a. Common open space shall be accessible and visible to users, as well as integrated into the overall project through connections and trails.
3. Landscaping/Hardscaping
 - a. Commercial areas shall provide common space in the form of plazas, courtyards, and/or seating areas including some of the additional features noted below.
 - b. Higher density residential areas shall have usable outdoor spaces that provide at least four of the following features to accommodate a variety of ages and activities:
 - Site furnishings (benches, tables)
 - Picnic areas
 - Patios or courtyards
 - Gardens
 - Open lawn with trees
 - Playfields
 - Special Interest landscape
 - Public art
 - Water features
 - Sports courts (tennis, basketball, volleyball)
4. Lighting
 - a. Pedestrian scale, bollard, or other accent lighting may be incorporated into the design of open space.





C. Landscaping & Planting Design

Intent

To provide well-designed public parks and greens within the development.

Guidelines

1. Incorporate native, drought-tolerant vegetation, avoid extensive use of lawn and plantings that demand significant irrigation and fertilization.
2. A minimum of 75% of the landscaped area (not including recreational areas) should be planted with other than turf or lawn. Perennials and annuals are encouraged to provide special interest and highlight pedestrian areas such as walkways and trails.
3. Where landscape areas are located adjacent to a street right-of-way, the type of landscaping should provide a vertical buffer.
4. Rocks, pebbles, sand, and similar non-living materials shall not be used as groundcover substitutes, but may be used as accent features provided such features do not exceed a maximum 5% of the total landscape area.

D. Stormwater Detention/Retention Ponds

Intent

To integrate stormwater facilities as project amenities.

Guidelines

1. Location
 - a. Use natural site topography plus low-impact development methods to determine appropriate locations, which is to be integrated into the overall project design.
2. Landscaping
 - a. Where possible, provide facilities that are site amenities, in order to reduce need for fencing. In general, public access to stormwater facilities should be included within design.
3. Fencing
 - a. Chain link fencing shall not be allowed. Other forms of non-obscuring fencing may be permitted when ponds exceed a safe slope. However, it is generally expected that ponds will be gently integrated into the design of the site with slopes that are safe to traverse on foot (less than 7% grade).

Building Design

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A. Residential Building Design

Intent

To ensure that new development complements and strengthens the character of Black Diamond and to allow for maximum flexibility in location, size and configuration of houses while ensuring that residential structures are in scale with lot sizes.

Guidelines

1. Variety of Styles
 - a. Provide a variety of building solutions through the mixing of one and two story building profiles. Limit the amount of replication of building styles within one block.
2. Setbacks of Houses to Create a Sociable Environment
 - a. The front facades of houses should be setback between 5 and 15 feet from the back of the sidewalk. Vary front and side yard setbacks from house to house to provide interest and variety.
3. Setbacks of Garage to Reduce Visual Impact
 - a. The preferred location for garages is at the rear of the lot, with vehicular access being provided from an alley. Garage doors should be within 10 ft of the alley.
 - b. If alley access is not possible, then garages shall be setback at least 20 ft from back of the sidewalk. That distance can be reduced when garage doors do not face the street.
4. Architectural Features
 - a. Housing shall include features such as:
 - Dormers
 - Brackets supporting roof overhangs
 - Corner boards
 - Wide trim around windows
 - Railings around balconies and porches
 - Low picket fencing
 - b. Fronts of houses shall face the street and incorporate usable porches, stoops and steps.
 - c. Upper floors of houses shall be smaller than the floors below.
 - d. Orientation of ridgelines of homes shall be varied.
5. Materials
 - a. Exterior finishes should incorporate traditional and natural building materials as historically used in Black Diamond.
6. Floor Area Ratio (FAR) (Building size to lot size)
 - a. FAR for detached residential development should not exceed 0.75;
 - b. Attached forms of residential may be up to 1.0 FAR;
 - c. Within Commercial/Civic Centers, residential development FAR may be as high as 2.5
7. Height
 - a. Minimum 1 story above grade
 - b. Maximum 2 1/2 stories
8. Massing
 - a. Horizontal facades longer than 30' shall be articulated into smaller units, using methods such as:
 - distinctive roof forms
 - changes in materials and/or patterns
 - color differentiation
 - recesses or offsets.

Building Design

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A. Residential Building Design Guidelines CONTINUED

9. Roof Pitch

- a. May range from 6:12 to 12:12

10. Architectural Features

- a. Front Porches—at least 6 ft in depth (or deep enough to allow for seating)
- b. Street-Facing Garage Location—the main house floor area shall extend at least 5 ft closer to the front lot line than any garage with street-facing doors. Design measures should be used for de-emphasizing garages, such as:
- porches
 - trellises
 - location of entry
 - break up massing/doors for double garages
 - overhanging second floor

NON-RESIDENTIAL BUILDINGS SHALL BE SUBJECT TO APPLICABLE CITY OF BLACK DIAMOND DESIGN GUIDELINES.

APPENDIX B
TO
REPLY BRIEF OF PETITIONERS

APPENDIX B

8.12.040 - Public disturbance noises.

- A. General Prohibition.** It is unlawful for any person to cause, or for any person in possession of property to allow to originate from the property, sound that is a public disturbance noise.
- B. Definition.** "Public disturbance noise" means any noise, sound or signal which unreasonably disturbs the comfort, peace, or repose of another person or persons. The following sounds are declared to be public disturbance noises for the purposes of this section:

 - 1.** Frequent, repetitive, or continuous noise made by any animal which unreasonably disturbs or interferes with the peace, comfort, and repose of property owners or possessors, except that such sounds made by animal shelters, or commercial kennels, veterinary hospitals, pet shops, or pet kennels licensed under and in compliance with applicable regulations shall be exempt from this subsection;
 - 2.** The frequent, repetitive or continuous sounding of any horn or siren attached to a motor vehicle except as a warning of danger or specifically permitted or required by law;
 - 3.** The creation of frequent, repetitive, or continuous noise in connection with the starting, operation, repair, maintenance, rebuilding, or testing of any motor vehicle, motorcycle, off-highway vehicle, or internal combustion engine in any residential or rural area district so as to unreasonably disturb or interfere with the peace, comfort, and repose of owners or possessors of real property;
 - 4.** The use of a sound amplifier or other device capable of producing or reproducing amplified sounds from the property of a business operation which is intended to either attract the attention of the potential customers to the business or to communicate with employees who are at extended portions of the business property, audible to the human ear beyond any perimeter of the subject business property;
 - 5.** The making of any loud and raucous noise within one hundred feet from any school, church, hospital, sanitarium or nursing or convalescent facility which unreasonably interferes with the use of such school, church, hospital, sanitarium or nursing or convalescent facility;
 - 6.** The creation by use of a musical instrument, whistle, sound amplifier, stereo, jukebox, radio, television, or other device capable of reproducing sound and raucous noises which emanate frequently, repetitively, or continuously from any building, structure, or property, such as sounds originating from a band session, tavern operation or commercial sales lot;
 - 7.** Sound from motor vehicle audio sound systems, such as tape players, radios and compact disc players, operated at a volume so as to be audible greater than seventy-five feet from the vehicle itself or which causes vibrations to be felt from a distance of greater than seventy-five feet;
 - 8.** Sound from audio equipment, such as loud speakers, amplification equipment, tape players, radios and compact disc players, operated at a volume so as to be audible greater than fifty feet from the source and not operated upon the property of the operator or with the knowledge, permission or consent of the owner or legal occupant of the property, and if operated on the property of the operator or with the knowledge, permission or consent of the owner or legal occupant of the property, than so as to be audible greater than fifty feet from the boundary of the property. For the purposes hereof, any sound, music or other noise emanating from fixed or

portable audio equipment of or in a business shall be presumed to be with the knowledge, permission or consent of the owner or legal occupant of the property, which presumption may be rebutted by reasonable evidence to the contrary;

9. Any other frequent, repetitive, or continuous noise, sound or signal within a residential or rural area district which unreasonably disturbs or interferes with the comfort, peace and repose of owners or possessors of real property.

C. Exemptions. This section shall not apply to regularly scheduled events at parks, schools or other public property between the hours of eight a.m. and ten-thirty p.m. nor shall it apply to sounds originating from residential property relating to temporary projects for the maintenance or repair of homes, grounds, appurtenances, including but not limited to sounds of lawn mowers, hand power tools, chain saws, snow removal equipment and composters between the hours of seven a.m. and nine p.m. Sounds originating from construction sites, including but not limited to sounds from construction equipment, power tools and hammering between seven a.m. and eight p.m. on weekdays, between eight a.m. and six p.m. on Saturdays, and between nine a.m. and six p.m. on Sundays shall also be exempt. This section shall not apply to any public construction projects, emergency construction or repair by public utility agencies, emergency vehicle operation or actions by emergency service providers or any other emergency repair and construction to prevent further damage to persons or property during floods or windstorms or other property or life-threatening emergencies which may occur.

D. Violation—Penalty. Violation of the provisions of this section shall be a misdemeanor and penalized as set forth in Section 1.12.010

(Ord. 826 § 1, 2007)