69414-6

69414-6

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

NO. 69414-6-I

TOWARD RESPONSIBLE DEVELOPMENT,

Appellant,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

OPENING BRIEF OF TOWARD RESPONSIBLE DEVELOPMENT

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I. INTRODUCTION

This appeal is one of two before this Court on a massive development project planned for the small town of Black Diamond. The project, proposed by respondent Yarrow Bay,[1] consists of two master planned developments known as "The Villages" and "Lawson Hills." Together, these two proposals constitute the largest development project ever proposed in King County.

The first of the two appeals now before this Court is titled *Toward Responsible Development et al. v. City of Black Diamond et al.*, Case No. 69418-9-I. It involves a challenge by appellant Toward Responsible Development ("TRD") to the City's first round of approvals for the development. These approvals are known as the Master Planned Development Permits, or "MPD Permits." The appeal has been fully briefed and the parties are awaiting a date for oral argument.

In contrast, this case challenges the City's second round of approvals (the Development Agreements), which are subsidiary to and add detail to the MPD Permits. The Development Agreements for The Villages and Lawson Hills depend on the MPD Permits for their validity

[1] Respondents BD Lawson Partners LP, and BD Village Partners LP, the two proponents of The Villages and Lawson Hills, are referred to collectively herein as "Yarrow Bay."

and cannot stand if this Court invalidates and voids the MPD Permits, as TRD has requested.

Because the Development Agreements cannot stand if the MPD Permits are voided, this case will become moot if TRD prevails in the first appeal before this Court. Moreover, TRD has stated below that it will not pursue this appeal if it loses its prior appeal of the MPD permits. As result, this appeal will be rendered moot regardless of how this Court resolves the first appeal (either because the foundation for the Development Agreements will be stripped away, or because TRD will drop this appeal).

Because this appeal will be rendered moot when this Court decides the first appeal, TRD moved the Superior Court below to stay this case pending this Court's resolution of the first appeal. The Superior Court denied the motion (and TRD's subsequent motion for reconsideration), failing to appreciate that staying this case would not prejudice respondents and would be in the clear interest of justice and efficiency.

After erroneously denying TRD's motion to stay this case, the Superior Court also dismissed the case for failure to pay for the administrative record. In doing so, the Superior Court erred again. Had the court granted the stay (as it should have), the issue of paying for the administrative record (estimated to cost $6,000, in addition to the $17,000

record TRD had to pay for the record in the first appeal), never would have arisen.

This Court should reverse the Superior Court's denial of TRD's motion to stay the case, and also reverse the Superior Court's dismissal. This case should be stayed pending a final outcome in TRD's first appeal, at which time this case can be disposed of on a simple motion for remand to the City of Black Diamond.

II. ASSIGNMENTS OF ERROR

The Superior Court erred when it denied TRD's Motion to Continue Stay of Proceedings (September 14, 2012).[2] The Superior Court abused its discretion in denying the stay because resolution of a companion case before this Court will moot the issues presented in this case.

For the same reasons that the Superior Court erred in denying TRD's Motion to Continue Stay of Proceedings, it also erred when it denied TRD's Motion for Reconsideration (October 2, 2012).[3]

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[2] TRD's Motion to Continue Stay of Proceedings may be found at CP 497. The Superior Court's denial of TRD's motion to continue the stay may be found at CP 457.

[3] TRD's Motion for Reconsideration may be found at CP 769. The Superior Court's denial of TRD's motion for reconsideration may be found at CP 801.

The Superior Court erred when, after erroneously denying TRD's motion to continue the stay, it denied in part TRD's Motion to Adjust Case Schedule Because of the Unavailability of Counsel (October 22, 2012) (which would have provided a workable date for TRD to pay for the record, and possibly shorten it),[4] and dismissed this case for failure to pay for the administrative record.[5]

The issues pertaining to the Assignments of Error are:

1. Whether a superior court should approve a stay of proceedings when the contested issues will soon be resolved by another, companion case, thus obviating the need to prosecute the appeal to resolve the issues.

2. Whether a superior court should dismiss a case for failure to pay for the administrative record after erroneously denying a motion to stay the proceedings.

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[4] TRD's Motion to Adjust Case Schedule Because of the Unavailability of Counsel (October 22, 2012) may be found at CP 901. The Superior Court's denial in part of the motion may be found at CP 952.

[5] The Superior Court's Order Granting Yarrow Bay's Third Motion to Dismiss Case (December 5, 2012) may be found at CP 1126.

III. STATEMENT OF THE CASE

A. Yarrow Bay's Proposal

In 2009, Yarrow Bay submitted a combined proposal for two adjacent master planned developments that it referred to as "Lawson Hills" and "The Villages." Together, the two developments would add approximately 6,000 new residential units (15,000 people), over a million square feet of new commercial/retail/office uses, multiple new school sites, and other miscellaneous development into the small town of Black Diamond. *See* CP 5–6.

The project is so large and the town of Black Diamond is so small that the project would cause a fivefold increase in the town's population, transforming it from a small rural town to a suburban city the size of Anacortes. *Id. See also* CP 418, 497. All this would occur in a town whose Comprehensive Plan calls for maintaining Black Diamond's "small-town" character. CP 6, 418.

B. The MPD Permits and the MPD Permits Appeal

The City of Black Diamond pursued a multi-step path for permitting the two development projects. The first development approvals were issued on September 20, 2010, when the Black Diamond City Council approved two Master Planned Development Permits (the "MPD

Permits") for The Villages and Lawson Hills. *See* CP 418, 498, 503. These broadly worded authorizations established various policies and regulatory controls for the development. CP 498.

TRD appealed the MPD Permits on October 11, 2010, seeking relief under the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW.[6] CP 503. That appeal also challenged the adequacy of the environmental impact statements ("EISs") that were prepared for the projects. *Id.* That appeal was captioned *Toward Responsible Development et al. v. City of Black Diamond et al.*, King County Superior Court Cause No. 10-2-35957-5.[7] We refer to it here as the "MPD Permits Appeal."

C. The Development Agreements and the Development Agreements Appeals

While the MPD Permits Appeal was pending, the City continued with the subsequent steps of its development review process. The 2010 MPD Permits contemplated that the next step for the City would be the

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[6] LUPA sets forth the process for judicial review of land use decisions made by local jurisdictions. RCW 36.70C.010. The trial court acts as an appellate court and reviews the decision of the local jurisdiction on a closed administrative record.

[7] TRD also challenged the MPD permits in an appeal filed with the Growth Management Hearings Board. That appeal progressed first. Though the Hearing Board granted TRD the relief it sought, this Court later determined that the Hearings Board lacked jurisdiction. *See BD Lawson Partners v. Cent. Puget Sd. Growth Mgmt. Hearings Bd.*, 165 Wn. App. 677, 269 P.3d 300 (2011), *rev. denied* 173 Wn.2d 1036, 277 P.3d 669 (Wash. April 25, 2012). As a result, the LUPA challenge to the MPD permits was re-activated.

adoption of Development Agreements that would set forth more specific conditions and procedures for how the properties would be developed. CP 418, 498. The former City Council adopted the Development Agreements (one for The Villages and one for Lawson Hills) on December 12, 2011. *See* CP 3, 15, 145. Instead of preparing new EISs for the Development Agreements, the City Council adopted by reference the EISs that had been used for the MPD Permits. CP 8, 499.

TRD appealed the City Council's approval of the Development Agreements on December 29, 2011, again seeking relief under LUPA. *See* CP 1. That appeal was captioned *Toward Responsible Development et al. v. City of Black Diamond et al.*, King County Superior Court Cause No. 11-2-44800-2, and is the case from which this appeal originates. We refer to this case as the "Development Agreements Appeal."[8]

In the Development Agreements Appeal, TRD asserts, among other claims, that if the MPD Ordinances are struck down as a result of the first appeal (the MPD Ordinances Appeal), then the Development Agreements (which implement the MPD Ordinances) must be rescinded,

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[8] Because the Development Agreements were issued more than a year after the MPD Permits, TRD was precluded from challenging them in a single judicial action. The result is a bifurcated challenge to Yarrow Bay's proposal, with one prong challenging the underlying MPD Permits, and the other prong challenging the Development Agreements which rest on the MPD Permits for their validity.

too. CP 8. *See also* CP 498–99. TRD also alleged that the Development Agreements were invalid because the EISs (the same ones at issue in the MPD Permits Appeal) were inadequate. CP 8.

D. The Appeal Process before the King County Superior Court

In early 2012, TRD's challenges to the MPD Permits and the Development Agreements were pending before the King County Superior Court. On March 1, 2012, the King County Superior Court entered an Agreed Order staying the Development Agreements Appeal until the Superior Court issued a decision in the MPD Permits Appeal. CP 476. The Development Agreements Appeal was stayed because a decision in the MPD Permits Appeal would directly affect and would likely be dispositive of the Development Agreements Appeal.

The Agreed Order indicated that the parties would resume litigation of the Development Agreements Appeal within three weeks of the Superior Court decision in the MPD Permits Appeal. *Id.* The parties recognized and agreed that a motion to continue the stay of the Development Agreements Appeal could be entertained by the Superior Court when that litigation resumed. CP 477.

On August 27, 2012, the King County Superior Court issued a decision in the MPD Permits Appeal denying TRD's challenge and

upholding the City's approval of the MPD Permits. CP 511. TRD appealed that decision to this Court on September 20, 2012. CP 726. The parties completed their briefing on April 19, 2013.

When the Superior Court issued its August 27, 2012 decision denying the MPD Permits Appeal, the stay of the Development Agreements Appeal (which was also before the same department of the Superior Court) was automatically lifted and the parties scheduled an initial status conference hearing. CP 504. For that hearing, TRD filed a motion to continue the stay of TRD's Development Agreements Appeal until a final appellate decision is rendered in the MPD Permits Appeal. *See* CP 497. TRD requested the stay because resolution of the MPD Permits Appeal by this Court would resolve all the issues to be resolved in its challenge to the Development Agreements. CP 501.

In a critical concession, TRD informed the Superior Court that if the Court of Appeals upholds the Superior Court decision on the MPD Permits Appeal, TRD would not pursue the Development Agreements Appeal. CP 726, 734, 770. TRD also explained that if the Court of Appeals reverses the Superior Court decision in the MPD Permits Appeal, the foundation for the Development Agreements would be gone and the Development Agreements would have to be re-evaluated after new

foundational ordinances are enacted. CP 732, 734. One way or another, this litigation will be rendered moot.

Despite TRD's concession that it would not pursue this appeal if it loses the MPD Permits Appeal, the Superior Court denied TRD's motion to continue the stay. CP 758. The Court also denied TRD's motion for reconsideration (CP 801), which raised virtually identical issues (*see* CP 769–73).

E. Proceedings Subsequent to TRD's Notice For Discretionary Review

On October 2, 2012, TRD sought discretionary review by this Court of the Superior Court's denial of its motion to continue the stay. *See* Notice for Discretionary Review to Court of Appeals, Division 1 (October 2, 2012). However, before this Court could rule on TRD's Motion for Discretionary Review, filed with this Court on October 17, 2012, the Superior Court dismissed TRD's Development Agreements Appeal. *See* CP 1126–27. The Superior Court dismissed TRD's Development Agreements Appeal for failure to pay the costs of the administrative record. *Id.*[9]

[9] Under LUPA, petitioners are responsible for paying the costs of the local jurisdiction's record of decision, and failure to pay such costs is grounds for dismissal. RCW 36.70C.110(3).

The Superior Court's dismissal followed two other attempts by Yarrow Bay to have the case dismissed for failure to pay for the record. *See* CP 806, 954. Both times, TRD objected to the motions to dismiss on the basis that the parties were continuing to negotiate a shortened record, *see* CP 874–75, 1071–72, which would have reduced the impact of paying for yet another record (in addition to the $17,000 record in the MPD Permits Appeal[10]) on TRD's limited financial resources. TRD also moved for an adjustment in the case schedule to allow TRD to pay for the record on January 13, 2013, instead of the previous November 5, 2012 date set by the Court. CP 901–03. TRD proposed the January 13, 2013 date as part of an effort to accommodate its counsel's extensive trial calendar in another case. CP 902. That case was scheduled for trial beginning on November 1, 2012, and ending on Christmas Eve. *Id.*

The Court rejected both of Yarrow Bay's motions to dismiss, but set a deadline of November 26, 2012 for TRD's payment for the record. CP 1092. However, TRD was unable to meet this deadline, and when Yarrow Bay brought a third motion to dismiss, TRD agreed that dismissal was warranted. CP 1107–09. Specifically, TRD informed the Court that

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[10] According to the City of Black Diamond, the record in this case would cost TRD approximately $6,000. CP 774. The prior record in the MPD Permits Appeal cost TRD approximately $17,000. CP 635.

while it had made repeated attempts to obtain a schedule allowing TRD's attorney to review the record and make decisions about shortening it, dismissal was warranted so the Superior Court's denial of the stay (which, if granted, would have obviated the need to pay for the record at this time) could be presented to this Court for resolution. *See* CP 1107–09.

On December 5, 2012, the Superior Court granted Yarrow Bay's third motion to dismiss, thus mooting TRD's motion for discretionary review to this Court. CP 1127. TRD then filed a new notice of appeal in which it continues to challenge the Superior Court's denial of its Motion to Continue Stay of Proceedings, as well as the Superior Court's ultimate dismissal of the case. *See* Notice of Appeal to Court of Appeals, Division I (December 31, 2012).

IV. ARGUMENT

A. Overview of the Law and Standard of Review

The Superior Court's authority to grant TRD's motion to continue the stay arose under LUPA, as well as its inherent authority to control its own docket. For example, under LUPA, land use petitions are generally subject to a short, sixty-day review timeline but a longer schedule may be

ordered upon a "showing of good cause." RCW 36.70C.090.[11] Similarly, courts have the inherent authority to stay proceedings where the interests of justice so require. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350, 16 P.3d 45 (2000) (explaining that "'[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants'") (*quoting* J. Cardozo, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)).

In deciding whether to grant a stay, a court will consider whether prejudice to the defending party would be caused by a stay and whether the stay would promote the efficient use of judicial resources. *Id.* at 353. In particular, a court should consider whether the disposition of another related case would either moot the case or clarify important issues. *Cohen v. Carreon*, 94 F. Supp. 2d 1112, 1115 (D. Or. 2000). *See also Lewa Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864–65 (9th Cir. 1979);

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[11] LUPA does not define the phrase "good cause." However, the phrase normally refers to "a legally sufficient reason . . . why a request should be granted or an action excused." Black's Law Dictionary (9th ed. 2009). Thus, the "good cause" standard is less demanding than, for instance, standards requiring a showing of "compelling circumstances." *See, e.g., Martine Power and Equip. v. Dept. of Trans'n*, 107 Wn.2d 872, 875, 734 P.2d 480 (1987); *G&G Elect. & Plumbing Dist. v. Dept. of Emp. Sec.*, 58 Wn. App. 410, 413, 793 P.2d 987 (1990). In the context of a continuance, the court in *In Re: Kirby*, 65 Wn. App. 862, 868, 829 P.2d 1139 (1992), found that "good cause" existed "[w]here the circumstances attending the request are anomalous rather than typical of the operation of the administration of justice."

CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (explaining that courts should consider the "simplifying or complicating of issues, proof, and questions of law which could be expected from a stay.").

After weighing the factors relevant to the decision to grant or deny a stay, a superior court's decision is reviewed for abuse of discretion. *King*, 104 Wn. App. at 338. A superior court abuses its discretion if "its ruling is manifestly unreasonable or is based upon untenable grounds or reasons." *Id.*

B. The Superior Court Erred in Failing to Grant TRD's Request for a Stay.

In this case, the Superior Court's decision to deny the stay was manifestly unreasonable, and was an abuse of the Superior Court's discretion, in light of the unique circumstances of the case and its relation to the MPD Permits Appeal. In particular, when the Superior Court denied TRD's motion for a stay below, it failed to appreciate that this case will be mooted when this Court resolves the MPD Permits Appeal. Because this case will be mooted, there can be no prejudice to respondents if the case is stayed and (with one limited exception discussed *infra* at pages 19 to 20) there is no reason to prosecute the appeal. Indeed, doing so would be a complete waste of the parties' and the courts' resources.

It is easy to see why this appeal will be mooted if TRD loses the MPD Permits Appeal; TRD has repeatedly stated that if it loses the MPD Permits Appeal, it will not prosecute this appeal. *See* CP 726, 734, 770. This concession is binding on TRD. Should TRD prevail in obtaining a stay, it will be precluded under principles of estoppel from taking a different position in later phases of this litigation. *See e.g. Cunningham v. Reliable Concr. Pumping, Inc.*, 126 Wn. App. 22, 108 P.3d 147 (2005) (estoppel precludes client from changing positions in subsequent litigation).[12]

It is no small concession for TRD to drop this appeal should it lose the MPD Permits Appeal, and the concession will benefit respondents greatly. TRD's Land Use Petition includes a number of claims that are independent of the relationship between the Development Agreements and the MPD Permits. *See* CP 7–13. But TRD will not prosecute these claims if it loses the MPD Permits Appeal. In essence, neither Yarrow Bay nor the City could be prejudiced by staying this case should TRD lose the MPD Permits Appeal. Instead, they will reap the benefit of having this

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[12] *See also Bauer v. Bauer*, 5 Wn. App. 781, 791, 490 P.2d 1350 (1971) ("'Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.'") (*quoting Markley v. Markley*, 31 Wn.2d 605, 613–14, 198 P.2d 486 (1948)).

case dismissed without investing substantial resources in litigating TRD's various claims.

On the other hand, if this Court reverses the Superior Court's decision on the MPD Permits Appeal, the Development Agreements Appeal will be rendered moot because the Development Agreements cannot stand if the MPD Permit approvals are invalidated.

When a court holds an agency action unlawful, it is proper to invalidate other actions that pre-date the court's ruling but that flowed from the agency's initial violation. *See Resp. Urban Growth Group v. Kent*, 123 Wn.2d 376, 390, 868 P.2d 861 (1994) (affirming superior court's invalidation of permit issued under illegal rezone ordinance); *U.S. v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384–85 (8th Cir. 1992) (overturning prior convictions that were based on subsequently invalidated rule). Any other result would violate the principle that judicial decisions are applied both prospectively (to cases arising after the decision is made), and retroactively (to cases arising before the decision is made). *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009); *Robinson v. City of Seattle*, 119 Wn.2d 34, 76, 830 P.2d 318 (1992); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). Here, because a decision invalidating

the MPD Permits would apply retroactively to any case arising before that decision is made (i.e. this case), respondents could not rely on the MPD Permits to justify the City's approval of the Development Agreements.

Invalidating the Development Agreements would also be consistent with the principle that actions taken in violation of statutory authority are void. *Noel v. Cole*, 98 Wn.2d 375, 380, 655 P.2d 245 (1982) (voiding timber sale for failure to comply with the State Environmental Policy Act, Chapter 43.21C RCW); *Leschi Improvement Council v. Wash. State Highways Comm.*, 84 Wn.2d 271, 525 P.2d 774 (1974). When agency actions are void, they are a nullity from their inception and, as a consequence, they naturally cannot be used to justify subsequent decisions. Applying this principle here, should TRD prevail in the MPD Permits Appeal, the MPD Permits should be declared void from their beginning. The Development Agreements will then have to be re-evaluated after new foundational MPD Permits are approved because the original, illegal, and void MPD Permits simply cannot be used to justify subsequent actions by the City of Black Diamond. One way or another, this litigation will be rendered moot.[13]

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[13] Indeed, the posture of this case presents an especially unique situation requiring a stay. While the issues in this case will be rendered moot once this Court decides the MPD Permits Appeal, in an important sense that issue also would not be ripe

The Superior Court was informed of the futility of pursuing this appeal when it denied TRD's motion for a stay. *See* CP 732. And subsequent proceedings in this and the MPD Permits Appeal have only reinforced the fact that this case will be rendered moot once the MPD Permits Appeal is resolved.[14] It is true, as Yarrow Bay and the City have previously argued to this Court, that TRD did not specifically ask this Court to elaborate on the effect of voiding the MPD Permits on the Development Agreements. *See* Respondent Yarrow Bay's Response Opposing Appellants' Motion to Stay Appeal (March 29, 2013) at 9–10; Black Diamond's Response to Motion to Stay Appeal (March 29, 2013) at

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to adjudicate or brief until that appeal is finally decided. Thus, issues of both mootness and ripeness counsel in favor of staying this appeal until after the MPD Permits Appeal is resolved.

[14] In its briefing on the MPD Permits, TRD requested that this Court invalidate the Permits as void from their beginning. *See* Appendix C to Yarrow Bay's Response Opposing Appellants' Motion to Stay Appeal (March 29, 2013). In its response brief, Yarrow Bay recognized the effect of TRD's requested relief—if this Court invalidates the MPD Permits as void (as TRD requested), then the Development Agreements must also fall. Specifically, Yarrow Bay recognized that the relief TRD sought was the "*voiding of the MPD Permits as though they never were approved.*" *Id.*, Appendix D (emphasis added). Yarrow Bay also appears to have recognized that voiding the MPD Permits would "invalidate the City's subsequent 2011 approval of development agreements that implement the MPD Permits." *Id.* But rather than argue that voiding the MPD Permits would somehow leave the Development Agreements unscathed, Yarrow Bay argued only that this Court lacks authority to grant TRD its requested relief. In other words, Yarrow Bay disputed this Court's authority to void the MPD Permits (an issue that will presumably be resolved by this Court as part of the MPD Permits Appeal), but did not dispute that, should this Court do so, the Development Agreements must also fall. Yarrow Bay's decision to dispute this Court's *authority* to void the MPD Permits, but not the *effect* of voiding the MPD Permits on the Development Agreements, simply reinforces the fact that resolving the MPD Permits Appeal will moot this appeal.

12. But the effect of voiding the MPD Permits is obvious. If the MPD Permits had no legal effect from their beginning (*i.e.*, they are void), then they may not be relied upon in this case to justify the City's approval of the Development Agreements.

TRD recognizes that it is put in a somewhat awkward position by arguing both that this case will be mooted when the MPD Permits Appeal is resolved, and that this case should be stayed instead of being dismissed. But this position, while unusual, simply reflects the unique nature and posture of the case.

First, TRD could not have waited to challenge the Development Agreements until after the MPD Permits Appeal is resolved. LUPA contains a strict 21-day statute of limitations for challenging local land use decisions. *See* RCW 36.70C.040(3). Second, while voiding the MPD Permits would necessarily mean that the Development Agreements are without support, TRD does not believe the effect of voiding the MPD Permits on the Development Agreements would be automatic; a court order would still be required to invalidate the Development Agreements. Thus, while this case will, for all practical purposes, be moot after this Court disposes of the MPD Permits Appeal, this appeal will still serve the

nominal purpose of providing TRD a judicial venue to request invalidation of the Development Agreements.

But it could hardly prejudice respondents to wait until after the MPD Permits Appeal is resolved to perform this ministerial task. In opposing TRD's request for a stay, Yarrow Bay cited a slew of hardships that would allegedly befall it were this litigation to be stayed. These hardships included a so-called "cloud of doubt" hanging over Yarrow Bay's development as a result of this lawsuit; alleged impacts on subsequent phases of the permitting process; attorney's fees and other litigation-related expenses; and speculation about Yarrow Bay potentially missing a construction window. *See* CP 667. However, as TRD explained in its Reply in Support of Motion to Continue Stay of Proceedings, none of these hardships can be linked to this litigation, rather than to TRD's challenge to the MPD permits. CP 730–31. *See also* CP 772. In light of the fact that this case will be essentially moot once this Court resolves the MPD Permits Appeal, and light of the ministerial nature of any later proceedings in this case, these alleged harms are at best *de minimis* and any weight placed on them by the Superior Court was an abuse of discretion.

C. The Superior Court Erred in Dismissing the Case for Failure to Pay for the Administrative Record

In addition to reversing the Superior Court's denial of a stay, this Court should reverse the Superior Court's dismissal of the case for failure to pay for the administrative record.

Had the Superior Court granted TRD's motion for a stay, the case never would have progressed to the point of requiring TRD to pay for the administrative record, which will tax TRD's limited financial resources significantly. *See* CP 630, 634. It is also highly likely that the issues in this case may be resolved as facial challenges to the Development Agreements, thus obviating the need to produce the entire record or even substantial portions of it. *See* CP 879. The Court's decision to dismiss the case after erroneously denying TRD's motion for a stay therefore clearly prejudiced TRD and requires reversal.

V. CONCLUSION

For the reasons above, this Court should reverse the Superior Court's denial of TRD's Motion to Continue Stay of Proceedings and its subsequent dismissal of the case. This Court should remand this case to the Superior Court with instructions to stay the case until this Court resolves the MPD Permits Appeal.

Dated this 3rd day of June, 2013.

Respectfully submitted,

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TRD\Appeals\69414-6-I\Opening Brief-FINAL

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DIVISION I

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

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, JOSIE WHITEHEAD, under penalty of perjury under the laws of the State of Washington, declare as follows:

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