

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

NO. 69418-9-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 concerns the largest development ever proposed in King County (and, therefore, probably the largest ever in the State). But this massive project is not proposed for the Seattle metropolitan area nor is it to be located along an interstate or other major highway. This unprecedented project is proposed in the remote, southeast corner of King County, in the small town of Black Diamond.

The project is so large and the town of Black Diamond so small that the project would cause a five-fold increase in the town's population, transforming it from a rural town into a city the size of Anacortes.

A project of this size and so out of keeping with its surroundings raises many issues. The length of the brief was necessitated by both the magnitude of the projects and the numerous errors made by the City of Black Diamond in approving them. We have limited the brief to only the most significant issues that go to the heart of the various errors the City made in approving these projects.

In 1995, the City entered into an agreement with Yarrow Bay, the owner of the property, that called for the property to be annexed to the City, with the land use converted from forest to urban development. But the 1995

agreement did not specify the amount, pace, or style of urban development. Those issues were to be addressed later.

In 2007, the City adopted a Comprehensive Land Use Plan that addressed those issues. The Plan recognized that the property would be subject to urban development, but in a manner and pace that fit with Black Diamond's small town character. The Comprehensive Plan is replete with policies that call for development that maintains and replicates the town's historic, small town character. The Plan and related City Code provisions call for development that meshes with the environment, not development that obliterates it.

In 2009, Yarrow Bay filed applications to develop the property. The applications were blatantly inconsistent with the City's recently adopted Comprehensive Plan, which has regulatory affect over the proposal under the City's code. Unfortunately, though, the City seemed intent on approving the project, no matter its obvious inconsistencies with the recently adopted Plan. Within the spectrum of urban development projects, it is hard to imagine a proposal that could have been more inconsistent with the Plan's vision. Whereas the Comprehensive Plan calls for urban development on this land that will "protect and maintain community character," the proposal would transform Black Diamond from a small, rural town into a suburban city.

Whereas the Comprehensive Plan calls for this land to be developed by repeating the “existing character of the historic villages (as found in Morganville and Black Diamond town sites),” the projects would radically transform Black Diamond into suburban-style malls and subdivisions. Whereas the Comprehensive Plan calls for development to “maintain the natural setting” with the intent that it be “integrated with the built environment,” Yarrow Bay proposes to clearcut the forests and level the land to create a pancake-flat development site.

Even though the City had adopted its Comprehensive Plan just two years before the applications were filed with these projects clearly on the horizon, the City was willing to ignore the policies in its Comprehensive Plan when asked to approve Yarrow Bay’s proposal. The City Council took the position that as long as the project was “urban,” the City could not require it to be consistent with Comprehensive Plan policies to protect Black Diamond’s small town character and assure that development “fits within the environment rather than on top of it.” AR 0014081.¹

The Comprehensive Plan provides that this development must not cause an increase in the phosphorous loading into fragile Lake Sawyer. The burden

¹ All citations to the administrative record use the “AR” designation. An electronic copy of the administrative record has been provided to the Court.

of proof was on Yarrow Bay to demonstrate compliance with that criterion. The Hearing Examiner determined that Yarrow Bay had failed to show that the development would comply with this requirement. But first the Examiner and then the City Council turned a blind eye to this failure and approved the project, despite the Examiner's unchallenged finding that Yarrow Bay had not proved the projects would protect Lake Sawyer and comply with the Comprehensive Plan.

The same disregard of obvious legal flaws was evident in the City Hearing Examiner's decision to approve the Environmental Impact Statement prepared for the projects. Time and again, the Examiner acknowledged that the Environmental Impact Statement was inadequate. In several instances, he stated that "vital" information was missing. But the Examiner contrived to approve the EIS nonetheless. He created illegitimate excuses to justify his apparent foregone conclusion to approve the EIS no matter what. When he could not find an excuse, he simply decided that the missing vital information could be ignored because *other* parts of the EIS were adequate. This rationale for excusing blatant inadequacies in an EIS is simply not legitimate under SEPA.

The list of violations goes on and on. The single unifying aspect is the

City's determination to approve the project regardless of what the facts and law require. The citizens of Black Diamond thus turn to this Court for an impartial review of the City's actions.

II. ASSIGNMENTS OF ERROR

The Black Diamond City Council erred when it approved Ordinance No. 10-946 (The Villages) and Ordinance No. 10-947 (Lawson Hills). The erroneous findings and conclusions are clearly disclosed in the discussion of the issues below.

The Black Diamond Hearing Examiner erred when he denied the appeal of the EISs. The erroneous findings and conclusions are clearly disclosed in the discussion of the issues below.

The trial court erred in entering the Findings of Fact, Conclusions of Law, and Order Denying Land Use Petition (Aug. 27, 2012) dismissing the case.

The issues pertaining to the Assignments of Error are:

1. Whether the EISs are adequate?
2. Whether the MPD ordinances are consistent with the City's Comprehensive Plan policies and code requirements related to protection of Black Diamond's small town character and preservation of the town's natural setting?

3. Whether the Council's findings and conclusions regarding consistency with the comprehensive plan are insufficient for judicial review?

4. Whether Yarrow Bay failed to meet its burden of proof that the projects will protect Lake Sawyer water quality?

5. Whether Yarrow Bay failed to meet its burden of proof that the projects' significant adverse transportation impacts were appropriately mitigated?

6. Whether Yarrow Bay failed to meet its burden of proof that the projects' significant adverse noise impacts were appropriately mitigated?

7. Whether the MPD ordinances include permit conditions with sufficient incentives for development which will meet employment targets set forth in the City's Comprehensive Plan, as required by BDMC 18.98.120.C?

8. Whether the MPD ordinances violate the City Code requirement that school sites must be a walkable distance from residential areas?

III. FACTS

A. The MPD Applications and Process

In 2009, Yarrow Bay filed applications for two master planned developments ("MPD"s) referred to as The Villages and Lawson Hills.² The

² Excerpts of these applications are attached as App. B (Villages) and C (Lawson Hills).

lands that were the subject of these two applications covered approximately 1,567 acres -- more than a third of the entire town of Black Diamond. The lands are in three distinct areas on different sides of the historic town. A map depicting the three areas is attached. (App. F; AR 5187).

The three areas are far larger than the area of the historic townsite. *Id.* Six thousand new households would increase the existing town's population five-fold. The proposal would also add over a million square feet of commercial space to the town. The development would transform the small town of Black Diamond into a suburban city, with a population similar to Anacortes.

The City Council approved the MPDs in Ordinance No. 10-946 (The Villages) and Ordinance No. 10-947 (Lawson Hills). AR 27155–59 (App. D); AR 27327–31 (App. E). Those two ordinances are the subject of Toward Responsible Development's appeal. The City Code provides a number of criteria that an MPD must satisfy. *See, e.g.*, BDMC 18.98.080 and 18.98.110-.190. Whether the MPDs approved by the City Council meets the Code's requirements is one of the primary issues presented. (Chapter 18.98 of the Code is reprinted in Appendix A.)

B. The Environmental Impact Statement Process

The State Environmental Policy Act (SEPA) requires the preparation of

an environmental impact statement or “EIS” -- a detailed analysis of environmental issues -- prior to an agency making major decisions like the MPD decisions here. *See* RCW 43.21C.030.

An EIS is supposed to be prepared by the agency. In this case, it was prepared primarily by the applicant’s consultants. AR 0020585. As demonstrated below, City staff provided only cursory review of the drafts of the EISs for Yarrow Bay’s proposal.

The heart of an EIS is supposed to be its analysis of alternatives to the proposal. Here, Yarrow Bay was proposing a massive development, the largest ever in King County and, therefore, most likely the largest ever in Washington State. AR 0024581. Yarrow Bay had no entitlement to a development that so radically transformed the land and the character of the town. Per the prior agreements and the City Code, the size and timing of developing this land was to be determined in this MPD process, consistent with the Comprehensive Plan’s policies.

Thus, the EIS should have provided the City Council with a robust, comparative discussion of the impacts associated with the proposal and the impacts that would be expected with alternative proposals, *e.g.*, significantly smaller projects or projects that were in keeping with the town’s historic

character. The EIS included, nominally, two alternatives (dubbed Alternative 3 and 4). But the EIS provided virtually no useful analysis of them. Rather than forming the “heart” of the EIS, the alternatives were treated as a useless appendix. As the Examiner stated, the EIS gave the alternatives only “short shrift.” AR 0024622.

The point person for the City’s work on the EIS was Steve Pilcher. He was designated as the “responsible official” overseeing the preparation of the EISs.³ But Mr. Pilcher was ill-qualified to oversee the environmental review of this massive process. He testified that he had very little experience with preparing environmental impact statements. Indeed, he had been involved in the preparation of only two environmental impact statements before he was faced with this massive project. AR 0002482–83. He had very little technical experience, AR 2366–70, and knew his salary was being paid by Yarrow Bay, AR 10257 (SEPA Processing Agreement). Numerous Black Diamond citizens (including members of TRD, which had not yet been formed) filed an administrative appeal of the adequacy of the EIS. The City’s Hearing Examiner determined that several parts of the EIS were inadequate. As detailed below, the Examiner acknowledged there were instances where the

³ Separate, but very similar EISs were prepared for The Villages and Lawson Hills. Because they were so similar, we frequently refer to them in the singular, as if they were one.

EIS failed to provide “vital information.” But the Examiner then excused the omissions of this “vital information” by averaging the good and the bad and concluding that “overall” the EIS was adequate. AR 0024581. As discussed in the argument section below, there is no legal basis for averaging the good and bad in an EIS as a way of ignoring the fatal flaw of missing “vital information.”

The Examiner also developed a number of other rationales to justify approving the EIS despite its numerous deficiencies — most of which deficiencies were acknowledged by the Examiner. We demonstrate below the errors in the Examiner’s various excuses, too.

C. The Subject Ordinances

As mentioned above, Ordinance No. 10-946 is the City’s approval of The Villages MPD. AR 27155–59 (App. D) and Ordinance No. 10-947 is the City’s approval of the Lawson Hills MPD. AR 27327–31 (App. E). The heart of each ordinance is Section 3 where the Council approves the MPDs “as set forth in” Yarrow Bay’s applications filed on December 31, 2009 (and as delineated on a revised Land Use Plan Map dated July 8, 2010) and Section 4 where the Council amends the zoning map. Section 3 of The Villages Ordinance reads:

Based on the Finding of Fact and Conclusions of Law adopted in Sections 1 and 2 above, the City Council hereby approves the Villages Master Planned Development as set forth in the application dated December 31, 2009 and as delineated on the revised Land Use Plan map (Figure 3-1) dated July 8, 2010 subject to the conditions of approval set forth in Exhibit C attached hereto and incorporated herein by this reference.

Section 4 provides in part:

[T]he City of Black Diamond Zoning Map is hereby amended to designate the parcels legally described and depicted in Exhibit D [Appendices F and G hereto] and incorporated herein by this reference as Master Planned Development – MPD.

(Virtually identical language is found in Sections 3 and 4 of the Lawson Hills ordinance.) Because Section 3 of the ordinances incorporates by reference the applications, the Court should refer to the applications as evidence of precisely what the Council approved. The relevant portions of the applications adopted by the City Council are attached hereto as Appendix G and Appendix H. Those documents contain the Land Use Plan maps, which identify the areas assigned for different land use categories; a “Design Concept and Land Use Plan,” which illustrates the design of the project; and development standards, which set forth specific legal standards and criteria for the proposal.

The applications also mention project-level permits like building permits, right-of-way permits, clearing and grading permits, subdivision

approvals, changes in land use category, modification of a previously approved subdivision, site plan review, accessory dwelling units, and binding site plans, AR 0024193–AR 0024195 (*id.* at 13-34 through 13-36), but the applications do not seek approval or issuance of any of these project level permits. The MPD applications simply identify the process and standards that will apply when those project-specific applications are filed and reviewed in future years.

D. The MPDs Create Irrevocable Rights

Yarrow Bay sought MPD approval to lock in development rights that could not be modified later when future permits are applied for, even if new information about the projects' impacts indicated that projects are in violation of the City's Code or Comprehensive Plan policies. The "lock in" was accomplished by a vesting clause found in BDMC 18.98.195. In places, the MPD ordinances call for future studies. But the City's approval of the MPD ordinances locks in Yarrow Bay's right to clearcut the forests, level the ground, build subdivisions for 6,000 households and develop a large, big box commercial area--regardless of the results of any future studies.

IV. PROCEEDINGS BELOW

TRD and several individuals sought review of the City's actions in

Superior Court pursuant to the Land Use Petition Act. CP 1. The Superior Court denied the petition. CP 98. On appeal, this Court reviews the City's decisions, not that of the Superior Court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 767, 129 P.3d 300 (2006).

V. STANDARD OF REVIEW AND BURDEN OF PROOF

The Land Use Petition Act (LUPA), ch. 36.70C RCW, establishes the procedures for judicial review of land use decisions made by cities and counties. LUPA provides that review is based on the city's record and that the appealing party has the burden of proof. The statute sets forth six grounds on which the reviewing court may reverse the local decision, the first four of which are implicated here:

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to

the facts;

RCW 36.70C.130. The judicial gloss on these standards is set forth in *Lauer v. Pierce County*, 173 Wn.2d 242, 252-53, 267 P.3d 988 (2011).

This appeal involves not only review of the City's adoption of the MPD ordinances approving the Yarrow Bay proposal, but also review of the adequacy of the EISs prepared for these projects. The determination of whether an EIS is "adequate" is an issue of law, determined only after the Court provides a "hard look" at the document. *See infra* at 17, 20-21.

VI. THE EIS IS INADEQUATE

If the EIS is found to be inadequate, then the MPD ordinances are invalid⁴ and the remaining substantive attacks on the ordinances need not be addressed. The City Council will need to reconsider the decision whether to approve the projects and, if so, with what conditions, after an adequate EIS has been prepared and is available to the Council during its deliberations.

A. SEPA's Purposes and Substantive Requirements

The State Environmental Policy Act ("SEPA"), ch. 43.21C RCW, was promulgated to further a "state policy which will encourage productive and enjoyable harmony between man and his environment" and "to promote

⁴ A decision based upon inadequate environmental review is void. *Leschi Imp. Council v. Wash. State Hwy. Comm'n*, 84 Wn.2d 271, 284-85, 525 P.2d 774 (1974).

efforts which will prevent or eliminate damage to the environment and biosphere.” RCW 43.21C.010. The Legislature has recognized that each person has a fundamental and inalienable right to a healthful environment and enacted SEPA to protect those rights. RCW 43.21C.020.

1. **Environmental review must be done early in the process so project decisions are based upon complete and adequate environmental review**

The purpose of SEPA is “to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences.” *King Cy. v. BRB*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). SEPA is “an attempt by the people to shape their future environment by deliberation, not default.” *Stempel v. DWR*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). The failure to conduct environmental review before key decisions are made can be destructive:

[Decisions early in the process] may begin a process of government action which can “snowball” and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When the government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences before the project picks up momentum, not after.

King Cy. v. BRB., supra, 122 Wn.2d. at 664 (internal citation omitted).⁵

2. All SEPA analysis must be based upon adequate information

When important information is missing, SEPA requires an agency to obtain information related to significant impacts essential to a reasoned choice among alternatives:

(1) If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the cost to obtain it are not exorbitant, agencies **shall** obtain and include the information in their environmental documents.

WAC 197-11-080(1) (emphasis supplied). *See also* WAC 197-11-030(2)(c) (“agencies shall to the fullest extent possible: . . . prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made”); -400 (EIS “shall be supported by the necessary environmental analysis”).

3. Agencies are to use the EIS to make an informed decision, not to evaluate a decision previously made

An EIS must be “impartial.” WAC 197-11-400. Moreover, the “point of an EIS is to not evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions.” *King Cy. v. BRB., supra*, 122 Wn.2d at 666 (emphasis in original). As stated

⁵ Although a DNS, not an EIS, was at issue in *King County v. BRB*, the principle that

in WAC 197-11-400:

(4) . . . An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions.

4. SEPA requires full disclosure and a “hard look” at the environmental issues

An EIS must “provide a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action.” *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 37, 873 P.2d 498 (1994). A decision made based upon inadequate environmental analyses is unlawful. *Leschi Imp. Council v. Wash. State Hwy. Comm’n, supra*, 84 Wn.2d at 284-85 (1974). SEPA, like its federal counterpart (NEPA), requires agencies to take a “hard look” at environmental issues. *PUD No. 1 of Clark Cy. v. PCHB*, 137 Wn. App. 150, 158, 151 P.3d 1067 (2007) (citing *Nat’l Aud. Soc. v. Dept. of Navy*, 422 F.3d 174, 184 (4th Cir. 2005)).⁶ Of course, SEPA does not require every single environmental effect or alternative to be considered, but “it must include a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency’s decision.” *City of*

government action must be based upon adequately disclosed environmental impacts before decisions have a snowballing effect is applicable here.

⁹ Washington courts regularly rely on NEPA case law in construing SEPA’s requirements. *PUD v. PCHB, supra*, 137 Wn. App. at 158 (“National Environmental Protection Act

Des Moines, supra, 98 Wn. App. at 35. See also *Weyerhaeuser, supra*, 124 Wn.2d at 37; *Gebbers v. Okanogan PUD*, 144 Wn. App. 371, 379, 183 P.3d 324 (2008); RCW 43.21C.031; WAC 197-11-400(2).

What is “reasonably thorough” is, of course, a function of the nature of the decision at hand. SEPA requires “a level of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives.” *Klickitat Cy. Cit. v. Klickitat Cy.*, 122 Wn.2d 619, 641, 94 P.3d 961 (1993).

Yarrow Bay will argue that “fly-specking” complaints do not render an EIS inadequate. The deficiencies identified by the Examiner and discussed below are pervasive and substantial. The “fly-specking” cases are irrelevant.

In this case, the pending decision was to determine the intensity and types of uses that would be allowed on 1500 acres of land that virtually encircles and envelops the small, historic town of Black Diamond. The decision will shape the face of Black Diamond and the surrounding rural areas for at least a hundred years. It would be difficult to conceive of a more momentous land use decision for this community. In making that decision, the City has to understand the impacts that would result from a development at the scale requested by the applicant. Under these circumstances, the requirement for a

(NEPA) is substantially similar to SEPA, Washington courts may look to federal case law for SEPA interpretation”); *Des Moines v. PSRC*, 98 Wn. App. 23, 37 n.28, 988 P.2d 27 (1999).

“thorough” EIS required more, not less, attention to important issues.

5. The “heart” of an EIS is its analysis of alternatives to the proposal

The “heart” of an EIS is its discussion of alternatives to the proposal. *Oregon Natural Desert Ass’n v. Bureau of Land Management*, 531 F.3d 1114, 1121 (9th Cir. 2008) (*quoting* 40 C.F.R. § 1502.14). The EIS must inform decision makers of the impacts that would be associated with alternative levels of development. The EIS must “devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action.” WAC 197-11-440(5)(c)(v). Per WAC 197-11-440(4), the EIS must focus on “environmental choices to be made among alternative courses of action.”

Basically, the EIS must have sufficient detail so that the City can decide whether it wants to endure the impacts associated with a development of this size and style or whether a smaller development or one more in keeping with the landscape and the town’s existing character would have fewer impacts and be more in keeping with the City’s recently adopted Comprehensive Plan. That comparative analysis cannot be undertaken if the EIS is too general and fails to clearly identify the project’s probable significant adverse impacts or fails to provide comparable information about the impacts associated with

alternative courses of action.

6. The Draft and Final EIS process

The SEPA regulations require that an EIS be published first in draft form.

That draft is circulated to the public and other agencies with expertise for

review and comment. As stated in WAC 197-11-400(4):

The EIS process enables government agencies and interested citizens to review and comment on proposed government actions, including government approvals of private projects and their environmental effects. This process is intended to assist the agencies and applicants to improve their plans and decisions, and to encourage the resolution of potential concerns or problems prior to issuing a final statement.

The comments on the draft form an important part of creating an adequate Final EIS. The rules require that the final EIS include a substantive response to those comments. WAC 197-11-560.

7. Deference to the responsible official

By law, the Examiner was required to give deference to the responsible official's determination that the EIS is adequate. Agency deference, however, is not absolute. Agency action "may be reversed where the agency has erroneously interpreted or applied the law, the agency's order is not supported by substantial evidence, or the agency's decision is arbitrary and capricious." *Postema v. Poll. Control Hrng. Bd.*, 142 Wn.2d 68, 76, 11 P.3d 726 (2000).

The issue of whether an EIS is adequate is a matter of law. *Glasser v.*

Seattle, 139 Wn. App. 728, 739, 162 P.3d 1134 (2007) (error to apply clearly erroneous standard to EIS adequacy challenge). “EIS adequacy refers to the legal sufficiency of the environmental data contained in the document.” *Id.* Thus, even though deference is required, “[a]n agency’s view of the statute will not be accorded deference if it conflicts with the statute.” *Postema v. Pollution Control Hearings Bd.*, *supra*, 142 Wn.2d at 76. “Ultimately, it is up to the Court to determine the meaning of the statute.” *Id.* As this Court stated in a SEPA case, an agency decision is entitled to deference only “*if it reflects a plausible construction of the language of the statute and is not contrary to legislative intent.*” *Alpine Lakes Prot. Soc. v. DNR*, 102 Wn. App. 1, 15, 979 P.2d 929 (1999) (emphasis added).

These cases show that Washington courts have put clear limits on agency deference. Most notably, the agency’s interpretation must be a plausible construction of the statute (*e.g.*, the meaning of an “adequate” EIS) and not be contrary to either legislative intent or the statute itself. Here, Mr. Pilcher’s lack of experience with overseeing the SEPA process has led to an EIS which defies SEPA’s statutory language and the intent behind it. By law, the Examiner was required to give deference to Mr. Pilcher’s decision, but the Examiner should not have been blind to the evidence that demonstrated that

Mr. Pilcher made numerous procedural and substantive errors along the way and lacked the technical background and experience necessary for this task.

B. The Examiner Made Several Systemic Errors that Appear in Multiple Portions of his Decision

1. The Examiner erred in using an unprecedented and improper “averaging approach” to excuse serious deficiencies in the FEIS

The Examiner determined that the FEIS contained “serious deficiencies” and that “vital information” was missing. But he excused these serious deficiencies because he thought that other - unspecified - parts of the EIS were adequate and that, on balance, the EIS was adequate. Allowing deficient parts of the EIS to escape revision because other parts of the EIS are adequate is unprecedented and just plain wrong. When a portion of an EIS is determined to be inadequate, the remedy is to remand the EIS for revision. *See* n. 4, *supra*. The law does not allow an agency to make a decision based on an inadequate EIS, simply because other parts of the EIS satisfy legal standards.

a. The Examiner found many serious deficiencies in the FEIS

The Examiner found numerous deficiencies in the EIS. The most egregious ones, by his estimation, were in areas where “vital information” was omitted:

[V]ital information was either not disclosed in the main text of [The

Villages] FEIS, or the text and appendices both failed to identify and/or adequately assess vital information on probable significant adverse environmental impacts.

AR 0024581.

For example, regarding the critical issue of the proposal's impact to water quality in Lake Sawyer, the Examiner concluded:

- “[T]here was a serious shortcoming in the identification of potential impacts in the text of the EIS.” AR 0024583.
- **“The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer.”** AR 0024599 (bold caption).
- “WAC 197-11-080(3) requires environmental review to provide a worst case scenario and likelihood of occurrence when acting in the face of uncertainty, to the extent the information can be reasonably developed. Given the uncertainty in the potential eutrophication of Lake Sawyer, the Villages and Lawson Hills EISs should identify the impacts of eutrophication to notify the decision maker of what could happen, even if the risk of that occurring is within the level of risk adopted by the TMDL conclusions in the Implementation Plan.

Neither the Villages EIS or the Lawson Hills EIS adequately identifies the impacts associated with reaching eutrophic status, *e.g.* the health hazards, beach closures, harm to endangered fish and aesthetic blight discussed in I(B) of this document are not identified. The Villages contains a fairly good description of the history of phosphorous problems associated with Lake Sawyer, but there is no recitation of specific impacts. Inexplicably, the Lawson Hills EIS doesn't even include the background information. It just mentions in one sentence that Lake Sawyer "...has a 303(d) listing for phosphorous, based upon past water quality problems" and in another sentence that "Lake Sawyer is susceptible to eutrophication." LH EIS, p. 4.36 and 5-11 [AR 0021044 and AR 0021115]. The appendices to both EISs also fail to identify specific impacts. 65% of The Villages and 100% of Lawson Hills drains into Lake Sawyer." AR 0024600 – AR 0024601.

- “The Applicant has not chosen to conduct its own analysis of how much

phosphorous the MPDs will discharge to Lake Sawyer.” AR 0024601.

- “Mr. Zisette’s calculations touch upon the most difficult issue of the Lake Sawyer EIS appeals: how could DOE [the Washington Department of Ecology] conclude that the Lake Sawyer 715 kg/yr TMDL [a limit on phosphorous pollution] would be reached [*i.e.*, phosphorous pollution would not exceed that limit] when the LSMP [Lake Sawyer Management Plan] model predicted 2,255 kg/yr at full build out? The LSMP and the Implementation Plan do not provide any explanation. As noted by the SEPA appellants, the mitigation measures in the LSMP don’t get you there – Table 6-7 of the LSMP reveals that all mitigation measures combined only attain an annual phosphorous loading of 1,793 kg/yr, still well above the 715 kg/yr. These mitigation measures include public improvements that cost eight to twelve million dollars to implement. See LSMP, p. 6-24 and 6-26 [AR 0005517 and AR 0005519]. Nothing in the record suggests that these improvements have occurred and, in fact, the Implementation Plan states generally that most mitigation measures have not been funded. Implementation Plan, p. 12 [AR 0015399]” AR 0024604.
- “. . . Mr. Zisette testified that the Applicant failed to determine how much phosphorous the MPDs would add to Lake Sawyer. He noted that the Applicant could have easily made this determination since it had data on both projected stormwater volumes and phosphorous concentrations. The Applicant did not rebut this testimony and the Examiner finds that the phosphorous loading would not have been unreasonably difficult to compute.” AR 0024606.

Likewise, the Examiner found the EIS inadequate regarding its disclosure

of the proposal’s long-term noise impacts (emphasis supplied):

- “The [Villages] FEIS noise analysis does a good job in identifying noise sources and their impacts. However, it doesn’t take into account the exceptional scale and duration of the MPD projects. In this context, construction noise is not “temporary” as contemplated in typical noise regulations, such as those adopted by [the Department of Ecology]. The [Villages] FEIS should have included an assessment of noise duration and mitigation that was reasonably designed to protect residents during this time period.” AR 0024583.

- “Neither FEIS nor their Technical Appendices disclose the anticipated duration of each of the constructions activities listed in the table in Exhibits 3-12. (Tr. at 795-96 [AR 0000681 – AR 0000682]).” AR 0024609.
- “. . . [A]pproximately 3,680,000 cubic yards of dirt would have to be removed from the site. This is equivalent to approximately 153,000 truckloads of material being exported. If ten truckloads are removed per hour, eight hours per day, five days per week, **that would be 400 truckloads a week for about 7.35 years.** (Tr. at 1640 [AR 0001347]). Exhibit 3-12 states that dump trucks operate at 82-94 dBA 50 feet from the source and 76-88 dBA 100 feet from the source.” AR 0024609
- “The FEIS and its Technical Appendices do not adequately disclose or discuss the duration of the construction noise impacts. Mr. Lilly testified that there is no information in the record disclosing the duration of the noise generated by construction, and a reading of the FEIS and accompanying Appendices confirms this testimony. Tr. at 795-96. . . . **The duration of construction noise impacts is a significant impact that has not been adequately addressed in the EIS.**” AR 0024611
- “. . . Though an EIS is not intended to be a compendium of every conceivable effect of a proposed project, it is reasonable to require such a site-specific analysis for properties where noise levels reasonably could reach unhealthy levels – continuous exposure above 70 dBA, as identified in Appendix C, Technical Memorandum on Noise (November 16, 2009). *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390 (1993).” AR 0024612.

The Examiner also found “areas in the traffic analysis that did not hold up particularly well,” AR 24584, including failing to assess impacts to the historic, aesthetic and recreational character of Green Valley Road (AR 0024618 (FF 16); *see also* AR 0000211-14; AR 0000391-92)⁷ and the use of a regional, instead of a local, traffic model.

⁷ Environmental review must include aesthetics, recreation and historic preservation. *See* WAC 197-11-448(2)(b)(iv)-(vi).

The Examiner found other deficiencies in the traffic analysis, too:

- “The FEIS did not identify safety concerns as a probable significant adverse impact.” AR 0024616 (FF 14).
- “The mitigation measures proposed by the FEIS did not discuss whether funding exists to implement the measures, or whether such measures are feasible.” AR 0024617 (FF 15).
- “The FEIS did not include an analysis or estimate of anticipated increases in travel times.” AR 0024618 (FF 15).
- “The FEIS contains no discussion of the traffic impacts posed by construction of the proposed projects. It is clear that the many years of construction arising out of the extensive development proposed by applicant will result in ongoing construction traffic impacts.” AR 0024620 (FF 19).
- “[T]he FEIS gave short shrift to Alternatives 3 and 4, merely noting the percentage increase posed by each alternative, . . .” AR 0024622 (CL 9).
- “The FEIS did not include a detailed analysis of potential queue lengths resulting from increased traffic. Mr. Tilghman testified that long queues at intersections posed a safety hazard for motorists coming upon an unexpected backup due to queues and that queues from adjacent intersections overlapping might cause gridlock.” AR 0024615 (FF 9).
- “The FEIS did not address individual turning movement failures at the various ‘legs’ . . . Mr. Pazooki testified that WSDOT requested information about individual legs of intersections and that that information was a standard EIS item for inclusion.” *Id.* (FF 10).

b. The Examiner used an “overall” balancing approach to excuse the acknowledged deficiencies

The numerous and sometimes egregious inadequacies chronicled by the Examiner were excused by him on the basis that *other, unspecified parts* of the FEIS were done well. Taken as a whole, the Examiner reasoned, the FEIS was pretty good, as shown in these excerpts (emphases supplied):

- Given the broad range of impacts that were thoroughly discussed in the [The Villages] FEIS, the deficiencies identified above are relatively minor

in comparison. **Overall**, the TV FEIS provides a reasonably thorough discussion of environmental impacts. AR 0024585–AR 0024586.

- The SEPA appellants have shown that the EIS does fail to disclose significant impacts in a couple of areas. As discussed for Lake Sawyer impacts, the most egregious lack of disclosure in the EIS concerns the potential impacts on Lake Sawyer water quality. The noise assessment doesn't identify the duration of noise impacts, which should be a key consideration in assessing the reasonableness of any noise mitigation. **Overall**, however, the EIS discloses the most significant and vital information regarding environmental impacts and alternatives. AR 24638.
- . . . [T]he reasonableness standard is . . . broad enough to encompass an assessment of deficiencies in light of the **overall** thoroughness of scope of an EIS. AR 0024595 (emphasis supplied). *See also* AR 0024583 (“the Examiner has to conclude that the EIS is still adequate given the **overall** thoroughness of the document”).

The Examiner cited no legal authority for his decision to excuse various deficiencies related to “vital information” by comparing them to other, unspecified portions of the EIS that the Examiner believed were adequate. The Examiner did not explain how, say, an exemplary discussion of the project's impacts on sewer service would excuse the fatally flawed analysis of traffic, noise and phosphorous (stormwater) pollution. We have not been able to find a single case among the hundreds (or probably thousands) of EIS adequacy cases in which omissions of “vital information” were excused because other portions of the EIS were adequate.

For instance, in *Kiewit Const. Group, Inc. v. Clark Cy.*, 83 Wn. App. 133, 920 P.2d 1207 (1996), the court upheld a decision that found an EIS

inadequate and remanded for preparation of a supplemental EIS on just those issues that the EIS failed to address adequately. Gilbert Western Corporation was proposing an asphalt plant. The reviewing board determined that the EIS “inadequately disclosed and discussed traffic concerns, particularly the safety hazards posed by increased truck traffic along Evergreen Highway.” *Id.* at 137. Gilbert Western argued that “the Board had no authority to order a supplemental EIS on traffic issues.” *Id.* at 142. The Court rejected the argument: “the S[upplemental] EIS was justified based upon Gilbert Western's failure to disclose the full effect of truck traffic on bicyclists and other trail users, and the company's failure to discuss meaningfully the alternative of direct access ramps onto State Route 14.” *Id.* There was no consideration of whether the adequacy of other portions of the EIS resulted in an EIS that “overall” was adequate. The failure of the EIS to adequately address traffic safety issues was sufficient, by itself, to require a supplemental EIS. Similar cases are collected in the note.⁸

⁸ See *Weyerhaeuser v. Pierce Cy.*, *supra* (EIS remanded for analysis of new alternatives); *Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 854, 613 P.2d 1148 (1980) (same); *Lands Council v. Powell*, 395 F.3d 1019, 1037 (9th Cir. 2004) (vacating agency decision; inadequate EIS prevented a proper environmental evaluation violating NEPA); *Oregon Nat. Res. Council v. Brong*, 492 F.3d 1120, 1124-25 (9th Cir. 2007) (affirming injunction based on inadequate EIS); *Olympic Forest Coal'n v. U.S. For. Serv.*, 556 F. Supp. 2d 1198, 1205 (W.D. Wa. 2008) (vacating permit based on inadequate environmental review); *Metcalf v. Delay*, 214 F.3d 1135 (9th Cir. 2000) (directing district court to suspend underlying action pending

In the present case, the Examiner identified numerous, substantial inadequacies in the EIS and explained them away by simply stating that they were balanced out by other sections of the EIS, *i.e.*, that “overall” the EIS was adequate. This is an egregious error of law. It is contrary to SEPA’s mandate that all substantial adverse environmental impacts be disclosed. It also subverts the twin policies that underlie that mandate: assuring that both decision-makers and the public are well informed. If the EIS contains inadequate information on one (or multiple) subjects, neither the decision-makers nor the public will have the information that SEPA seeks to place in their hands before decisions are made. The Examiner’s use of an unprecedented “overall” average to excuse multiple, substantial deficiencies in the EIS should be rejected.

2. The Examiner erred in believing that an adequate mitigation plan excuses an inadequate disclosure of impacts

Another error that sweeps across several EIS topics is the Examiner’s confusing the substantive sufficiency of proposed mitigation with SEPA’s procedural duty to analyze impacts in the EIS. For instance, while the Examiner found that the EIS failed to adequately disclose water quality

completion of adequate environmental review); *Mountaineers v. U.S. For. Serv.*, 445 F. Supp. 2d 1235, 1251 (W.D. Wa. 2006) (injunction pending completion of environmental review).

impacts on Lake Sawyer, he excused this, in part, because he found that “The Villages and Lawson Hills MPDs Adequately Mitigate Phosphorous Impacts to Lake Sawyer.” AR 0024603. *See also* AR 0024621. Likewise, he excused the failure of the EIS to disclose a variety of traffic impacts on grounds that the city’s traffic mitigation ordinance did not require consideration of those impacts in developing mitigation requirements. AR 0024621 (CL5).

This reasoning reflects a fundamental confusion by the Examiner, conflating the City’s duty under SEPA to prepare an adequate EIS and the City’s duty under other laws to provide for adequate mitigation.

SEPA provides substantive authority to impose mitigation, but the exercise of that authority is largely discretionary. RCW 43.21C.060. In contrast, SEPA’s procedural mandates (*e.g.*, preparation of an adequate EIS) are just that — mandates. Regardless of whether an agency chooses to exercise its substantive authority to impose mitigation, SEPA (like NEPA) requires preparation of an adequate EIS. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989).

An EIS must disclose a project’s probable impacts. WAC 197-11-440(6). An EIS must identify potential mitigation measures, too. *Id.* Logically, the impacts must be identified before mitigation measures because the mitigation

measures are to address the identified impacts. *Id.* (“describe the existing environment that will be affected by the proposal, . . . and discuss reasonable mitigation measures that would significantly mitigate *these impacts*”) (emphasis supplied). Unless “these impacts” are accurately identified, measures to “significantly mitigate” them cannot be developed. The Examiner could not possibly know that the impacts had been adequately mitigated when he did not have information about what those impacts were.

Likewise, SEPA requires disclosure of impacts that remain after mitigation is used. WAC 197-11-440(6)(c)(v). Unless impacts are identified initially, it is impossible to disclose the impacts that remain after mitigation.

Regardless what the Examiner thought about the adequacy of the proposed mitigation, SEPA required first a disclosure of the anticipated impacts and those remaining after mitigation. The Examiner committed a fundamental legal error when he concluded that his satisfaction with the substance of the mitigation program excused non-compliance with SEPA’s duty to provide a reasonably thorough disclosure of the proposal’s impacts.

3. The Examiner erred in characterizing the EIS as a “programmatically” EIS (as opposed to project-specific EIS) and judging it by a relaxed standard

SEPA distinguishes between “non-project” and “project” EISs. A non-

EIS. *See, e.g.*, AR 0024620 (safety concerns); AR 0024623 (queue lengths); AR 0024620 (traffic model); AR 0024618 (travel time).

Every time the Examiner excused deficiencies in the EIS on the basis that the document was a “programmatic” EIS, the Examiner committed an error of law. The issue of whether the MPD ordinances at issue here are a “project” or a “nonproject” action has been litigated and resolved by this Court in *BD Lawson Partners, LP v. Central Puget Sound Gr. Mgmt Hrngs Bd*, 165 Wn. App. 677, 269 P.3d 300 (2011). “We hold the 2010 MPD ordinances adopted by Black Diamond were project permit approvals.” *Id.* at 690.

The Examiner’s conclusion that these ordinances were programmatic and that the EISs could be held to the more flexible standards for programmatic EISs was an error of law requiring reversal. RCW 36.70C.130(1)(b).

4. The Examiner’s reliance on phased review does not excuse the non-compliance

The Examiner also erred in relying on the concept of “phased review” to bail out the deficient EIS. For instance, according to the Examiner, the assessment of safety issues can wait until specific intersections and roadways are being designed. *See* AR 0024620 (Examiner at 42, FF 2).

WAC 197-11-060(5) allows environmental review to be phased in limited circumstances. *Id.* For example, phased review may be appropriate when the

sequence is from a nonproject EIS to document of narrower scope such as a site-specific analysis. WAC 197-11-060(5)(c). When phased review is used, general issues are addressed first (like site selection and the impacts resulting from the basic scale and nature of the development proposal). Then, at a later stage, when more specific plans are reviewed, more detailed, site-specific analysis can be undertaken.

At each stage, the level of the environmental review must provide the information necessary to allow an informed decision to be made at that stage. *See* WAC 197-11-060(5)(a) (agencies to “determine the appropriate scope and level of detail of environmental review to coincide with meaningful points in their planning and decision-making processes”). Phased review cannot be used to defer analyzing issues that are ripe for review. SEPA’s purposes are frustrated if impacts are disclosed in a latter phase of review after vested rights have been conferred.

Similarly, the rules require EISs to be prepared “at the earliest possible point in the planning and decision-making process, when the principle features of a proposal and its environmental impacts can be reasonably identified.” WAC 197-11-055(2). Critically, the “fact that proposals may require future agency approvals or environmental review **shall not preclude**

current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.” WAC 197-11-055(2)(a)(i) (emphasis supplied). Indeed, agencies “should adopt procedures for environmental review and for preparation of EISs on private proposals **at the conceptual stage rather than the final detailed design stage.**” WAC 197-11-055(4) (emphasis supplied).

The phased review regulations of SEPA are “designed to streamline environmental review as a proposal progresses from broad planning to narrow site specific implementation.” *Glasser v. City of Seattle, supra*, 139 Wn. App. at 738. The intent is that the review “assists agencies and the public to focus on issues **ready for decision** and exclude from consideration issues already decided or not yet ready.” *Klickitat County, supra*, 122 Wn.2d at 639 (emphasis supplied). “The purpose of phasing review is to enable agencies and the public to focus on issues *ripe for decision* and to exclude from consideration issues that are not ready.” *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 879, 913 P.2d 793 (1996) (emphasis added).

“Moreover, phased review of a project is *inappropriate* where phasing avoids discussion or distorts the impact of a project’s cumulative effects.”

around existing landforms and forests in keeping with Black Diamond's historic, small town character. The City Council cannot change those fundamental decisions with future decisions. Therefore, *this* EIS must provide the information necessary to inform those choices *before* they are made.

The EIS included two alternatives that were smaller than Yarrow Bay's proposal. If the EIS had been adequate, the EIS would have provided the City and the public with information that allowed them to compare and contrast the environmental effects likely to be associated with these alternative developments of varying size. Even if detailed environmental review of, say, specific intersection improvements would appropriately await applications for those specific mitigation projects (*e.g.*, determining how many square feet of wetlands might be impacted by adding a turn lane), that is no excuse for not analyzing now the larger issues generated by the size and style of the development and the extent to which they could be avoided with a smaller development.

For instance, as discussed in more detail below, given the staff's recognition that the increase in traffic would result in increased safety

impacts, the decision makers and public should have been provided with an assessment of the extent to which safety concerns vary among the various alternatives. And given that fifteen years of construction traffic would create noise, dirt and congestion, the Council and public needed at least some information about these impacts, too. But the EIS was totally silent on these issues. There is no information in the EIS that allows decision makers to compare and contrast the safety or construction traffic impacts among the various alternatives. This analysis would have been pertinent to the issues before the Council at this time, even if a more detailed analysis of safety and construction issues might await a subsequent phase. Thus, the Examiner's reliance on phased review was misplaced and does not excuse the EIS's failure to address the issues that were being decided by the City at this stage.

C. The FEIS Failed to Include an Adequate Response to Critical Agency Comments on the Draft EIS

An important part of the environmental review process involves circulating a draft of the environmental impact statement to other agencies with expertise and to the public for their review.

WAC 197-11-500 provides the public must be given the opportunity for consultation and comment on environmental documents, and lead agencies must respond to those comments in preparing the final EIS: 'Review, comment, and responsiveness to comments on a draft EIS are the focal point of the act's commenting process because the DEIS is

developed as a result of scoping and serves as the basis for the final statement.’

Klickitat County, supra, 122 Wn.2d at 636 (quoting WAC 197-11-500(4)).

Furthermore, “Under WAC 197-11-560(1), the lead agency preparing the final EIS ‘*shall consider* comments’ received on its proposal and ‘*shall respond*’ by one or more of several methods.” *Id.* (emphasis in original).⁹

A failure to adequately respond to comments results in a failure to take a hard look at the environmental consequences of a proposed action. *See Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011) (agency failed to take a hard look at environmental consequences by neither responding to comments “objectively and in good faith” nor making responsive changes to the proposed regulations). *See also Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157 (9th Cir. 2003) (“Because the commenters’ evidence and opinions directly challenge the scientific basis upon which the Final EIS rests and which is central to it, we hold that Appellees were required to disclose and respond to such viewpoints in the final impact statement”); *Sea. Aud. Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (agency erred in not addressing scientific uncertainties and

⁹ WAC 197-11-650(1) requires either a modification of the proposal, a correction or further analysis in the FEIS, or “[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons that support the agency’s response . . .”

criticisms regarding the scientific model used in the proposed project).

In this case, Mr. Pilcher took responsibility for drafting many of the responses, but they were woefully inadequate. He repeatedly failed to provide meaningful responses to important comments submitted by King County, the Washington State Department of Transportation, and other individuals and entities. Some examples follow:

- King County commented that the proposed infiltration pond in the rural area “may impact the regional Green to Cedar River trail corridor in Section 21.” AR 0023500. No response was provided in the FEIS.
- King County stated that “the DEIS also is deficient in addressing cultural resource issues within the City. . . .” AR 0023504. No response was provided in the FEIS.
- King County commented about the deficient discussion of stormwater: “Stormwater impacts to these water bodies [including Lake Sawyer] and mitigation measures are discussed in only a very general way in the stormwater section of this chapter. Stormwater impacts to each of these unique water bodies should be addressed in more detail.” AR 23503. The FEIS response was “As appropriate, clarifications and/or corrections have been made to the EIS document.” *Id.* As discussed in more detail later in

this brief, no “clarifications and/or corrections” were made regarding water quality impacts to Lake Sawyer. *See also* AR 703 – 705 (County testimony that FEIS responses to County’s comments were inadequate).

- King County complained that the “DEIS also does not adequately address potential adverse impacts to the Rural Area and Resource Lands as called for by the following policies: . . . [Countywide Planning Policy LU-11 and County Comprehensive Plan Policy R-510 quoted in full.]” AR 0023476. Again, no response was provided.
- King County complained: “Both DEISs need to more clearly describe how new local wastewater infrastructure will connect into existing and planned conveyance facilities intended to convey wastewater to treatment. This is necessary so that the timing and scale of improvements to the wastewater conveyance system can be reviewed to ensure there will be no adverse impacts to local streams, wetlands, or soil, or impacts to public health.” AR 23494 (Comm. A-004-029). The FEIS states that this is a “comment for which a response is not required because it is not related to the SEPA process.” The FEIS does not explain why “adverse impacts to local streams, wetlands, or soil or impacts to public health” do not fall within the ambit of the SEPA process. That assertion lacks any

support in law or fact.

- King County was critical of other sewage issues in the DEIS, too: “The DEIS needs to describe how this [sewer conveyance] configuration could operate reliably, and function compatibly with the existing Black Diamond pump station and Black Diamond trunk. The current level of detail does not allow for an assessment of the ability of the configuration to adequately protect the environment and public health.” AR 0023495 (Comment A-004-033). Again, the FEIS responds that “this is a comment for which a response is not required because it is not related to the SEPA process.” It is difficult to understand the conclusion that a failure to provide sufficient information to assess impacts relating to “the environment and public health” does not relate to the SEPA process.
- King County identified deficiencies in the transportation analysis:

Southeast Green Valley Road between Southeast Auburn-Black Diamond Road to Enumclaw-Black Diamond Road SE (SR 169) was recently designated as a ‘Community Landmark’ by the Landmarks Commission. Green Valley Road is one of nine Heritage Corridors found significant for their historic integrity, adjacent historic resources, and scenic quality in a joint study with Roads Services Division of DOT. While the designation entails no regulation through the Landmark Design Review Process, it recognizes the particular historic significance of the road and corridor **which would be severely impacted by additional traffic generated by the proposed Master Planned Developments (MPDs)**. In addition to cumulative physical impacts and, eventually, changes in the capacity and physical

character of the road, there are several inventoried historic buildings, family burial plots, and archaeological sensitive areas in the corridor that would also be adversely affected. Cultural resource analysis accompanying the Draft Environmental Impact Statement (DEIS) documents does not address these issues. AR 0023504 (emphasis supplied).

The FEIS did not respond to the substance of this comment. The response merely explains that a direct connection to Green Valley Road has been eliminated. But, even without the direct connection, the developments will result in a 300 percent to 400 percent increase in traffic volumes on Green Valley Road. AR 0000399-401 (testimony by King County's Mathew Nolan). King County's concerns about impacts to this Heritage Corridor from the increased volumes (irrespective of a direct connection) were wholly ignored in the FEIS response.

- The Washington Department of Transportation (WSDOT) was critical of the analysis of traffic impacts on State Route 169 (which passes through Black Diamond): "Traffic queuing analysis must be added to the reports. . . . **It is essential for determining the operations of closely spaced intersections and for corridor as a whole.**" AR 0023510 (emphasis supplied). Incredibly, the FEIS responds that this "is a comment for which a response is not required because it is not related to the SEPA process." Little wonder that WSDOT penned another letter after the FEIS

was published lamenting the lack of an adequate response to this (and other comments). AR 0003900 (Wheeler Ex. 10)

The Examiner provided virtually no explanation for upholding the EIS's response to these agency comments. He acknowledged that an

“...inadequate . . . FEIS response could be consequential if it reveals a failure to address a significant environmental impact that is within the scope of a properly filed appeal. A permitting agency can find itself in a much more difficult position to argue a reasonably thorough discussion if it is given notice of a significant impact through a DEIS comment and still fails to address it.” AR 0024635.

That is exactly what happened here, yet the Examiner basically ignored the issue. Even though the SEPA appellants called to his attention the inadequate responses quoted above in our post-hearing brief (*see* AR 7210–81 and our cross-exam of Pilcher AR 2366–70), the Examiner failed to discuss them or explain on what basis he concluded that the responses quoted above somehow were adequate. *See* AR 24634–35. The Examiner's conclusion that the responses were adequate is entitled to no deference because he did not provide any analysis or discussion of the specific items that formed the basis for this part of the SEPA inadequacy claim.¹⁰

The FEIS contains example after example of substantive comments to

¹⁰ *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) (findings must disclose basis for decision makers conclusions).

which no meaningful response was provided. This “lackadaisical approach” is not countenanced in the law. See *Klickitat Cy, supra*, 122 Wn.2d at 636, *Western Watersheds Project supra*; *Ctr. for Biological Diversity v. U.S. Forest Service, supra*; *Seattle Audubon Soc’y v. Espy, supra*. Instead, it demonstrates that the necessary “hard look” was not provided.

Because the Final EIS fails to adequately respond to the comments in the Draft EIS, the Final EIS is inadequate. The failure to adequately respond to written comments could be cured by the publication of a new FEIS that contained adequate responses.

D. The EIS Fails to Adequately Analyze Phosphorous Impacts to Lake Sawyer

Black Diamond’s Lake Sawyer is the fourth largest natural lake in King County. The lake is highly valued and “an extremely significant aquatic resource” used by the community. AR 5395 (Lake Sawyer Mgmt Plan at ES-1). The lake provides habitat for three federally listed species, steelhead, Coho and Chinook salmon, AR 20805, 20807, and is part of an important migration corridor for salmon, Comp. Plan at 4-5. Lake Sawyer also provides year round recreational fishing for rainbow trout, cutthroat, steelhead and a variety of other fish. *Id.* at 4-10.

Water quality in the lake already is precarious. Yarrow Bay’s project

threatens to push it over the edge. As the Examiner stated, “development in the Lake Sawyer watershed has the potential to exact devastating consequences upon Lake Sawyer.” AR 0024581.

The Examiner concluded that the EIS was based on an old water quality plan that “makes no assurance that its mitigation measures will prevent the adverse impacts of phosphorous contamination, despite the clearly erroneous belief of the Applicant’s consultant that it would.” AR 0024582 (emphasis supplied). The Examiner also concluded that, based on the applicant’s model, “there was a reasonable chance that the MPD proposals alone could ‘tip’ Lake Sawyer into producing the blue-green algae blooms and all associated adverse impacts.” *Id.*

The Examiner also stated that “there was a serious shortcoming in the identification of potential impacts [to Lake Sawyer] in the text of [the] EIS.” AR 24583. Per the Examiner, the EIS “text mentions that Lake Sawyer has phosphorous problems, but it does not identify the consequences of those problems, *i.e.*, blue green algae blooms, toxins, beach closures, etc.” *Id.*

Despite finding that the applicant’s “no harm” theory was based on a “clearly erroneous” belief and that there was a “serious shortcoming in the identification of potential impacts” to Lake Sawyer in the EIS, the Examiner

excused serious inadequacies by employing his “overall” averaging method. *Id.* We have addressed that faulty rationale above. In this section, we address other rationales offered by the Examiner for excusing the obvious deficiencies in the EIS.¹¹ We begin with some background.

1. Lake Sawyer is at a tipping point

The rule of reason for an EIS means that impacts of greater severity should have a more thorough analysis than impacts that are of lesser import. “The severity of an impact should be weighed along with the likelihood of its occurrence.” WAC 197-11-794(2).

Context is critical, too. The significance of an impact will “vary with its physical setting.” *Id.* Phosphorous pollution of a highly used lake near the tipping point is more significant — and warrants a more thorough analysis — than phosphorous pollution in some other, less sensitive, less utilized setting.

The evidence demonstrates that Lake Sawyer is extremely sensitive to

¹¹ The Examiner also excused the absence of the analysis in the FEIS by referring to the discussion of these issues during the appeal hearing. *Id.* But the required analysis must be included in the EIS itself, not in a subsequent appeal process. WAC 197-11-402(6). Decision makers rely on the EIS, not a hearing transcript, as the source of their environmental impact information.

The Examiner also excused these deficiencies on the basis that the City Council would be “encourage[d]” to “investigate these issues [later] and to promote a reevaluation of the [old plan] if necessary to protect Lake Sawyer water quality.” AR 0024583. Again, the possibility of a later investigation is no cure for a deficient EIS. An adequate EIS must *precede* the city’s decision, *see supra*, §§ VI.A.3 & VI.B.4, so that the City can use the EIS when the decision is made. It is too little, too late to hope that a subsequent study will take place and somehow be

phosphorous. The City's Comprehensive Plan identifies protection of Lake Sawyer water quality as a "key issue." Comprehensive Plan at 1-2. High phosphorous loads in the 1980s caused a terrible deterioration of water quality. As phosphorous levels went up, algae blooms occurred. A green scum covered the lake, rendering the lake virtually unusable for all recreational and other public activities. AR 557-58 (testimony of King County's Sally Abella), AR 2633 (testimony of Wheeler).

The algae blooms were not just an aesthetic assault. They were harmful to the fish in the lake. The scum precludes aeration of the lake, suffocating aquatic life, including salmon and trout. In its "blue green" form, it creates toxins, lethal to aquatic life, birds and shore animals (including domestic cats and dogs). AR 557 (testimony of King County's Sally Abella).

In those days, a major source of phosphorous loading was the effluent from a wastewater treatment plant. When that was stopped, the lake continued to be plagued by algae blooms and high phosphorous levels for several years. Finally, in the late 1990s, the lake's water quality began to improve, but it remains problematic. AR 0015386. Because of the impaired water quality, in 1993, the EPA set a maximum mean summer total phosphorous concentration limit of 16 micrograms per liter. AR 0020760.

used to retroactively re-visit the decision under review.

Because the algae blooms are directly connected to phosphorous loads in the lake, water quality management efforts have been focused on limiting phosphorous flowing into the lake. “The management of Lake Sawyer requires the long-term commitment to **reduce** future watershed loading.” AR 0005400 (2000 Lake Sawyer Management Plan at ES-6).

Land development is a major determinant of phosphorous loading. Forested land typically results in little or no phosphorous reaching the lake. AR 2613 (aquatic scientist Rob Zisette testimony). But when land is cleared, significant amounts of phosphorous are released. *Id.* In addition to the slugs released during the construction phase, once homes and roads are built, additional phosphorous washes off of yards, streets, and other developed areas in quantities far greater than in a natural condition. As the 2000 Plan noted: “Modeling of future water quality in Lake Sawyer indicates the potential for a significant degradation as a result of development within the watershed.” AR 5400.

Virtually none of the foregoing information is included in the EIS. *See* WAC 197-11-440(6)(a) (“EIS shall describe the existing environment that will be affected by the proposal”).

2. Evaluating the potential impact on Lake Sawyer requires an assessment of the total phosphorous load that will reach the lake

Water quality in Lake Sawyer is a function of the total phosphorous load reaching the lake (or re-circulated within it). AR 2626 (Zisette). *See also* AR 5395-96. That is, the amount of phosphorous reaching the lake (or already in it) — the so-called phosphorous load — is the catalyst for the algae growth and other deleterious effects. As aquatic scientist Zisette explained, a flow that is only one percent phosphorous can deliver as much phosphorous to the lake as a flow that is 100 percent phosphorous if the former flow is 100 times larger in volume than the latter one. It is the quantity of phosphorous reaching the lake, not the concentration levels in the influent, which makes the difference. AR 2615-28. Yarrow Bay’s consultant, Mr. Kindig, did not dispute this.

Thus, to assess the projects’ impacts on Lake Sawyer, it is “essential” to assess the total quantity of phosphorous that likely will reach the lake as a result of these projects. AR 0004035 (Zisette (Herrera Consulting) Report). Without this “essential” information, it is impossible to assess the projects’ impacts on the lake. This is not a matter of opinion. It is a scientific fact.

Stormwater facilities can remove some of the phosphorous (50% according to Yarrow Bay’s consultant), but even accepting Yarrow Bay’s removal efficiency assumption for the moment, 50% of the phosphorous

generated on-site gets through the treatment facilities and moves on to the lake. How much of a load to the lake is that? That requires a calculation of the “phosphorous load.” AR 2581-82. That calculation was not done.

Moreover, “much of the water during large storm events bypass” the treatment pond, “so there will be additional phosphorus that will be exported from the development that doesn’t even get through the pond for treatment.” AR 0089. During these large storms, much larger loads of phosphorous reach the lake (and settle out there) both because the volume of water is greater and the removal efficiency is lower. This must be addressed in calculating the phosphorous load, too. *Id.*

Once the load of new phosphorous is calculated (and added to the background load), that total load can be compared to several standards to assess its significance. The TMDL threshold¹² set for the lake is 16 micrograms per liter. AR 0015386 (Water Quality Implementation Plan). Recent monitoring indicates that the TMDL threshold is not consistently being met. AR 0015388. The EIS fails to evaluate how much phosphorous will reach the lake or what impact it will have on phosphorous levels in the lake or whether it will cause an exceedance of the TMDL.

¹² Total Maximum Daily Load. This standard is established pursuant to the federal Clean Water Act for water bodies that have impaired water quality. 33 U.S.C. § 1313(d).

Another benchmark is the non-degradation standard in the City's Comprehensive Plan. Policy NE-6 at 4-25. Policy NE-6 requires that protection measures be adopted "to reduce pollutant loads, including phosphorous discharged to Lake Sawyer." *Id.* (emphasis supplied). In like manner, the 2000 Lake Sawyer Management Plan states: "Further degradation of the lake is unacceptable to the community. The management of Lake Sawyer requires the long-term commitment to reduce future watershed loading." AR 0005400 (emphasis supplied).

Will the development approved by the ordinances "reduce pollutant loads, including phosphorous" as called for by the Comprehensive Plan and the 2000 Plan? The EIS does not disclose that critical information either. Before deciding whether to approve Yarrow Bay's proposal (or something smaller), the Council needed to determine whether the development would be consistent with Comprehensive Plan Policy NE-6 (as required by the City's own Code). The Council vitally needed information on the projects' impact on phosphorous levels in Lake Sawyer to make that determination. But that information was not provided by the EIS, rendering it woefully inadequate.¹³

¹³ The City's Comprehensive Plan policy to reduce phosphorous in the lake is consistent with Ms. Abella's testimony that algae scum can form even in a mesotrophic lake. Mesotrophic conditions arise with phosphorous levels between 16 micrograms per liter and 24 micrograms per liter. AR 0005477.

The failure of the EIS to assess the phosphorous loading to Lake Sawyer is not limited to the analysis of Yarrow Bay's proposal. The EIS should have included an analysis of the phosphorous loading impacts of the scaled down alternatives. . See WAC 197-11-768 (first form of mitigation is "[a]voiding the impact altogether by not taking a certain action or parts of an action"). AR 5503 (Lake Sawyer Mgmt. Plan: "[f]orest retention and open space dedication . . . could play an important role in the long-term protection of Lake Sawyer"); AR 2626 (Zisette: reducing acreage converted from forest to urban is the ultimate "source control" to mitigate phosphorous impacts).

But the EIS analyses for these alternatives are non-existent. All the EIS states is that Alternative 3's water quality impacts (generally, not specific to Lake Sawyer) "will be proportionally less." AR 0020772. That's it! And there is no mention of stormwater impacts for Alternative 4. *Id.* Nothing at all! The City Council could not assess whether impacts to Lake Sawyer would be meaningfully reduced by approving a smaller version of the proposal with that kind of information. And these fundamental inquiries needed to be addressed when the project's size was being decided in the MPD approvals, not in some later phase of SEPA or permit review.

As the Examiner found, a phosphorous loading analysis would have

provided the City Council with “vital” information as to what extent phosphorous loading to Lake Sawyer might be reduced if a smaller project were approved. AR 0024581-AR 0024583. The absence of this “vital” information renders the Lake Sawyer water quality section of the EIS fatally flawed.¹⁴ The Examiner unambiguously found the EIS analysis of Lake Sawyer water quality inadequate: “The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer.” AR 0024599.¹⁵ Yet he managed to justify finding the EIS adequate despite his finding that the EIS fails to disclose these impacts to Lake Sawyer.

Part of the Examiner’s rationalization for upholding the EIS was based on

¹⁴ So if the EIS did not provide this information, what did it disclose? The EISs’ discussion of water quality impacts is contained in a section that is entitled “How Would the Alternatives Affect Water Resources?” which begins at 4-30. The water quality portion of that discussion begins at the bottom of page 4-33. At 4-35, the EIS acknowledges that the “increase in phosphorous and urban runoff may be several times greater than that of previously forested conditions. Specific to this site, quantified analysis indicates that total phosphorous discharge **concentrations** are forecast to be higher in post-developed conditions (Appendix M, Table 3-13).” (Emphasis supplied.) The EIS goes on to note that these higher concentration levels refer to phosphorous suspended in solution and does not include phosphorous bound to particles. *Id.* The EIS acknowledges the general risk that the “combined impact of phosphorous in runoff and phosphorous bound to sediments may contribute substantially to the risks of eutrophication of receiving water.” *Id.*

But the EIS does not take the next and “essential” steps of attempting to calculate the phosphorous load or the impact on the lake. The next two pages of the EIS include a discussion of Alternative 2 in particular. That discussion covers a variety of water quality issues, most of which are not relevant to Lake Sawyer’s phosphorous issues. Nowhere in that discussion is there any assessment of the amount of phosphorous expected to reach Lake Sawyer or the impact that will have on phosphorous concentrations in the lake.

¹⁵ This statement is in the title of a section of the Examiner’s decision. The Examiner specifically stated that section headings serve as findings of fact. AR 0024595.

his “overall” calculus of the documents’ adequacy. We have addressed that flawed rationale above. In the next section, we address other rationalizations offered by the Examiner unique to the Lake Sawyer issue.

3. The Examiner’s excuses for the deficient Lake Sawyer analysis are inadequate

a. The Examiner’s reference to “inquiry notice” is off base

The Examiner opines that even though the EIS does not provide adequate information about Lake Sawyer water quality issues, the discussion nonetheless survives legal scrutiny because the EIS puts the reader “on inquiry notice.” AR 0024601. Inquiry notice is defined as “notice attributed to a person when the information would lead an ordinary prudent person to investigate the matter further.” Black’s Law Dictionary (9th ed. 2009). It is a concept used primarily in property and contract law. It has never been used to justify an inadequate disclosure in an EIS.

Inquiry notice, by its nature, requires that only enough information be given that individuals will investigate on their own. This is simply not the way SEPA works. As discussed above, an EIS must “provide a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action.” *Weyerhaeuser v. Pierce Cy., supra*, 124 Wn.2d at 37. It is also required to contain a discussion of alternatives

because it “provides a basis for a reasoned decision among alternatives having different environmental impacts.” *Brinnon Group v. Jefferson Cy.*, 159 Wn. App. 446, 481, 245 P.3d 789 (2011). This information must be included in the EIS, WAC 197-11-440, not just a hint of it with the burden placed on the decision-makers and public to find it elsewhere.

The Examiner’s reliance on “inquiry notice” shows a gross misunderstanding of how the SEPA process is intended to work (or a revealing insight into how much the Examiner would contort the law to uphold the EIS). The preparers of an EIS are required by law to provide *all* the necessary information to the decision makers and the public so they may make an informed decision. The Examiner’s reliance on the out-of-place concept of inquiry notice is legal error. The EIS should be set aside.

b. The Examiner erred in rationalizing that information on the proposal’s contribution to the lake’s phosphorous load “would not have provided anything of significant use to the decision maker”

In another statement nothing short of amazing, the Examiner penned that the “serious shortcomings in the identification of potential impacts” to Lake Sawyer, AR 24583, were excused because the omitted information “would not have provided anything of significant use to the decision maker.” AR 24606. According to this implausible rationale and using the assumptions in

the 2000 Plan, the project would cause exceedances of the TMDL standard, regardless which size project was selected or which mitigation was imposed. *Id.* Thus, theorized the Examiner, there was no point in estimating how much phosphorous would end up in the lake because of Yarrow Bay's project — it would violate the TMDL standards in any event. *Id.*

First, even if all alternatives will cause exceedances of the TMDL, the *magnitude* of the exceedances is important information. An alternative that causes only a slight exceedance would, presumably, be preferable to one that causes a large exceedance. To make a reasoned choice between alternatives, it was critical that the Council know not only whether each option would exceed the TMDL, but by how much.

Second, if the project is going to cause violations of the TMDL standard, the EIS should certainly disclose that. The failure to disclose that is not excused by rationalizing that “all the options will violate the standard, therefore, there is no need to mention it.”

Third, if it is true that the proposals will inevitably cause violations of the TMDL, then the City should not be approving the proposal. Doing so would violate both the requirements of the Clean Water Act (*see* 33 U.S.C. § 1313(d)(1)(C) (requiring agencies to set a total maximum daily load)) and the

City' s own Comprehensive Plan (*see* Comp Plan at 8-48).

4. Both King County and a peer reviewer had concerns with the EIS “analysis,” but those concerns were ignored by the City

When Kindig’s limited analysis first appeared in the Draft EIS, King County filed a comment letter indicating concerns with the lack of analysis in the EIS regarding this key issue. King County commented: “Stormwater impacts to these water bodies [including Lake Sawyer] and mitigation measures are discussed in only a very general way in the stormwater section of this chapter. Stormwater impacts to each of these unique water bodies should be addressed in more detail.” AR 17807 (Comm.A-004-047).

The Final EIS responded simply: “Thank you for submitting this information. As appropriate, clarifications and/or corrections have been made to the EIS document.” *Id.* A comparison of the Draft and Final EIS reveals that no “clarifications and/or corrections” were made in terms of providing “more detail” regarding the impacts to Lake Sawyer. In pertinent part, there is no difference at all between the two documents. Mr. Foley (the county’s stormwater engineer) testified that he considered that “response” to be unresponsive AR 702-04. He also corroborated TRD’s argument herein, testifying that the EIS stormwater analysis was too general – far more general than the analysis done for other large projects he has worked on. AR 703-05.

Earlier, when Mr. Kindig's technical report was prepared for use in drafting the EIS, the City had the report peer-reviewed by Parametrix. Parametrix raised some of the same concerns summarized above. With regard to Kindig's claim that compliance with the 2000 Plan assured a lack of impact to the lake, Parametrix's peer review report stated:

“Given that total loads are likely to increase significantly under the proposed developments, and that the proposed BMPs are predicted to remove only 50 percent of the total phosphorous, **it seems likely that the development would increase the phosphorous load to the watershed.** Therefore, the document should discuss how the project will provide additional mitigation for the increase to phosphorous load needed to meet the total phosphorous load for Lake Sawyer.” AR 0017149 (emphasis supplied).

Similarly, Parametrix stated “it is not clear” from either the 2000 Plan or Ecology's 2005 Stormwater Manual that the proposed projects can be developed “without impacting the trophic state of the lake.” AR 0017147.

Regarding the inappropriateness of Kindig relying on the outdated 2000 Plan, Parametrix stated: “The City should review the King County Lake Sawyer Management Plan and update it as needed based on recent literature and new land use plans.” *Id.*

Incredibly, even though the City recognized the need to have Kindig's report peer-reviewed and, presumably, paid good money to obtain it from Parametrix, the City simply sat on it. The City did not forward this peer

review critique to Mr. Kindig nor did the City convey the substance of the report to Mr. Kindig in some other form. AR 1624-25. It is undisputed that Mr. Kindig did not prepare a supplemental report or anything else in response to Parametrix's criticisms or the concerns raised by King County. Instead, the FEIS relies on the original Kindig report with no changes whatsoever.

E. The EIS Fails to Discuss Several Major Traffic Issues and Those That Are Discussed Suffer From Analytical Flaws

While an EIS need not disclose every conceivable impact, it must do more than analyze widespread, multi-faceted traffic impacts by reference to a single, obtuse measure. The totality of the disclosure of traffic impacts associated with the projects is a list of intersections that will fail the level-of-service (LOS)¹⁶ test for the afternoon peak hour. *See* AR 0020654-56 (EIS at 3-18 and accompanying figures). A "thorough analysis" of the traffic impacts of a project of unprecedented size in a remote part of King County ill-served by an existing transportation infrastructure cannot possibly be accomplished in one page of text and two figures. Many critical facets to the project's transportation impacts were simply ignored.

¹⁶ Level of service (LOS) is a measure used by traffic engineers to quantify traffic flow levels and/or road capacity levels.

The omission of these issues strikes at the heart of SEPA's requirement that EISs shall "allow the reader to understand the most significant and vital information concerning the proposed action, alternatives, and impacts, . . ." WAC 197-11-425(1). The omitted items are among the "most significant and vital information" that should have been disclosed regarding this project. Disclosure of these items was vital if decisions about the City's and region's future were to be made "by deliberation, not default." *Stempel, supra*.

1. Safety

There is no dispute that the project will cause safety impacts. Yarrow Bay's transportation witness, Mr. Perlic, admitted as much. AR 1271-72. He also admitted that those impacts were not disclosed. AR 1275-76. Mr. Perlic claimed that the undisclosed impacts could or would be adequately mitigated, but he admitted that the EIS does not disclose the phantom mitigation either. *Id.* This is wholly unacceptable. If there are impacts (as Perlic admits), they should be disclosed. If the impacts can be mitigated, those mitigation measures should be disclosed, too. If there are any safety impacts that cannot be mitigated, those must be disclosed, too. WAC 197-11-440(6)(c)(v).

The Examiner found that the EIS failed to address safety issues:

The FEIS did not identify safety concerns as a probable significant adverse impact. Mr. Nolan testified King County was concerned about

safety on the rural roads including Southeast Green Valley Road. Tr. 389. Mr. Nolan identified concerns including safety issues and issues related to the physical geometry of the roads, problems with site distances, and curves in the roads. Tr. 427. Mr. Nolan further testified that he was not aware of any piece of the Draft Environmental Impact Statement or the Final Environmental Impact Statement that specifically addresses potential safety issues related to the increased volumes on the rural unincorporated King County roads. Tr. 428.

AR 0024616 (FF 14) (emphasis supplied).

The FEIS did not include a detailed analysis of potential queue lengths resulting from increased traffic. Mr. Tilghman [a transportation planner] testified that long queues at intersections posed a safety hazard from motorists coming upon an unexpected back up due to queues and that queues from adjacent intersections overlapping might cause gridlock. Tr. page 594-600.

AR 0024615 (FF 9).¹⁷

While the Examiner acknowledged that the EIS failed to disclose the safety issues, he excused the omission with this short statement:

While the FEIS did not identify safety concerns as a probable significant adverse impact, the Appellants did not present evidence that these issues could be adequately addressed at this higher level review. It is reasonable to conclude that decision-makers would recognize that vehicle accidents will increase proportionately with increased traffic volumes.

AR 24620 (CL 2). Neither of these excuses is sufficient to excuse the gross

¹⁷ Not only does the EIS fail to disclose the impact of additional highway traffic on bicyclist and pedestrian safety, it falsely asserting that the project will “not affect” pedestrians or cyclists off-site. AR 20660. This is worse than omitting an issue. It is a blatantly incorrect disclosure.

Mr. Tilghman’s testimony cited by the Examiner was echoed by both independent traffic experts who testified, WSDOT’s Pazooki (AR1151:25-1153:6) and Maple Valley’s Janarthanan (AR1087:23-1088:13).

inadequacy of the EIS. The reference to “this higher level of review” is a reference to the Examiner’s mistaken belief that this was a “programmatic” EIS and not a specific project EIS. As demonstrated above, that determination was in error. Moreover, even if this were a “programmatic” EIS, that does not justify ignoring issues or providing incorrect information (*e.g.*, project will “not affect” pedestrians or cyclists). This EIS informed a decision that locked in the housing numbers, commercial square footage, and other details that were intended to vest rights for Yarrow Bay once that approval was issued. A generalized treatment may be sufficient, but not no analysis at all.

The second excuse offered by the Examiner is reminiscent of his “inquiry notice” rationale. Rather than requiring adequate disclosures in the EIS, he assumed that decision-makers and the public were aware of the impacts in general terms (*i.e.*, more traffic means more safety issues). But for the EIS to be adequate, it would need to do more than state that basic relationship. How many road miles with increased traffic have paved shoulders, gravel shoulders or no shoulders? Where are the problems with the sight distances and curves mentioned by King County (AR 0024617) and what can be done about those? Which roads have (or can be expected to have) large numbers of pedestrians and/or bicyclists? Are there opportunities for new sidewalks

and/or bike lanes? To what extent would these problems be reduced if one of the alternatives were selected? Questions like these need to be answered before an informed decision can be made on the size of the project, not during a later phase of review after key decisions are etched in stone.

Yet again, the Examiner found deficiencies in the EIS and then stretched to find some reason, even legally insufficient reasons, to paper over the inadequacies. The Court should restore the Examiner's finding that the EIS failed to adequately address safety issues and rule that the Examiner's conclusion of law excusing that omission is legally insufficient.

2. Travel time

Mr. Perlic admitted that, in contrast to the cryptic LOS predictions, disclosing the development's impact on travel time would be "more meaningful" to the City Council, not to mention the public. AR 1841. Would the developments turn a 20 minute commute into a commute that lasts 22 minutes? Or 30 minutes? Or 40 minutes? Will the eight minute trip to the grade school become a 20 minute ordeal? That is the kind of information that Council members and the public can understand and base decisions on. It is also information that could have been readily included. Hiding impacts by reference to arcane LOS terminology, when a simple statement of additional

travel time could readily have been disclosed, demonstrates again the failure of this EIS to make **meaningful** disclosures.

The Examiner excused this omission on grounds that the city has a traffic management system that is based on LOS and that the City Council members were presumably familiar with that metric. AR 0024621 (CL 3). This reasoning suffers two flaws. First, an EIS is to be useful to the public, not just the decisionmakers. WAC 197-11-440(2) (EIS “shall inform decision makers and the public”). The Examiner made no finding that members of the public are familiar with the LOS terminology.

Second, the Examiner confused the information necessary to implement the city’s traffic congestion ordinance (the LOS forecasts) with the information required by SEPA. Providing one statistic (LOS) used in a regulatory program, and an obtuse one at that, does not meet SEPA’s requirement for a reasonably thorough disclosure. The Examiner ignored SEPA’s “reasonably thorough” command when he concluded that the LOS forecasts were all that was required to inform the public and the Council of the development’s traffic impacts. AR 0024621 (CL3).

3. **Construction traffic impacts**

The EIS contains no discussion of the traffic impacts associated with this

massive construction project. For fifteen years (or longer), area residents are going to endure roads crowded with construction vehicles and lane closures. *See, e.g.*, AR 21609 (dump trucks for The Villages alone equivalent to eight trucks per hour, five days a week for over seven years).

This omission was called to the City's attention by King County: "The short term impacts of both construction hauling and possible partial road closures need to be analyzed in the EIS." AR 17785 (Comm. A-004-010). The FEIS responded, enigmatically, that "This request for additional information goes beyond the scope of the EIS . . ." Why is that? SEPA does not distinguish between short and long term impacts. If they are significant, they must be addressed. And here the so-called "short term" impacts would persist for fifteen years — hardly "short-term" by most people's standards.

A reasonably thorough EIS would include a disclosure of these atypical, highly intrusive, long-term construction traffic impacts and assess whether mitigation is possible. If not, the project may need to be scaled down. The failure of the EIS to disclose these impacts and assess mitigation options renders the EIS inadequate.

The Examiner recognized that the developments would create construction traffic impacts and that these impacts were not disclosed.

The FEIS contains no discussion of the traffic impacts posed by construction of the proposed projects. It is clear that the many years of construction arising out of the extensive development proposed by applicant will result in ongoing construction traffic impacts.

AR 0024620 (FF 19). But after repeating that finding in a conclusion of law, he decided that *mitigation* for these undisclosed impacts could be better assessed later — after the City had committed to a project of this magnitude. AR 0024624 (CL 14) (“mitigation of such impacts is more appropriately handled at each phase of the project”).

The Examiner’s rationale that the construction traffic problems could be addressed later, after the die was cast, runs directly counter to SEPA’s most basic premise: that government decisions should be informed by the environmental facts; that we should make our decisions “by deliberation, not default.” *Stempel, supra*. As stated in the SEPA rules, “[a]ppropriate consideration of environmental information shall be completed before an agency commits to a particular course of action”. WAC 197-11-055(2)(c).

Even if development of some of the mitigation measures could await review of construction permits, the Council had a more fundamental issue before it at this juncture: **“Will the impacts associated with these projects—even with mitigation--be too large to justify projects of this size?”** An EIS must “[s]ummarize significant adverse impacts that cannot or

will not be mitigated.” *See* WAC 197-11-440(6)(c)(v). The Examiner’s assertion that all of this could be addressed later — after the City was irrevocably committed to projects of this size — directly violates SEPA’s commands to study and disclose impacts early in the process so that information can be considered *before* irrevocable decisions are made.

4. No detailed analysis of Alternatives 3 and 4

If properly informed about the project’s traffic impacts, the City Council may well have determined that the proposed development was too large, especially with so much uncertainty surrounding the expense, effectiveness and availability of mitigation measures. To inform the Council about options, the EIS included two scaled down alternatives. But in the traffic section, the EIS failed to assess the traffic impacts associated with these alternatives so that the Council (and the public) could assess to what degree scaling back on the projects would avoid traffic impacts. That comparative analysis, which forms the “heart” of the EIS, *see supra* at VI.A.5, was missing.

Not only did the EIS fail to address issues like safety and impacts to Green Valley Road for the alternatives, it did not even meaningfully address the one parameter analyzed for the preferred alternative, failing to disclose the number of intersections failing LOS standards.

The Examiner forthrightly found that the EIS gave “short shrift” to the alternatives in the traffic assessment. AR 24622 (CL 9). But as was with every other deficiency, he had an excuse. Considering that the analysis of alternatives is the “heart” of the EIS, one might have expected the Examiner’s excuses in this vein to be particularly thoughtful. Instead, he dismissed this omission with conclusory platitudes. *Id.* For instance, while the Examiner states that the EIS gave “short shrift” to the transportation impacts of the alternatives, he states the EIS provided adequate information for a “reasoned” decision. How could that possibly be? The Examiner never explains. Without a comparison of the traffic impacts of the proposal measured against the scaled-down alternatives, a reasoned decision was impossible. The Council and public were left to guess the extent the smaller alternatives’ impacts, in violation of SEPA’s foremost requirements.

5. Traffic mitigation measures

The EIS focuses on the project’s traffic impacts at various intersections assuming that a long list of intersection and roadway projects will be funded, permitted and constructed. If those projects are not built, the traffic impacts would be far worse. AR 0021381.

SEPA does not allow impacts to be understated based on speculative

mitigation measures. To be included in the EIS analysis, mitigation must be both “reasonable and capable of being accomplished.” WAC 197-11-660(c). Skewing the disclosure of impacts by resort to speculative mitigation projects violates SEPA’s rules and results in misleading disclosures that lead to irrational, not “reasoned,” decisions.

The EIS contains absolutely no analysis of the feasibility of implementing any of the mitigation measures. Given that the EIS forecasts that 22 intersections will fail LOS requirements without mitigation, the feasibility of constructing the mitigation measures is central to a “thorough analysis” of transportation impacts. Despite the critical importance of the proposed mitigation, the authors of the EIS chose not to disclose any of the issues concerning the feasibility of actually building these mitigation measures. Mr. Perlic candidly acknowledged that there has been no assessment of this issue. *See* AR 1305-07 (no analysis of funding or permitting issues).

Tellingly, Mr. Perlic testified that he omitted from his transportation model all future transportation improvement projects subsequent to the next six years, even those in approved Comprehensive Plans and Transportation Plans, because they lacked funding and, therefore, were “speculative.” AR 0001974. Yet the EIS lists and relies on dozens of mitigation measures

without the slightest disclosure that there is no funding for these measures and they are, consequently, “speculative,” too. As, Mr. Pazooki (WSDOT) testified, there is absolutely no money available for any of the 4-lane improvements proposed on SR 169. AR 0001174-75.

The Examiner also relied on GMA concurrency to justify the EIS’s failure to make even a rudimentary assessment of the feasibility of these critical transportation mitigation measures. AR 0024623 (CL 10). But the Examiner’s reliance on “GMA concurrency” is misplaced. The GMA requires cities to adopt concurrency regulations which, in brief, set traffic congestion standards at key intersections and preclude the city from approving projects which would violate those standards. RCW 36.70A.070(6)(b). But cities are free to set those standards at any level they want, even gridlock. *Id. See also City of Bellevue v. East Bellevue Comm. Mun. Corp.*, 119 Wn. App. 405, 415, 81 P.3d 148 (2003). The City’s Comprehensive Plan explicitly contemplates reducing LOS standards if mitigation is too expensive. Comp. Plan at 7-4 (“lower the LOS standards to LOS D, E, or F for the system or portions of the system that cannot be improved without significant expenditure”). Thus, if the mitigation unthinkingly assumed to be feasible turns out to be unaffordable or otherwise unattainable, the City can simply

relax the concurrency standards, resulting in far worse impacts than disclosed in the EIS. *Id.* The Examiner was mistaken in believing that the GMA concurrency standards would preclude construction of the project if the speculative mitigation fails to materialize.

6. Omissions regarding the true extent of LOS failures

While providing the public and City Council members with information only about travel delays at certain intersections is not sufficient for a project with traffic impacts of this magnitude, the EIS did not even provide that so-called LOS information completely. First, the analysis was limited to only a single “peak” hour. AR 0020652. The decisions makers and the public needed to understand whether those failing conditions would persist for more than a single hour. It matters whether an intersection is failing from 3:00 p.m. to 7:00 p.m. or for just a single hour.

Second, the EIS fails to disclose LOS failures in the morning commute, which is uniquely related to school and construction traffic. If commuters are going to be held up in traffic in the morning, they want to know that, too, not just that their evening commutes will be slowed. AR 00015136.

The Examiner said these two issues could be ignored because the EIS did not need to be a “compendium” of every conceivable impact. AR 0024621

(CL 4). But disclosing whether intersections will be jammed for one hour or four (and during both rush hours or only in the afternoon) is hardly pushing the limits of an adequate (“reasonably thorough”) disclosure. This is basic information important to making a reasoned decision. Time and again, the Examiner was content with the skimpiest of disclosures, instead of “reasonably thorough” ones.

Third, the EIS revealed LOS failures only if the entire intersection failed. That involves averaging the various movements within an intersection and disclosing a problem at the intersection only if all of the movements are so bad that “on average” the intersection fails. This masks the failures at intersections where only some of the movements are particularly bad. A three minute wait to make a left turn is not any less a significant impact simply because other movements at the intersection are unimpaired.

The Examiner excused this last omission by referring to the City’s regulatory program which uses the intersection average statistic. AR 0024621 (CL 5). But as discussed above, while the city’s regulations may (rightly or wrongly) utilize only intersection averages, an environmental impact statement must disclose all significant impacts. As Mr. Perlic acknowledged, the failure of one or more turning movements at an intersection is a

significant impact, even if the average is not sufficient to trigger regulatory requirements. AR 0001234. Further, the failure to disclose the impact also results in a failure to identify mitigation for the impact. Those failures can create long queues (slowing travel time; blocking access to businesses; and creating safety hazards) as well as create the need for more mitigation. None of this was disclosed in the EIS.

F. The EIS Did Not Adequately Address Construction Noise Impacts

The Examiner stated that “[p]erhaps the second greatest shortcoming of the [Villages EIS] is its analysis of noise.” AR 0024583. The FEIS treated noise as if the developments were run-of-the-mill subdivisions that would cover a small acreage and be fully developed in a short time. In fact, Yarrow Bay plans for construction of The Villages alone to last for fifteen years (if things go as planned). AR 0024300. During that time, the community would have to endure the incessant noise involved with clearcutting the existing forest, re-grading the land, digging trenches for utilities, paving roads, endless construction truck traffic, and countless other noise sources. According to the Examiner, the EIS failed to address the totality of the noise impacts:

[The Villages FEIS] doesn’t take into account the exceptional scale and duration of the MPD projects. In this context, construction noise is not ‘temporary’ as contemplated in typical noise regulations, such as those

adopted by [the Department of Ecology]. [The Villages] FEIS should have included an assessment of noise duration and mitigation that was reasonably designed to protect residents during this time period. AR 0024583.

But despite identifying this critical omission of vital information, the Examiner offered two excuses and did not require further analysis. Neither of these excuses holds up to scrutiny.

The Examiner's first excuse was that only a small number of homeowners would be impacted by the clearly excessive noise, noise that would be "shockingly loud", equivalent to a fire alarm sounding in your house." AR 0024609 (quoting and citing noise engineer, Jerry Lilly). But SEPA requires disclosure of all significant impacts. "Shockingly loud" noise is a significant impact, regardless of whether it impacts many or a few.

More importantly, the Examiner's statement that only a few would be impacted was inconsistent with his own analysis of the noise issue. There would be two primary noise sources: noise created by the clearing and grading of the forested property and noise generated by the endless stream of construction trucks traveling on Black Diamond's roads. The former noise impacts were focused on specific households. But the noise from the truck traffic would be nearly as bad and would impact everyone working or living along the haul routes. The Examiner determined that the noise from the

construction trucks would be in the same “shockingly loud” range as the clearing and grading noise for those within 50 feet of the road and would be nearly as bad for those 100 feet away. AR 0024609. And the Examiner determined that the truck noise would be incessant for the better part of a decade. *Id.* (400 trucks a week for over 7 years); AR 0024611 (150,000 truck trips over 15 years). The Examiner concluded that the truck noise was so serious, it presented a possible human health impact:

As noted previously, dump trucks exceed 90 dBA [“shockingly loud”] for receivers within 50 feet. . . . As amply demonstrated in the testimony and FEIS, long term exposure to high noise levels can lead to health problems. The duration of construction noise impacts is a significant impact that has not been adequately addressed in the EIS. AR 0024611.

Because the truck traffic noise is as serious as the clearing and grading noise, because the EIS failed to address this significant noise source, and because it impacts everyone along the haul routes, the Examiner erred in excusing the inadequate analysis on grounds that it impacts only a few.

The Examiner’s second excuse was that the noise issue could be addressed later (AR 24583) -- after the City had irrevocably committed to a project of this size and character (clearcutting the forest and leveling the development site, instead of working within the environment). As discussed above, significant impacts on the environment must be disclosed in time to be

used when key decisions are made. *See supra*, § VI.A.1 and § VI.A.3. SEPA, like NEPA, “requires that the agency provide the data on which it bases its environmental analysis. Such analysis must occur before the proposed action is approved, not afterward.” *N. Plains Res. Council, Inc., v. Solid Transport*, 668 F.3d 1067, 1083 (9th Cir. 2011).

A corollary to that rule is that a failure to include required information in an environmental document cannot be “cured” by providing the information later, after the decision has been made. *Protect Key West, Inc. v. Cheney*, 795 F. Supp. 1552 (S.D. Fla. 1992). Thus, as with other issues where the Examiner erred by proposing that the EIS’s deficiencies be cured with subsequent studies, the failure of the EIS to provide a reasonably thorough assessment of noise impacts rendered the EIS inadequate. The Examiner should have said so, instead of letting the defective EIS be used by the City Council when it deliberated on and made its fateful decisions.

VII. THE MPDs ARE INCONSISTENT WITH THE CITY’S COMPREHENSIVE PLAN POLICIES AND CODE REQUIRMENTS RELATED TO PROTECTION OF BLACK DIAMOND’S SMALL TOWN CHARACTER AND PRESERVATION OF THE TOWN’S NATURAL SETTING

A. The City Code Requires MPDs to be Consistent with the City’s Comprehensive Plan Policies

The Black Diamond Municipal Code prohibits approval of an MPD

unless it “complies with all applicable adopted policies” of the Comprehensive Plan. BDMC § 18.98.080.A.1.¹⁸ This follows from the purpose of the MPD chapter of the Code which is to “implement the city’s . . . Comprehensive Plan”, BDMC § 18.98.010.M, and the review process which requires the application to include a “narrative description and illustrations of the MPD planning/design concept, demonstrating how the proposed MPD is consistent with the adopted MPD design standards [and] the Comprehensive Plan, . . .” BDMC § 18.98.040.A.7. Comprehensive plans have regulatory effect when, as here, the land use code requires consistency with the comprehensive plan, even if the plan’s policies are more general than the corresponding development regulations. *See, e.g., Cingular Wireless, LLC v. Thurston County, supra*, 131 Wn. App. at 775. *See also Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007).

The Black Diamond Code also requires consistency with the planning and design principles identified in the book *Rural by Design*. BDMC 18.98.010.L & BDMC 18.98.080.A.10. One of the key planning principles for *Rural by Design* development is: “*Fit within the environment rather than on top of it.*”

¹⁸ A comprehensive plan is a “generalized coordinated land use policy statement of the governing body of a county or city.” RCW 36.70A.030(4). Excerpts from the City’s Plan are collected in Appendix K hereto. The entire plan can be found at http://www.ci.blackdiamond.wa.us/Depts/CommDev/planning/FinalPlan_092209.pdf.

New development can be designed to nestle into rather than to intrude upon its natural setting. . . .” AR 0014081 (*Rural by Design* at 62 (italics in original, underlining supplied)).

This principle is repeated as one of the “fundamental principles to retain small town character” in the City’s Comprehensive Plan (at 5-8). The Plan states that new development is to “retain the natural setting.”¹⁹

B. The MPDs Violate Comprehensive Plan Policies That Seek to Retain Black Diamond’s Small Town Character and the Preservation of its Natural Setting

Yarrow Bay’s applications are wholly contrary to the “retain the natural setting” principle in *Rural by Design* and related policies in the Comprehensive Plan. As the Examiner found: “Given the proposed densities, it is anticipated that the development areas shown on the Figure 3-1 Land Use Plan [approximately 750 acres] will be cleared of all vegetation and graded to facilitate development.” AR 24919. Yarrow Bay plans to excavate six **million** cubic yards of soil and fill with more than two million cubic yards of soil. AR 0024135, 0023756.

¹⁹ Two drawings from *Rural by Design* (Appendices I and J hereto) provide a clear demonstration of the design flaws of this project. Figure 7-2 from *Rural by Design* (AR 14092) provides an “aerial view after conventional development.” Note the amount of areas that have been cleared and the predominant urban form within those areas. Even though developed areas are surrounded by significant open space and woods, the *character* of the developed area is clearly urban, not rural. In contrast, in Figure 7-3 (AR 14092), “aerial view after creative development,” the development is tucked into the landscape, instead of being

The result will be massive acreages of flat, barren land upon which new development will occur. This will result in a classic, mega-suburban subdivision development pattern. The look and feel will be very much like other subdivisions built throughout the area (only much larger). Yes, there will be woods preserved around and between some of the subdivisions. But thousands of homes covering hundreds of acres will be built on land that has been cleared and graded.²⁰

Likewise, the proposed big box retail development (euphemistically termed “destination commercial” by Yarrow Bay) will be blatantly inconsistent with the historic small town character of Black Diamond and the principles of *Rural by Design*.

The core principles from *Rural by Design* are reflected in many of the policies of the Comprehensive Plan. Yarrow Bay’s projects are inconsistent with these policies, too. Consider the following Comprehensive Plan excerpts (emphasis supplied):

- Principles of small town character: maintain the natural setting

plopped upon it.

²⁰ Staff opined that this clearcutting and leveling is necessary for urban development to occur. See AR 0024918 (Examiner’s TV Recommendation at 147). Nothing could be further from the truth. One need only envision the hills of Seattle and San Francisco to know that urban development does not require leveling the natural landforms. And *Rural by Design* makes evident that clearcutting is not required either – and was not the City’s design choice when it adopted its Comprehensive Plan.

(Comprehensive Plan at 5-8).

- In the Black Diamond area, the natural setting is not just an accent, but is intended to be *integrated* with the built environment (*id.*).

Yarrow Bay does not propose to “maintain” the natural setting, but to eliminate it. The natural setting will be preserved on the surrounding lands, but will not be “integrated” with the built environment.

- Continue compact form and incremental development (Comprehensive Plan at 5-10).

The proposal is not a continuation of Black Diamond’s “incremental development.” It took Black Diamond nearly 100 years to grow to its current size. Yarrow Bay proposes to quintuple that in just fifteen years.

- To ensure that new large-scale development in the City feels connected to the older sections of town, this plan encourages the use of techniques *that continue the character of compact form and incremental growth. Design guidelines will provide methods and examples of how to achieve design continuity and to reinforce the identity of the City as a rural community* (Comprehensive Plan at 5-10).

Yarrow Bay’s projects certainly will not “reinforce the identity of the City as a rural community.” Rather, the project will remake Black Diamond as yet one more suburban city (the size of Anacortes) with big box retail and massive subdivisions.

- The City will develop as a balanced community similar to traditional small towns. Principles and guidelines for community design and character will guide development to ensure it remains a traditional village community (Comprehensive Plan at 5-33).

Yarrow Bay does not seek to develop as a “traditional small town.” It seeks to create a massive urban development.

- The small-town atmosphere will be maintained *by controlling the scale and character of new development*, creating pedestrian linkages between the different neighborhoods, building on the City’s rich history and encouraging participation in City government and special community events (Comprehensive Plan at 5-33).

Yarrow Bay’s application does not “control the scale and character” of its new development in any meaningful way. The scale is massive, quintupling the town’s population in just fifteen years with a project that is wholly out of character with the existing small town ambience.

- Discourage widening of SR 169 to a four or five lane facility thus creating a “thoroughfare” that will tend to divide the City. (Comprehensive Plan at 7-49).

Increased traffic is likely to necessitate a widening of SR 169. Rather than “discouraging” widening, the Council’s actions serve as a catalyst for it.

- Design guidelines may include concepts such as: . . . limiting proposed clearing and grading (Comprehensive Plan at 5-38).
- Retain a sense of place by protecting the community’s important natural features (Comprehensive Plan at 5-49).

While the Comprehensive Plan contemplates limiting clearing and grading, Yarrow Bay proposes to totally clear and grade the lands it wants to develop. This hardly protects the site’s “natural features.”

- [C]haracter designations describe the look and feel of different parts of

the City. In general, **character may be more important than the specific uses, activities, and building types.** . . . Traditional “zoning” concerns, including density and setbacks, must be balanced with the intent of the character designations to encourage development that achieves both the described function and character of the respective area (Comprehensive Plan at 5-50 (emphasis supplied)).

This passage emphasizes the importance of “character” and not just in terms of providing a mathematical review of densities and setbacks. The density of a project may be appropriate, but it is the character of these projects that is wholly out of keeping with Black Diamond’s existing character and the requirements of the Comprehensive Plan that that character be preserved and replicated as development takes place in the rest of the City.

- [D]evelopment . . . in areas subject to significant environmental constraints and open space protection will reflect the informal rural development typical of many portions of the City. Subdivisions and short plats should provide interconnected streets. Development is encouraged to promote a variety of individual dwelling designs and is discouraged from using walled planned residential techniques common in other portions of King County. (Comprehensive Plan at 5-50.)
- The primary design element [for Village Residential] will be consistency with existing historical development.
- Encourage land uses and development that retain and enhance significant historical resources and sustain historical community character.
- Enhance the “small town” character that the City currently possesses (Comprehensive Plan at 7-49).

The projects are inconsistent with each of these four provisions. The projects do not “reflect” or “sustain” the town’s historic, informal rural development, nor are they “consistent with” that historic development. They

do not “enhance” the town’s small town character, but rather overwhelm it.

- [D]iscourage **significant vegetation clearing** (Comprehensive Plan at 8-44).
- Development regulations should encourage the reduction of impervious surface **and retention of natural vegetation**. *Id.*
- Care should be taken to reflect the town’s “varied topography . . . and small town scale.” (MPDFSG (B) (p.4.) [AR 0016101])

The projects do not retain **any** natural vegetation or protect the “varied topography” on site. Instead, the plans call for the complete clearing and leveling of the development site.

As the foregoing lengthy list of Comprehensive Plan policies demonstrates, the reference to the *Rural by Design* principles in the City’s Code was no accident. That reference is a specific embodiment of Comprehensive Plan policies that speak repeatedly to the City’s intent that new development be undertaken as an extension of the town’s historic rural character, not as the introduction of nondescript, big-box commercial and treeless, pancake-flat housing tracts that you can find in Anytown, U.S.A.

The Comprehensive Plan represented a compromise between those who wanted to avoid development of Yarrow Bay’s forested lands and those who sought to annex those lands to the city and develop them at urban densities. The grand compromise was that annexation and urban development would be allowed, but that the form would be consistent with Black Diamond’s

historic, small town character and that the development would “fit within the environment rather than on top of it.” AR 0014081 (*Rural by Design* at 62). Now Yarrow Bay seeks to have its cake and eat it, too — to throw away the community’s half of the bargain. Yarrow Bay wants to develop its land inside the City, but with no regard to the policies and codes that require growth consistent with the town’s historic character and natural setting. Yarrow Bay’s application should have been rejected because of its inconsistency with these foundational elements of the City’s Comprehensive Plan and Code which require new development to “nestle into” and “retain the natural setting,” not to be dropped “on top of it” and destroying it. This blatant inconsistency required rejection of Yarrow Bay’s proposals in their current form.

C. **The City Council’s Findings and Conclusions are Deficient: The City Council All But Ignored the Fundamental Issue of the Projects’ Inconsistency with the Comprehensive Plan’s Policies for Growth Consistent with Black Diamond’s Small Town Character**

Findings of facts and conclusions of law must be sufficiently detailed that the reviewing court can understand the thought process of the underlying decision maker. *Weyerhaeuser v. Pierce County, supra*, 124 Wn.2d at 36.

The Council’s findings mention the Comprehensive Plan’s small town

character policies, but only fleetingly when the Council acknowledges that the City's Comprehensive Plan includes policies calling for protection of "community character,' 'existing character of the historic villages,' 'natural setting,' 'rural community,' 'traditional village community,' 'small town character' and 'existing historical development,'" AR 0027258 (MPD Ord., Ex. B, CL 17) and that all the "policies referenced above reflect a strong preference to retain small town character." *Id.* But then, instead of addressing whether Yarrow Bay's proposal is consistent with these policies, the finding sidetracks into a discussion of densities. ²¹

The foregoing is the entirety of the Council's findings about the projects' consistency with these critical Comprehensive Plan policies. The findings are woefully inadequate. They never meaningfully address the substance of these issues. The Council's decision should be remanded so that consistency with these foundational policies can be assessed and a decision is rendered with findings sufficient for judicial review. *Weyerhaeuser v. Pierce Cy., supra.*

VIII. YARROW BAY HAS NOT ESTABLISHED THAT THE PROJECTS WILL PROTECT LAKE SAWYER

²¹ According to Conclusion of Law A.v., AR 27258-59, consistency with these policies should not be required because they are "vague," "highly subjective," and "difficult to assess." *Id.* The City cannot so easily read out of existence these critical, foundational policies of its own Comprehensive Plan. See *Cingular Wireless, supra*, 131 Wn. App. at 779 ("our state law does not require specific standards, but only general standards such as those contained in a Comprehensive Plan").

The City's Comprehensive Plan includes a policy calling for a reduction in phosphorous loading in Lake Sawyer. Comprehensive Plan at 4-26. Policy NE-6. The burden of proof was on Yarrow Bay to demonstrate that development of these projects will not cause an increase in phosphorous pollutants reaching Lake Sawyer (the so-called "phosphorous load"). Yarrow Bay failed to meet its burden.

The Examiner found that neither the EIS nor the testimony provided by Yarrow Bay's water quality witness at the hearings established that Lake Sawyer would be protected. But the Examiner nonetheless recommended approval, based on a "leap before you look" condition (more study *later* after rights are vested) and the Council obliged. Given the importance and vulnerability of Lake Sawyer and the size of the projects, the Council's duty to protect Lake Sawyer could not be satisfied by approving these projects now and commissioning studies to be done later.

A. **The Examiner Agreed That the Record Does Not Contain Critical Information About the Projects' Phosphorous Load to Lake Sawyer**

As discussed above in detail regarding the EIS, the Examiner agreed that nowhere in this voluminous record is there evidence of how much phosphorous these projects will add to Lake Sawyer. Yarrow Bay's

consultant asserted that this calculation did not need to be made because the project would be consistent with the Lake Sawyer Management Plan, but the Examiner (AR 0024582) rejected that argument:

However, the SEPA Appellants successfully established that the [Lake Sawyer Management Plan] makes no assurance that its mitigation measures will prevent the adverse impacts of phosphorous contamination, despite the clearly erroneous belief of the Applicant's consultant that it would. The SEPA Appellants also established that under the modeling used in the [Lake Sawyer Management Plan] to predict future phosphorous levels, there was a reasonable chance that the MPD proposals alone could "tip" Lake Sawyer into producing the blue-green algae blooms and all associated adverse impacts.

Thus, it was critical to calculate the actual phosphorous load, but there was no indication DOE did that for its 2009 Plan. The Examiner agreed with us on this point, too:

The DOE Implementation Plan **provides no analysis or modeling** to show how DOE determined that its recommended conditions for new development would preserve Lake Sawyer water quality. The modeling in the LSMP was left unchanged in the Implementation Plan. **There is certainly a gap of information** in the record that could be of use in assessing the phosphorous impacts of the project. *Id.* (emphasis supplied).

In sum, the Examiner determined that the record lacked "vital information" (AR 0024581) regarding the projects' impacts on Lake Sawyer, but concluded this omission was cured by reference to DOE's Implementation Plan. But then he concluded that the Implementation Plan, too, provided "no analysis or modeling" to support its conclusions and that

“certainly a gap of information in the record remained.”

In the SEPA disclosure context, the Examiner excused this critical shortcoming by averaging the good with the bad (his “overall” approach).” But regardless of SEPA’s disclosure requirements, the Council could not determine compliance with the substance of the City Code absent this “vital information.”

The City Council operated from the same factual record that the Examiner created. Thus, the Examiner’s conclusion that the record he created lacked vital information regarding phosphorous loads in Lake Sawyer establishes that the record before the City Council lacked this vital information, too. The Court should remand so that the vital information can be obtained before irrevocable decisions are made.

B. The Lack of Adequate Information is Not Excused by Creating an After-the-Fact Monitoring Plan

The Examiner proposed addressing the deficiency in phosphorous pollution information by adding a condition that requires a “phosphorous monitoring plan.” AR 0024975 (proposed Cond. No. 78). The City Council did so. AR 0027315 (Cond. No. 79). The problem with the monitoring plan, of course, is that the damage will be done by the time monitoring documents the problem. Once phosphorous is in the lake, it tends to stay there and re-

circulate causing algae blooms for a very long time. AR 0005396 (Lake Sawyer Mgmt. Plan at ES-2). Even if one could stop the additional input of phosphorous flowing off the developed site immediately, the lake would take years, perhaps a decade or longer, to clear itself. And, of course, the additional phosphorous flowing off the site will not miraculously be halted overnight. Phosphorous running off of developed lands is an ongoing problem in suburban neighborhoods. *Id.*

IX. YARROW BAY DID NOT MEET ITS BURDEN OF PROOF REGARDING TRANSPORTATION ISSUES

A. Yarrow Bay Failed to Provide Adequate Information Regarding Many Important Traffic Issues

The City Code prohibits approval of an MPD unless “significant adverse environmental impacts are appropriately mitigated.” BDMC 18.98.080A.2. As the Council deliberated on whether to approve these projects, it needed to address a range of significant traffic issues, such as: (1) As traffic volumes increase on area roads, will there be any safety concerns of note? (2) How much longer will it take someone to travel from one end of town to the other or from Black Diamond to Maple Valley or Kent? (3) How long will the rush “hour” conditions noted in the LOS analysis persist--just one hour of sluggishness or will it extend for two or three or four hours? (4) How will the

traffic be during the morning commute? (5) The Examiner finds that there will be over 100,000 truck trips associated with construction of the project alone. How will all that truck traffic impact area roads? (6) Are the new lanes, traffic signals and other mitigation measures at dozen of area intersections feasible (*e.g.*, is there enough room to add extra lanes) and is there money available to fund all these projects? (7) How much smaller does the project need to be to eliminate the significant impacts? (8) Will it be necessary to expand SR 169 to four or five lanes through Black Diamond to accommodate the traffic? If so, what will that do to the “small town character” that the Comprehensive Plan states we are supposed to maintain? If we do not shrink the projects and do not expand the highway to accommodate the traffic, how bad will the backups be?

Incredibly, in the thousands of pages of documents constituting the record, the Council was not provided answers to any of these important questions. As the Hearing Examiner found:

- **The FEIS did not include a detailed analysis of potential queue lengths [backups]** resulting from increased traffic. Mr. Tilghman testified that long queues at intersections posed a safety hazard from motorists coming upon an unexpected back up due to queues and that queues from adjacent intersections overlapping might cause gridlock. Tr. page 594-600. [AR 0000597-AR 0000603] Mr. Pazoooki [WSDOT] testified that WSDOT provided a standard request as part of the DEIS a queue analysis and an analysis of volume over capacity at individual

intersection legs as part of an EIS. Tr. page 1,444-1,445. [AR 0001151-AR 0001152]

- **The FEIS did not address** individual turning movement failures at the various “legs” of each intersection.
- **The FEIS did not identify safety concerns** as a probable significant adverse impact.
- **The mitigation measures proposed by the FEIS did not discuss whether funding exists to implement the measures, or whether such measures are feasible.**
- **The FEIS did not include an analysis or estimate of anticipated increases in travel times.**
- **The FEIS contains no discussion of the traffic impacts posed by construction** of the proposed projects. It is clear that the many years of construction arising out of the extensive development proposed by applicant will result in ongoing construction traffic impacts.
- **The FEIS did not go into great detail with regards to Alternatives 3 and 4;** it merely noted the percentage increase posed by each alternative.

AR 24615, 24617-19, and AR 24621 (emphasis supplied).

The Examiner ultimately concluded that these omissions in the transportation analysis did not render the EIS “legally inadequate.” But that does not mean that Yarrow Bay met its burden of proof or that the City Council had enough information to make a binding decision that will commit the City to the development of 6,000 new homes, more than a million square feet of commercial space and the attendant traffic that goes with that development. Without credible answers to the unanswered questions listed above, the Council should have found that Yarrow Bay had not met its burden of proof and denied the applications.

B. The Council’s “Mid-Point Review” Is Inadequate

Even with regard to the one traffic issue analyzed in the EIS (impacts to certain intersections during one hour of the afternoon), there was much testimony regarding the accuracy of that assessment, with experts from WSDOT, Maple Valley, King County, and the SEPA appellants’ consultant calling into question much of the applicant’s analysis. In the end, the Examiner decided that neither the applicant’s analysis nor that proposed by the City of Maple Valley were legitimate. But instead of requiring a new, accurate analysis before approval of the MPDs, he proposed that a new model be developed and a re-assessment made later, thus giving Yarrow Bay vested rights no matter what the subsequent studies revealed. BDMC 18.98.195.

The Council took that bad, “leap before you look” idea and made it worse. The Council agreed with the Examiner that the EIS traffic analysis was unreliable and that a new model should be developed, but the Council delayed the corrective action even further. AR 0027303 (Cond. 17: correct analysis not required until development partially completed).

This is both too little and too late. The City’s action is too little, because the subsequent LOS study does nothing to address any of the multiple ignored traffic issues identified above (*e.g.*, safety, travel time). It is too late because

the second greatest shortcoming of the EIS” (outstripped only by the lack of information regarding Lake Sawyer pollution issues). *Id.*

The Examiner noted that for a typical subdivision or mall, construction noise impacts are inherently limited because of the relatively short duration of construction. In this case, however, a 15-year construction period means that construction noise impacts must be taken into account.

How much noise is Yarrow Bay going to subject the community to and for how long? The Examiner noted that truck traffic needed to carry away dirt as Yarrow Bay levels the site could involve “153,000 two-way [truck] trips over the course [of] the 15-year development.” *Id.* The failure of Yarrow Bay to provide the City Council with information that details the impacts associated with the truck noise and measures to mitigate it require that the applications be denied.

The Examiner excused the lack of analysis of construction noise impacts by concluding that these impacts can be studied later. AR 0024583-84. The Council concurred. AR 0027476 (MPD Cond. of Approval 32 at 13). But a significant part of the noise impact is a function of magnitude of the development. There is not very much mitigation that can be provided to dampen the sound from dump trucks rumbling by area residents. If the trucks

slow down, the duration of the noise impact increases. If the trucks speed up, they are louder. If they are re-routed, they simply change the identity of the unlucky victims (not to mention impacting congestion on area roads).

Fundamental issues like these should be evaluated before the Council decides how large a project is to be constructed on this site in the next fifteen years. These are not issues that can be dealt with as each individual subdivision comes forward for plat approval. The cumulative effect of subjecting the community to an extended period of noise had to be evaluated before irrevocable decisions on the scale and timing of the development were made. Because that information was not provided, Yarrow Bay did not meet its burden of proof; its applications should have been denied. The Council erred as a matter of law and fact in deciding otherwise.

XI. THE ORDINANCES VIOLATE THE JOB CREATION REQUIREMENTS OF THE MUNICIPAL CODE

The City Code includes an important job creation requirement that supports the fiscal health of the City. The Code reflects the City's concern that it not be overwhelmed with the financial consequences of providing services to a massive "bedroom community." The Code requires that adequate land be set aside and incentives created to spur the creation of jobs for the new residents (and tax revenues for the city). BDMC 18.98.120C.

The Comprehensive Plan (at 3-10) expressly sets the job standard: “The City's goal is to ensure that land use planning allows the achievement of one local job per household for the year 2025 and beyond.”

Initially, the staff erred by using a 0.5 jobs per household standard in its staff report. The Examiner caught the error and determined that the correct standard was the one job per household benchmark set in the Comprehensive Plan. AR 0024772; AR 0024935; AR 0024936. But the Council ignored the Examiner and reverted to the staff's erroneous 0.5 jobs per household standard. AR 0027187. This was clear legal error on the Council's part.

The Hearing Examiner found that the applications did not meet this one job per household criterion established in the Comprehensive Plan. AR 0024772; AR 0024935; AR 0024936. The City Council, based on the same evidence considered by the Examiner, decided otherwise.

As the Examiner found, simply having sufficient quantities of land zoned for job production uses does not mean that the land will be developed, jobs created, and tax revenues generated. There is no substantial evidence to support the City Council's finding that the Examiner was wrong and that the MPD approvals include “sufficient incentives” to meet the City's employment targets. To the contrary, the record contains an analysis prepared

by the City's own consultant that documents that the incentives included in the approval will be grossly insufficient to encourage development necessary to meet the City's employment targets. AR 2982, 7718 (staff reports). The City Council's override of the Examiner's findings was not based on substantial evidence and should be reversed.

XII. THE ORDINANCES VIOLATE THE CITY CODE REQUIREMENT THAT SCHOOL SITES MUST BE A WALKABLE DISTANCE FROM RESIDENTIAL AREAS

The City Code requires that "School sites shall be identified so that all school sites meet the walkable school standard set for in the comprehensive plan." BDMC 18.98.080.A.14. The City Council concluded that this required that all homesites be within one-half mile of a school site. AR 0027267-AR 0027268 (The Villages CL 40A); AR 0027438-39 (Lawson Hills CL 40A).

The MPD ordinances water down this requirement by providing that school sites meet the walkability standard only "where reasonable and practicable." AR 0027317, AR 0027485 (Villages Cond. # 98; Lawson Hills Cond. # 99). Approval with this condition is a clear violation of the Code. Nothing in the Code authorizes an approval of an MPD unless all school sites meet the walkability standard.

The conditions of approval also are flawed because they limit the

walkability requirement to elementary schools. According to the conditions of approval, middle schools and high schools do not need to comply. No code provision is cited to justify this exception either.²²

XIII. CONCLUSION

1. The Court should find the EIS inadequate and remand it for revision consistent with the Court's conclusions in that regard. If the EIS is inadequate, the Court should also invalidate the MPD ordinances which were based on the inadequate EISs. *Leschi Imp. Council v. Wash. State Hwy. Comm'n*, 84 Wn.2d 271, 284-85, 525 P.2d 774 (1974) (decision based on inadequate environmental review is void). *See also* n.9, *supra*.

2. The deficiencies in the Council's findings and conclusions requires a remand and, if so, obviates the need for the Court to determine the substance of the Comprehensive Plan and Code consistency issues. (The Court is to *review* decisions made by the City, not make those decisions in the first place.)

3. If the Court addresses the substance of the ordinances, the Court

²² Of major significance is the residential area on the east side of Parcel B (the North Commercial property). None of these residences are even within one mile of a school site. Currently, the only access to schools from homes in the "North Commercial" area would be by walking north to Highway 169 and then south along that busy state highway. Allowance of residential property in this isolated area violates sensible public policy as well the more specific school walkability requirements of the Code. The location of this residential area is the most egregious (but not the only) violation of the walkability requirement of the Code.

should invalidate them because of their inconsistencies with the Black Diamond Municipal Code and Black Diamond Comprehensive Plan.

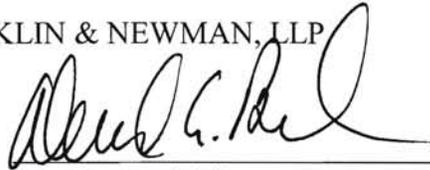
4. The Court should award petitioners their statutory fees and costs.

Dated this 8th day of February, 2013.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



David A. Bricklin, WSBA No. 7583
Attorneys for Petitioners

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

Chapter 18.98 - MASTER PLANNED DEVELOPMENT ^[17]

Sections:

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

18.98.005 - MPD zoning district created.

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

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

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

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

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

APPENDIX A

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

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

18.98.020 - MPD permit—Public benefit objectives.

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

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

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

18.98.030 - MPD permit—Criteria for MPD eligibility.

- A. *Where required.* An MPD permit shall be required for any development where:
 1. Any of the property within the development is subject to an MPD designation on the Comprehensive Plan Future Land Use Map or an MPD zoning designation;
 2. The parcel or combined parcels to be included in a development total at least eighty gross acres; or
 3. Any of the property within the development is subject to a development agreement that requires an MPD permit to be obtained.
 4. Provided, however, the above provisions notwithstanding, any commercial area that is intended to be used to meet the economic objectives of an MPD and is geographically separated from the residential component of a proposed MPD may be approved through the site plan approval process of Chapter 18.16, subject to the following conditions:
 - a. The commercial area is included in an MPD application that has been determined to be complete and is identified in the application as being intended to meet the economic objectives of the MPD application;
 - b. The MPD design and development standards shall be applied, unless modified in accordance with the provisions of section 18.98.130(A);
 - c. The approved conditions shall include the requirements of section 18.98.080(A);
 - d. If the environmental review on the MPD permit application has not been completed, then, if determined appropriate, an environmental determination may be issued for the commercial area, provided the determination contains provisions that the commercial area shall still be considered for cumulative impact purposes, and appropriate additional mitigation requirements in the environmental review for the MPD application;
 - e.

The provisions of the subsequent MPD approval shall apply to the site plan approval, including vesting, but only to the extent that they do not adversely impact complete building applications that have been submitted, or on-site infrastructure improvements that have already been permitted.

- B. **Eligibility.** Where not required under subsection (A) of this section the city may accept an MPD permit application, and process a development proposal as an MPD, only for contiguous properties that are in a single ownership, or if in multiple ownerships, specific agreements satisfactory to the city shall be signed by each property owner that place the properties under unified control, and bind all owners to the MPD conditions of approval.
1. All properties within its proposed MPD are within the city limits or within the PAA provided that, if a proposed MPD includes lands within the PAA, approval of the entire MPD will not be granted until such time annexation of unincorporated lands is completed.
- C. **Contiguity.** All properties to be included in an MPD must be contiguous, excepting those areas intended to be used for commercial purposes, other than neighborhood commercial.

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

18.98.040 - MPD permit—Application requirements.

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

A narrative description and illustrations of the MPD planning/design concept, demonstrating how the proposed MPD is consistent with the adopted MPD design standards, the comprehensive plan, all elements of Sections 18.98.010 and 18.98.020, and other applicable policies and standards. If deviations from these standards are proposed, the narrative shall describe how the proposed deviations provide an equal or greater level of public benefit.

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

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

18.98.050 - MPD permit—Required approvals.

- A. *MPD permit required.* An approved MPD permit and development agreement shall be required for every MPD.
- B. *Consolidated review.* An MPD permit will be allowed as part of a consolidated permit action as authorized by RCW 36.70B. Consolidation shall not be allowed for comprehensive plan amendments. At the city's discretion, an MPD permit may be processed concurrently with amendments to the development regulations or interlocal agreements, provided that the applicant acknowledges in writing that they assume the risk of the MPD permit application

being denied or otherwise conditioned as a result of final action on any requested amendment.

- C. *Implementing development applications.* An MPD permit must be approved, and a development agreement as authorized by RCW 36.70B completed, signed and recorded, before the city will grant approval to an application for any implementing development approval. An application for an MPD permit may be processed with amendments to the comprehensive plan, zoning code, inter-local agreements and land development permits associated with the MPD permit, such as forest practice permits, clearing and grading permits, shorelines permits, and permits required by other public agencies. The city shall not grant approvals to related permits before the granting of an MPD permit and recording of a development agreement except as provided in [Section] 18.98.030.A.4.

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

18.98.060 - MPD permit—Review process.

- A. *MPD permit—Pre-application conference, public information meeting and planning commission informational meeting required.*
1. A pre-application conference between the MPD applicant or representative and staff is required before the city will accept an MPD permit application.
 - a. The purpose of this conference is for the applicant to familiarize the staff with the proposed MPD, and for the staff to review with the applicant the city's submittal requirements, anticipated staffing needs, and processing procedures for MPD permit approval. The goal is to identify the city's objectives and likely issues, and to eliminate potential problems that could arise during processing of the MPD permit application prior to formal processing on the MPD permit application.
 - b. The applicant or representative shall present the information required as part of the MPD application. The city's intent is that the conference occurs after site inventory and analysis has been substantially completed, but prior to the completion of detailed survey, architectural or engineering work on the proposal.
 - c. A nonrefundable pre-application conference fee in an amount set forth in the adopted fee schedule resolution shall be paid before the pre-application conference will be scheduled.
 - d. If, at the pre-application conference, the city determines that it does not have adequate staff, space, or equipment, to process the application, then the applicant shall deposit with the city an amount sufficient for the city to hire the additional staff and/or consultants, and acquire the space and/or equipment necessary to process the application. The deposit must be made no less than four months or more than five months before the application is submitted. The public information meeting may not be scheduled until the deposit has been made. The city council may waive or shorten the four-month period if it is determined the necessary arrangements for staffing, space and equipment can be made in less than four months.
 2. After the pre-application conference has been completed, a public information meeting shall be conducted by the applicant prior to acceptance of an MPD permit application.
 - a. The applicant shall schedule and conduct a public information meeting regarding the proposed application. The public information meeting shall be conducted at City Hall, or at such other public location within the city that will accommodate the anticipated attendees. The applicant shall attend the meeting and provide information to the public regarding the proposed project, its timing, and consistency with the city's MPD code, the comprehensive plan, and other applicable city codes and regulations.
 - b. The public information meeting shall not be a public hearing, but shall allow for an informal exchange of comments between the applicant and the general public. Notice of this meeting shall be provided in the newspaper of record at least fourteen days in advance of the meeting and shall be mailed to the property owners identified in subsection A.4.e.(c) of this section.
 3. After the public information meeting has been completed, a planning commission informational meeting shall be conducted. The planning commission informational meeting is required before the city will accept an application for MPD permit approval.
 - a. The planning commission informational meeting will take place at a regular meeting of the commission. At this meeting, the applicant shall present the overall planning and design concept of the proposed MPD, and the commission shall provide preliminary feedback to the applicant regarding the consistency of this concept with the city's adopted standards, goals and policies. The planning

- commission may bring specific issues of interest or concern to the attention of the applicant.
- b. While a public meeting, the purpose of the planning commission informational meeting is not intended for the receipt of comments from the public regarding the proposed MPD.
4. **MPD permit public review process.**
 - a. **Completeness check and SEPA.** Staff shall review the MPD application for completeness and, once it is determined to be complete, provide the required notice of application. Staff will then initiate the SEPA process.
 - b. **Optional EIS scoping meeting.** If the responsible official makes a determination of environmental significance regarding an MPD application, staff may schedule and conduct an EIS scoping meeting. The applicant shall attend the meeting and provide information regarding the proposed project, scope, planning, timing, and the results of any relevant environmental studies performed by the applicant's consultants.
 - c. **Staff review.** At the conclusion of the SEPA process, staff will conduct its detailed review of the proposal. This review may include requesting additional information, or proposal revisions, from the applicant.
 - d. **Staff report.** The staff will prepare a written staff report to the hearing examiner. The completed staff report shall be sent to the hearing examiner and to the applicant at least ten calendar days prior to the public hearing.
 - e. **Hearing examiner public hearing.** The city's hearing examiner shall hold a public hearing on the MPD permit application. At least fourteen calendar days prior to the public hearing, the city shall provide notice of the hearing as follows:
 - (a) Publication in the city's newspaper of record;
 - (b) Posting of the proposal site, in at least three locations visible from public streets or rights-of-way;
 - (c) Mailing to owners of record of properties within five hundred feet of the perimeter of the proposed MPD per Section 18.98.040(A)(9); and
 - (d) Any person(s) formally requesting notice.
 5. **MPD permit approval criteria.** The hearing examiner shall prepare recommended findings of fact, conclusions of law, and conditions of approval or a recommendation for denial for the city council's consideration, and shall transmit these to the city council within fourteen calendar days of the close of the public hearing unless the hearing examiner determines by written findings that a specified amount of additional time is necessary because the matter is of unusual complexity or scope or for other good cause. The examiner shall evaluate the MPD application and other evidence submitted into the record, to determine if the application, when appropriately conditioned, meets or exceeds the approval criteria set forth in Section 18.98.080
 6. **City council.** At its first regular meeting following the receipt of the hearing examiner's recommendations, the city council shall schedule a time for its consideration of the MPD. The council may:
 - a. Accept the examiner's recommendation;
 - b. Remand the MPD application to the examiner with direction to open the hearing and provide supplementary findings and conclusions on specific issues; or
 - c. Modify the examiner's recommendation. If modifying the examiner's recommendation, the council shall enter its own modified findings and conclusions as needed.
 7. **Appeals.** The council's decision with regard to an MPD permit shall be the city's final action for the purpose of any and all appeals.

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

18.98.070 - MPD permit—Environmental review (SEPA).

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

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

18.98.080 - MPD permit—Conditions of approval.

- A. An MPD permit shall not be approved unless it is found to meet the intent of the following criteria or that appropriate conditions are imposed so that the objectives of the criteria are met:
1. The project complies with all applicable adopted policies, standards and regulations. In the event of a conflict between the policies, standards or regulations, the most stringent shall apply unless modifications are authorized in this chapter and all requirements of Section 18.98.130 have been met. In the case of a conflict between a specific standard set forth in this chapter and other adopted policies, standards or regulations, then the specific requirement of this chapter shall be deemed the most stringent.
 2. Significant adverse environmental impacts are appropriately mitigated.
 3. The proposed project will have no adverse financial impact upon the city at each phase of development, as well as at full build-out. The fiscal analysis shall also include the operation and maintenance costs to the city for operating, maintaining and replacing public facilities required to be constructed as a condition of MPD approval or any implementing approvals related thereto. This shall include conditioning any approval so that the fiscal analysis is updated to show continued compliance with this criteria, in accordance with the following schedule:
 - a. If any phase has not been completed within five years, a new fiscal analysis must be completed with regards to that phase before an extension can be granted; and
 - b. Prior to commencing a new phase.
 4. A phasing plan and timeline for the construction of improvements and the setting aside of open space so that:
 - a. Prior to or concurrent with final plat approval or the occupancy of any residential or commercial structure, whichever occurs first, the improvements have been constructed and accepted and the lands dedicated that are necessary to have concurrency at full build-out of that project for all utilities, parks, trails, recreational amenities, open space, stormwater and transportation improvements to serve the project, and to provide for connectivity of the roads, trails and other open space systems to other adjacent developed projects within the MPD and to the MPD boundaries; provided that, the city may allow the posting of financial surety for all required improvements except roads and utility improvements if determined to not be in conflict with the public interest; and
 - b. At full build-out of the MPD, all required improvements and open space dedications have been completed, and adequate assurances have been provided for the maintenance of the same. The phasing plan shall assure that the required MPD objectives for employment, fiscal impacts, and connectivity of streets, trails, and open space corridors are met in each phase, even if the construction of improvements in subsequent phases is necessary to do so.
 5. The project, at all phases and at build-out, will not result in the lowering of established staffing levels of service including those related to public safety.
 6. Throughout the project, a mix of housing types is provided that contributes to the affordable housing goals of the city.
 7. If the MPD proposal includes properties that are subject to the Black Diamond Urban Growth Area Agreement (December 1996), the proposal shall be consistent with the terms and conditions therein.
 8. If the MPD proposal includes properties that were annexed into the city by Ordinances 515 and 517, then the proposal must be consistent with the terms and conditions therein.
 9. The orientation of public building sites and parks preserves and enhances, where possible taking into consideration environmental concerns, views of Mt. Rainier and other views identified in the comprehensive plan. Major roads shall be designed to take advantage of the bearing lines for those views.
 10. The proposed MPD meets or exceeds all of the public benefit objectives of [Section] 18.98.020 and the MPD purposes of [Section] 18.98.010(B) through (M).
 11. If the MPD project is adjacent to property already developed, or being developed as an MPD, or adjacent to property which is within an MPD zone, then the project is designed so that there is connectivity of trails, open spaces and transportation corridors, the design of streetscape and public open space amenities are compatible and the project will result in the functional and visual appearance of one integrated project with the adjacent properties subject to an MPD permit or, if not yet permitted, within an MPD zone.

12. As part of the phasing plan, show open space acreages that, upon build-out, protect and conserve the open spaces necessary for the MPD as a whole. Subsequent implementing approvals shall be reviewed against this phasing plan to determine its consistency with open space requirements.
 13. Lot dimensional and building standards shall be consistent with the MPD Design Guidelines.
 14. School sites shall be identified so that all school sites meet the walkable school standard set for in the comprehensive plan. The number and sizes of sites shall be designed to accommodate the total number of children that will reside in the MPD through full build-out, using school sizes based upon the applicable school district's adopted standard. The requirements of this provision may be met by a separate agreement entered into between the applicant, the city and the applicable school district, which shall be incorporated into the MPD permit and development agreement by reference.
- B. So long as to do so would not jeopardize the public health, safety, or welfare, the city may, as a condition of MPD permit approval, allow the applicant to voluntarily contribute money to the city in order to advance projects to meet the city's adopted concurrency or level of service standards, or to mitigate any identified adverse fiscal impact upon the city that is caused by the proposal.

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

18.98.090 - MPD permit—Development agreement.

The MPD conditions of approval shall be incorporated into a development agreement as authorized by RCW 36.70B.170. This agreement shall be binding on all MPD property owners and their successors, and shall require that they develop the subject property only in accordance with the terms of the MPD approval. This agreement shall be signed by the mayor and all property owners and lien holders within the MPD boundaries, and recorded, before the city may approve any subsequent implementing permits or approvals (preliminary plat, design review, building permit, etc.).

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

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

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

- A. Would not increase the total number of dwelling units in an MPD above the maximum number set forth in the approved MPD permit or reduce the number by more than ten percent;
- B. Would not increase the total floor area of nonresidential uses by more than ten percent;
- C. Would not decrease the minimum, or increase the maximum density for residential areas of the MPD beyond density ranges approved in the MPD permit;
- D. Would not decrease the approved amount of open space or recreation space;
- E. Would not increase any adverse environmental impact, provided that additional environmental review may be required to determine whether such change is likely to occur;
- F. Would not adversely impact the project's fiscal projections to the detriment of the city;
- G. Would not significantly impact the overall design of the approved MPD; and
- H. Would not significantly alter the size or location of any designated open space resulting in a lowered level of service and does not reduce the total amount of required open space.
- I. Minor amendments may be approved administratively in accordance with the procedure set forth in the MPD development agreement, where applicable. Any amendment application that is not "minor" shall be deemed to be major. The final determination regarding whether an amendment is "minor" or "major" shall rest with the director, subject to appeal to the hearing examiner. Applications for major modifications shall be reviewed by the same procedures applicable to new MPD permit requests. The city, through the development agreement for the approved MPD, may specify additional criteria for determining whether a proposed modification is "major" or "minor", but the criteria listed in this section cannot be modified or reduced in a development agreement.

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

18.98.110 - MPD standards—Design review required.

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

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

18.98.120 - MPD standards—Permitted uses and densities.

- A. MPDs shall include a mix of residential and nonresidential use. Residential uses shall include a variety of housing types and densities.
- B. The MPD shall include those uses shown or referenced for the applicable parcels or areas in the comprehensive plan, and shall also provide neighborhood commercial uses, as defined in the comprehensive plan, sized and located to primarily serve the residential portion of the MPD.
- C. The MPD shall, within the MPD boundary, or elsewhere within the city, provide for sufficient properly zoned lands, and include sufficient incentives to encourage development as permit conditions, so that the employment targets set forth in the comprehensive plan for the number of proposed residential units within the MPD, will, with reasonable certainty, be met before full build-out of the residential portion of the MPD.
- E. Property that is subject to a preannexation agreement, development agreement or annexation ordinance conditions relating to residential density will have as its base density the minimum density designated in such agreement or ordinance. All other property will have as its base density the minimum density designated in the comprehensive plan.
- F. The council may authorize a residential density of up to twelve dwelling units per acre so long as all of the other criteria of this chapter are met, the applicant has elected to meet the open space requirements of Section 18.98.140(G), or otherwise is providing the open space required by Section 18.98.140(F), and the additional density is acquired by participation in the TDR program. In any development area within an MPD, for which the applicant has elected to meet the open space requirements of Section 18.98.140(G) or is otherwise meeting the open space requirement of [Section] 18.98.140(F), an effective density of development up to a maximum of eighteen dwelling units per gross acre may be approved, so long as the total project cap density is not exceeded and the development, as situated and designed, is consistent with the provisions of [Sections] 18.98.010 and 18.98.020. A MPD may include multi-family housing at up to thirty dwelling units per gross acre, subject to the following:
- 1.

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

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

18.98.130 - MPD standards—Development standards.

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

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

18.98.140 - MPD standards—Open space requirements.

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

The approved MPD permit and development agreement shall establish which open space shall be dedicated to the city, which shall be protected by conservation easements, and which shall be protected and maintained by other mechanisms.

- F. An approved MPD shall contain the amount of open space required by any prior agreement.
- G. If an applicant elects to provide fifty percent open space, then the applicant may be allowed to vary lot dimensions as authorized elsewhere in this chapter, cluster housing, and seek additional density as authorized in Section 18.98.120(F).

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

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

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

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

18.98.155 - MPD standards—Sensitive areas requirements.

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

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

18.98.160 - MPD standards—Transfer of development rights.

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

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

18.98.170 - MPD standards—Street standards.

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

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

18.98.180 - MPD standards—Stormwater management standards.

- A. The stormwater management system shall enhance the adopted standards that apply generally within the city, in order to implement the concepts in Sections 18.98.010(C), (H), and (L), 18.98.020(B) and (C), and 18.98.180(C). The stormwater detention system shall be publicly owned. Provided, in non-residential areas, the use of private vaults and filters may be

authorized where: (1) the transmission of the stormwater by gravity flow to a regional system is not possible and (2) there is imposed a maintenance/replacement condition that requires vault filters to be regularly inspected and maintained by the property owner.

- B. The stormwater management system shall apply to public and private stormwater management systems in all subsequent implementing projects within the MPD, except when new or different standards are specifically determined by the city council to be necessary for public health or safety, or as modified as authorized in Section 18.98.195(B).
- C. Opportunities to infiltrate stormwater to the benefit of the aquifer, including opportunities for reuse, shall be implemented as part of the stormwater management plan for the MPD.
- D. The use of small detention/retention ponds shall be discouraged in favor of the maximum use of regional ponds within the MPD, recognizing basin constraints. Ponds shall be designed with shallow slopes with native shrub and tree landscaping and integrated into the trail system or open space corridors whenever possible. Small ponds shall not be allowed unless designed as a public amenity and it is demonstrated that transmitting the stormwater to a regional pond within the MPD is not technically feasible.

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

18.98.190 - MPD standards—Water and sewer standards.

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

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

18.98.195 - Vesting.

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

Any request for an extension shall be considered as a major amendment to the MPD. The council may impose such additional conditions to the phases as it deems appropriate to further the

purposes and public benefit objectives of the MPD code in light of the number of years that have passed since the original MPD permit approval and taking into consideration the effectiveness of the existing permit conditions in meeting those purposes and public benefit objectives.

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

18.98.200 - Revocation of MPD permit.

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

- A. If the MPD permit allowed for phasing and the implementing action (i.e., final plat approval, site plan approval, etc.) for the development of the next phase has not been approved within five years of the approval of the previous phase or, in the case of the first phase, from the original MPD approval and an extension of said phase has not been previously granted. An extension may be granted for up to an additional two years on such additional conditions as the council determines are necessary in order to assure that the extension does not adversely impact the intent and purpose of the initial MPD approval.
- B. A condition of the MPD approval has been violated and the violation has not been corrected after sixty days notice of the violation unless said violation can be corrected through the use of a duly posted performance or maintenance bond provided at the time of MPD approval.
- C. A violation of an MPD condition of approval that cannot be corrected, such as the destruction of wetlands or removal of trees and vegetation that was specifically prohibited and cannot be restored to their original state within sixty days.
- D. The MPD permit has been approved for more than five years and the city council finds that further development will present a threat to the public health, safety and welfare unless the amendment or revocation is implemented; provided, however, the city shall first determine that the condition cannot be amended in order to eliminate the threat to the public health, safety or welfare before it revokes the permit approval.

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

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

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

FOOTNOTE(S):

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

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The Villages
Master Planned Development

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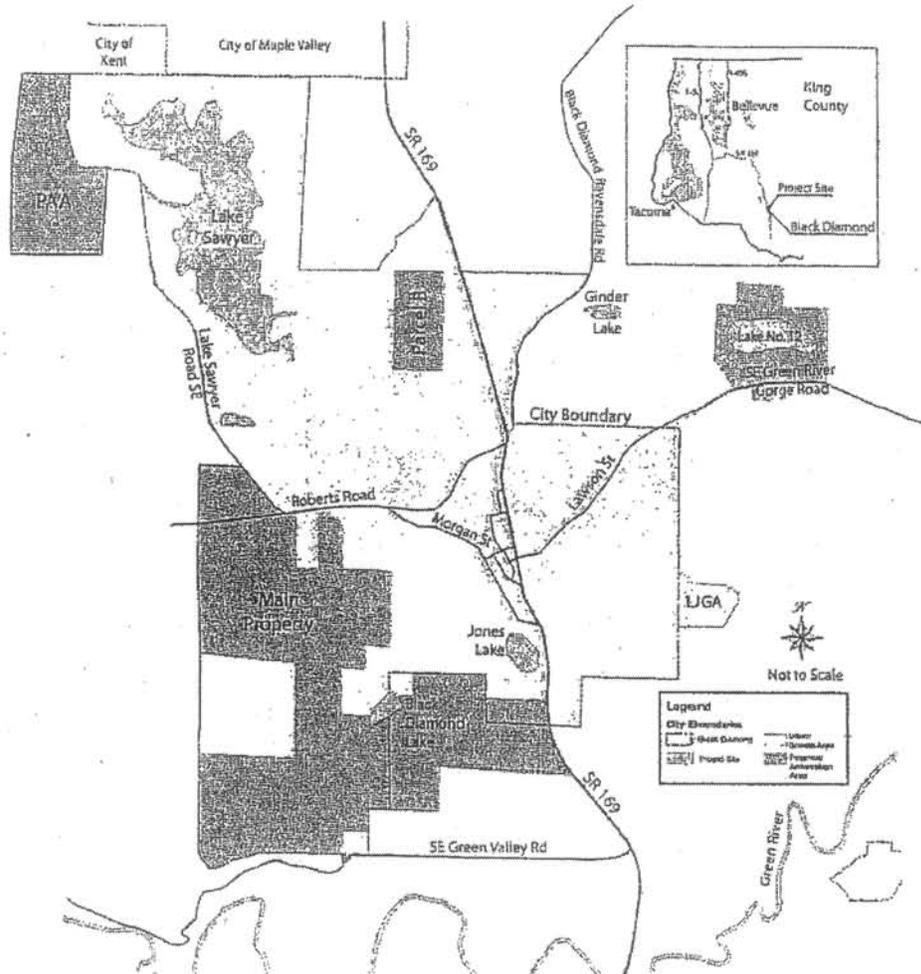
EXECUTIVE SUMMARY

The Villages
Master Planned Development

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Vicinity Map Figure 1-1

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PROPOSAL

The Villages site (consisting of the Main Property and Parcel B) will be developed as a Master Planned Development (MPD) and will provide a mix of uses including: residential, commercial, office, retail, educational, civic, recreational uses, trails, and open space. A maximum of 4,800 residential units (approximately 3,600 single family detached and approximately 1,200 attached dwelling units); 775,000 square feet of commercial/retail/office uses, public and civic uses; multiple school sites, a minimum of 481.4 acres of open space (including sensitive areas and their buffers and forest areas); and other recreational uses. The commercial/retail/office is anticipated to have the following approximate distribution: 325,000 square feet of destination and neighborhood retail uses; approximately 450,000 square feet of office, plus additional public and civic uses. Table 1.1 summarizes the proposed uses and approximate areas within the MPD property by land use categories. The overall average residential density of the site is proposed to be 4 dwellings per gross acre.

In addition to the MPD approval, the following other permits or approvals are requested or associated with this application:

- Annexation of the South Annexation Area
- Issuance of Final EIS
- Planned Action Ordinance adoption
- Development Agreement approval (between the City of Black Diamond and the applicant)

PLANNING AND DESIGN CONCEPT

The Villages MPD will provide a vibrant mixed-use community with a mix of housing, employment, civic, educational, open space, trails, and recreational opportunities in the City of Black Diamond. The MPD will create new neighborhoods in the City that are meant to support and enhance the existing community. The MPD will create an integrated community that provides a sense of neighborhood through coordinated building and landscape design. The community will include a variety of housing types, styles, sizes, and densities geared to a range of income levels. Commercial/office/retail uses will be provided that will contribute positively to the City's ability to achieve a net fiscal benefit for the community and to provide jobs. Development will be clustered to minimize impacts to environmentally sensitive areas (i.e., wetlands, streams, and steep slope areas and their buffers) and to promote efficient delivery of services. Passive and active open space (including parks and trail corridors) will be woven into the development in a coordinated, connected manner to incorporate, yet protect, environmentally sensitive areas, and provide visual separation, recreational opportunities, and an attractive setting for the community. Trails will be designed to provide connections to off-site locations.

DEVELOPMENT AGREEMENT

The drawings and associated descriptions contained within this MPD application illustrate the proposed overall distribution of development parcels, land uses, major roads, open space areas, and overall conceptual utility plans. Future subdivisions and development that is proposed within individual development parcels will be guided by the provisions in the MPD and standards contained in the Development Agreement. The Development Agreement will be separately approved.

LOCATION

The Villages MPD is comprised of two primary development areas totaling 1196 acres: the Main Property and Parcel B. Parcel B is approximately 82 acres in size and located approximately 2 miles to the north of the Main Property, west of Highway 169 and north of SE 312th street (if it were extended). The Main Property is approximately 1,114 acres and located west of SR 169 (also called Maple Valley Highway), south of SE Auburn-Black Diamond Road (an approximately 55-acre portion of the property lies to the north of this road) and north of SE Green Valley Road. The property consists of all or portions of 48 tax parcels ranging from approximately 17 acres to 155 acres in size. The Main Property lies almost entirely within the City of Black Diamond. An approximately 234-acre area in the southeast portion of the Main Property known as the South Annexation Area was recently annexed to the City. The South Annexation Area is proposed as part of The Villages MPD project.

LAND USE

A mix of uses within seven land use designations is proposed within the MPD. The designations are Low Density Residential, Medium Density Residential, High Density Residential, Commercial/Office/Retail, Mixed Use, School, and Open Space. Residential land uses comprise the largest area, approximately 45% of the site.

Table 1.1
Proposed MPD Land Use Summary

Land Use Type	Area (Estimated Acres)	% of Total Property
Residential		
MPD Low Density	285	24%
MPD Medium Density	178	15%
MPD High Density	72	6%
Commercial/Office/Retail and Mixed-use	67	6%
Schools	33	3%
Open Space ¹	505	42%
Streets (ROW)	56	4%
Total	1196	100%

¹ Includes neighborhood and community parks, stormwater ponds, sensitive areas and their buffers and natural areas; does not include school playfields, pocket parks, additional park & recreational facilities provided by parcel developers trailheads, trails, plazas or other open space within commercial areas.

RESIDENTIAL

The Villages MPD will feature a range of housing types, sizes, and densities geared to a range of income levels that will respond to dynamic market factors over time. Residential development will include: low-density (at 1 to 8 dwelling units per acre), medium-density (at 7 to 12 dwelling units per acre), and high-density (at 13 to 30 dwelling units per acre) housing and a limited amount of multi-family housing in Mixed-Use areas. Single-family units will be located on a variety of lot sizes, and will include traditional single-family homes, as well as duplexes and cottage units. Multi-family attached units will include townhouses, condominiums, and apartments.

COMMERCIAL/OFFICE/RETAIL

Commercial, office and retail uses will be provided in the proposed MPD on both the Main Property and Parcel B. These uses will contribute positively to the City's ability to achieve a net fiscal benefit for the community, as required by the City's MPD standards (BDMC 18.98.1 20). Master Planned Development on Parcel B will feature destination commercial and office uses. Some housing may also be provided on this parcel. This development will provide a mixture of professional office space, along with destination retail space, and will represent an extension of the proposed commercial and office uses on the Lawson Hills MPD North Triangle Property to the north.

Civic uses have been anticipated for in the commercial/office/retail designation on the northern portion of the Main Property. The civic uses have not been defined to date, but possible uses could include public and quasi-public facilities such as a YMCA, boys and girls club, and/or public offices or services.

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MIXED-USE

A Mixed-Use area comprised of commercial uses and housing will be provided in the northern portion of the Main Property in a "Town Center", at the intersection of SE Auburn Black Diamond Road and the north/south arterial on site. Mixed-Use development will consist of neighborhood retail uses, small businesses, office and higher density housing.

PARKS, OPEN SPACE AND TRAILS

The Villages MPD will include a coordinated network of open space, parks and trail corridors. Open space will provide recreational opportunities and protection of environmentally sensitive areas and their buffers. It will also provide relief from the built environment by providing physical and visual buffers. The Villages open space will provide connectivity to existing and planned city and regional open space, trail corridors and wildlife corridors on and adjacent to the site. A coordinated trail system is proposed to provide links between parks and other uses within the proposed MPD. Joint use of school facilities will provide for major recreational opportunities.

The Villages MPD will provide a minimum of 481.4 acres of open space including neighborhood and community parks planned at the master developer level, environmentally sensitive areas and their buffers, and natural areas. Additional open space will be provided in pocket parks, trailheads, trails, school playfields, plazas and other open space in commercial areas as land areas develop.

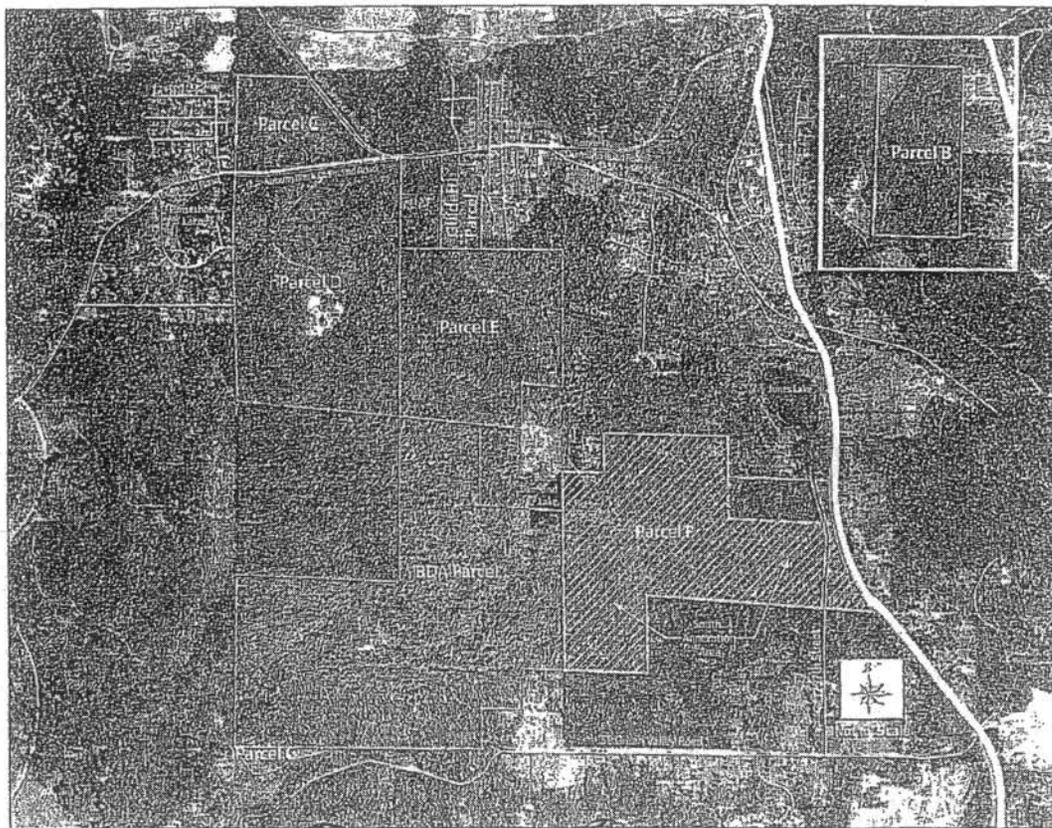
ACCESS AND CIRCULATION SYSTEM

An internal street system will be constructed in phases to serve the Main Property. Primary access to this property will be provided from SE Auburn-Black Diamond Road with a secondary access point to SR 169. An internal street system will also be constructed to serve Parcel B. This street system will connect to Lawson Hills MPD and will generally be located in the alignment of the City's planned North Connector Road (as shown in the City's Comprehensive Plan Update, June 2009).

WATER AND SEWER

WATER

The Villages Main Property and Parcel B are within the City of Black Diamond's water service area. The project is proposed to be served by a combination of water main extensions, upgrades, and a new looped water system. The closest existing water lines to the Main Property are 6-inch and 12-inch mains in Auburn-Black Diamond Road that terminate near the Lake Sawyer Road/Auburn-Black Diamond Road intersection. The closest existing water mains to Parcel B are within the SR 169 right-of-way. Upgrades to and extensions of these existing water mains are proposed to bring service to the project site based on specific water demand, fire flow requirements, and project timing. In addition to upgrades and extensions, a looped system of new on-site and off-site water mains, pressure reducing valves, and a reservoir or loop are proposed to provide service for future phases.



SEWER

The Villages project site is located within the City of Black Diamond's sewer planning area. It is proposed to be served by a system of gravity lines, force mains, storage facilities and up to three pump stations. The closest City sewer facility to the Main Property is a King County METRO sewer trunk connecting the City's Black Diamond Pump Station to the Soos Creek Water and Sewer District. This sewer trunk is located in Auburn-Black Diamond Road and Lake Sawyer Road. The proposed on-site sewer system will pump wastewater to a connection to the King County METRO sewer trunk in Lake Sawyer Road.

The closest City sewer system to Parcel B is the City's main in SR 169. Parcel B is proposed to be served by a pump station and main connecting to the existing City sewer main in SR 169. Alternatively, it could be served by a gravity main to the Black Diamond Pump Station located in the old railroad grade to the south of the site.

According to the City of Black Diamond Sewer Plan (1999), the existing sewer system, together with improvements proposed in this plan, will be adequate to serve the proposal. Sewer treatment is provided by King County METRO under an agreement with the City of Black Diamond. King County METRO has committed to providing sewer service to The City of Black Diamond and associated unincorporated Urban Growth Area.

STORMWATER CONTROL

Stormwater for The Villages MPD is managed through collection, treatment and release into groundwater or surface water bodies. The stormwater control system for the Villages MPD will be designed and constructed in accordance with the 2005 Ecology manual that is expected to be adopted by the City of Black Diamond. Based on this manual, post development stormwater recharge rates will match pre-development rates ranging from 50 percent of the 2 year peak flow up to the full 50-year peak flow.

MAIN PROPERTY

Large areas of The Villages site are suitable for infiltration of stormwater to groundwater (aquifers) using Low Impact Development (LID) techniques. so infiltration is a key component of the stormwater management plan. Where feasible, stormwater is proposed to be infiltrated to shallow outwash soils (Qvr) that form a shallow aquifer or to deeper outwash deposits (Qpog) that form a deep aquifer underlying the site. Since some areas are sensitive to changes in water volumes or are not suitable for infiltration, more traditional stormwater management techniques are also necessary. Thus, the components of the stormwater management plan for the site include infiltration of stormwater into the shallow aquifer (Qvr) through LID, infiltration into the deep aquifer (Qpog) through infiltration facilities, conventional ponds, wetland recharge, water quality treatment facilities and two regional stormwater management facilities.

PARCEL B

Conventional stormwater collection and treatment ponds are proposed on Parcel B.

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LOW IMPACT DEVELOPMENT

The design and development of the MPD will incorporate Low Impact Development (LID) methods and best management practices in order to reduce the potential impacts of development on water resources, where practical, and enhance the overall environment and character of the community and reduce long term maintenance costs. LID measures will be incorporated into the site planning, stormwater controls, roadways, and utility systems.

The proposed clustering of development will retain a minimum of 481.4 acres of the total MPD site area in open space. LID measures that may be used in the design of individual lots include reduced front yard setbacks to decrease driveway lengths and associated impervious surface area on lot infiltration systems, and decreased lot sizes to minimize the overall development footprint.

The proposed stormwater control system will maintain wetland recharge for wetlands located on the Main Property in order to protect wetland hydrology and function. Runoff from rooftops and detention facilities will be used to recharge on-site wetlands. LID techniques that may be incorporated include infiltration, rain gardens, bioswales, media filter strips, and other technologies.

LID techniques may be incorporated into the street and circulation network on both properties to reduce the amount of impervious surface area. These techniques include narrower street widths, sidewalks on one side of the street, street trees and landscape medians, narrower lot frontages to reduce the overall road length per home, pedestrian paths in open space areas to increase connectivity, and clustering lots to reduce road lengths.

The MPD will include a water conservation plan with strategies to reduce the amount of water consumed by each residential unit, as needed to meet the requirements specified in the Black Diamond Municipal Code (BDMC 18.98.190 B).

CLEARING AND GRADING

The unique landforms and open space areas within the MPD are strong elements of the design plan. While development of the MPD will require clearing and grading within the site and in certain offsite areas, care has been taken to work with the topography to maintain the general landforms of the site. These landforms help to define the neighborhoods within the community and reinforce the rural character of Black Diamond.

A detailed grading plan has not yet been formulated to reflect how the development works with the topography. It is estimated that approximately 4,753,000 cubic yards of cut and 1,685,000 cubic yards of fill would be required for the Main Property. The fill would come from material excavated on site, so no imported fill would be necessary. For parcel B it is estimated that 81,000 cubic yards of cut and 81,000 cubic yards of fill would be required. It appears that native materials on Parcel B will be suitable for reuse as fill requiring no net

import. Balancing the amounts of cut and fill material on the site will reduce the quantity of material to be removed from or imported to the site, thus lessening impacts on surrounding neighborhoods.

DEVELOPMENT APPROVAL PROCESS

Issuance of an MPD permit by the City Council and subsequent execution and recording of a development agreement is the first step in the development process. In addition, a Planned Action ordinance will be adopted that establishes the level of development and thresholds within the MPD that can occur without additional SEPA review. These documents provide the standards and procedures for which all future implementing development actions within the MPD boundaries, such as preliminary plats, commercial site plans, grading permits, and others, will be reviewed against. Each future implementing development will submit the appropriate permits for review and approval by City. Following preliminary land use approval (e.g. preliminary plat), detailed engineering and construction documents would be developed and approved by the City prior to infrastructure and/or building construction.

CONSTRUCTION SCHEDULE

Development of The Villages MPD is expected to commence in 2010. Full buildout is anticipated to occur by 2025. Phasing of residential development will largely depend upon market condition. Development of the commercial and office areas will also depend upon market conditions. It is contemplated that the area south of SE Auburn-Black Diamond Road and the Lawson Hills North Triangle will develop first, with development radiating out from those points in subsequent phases. The timing of development of the school sites will be coordinated with the school districts.

PROJECT HISTORY

The City of Black Diamond, including the historic downtown, Morganville, Lawson Hills and various additional properties, was incorporated in 1959. The City completed its first Comprehensive Plan in 1980. This plan proposed future annexation of lands to the northwest, east and southwest to the City. Subsequent annexations in 1985 and 1994 added lands to the northwest and southwest to the City. The City of Black Diamond completed its first Comprehensive Plan in compliance with the Growth Management Act (GMA) in 1996. That same year, the City negotiated a "Potential Annexation Area" (PAA) agreement with King County and nearby property owners. This agreement was formalized as the Black Diamond Urban Growth Area Agreement (BDUGAA) (see below for details). Following execution of the BDUGAA, the City annexed an area around Lake Sawyer and the West Annexation Area to the City in 1998 and 2005, respectively (the North Triangle Property and a portion of the proposed Villages MPD site are in the West Annexation Area) In 2009, the City annexed the South Annexation Area (Parcel F is in the South Annexation area). The Covington Creek area and the Lake 12 Annexation Areas are the remaining PAA's.

PRIOR PLANNING AND AGREEMENTS

Following are further descriptions of key planning actions and agreements and their relationship to The Villages site and its proposed development.

BLACK DIAMOND URBAN GROWTH AREA AGREEMENT

In December 1996, the City of Black Diamond, King County, Plum Creek Timber Company, L.P., and Palmer Coking Coal Company entered into the Black Diamond Urban Growth Area Agreement (BDUGAA) (adopted as Ordinance No. 12534). This joint planning effort and agreement provides the foundation for the annexation and development of properties within the City of Black Diamond's Urban Growth Area (UGA). Through the agreement, an approximately 782-acre Potential Annexation Area (PAA) was identified that coincides with the City's UGA and includes: the West, South, East, and Lake 12 Annexation Areas. The PAA includes lands that, upon annexation to the City, are intended for urban development and lands that are to be set aside as permanent open space. Implementation of the BDUGAA will result in the protection of over 2,500 acres of open space in the City, unincorporated County, and the City's UGA. The agreement sets forth the conditions for and potential timing of the annexations. Conditions include availability of sewer and water service and major road access. The agreement includes provisions establishing appropriate land uses, zoning, and residential density and development standards for urban development in the PAAs. The BDUGAA also directs the City to establish a Transfer of Development Rights Program for Open Space (TDR). Since 1996, approximately 329 acres within the PAA have been annexed to the City (in the Lake Sawyer and West Annexation Areas, as noted above), and associated open space required by the BDUGAA was protected/conserved.

As indicated previously, portions of The Villages Main Property are located in the West Annexation Area. Portions of the Main Property are also located in the South Annexation Area. Therefore, these properties/portions of properties are subject to the provisions of the BDUGAA. The West Annexation Area was annexed to the City in 2005. The South Annexation Area is expected to be annexed to the City as well.

BLACK DIAMOND TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM

In December 2003, the City of Black Diamond adopted the Black Diamond Transferable Development Rights (TDR) Program via Ordinance No. 752 (the ordinance was subsequently codified as Chapter 19.24 of the Black Diamond Municipal Code). This program is being used, in conjunction with other measures, to protect property rights while allowing development rights to be transferred from properties that have been determined to be of greater public benefit as open space, parks, or community facilities, in accordance with the BDUGAA.

Generally, the program allows the City to transfer development rights from properties it wants to protect from development (TDR Sending Areas) to other areas within the City that the City has determined are better suited to urban development (TDR Receiving Areas). Eligible sending areas are shown on the TDR Sending Area Map, attached to Ordinance

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No. 747 as Exhibit 2. Eligible TDR Receiving Areas are identified on the TDR Program Map, also attached to Ordinance No.747 as Exhibit 2. Property owners who sell their development rights must establish conservation easements on their land permanently restricting future development and protecting/preserving the environmental/resource values of the TDR Sending Area. Developers, who purchase the development rights from properties to be conserved, can transfer those rights to eligible receiving sites and increase the residential densities on their property, the TDR Receiving Area, beyond levels that would otherwise be allowed.

Currently, most property within The Villages site is identified on the TDR Program Map as a TDR receiving area. There are several TDR sending areas on the Main Property identified on the City's TDR Sending Area Map. Application of the City's TDR Program will be necessary to achieve the number of units proposed within the receiving areas onsite; however, the exact application of the TDR Program will be determined at the final plat stage. The development agreement will provide clarification of this issue.

TRANSFER OF DEVELOPMENT RIGHTS

To achieve the proposed densities on the site, up to 2,871 TDRs will be purchased and transferred to the site. The use of TDR's will be phased through the full build-out of the project.

BLACK DIAMOND AREA OPEN SPACE AGREEMENT

In June 2005, the City of Black Diamond, King County, Plum Creek Timber Company, and Cascade Land Conservancy entered into the Black Diamond Open Space Agreement. The purpose of the agreement was to more specifically identify lands that qualify as In-City Open Space required to be protected or conserved under Section 7 of the Black Diamond Urban Growth Area Agreement. It further sets forth the steps that must be carried out to meet these BDUGAA requirements prior to Annexation of the South and West Annexation Areas into the City. The agreement included conservation easements, deeds, and dedication documents that protected or conserved a substantial portion of the In-City Open Space areas. The remaining In-City open space is required to be protected or conserved prior to annexation of the South Annexation Area to the City. The In-City Open Space required for the annexation of the South Annexation Area is intended to be provided in the southern portion of the Villages MPD.

WEST ANNEXATION AREA PRE-ANNEXATION AND DEVELOPMENT AGREEMENT

In December 2005, the conditions of the Black Diamond Area Open Space Agreement relative to the West Annexation Area were met and the area was annexed into the City. The BDUGAA required that the City and Plum Creek Land Company enter into an agreement to establish land uses, zoning, and development standards for urban development in the West Annexation Area. The West Annexation Area Pre-Annexation and Development Agreement between these parties address these requirements.

The agreement establishes that zoning of the West Annexation Area, including portions of The Villages Main property, will be MPD Overlay. The land uses in these areas allowed by the agreement on the Main Property are: residential, commercial, mixed-use, and open space, as shown in Appendix A, Map 7 of the BDUGAA. The allowed residential density, as well as the requirements for open space, sewer and water service, roads and development phasing, stipulated in the agreement will be met by MPD development on the Main Property.

BLACK DIAMOND MASTER PLANNED DEVELOPMENT ORDINANCES

In 2005, the City adopted Master Planned Development Ordinance No. 05-779 and No. 05-796 (these ordinances were subsequently codified as Chapter 18.98 of the Black Diamond Municipal Code). In April 2009, the City adopted Ordinance No. 09-897 which significantly revised Chapter 18.98. These ordinances describe the development standards, requirements, and permit process for MPDs. The ordinances indicate that MPDs are required for parcels/groups of parcels in the City of Black Diamond that are designated in an MPD Overlay zone or are contained in a single ownership and at least 80 acres in size. A key purpose of MPDs is to create mixed-use neighborhoods with a balance of housing, employment, and recreational opportunities. MPDs are intended to preserve passive open space (including critical areas) and provide active open space in a coordinated manner. They are meant to provide greater certainty about the character and timing of development and population growth in the City. They are also meant to provide needed services and facilities in an orderly, fiscally responsible manner. A specific objective of MPDs is to provide public benefits not typically available through conventional development.

The Villages site, including the Main Property and Parcel B, is contained within a single ownership and in total is 1196 acres in size; it is also almost entirely within the City's MPD Overlay zone. Therefore, the provisions of the MPD ordinances will pertain to development of the site.

LAND USE OVERVIEW

The Villages site (including both the Main Property and Parcel B) is proposed to be developed with a mix of uses, including: residential, commercial, retail, office, educational, civic, recreational uses, and open space. The Land Use Plan is shown on Figure 3-1.

A maximum of 4,800 residential units (approximately 3,600 single-family detached and approximately 1,200 attached dwelling units); 775,000 square feet of commercial/retail/office uses, public and civic uses; multiple school sites, a minimum of 481.4 acres of open space (including sensitive areas and their buffers and forest areas); and other recreational uses. The commercial/retail/office is anticipated to have the following approximate distribution: 325,000 square feet of destination and neighborhood retail uses; approximately 450,000 square feet of office, plus additional public and civic uses. While the maximum square feet of office and commercial uses will not change, the mix of commercial and office uses is approximate and may change. The average overall density of the project site is proposed to be 4 dwellings per gross acre.

Table 3.1 summarizes the uses and approximate areas within the MPD property by land use categories.

Table 3.1
MPD Land Use Summary

Land Use Type	Area (Estimated Acres)	% of Total Property
Residential		
MPD Low Density	285	24%
MPD Medium Density	178	15%
MPD High Density	72	6%
Commercial/Office/Retail/Mixed-use	67	6%
School	33	3%
Open Space ¹	505	42%
Streets (ROW)	56	4%
Total	1196	100%

¹ Includes neighborhood and community parks, stormwater ponds, sensitive areas and their buffers and natural areas; does not include school playfields, pocket parks, additional parks and recreational facilities provided by parcel developers, trailheads, trails, plazas or other open space within commercial areas.

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LAND USE

The Villages MPD is organized around the mixed-use Town Center located south of Auburn-Black Diamond Road. The Town Center is proposed to be a pedestrian-oriented central gathering place with retail shops, residential, small offices, cafés and higher density residential around a central plaza. Commercial/office/retail areas are proposed adjacent to the Town Center, north of SE Auburn-Black Diamond Road, to provide a critical mass of retail and employees to support the Town Center.

Residential neighborhoods of varying densities are linked to the Town Center by the Community Connector and an extensive open space and trail system. Two higher density residential neighborhoods located on the southwest and southeast portions of the site are surrounded by low density residential neighborhoods. These higher density neighborhoods serve several functions: they create a central focus for the surrounding low density neighborhoods; the overall density is spread throughout the site rather than concentrated; and these areas create variation in the development pattern.

RESIDENTIAL

Each residential land use category intentionally allows a mix of housing types. This mix is an important component of the organic urbanism concept. It will prevent the cookie-cutter appearance common in many suburban subdivisions and allows for a mix of lot sizes as discussed in "Rural By Design". Common design elements and guidelines will be the thread linking the neighborhoods within the MPD, while the mix of housing types and uses will allow each neighborhood to develop its own individual character. Schools and similar institutional uses are allowed within these categories, provided that a high school located within these categories will require a City of Black Diamond conditional use permit. Live/work units in these areas would be considered home occupations subject to City of Black Diamond Municipal Code.

Low Density (MPD-L). The low density residential category provides for predominantly single-family detached housing types. Attached housing in the form of duplexes, triplexes and quadplexes are allowed within the category provided they are designed to fit into the predominantly single-family character of the neighborhood. The density range for this category is 1-8 dwellings per acre.

Medium Density (MPD-M). The medium density residential category provides for single-family detached dwellings on small lots, cottages, duplexes, and townhouses. The density range for this category is 7-12 dwelling units per acre.

High Density (MPD-H). The high density residential category provides a mix of housing types including cottages, attached townhouses and stacked flats. The density range for this category is 13-30 dwelling units per acre. Most of the high density residential parcels are located around the Town Center to encourage pedestrian activity and to place households closest to areas likely to be served by transit. Three other high density

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nodes form the basis for several smaller isolated neighborhood centers throughout the MPD. Densities in the range from 18-30 dwelling units per acre will be allowed, subject to the criteria for such densities contained in the City's Master Planned Development ordinance. Approximately 35 acres of the site could be developed in the 18-30 dwelling unit per acre range. Potential areas are shown on Figure 3-1.

UNIT COUNTS BY LAND USE CATEGORY

Table 3.2 provides a general estimate of the number of units by designation. Since there are many development parcels within each category and the density may vary on each, this table is not intended to replace the total cap of 4,800 dwelling units proposed. It is intended to show that the typical densities of most development will result in the approximate number of total dwelling units proposed.

**Table 3.2
Residential Densities and Projected
Unit Count by Land Use Category**

Land Use Designation	Density Range (du/acre) Min-Max	Target Density (du/acre)	Approximate Acres	Projected Units
MPD-L	1-8	6	285	1710
MPD-M	7-12	10	178	1780
MPD-H	13-30	16	72	1152
MPD Mixed Use	Above retail	Above retail	Above retail	158

Note: Total area may shift with final planning and implementation approvals.

COMMERCIAL/OFFICE/RETAIL

This category includes uses providing services or sale of goods or merchandise to the public. Uses include, but are not limited to: banks, travel agencies, hotel/motels, eating and drinking establishments, clothing stores, drug stores, gift shops, video rental, bookstore, grocery stores, variety stores, paint stores, craft stores, specialty stores, theaters, wholesale clubs, and gas stations. Schools and similar institutional uses are also allowed within these categories, provided that a high school located within this category will require a City of Black Diamond conditional use permit.

Office uses include general office, research and development, technology, biotechnology and medical equipment, light manufacturing, wholesaling, mini-storage, distillery, brewery, winery, religious and educational uses, civic, continuing care, institutional uses and business support services.

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Commercial/office/retail uses will be provided in the proposed MPD on both the Main Property and Parcel B. These uses will positively contribute to the City's ability to achieve a net fiscal benefit for the community, as required by the City's MPD standards (BDMC 18.98.120). A wide variety of commercial/retail, office, and civic uses are allowed within this category. These may include educational opportunities and churches as well as a wide range of private or private enterprise recreation such as bowling alley, skating rink, miniature golf, etc.

MIXED USE - TOWN CENTER

The Mixed Use category is comprised of commercial/office/retail and housing and is proposed in the northern portion of the Main Property, at the intersection of SE Auburn-Black Diamond Road and Main Street. The Town Center is intended to become a focal point for community gathering and pedestrian-oriented development, so the allowed uses are those that promote these activities. Live entertainment is permitted. Higher density housing in and around the center will provide the population needed to support the center and to generate activity.

SCHOOL

The School category is intended for uses such as schools and other facilities that serve the community and are often provided by a public entity or non-profit organization. In the event that a parcel is not needed for a school, it shall revert to the MPD-M category. There are several school sites proposed throughout the MPD. Parcels V21, V50 and V58 are proposed as Elementary School Sites; Parcel V57 is proposed for a middle school. Walking distances are shown on Figure 3-2. Civic uses are also anticipated to locate in the commercial/office/retail designation, and sufficient land is zoned to accommodate these uses.

PARKS, OPEN SPACE AND TRAILS

The open space category is intended for protection of certain critical areas, passive and active recreation, and utilities as a secondary use. The Villages MPD includes a coordinated network of open space, parks, and trail corridors. It also provides relief from the built environment by providing physical and visual buffers. The open space provides connectivity to existing and planned open space, trail corridors, and wildlife corridors on and adjacent to the site. A coordinated trail system is proposed to provide links between parks and all uses within the proposed MPD.

Per the MPD standards (BDMC 18.98.120 (G), 18.98.140(F) and 18.98.140 (G)) The Villages MPD must provide the open space required by prior agreements. Portions, but not all, of the property are subject to the BDUGGA and Black Diamond Area Open Space Protection Agreement. Additionally, to cluster development or increase densities, the MPD must provide either the open space required per previous agreements or 50% open space where there are no prior open space agreements. According to the City's MPD standards, the BDUGGA, and Ordinances 515 and 517, The Villages MPD must provide 145 acres of open space. To use the MPD provisions that allow increases in density, flexible lot sizes

and clustering of lots, an additional 336.4 acres of open space must be provided.' Based in these requirements, the minimum requirement is 481.4 acres. Currently 505 acres are provided. Additional open space will be provided in school playfields, trails, and neighborhood parks. Since different areas of the site have different open space requirements, Table 3.3 includes an approximate breakdown of open space required and provided by parcel. The proposal meets the overall open space requirements of both the BDUGAA and MPD ordinances. Additional open space in school playfields, pocket parks, trails, plazas and other open space in commercial areas will be proposed, and are not included in these calculations.

Table 3.3
Open Space Calculations

	Gross Acres	BUDGAA/ Open Space requirement	MPD Open Space Provision (if applicable)	Proposed open space	Net difference over/(under)
Parcel B	81.53	0	40.77	34.00	(6.77)
Parcel C	54.62	5.00	0	8.00	3.00
Parcel D	225.99	58.30	0	38.00	(20.30)
Guidetti	20.38	0	10.19	20.00	9.81
Parcel E	151.15	0	75.58	95.00	19.42
Parcel F	258.90	81.70	12.00	143.00	49.30
Parcel G	8.06	0	0	0	0.00
BDA	395.74	0	197.87	167.00	(30.87)
Total In City/UGA MPD open space	1196.40	145.00	336.41	505.00	23.59

ALLOWED USES

The range of allowed uses is broad to maintain flexibility and respond to the market over the project build-out. The intent and purpose of the land use categories guides the allowed uses:

- The Mixed Use category is intended for pedestrian-oriented development. Intended uses include, but are not limited to, small retail shops, restaurants, grocery stores, multi-family housing, office space, farmer's markets, kiosks, and parks/plazas.
- The Commercial/Office/Retail category is intended for a wide variety of large scale commercial, institutional, office, retail and medium and high density residential uses. The intent of this designation is to provide sufficient commercial and office uses to generate employment and retail income for economic development within the City.
- The School category is primarily intended for schools. The school(s) may elect to share facilities with other Institutional uses such as, but not limited to, YMCA or Boys' and Girls' Clubs. If not needed for a school, the parcel may be changed.
- The Open Space category is intended for recreation, trails, temporary uses, utilities, and the protection of critical areas.

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DESIGN CONCEPT AND LAND USE PLAN

Table 3.4.
Allowed Uses

Principal Use	MPD-L	MPD-M	MPD-H	Commercial Office Retail	Mixed Use	School	Open Space
Dwelling Unit							
Detached	P	P	P	A	X	X	X
Attached <=6 units per building	P	P	P	X	P	X	X
Attached >6 units per building	X	P	P	P	P	X	X
Model Homes/Sales Office	P	P	P	P	P	P	P1,6
ADU	A	A	X	A	A	X	X
Office	A	A	A	P	P2	A	A1
Institutional	P	P/C7	P/C7	P/C7	P	P	P1
Recreation	P	P	P	P	P	P	P3
Retail	P5	P5	P5	P	P4	A	A1
Temporary Use(6)	P	P	P	P	P	P	P1
Utility Facility							
Major	P	P	P	P	P	P	P1
Minor	P	P	P	P	P	P	P

P=Permitted, X= Prohibited, A= Permitted as an accessory or incidental use, C= City of Black Diamond Conditional Use Permit

1. Allowed outside of sensitive areas and buffers.
2. Office and other similar offices may be permitted on the ground floor abutting Main Street subject to ARC Design Guidelines to ensure compatibility with the pedestrian-oriented streetscape.
3. Allowed outside of sensitive areas and buffers. passive use parks, trails and open space are allowed within sensitive areas and buffers consistent with the Sensitive Areas Ordinance.
4. Automobile oriented uses such as gas stations, whole sale clubs, and uses with drive-up facilities may be allowed subject to ARC Design Guidelines.
5. Limited to neighborhood commercial such as corner stores and other small scale Retail establishments.
6. Model homes and temporary uses such as contractor storage yards, construction staging areas and similar construction related uses are not intended to be permanent uses and must cease once the phase or Development the use serves is completed.
7. A high school located within these classifications will require a conditional use permit processed pursuant to City of Black Diamond's Conditional Use Permit process.

ACCESSORY USES

The Table of Allowed Uses classifies different principal uses according to their different impacts. Whenever an activity is conducted in conjunction with another principal use and the former use (i) constitutes only an incidental or insubstantial part of the total activity that

3

CHAPTER

takes place on a lot, or (ii) is commonly associated with the principal use and integrally related to it, then the former use may be regarded as accessory to the principal use and may be carried on underneath the umbrella of the principal use. To be "commonly associated" with a principal use it is not necessary for an accessory use to be connected with such principal use more times than not, but only that the association of such accessory use with such principal use takes place with sufficient frequency that there is common acceptance of their relatedness.

The following activities, subject to Architectural Review Committee (ARC) Design Guidelines, are specifically regarded as accessory to residential principal uses:

- Home occupations/live-work;
- Hobbies or recreational activities of a noncommercial nature;
- Accessory living quarters, mother-in-law units and accessory dwellings;
- Keeping household pets;
- On-site rental/sales office;
- Storage of yard maintenance equipment;
- Appropriate storage of private vehicles, e.g., motor vehicles, boats, trailers or planes; or
- Greenhouses.

CHANGE THE CATEGORY OF DEVELOPMENT PARCELS

The following land use plan (LUP) category changes are allowed pursuant to an administrative approval process described in Chapter 13. Land use category changes are not intended to allow development of more dwelling units or square feet than the total amounts proposed.

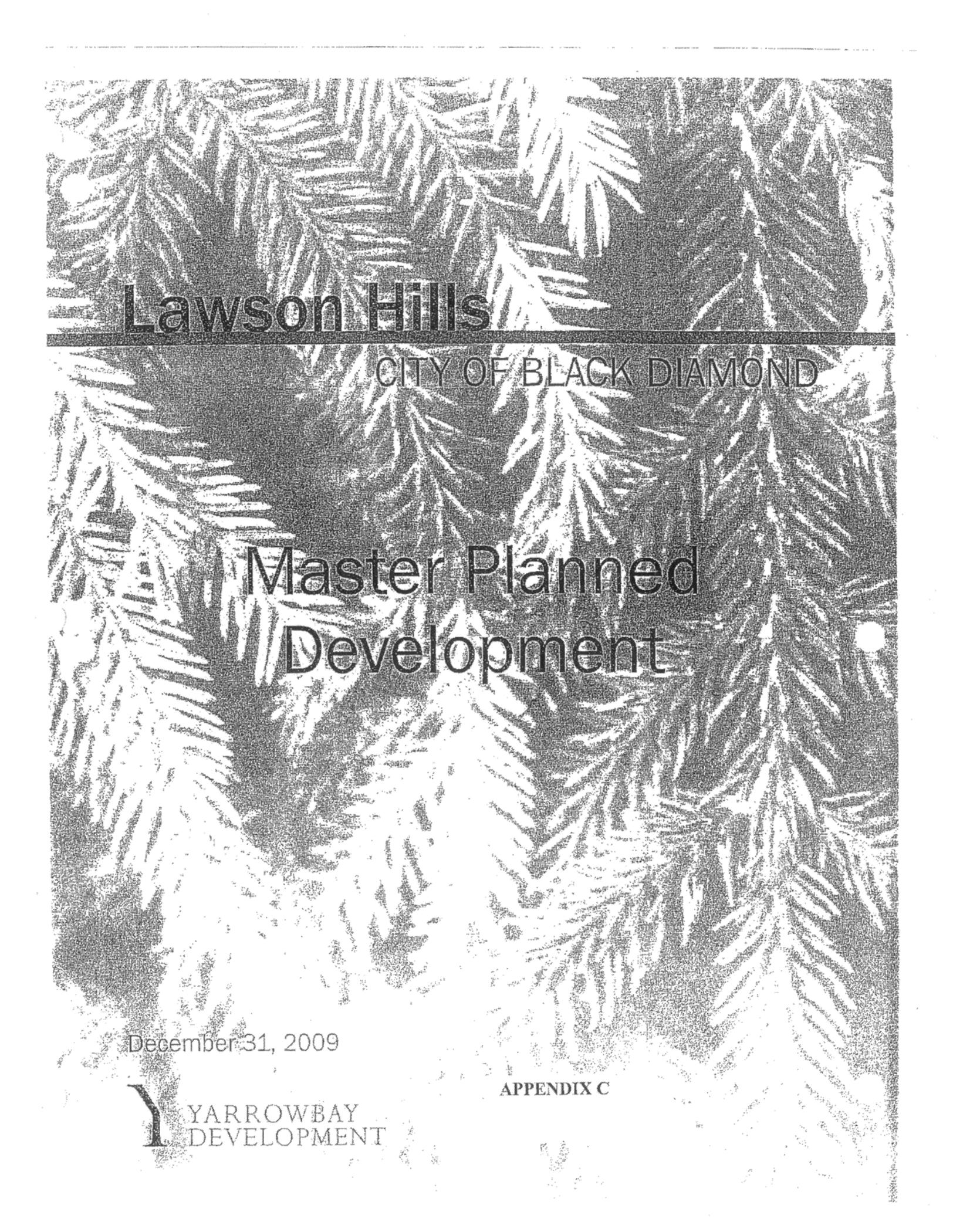
Any residential development parcel can adjust up or down one residential land use category, except no parcels may adjust up to the MPD-H 18-30 designation without a Minor Amendment to the MPD Permit. For instance, MPD-L may move up to MPD-M, or MPD-H may move down to MPD-M. In no instance may a parcel move up or down more than one category from its original category as depicted on Figure 3-1.

Any development parcel adjacent to or across a road from a Mixed Use category may be changed to the Mixed Use category.

A development parcel that is classified as school, but is not dedicated to the Enumclaw School District may revert to the MPD-M category at the election of the Master Developer. The Master Developer may elect to keep the school category for development allowed within the category or to change the category of the parcel to MPD-M.

Any portion of open space shown as a sensitive area or buffer on Figure 3-1 that is determined not to be a Sensitive Area or buffer will be changed to a category that is compatible with the category of abutting development parcel(s).

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Lawson Hills

CITY OF BLACK DIAMOND

Master Planned Development

December 31, 2009

 YARROWBAY
DEVELOPMENT

APPENDIX C

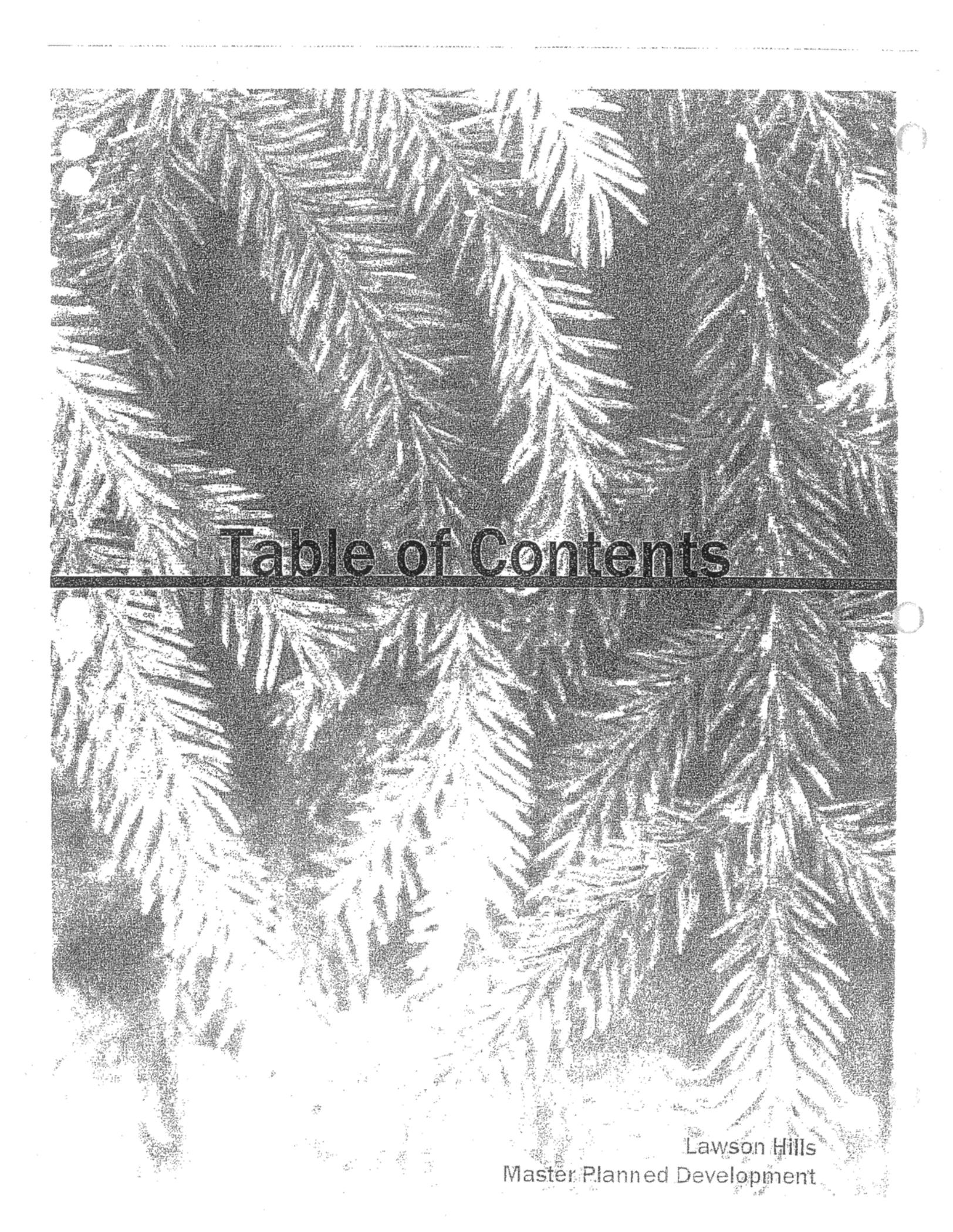


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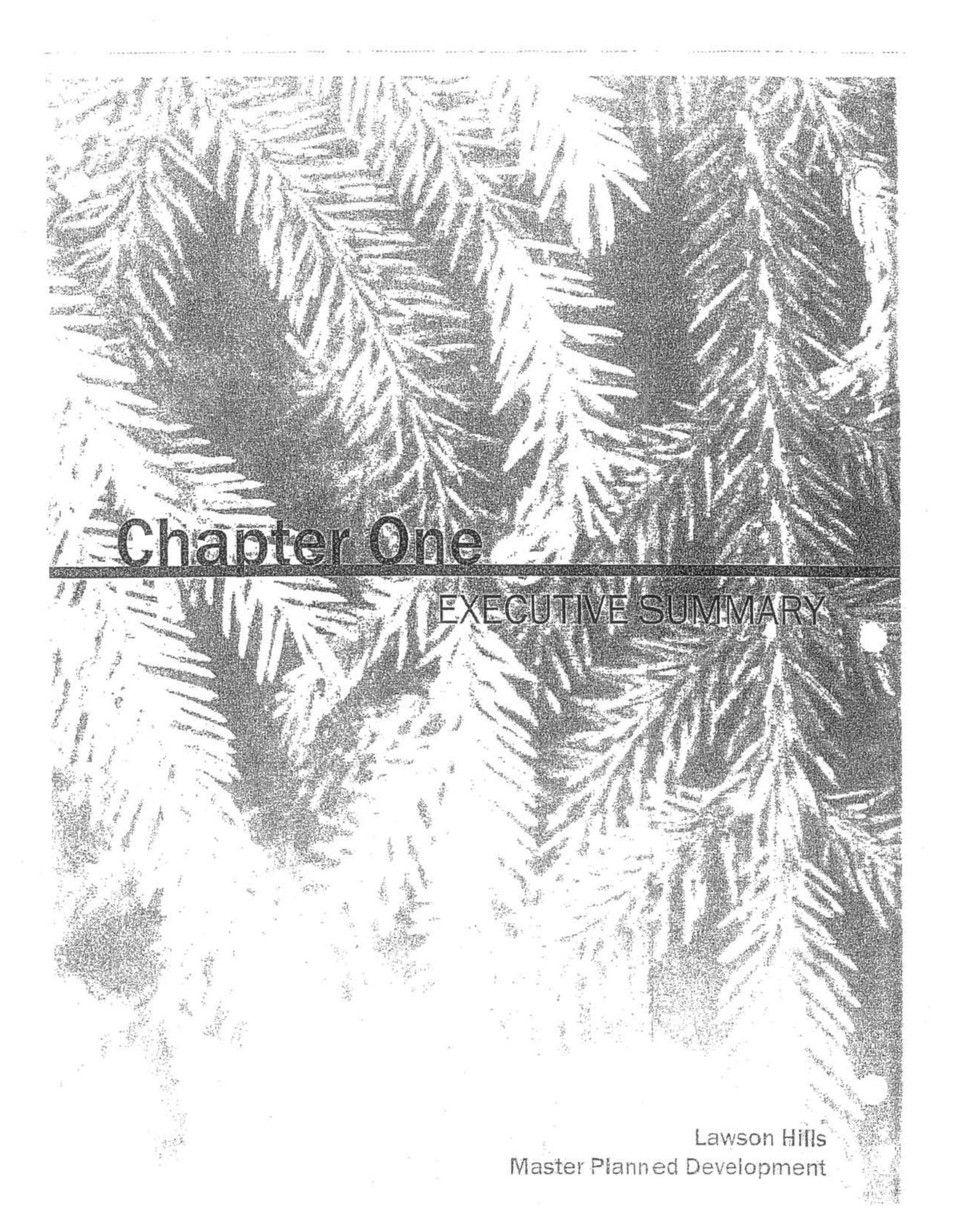
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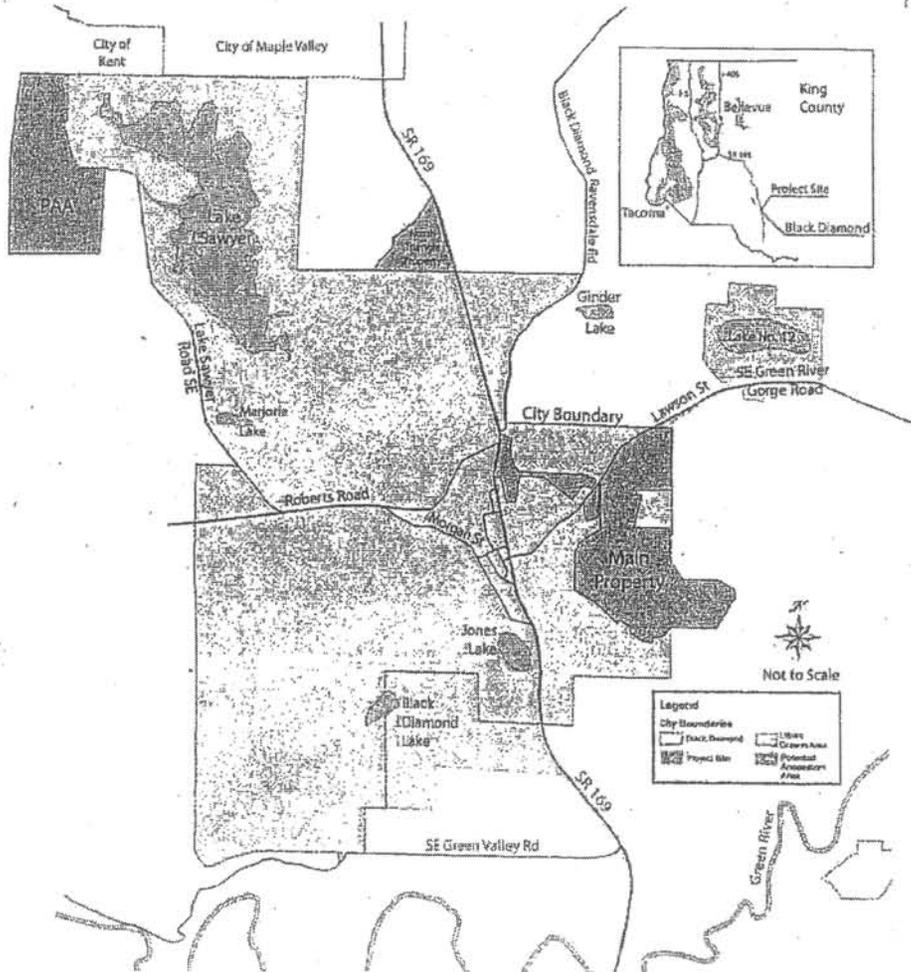
Chapter One

EXECUTIVE SUMMARY

Lawson Hills
Master Planned Development

EXECUTIVE SUMMARY

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Vicinity Map Figure 1-1

PROPOSAL

The 371 acre Lawson Hills site (consisting of the Main Property and the North Triangle Property) will be developed as a Master Planned Development (MPD) with a mix of uses, including: residential, retail/commercial, office, educational, recreational uses, and open space. A maximum of 1,250 residential units (approximately 930 single family detached and approximately 320 multifamily attached dwelling units); 390,000 square feet of destination, office and neighborhood retail uses; a 10-acre elementary school site; approximately 138 acres of open space; and other recreational uses will be provided in the MPD. The commercial/office/retail is anticipated to have the following approximate distribution: 190,000 square feet destination and neighborhood retail, 200,000 square feet of office, plus additional public and institutional uses. The average density proposed for the residential portion (Main Property) is approximately 4 dwellings per gross acre. Table 1.1 summarizes the proposed uses and approximate areas within the MPD property by land use categories.

In addition to the Master Planned Development approval, the following other permits or approvals are requested within or concurrent with this application:

- Annexation of East Annexation Area
- Issuance of Final EIS
- Planned Action Ordinance adoption
- Development Agreement approval (between the City of Black Diamond and the applicant)

PLANNING AND DESIGN CONCEPT

The Lawson Hills Master Planned Development will provide a vibrant mixed-use community with a mix of housing, employment, open space, recreational opportunities in the City of Black Diamond. The MPD will create a new neighborhood in the City that is meant to support and enhance the existing community. The MPD will achieve an integrated community that provides a sense of neighborhood through coordinated building and landscape design. The community will include a variety of housing types, sizes and densities geared to a range of income levels. Commercial/office/retail uses will be provided that will contribute positively to the City's ability to achieve a net fiscal benefit for the community and adds jobs. Development will be clustered to avoid environmentally sensitive areas (i.e., wetlands, streams and steep slope areas and their buffers) and to promote efficient delivery of services. Passive and active open space (including parks and trail corridors) will be woven into the development in a coordinated, connected manner to protect environmentally sensitive areas, and provide visual separation, recreational opportunities and an attractive setting for the community.



EXECUTIVE SUMMARY

DEVELOPMENT AGREEMENT

The master drawings and associated descriptions contained within this MPD application illustrate the overall distribution of development parcels, land uses, major roads, open space areas and overall conceptual utility plans. The MPD approval will be accompanied by a Development Agreement recorded on title for Lawson Hills, and detailing the approval requirements and standards. Future subdivisions and development that is proposed within individual development parcels will be guided by the approved MPD and the standards contained in the development agreement.

LAND USE

A mix of uses within six land use designations is proposed within the MPD. Development within the designations will be governed by the provisions of the development agreement. The proposed designations are Low Density Residential, Medium Density Residential, High Density Residential, Commercial/Office/Retail, School and Open Space. The largest proportionate share of land use proposed is residential land use; approximately 44% of the site is proposed to be designated for residential use.

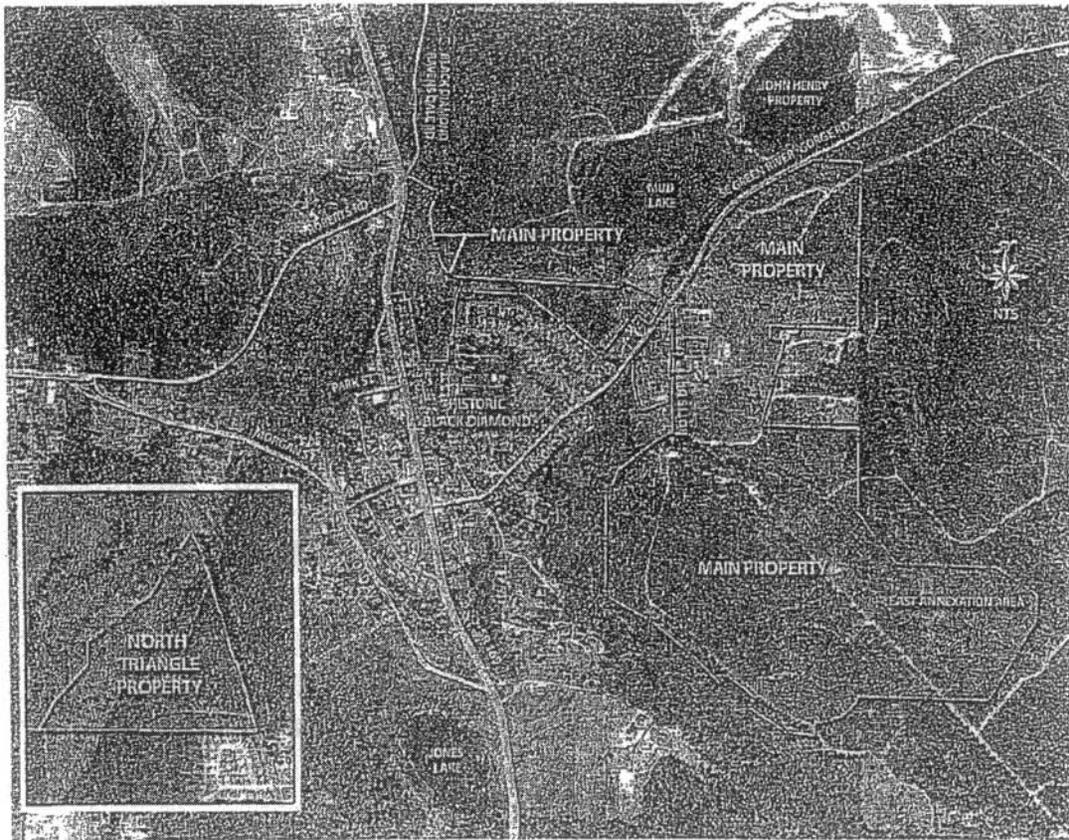
Table 1.1
Proposed MPD Land Use Summary

Land Use Type	Area (Estimated Acres)	% of Total Property
Residential		
MPD - Low Density	79	21%
MPD - Medium Density	63	17%
MPD - High Density	23	6%
Commercial/Office/Retail	35	10%
School Site	10	3%
Open Space ¹	138	37%
Streets (ROW)	23	6%
Total	371	100%

¹ Includes sensitive areas and their buffers, neighborhood and community parks, stormwater ponds and forest areas; does not include pocket parks additional parks and recreational facilities provided by parcel developers, trailheads, trails, school playfields, plazas or other open space within commercial areas.

RESIDENTIAL

The Lawson Hills MPD will feature a range of housing types, sizes and densities geared to a range of income levels that will respond to dynamic market factors over time. Residential development will include: low-density (at 1 to 8 dwelling units per acre), medium-density (at 7 to 12 dwelling units per acre), high-density (at 13 to 30 dwelling units per acre) housing. Single family units will be located on a variety of lot sizes, and will include traditional single family homes, as well as duplexes and cottage units. Multifamily units will include townhouses, condominiums and potentially apartments.



COMMERCIAL/OFFICE/RETAIL

Commercial/office/retail uses will be provided in the MPD on the North Triangle Property. These uses will contribute positively to the City's ability to achieve a net fiscal benefit for the community, as required by the City's MPD standards (BDMC 18.98.120). Master Planned development on the North Triangle Property will feature approximately 200,000 square feet of office and other general commercial uses and 190,000 square feet of retail uses on approximately 35 acres of that property.

As the North Triangle Property is within the City of Black Diamond's proposed Gateway Overlay District, those guidelines will influence the frontage along SR 169. Signage, landscaping and building setbacks will be influenced by the ordinance.

SCHOOL SITE

Approximately 10 acres in the northern part of the Main Property will be provided for a new elementary school site to serve the future student population of the MPD and existing and future students in the surrounding neighborhood. The applicant will coordinate with Enumclaw School District regarding specific School District needs, future potential acquisition and development of the site, provision of school bus transportation to/from the site and other school-related issues.

PARKS, OPEN SPACE, AND TRAILS

The Lawson Hills MPD will include a coordinated network of parks, open space and trail corridors. Open space will provide recreational opportunities and protection of environmentally sensitive areas and their buffers. It will also provide relief from the built environment by providing physical and visual buffers. The open space will provide connectivity to existing and planned open space, trail corridors and wildlife corridors on and adjacent to the site.

A total of approximately 138 acres of open space will be provided in the Lawson Hills MPD. Approximately 123 acres of open space will be located throughout the Main Property, including several neighborhood parks planned at the master developer level, environmentally sensitive areas and their buffers, forested areas, stormwater ponds/facilities, and trail corridors. Additional open space would be provided in school playfields, pocket park areas, trailheads, etc. throughout the property as land areas develop. This detail is further described in the Parks, Open Space and Trails Chapter.

Approximately 15 acres of open space will be located on the North Triangle property, including preservation of a view protection buffer along SR 169, environmentally sensitive areas and their buffers, and other forested areas and trail corridors as required in the BDUGGA.

ACCESS AND CIRCULATION SYSTEM

An internal road system will be constructed in phases to serve the Main Property. Primary access to this property will be provided via Lawson Parkway from SR 169 and Lawson

EXECUTIVE SUMMARY

Street/SE Green River Gorge Road. The intersection of the internal road system and SR 169 will be improved with a traffic signal or other control and additional lanes.

An internal road system will also be constructed to serve the North Triangle Property. The main road will connect to SR 169 and will generally be located in the vicinity of the City's planned North Connector Road (as shown in the City's June 2009 Comprehensive Plan).

SEWER AND WATER

SEWER

Sewer service on the Main Property will be provided via new sewer mains located within onsite roads and utility tracts. The onsite sewer mains will gravity flow to the west through the property to a new offsite sewer main extension or existing sewer lines that will connect to the Black Diamond Pump Station (Metro Pump Station G). There are several potential alignments for the off-site sewer extension or upgrades to existing lines. Sewer connections to existing onsite residences located near Botts Drive will be abandoned. The onsite septic systems will be removed as well unless completed earlier through separate action. The existing sewer main located in Botts Drive will be upgraded or replaced and flows will be redirected to the offsite sewer mains. Sewer service to the offsite residences located along Botts Drive and to the east of the Main Property will be maintained with the proposed MPD. The existing sewer mains that currently cross the site from the residences to the east will be relocated or rerouted to maintain sewer service, as necessary.

Sewer service to the North Triangle Property could be provided via onsite sewer mains that will gravity flow to a lift station and force main located on the property or on Parcel B of The Villages MPD. This onsite system could connect to a new offsite sewer main (likely a force main) that will extend to the existing sewer main located in SR 169 to the east or other alternate route to connect to the Black Diamond Pump Station. Upgrades to the existing sewer system between the connection point at SR 169 and the Black Diamond Pump Station may be required to provide the capacity needed to serve proposed development on the North Triangle Property. All onsite sewer facilities, proposed extensions, and any other necessary downstream upgrades will meet City standards.

WATER

New water mains will be constructed within the roads, utility tracts and easements on the Main Property that will connect to the existing City of Black Diamond water system at several locations. The Main Property will be served by the two existing Black Diamond reservoirs; the 850 zone reservoir will serve the lower portion of the Main Property and the 965 zone reservoir will serve the middle portion of the Main Property. The 965 zone reservoir will be evaluated and upgraded as necessary to meet demand from the MPD. It is expected that a pump station will be constructed near the 965 zone reservoir to pump water up to a new reservoir to be located on the eastern edge of the property. Alternatively, the existing pump station at the 850 zone may be utilized to pump to this proposed 1175 zone reservoir located in a higher elevation pressure zone, and the 965 zone reservoir

could be abandoned. This new reservoir will serve the remainder of the Main Property that cannot be served by existing pressure zones. This will include upper portions of the property which will be served via main lines that will be gravity-fed from the new reservoir.

Water is proposed to be extended to the North Triangle Property via a looped 12-inch main. Alternatively, a single 16-inch main could be extended to the property from the existing main located in SR 169 to the south of the property. This water main extension may be located in SR 169, or in an alternate alignment approved by the City. Fire flow will be evaluated for both the North Triangle Property and the Main Property, and system improvements provided, as necessary. All improvements will meet current standards (as they are ultimately adopted) in the City's 2008 Comprehensive Water System Plan.

STORMWATER CONTROL

The stormwater control system for the Lawson Hills MPD will be designed and constructed in accordance with the 2005 Ecology Manual that is expected to be adopted by the City of Black Diamond. Based on this manual, post-development stormwater discharge rates will match pre-development rates ranging from 50 percent of the 2 year peak flow up to the full 50-year peak flow. Hydrologic modeling was conducted via the KCRTS model (a continuous simulation model), as required by the manual, to determine the flow control standard for the stormwater control system. Detention ponds were also sized using this model.

MAIN PROPERTY

Detention ponds will be provided to control release rates from the Main Property. Five detention ponds are proposed throughout the property, one detention facility may be located offsite. Post-development drainage basins will be configured and outfall locations selected to reduce impacts on downstream water resources (i.e., due to erosion or reduction in stream base flows). Where possible, stormwater discharge will be directed towards natural discharge locations, including: Lawson Creek, Mud Lake, Ginder Creek and a defined channel that flows to the Unnamed Creek tributary to Jones Lake. Runoff from rooftops and other non-pollution generating surfaces will be used to maintain recharge to the onsite wetlands.

Two options are proposed for discharge of the stormwater on the Main Property. Under both of these options part of the stormwater runoff from the central portion of the site will be piped from stormwater ponds in the western portion of the site to locations near Jones Lake. The routes under the two options will differ, but both are proposed to by-pass a portion of Lawson Creek downstream of the site and thereby avoid exacerbating existing erosion problems in the Creek. Two options are also proposed to address stormwater runoff from the extreme western portion of the site and from the frontage improvements proposed on SR 169. The options for this component of the stormwater control system will feature larger or smaller detention ponds and possibly water quality facilities offsite.

EXECUTIVE SUMMARY

Water quality treatment on the Main Property will be provided by wetponds, and a treatment sequence featuring a basic wetpond followed by a sand filter. Wetponds will be used for phosphorous treatment on those portions of the property that drain to Lake Sawyer. Wetponds followed by a sand filter will be used on those portions of the property where 50 percent or more of the proposed development will be in commercial and/or multifamily uses.

NORTH TRIANGLE PROPERTY

The majority of the North Triangle Property is underlain by outwash soils with good infiltration rates. Therefore, stormwater runoff is proposed to be infiltrated in the lower portion of the North Triangle Property, together with offsite areas that currently infiltrate in this portion of the property.

Water quality treatment for runoff from paved surfaces on the North Triangle Property will be provided prior to infiltration through one or more of the methods from the 2005 Ecology Manual that will meet enhanced and phosphorous removal requirements. The methods include: large sand filter, amended sand filter, stormwater treatment wetland followed by sand filter, compost amended filter strip and two-facility treatment sequences. Where possible, sand filters will be incorporated into landscape areas for water quality treatment. Runoff from roof tops and other non-pollution-generating surfaces will not receive water quality treatment prior to infiltration, as allowed by the Ecology Manual.

LOW IMPACT DEVELOPMENT

The design and development of the MPD will incorporate Low Impact Development (LID) methods and best management practices in order to reduce the potential impacts of development on water resources when practical to enhance the overall environment and character of the community and reduce long term maintenance costs. LID measures will be incorporated into the site planning, and stormwater control, roadway and utility systems.

The site plan for the MPD is intended to minimize the amount of site disturbance and to protect natural features, including water resources. The clustering of development will retain approximately 138 acres of the total MPD site area in open space. LID measures that may be used in the design of individual lots include: reduced front yard setbacks to decrease driveway lengths and associated impervious surface area, and decreased lot sizes to minimize the overall development footprint.

The stormwater control system will maintain wetland recharge for wetlands located on the Main Property in order to protect wetland hydrology and function. Runoff from rooftops and detention facilities will be used to recharge onsite wetlands.

The outwash soils on the North Triangle property are well suited to many LID concepts, because of their high infiltration rates. As mentioned previously, stormwater runoff will be infiltrated for the entire North Triangle property. Runoff from rooftops and other non-pollution generating surfaces will be infiltrated directly without water quality treatment.

Porous pavement and pavers could be used on non-pervious surfaces, such as walkways. LID concepts could also be used within landscape planter islands and medians, such as: bioretention facilities, rain gardens, infiltration basins with amended soils, and mixing of soil strippings with compost for top dressing over planters.

LID techniques could be incorporated into the proposed street and circulation network on both properties to reduce the amount of impervious surface area. These techniques include: narrower street widths, sidewalks on one side of the street, street trees and landscape meridians, narrower lot frontages to reduce the overall road length per home, pedestrian paths in open space areas to increase connectivity, and clustering lots to reduce road lengths.

CLEARING AND GRADING

Development of the MPD as residences, retail/commercial and office areas, a school site, parks, roadways and other infrastructure will require clearing and grading within the site and in certain offsite areas. The design plan for Lawson Hills respects the hillside nature of the site and works closely with the existing topography. Shallow bedrock conditions further influence the development plan and grading.

A specific grading plan has not yet been formulated; however, it is estimated that approximately 1 million cubic yards of soil could be exported and 665,000 cubic yards of soil could be imported for construction of the entire project, assuming that high moisture content soils from the site will be exported. If admixtures, such as cement or kiln dust, are used to amend the high moisture content soils onsite, approximately 540,000 cubic yards of soil could be exported and 165,000 cubic yards of soils could be imported. It is likely that a portion of the high moisture content soils will be treated with admixtures and a portion will be exported. Therefore, the actual amounts of soil to be imported and exported will likely fall between the above values. Exported soils will be transported to an approved disposal location.

DEVELOPMENT APPROVAL PROCESS

Issuance of an MPD permit by the City Council and subsequent execution and recording of a development agreement is the first step in the development process. In addition, a Planned Action ordinance will be adopted that establishes the level of development and thresholds within the MPD that can occur without additional SEPA review. These documents provide the standards and procedures for which all future implementing development actions within the MPD boundaries, such as preliminary plats, commercial site plans, grading permits, and others, will be reviewed against. Appropriate permits will be submitted for each future preliminary land use approval. Following preliminary land use approval (e.g. preliminary plat), detailed engineering and construction documents would be developed and approved by the City prior to infrastructure and/or building construction.

CONSTRUCTION SCHEDULE

Development of the Lawson Hills MPD is expected to commence in 2010. Full buildout is anticipated to occur by 2025. Phasing of residential development will largely depend upon market conditions. Development of the commercial/retail and office areas will also depend upon market conditions. The commercial/retail and office area on the North Triangle Property will likely be developed within the first few years of MPD development.

PROJECT HISTORY

The City of Black Diamond, including the historic downtown, Morganville, Lawson Hills and various additional properties, was incorporated in 1959. The City completed its first Comprehensive Plan in 1980. This plan proposed future annexation of lands to the northwest, east and southwest to the City. Subsequent annexations in 1985 and 1994 added lands to the northwest and southwest of the City. The City of Black Diamond completed its first Comprehensive Plan in compliance with the Growth Management Act (GMA) in 1996. That same year, the City negotiated a "potential annexation area" (PAA) agreement with King County and nearby property owners. This agreement was formalized as the Black Diamond Urban Growth Area Agreement (BDUGAA) (see below for details). Following execution of the BDUGAA, the City annexed an area around Lake Sawyer and the West Annexation Area to the City in 1998 and 2005, respectively (the North Triangle Property and a portion of the proposed Villages MPD site are in the West Annexation Area). The Covington Creek and the Lake 12 Annexation Areas are the remaining PAAs.

PRIOR PLANNING AND AGREEMENTS

Following are further descriptions of key planning actions and agreements and their relationship to the Lawson Hills site and its proposed development.

BLACK DIAMOND URBAN GROWTH AREA AGREEMENT

In December 1996, the City of Black Diamond, King County, Plum Creek Timber Company, L.P., and Palmer Coking Coal Company entered into the Black Diamond Urban Growth Area Agreement (BDUGAA) (adopted as King County Ordinance No. 12534). This joint planning effort and agreement provides the foundation for the annexation and development of properties within the City of Black Diamond's Urban Growth Area (UGA). Through the agreement, an approximately 782-acre Potential Annexation Area (PAA) was identified that coincides with the City's UGA and includes: the West, South, East and Lake 12 Annexation Areas. The PAA includes lands that upon annexation to the City are intended for urban development and lands that are to be set aside as permanent open space. Implementation of the BDUGAA will result in the protection of over 2,500 acres of open space in the City, unincorporated County and the City's UGA. The agreement sets forth the conditions for (i.e., availability of sewer and water service and major road access) and potential timing of the annexations. The agreement includes provisions for establishing appropriate land uses, zoning, residential density and development standards for urban development in the PAAs. The BDUGAA also directs the City to establish a Transfer of Development Rights Program for Open Space (TDR). Since 1996, portions of the PAA have been annexed to the

City (in the Lake Sawyer and West Annexation Areas, as noted above) and temporary conservation easements were put in place in anticipation of future development as required by the BDUGAA.

As indicated above, the Lawson Hills North Triangle Property is a portion of the West Annexation Area and the easternmost portion of the Lawson Hills Main Property is located in the East Annexation Area. Therefore, these properties/portions of properties are subject to the provisions of the BDUGAA. The West Annexation Area was annexed to the City in 2005. The East Annexation area is anticipated to be annexed concurrent with the MPD application. As required by the BDUGAA, water and sewer service and major road access for the East Annexation Area must be available at the time of annexation, or provisions must be in place so that this service/infrastructure can be provided at the time of project completion.

BLACK DIAMOND TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM

In December 2003, the City of Black Diamond adopted the Black Diamond Transferable Development Rights (TDR) Program via Ordinance No. 752 (the ordinance was subsequently codified as Chapter 19.24 of the Black Diamond Municipal Code). This program is being used, in conjunction with other measures, to protect property rights while allowing development rights to be transferred from properties that have been determined to be of greater public benefit as open space, parks or community facilities, in accordance with the BDUGAA.

Generally, the program allows the City to transfer development rights from properties it wants to protect from development (TDR Sending Areas), to other areas within the City that the City has determined are better suited to urban development (TDR Receiving Areas). Eligible sending areas are shown on the TDR Sending Area Map, attached to Ordinance No. 752 as Exhibit 2. Eligible TDR Receiving Areas are identified on the TDR Program Map, also attached to Ordinance No. 752 as Exhibit 2. Property owners who sell their development rights must establish conservation easements on their land permanently restricting future development and protecting/preserving the environmental/resource values of the TDR Sending Area. Developers, who purchase the development rights from properties to be conserved can transfer those rights to eligible receiving sites and increase the residential densities on their property, the TDR Receiving Area, beyond levels that would otherwise be allowed.

The 50-acre East Annexation Area is designated as a TDR Receiving Area and is, therefore, eligible to accommodate urban residential development. A 50-acre In-City Forest Land, located to the south of and adjacent to the Main Property, is designated as a TDR Sending area by the City's TDR Program. The applicant has secured the TDRs from the In-City Forest Property, which was recently conveyed to the City. Once the East Annexation Area is brought into the City, the TDRs will be applied to the East Annexation Area as contemplated in the BDUGAA.

EXECUTIVE SUMMARY

BLACK DIAMOND AREA OPEN SPACE AGREEMENT

In June 2005, the City of Black Diamond, King County, Plum Creek Timber Company and Cascade Land Conservancy entered into the Black Diamond Open Space Agreement. The purpose of the agreement was to more specifically identify lands that qualify as In-City Open Space required to be protected or conserved under Section 7 of the Black Diamond Urban Growth Area Agreement. It further sets forth the steps that must be carried out to meet these BDUGAA requirements prior to Annexation of the South and West Annexation Areas into the City. The agreement included conservation easements, deeds and dedication documents that protected or conserved a substantial portion of the In-City Open Space areas required for the West and South annexation areas.

The In-City Open Space specified in the agreement included preservation of not less than 55 acres of property along SR 169 to create a visual buffer (or view corridor open space) on the Lawson Hills North Triangle Property and the adjacent property to the east, and a trail corridor on the adjacent property to the east. The intent of the visual buffer is to obscure any future development on the North Triangle Property and the property to the east from views along SR 169 with existing or new vegetation. The In-City Open Space to be protected/conserved that is specified in the Open Space Agreement also includes the 50-acre In-City Forest Land, located to the south of the Lawson Hills Main Property (subject to the TDR Program, as noted above).

WEST ANNEXATION AREA PRE-ANNEXATION AND DEVELOPMENT AGREEMENT

In December 2005, the conditions of the Black Diamond Area Open Space Agreement relative to the West Annexation Area were met and the area was annexed into the City. The BDUGAA required that the City and Plum Creek Land Company enter into an agreement to establish land uses, zoning and development standards for urban development in the West Annexation Area. The West Annexation Area Pre-Annexation and Development Agreement between these parties address these requirements.

The agreement establishes that zoning of the West Annexation Area, including the North Triangle Property will be MPD Overlay. The land uses allowed by the agreement on the North Triangle Property are commercial and residential uses and open space, as shown in the BDUGAA. The agreement stipulates that the North Triangle Property be developed in accordance with the development standards in effect when a complete MPD application is submitted. The allowed residential density, as well as the requirements for open space, sewer and water service, roads and development phasing, stipulated in the agreement will be met by the MPD development on the North Triangle Property.

BLACK DIAMOND MASTER PLANNED DEVELOPMENT ORDINANCES

In 2005, the City adopted Master Planned Development Ordinance No. 05-779 and No. 05-796 (these ordinances were subsequently codified as Chapter 18.98 of the Black Diamond Municipal Code). In April 2009, the City adopted Ordinance No. 09-897 which significantly revised Chapter 18.98. These ordinances describe the development standards,

LAND USE OVERVIEW

The Lawson Hills site (including both the Main Property and the North Triangle) will be developed with a mix of uses including: residential, retail, general commercial, office, educational, civic, and recreational uses, trails and open space. The Land Use Plan is shown on Figure 3-1.

The maximum level of development is 1,250 residential units (approximately 930 single family detached and approximately 320 multifamily attached dwelling units); 390,000 square feet of office, destination, general and neighborhood commercial uses are proposed. While the total square feet of office and commercial uses (390,000) will not change, the mix and location of retail, commercial and office uses is approximate and may change. The commercial/office/retail is anticipated to have the following approximate distribution: 190,000 square feet destination and neighborhood retail, 200,000 square feet office, plus additional public and institutional uses. In addition, areas for public and civic uses, approximately 138 acres of open space (including sensitive areas and their buffers and forest areas) and other recreational uses will be provided in the MPD.

Table 3.1 summarizes the uses and approximate areas within the MPD property by land use categories. The overall average density of the project site will be 4 dwellings per gross acre.

Table 3.1
MPD Land Use Summary

Land Use Type	Area (Estimated Acres)	% of Total Property
Residential		
MPD Low Density	79	21%
MPD Medium Density	63	17%
MPD High Density	23	6%
Commercial/Office/Retail	35	10%
School Site	10	3%
Open Space ¹	138	37%
Streets (ROW)	23	6%
Total	371	100%

¹ Includes sensitive areas and their buffers, neighborhood and community parks, stormwater ponds and forest areas; does not include pocket parks additional parks and recreational facilities provided by parcel developers, trailheads, trails, school playfields, plazas or other open space within commercial areas.



LAND USE

The Main Property provides residential neighborhoods of varying densities linked by the spine road and an extensive open space and trail system. Neighborhoods are clustered and surrounded by large areas of open space. To reduce the visual impact of a hillside development, lower density neighborhoods and significant open space areas are located in visually prominent hillside areas. Medium and higher density residential neighborhoods are proposed adjacent to existing development of similar density along Lawson Street and on the southwest and southeast portions of the site where they will be screened by a dip in the topography. The overall density is spread throughout the site rather than concentrated in one area to create variation in the development pattern similar to the existing pattern within the City.

The North Triangle is proposed to provide approximately 35 acres designated for commercial/office development sufficient to ensure that the MPD has a positive fiscal impact on the City and create jobs. A forested buffer is proposed to visually screen the proposed commercial/office areas from SR-169.

RESIDENTIAL

Each residential land use category intentionally allows a mix of housing types. This intentional mix is an important component of the organic urbanism concept. It will prevent the cookie-cutter appearance common in many suburban subdivisions. Common design elements and guidelines will be the thread linking the neighborhoods within the MPD, while the mix of housing types will allow each neighborhood to develop its own individual character.

Low Density (MPD-L). The low density residential category provides for predominantly single family detached housing types. Attached housing in the form of duplexes, triplexes and quadplexes are allowed within the category provided they are designed to fit into the predominantly single family character of the neighborhood. The density range for this category is 1-8 dwellings per acre.

Medium Density (MPD-M). The medium density residential category provides for single family detached dwellings on small lots, townhouses, cottages, and duplexes. The density range for this category is 7-12 dwelling units per acre.

High Density (MPD-H). The high density residential category provides a mix of housing types including cottages, attached townhouses and stacked flats. The density range for this category is 13-30 dwelling units per acre. Densities in the range from 18-30 dwelling units per acre will be allowed subject to the criteria for such densities contained in the City's Master Planned Development Ordinance.

UNIT COUNTS BY LAND USE CATEGORY

Table 3.2 provides a general estimate of the number of units by designation. Since there are many development parcels within each category and the density may vary on each, this table is not intended to replace the total cap of 1,250 dwelling units proposed. It is intended to show that the typical densities of most development will result in the approximate number of total dwelling units proposed.

**Table 3.2
Density Ranges**

Land Use Designation	Density Range (du/acre) Min-Max	Target Density (du/acre)	Approximate Acres	Projected Units
MPD-L	1-8	5	79	395
MPD-M	7-12	9	63	567
MPD-H	13-30	13	23	299

¹ Note: Total area may shift with final planning and implementation approvals.

COMMERCIAL/OFFICE/RETAIL

Commercial/office/retail uses will be provided in the proposed MPD on the North Triangle Property. These uses will contribute positively to the City's ability to achieve a net fiscal benefit for the community, as required by the City's MPD standards (BDMC 18.98.120). A wide variety of retail, commercial, office, and civic uses are allowed within this category.

This category includes uses providing services or sale of goods or merchandise to the public. Uses include, but are not limited to: banks, travel agencies, hotel/motels, eating and drinking establishments, clothing stores, drug stores, gift shops, video rental, bookstore, grocery stores, variety stores, paint stores, craft stores, specialty stores, theaters, wholesale clubs, and gas stations.

Office uses include general office, research and development, technology, biotechnology and medical equipment, light manufacturing, wholesaling, mini-storage, distillery, brewery, winery, religious and educational uses, civic, continuing care, institutional uses including but not limited to and business support services.

SCHOOL

The Schools category is an overlay intended for a school site and other accessory uses and facilities. Parcel L5 is proposed as Elementary School Site. In the event that the parcel is not needed for a school, it shall revert to the MPD-M category.

DESIGN CONCEPT AND LAND USE PLAN

PARKS, OPEN SPACE AND TRAILS

The open space category is intended for protection of certain critical areas, passive and active recreation, and utilities. Lawson Hills MPD includes a coordinated network of open space, parks and trail corridors. It also provides relief from the built environment by providing physical and visual buffers. The open space provides connectivity to existing and planned open space, trail corridors and wildlife corridors on and adjacent to the site. A coordinated trail system is proposed to provide links between parks and all uses within the proposed MPD.

Per the MPD standards (BDMC 18.98.120 (G), 18.98.140(F) and 18.98.140 (G)) The Lawson Hills MPD must provide the open space required by prior agreements. Portions, but not all of the property, are subject to the BDUGGA open space agreement which includes open space requirements. Additionally, to cluster development or increase densities; the MPD must provide either the open space required per previous agreements or 50% open space where there are no prior open space agreements. The 50-acre East Annexation Area (located on the Main Property) and a 54-acre portion of the West Annexation area (the North Triangle Property) are subject to prior open space agreements. The open space requirement for the MPD under these agreements is the dedication of the 50 acre In-City Forest land to the City (East Annexation Area) and preservation of 55 acres for a view and trail corridor on the North Triangle and other property east of SR-169. In order to utilize clustering or to increase densities, the Lawson Hills MPD must provide 134 acres of open space in addition to the open space required under prior agreements (371 acre site area - 104 acres in PAA onsite = 267 acres; 50 percent of 267 acres = 134 acres of required open space). Currently 138 acres are provided on-site including the view corridor. Additional open space will be provided in school playfields, trails and neighborhood parks.

Table 3.3
Open Space

	Gross Acres	BUDGAA/ Open Space requirement	MPD Open Space Provision (If applicable)	Proposed open space	Net difference over/ (under)
Main Property not including PAA	267	0	134	119.2	(14.8)
PAA- North Triangle	54	55 acres for view and trail corridor*	0	55 acres for view and trail corridor*	0
PAA- East Annexation Area	50	50 acre In- City Forest	0	50 acre In- City Forest	0
Total In City/UGA MPD open space	371	105*	134	224.2*	(14.8)**

*Only a view corridor needs to be provided on-site. The remaining acreage is provided off-site to the north and east in the form of a view corridor and trail corridor.

** Additional open space will be provided in the form of school playfields, trails and neighborhood parks that are not shown on Figure 3-1.

ALLOWED USES

The range of allowed uses is broad to maintain flexibility and respond to the market over the project build-out. The intent and purpose of the land use categories guides the allowed uses:

- The Commercial/Office/Retail category is intended for a wide variety of large scale commercial, institutional, office, retail and medium and high density residential uses. The intent of this designation is to provide sufficient commercial and office uses to generate employment and retail income for economic development within the City.
- The School category is primarily intended for schools. The school(s) may elect to share facilities with other Institutional uses such as, but not limited to, YMCA or Boys' and Girls' Clubs. If not needed for a school, the parcel may be changed.
- The Open Space category is intended for recreation, trails, temporary uses, utilities, and the protection of critical areas.

Table 3.4
Allowed Uses

Principal Use	MPD-L	MPD-M	MPD-H	Commercial Office Retail	School	Open Space
Dwelling Unit						
Detached	P	P	P	A	X	X
Attached <=6 units per building	P	P	P	X	X	X
Attached >6 units per building	X	P	P	P	X	X
Model Homes/Sales Office	P	P	P	P	P	P1,4
ADU	A	A	X	A	X	X
Office	A	A	A	P	A	A1
Institutional	P	P/C5	P/C5	P/C5	P	P1
Recreation	P	P	P	P	P	P2
Retail	P3	P3	P3	P	A	A1
Temporary Use(6)	P	P	P	P	P	P1
Utility Facility						
Major	P	P	P	P	P	P1
Minor	P	P	P	P	P	P

P=Permitted, X= Prohibited, A= Permitted as an accessory or incidental use, C= City of Black Diamond Conditional Use Permit

1. Allowed outside of sensitive areas and buffers.
2. Allowed outside of sensitive areas and buffers. passive use parks, trails and open space are allowed within sensitive areas and buffers consistent with the Sensitive Areas Ordinance.
3. Limited to neighborhood commercial such as corner stores and other small scale Retail establishments.
4. Model homes and temporary uses such as contractor storage yards, construction staging areas and similar construction related uses are not intended to be permanent uses and must cease once the phase or Development the use serves is completed.
5. A high school located within these classifications will require a conditional use permit processed pursuant to City of Black Diamond's Conditional Use Permit process.

ACCESSORY USES

The Table of Allowed Uses classifies different principal uses according to their different impacts. Whenever an activity is conducted in conjunction with another principal use and the former use (i) constitutes only an incidental or insubstantial part of the total activity that takes place on a lot, or (ii) is commonly associated with the principal use and integrally related to it, then the former use may be regarded as accessory to the principal use and may be carried on underneath the umbrella of the principal use. To be "commonly associated" with a principal use it is not necessary for an accessory use to be connected with such principal use more times than not, but only that the association of such accessory use with such principal use takes place with sufficient frequency that there is common acceptance of their relatedness.

The following activities, subject to Architectural Review Committee (ARC) Design Guidelines, are specifically regarded as accessory to residential principal uses:

- Home occupations/live-work;
- Hobbies or recreational activities of a noncommercial nature;
- Accessory living quarters, mother-in-law units and accessory dwellings;
- Keeping household pets;
- On-site rental/sales office;
- Storage of yard maintenance equipment;
- Appropriate storage of private vehicles, e.g., motor vehicles, boats, trailers or planes; or
- Greenhouses.

FLOOR AREA RATIO

No floor area ratio is proposed. Applying the FAR in this application does not satisfy the intent of the MPD code: to "encourage imaginative site and building design and development layout" (BDMC 18.98.010.D). A limit applied in that manner would be restrictive to future designs. As contemplated in the MPD application, design standards that define setbacks, height, and other building related standards will effectively achieve the same goal. In addition, the Master Developer will have architectural guidelines that will apply to building bulk and mass, just as the City has their design guidelines that will also apply to this project. These elements alone will be sufficient to guide and regulate future commercial building design and construction.

CHANGE THE CATEGORY OF DEVELOPMENT PARCELS

Any residential development parcel can adjust up or down one residential land use category through the administrative approval process provided that the total dwelling unit cap is not exceeded. For instance, MPD-L may move up to MPD-M, or MPD-H may move down to MPD-M. In no instance may a parcel move up or down more than one category from its original category as depicted on Figure 3-1.

A development parcel that is classified school, but is not dedicated to the Enumclaw School District may revert to the MPD-M category at the election of the Master Developer. The Master Developer may elect to retain the school category for development allowed within the category or change the parcel to MPD-M.

Any portion of open space shown as a sensitive area or buffer on Figure 4.3 that is determined not to be a Sensitive Area or buffer will be changed to a category that is compatible with the category of abutting development parcel(s). The administrative approval process for changing to a different category is described in Chapter 13 and includes:

- Submittal of an application for an administrative category change;
- Notice of application or notice of decision provided to the owners located within 300 feet of the boundaries of the development parcel subject to the category change;
- Decision by the Director of Planning and Community Development to include a finding that the transportation, stormwater, water and sewer system improvements necessary to support the change are in place or will be provided at the time of occupancy;
- The change in category will not result in the maximum number of residential units or combined Commercial/Office/Retail square feet to be exceeded or the total area of required Open Space to be reduced unless an amendment to the MPD permit is approved; and
- The Director's decision is appealable to the Hearing Examiner.

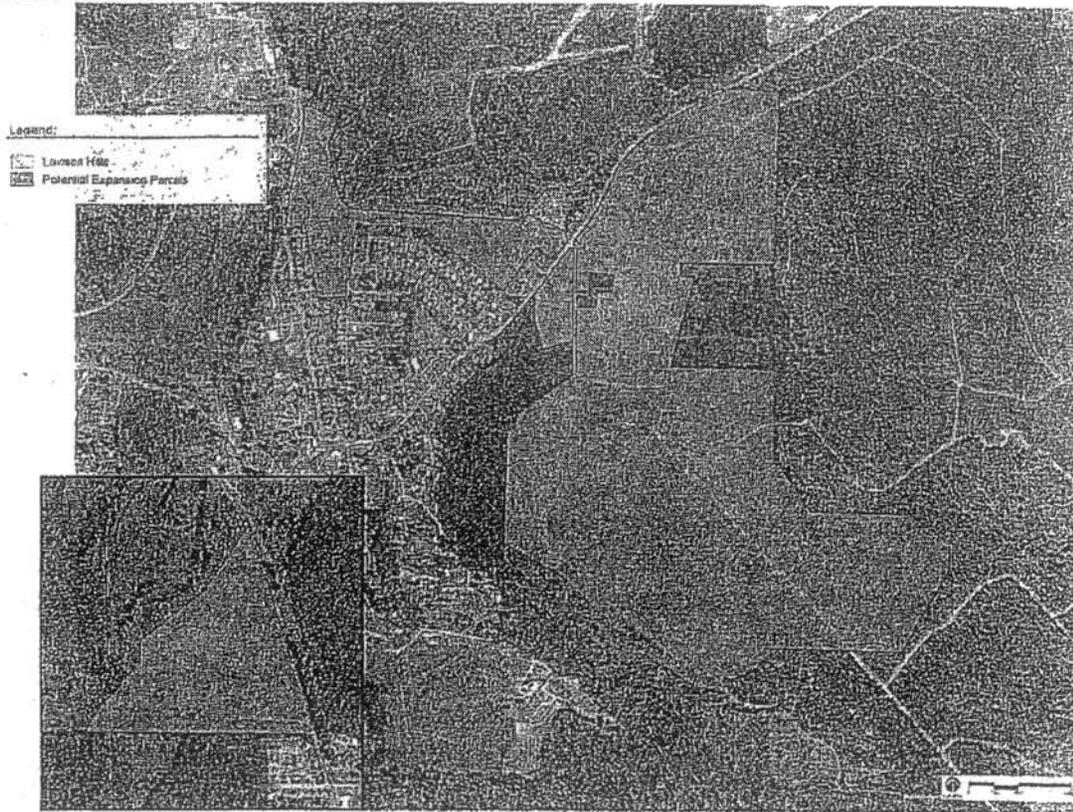
EXPANSION AREAS

Any or all of the expansion areas may be developed during the buildout period subject to the conditions listed below. The Master Developer shall select a compatible land use category as part of the expansion request. Expansion parcels are not intended to allow development of more units or square feet than the total amounts proposed in this Chapter unless a Major Amendment to the MPD permit is processed pursuant to BDMC 18.98:

- Written notice is provided to the City by the Master Developer of its intention to develop the expansion area(s); and
- The Master Developer must have ownership or control of the expansion area(s) or the Master Developer and the owner(s) of the expansion area must agree that the expansion area will be subject to the requirements of the approved MPD and development agreement; and
- The expansion proposal includes the location of proposed land use categories and open space; a conceptual street plan showing the location of any proposed minor arterials and collectors; and conceptual water, sewer and stormwater plans; and

DESIGN CONCEPT AND LAND USE PLAN

FIGURE 3-3 POTENTIAL EXPANSION AREAS



- The proposal has complied with the requirements of the State Environmental Policy Act through adoption of an addendum to the EIS or other appropriate method; and
- The expansion area approval is reviewed using the process and procedures for either a Minor or Major MPD Permit Amendment, as applicable to the proposal.

OWNERSHIP AND MAINTENANCE

All non-sensitive parks, trails and open space will be owned and maintained by the master home owner's association (HOA) or Master Developer.

All streets, stormwater facilities, water facilities and sewer facilities are proposed to be owned and maintained by the City of Black Diamond except for the following which will be privately owned and maintained by the Master Developer, HOA or a subset thereof:

- Stormwater vaults serving commercial property;
- Streets or drives serving less than 20 residences that are labeled "Private" on an implementing plat;
- All maintenance for landscaping associated with all streets within the community will be provided by the Master Developer, HOA or a subset thereof.

ORDINANCE NO. 10-946

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, KING COUNTY, WASHINGTON, APPROVING THE MASTER PLANNED DEVELOPMENT FOR THE VILLAGES; AMENDING THE CITY'S ZONING MAP TO DESIGNATE CERTAIN PROPERTY "MASTER PLANNED DEVELOPMENT - MPD"; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, in accordance with a request by BD Village Partners, LP ("the Applicant"), the City of Black Diamond determined that an Environmental Impact Statement ("EIS") should be prepared concerning the Applicant's Villages Master Plan Development proposal pursuant to the State Environmental Policy Act, RCW 43.21C ("SEPA"); and

WHEREAS, the City retained an independent consulting firm, Parametrix, to prepare the EIS; and

WHEREAS, on May 28, 2008 and pursuant to WAC 197-11-408 and Black Diamond Municipal Code ("BDMC") Section 18.98.060(A)(4)(b), Parametrix held a scoping meeting to obtain input from the public and other public agencies as to the proposed scope of the EIS; and

WHEREAS, on June 11, 2008, Parametrix held an additional meeting with other public agencies, including the Cities of Maple Valley and Covington, and the Washington Department of Transportation, to discuss the scope of the EIS's analysis concerning the proposed MPD's anticipated transportation impacts; and

WHEREAS, pursuant to Black Diamond Municipal Code ("BDMC") Section 18.98.060(A)(1), on January 27, 2009 the Applicant attended a pre-application conference with City of Black Diamond staff, prior to submitting its application for the Villages Master Planned Development ("Villages MPD"); and

WHEREAS, on February 7, 2009, the Applicant held a public information meeting concerning the Villages MPD application, pursuant to BDMC 18.98.060(A)(2); and

WHEREAS, on February 10, 2009, pursuant to BDMC 18.98.060(A)(3), the Applicant made a presentation concerning the overall planning and design concept of the proposed Villages MPD to the Black Diamond Planning Commission, and the Commission provided preliminary feedback to the Applicant regarding the consistency of this concept with the City's adopted standards, goals and policies; and

WHEREAS, on March 17, 2009, a second public information meeting was held concerning the proposed Villages MPD; and

WHEREAS, on May 28, 2009, the Applicant submitted an application for the Villages MPD approval to the City of Black Diamond; and

WHEREAS, on August 12, 2009, Parametrix held additional meetings with the government agencies listed above, to conduct a pre-release discussion of the draft EIS element related to the transportation impacts analysis; and

WHEREAS, at the June 11, 2008 and August 12, 2009 transportation meetings, Parametrix explained the methodology the EIS would use to analyze transportation impacts, the size and parameters of the EIS study area and study area intersections, and the expected trip distribution percentages, and the other public agencies concurred in Parametrix's approach; and

WHEREAS, on September 2, 2009, the City of Black Diamond issued a Draft Environment Impact Statement ("DEIS"); and

WHEREAS, on September 29, 2009, the City of Black Diamond held a public hearing on the DEIS; and

WHEREAS, on September 30, 2009, the City of Black Diamond extended the comment period, during which it would accept written public comment on the DEIS, until October 9, 2009; and

WHEREAS, on December 11, 2009, the City of Black Diamond announced the availability of the Final Environmental Impact Statement ("FEIS"); and

WHEREAS, on December 28, 2009, appeals of the FEIS were filed by Christopher P. Clifford on behalf of Annette Smith, Gilbert and Marlene Bortleson, Jay and Kelley McElroy, Melanie Gauthier, Michael Smith, Judith Carrier, Gerold Mittlestadt, Steve Sundquist; Vicki and William Harp and their daughter, Cindy Proctor; Joe May; and

WHEREAS, on December 31, 2009, the Applicant submitted a revised application for the Villages MPD to the City of Black Diamond; and

WHEREAS, pursuant to BDMC Section 18.98.060(A)(d), the Villages MPD application was forwarded to the Black Diamond Hearing Examiner; and

WHEREAS, pursuant to BDMC Section 19.04.250, the FEIS appeals were forwarded to the Black Diamond Hearing Examiner; and

WHEREAS, the Hearing Examiner scheduled consolidated hearings on the MPD application and the FEIS appeals, pursuant to WAC 197-11-680(3)(a)(v) and RCW 36.70B.120; and

WHEREAS, the Hearing Examiner held an open record hearing commencing on March 6, 2010 and continuing from day to day until March 22, 2010; and

WHEREAS, the Hearing Examiner accepted additional rebuttal presentations in accordance with the deadlines he had previously set, until April 12, 2010; and

WHEREAS, on April 15, 2010, the Hearing Examiner issued the Hearing Examiner Decision affirming the FEIS for the Villages MPD; and

WHEREAS, on May 10, 2010 the Hearing Examiner issued his Findings, Conclusions and Recommendation recommending approval of the Villages MPD, and issued an Errata and a signed copy of the Recommendation the following day, on May 11, 2010; and

WHEREAS, on June 21, 2010, the City Council convened its closed record hearing to consider the Villages MPD application; and

WHEREAS, the City Council continued the closed record hearing from day to day, and heard oral argument from and considered written materials submitted by parties of record from June 24, 2010 to July 14, 2010; and

WHEREAS, the City Council continued the closed record hearing from day to day to deliberate concerning the MPD application and to discuss potential litigation concerning it, from July 19, 2010 to August 24, 2010; and

WHEREAS, on August 24, 2010, the Black Diamond City Council approved a motion to direct the City Attorney to prepare a written ordinance approving the Villages MPD subject to conditions as discussed by the Council; and

WHEREAS, the City Council desires to approve the Villages MPD subject to certain specified conditions of approval as set forth herein, and to rezone certain parcels within the MPD to the zoning designation of "Master Planned Development – MPD"):

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings of Fact. The City Council hereby adopts the Findings of Fact set forth in Exhibit A attached hereto and incorporated herein by this reference.

Section 2. Conclusions of Law. The City Council hereby adopts the Conclusions of Law set forth in Exhibit B attached hereto and incorporated herein by this reference.

Section 3. Approval of Master Planned Development. Based on the Findings of Fact and Conclusions of Law adopted in Sections 1 and 2 above, the City Council hereby approves the Villages Master Planned Development, as set forth in the application dated December 31, 2009 and as delineated on the revised Land Use Plan map (Figure 3-1) dated July 8, 2010, subject to the conditions of approval set forth in Exhibit C attached hereto and incorporated herein by this reference.

Section 4. Rezone. Although pursuant to Black Diamond Municipal Code Section 18.98.130(B) a formal rezone of parcels within the Master Planned Development boundary is not required, in order to remove any uncertainty or confusion as to the applicable zoning designation, the City of Black Diamond Zoning Map is hereby amended to designate the parcels legally described and depicted in Exhibit D attached hereto and incorporated herein by this reference as "Master Planned Development – MPD."

Section 5. Severability. Each and every provision of this Ordinance shall be deemed severable. In the event that any portion of this Ordinance is determined by final order of a court of competent jurisdiction to be void or unenforceable, such determination shall not affect the validity of the remaining provisions thereof, provided the intent of this Ordinance can still be furthered without the invalid provision.

Section 6. Effective Date. This Ordinance shall be in full force and effect five (5) days after publication as required by law. A summary of this Ordinance may be published in lieu of the entire Ordinance, as authorized by State law.

Introduced on the 14th day of September, 2010.

Passed by the City Council on the 20th day of September, 2010.



Mayor Rebecca Olness

ATTEST:

Brenda L. Martinez
Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:

Chris Bacha
Chris Bacha, City Attorney

Published: 9/28/10
Effective Date: 10/3/10

EXHIBIT C
CONDITIONS OF APPROVAL
The Villages MPD

GENERAL

1. Approval of the MPD 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.

2. After approval by the City Council at an open public meeting and after a public hearing as required by law, a Development Agreement shall be signed by the Mayor and all property owners and lien holders within the MPD boundaries, and recorded, before the City shall approve any subsequent implementing permits or approvals. Any requirements deferred to the Development Agreement in this decision shall be integrated into the Agreement prior to any approval of subsequent implementing permits or approvals.

3. The Phasing Plan of Chapter 9 of the MPD application is approved, with the exception of the bonding proposal at p. 9-3 and the proposal for off-site trails at p. 9-2 (to the extent not already considered a regional facility) and parks at p. 9-10, and except as otherwise noted in these conditions of approval.

4. The Development Agreement shall specify which infrastructure projects the applicant will build; which projects the City will build; and for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur.

5. The Development Agreement shall specifically describe when the various components of permitting and construction must be approved, completed or terminated (e.g., when must open space be dedicated, plats recorded, and utility improvements be accepted by the City).

6. The Development Agreement shall include language that defines and identifies a "Master Developer." A single Master Developer shall be maintained through the life of the Development Agreement. The duties of the Master Developer shall include at least the following: a) function as a single point of contact for City billing purposes; b) function as a single authority for Development Agreement revisions and modifications; c) provide proof of approval of all permit applications (except building permits) by other parties prior to their submittal to the City; and d) assume responsibility for distributing Development Agreement entitlements and obligations and administering such.

7. The City shall have the ability but not the obligation to administratively approve off-site projects that would otherwise be compromised if they cannot be completed prior to approval and execution of the Development Agreement. In these instances, the applicant shall acknowledge in

writing that the approval of any such applicable projects does not in any way obligate the City to incur obligations other than those specifically identified in the approved permits for the applicable project.

8. The applicant shall submit a construction waste management plan for inclusion in the Development Agreement.

9. Homeowners Association(s) conditions, covenants and restrictions (CCRs) and/or the proposed Architectural Review Committee shall be required to allow the use of green technologies (such as solar panels) in all buildings. In addition, the CCRs shall include provisions, to be enforced by the HOA, prohibiting washing of cars in driveways or other paved surfaces, except for commercial car washes, and limiting the use of phosphorous fertilizers in common areas, so as to limit phosphorous loading in stormwater.

TRANSPORTATION

10. Over the course of project build out, construct any new roadway alignment or intersection improvement that is: (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan and in the City's reasonable discretion is (i) necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service deficiency as determined by the City's adopted level of service standard, or (ii) to provide access to or circulation within the project; (b) functionally equivalent to any said alignment or improvement; or (c) otherwise necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service failure as determined by the City's adopted level of service standard, or to provide access to or circulation within the project, as determined by the City in its reasonable discretion based on the monitoring and modeling provided for in Conditions 25 and 20 below. The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur. Any "functionally equivalent" realignment that results in a connection of MPD roads to Green Valley Road shall be processed as a major amendment to the MPD.

11. The City shall create, at the expense of the Applicant, a new transportation demand model for this project for use in validating the distribution of project traffic at the intervals specified in Condition No. 17. The new model shall incorporate, at an appropriately fine level of detail, and at a minimum, the transportation network from the northern boundary of the City of Enumclaw on SR 169 through the City of Maple Valley to the northern limits of that city. The new model shall include the intersections studied in the FEIS, together with the following additions: all existing principal and minor arterials in Black Diamond, Covington and Maple Valley and the unincorporated areas between these cities and specifically including the Kent-Black Diamond Road; additional study intersections at SE 231st Street/SR 18 westbound ramps, SR 169/SE 271st Street and SR 169/SE 280th Street in Maple Valley. External trips may be captured by any valid methodology including overlaying the new model onto the existing Puget Sound Regional Council transportation model. The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation. Key to the success of the new model is a well-coordinated effort and cooperation among the

110. Prior to approval of the first implementing plat or site development permit within a phase, the applicant shall submit an overall grading plan that will balance the cut or fill so that the amount of cut or fill does not exceed the other by more than 20%.

LANDSLIDE HAZARDS

111. Development of landslide hazard areas shall be avoided. Sufficient setbacks shall be required to assure or increase the safety of nearby uses, or where feasible grade out the landslide hazard area to eliminate the hazard in compliance with the city's Sensitive Areas Ordinance BDMC 19.10. [FEIS Mitigation Measure]

112. Stormwater and groundwater shall be managed to avoid increases in overland flow or infiltration in areas of potential slope failure to avoid water-induced landslides. [FEIS Mitigation Measure]

113. Geologically hazardous areas shall be designated as open space and roads and utilities routed to avoid such areas. Where avoidance is impossible, utilize the process in the Sensitive Areas Ordinance (supplied with adequate information as defined in code) and Engineering Design and Construction Standards (ED&CS) to build roads and utilities through these areas.

MINE HAZARDS

114. Development within the moderate mine hazard area may require additional mitigation measures, which shall be evaluated with future implementing development proposals.

115. All proposed development within mine hazard areas shall occur in conformance with BDMC 19.10.

116. All houses that are sold in classified or declassified coal mine hazard areas shall require a liability release from the homeowner to the City. The release must recognize that the City is not liable for actual or perceived damage or impact from the coal mine hazard area. The release form shall be developed and included in the Development Agreement.

VEGETATION AND WETLANDS

117. Structural measures such as silt fences and temporary sediment ponds shall be used to avoid discharging sediment into wetlands and other critical areas. [FEIS Mitigation Measure]

118. Implementing projects shall provide "on the ground" protection measures such as wetland buffers or root protection zones for significant trees. [FEIS Mitigation Measure]

119. New stormwater outfalls shall be located to avoid impacts to any stream and adjacent wetlands, riparian buffers, unstable slopes, significant trees, and instream habitat. Where all

on page 3-18); a maximum of 4,800 total residential units and 775,000 square feet of commercial space; and target densities (Table 3.2), except as modified herein. Corner store-style neighborhood commercial uses within residential land use categories shall be defined in the Development Agreement and shall only be allowed through minor amendment of the MPD. All other specifics shall be resolved through the Development Agreement process.

129. The project shall provide a mix of housing types in conformance with the MPD Design Guidelines. The Development agreement shall set targets for various types of housing for each phase of development.

130. Identification of specific areas where live/work units can be permitted shall be done as part of the Development Agreement or through an MPD minor amendment.

131. A minimum density of 4 du/per net acre for residential development shall be required for implementing projects, and shall be calculated for each development parcel using the boundaries of that parcel (or the portion thereof to be developed) as shown on the Land Use plan map (Figure 3-1, as updated July 8, 2010).

132. If the applicant requests to increase a residential category that abuts the perimeter of the MPD, it shall be processed as a Major Amendment to the MPD. Residential land use categories can otherwise be adjusted one category up or down through an administrative approval process provided they also otherwise meet the requirements for minor amendments outlined in BDMC 18.98.100.

133. The Development Agreement shall limit the frequency of proposed reclassification of development parcels to no more frequently than once per calendar year.

134. The Expansion Area process shall be clarified in the Development Agreement.

135. Project specific design standards shall be incorporated into the Development Agreement. These design guidelines must comply with the Master Planned Development Framework Design Standards and Guidelines. All MPD construction shall comply with the Master Planned Development Framework Design Standards and Guidelines, whether or not required by the Development Agreement.

136. A unit split (percentages of single family and multifamily) and commercial use split (commercial, office and industrial) shall be incorporated into the Development Agreement.

137. All commercial/office uses (other than home occupations and identified live/work areas) shall only occur on lands so designated. Additional commercial areas shall be identified on the Land Use Plan through future amendment to the MPD.

138. The project shall include a mix of housing types that contribute to the affordable housing goals of the City. The Development Agreement shall provide for a phase-by-phase analysis of affordable housing Citywide to ensure that housing is being provided at affordable

prices. Specifications for affordable housing needs within the project shall be determined as a result of the phase-by-phase analysis.

139. Exact specifications for the housing described in paragraph 122 shall be included within the Development Agreement.

140. A distinct land use category shall be created to recognize potential light industrial uses or the "office" category shall be renamed to properly indicate the range of potential uses. Areas intended to have light industrial type uses shall be identified on the Land Use Map that is made part of the Development Agreement.

141. The high density residential (18-30 du/ac) supplemental design standards and guidelines (MPD application Appendix E) shall become part of the Development Agreement.

142. Detached single family dwelling units shall be alley loaded, except where site conditions prevent alley loading or cause alleys to be impractical as determined by the City, in its reasonable discretion.

143. Homeowners Association conditions, covenants and restrictions (CCRs) or the Architectural Review Committee shall review, but shall not preclude, the use of green technologies such as solar panels.

144. Front yard setbacks and other specific lot standards shall be determined as part of the Development Agreement.

145. A FAR standard shall be established through the Development Agreement process.

146. No more than two floors of residential uses above ground floor commercial/office uses shall be allowed.

147. The orientation of public building sites and parks shall preserve and enhance views of Mt. Rainier and other views identified in the comprehensive plan. There are tailing piles located on property near Parcel B. The Applicant is not responsible for removal of those tailing piles, but future site and building design for Parcel B should consider the nature of the views to Mt. Rainier that may be possible if those piles are later removed.

148. The Applicant's requests for reduced parking standards in the Mixed Use Town Center as identified at p. 13-4 of the MPD application is granted. All other requests for deviation in the Chapter 13 of the MPD application are denied except for those deviations, mostly utility and street standards, that are identified in the recommendation as amenable to further review in the development agreement process. Any MPD deviations to the Sensitive Areas Ordinance are denied, because BDMC 18.98.155(A) provides that the Sensitive Areas Ordinance shall be the minimum standards for protection of sensitive areas within MPDs.

SENSITIVE AREAS/OPEN SPACE

149. The use of sensitive areas including but not limited to wetlands, landslide and mine hazard areas and their associated buffers for development including trails, stormwater management, etc. shall be regulated by BDMC Chapter 19.10. Appropriate mitigation, if required, for impacts as well as other required measures shall be evaluated on a case-by-case basis at the time of implementing project application.

150. Areas shown as natural open space in the figure on Page 5-7 of the application are required to remain natural with the possibility for vegetation enhancement. Modifications to these areas may be approved by the City in its reasonable discretion, on a case-by-case basis, only if necessary for construction of required infrastructure such as roads, trails or stormwater facilities. Any areas disturbed pursuant to such approval shall be replanted with native plants. Nothing in this condition shall allow grading or modifications in the sensitive areas and buffers, except as provided in the Sensitive Areas Ordinance.

151. The Development Agreement shall include a tabular list of the types of activities and the characteristics of passive open space and active open space so that future land applications can accurately track the type and character of open space that is provided.

152. The Development Agreement shall include language that specifically defines when the various components of permitting and construction must be approved, completed or terminated. For example; when must open space be dedicated, plats recorded, and utility improvements be accepted by the City.

153. Specific details on which open space shall be dedicated to the city, protected by conservation easements or protected and maintained by other mechanisms shall be established as part of the Development Agreement.

154. Once acreages have been finalized, phasing of open space (which includes parks and is identified within the MPD application) shall be defined and articulated for timing of final designation within the Development Agreement.

155. Once the mapped boundaries of sensitive areas have been agreed to, the Development Agreement shall include text that identifies that these areas are fixed. If during construction it is discovered that the actual boundary is smaller or larger than what was mapped, the mapped boundary shall prevail. The applicant shall neither benefit nor be penalized by errors or changes in the sensitive area boundaries as the projects are developed.

ADMINISTRATION

156. The proposed project shall have no adverse financial impact upon the city, as determined after each phase of development and at full build-out. The required fiscal analysis shall include the costs to the city for operating, maintaining and replacing public facilities required to be constructed as a condition of MPD approval or any implementing approvals related thereto. The fiscal analysis shall ensure that revenues from the project are sufficient to

maintain the project's proportionate share of adopted City staffing levels of service. The fiscal analysis shall be updated to show continued compliance with this criterion, in accordance with the following schedule:

a. Within five years, a new fiscal analysis shall be completed to determine the long-term fiscal impact to the City. If necessary, additional project conditions may be required.

b. Prior to commencing a new phase, including the first phase of construction.

The exact terms and process for performing the fiscal analysis and evaluating fiscal impacts shall be outlined in the Development Agreement, and shall include a specific "MPD Funding Agreement," which shall replace the existing City of Black Diamond Staff and Facilities Funding Agreement. The applicant shall be responsible for addressing any projected city fiscal shortfall that is identified in the fiscal projections required by this condition. This shall include provisions for interim funding of necessary service and maintenance costs (staff and equipment) between the time of individual project entitlements and off-setting tax revenues; provided, however, that in the event that the fiscal projection prepared prior to the commencement of Phase III indicates a likelihood of significant ongoing deficits in the city's general fund associated with operations or maintenance for properties within the MPD, the applicant must address the projected shortfalls by means other than interim funding.

157. The Applicant and other property owners may petition for the formation of a Community Facilities District to provide a mechanism for funding the costs of "facilities" as defined in Section 501 of SSB 6241. The City Council will review the petition as provided in SSB 6241 and, as set forth in Section 205, determine in its sole discretion whether the petitioners will benefit from the proposed district and whether the formation of a district will be in the best interest of the City and comply with the requirements of the Growth Management Act, Ch. 36.70A RCW.

The Development Agreement shall include language that specifically defines when the various components of permitting and construction must be approved, completed or terminated. For example: when must open space be dedicated, plats recorded, and utility improvements be accepted by the City.

158. The Development Agreement shall document a collaborative design/review/permitting process that allows City staff to participate in the conceptual stage of project planning in order to provide input on designs and choices that benefit the City as well as the applicant.

159. The Development Agreement shall specifically identify which rights and entitlements are vested with each level of permitting, including but not limited to the MPD Application approval, the Development Agreement approval, and Utility Permit approvals.

160. Reclassification of development parcels shall occur no more frequently than once per calendar year.

161. Proposed reclassification of development parcels located at the project perimeter to a higher density shall only occur through a Major Amendment to the MPD.

162. A process for including lands identified as "Expansion Areas" in the application shall be defined in the Development Agreement.

163. The Development Agreement shall define the proposed phasing plan for the various matters (utility and street infrastructure, parks, transferred development rights, etc.) subject to phasing standards.

164. Prior to the approval of the first implementing project of a defined phase, a detailed implementation schedule of the regional projects supporting that phase shall be submitted to the City for approval. The timing of the projects shall be tied to the number of residential units and/or square feet of commercial projects.

ORDINANCE NO. 10-947

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, KING COUNTY, WASHINGTON, APPROVING THE MASTER PLANNED DEVELOPMENT FOR LAWSON HILLS; AMENDING THE CITY'S ZONING MAP TO DESIGNATE CERTAIN PROPERTY "MASTER PLANNED DEVELOPMENT - MPD"; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, in accordance with a request by BD Lawson Partners, LP ("the Applicant"), the City of Black Diamond determined that an Environmental Impact Statement ("EIS") should be prepared concerning the Applicant's Lawson Hills Master Plan Development proposal pursuant to the State Environmental Policy Act, RCW 43.21C ("SEPA"); and

WHEREAS, the City retained an independent consulting firm, Parametrix, to prepare the EIS; and

WHEREAS, on May 28, 2008 and pursuant to WAC 197-11-408 and Black Diamond Municipal Code ("BDMC") Section 18.98.060(A)(4)(b), Parametrix held a scoping meeting to obtain input from the public and other public agencies as to the proposed scope of the EIS; and

WHEREAS, on June 11, 2008, Parametrix held an additional meeting with other public agencies, including the Cities of Maple Valley and Covington, and the Washington Department of Transportation, to discuss the scope of the EIS's analysis concerning the proposed MPD's anticipated transportation impacts; and

WHEREAS, pursuant to Black Diamond Municipal Code ("BDMC") Section 18.98.060(A)(1), on January 27, 2009 the Applicant attended a pre-application conference with City of Black Diamond staff, prior to submitting its application for the Lawson Hills Master Planned Development ("Lawson Hills MPD"); and

WHEREAS, on February 7, 2009, the Applicant held a public information meeting concerning the Lawson Hills MPD application, pursuant to BDMC 18.98.060(A)(2); and

WHEREAS, on February 10, 2009, pursuant to BDMC 18.98.060(A)(3), the Applicant made a presentation concerning the overall planning and design concept of the proposed Lawson Hills MPD to the Black Diamond Planning Commission, and the Commission provided preliminary feedback to the Applicant regarding the consistency of this concept with the City's adopted standards, goals and policies; and

APPENDIX E

WHEREAS, on March 17, 2009, a second public information meeting was held concerning the proposed Lawson Hills MPD; and

WHEREAS, on May 28, 2009, the Applicant submitted an application for the Lawson Hills MPD approval to the City of Black Diamond; and

WHEREAS, on August 12, 2009, Parametrix held additional meetings with the government agencies listed above, to conduct a pre-release discussion of the draft EIS element related to the transportation impacts analysis; and

WHEREAS, at the June 11, 2008 and August 12, 2009 transportation meetings, Parametrix explained the methodology the EIS would use to analyze transportation impacts, the size and parameters of the EIS study area and study area intersections, and the expected trip distribution percentages, and the other public agencies concurred in Parametrix's approach; and

WHEREAS, on September 2, 2009, the City of Black Diamond issued a Draft Environment Impact Statement ("DEIS"); and

WHEREAS, on September 29, 2009, the City of Black Diamond held a public hearing on the DEIS; and

WHEREAS, on September 30, 2009, the City of Black Diamond extended the comment period, during which it would accept written public comment on the DEIS, until October 9, 2009; and

WHEREAS, on December 11, 2009, the City of Black Diamond announced the availability of the Final Environmental Impact Statement ("FEIS"); and

WHEREAS, on December 28, 2009, appeals of the FEIS were filed by Christopher P. Clifford on behalf of Annette Smith, Gilbert and Marlene Bortleson, Jay and Kelley McElroy, Melanie Gauthier, Michael Smith, Judith Carrier, Gerold Mittlestadt, Steve Sundquist, Joe May, and William and Cindy Wheeler; and

WHEREAS, on December 31, 2009, the Applicant submitted a revised application for the Lawson Hills MPD to the City of Black Diamond; and

WHEREAS, pursuant to BDMC Section 18.98.060(A)(d), the Lawson Hills MPD application was forwarded to the Black Diamond Hearing Examiner; and

WHEREAS, pursuant to BDMC Section 19.04.250, the FEIS appeals were forwarded to the Black Diamond Hearing Examiner; and

WHEREAS, the Hearing Examiner scheduled consolidated hearings on the MPD application and the FEIS appeals, pursuant to WAC 197-11-680(3)(a)(v) and RCW 36.70B.120; and

WHEREAS, the Hearing Examiner held an open record hearing commencing on March 6, 2010 and continuing from day to day until March 22, 2010; and

WHEREAS, the Hearing Examiner accepted additional rebuttal presentations in accordance with the deadlines he had previously set, until April 12, 2010; and

WHEREAS, on May 4, 2010, the Hearing Examiner issued the Hearing Examiner Decision affirming the FEIS for the Lawson Hills MPD; and

WHEREAS, on May 17, 2010 the Hearing Examiner issued his Findings, Conclusions and Recommendation recommending approval of the Lawson Hills MPD, and issued an Errata and a signed copy of the Recommendation the following day, on May 11, 2010; and

WHEREAS, on June 21, 2010, the City Council convened its closed record hearing to consider the Lawson Hills MPD application; and

WHEREAS, the City Council continued the closed record hearing from day to day, and heard oral argument from and considered written materials submitted by parties of record from June 24, 2010 to July 14, 2010; and

WHEREAS, the City Council continued the closed record hearing from day to day to deliberate concerning the MPD application and to discuss potential litigation concerning it, from July 19, 2010 to August 24, 2010; and

WHEREAS, on August 24, 2010, the Black Diamond City Council approved a motion to direct the City Attorney to prepare a written ordinance approving the Lawson Hills MPD subject to conditions as discussed by the Council; and

WHEREAS, the City Council desires to approve the Lawson Hills MPD subject to certain specified conditions of approval as set forth herein, and to rezone certain parcels within the MPD to the zoning designation of "Master Planned Development – MPD");

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings of Fact. The City Council hereby adopts the Findings of Fact set forth in Exhibit A attached hereto and incorporated herein by this reference.

Section 2. Conclusions of Law. The City Council hereby adopts the Conclusions of Law set forth in Exhibit B attached hereto and incorporated herein by this reference.

Section 3. Approval of Master Planned Development. Based on the Findings of Fact and Conclusions of Law adopted in Sections 1 and 2 above, the City Council hereby approves the Lawson Hills Master Planned Development, as set forth in the application dated December 31, 2009 and as delineated on the revised Land Use Plan map (Figure 3-1) dated July 8, 2010, subject to the conditions of approval set forth in Exhibit C attached hereto and incorporated herein by this reference.

Section 4. Rezone. Although pursuant to Black Diamond Municipal Code Section 18.98.130(B) a formal rezone of parcels within the Master Planned Development boundary is not required, in order to remove any uncertainty or confusion as to the applicable zoning designation, the City of Black Diamond Zoning Map is hereby amended to designate the parcels legally described and depicted in Exhibit D attached hereto and incorporated herein by this reference as "Master Planned Development – MPD."

Section 5. Severability. Each and every provision of this Ordinance shall be deemed severable. In the event that any portion of this Ordinance is determined by final order of a court of competent jurisdiction to be void or unenforceable, such determination shall not affect the validity of the remaining provisions thereof, provided the intent of this Ordinance can still be furthered without the invalid provision.

Section 6. Effective Date. This Ordinance shall be in full force and effect five (5) days after publication as required by law. A summary of this Ordinance may be published in lieu of the entire Ordinance, as authorized by State law.

Introduced on the 14th day of September, 2010.

Passed by the City Council on the 20th day of September, 2010.



Mayor Rebecca Olness

ATTEST:

Brenda L. Martinez
Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:

Chris Bacha
Chris Bacha, City Attorney

Published: 9/28/10
Effective Date: 10/3/10

EXHIBIT C
CONDITIONS OF APPROVAL
Lawson Hills MPD

GENERAL

1. Approval of the MPD 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.

2. After approval by the City Council at an open public meeting and after a public hearing as required by law, a Development Agreement shall be signed by the Mayor and all property owners and lien holders within the MPD boundaries, and recorded, before the City shall approve any subsequent implementing permits or approvals. Any requirements deferred to the Development Agreement in this decision shall be integrated into the Agreement prior to any approval of any implementing permits or approvals. The Development Agreement shall be binding on all MPD property owners and their successors and shall require that they develop the subject property only in accordance with the terms of the MPD approval.

3. The Phasing Plan of Chapter 9 of the MPD Application is approved, with the exception of the bonding proposal at p. 9-3, the proposal for off-site trails at p. 9-2 (to the extent not already considered a regional facility) and parks at p. 9-10, and except as otherwise noted in these conditions of approval. The Development Agreement shall specify the following additional details: which infrastructure projects from the Phasing Plan and other mitigation obligations the applicant will build; which projects the City will build; and for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur.

4. The Development Agreement shall specifically describe when the various components of permitting and construction must be approved, completed or terminated (e.g., when must open space be dedicated, plats recorded, and utility improvements be accepted by the City).

5. The Development Agreement shall include language that defines and identifies a "Master Developer." A single Master Developer shall be maintained through the life of the Development Agreement. The duties of the Master Developer shall include at least the following: a) function as a single point of contact for City billing purposes; b) function as a single authority for Development Agreement revisions and modifications; c) provide proof of approval of all permit applications (except building permits) by other parties prior to their submittal to the City; and d) assume responsibility for distributing Development Agreement entitlements and obligations and administering such.

6. The City shall have the ability but not the obligation to administratively approve off-site projects that would otherwise be compromised if they cannot be completed prior to approval and execution of the Development Agreement. In these instances, the applicant shall acknowledge in

writing that the approval of any such applicable projects does not in any way obligate the City to incur obligations other than those specifically identified in the approved permits for the applicable project.

7. The applicant shall submit a construction waste management plan for inclusion in the Development Agreement.

8. Homeowners Association(s) conditions, covenants and restrictions (CCRs) and/or the proposed Architectural Review Committee shall be required to allow the use of green technologies (such as solar panels) in all buildings. In addition, the CCRs shall include provisions, to be enforced by the HOA, prohibiting washing of cars in driveways or other paved surfaces, except for commercial car washes, and limiting the use of phosphorous fertilizers in common areas, so as to limit phosphorous loading in stormwater.

TRANSPORTATION

9. Over the course of project build out, construct any new roadway alignment or intersection improvement that is: (a) depicted in the 2025 Transportation Element of the adopted 2009 City Comprehensive Plan and in the City's reasonable discretion is (i) necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service deficiency as determined by the City's adopted level of service standard, or (ii) to provide access to or circulation within the project; (b) functionally equivalent to any said alignment or improvement; or (c) otherwise necessary to maintain the City's then-applicable, adopted levels of service to the extent that project traffic would cause or contribute to any level of service failure as determined by the City's adopted level of service standard, or to provide access to or circulation within the project, as determined by the City in its reasonable discretion based on the monitoring and modeling provided for in Conditions 24 and 19 below. The Development Agreement shall specify for which projects the applicant will be eligible for either credits or cost recovery and by what mechanisms this shall occur. Any "functionally equivalent" realignment that results in a connection of MPD roads to Green Valley Road shall be processed as a major amendment to the MPD.

10. The City shall create, at the expense of the Applicant, a new transportation demand model for this project for use in validating the distribution of project traffic at the intervals specified in Condition No. 15. The new model shall incorporate, at an appropriately fine level of detail, and at a minimum, the transportation network from the northern boundary of the City of Enumclaw on SR 169 through the City of Maple Valley to the northern limits of that city. The new model shall include the intersections studied in the FEIS, together with the following additions: all existing principal and minor arterials in Black Diamond, Covington and Maple Valley and the unincorporated areas between these cities and specifically including the Kent-Black Diamond Road; additional study intersections at SE 231st Street/SR 18 westbound ramps, SR 169/SE 271st Street and SR 169/SE 280th Street in Maple Valley. External trips may be captured by any valid methodology including overlaying the new model onto the existing Puget Sound Regional Council transportation model. The new model must be validated for existing traffic, based on actual traffic counts collected no more than two years prior to model creation. Key to the success of the new model is a well-coordinated effort and cooperation among the

sources resulting from habitat reductions when designing landscape plans for development parcels adjoining wetland buffers, or for wetland buffer enhancement plantings. [FEIS Mitigation Measure] The Development Agreement shall specify a process by which such landscape plans are to be reviewed and approved by the Director of Natural Resources and Parks for compliance with the mitigation requirement herein.

CLIMATE CHANGE

130. Building design guidelines shall allow the use of solar, wind, and other renewable sources. [FEIS Mitigation Measure]

131. Should a large employer (100+ employees) or a group of similar employers locate in the commercial areas of the MPD, a Transportation Management Association shall be implemented to reduce vehicle trips. [FEIS Mitigation Measure]

LAND USE

132. Approval of the design concept and land use plan (Chapter 3) shall be limited to the plan map (Figure 3-1 as updated July 8, 2010); description of categories (beginning on page 3-18); a maximum of 1,250 total residential units and 390,000 square feet of commercial space; and target densities (Table 3.2), except as modified herein. Corner store-style neighborhood commercial uses within residential land use categories shall be defined in the Development Agreement and shall only be allowed through minor amendment of the MPD. All other specifics shall be resolved through the Development Agreement process.

133. Parcel L2 shall be designated either Low or Medium Density Residential, or open space.

134. The project shall provide a mix of housing types in conformance with the MPD Design Guidelines. The Development agreement shall set targets for various types of housing for each phase of development.

135. Identification of specific areas where live/work units can be permitted shall be done as part of the Development Agreement or through an MPD minor amendment.

136. A minimum density of 4 du/per net acre for residential development shall be required for implementing projects, and shall be calculated for each development parcel using the boundaries of that parcel (or the portion thereof to be developed) as shown on the Land Use plan map (Figure 3-1, as updated July 8, 2010).

137. If the applicant requests to increase a residential category that abuts the perimeter of the MPD, it shall be processed as a Major Amendment to the MPD. Residential land use categories can otherwise be adjusted one category up or down through an administrative approval process

provided they also otherwise meet the requirements for minor amendments outlined in BDMC 18.98.100.

138. The Development Agreement shall limit the frequency of proposed reclassification of development parcels to no more frequently than once per calendar year.

139. Project specific design standards shall be incorporated into the Development Agreement. These design guidelines must comply with the Master Planned Development Framework Design Standards and Guidelines. All MPD construction shall comply with the Master Planned Development Framework Design Standards and Guidelines, whether or not required by the Development Agreement.

140. A unit split (percentages of single family and multifamily) and commercial use split (commercial, office and industrial) shall be incorporated into the Development Agreement.

141. All commercial/office uses (other than home occupations and identified live/work areas) shall only occur on lands so designated. Additional commercial areas shall be identified on the Land Use Plan through future amendment to the MPD.

142. The project shall include a mix of housing types that contribute to the affordable housing goals of the City. The Development Agreement shall provide for a phase-by-phase analysis of affordable housing Citywide to ensure that housing is being provided at affordable prices. Specifications for affordable housing needs within the project shall be determined as a result of the phase-by-phase analysis.

143. Specifications for affordable housing needs within the project shall be determined as a result of the phase-by-phase analysis referenced in the preceding condition.

144. A distinct land use category shall be created to recognize potential light industrial uses or the "office" category shall be renamed to properly indicate the range of potential uses. Areas intended to have light industrial type uses shall be identified on the Land Use Map that is made part of the Development Agreement.

145. An additional 14.8 acres of open space shall be provided and designated as such on the Land Use Plan or a plan for providing the acreage shall be provided in the Development Agreement.

146. The high density residential (18-30 du/ac) supplemental design standards and guidelines (MPD application Appendix E) shall become part of the Development Agreement.

147. Detached single family dwelling units shall be predominantly alley loaded, except where site conditions prevent alley loading or cause alleys to be impractical as determined by the City, in his/her reasonable discretion.

148. Homeowners Association conditions, covenants and restrictions (CCRs) or the Architectural Review Committee shall review, but shall not preclude, the use of green technologies such as solar panels.

149. Front yard setbacks and other specific lot standards shall be determined as part of the Development Agreement.

150. A FAR standard shall be established through the Development Agreement process.

151. Prior to approval of the Development Agreement, the legend on Figure 3-1 (Land Use Plan) must be clarified to differentiate between wetlands, their associated buffers, other critical areas and open space, trails and parks and to incorporate the additional required open space area.

152. All requests for deviation in Chapter 13 of the MPD application should be denied except for those deviations, mostly utility and street standards, that are identified in the recommendation as amenable to further review in the development agreement process. Any MPD deviations to the Sensitive Areas Ordinance should be denied, since BDMC 18.98.155(A) provides that the Sensitive Areas Ordinance shall be the minimum standards for protection of sensitive areas within MPDs.

SENSITIVE AREAS/OPEN SPACE

153. The use of sensitive areas including but not limited to wetlands, landslide and mine hazard areas and their associated buffers for development including trails, stormwater management, etc. shall be regulated by BDMC Chapter 19.10. Appropriate mitigation, if required, for impacts as well as other required measures shall be evaluated on a case-by-case basis at the time of implementing project application.

154. Areas shown as natural open space in the figure on Page 5-5 of the application are required to remain natural with the possibility for vegetation enhancement. Modifications to these areas may be approved by the City in its reasonable discretion, on a case-by-case basis, only if necessary for construction of required infrastructure such as roads, trails or stormwater facilities. Any areas disturbed pursuant to such approval shall be replanted with native plants. Nothing in this condition shall allow grading or modifications in the sensitive areas and buffers, except as provided in the Sensitive Areas Ordinance.

155. The Development Agreement shall include a tabular list of the types of activities and the characteristics of passive open space and active open space so that future land applications can accurately track the type and character of open space that is provided.

156. The Development Agreement shall include language that specifically defines when the various components of permitting and construction must be approved, completed or terminated. For example; when must open space be dedicated, plats recorded, and utility improvements be accepted by the City.

157. Specific details on which open space shall be dedicated to the city, protected by conservation easements or protected and maintained by other mechanisms shall be established as part of the Development Agreement.

158. Once acreages have been finalized, phasing of open space (which includes parks and is identified within the MPD application) shall be defined and articulated for timing of final designation within the Development Agreement.

159. Once the mapped boundaries of sensitive areas have been agreed to, the Development Agreement shall include text that identifies that these areas are fixed. If during construction it is discovered that the actual boundary is smaller or larger than what was mapped, the mapped boundary shall prevail. The applicant shall neither benefit nor be penalized by errors or changes in the sensitive area boundaries as the projects are developed.

ADMINISTRATION

160. The proposed project shall have no adverse financial impact upon the city, as determined after each phase of development and at full build-out. The required fiscal analysis shall include the costs to the city for operating, maintaining and replacing public facilities required to be constructed as a condition of MPD approval or any implementing approvals related thereto. The fiscal analysis shall ensure that revenues from the project are sufficient to maintain the project's proportionate share of adopted City staffing levels of service. The fiscal analysis shall be updated to show continued compliance with this criterion, in accordance with the following schedule:

- a. If any phase has not been completed within five years, a new fiscal analysis must be completed with regards to that phase before an extension can be granted; and
- b. Prior to commencing a new phase, including the first phase of construction.

The exact terms and process for performing the fiscal analysis and evaluating fiscal impacts shall be outlined in the Development Agreement, and shall include a specific "MPD Funding Agreement," which shall replace the existing City of Black Diamond Staff and Facilities Funding Agreement. The applicant shall be responsible for addressing any projected city fiscal shortfall that is identified in the fiscal projections required by this condition. This shall include provisions for interim funding of necessary service and maintenance costs (staff and equipment) between the time of individual project entitlements and off-setting tax revenues; provided, however, that in the event that the fiscal projection prepared prior to the commencement of Phase III indicates a likelihood of significant ongoing deficits in the city's general fund associated with operations or maintenance for properties within the MPD, the applicant must address the projected shortfalls by means other than interim funding.

161. The Applicant and other property owners may petition for the formation of a Community Facilities District to provide a mechanism for funding the costs of "facilities" as defined in Section 501 of SSB 6241. The City Council will review the petition as provided in

SSB 6241 and, as set forth in Section 205, determine in its sole discretion whether the petitioners will benefit from the proposed district and whether the formation of a district will be in the best interest of the City and comply with the requirements of the Growth Management Act, Ch. 36.70A RCW.

162. The Development Agreement shall include language that specifically defines when the various components of permitting and construction must be approved, completed or terminated. For example: when must open space be dedicated, plats recorded, and utility improvements be accepted by the City.

163. The Development Agreement shall document a collaborative design/review/permitting process that allows City staff to participate in the conceptual stage of project planning in order to provide input on designs and choices that benefit the City as well as the applicant.

164. The Development Agreement shall specifically identify which rights and entitlements are vested with each level of permitting, including but not limited to the MPD Application approval, the Development Agreement approval, and Utility Permit approvals.

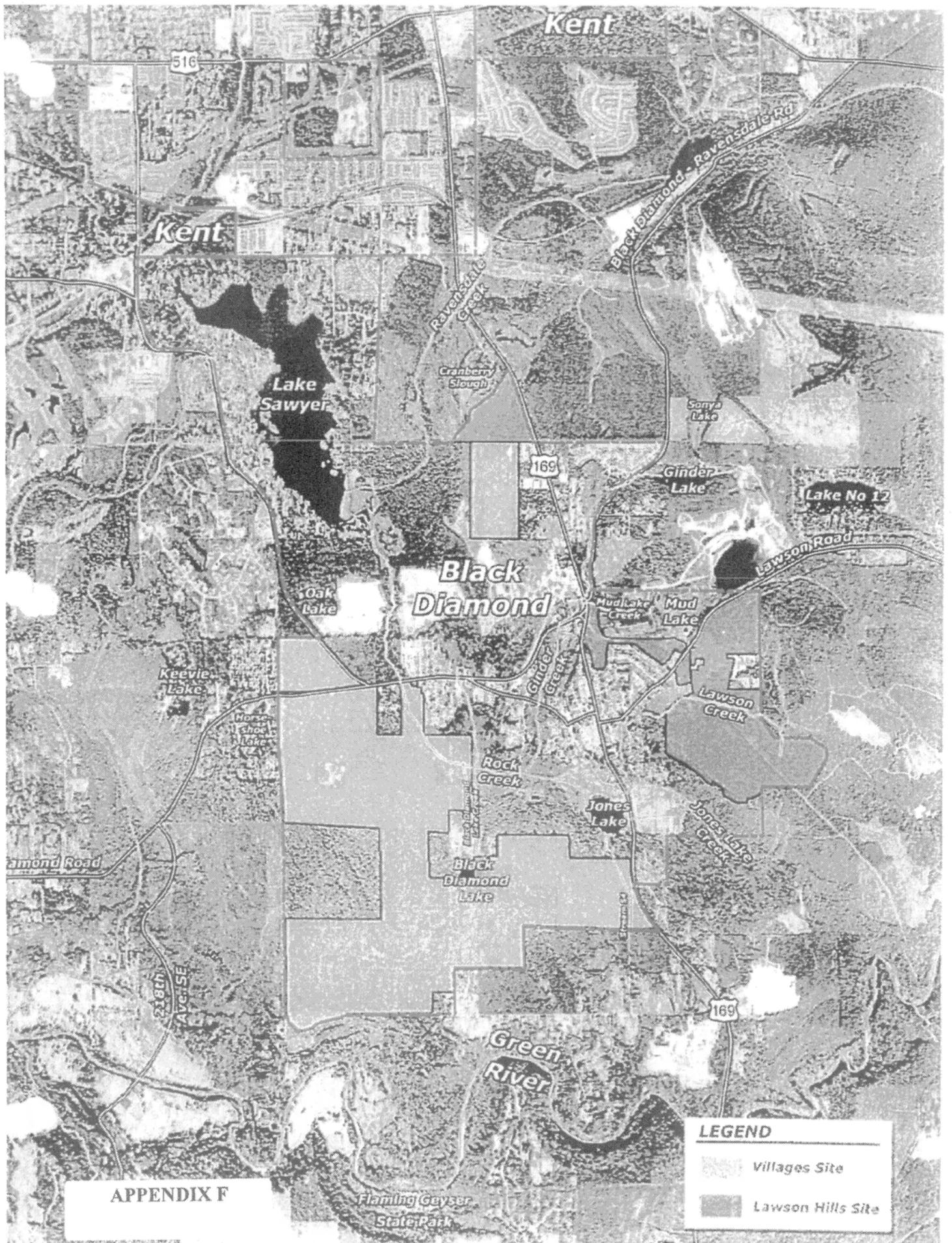
165. Reclassification of development parcels shall occur no more frequently than once per calendar year.

166. A process for including lands identified as "Expansion Areas" in the application shall be defined in the Development Agreement.

167. Proposed reclassification of development parcels located at the project perimeter to a higher density shall only occur through a Major Amendment to the MPD.

168. The Development Agreement shall define the proposed phasing plan for the various matters (utility and street infrastructure, parks, transferred development rights, etc.) subject to phasing standards.

169. Prior to the approval of the first implementing project of a defined phase, a detailed implementation schedule of the regional projects supporting that phase shall be submitted to the City for approval. The timing of the projects shall be tied to the number of residential units and/or square feet of commercial projects.

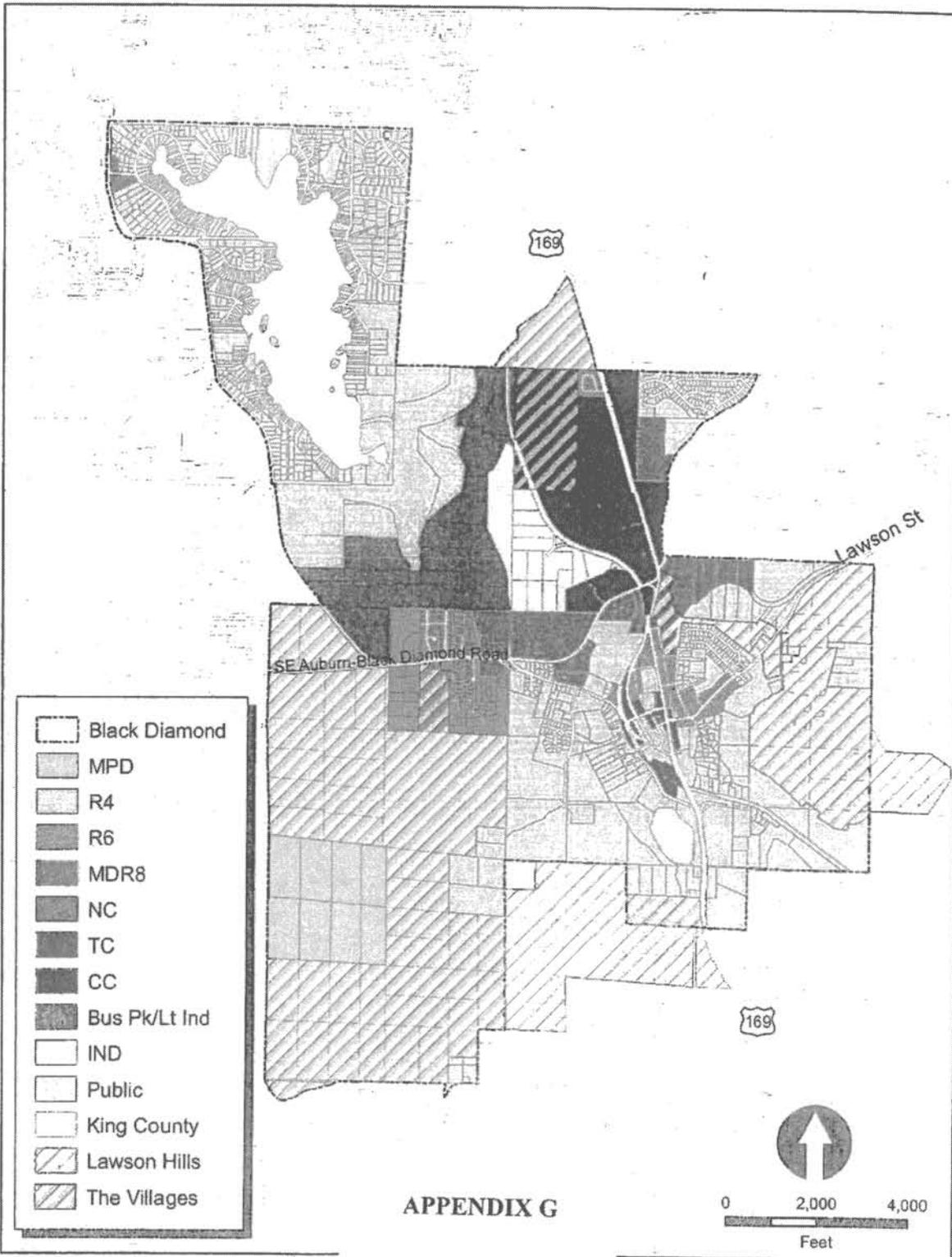


APPENDIX F

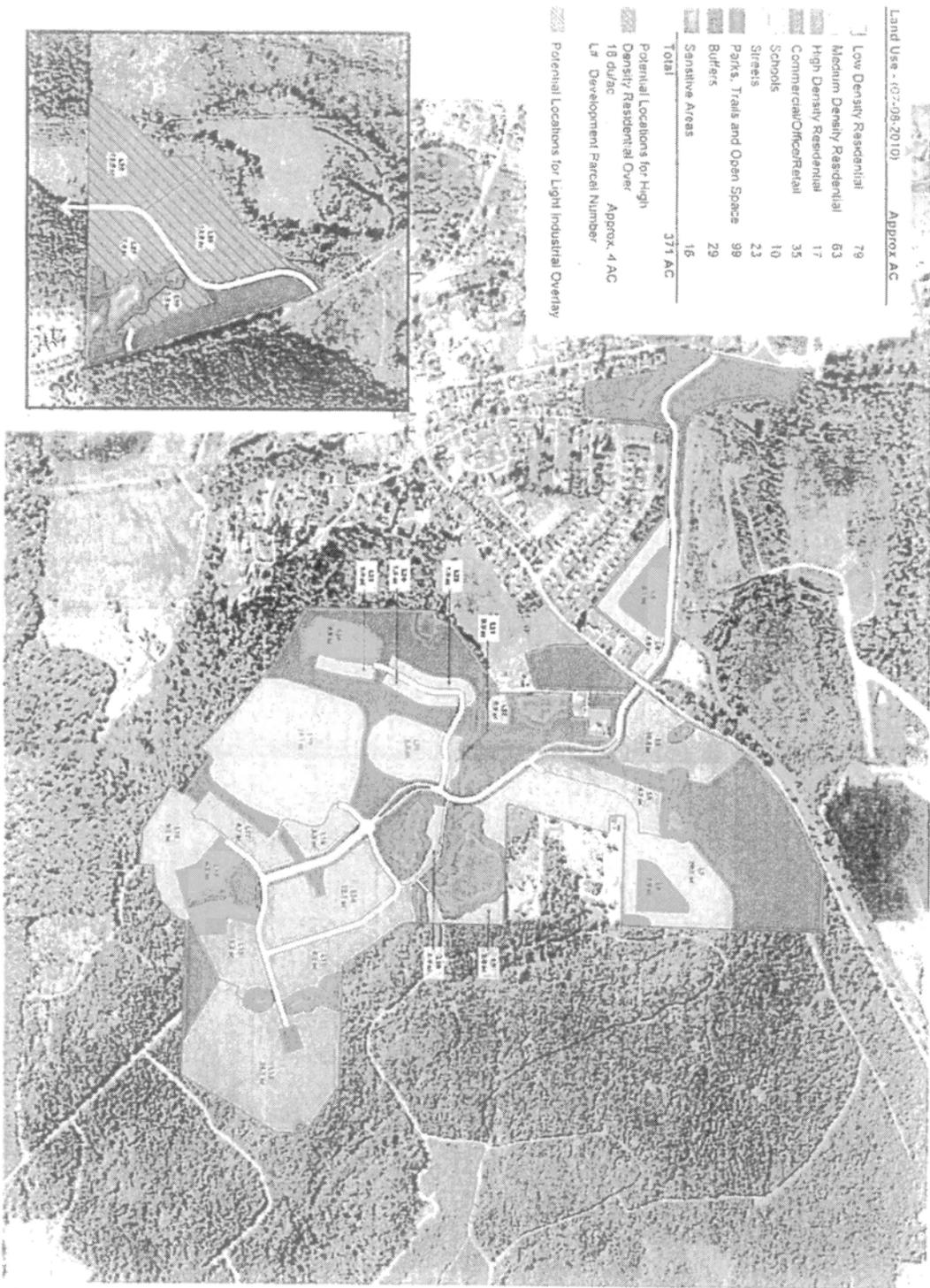
LEGEND

- Villages Site
- Lawson Hills Site

Exhibit 3-1
City of Black Diamond Zoning



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



APPENDIX H-2

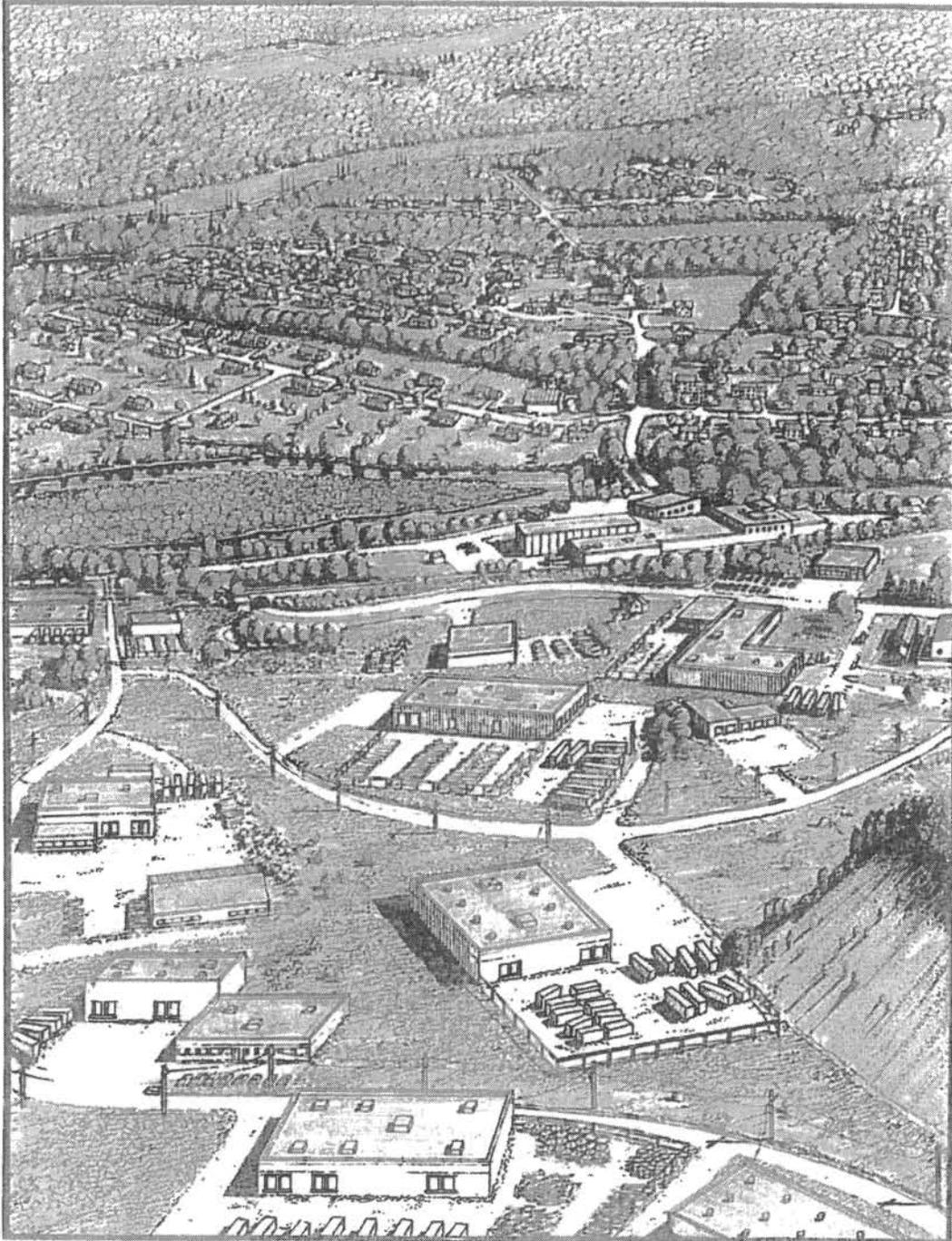


Figure 6-2. Aerial view after conventional development.

APPENDIX I

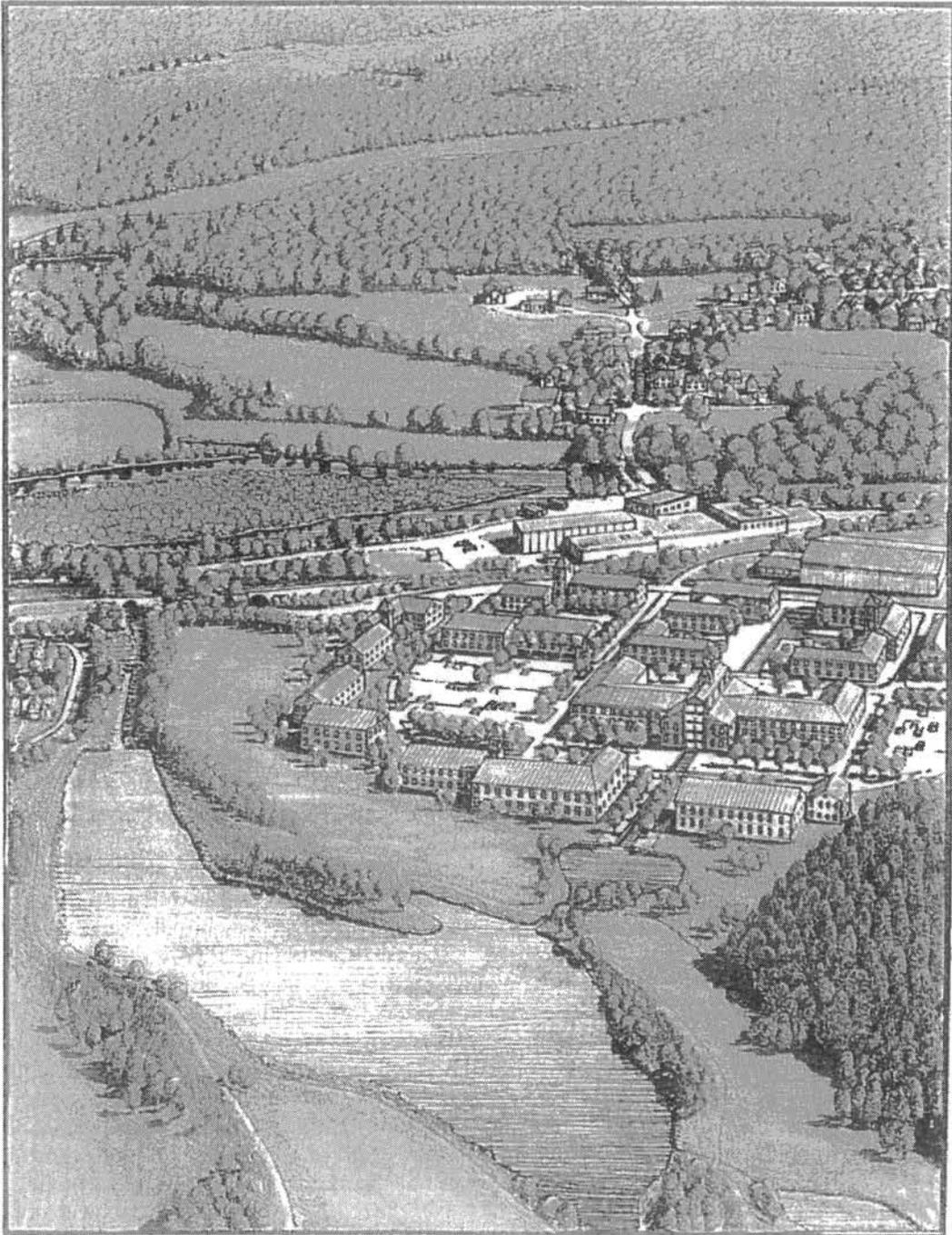


Figure 6-3. Aerial view after creative development.

APPENDIX J

City of Black Diamond Comprehensive Plan



June 2009

APPENDIX K

and Maple Valley both incorporated in the 1990s and today contain approximately 37,200 people. King County projects that by 2022, South King County will contain more than 600,000 people, approximately one-third of the county's total population. The south county area is also projected to contain almost one-third of new countywide jobs. In the face of this anticipated growth, the citizens of the City want to ensure that the quality of life is maintained and enhanced, and that City government continues to be financially sound. The City of Black Diamond Comprehensive Plan is being updated to anticipate these future conditions and to establish desirable patterns of growth.

One of the City's primary concerns is to balance new growth and development with stormwater management and maintenance of surface water quality. Given historical concerns with water quality in Lake Sawyer, protection of surface and groundwater quality within the City's drainage basins will be a key issue into the future.

The City has a rich and long history and strong community identity. A collective vision statement was prepared through a public process when the City's comprehensive plan was adopted in 1996. This vision is carried forward in this updated comprehensive plan through the year 2025. The City's vision is:

In the year 2025, Black Diamond will be a beautiful, friendly community based on a rich historic heritage and exceptional natural setting, and with a small-town atmosphere. Forested areas and open space remain, while development maintains a healthy balance of moderate growth and economic viability.

The economic base will be a mix of retail, industrial/business park, office, tourist and local cottage industries. Residential development will be a mix of types, sizes and densities, clustered to preserve maximum open space and to access a system of trails/bikeways/greenbelts which connect housing, shopping, employment and recreation areas with nearby regional parks and recreational facilities.

Citizens actively participate in an effective and open government decision-making process that reflects community values. There will be good cooperation among nearby jurisdictions, and adequate public services and environmental protection to provide a safe and healthy quality of life for all citizens, from children to seniors.

The comprehensive plan is intended to reflect the community's vision and to plan to accommodate expected change. Change will require the community to make choices—often hard choices—about its future and to attempt to minimize the adverse

the marsh treatment system was not functioning as designed and that the sewage effluent was contributing to the algae blooms in Lake Sawyer, the City conducted a lengthy study (e.g., Comprehensive Sewage Plan) to identify solutions to the problem. As part of this process, and through the development of the Groundwater Management Plan (part of the South King County Coordinated Water System Plan), the City committed to maintain surface and groundwater quality within the Rock Creek/Lake Sawyer watershed. The plan required that all development within the Rock Creek/Lake Sawyer drainage (including that area outside the existing City limits) needed to be served by public sewer. Land use control within the basin was also deemed critical in order to promote the clustering of residential units and preservation of significant tracts of open space to maintain the City's identity.

In contrast to the majority of water bodies in the City that flow westward into Lake Sawyer, Lake 12 drains north to the Cedar River via another Rock Creek (tributary 08-0833), the Rock Creek/Lake 12 watershed. Lake 12 is a 44 acre water body that drains approximately 500 acres. Historically, it had good water quality. However, due to septic system failures around the lake, unacceptably high fecal coliform levels have resulted (Seattle-King County Department 1997). Additional phosphorus inputs entering the lake from stormwater runoff, are also expected to increase algal growth and lower water quality (Metro, 1994). These circumstances necessitate the extension of sewer, water, and stormwater facilities around the lake, if it is to meet or exceed state water quality standards.

Protect and Maintain Community Character

Residential growth in unincorporated King County has increased significantly along the State Route (SR) 169 and SR 516 corridors. As new large subdivisions have been built in areas from Maple Valley to Enumclaw, the City has been affected by increased traffic and new construction in the surrounding area. The City desires to have more control over development decisions in the area and thereby shape the kind of land use between the City and rural lands into the future.

By encouraging an environment for quality development, the existing character of the historic villages (as found in Morganville and the Black Diamond townsite) would be repeated throughout the City and into the UGA. Development of clustered small scale neighborhood villages is also encouraged to promote a sense of community while encouraging pedestrian and bicycle mobility and reducing the number and length of shopping trips. Community shopping opportunities and community employment are planned to support the residential growth.

In identifying a substantial UGA, the City is attempting to resolve significant and long-standing concerns about the future and preservation of its unique identity. The City of Black Diamond Comprehensive Plan reflects community choices by addressing local circumstances and traditions. Because of the City's origin as a

Chapter 4. The Natural Environment

4.1. Introduction

4.1.1. Preserving the Natural Beauty

The first 100 years of the City of Black Diamond's (City's) history were based on extraction of the natural resources. The next 100 years of the City's future will be characterized by the preservation of the quality of its natural setting, its scenery and views, and the preservation of its historic treasures.

From the local fishing hole, to the field where deer graze, to the beaver dams, to the eagle flight overhead; these resources are a tangible part of living in the City. The extensive natural beauty and intricate ecosystem of the City form the basis for a natural resource and open space network. The network serves to define the edges for the existing and future development areas.

This Natural Environment chapter provides the framework for protection of natural resources. The City's forests and fields—along with the natural drainage system and its connections with lakes, streams and forests—form a rich habitat for fish and wildlife that is unlike any other city in King County.

Information contained within the Natural Environment chapter is based upon sensitive areas inventories conducted by the City in the early 1990s to locate, identify, and categorize sensitive areas within the City's jurisdiction. The City uses King County Map data as a basis for developing existing sensitive areas maps. Therefore, the King County Interactive Map Folio was used to provide sensitive areas inventory information for the current City boundaries. The City's current Environmentally Sensitive Areas regulations (Chapter 19.12, Black Diamond

Lake Sawyer is the fourth largest natural lake in King County at 286 acres with a watershed of 13 square miles. Lake Sawyer is considered a “shoreline of the state” and is subject to the SMA and the City’s Shoreline Master Program. The lake is fed by the Rock Creek and Ravensdale Creek drainage systems. Lake Sawyer has experienced water quality problems from various sources, including discharge of inadequately treated sewage from the decommissioned the City’s sewage treatment plant located in the Rock Creek drainage. A lake management plan for Lake Sawyer was completed by King County in 2000. The City and King County have conducted stormwater monitoring in the lake’s watershed to help identify sources of phosphorus. Data collected by volunteer lake monitors indicate that Lake Sawyer is low to moderate in primary productivity with very good water quality.⁵ Ravensdale Creek has a disproportionately high discharge to drainage area ratio likely due to a high influx of groundwater. Although its drainage area is about half that of Rock Creek’s drainage area, Ravensdale Creek has a discharge about 3 times greater than that of Rock Creek during the dry summer months. The phosphorus concentrations in Ravensdale Creek are relatively low during the wet season but exceed those of Rock Creek during the dry season when most of the flow is comprised of naturally phosphorus rich groundwater. Consequently, Ravensdale Creek contributes about half as much phosphorus to Lake Sawyer as Rock Creek. Lake Sawyer is an important migration corridor for a late run of coho salmon that pass upstream shortly after Christmas. The fish spawn in upper Ravensdale Creek. Lake Sawyer also provides year-round recreational fishing for stocked rainbow trout and warm water fish. The lake is also used extensively for boating, water-skiing, and other recreation. Public access is provided at a boat launch on the northwest side of the lake. An undeveloped 168 acre park is located along the southern part of the lake.

Frog Lake is located in the northwestern part of the planning area at the southeastern portion of Lake Sawyer. Frog Lake is approximately 25 acres in size. It is largely a forested wetland with an open water area, identified as Wetland 2 by the City or as Covington Creek 22 by King County’s Interactive Map Folio Sensitive Areas layer. As a wetland related to Lake Sawyer, Frog Lake is considered a shoreline of the state regulated by the SMA.

Jones Lake is 23 acres in size with a watershed of 740 acres. It is fed by Lawson Creek and two other unnamed tributaries, but is a highly groundwater-dependent lake that displays a seasonal fluctuation in water level. Jones Lake is classified as a dystrophic lake, characterized by relatively high concentrations of acidic organic materials in solution. These chemical conditions can reduce the rate or prevent the processes of bacterial breakdown that would otherwise recycle nutrients from dead

⁵ King County Lake Monitoring Report, Water Year 2004.

meet the City's SAO criteria for FWHCAs: 1) Ravensdale Creek and its adjacent wetlands; and 2) Black Diamond Lake and its adjacent wetlands (Figure 4-2). The City is currently updating its SAO and may revise the criteria for FWHCAs in the update process.

The general habitat types in the Black Diamond area include mixed deciduous and unmanaged evergreen forest, areas of regenerating managed forest, wetlands, lakes, riparian areas, and creeks. Wetlands, riparian areas, and lakes meeting certain criteria are listed as "priority habitats" in the Washington Department of Fish and Wildlife's (WDFW's) Priority Habitats and Species (PHS) program. WDFW has compiled draft maps of priority habitat areas in the City.

Wildlife corridors provide a means for wildlife, particularly species that roam widely or have large home ranges, to move freely within and among habitat types. Creeks and streams and their associated buffers function as wildlife corridors in urban areas. Rock Creek, Ravensdale Creek and the associated riparian habitat, functions as a corridor between the upper and lower Soos Creek basin. The Rock Creek corridor likely serves as a route to the Green River and upper parts of the Green River watershed as well, linking wildlife that use the lower Green River watershed and the upper Soos Creek basin. The following list of drainages and the known fish species are updated from the Water Resource Inventory Area (WRIA) 9 Fish Distribution maps (2000, King County DNR):

Covington Creek. Coho, cutthroat trout and steelhead are known to inhabit Covington Creek. The WRIA 9 Fish Distribution Map indicates that Covington Creek also provides good habitat for Chinook salmon, though presence of that species has not been verified.

Lake Sawyer. Covington Creek drains Lake Sawyer, which is fed by Ravensdale and Rock Creeks. Lake Sawyer supports populations of cutthroat trout, steelhead, largemouth and smallmouth bass, yellow perch, and rainbow trout (WRIA 9 2000 and WDFW 1991). The lake is impounded by a small dam at the head of Covington Creek. The dam has a fish ladder that allows passage of migrating coho. Due to low water flows and creekbed infiltration, however, the fish ladder is not typically passable until December. This factor limits coho use of the upper watershed, including Rock Creek.

Ravensdale Creek. Ravensdale Creek has significant fisheries value and is known to support coho and cutthroat trout. The headwater wetlands are important for maintaining perennial flow, as well as maintaining water quality in Rock Creek.

- Policy NE-5: Within areas highly susceptible to groundwater (aquifer) contamination, adopt special protection measures. The special protection measures require businesses that use hazardous chemicals to have containment facilities to capture potential chemical spills, and require the use of best management practices for applying pesticides and fertilizers for business residential, and recreational uses.
- Policy NE-6: The special protection measures noted in NE-5 should evaluate and define “high risk” uses and address the siting of such uses in sensitive aquifer recharge areas. The protection measures should also evaluate and include measures to reduce pollutant loads, including phosphorous discharged to Lake Sawyer.
- Policy NE-7: Require temporary erosion control measures to be installed before construction begins and maintenance of those control measures through the stabilization of the site following the completion of construction to control the quantity of sediment entering surface water.

4.3.3. Critical Area Concepts, Objectives, and Policies

Critical Area Concepts

Critical Areas include wetlands, aquifer recharge, fish and wildlife habitat conservation areas (FWHCAs), frequently flooded areas, and geologically hazardous areas. These features of the natural environment are critical to maintaining local environmental quality, quality of life, and maintaining the City's character. Some of the critical areas may present potential development constraints, i.e., floodplains, and geologically hazardous areas (including coal mine hazards).

Critical Area Objectives

The City will control development in all critical areas through its Critical Areas Ordinance (CAO). Those areas designated as posing a hazard to life or property will be identified prior to development approvals. Development will not be permitted unless detailed technical studies find the hazardous condition can be safely mitigated. Monitoring of the CAO should result in periodic updates to assure effectiveness of the ordinance.

- Objective NE-2: Implement the Natural Resources Management Plan for the Comprehensive Plan planning area.

Objective NE-3: Promote preservation of fish and wildlife habitats of documented threatened and endangered species.

Critical Area Policies

Policy NE-8: Coordinate with King County and the Muckleshoot Indian Tribe in the developing natural resources planning for the areas surrounding the City.

Policy NE-9: Protect sensitive areas from inappropriate land uses, activities, or development through continued application of and periodic updates to the CAO and development regulations. The City of the City will monitor the effectiveness of its CAO and will modify this ordinance as necessary, based upon the information gathered during monitoring.

Policy NE-10: Avoid disturbance to valuable fish and wildlife habitat through the proper location, design, construction, and management of new development.

Policy NE-11: Minimize disruption of areas in current use by endangered wildlife species or by unique wildlife populations.

Policy NE-12: Establish an open space network, linking critical habitat areas to enhance their ecological value.

Policy NE-14: Update and enforce comprehensive regulations pertaining to development in critical areas.

Policy NE-15: Manage land uses to be compatible with aquifer recharge areas and to minimize potential groundwater contamination.

4.3.4. Air Quality Concepts, Objectives and Policies

Air Quality Concepts

Because of the surrounding geographic and climatic characteristics, the City experiences prevailing winds, long summer days and higher inland temperatures. Although there are no air quality monitoring stations in the planning area, southeast King County has a higher ozone pollution concentration than the rest of the county.

Air Quality Objectives

Objective NE-5: Protect the City's air quality by minimizing potential new pollution from new and existing sources. Air quality will be considered in approving new development.

Air Quality Policies

Policy NE-16: Adopt local land use planning and development control procedures designed to avoid and mitigate adverse cumulative air quality impacts prior to project approval and construction.

Policy NE-17: Promote infill developments contributing to a better jobs/housing balance and greater non-automobile transportation accessibility to residents and workers, rather than land consuming and car dependent sprawl.

Policy NE-18: Discourage wood as a source of heat for residential development in low lying areas susceptible to pollution accumulations.

Policy NE-19: Conform to the federal and state Clean Air Acts by maintaining conformity with the Metropolitan Transportation Plan of the Puget Sound Regional Council and by the requirements of the state law (WAC 173-420).

4.3.5. Soils & Geology Concepts, Objectives and Policies

Soils & Geology Concepts

The soils and geology of the planning area are glacial in nature. The most common soils in the planning area are coarse, well-drained soils often overlying a hardpan of more compact material. These coarser soils allow rapid infiltration with little pollutant removal ability. Perched water tables are common above hardpan layers and lateral movement of this shallow groundwater can be relatively rapid. Hydric soils are present in the many wetlands within the planning area. These soils are poorly drained and experience frequent saturation. Soil stability and suitability for supporting structures varies with soil type and slope across the planning area but in general, the soils in the planning area are poorly suited to supporting functioning septic systems and provide minimal protection of groundwater from contaminants in stormwater, septic leachate, chemical spills or other sources of contaminant introduction.

were important steps towards achieving this objective. The City is also committed to meeting its obligation to provide its fair share of affordable housing. Some of the City's older housing also meets this objective.

Commercial

Existing commercial areas are found in four locations:

- An area located along both sides of SR 169, north of the intersection with Roberts Drive;
- An area located between SR 169 and Railroad Avenue at Baker Street (Black Diamond townsite/Old Town);
- A small area along both sides of Roberts Drive at Morganville, and
- A commercial cluster at the intersection of Covington-Sawyer Road and 216th Avenue SE near Lake Sawyer.

Three of the commercial areas are considered partially developed and encompass a mix of small commercial uses.

Currently, the City does not have a central commercial core. The historical Black Diamond townsite commercial area has the famous Black Diamond Bakery and restaurant, antique shops, a museum, the post office, Black Diamond Elementary School, a fire station and some highway-oriented commercial uses (automotive repair and/or auto parts, restaurant, gas station with small convenience store). Single family homes are interspersed within this area, too. The area functions well with a mixed-use character. The small commercial area at Covington-Sawyer Road/216th Avenue SE consists of a small number of lots including a convenience grocery, a restaurant, a retail store, an automotive repair business, and some vacant land.

The commercial frontage along SR 169 contains a mix of commercial uses, including an attorney's office, dentist's office, grocery store, material supply, meat market, Palmer Coking Coal Company office, the Black Diamond Community Center, a church, a sporting goods shop, bakery, and a tavern. Some residential uses are also found intermixed in this commercial area. The area is currently developing as a typical "commercial strip"—a series of individual structures with individual driveways, parking in front of the buildings, little or no vegetation or landscaping, and no pedestrian connections between commercial areas. The 1996 Comprehensive Plan Map designated this area as Business Park and Light Industrial. Annexation of the "north triangle" of the West Annexation Area in 2005 added more Business Park and Light Industrial designated land to this area.

The small commercial area at Morganville encompasses the Dinner House restaurant, a small garden nursery, and office uses.

Currently, the City has relatively little vacant land designated for commercial use. However, commercial uses are also permitted, and likely to occur, in future Master Planned Communities to provide jobs and services for local residents.

Industrial

Two areas within the City are currently zoned for industrial use: along the south side of Roberts Drive at Morganville, which contains Anesthesia Equipment Supply, the City's only industrial use, and office space; and the area west of SR 169, north of Roberts Drive. For the past 100 years, the latter area has been used for mineral extraction, processing activities, and associated industrial uses (an auto wrecking yard, a meat market, fuel supply station, truck and equipment repair facilities and several storage warehouses). The area is currently available for redevelopment.

5.2.3. A New Direction

The community's vision is for the City to guide and manage growth carefully and creatively, in a manner which protects its sensitive areas and treasured places (e.g., historical structures and sites) and retains open spaces that form the natural beauty of the City. Given the abundance of these features throughout the City, future development is likely to occur in numerous "villages" separated by these features. New development can be accommodated within this framework and landscape.

Preparation of the Land Use Element considered and identified areas that are appropriate for development and those which should be protected as sensitive areas and open space. The result is a comprehensive pattern of greenbelts and buffers shaped through a variety of policies, regulations, and incentive programs, such as transfer of development rights (TDR)—i.e., providing development "credits" for constrained or open space areas that can be transferred and used on other, more appropriate lands. The program allows property owners to realize much of the value of lands that cannot be developed to their full potential because of physical constraints. While every square foot of land has value to the land owners, not every square foot has to be built upon to achieve that value.

5.3. Community Design and Character

5.3.1. Fundamental Principles: Village with a View

In the process of developing the comprehensive plan, the community has expressed its strong desire that the City preserve forested areas and open spaces, views of Mt. Rainier, historical buildings, and a strong sense of community. The City will apply several fundamental principles to retain its small town character, as follows:

- Retain the natural setting.
- Define features and landmarks.
- Provide mixture of uses and continuity of form.
- Continue compact form and incremental development.
- Maintain pedestrian scale and orientation.
- Provide opportunities for casual meeting and socializing.

5.3.2. Principles of Small-Town Character

Retain the Natural Setting

As settlement patterns consume land in the rural landscape, citizens have become more aware of the need to protect environmentally sensitive areas, forests and open spaces.

Open space occurs in many forms, including wooded hillsides, open meadows, parks, undeveloped lots, school yards, riversides and even cemeteries. In the Black Diamond area, the natural setting is not just an accent, but is intended to be integrated with the built environment. The retention of open space forms the skeletal framework for the village and helps to define the City's neighborhoods.

The most significant open spaces in the City are those that frame the City to the south and west. These open spaces are related to wetlands and previously unusable areas. The City's mining origins meant historically there was not pressure to drain or fill these areas for agricultural uses. The City is committed to protecting its sensitive areas as the basis of the open space network. Retention of sensitive areas and other existing open spaces will be the key to ensuring sufficient open space in the future.

The City will include protected sensitive areas as part of its formal open space network. This will be achieved through buffers required as part of the Critical Areas Ordinance (CAO), by allowing clustered residential development, and by implementing the TDR program. New parks will be located to support and connect to open space areas. Jones Lake trail will be a key park feature. Parks are targeted for the area just west of the Black Diamond Historical Museum, at the "castle" (historical mine entrance), at the trestle (also known as fish pond), and parks south of Morgan Street, north of Roberts Drive and in the Black Diamond Lake area. A major acquisition is Lake Sawyer Park, consisting of approximately 150 acres at the south end of Lake Sawyer. A trail network that relates to natural systems, especially wildlife and wetland corridors will be an essential part of the open space network.

The Black Diamond Area Open Space Protection Agreement (BDAOSPA), adopted in June 2005, represents a significant step toward achievement of the City's vision for the establishment of connected open space and recreational facilities within and adjacent to the City. Developed as a tool to achieve the open space requirements of the BDUGAA, the BDAOSPA provides for over 2,500 acres of open space within and adjacent to the City, including the Lake Sawyer Park property and 27 acres of property along Ginder Creek just west of SR 169 and south of Robert's Drive.

Defining Features and Landmarks

Small towns arise from a time and place (that is, they were located in a specific place and developed in a particular period). They usually have distinguishing features and landmarks. Some of these features are shared by other small towns, while others are unique to the town and often become landmarks.

Individual characteristics result from the geography of the place; the industries and origins of its residents, and many other factors. Landmarks are more specific; they are either places or things that help a community become oriented in location and time.

The City's distinguishing characteristics include its history as a coal mining town and traditions associated with that history; views of Mount Rainier; and the geography of natural features that define the southern and western edges of the original townsite.

Adding to the value of the historical museum in town, elements of history may be made visible and tangible through literal and creative reminders located throughout the town. For example, the location of underground mine shafts may be identified at ground level through painted poles or changes in roadway or sidewalk paving.

Mixture of Uses and Continuity of Form

Prior to zoning, the mixture of uses within many small towns was often dictated by necessity and function. Limits in transportation frequently meant that there was a greater mix of uses within a small area.

While zoning is a twentieth century creation, most traditional rural towns are based on a plan or organizing concept. The "plan" may be as formal as a grid with a town green bordered by a grange hall, school, and church. The town may, on the other hand, reflect its function as, for example, an agricultural, or mining town. Typically, small towns are also characterized by the architecture popular during its periods of economic and social growth. This results in continuity in the arrangement and form of buildings.

The City contains a variety of uses within its corporate limits. Several small commercial enterprises exist along SR 169. Another cluster of commercial uses can be found along Railroad Avenue. Civic facilities are scattered among several locations. For example, the elementary school occupies a central location on the west side of SR 169, while the police station and City Council Chambers are a few blocks away on the east side. Although there are several roads that parallel SR 169, the lengths of blocks vary. The plan provides an opportunity to take advantage of Old Town and Morganville, with their historical significance and cultural potential, and to further enhance civic and commercial uses there.

Continue Compact Form and Incremental Development

Similar to many other rural towns, the City initially developed as a compact community. The Pacific Coast Coal Company built few buildings other than a church. The company allowed the miners to build their own modest houses at the center of town, on land not expected to be used for mining operations. Those businesses locating in town were able to do so because they did not need large amounts of land. Since travel was difficult before the automobile, businesses and residences were conveniently located near each other to facilitate errands and business. As with other older towns, new development often filled in undeveloped parcels or extended the existing pattern. Growth was slow as miners built houses to meet their own needs.

Morganville was built on a parcel of land donated to striking miners. The miners used land efficiently and their houses were modest. Consequently, the pattern of development in Morganville reflects the compact character of the rest of the City.

Large-scale development can dramatically alter the character of the community. To ensure that new large-scale development in the City feels connected to the older sections of town, this plan encourages the use of techniques that continue the character of compact form and incremental growth. Design guidelines will provide methods and examples of how to achieve design continuity and to reinforce the identity of the City as a rural community. Connector trails, opens space, forested areas, and wildlife corridors will highlight the connection between new, large scale development and the existing City.

Maintaining Pedestrian Scale and Orientation

Walking was the dominant mode of travel in rural towns. Even if one arrived by horse, carriage, or train, in town, one could walk amongst various destinations. Both the networks of streets and scale of buildings reflect this pedestrian orientation. A fine network, often a grid, served to allow efficient use of the land and gave many alternative routes between locations. Structures, particularly commercial ones, were located close to the street to attract walk-in customers. Typically, downtown

commercial districts featured amenities including benches and small parks for pedestrians. Boardwalks may have been provided to elevate the pedestrians above the mud and debris in the street. Much of the City has a relatively fine network of streets that functions well as a pedestrian system, but lacks sidewalks, benches and other pedestrian oriented amenities. The newer commercial areas north of Old Town do not function well as pedestrian areas.

Increased traffic in the Old Town commercial area may necessitate the addition of sidewalks and other pedestrian facilities. New commercial uses should be designed to increase pedestrian orientation by providing a fine-grained circulation network, sidewalks, and buildings that focus on the sidewalk environment. New residential areas should incorporate site and street design techniques that support walking. On-road pedestrian facilities should be augmented by a network of off-road facilities including trails that will further connect City residents with the many forested buffers and natural areas which contribute to the City's unique rural character.

Providing Opportunities for Casual Meeting and Socializing

A town center located close to residential areas can provide opportunities for informal socializing. Local residents may go to the bank or pick up a movie. Small spaces like a cafe or bakery or park encourage residents to stop for a moment where they might meet their neighbors. The Black Diamond Bakery, a favorite local spot, attracts visitors as well as residents. The schoolyard may also function as a formal or informal meeting place. The City Council Chambers, the grocery store, and at church are other places in town where people meet.

As the City grows to its projected size over time, maintaining a sense of community will be a significant challenge. A strong town center where formal interaction and pedestrian activity are encouraged will enable familiarity and community among residents. Providing places for active and passive interaction – such as parks, adult schools, community centers, and clubs—can also perpetuate the sense of community possessed by the City now. The recently acquired Lake Sawyer Park site provides a unique opportunity for this important social interaction to be centered on a high quality recreational amenity, connected to each of the City's existing and future large-scale development areas by an integrated trail system. Continuing the community bulletin boards and /or newsletters will also help.

New areas for socializing may include a cafe or tavern, community gardens, community center, the Lake Sawyer Park site, the Ginder Creek open space area, or a lakeside park for swimming. To foster a sense of community and history for old and new residents alike, the City could revive the Black Diamond Band, open a speakeasy (specialty brew), revive the City's community baseball and soccer teams, or create festivals to celebrate the City's history or celebrate nature's bounty.

while maintaining a small-town atmosphere in a natural setting and meeting the needs of a diverse population.

Policy LU-1: Develop and enforce regulations consistent with the character and scale of the community and use design guidelines to help shape development.

Overall Development Concept

The City will develop as a balanced community similar to traditional small towns. Principles and guidelines for community design and character will guide development to ensure it remains a traditional village community (see Section 5.3 above). The City will provide a variety of housing types, retail goods and services and local and regional employment opportunities. Significant population and employment growth are anticipated and encouraged so long as new development is consistent with the City's vision for integration of development and open space areas. The City will take an aggressive stance to attract new employment opportunities.

To achieve the desired balance of places for living, working and recreating, new residential and Light Industrial/Business Park development will be interspersed with large areas of active and passive open space as the City grows.

Active and passive open space will be preserved within the City through the use of TDR, acquisition, and dedication. The TDR program is an essential element used to preserve the connections between valuable sensitive areas and open space.

The City now has a strong visual identity with clear edges and gateways defined by its natural setting. Preservation of this identity, gateways and edges should continue, and be enhanced. New development in the vicinity of a gateway should strengthen, or at least not diminish, these features. This concept has been further implemented along the City's northern SR 169 gateway through strict view protection requirements on adjacent lands as set forth in the BDAOSPA in 2005.

The principal elements of the natural system (lakes, creeks, forested hillsides, open meadows, and views of Mount Rainier) will be incorporated into a permanent open space system that separates individual neighborhoods, preserves critical natural functions and provides a visual reminder of the natural landscape. Important community design elements should be retained and/or enhanced.

The small-town atmosphere will be maintained by controlling the scale and character of new development, creating pedestrian linkages between the different neighborhoods, building on the City's rich history and encouraging participation in City government and special community events. New development should be designed to encourage residents to become part of the City's community.

Residential Development Concept

The existing pattern of distinct residential neighborhoods should be continued and expanded. While existing neighborhoods may experience some infill, much of the City's new residential growth will be directed towards larger tracts, physically separated from the existing neighborhoods. The City recognizes that individual lot size and density are two important, but different, issues. Whether infill or a new development, residential units should be clustered and neighborhoods separated by elements of the open space system. Within new development, design of the open space system will be a critical issue. Clustering will guarantee permanent open space and help to preserve environmental amenities such as creeks, wetlands, and significant stands of trees that, in part, give the City its character.

To encourage clustering, the City will examine potential amendments to the Zoning Code to provide incentives for new development that is consistent with appropriate design standards. Design guidelines may include concepts such as:

- Allowing lot size averaging and/or reducing the lot size, as appropriate, while maintaining the overall density established by the zoning district (small lot sizes, with permanent open space are consistent with a small town);
- Creating residences that relate to the neighborhood's character;
- Maintaining, enhancing or replacing existing native vegetation along arterial and collector streets;
- Creating or maintaining substantial vegetative buffers at boundaries of neighborhoods;
- Establishing a significant amount of permanent, common open space;
- Providing space and facilities for active recreation;
- Limiting proposed clearing and grading;
- Respecting the integrity of the character of the site and its natural systems;
- Integrating local cultural or historical elements into the site design;
- Integrating local architectural components;
- Screening parking and garages; and
- Providing incentives to encourage good design such as density increases within the site, and/or transfer of density credits to other appropriate sites.

The lowest residential densities should be applied where environmentally sensitive areas warrant limited development densities, as well as in established lower density

Policy LU-45: Reclamation plans should be consistent with the land uses indicated on the Future Land Use Map. At the cessation of mineral extraction activities, sites should be converted to their long-term planned land use

5.6.7. Community Design and Character Objectives, Policies and Concept

Community Design Objective and Policies

Objective LU-6: Use development regulations to enhance and protect the overall appearance and character of the City.

Policy LU-46: Retain a sense of place by protecting the community's important natural features.

Policy LU47-48: Old Town should be the primary historical component of the City.

Policy LU-48: Major entrances into the City should be given symbolic markers and landscaping to create a gateway effect.

Policy LU-49: Parks, schools, churches and other public and semi-public buildings should be encouraged to locate on sites to create neighborhood landmarks.

Policy LU-50: Public buildings should fulfill their role as gathering areas and community resources.

Policy LU-51: Building design, zoning regulations and design standards should provide for buildings of a character and scale appropriate to the site, encourage building variety while providing for designs that reflect the distinctive local character, historical character, and natural features.

Policy LU-52: Design standards, building design and site design should provide appropriate transitions between dissimilar uses, such as echoing design features and graduating building heights and intensities.

Policy LU-53: New developments should be designed to incorporate features to encourage alternative travel modes, such as biking, walking, and transit.

Community Design Concept

What is desired is the “chance to live in a real human settlement with a sense of place and sense of belonging.” (Arendt, 1994 *Rural By Design*)

Community character relates to the types of land uses found in the comprehensive plan. While land use designations describe the dominant uses and overall function of areas in the City, character designations describe the look and feel of different parts of the City. In general, character may be more important than the specific uses, activities, and building types. The character designations describe: key design elements, mixture of uses, related activities and intensities of development. The key design element discusses the relation of the built and natural environment, and building features. The mixture of uses, related activities, and intensities describe the scale and character of a land use.

Traditional “zoning” concerns, including density and setbacks, must be balanced with the intent of the character designations to encourage development that achieves both the described function and character of the respective area.

“Limited” Residential

Key Design Element: This development pattern, generally found in areas subject to significant environmental constraints and open space protection, will reflect the informal rural development typical of many portions of the City. Subdivisions and short plats should provide interconnected streets. Development is encouraged to promote a variety of individual dwelling designs and is discouraged from using walled planned residential techniques common in other portions of King County.

Mixture of Uses, Related Activities, and Intensities of Development: This area is reserved for residential uses. Accessory units may be built on single lots provided they are significantly secondary to the main use.

Village Residential

Key Design Element: The primary design element will be consistency with existing historical development. Some areas may be subject to historic preservation guidelines, while others may have general guidelines that promote the incorporation of historical design features in new development. The development will be predominantly compact single-family buildings with pitched roofs. Structures will be located towards the street edge and generally have building design features such as front porches and overhanging eaves.

Mixture of Uses, Related Activities, and Intensities of Development: Some mixture of small scale retail and professional office will be included with residential uses. Commercial buildings will generally take similar forms to or use residential

Industrial and Light Industrial/Business Park

Key Design Element: Industrial uses would be substantially buffered and screened from nearby uses. In addition, industrial uses would be subject to performance standards with respect to noise, dust, and light emissions.

Light industrial/business park uses would incorporate buffering and high landscaping as a part of stringent site design and to provide a corporate campus setting. These uses may serve as a transition from industrial or other less intense uses.

Mixture of Uses, Related Activities and Intensities of Development: Retail and residential uses are not allowed in industrial areas. Light Industrial/Business Parks may have a food service and some limited personal services (e.g., sandwich shop, travel agent) available. Office buildings would be encouraged to be multi-story to retain greater open areas around the buildings.

5.6.8. Historic Preservation Objective, Policies and Concept

Historic Preservation Objective and Policies

Objective LU-7: Maintain those historical qualities in the environment that bring value to the community.

Policy LU-54: The City should provide reasonable flexibility in applying development requirements and building codes to encourage the preservation and rehabilitation of historically and culturally valuable buildings and sites. Explore alternatives to the demolition of structures and sites that are historically significant or otherwise deemed eligible for the local, state, or national registers to accommodate private or public sector development proposals.

Policy LU-55: Historically and culturally significant buildings should be protected from demolition or inappropriate exterior modification.

Policy LU-56: Place new structures, circulation, and utility systems in such a way as to minimize the alteration of the historical character of the City's landscape.

Policy LU-57: Expand the existing historical district to the southern edge of Jones Lake Road and SR 169 to provide a southern "gateway" to the City.

Policy LU-58: Adopt and enforce design guidelines for the areas with historical character.

7.2.3. Level of Service Standards

Based on the City Council's recommendations, this plan identifies a LOS standard of LOS D for intersections along State Route (SR) 169 and LOS C for all other arterials and collectors throughout the City. Setting different LOS standards for specific areas is a common practice that accounts for the function and use of the roadways into the acceptable operating conditions.

The City also recognizes how intersection control (i.e., traffic signals, roundabouts, and stop signs) defines LOS. For two-way and one-way stop-controlled intersections, the LOS is defined by the amount of time vehicles are waiting at the stop sign. Although a substantial volume of traffic can proceed through the intersection without any delays, a small volume at the stop sign can incur delays that would exceed LOS C or LOS D. To avoid mitigation that would only serve a small volume of traffic, the City allows two-way and one-way stop-controlled intersections to operate worse than the LOS standards. However, the City requires that these instances be thoroughly analyzed from the operational and safety perspectives and the City will individually evaluate these situations to determine when mitigation is appropriate.

These LOS standards are higher than other cities in the area. For example, the City of Covington adopted a LOS E standard and Maple Valley generally uses LOS D, except along Maple Valley Highway (SR 169), Kent-Kangley Road, and Witte Road where the LOS standard is lowered to LOS E. The higher LOS standards indicate the City's desire to avoid congestion and the willingness to identify and fund future transportation improvements. If expected funding for improvements to meet future transportation needs is found to be inadequate, then the City may pursue one of the following options:

- Lower the LOS standards to LOS D, E, or F for the system for portions of the system that cannot be improved without significant expenditure.
- Revise the City's current land use plan to reduce density or intensity of development that will "fit" with the planned transportation system; or
- Phase or restrict development to allow more time for the necessary LOS-driven transportation improvements to be completed by the development community and/or responsible agency or jurisdiction(s).

7.2.4. Level of Service Methodology

The City has established specific methods to calculate the LOS for evaluating the performance of the roadway intersections and transit service and facilities. This section describes those methods.

2. Promote transit by developing design standards that provide accessibility through bus pullouts, pedestrian access to bus stops and bus shelters; and,
3. Seek to complete its sidewalk system and pursue development of a network of off-road facilities for non-motorized travel.
4. Cooperate in regional efforts in exploring the feasibility of DMU service to southeast King County.

Policy T-9 “Old Town” Parking Policy:

Encourage the construction of additional parking in the historic “Old Town” area of Black Diamond, both within the public right-of-way and in off-street lots.

The City recognizes that parking in the “Old Town” area of Black Diamond is essential to the continued growth and prosperity of the businesses in this area of the City. Therefore, the City will promote the addition of parking spaces in the “Old Town”, possibly to include the use of a Local Improvement District to fund these parking improvements.

Goal T-2: Provide a transportation system that preserves the “small town” character of the City and minimizes the environmental impact to critical areas.

Road Character and Right-of-Way Policies

Policies contained in this subsection promote the unique “small town” characteristics of Black Diamond and address issues regarding land use development emphasizing desired locations for development throughout the City of Black Diamond. These policies also address the City’s view on right-of-way issues.

Policy T-10 “Small Town” Character Policy:

Enhance the “small town” character that the City currently possesses.

This can be done by the following:

7. Discourage widening of SR 169 to a four or five lane facility thus creating a “thoroughfare” that will tend to divide the City;
8. Encourage landscaping, parkway trees, and compatible architecture in the design and construction of roadways,

Frog Lake, and Lake Sawyer. Proper construction practices, especially with regard to erosion control, shall be required. Zoning regulations, construction, and development standards should allow for low impact development measures.

Development regulations should encourage ways to provide stormwater cleansing and infiltration. The loss of current biofiltration opportunities in roadside ditches should be replaced as ditches are replaced with pipes. The City should be prepared to respond to new federal or state requirements, which may require the treatment of stormwater releases. The City should encourage the potential for regional detention facilities where development was not built with drainage facilities. Dual use of storm drainage facilities for open space/recreation uses is encouraged where feasible. The overall Storm Drainage Plan must balance the needs of an urban community and the natural drainage system, which provides significant fish and wildlife habitat.

Storm Drainage System Objective and Policies

Objective CF-11: Manage the quality of stormwater runoff to protect public health and safety, surface and groundwater quality, and the natural drainage systems.

Policy CF-40: Complete the Storm Drainage Plan that addresses both quantity and water quality concerns, and complies with NPDES Phase II permitting requirements.

Policy CF-41: Design storm drain lines or pathways to minimize potential erosion and sedimentation, discourage significant vegetation clearing, and preserve the natural drainage systems such as rivers, streams, lakes, and wetlands.

Policy CF-42: Development regulations should encourage the reduction of impervious surface and retention of natural vegetation.

Policy CF-43: Ensure that the storm drainage facilities necessary to support construction activities and long-term development are adequate to serve the development at the time construction begins and when the development is available for occupancy and use.

Policy CF-44: Design new development to allow for efficient and economical provision of storm drainage facilities, and require new development to pay its fair share of providing service.

Policy CF-45: The City of Black Diamond Stormwater Utility shall be responsible for implementing the Storm Drainage Plan.

- Comprehensive Stormwater Management and Programs
- Detailed mapping and inventory of the stormwater systems
- Capital Project Planning will propose stormwater project concepts to minimize the environmental impacts of stormwater, minimize maintenance, and protect public and private property from storm runoff.

Capital Planning

A capital improvement plan is under development as part of the comprehensive stormwater planning. The projects that are needed to serve growth will be included in the City's capital planning just as recognition of the future facility. However, the projects supporting future development will not be included as City-funded projects. It is expected that each developer will provide for stormwater treatment and detention as needed for its projects. Given that much of the City will be developing as MPDs, the City preference for regional storm facilities can be coordinated with the developers through the permitting and development approval process. The majority of the projects listed in the Capital Improvement Plan are maintenance projects replacing old, rusted out culverts.

The City is investigating opportunities where regional storm facilities serving the new MPDs could provide a storm treatment or detention benefit to areas of the City that are already developed. If such a project is identified, this will be incorporated into the City of Black Diamond Comprehensive Plan during the next update.

Other Plans and Requirements

The **King County Stormwater Management Soos Creek Basin Plan** recommended two water quality enhancement projects for inclusion in the 6-year Capital Improvement Plan. The projects listed in this plan are now outdated as the John Henry Mine has very limited activity, and there are no longer any livestock in the Jones Lake area.

Lake Sawyer Total Maximum Daily Load Restrictions (Department of Ecology Requirements to clean up a water body): The City will need to consider various measures through capital planning, policy development, coordination with Soos Creek Water and Sewer District, and development of designed and constructed facilities to reduce phosphorous loading into Lake Sawyer. Part of the solution to the phosphorous loading into Lake Sawyer will be the elimination of septic systems around Lake Sawyer and the education of homeowners.

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

TOWARD RESPONSIBLE
DEVELOPMENT, et al.,

Appellants,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

NO. 69418-9-I

DECLARATION
OF SERVICE

STATE OF WASHINGTON)

)

ss.

COUNTY OF KING)

)

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

I am the legal assistant for Bricklin & Newman, LLP, attorneys for
appellants herein. On the date and in the manner indicated below,

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STATE OF WASHINGTON
2013 FEB -8 PM 4:30

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