

BLACK DIAMOND CITY COUNCIL MINUTES**August 20, 2009**

Council Chamber, 25510 Lawson Street, Black Diamond, Washington

CALL TO ORDER, FLAG SALUTE:

Mayor Botts called the regular meeting to order at 7:00 p.m. and lead us all in the Flag Salute.

ROLL CALL:

PRESENT: Mayor Botts, Councilmembers Bowie, Boston, Olness and Mulvihill.

ABSENT: Councilmember Hanson (excused)

Staff present were: Gwendolyn Voelpel, City Administrator; Steve Pilcher, Community Development Director; Steve Munson, City Planner; Seth Boettcher, Public Works Director; May Miller, Finance Director; Greg Smith, Fire Chief; Loren D. Combs, City Attorney and Brenda L. Martinez, City Clerk.

PUBLIC COMMENTS:

Cindy Wheeler, 30221 234th Avenue SE, Black Diamond, addressed Council regarding the City's Tree Preservation Ordinance. She stated the intention of the Ordinance is to reflect the City's priorities that significant trees have, which is clearly stated in the opening of the ordinance. However, in order for an ordinance to have integrity the outcome needs to actually reflect the stated intention and this is not happening now with the way this tree ordinance works. She added the consequences of this ordinance as written are not severe enough to warrant adherence by residents and before another lot in the community is clear cut she asked Council to revisit this ordinance and make sure that enforcement is being done by staff and also the fines are significant to encourage adherence to this ordinance.

PUBLIC HEARINGS:**Ordinance No. 09-920, Amending Sign Code Regarding Temporary Signage**

Community Development Director Pilcher reported earlier this year Council passed a Resolution authorizing the use of a variety of temporary signage to be used by local businesses until September 12, 2009. He added, at that meeting several Councilmembers expressed an interest in extending this allowance for a greater period of time and at that time the City Attorney advised that do so would require action by ordinance. He mentioned the Planning Commission held a public hearing on the proposed changes on August 11, 2009 and after review the Planning Commission recommended extending the

allowance for greater use of temporary signs through the end of this year (December 31, 2009).

Mayor Botts opened the public hearing at 7:14 p.m. No public comments were heard and the public hearing was closed at 7:15 p.m.

Councilmember Bowie expressed he would like to see the temporary sign code allowance be continued until December 31, 2010.

A **motion** was made by Councilmember Olness and **seconded** by Councilmember Bowie to approve Ordinance No. 09-920, amending Chapter 18.82 of the Black Diamond Municipal Code 18.82.020, 18.82.050(A), 18.82.050(H), 18.82.060, 18.82.080, and 18.82.090, and repealing section 18.82.070 and changing the date to December 31, 2010 instead of December 31, 2009. Motion **passed** with all voting in favor (4-0).

Proposed Amendments to Chapter 17 of the Black Diamond Municipal Code Concerning Division of Lands

City Planner Munson reported amending the existing Subdivision Ordinance (Divisions of Land), Chapter 17 is another step in the City's continued update of its Development Regulations. The Planning Commission and staff began work in the late summer/early fall of 2008 and reviewed several drafts of proposed changes before they were presented to the Planning Commission in a public hearing on April 21, 2009. At the public hearing the Commission voted 6-0 to pass on the proposed amendments {to include revised definitions of Short Subdivision and Subdivision; definition of Paper Plats; and elimination of Sec. 17.36.040 (3)} to the City Council for its review and consideration.

He added, Council reviewed with Community Development staff the Planning Commission recommended draft in a study session on August 6, 2009. Council requested that staff provide copies of the existing Subdivision Density Bonus (SDB) section (Chapter 17.14) and to include language about Tree Preservation in the text of the amendments to Chapter 17. The existing SDB section is included here as an attachment and the Tree Preservation has been provided for in Chapter 17.15.020 (A) (14). Also provided in the Definitions section {Chapter 17.08.010 (11)} is an explanation of the term "Paper Plats".

Mr. Munson noted that staff recommends approval of the proposed amendments. He clarified that no action is anticipated as tonight is to conduct the public hearing on the proposed amendments.

Mayor Botts opened the Public Hearing at 7:19 p.m. No comments were heard and the public hearing was closed at 7:19 p.m.

Pre-Annexation Zoning Classification for the Proposed South Annexation

City Planner Munson reported Black Diamond Lawson Partners (South) has submitted to the Community Development Department a draft Pre-Annexation and Development Agreement for this proposed Annexation. This Agreement details the specific land use designations and zoning to be applied to the properties and the specifics of other features including, but not limited to, roads and utilities.

Mr. Munson noted in preparation for future City Council consideration of this document, Council is required by RCW 35A.14.330 and RCW 35A.14.340 to conduct two public hearings at least 30 thirty days apart to allow public testimony on any proposed pre-annexation zoning. The first public hearing was conducted on July 16, 2009.

He also noted at this time staff is recommending the assignment of the MPD, Master Plan Development Zoning District zoning designation for all of the proposed annexation area with the exception of two parcels to be designated as R-4, Single Family Residential District.

Mayor Botts opened the public hearing at 7:20 p.m.

Nancy Rogers, Attorney for YarrowBay Development, spoke in regards to the letter she distributed concerning the South Annexation Area Pre-Annexation agreement. She stated that YarrowBay requests that Council delete language which appears in Section 9.2 of the South Annexation Area Pre-Annexation and Development Agreement regarding Roberts Drive. She noted YarrowBay is here seeking an amendment as consensus has not been reached on this matter as stated in the agenda bill. She added it is YarrowBay's perspective that impact to Roberts Drive should be and are being addressed during a permit review and environmental review process specifically the Villages MPD. Ms. Rogers highlighted other key points to the letter which is attached as part of the record.

In closing, Ms. Rogers added YarrowBay is absolutely committed to reviewing, analyzing those impacts and addressing those impacts and will do what works for the City as well as YarrowBay. The City does not need to worry about those impacts not being addressed as they will be addressed during the permitting process for the MPD and EIS.

Councilmember Mulvihill asked Ms. Rogers how this language will harm her client. Ms. Rogers responded one of their concerns is what it might mean in the future and she feels the City should be concerned about that as well as the City will be signing this agreement and it essentially says there is not going to be any degregation in level of service on Roberts Drive or any additional land and who knows what will happen in ten years.

Erica Morgan, Chubb Lake, Black Diamond, addressed Council concerning the impacts of the South Annexation to Roberts Drive. She stated she lives in a wetland and has a lot of contact with wildlife and has two concerns when she looks at the maps 1) a proper wildlife corridor over Rock Creek needs to be addressed and 2) there needs to be a pedestrian over-pass over Roberts Drive.

Vicki Harp, 32508 236th Street, Black Diamond, stated the delineation of Roberts Drive is a huge issue. She added she is not against development, but doesn't like seeing things delineated before we have gotten through the whole process.

Mayor Botts closed the public hearing at 7:30 p.m.

City Attorney Combs noted that he would address the Roberts Drive issue under Item No. 5 on the agenda as this item it to set the pre-annexation zoning, should the property be annexed. The Robert Drive issue has to do with the pre-annexation agreement not the pre-annexation zoning.

A **motion** was made by Councilmember Mulvihill and **seconded** by Councilmember Olness to approve the requested pre-annexation zoning and direct the Mayor to have an ordinance brought back for Council to consider.

Councilmember Bowie asked about the R-4 parcels on the map. Mr. Combs responded these are the little tiny parcels on the map.

Vote: Motion **passed** with all voting in favor (4-0).

Pre-Annexation Zoning Classification for the Proposed East Annexation

City Planner Munson reported before Council is essentially the same proposal for East annexation in terms of attaching pre-annexation zoning to the area. The only difference between the two is the East Annexation is recommended to be zoned completely R-4 for the entire proposed annexation area.

Mayor Botts opened the public hearing at 7:36 p.m. No public comments were heard and the public hearing was closed at 7:37 p.m.

A **motion** was made by Councilmember Olness and **seconded** by Councilmember Mulvihill to approve the requested pre-annexation zoning and direct the Mayor to have an ordinance brought back for the Council to consider.

Councilmember Bowie asked if this is only to set the pre-annexation zoning. Mr. Combs responded yes.

Vote: Motion **passed** with all voting in favor (4-0).

UNFINISHED BUSINESS: None

NEW BUSINESS:

Resolution No. 09-626, Finalizing Pre-Annexation and Development Agreement for the Proposed South Annexation

City Attorney Combs reported YarrowBay signed an agreement several months ago saying that prior to authorizing the circulation of petition the City and YarrowBay would enter into a pre-annexation agreement. He added he received the draft agreement earlier this afternoon and would be happy to provide a written response to the Council should they so choose, but can not give a detailed response with only having five to ten minutes to read it during this Council meeting. He emphasized the staff in negotiating this agreement along with his assistance chose not to fight over some things to try to keep the process moving forward. Mr. Combs noted that he and Ms. Roger's partner were involved in negotiating the BDUGGA. He recapped issues regarding the west annexation and asked Council that if they are inclined to amend the pre-annexation agreement that they allow staff to go back to the table and negotiate the others things that they let slide through, as the intent was to negotiate an agreement that would be mutually beneficial.

In addition, Mr. Combs added the reason Roberts Drive is addressed in the agreement is so that it would not be the major corridor and become a freeway going east/west through the City and we need to tie language to the South so this does not happen.

Mr. Combs stated that if Council would like a full response to this he would be happy to provide it, but the agenda item will need to be held over in order for him to prepare it and provide it at the next staff meeting. He added City staff recommends that you adopt as presented by staff once YarrowBay signs the agreement.

Councilmember Bowie suggested that this item could be brought back before them to allow Council and Legal more time to review.

Councilmember Mulvihill stated that she doesn't believe this is necessary as Council has everything in front of them, she stated that she trusted staff and that the question that was asked of Ms. Rogers on how it would harm them and she didn't have an answer. She added that she believed they should move forward.

Councilmember Olness stated that she believed that what should be looked at was when the bridge was closed and the effect it had on Roberts Drive and the pot holes that are there now and stated that it was really important that Roberts Drive does not have that amount of impact of traffic.

YarrowBay representative Colin Lund stated that he knew public comments were left to three minutes, but would like the opportunity to address the issue at hand.

Mayor Botts agreed to let Mr. Lund make his comments.

Mr. Lund reported that from a non-legal perspective, all YarrowBay is trying to say is that as its written it says there won't be any degregation of Roberts Drive and it's not defined. What does that mean? One more car on Roberts Drive is that a degregation? Yes, technically. Five more cars is that a degregation? Yes. Will there be more cars and more people in them? Absolutely, it's hard to know what the standard is but regardless of that we are saying the environmental documents that are going to be prepared and applied

to the MPD are the logical place for the City to understand what improvements may be necessary for Roberts Drive. Mr. Lund wasn't sure what type of improvements as far as turn lanes, stop signs or even round-a-bouts would be necessary, as he hasn't seen a document, but it would be forthcoming soon. Mr. Lund also stated that YarrowBay doesn't believe this is the appropriate place to have that language, and that YarrowBay isn't saying that they don't agree with it, they just think it's the wrong venue for that language. Mr. Lund noted that regardless they are out of time and they need this agreement signed and moved forward. Mr. Lund also noted YarrowBay is not looking to do anything different than what is in the agreements; they just do not think the language regarding Roberts Drive is in the right place.

City Attorney Combs reported to Council that no one came back and asked staff to clarify the word degregation, plus this is about a contract, this is not about a development. The City in the agreement that it negotiated with YarrowBays predecessor and interest, basically said that they could have required that road to have been built before the West was even annexed. This is about a contract that the City entered into, the City chose on the West to say wait, you had three choices and Council chose the one that Plum Creek wanted you to choose. Council had a choice to say no, we want you to build the pipeline road now, but you chose not to.

Mr. Combs stated that he was not saying it was right or wrong or indifferent on the choice that Council made, he was just saying that they had a choice. He stated that Council did not have to wait on an environmental document on future development Council can do it as part as the annexation. He stated that is what the document is, the contract you cut for a deal if they wanted the property to be annexed. He reported that he wanted Council to be clear on that, this isn't the development application document, this is a contract you entered into as a City 12-14 years ago and the deal whether they liked it or not they bought the dirt subject to the deal that was in place at the time. By contract, not by development application and the contract says you can actually say no, we want the major roads built before we annex it so we don't take a chance that they won't get built later. We don't want to take a change that your performance bond company goes bankrupt or take a chance that someone else goes bankrupt that you sell it to, we want the road in before we take this property into our city. Contractually you could have done that on the West, you chose not to. The BDUGGA is pretty clear, it does not state that you can only have a road built with the application approval process, although they would like for you to believe that from the memo from YarrowBay in front of you. Mr. Combs stated that Council, no matter what they decide to do, do it for the right reasons and if you want your staff to go back and answer these things and tell you why they came up with the language they did, that was the threshold that you could get with out changing the entire character of the road. You can allow a few things but you wouldn't change the basic character of Roberts Drive. If there is a question about degregation he wished they would have brought it up in the three weeks they had that draft.

A **motion** was made by Councilmember Mulvihill and **seconded** by Councilmember Olness to adopt Resolution No. 09-626, finalizing the agreement pursuant to the requirements of Resolution No. 09-590.

Councilmember Bowie asked is time so rushed that we need to take this action now and why can't it wait until the next Council meeting giving Loren time to review the information in order to tell us what it really means. Mr. Combs responded from his understanding it is a YarrowBay concern to get it done before the end of the year – from the City's perspective there is no rush.

Nancy Rogers, Attorney for YarrowBay stated from YarrowBays perspective Council should adopt the Resolution as presented even though the process has been a bit messy and appreciated Council's efforts to raise questions.

Councilmember Bowie asked if we have a mutual agreement. Ms. Rogers stated yes, the resolution directs YarrowBay to sign the agreement before the Mayor signs it as is with the language they do object to. She noted they will just deal with it as their timing issue is that important to them.

Vote: Motion **passed** with all voting in favor (4-0).

Resolution No. 09-627, Finalizing Pre-Annexation and Development Agreement for the proposed East Annexation

City Planner Munson reported essentially this is the same recommendation as the previous item, but for a different annexation – the East.

A **motion** was made by Councilmember Mulvihill and **seconded** by Councilmember Boston to adopt Resolution No. 09-627, finalizing the agreement pursuant to the requirements of Resolution No. 09-591. Motion **passed** with all voting in favor (4-0).

Mr. Munson explained that we have a procedural matter. Before Council can take action on the next item we have to have a signed agreement on the part of the parties. The language in the proposals in accepting the petitions the petitions can not be accepted and circulated until we have a signed pre-annexation agreement on the parts of the parties of the agenda bills Council just acted upon. Mr. Combs added these documents are set up for Council to have adopted the Ordinance setting pre-annexation zoning.

Mayor Botts recessed the meeting at 8:02 p.m.

The meeting was reconvened at 8:10 p.m.

Resolution No. 09-632, Amending the City's Fee Schedule to Add Certain Fees for Travel Documents and New City Parks Permit Fees

Assistant City Administrator/City Clerk Martinez reported recently the City of Black Diamond became an approved passport acceptance facility and in order for the City to collect the fees associated with this service those fees must be added to our official fee schedule. She added also included in this update are the permit fees associated with the

newly adopted park rules. Areas where the fee schedule has been changed are highlighted.

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Olness to adopt Resolution No. 09-632, updating the City's Official Fee Schedule to add new fees for travel documents (passports) and new City parks permit fees. Motion **passed** with all voting in favor (4-0).

Ordinance No. 09-921, Amending Chapter 10.04.100 of the Black Diamond Municipal Code to Update the Provisions Dealing with Parking Fees

Community Development Director Pilcher reported he his standing in for Mr. Nix on this item and explained that Council requested that staff bring changes to this code in order to allow reduced prices for annual passes for park at the Lake Sawyer Boat Launch.

Councilmember Bowie asked that the deed be researched in regards to discriminating on folks who do not live in Black Diamond.

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Boston to table Ordinance No. 09-921 to a future meeting. Motion **passed** with all voting in favor (4-0).

City Attorney Combs referred Council back to Item #5 (Resolution No. 09-626) on the agenda regarding the resolution authorizing the Mayor to execute a pre-annexation agreement for the South Annexation. He stated the way both item 5 and 6 are set up paragraph 4.1 says by adoption of Ordinance bland as these were set up to be presented at the time you would adopt the zoning by Ordinance which would be at the next session. However, in trying to keep YarrowBay moving forward with their time table there is another way to do this tonight, which is to delete paragraph 4.1 from both agreements provided YarrowBay tells Council tonight that this is okay with them and they fully understand that will be the zoning adopted. Mr. Combs added this is okay because paragraph 4.2 of the agreements locks them into the zoning for five years, so the agreement would still be solid with the deletion of paragraph 4.1. He stressed timing is important on this item because items 6 and 7 on the agenda could not move forward tonight without these documents being signed. So Council would pass items 7 and 8 and authorize the circulation of petitions so long as the signed agreements from items 5 and 6 are received by noon tomorrow. Another option is to hold off on these items until the next Council meeting in two weeks and do the process that was done with the West Annexation.

Mr. Combs clarified to Council the process regarding agenda items 5 and 6 in relation to agenda items 7 and 8 and noted that when adopting items 7 and 8 the motion needs to include move to authorize the adoption of the resolution authorizing the circulation of petition so long as the Mayor receives by noon tomorrow the signed pre-annexation agreement.

A **motion** was made by Councilmember Bowie and seconded by Councilmember Olness to adopt Resolution No. 09-626, finalizing the pre-annexation and development agreement for the South Annexation area, subject to the deletion of paragraph 4.1 in its entirety and authorizing the Mayor to execute such agreement upon receipt of an executed agreement from the applicant.

Attorney Combs asked that before Council votes on this a representative of YarrowBay come forward to state on the record that what we are doing is agreeable to them and then they acknowledge this is the zoning being put on the property even though paragraph 4.1 is being deleted.

Jami Balint, YarrowBay stated to please adopt this agreement as Loren requested and we certainly agree the zoning will be as you previously authorized R-4 for the East Annexation and MPD/R-4 for the South Annexation. Ms. Balint added as representing the applicant they agree with this and also approve of the deletion of paragraph 4.1.

Vote: Motion **passed** with all voting in favor (4-0).

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Mulvihill to adopt Resolution No. 09-627, finalizing the pre-annexation and development agreement for the East Annexation area, subject to the deletion of paragraph 4.1 in its entirety and authorizing the Mayor to execute such agreement upon receipt of an executed agreement from the applicant and also subject to the applicant's approval of the deletion of paragraph 4.1 or the applicants legal counsel accepting that.

Mr. Combs explained the next item is different from the first because Bill Kombol needs to sign this agreement and he believes Ms. Balint is not authorized to represent Mr. Kombol on this.

Ms. Balint responded she is not, but is quite certain Mr. Kombol will given that YarrowBay has the property in a contract and if Mr. Kombol did not approve YarrowBay would not purchase the property. She added, the applicant BD Lawson Partners LP, her client approves the changes to the East pre-annexation agreement and the pre-annexation zoning will be R-4.

Vote: Motion **passed** with all voting in favor (4-0).

Resolution No. 09-628, Accepting First Petition of Proposals to Annex Portions of the City's Urban Growth Areas designated as the "South Annexation Area"

City Planner Munson reported Black Diamond Village Partners has submitted to the Community Development Department a Notice of Intent letter seeking the annexation of 250.18 acres (South Annexation Area) generally adjacent to the south-central boundary of the City. By RCW 35A.14.120 property owners may use the "lands to a city. Once submitted to the city the local legislative body (City Council) must meet with the property owners within sixty days to determine whether the City will accept, reject, or

geographically modify the proposed annexation; whether it shall require the simultaneous adoption of proposed zoning regulations; and finally whether it shall require the assumption of any portion of existing City indebtedness by the area to be annexed.

Mr. Munson added approval of the petition being submitted does not bind the Council into ultimately approving annexation. If the Council approves the proposed annexation at this Council meeting, the annexation process then requires the proponents to submit a second petition signed by persons representing at least 60% of the value of the land in the annexation area. At that point, the City must hold another public hearing and the Council may vote to accept or reject the second petition.

City Attorney Combs explained that before Council can adopt this Resolution a meeting with the initiating parties needs to take place.

Jamie Balint, representing BD Village Partners LP, BD Lawson Partners LP and the South and East Annexation property owners. She thanked Council for meeting with them tonight and added hopefully Council will approve accepting their notice of intent to annex.

A **motion** was made by Councilmember Olness and **seconded** by Councilmember Mulvihill to adopt Resolution No. 09-628, accepting the notice of intent to annex the South Annexation area and authorizing the circulation of the petition for annexation. Motion **passed** with all voting in favor (4-0).

Resolution No. 09-629, Accepting the First Petition of Proposal to Annex Portions of the City's Urban Growth Areas Designated as the "East Annexation Area"

City Planner Munson reported this item is basically the same as the previous item, except for the condition that we need to have the signed pre-annexation agreement in the hands of the City by noon tomorrow to complete the authorization of circulating this petition. In addition, before action can be taken a representative of the applicant needs to come forward so a meeting with the initiating parties can take place.

Jamie Balint, representing BD Lawson Partners, LP who is looking forward to annexing their property into Black Diamond and requests Council adopt our notice of intent to annex and allow us to move forward with submitting our 60% petition.

City Attorney Combs asked Ms. Balint if she was agreeable regarding the South and the East Pre-Annexation Agreements be submitted to the City by noon tomorrow. Ms. Balint responded, absolutely.

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Mulvihill adopting Resolution No. 09-629, accepting the notice of intent to annex the East Annexation Area and authorizing the circulation of the petition for annexation, subject to the City receiving the executed pre-annexation agreements prior to noon tomorrow. Motion **passed** with all voting in favor (4-0).

Resolution No. 09-630, Authorizing the Mayor to execute a Purchase and Sale Agreement with Mrs. Parkin for the Railroad Avenue Street Improvement Project

Public Works Director Boettcher reported Council authorized the Mayor to negotiate the purchase of a portion of Mrs. Parkin's property as needed for the Railroad Avenue Street Improvement Project. Mrs. Parkin and the City have agreed to the amount of property, the terms and the amount for the sale.

He added, for this small of a purchase a certified appraisal is not required. The seller has the right to request an appraisal but opted not to request the appraisal because of the cost and potentially the appraisal might have come in lower than what the City was offering.

Staff is recommending moving forward with the right-of-way purchase to keep the Railroad Avenue project on schedule.

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Boston to adopt Resolution No. 09-630, authorizing the Mayor to execute a Purchase and Sale Agreement with Mrs. Parkin for a portion of her property for the Railroad Avenue Street Improvement Project. Motion **passed** with all voting in favor (4-0).

Resolution No. 09-631, Accepting the Railroad Avenue Watermain Improvements as Complete by SLEAD, LLC

Public Works Director Boettcher explained this is a formal action required by the Council that starts a 45 day waiting period to where an outside vendor, supplier or laborer would have an opportunity to file a claim against this project pursuant to RCW 60.28.011(2). After the 45 days and once the City has received, an affidavit of no liens, a release from the Department of Revenue that all taxes have been paid and a release from any claims from the Department of Labor and Industries, pursuant to RCW 60.28.051 the retainage being held by the city can then be released.

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Boston to adopt Resolution No. 09-631, accepting the Railroad Avenue Watermain Improvements as complete by SLEAD, LLC according to the contract documents. Motion **passed** with all voting in favor (4-0).

DEPARTMENT REPORTS: None

MAYOR'S REPORT:

Mayor Botts thanked staff for all their hard work.

COUNCIL REPORTS:

Councilmember Boston updated Council on the South King County Area Transportation Board meeting with regards to proposed metro cuts.

ATTORNEY REPORT:

City Attorney Combs reported there will be an executive session regarding real estate negotiation, potential litigation and personnel.

PUBLIC COMMENTS: None

CONSENT AGENDA:

A **motion** was made by Councilmember Boston and **seconded** by Councilmember Bowie to adopt the Consent Agenda. Motion **passed** with all voting in favor (4-0). The Consent Agenda was approved as follows:

Claim Checks – August 20, 2009, No. 33898 through No. 33959 in the amount of \$178,546.84

Payroll - July 31, 2009, No. 16094 through 16175 in the amount of \$303,006.46

Minutes – Workstudy Notes from August 6, 2009 and Council Minutes from August 6, 2009

EXECUTIVE SESSION:

Mayor Botts recessed the regular meeting for an Executive Session at 8:44 p.m. to discuss potential litigation, real estate negotiation and on personnel to review the performance of a public employee pursuant to RCW 42.30.110(1)(g). No action was anticipated to follow the Executive Session, which was expected to last thirty minutes.

Mayor Botts announced a thirty minute extension of the executive session.

The regular meeting was called back to order at 9:44 p.m.

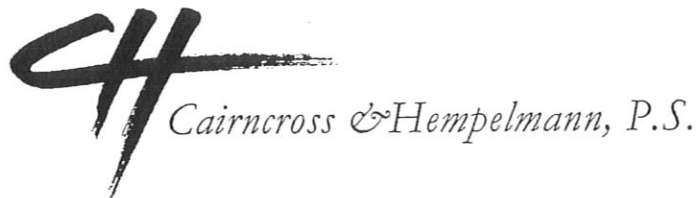
ADJOURNMENT:

A **motion** was made by Councilmember Bowie and **seconded** by Councilmember Boston to adjourn the meeting. Motion **passed** with all voting in favor (4-0).

ATTEST:



Howard Botts, Mayor


Brenda L. Martinez, City Clerk



MEMORANDUM

To: Black Diamond City Council

From: Nancy Bainbridge Rogers, Attorney for Yarrow Bay Development 

Re: Yarrow Bay request for Revision to South Annexation Area "Pre-Annexation and Development Agreement"

Date: August 20, 2009

SUBSTANTIVE REQUEST TO THE COUNCIL

Yarrow Bay requests that the Council delete language regarding Roberts Drive from the South Annexation Area Agreement, because the City has no authority to require inclusion of the language, and it is superfluous because the issue will be addressed in future permit processes. The Roberts Drive language which Yarrow Bay asks the Council to strike appears in Section 9.2 of the South Annexation Area Pre-Annexation and Development Agreement (the "PADA"), and is shown in strike through font on the attached excerpt of the PADA, labeled "Yarrow Bay's Requested Amendment".

Nothing in any prior agreement obligates Yarrow Bay to agree to these statements and assumptions about the future of Roberts Drive. The City Attorney has told Yarrow Bay that the Pre-Application Agreement for Yarrow Bay's pending application for the Villages MPD, and the Black Diamond Urban Growth Area Agreement ("BDUGAA") require reference to Roberts Drive. In fact, Section 3.2 of the Pre-Application Agreement states only that Yarrow Bay and the City "shall negotiate a pre-annexation agreement that will provide for the implementation of the remaining BDUGAA conditions relative to annexation of the South Annexation Area." Regarding "major road access," Section 5.4 of the BDUGAA directs that "commitments to construct and provide such infrastructure are in place so that service can be provided at the time of project completions." Therefore, the only language mandated by prior agreements is language Yarrow Bay does agree and consent to: specifically, the proposed terms of the PADA which properly obligate Yarrow Bay to construct and provide major road access to the Villages Property so major road access service for the South Annexation Area can be provided at the time of project completions related to the pending Villages MPD application, and the fallback language that assures major road access if the Villages MPD does not proceed.

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It is likely that the City Attorney will assert that the Roberts Drive language must be included in order to further the “intent” of the BDUGAA. However, pursuant to Section 9.10, the BDUGAA is a fully integrated contract, meaning that the words of the BDUGAA represent the complete agreement. External evidence of intent may not be used to “add to, subtract from, vary or contradict” the terms of integrated contracts; evidence of intent can only be used to interpret the meaning of what is actually contained in the agreement. Berg v. Hudesman, 115 Wn. 2d 657, 670, 801 P.2d 222 (1990). What is contained in the BDUGAA is solely the requirement to assure “major road access,” as well as only one specific reference to the provision of “Pipeline Road.”

In addition to not being required under the agreements, the Roberts Drive language is couched in terms of mitigation for specific project applications that are currently being processed by the City. The proposed language forces the City and Yarrow Bay to agree – before the official analysis is complete, and without any definitions for what constitutes an impact – that there will be no negative effect on the level of service of Roberts Drive associated with either the Villages MPD or alternate development in the South Annexation Area. The proper venue to dictate limits on use of Roberts Drive is a permitting action where technical transportation analysis can be conducted, and mitigation conditions evaluated and imposed, not a PADA.

That the specifics of road access are to be addressed with MPD permitting is further confirmed by the Major Road Access Funding Agreement for West Annexation Area. The purpose of that Agreement was to satisfy the BDUGAA requirement that commitments to construct and provide would be in place so that service can be provided at the time of project completion. The Agreement included the commitment to “construct and provide major road access, including an east-west connection (“Pipeline Road”),” and that the “details, timing and phasing for the construction of said major road access improvements shall be determined during the Master Plan Development permit approval process and shall be incorporated into the Master Plan Development permit approval conditions.” Again, nothing defining Roberts Drive was listed in this Agreement either.

Because there is no prior agreement that obligates inclusion of language regarding Roberts Drive in the PADA, and because there is no legal basis to include reference to mitigation standards applicable to Roberts Drive, and because even without the Roberts Drive language, the PADA assures that “major road access” will be provided by Yarrow Bay for development of the South Annexation Area, the Roberts Drive language should be deleted from the PADA.

PROCEDURAL DETAILS

Yarrow Bay also wants the Council to understand that Yarrow Bay is working hard to work with all branches of the City to advance this annexation and other matters. Unfortunately, sometimes the City’s process can be quite frustrating.

In this case, the City Attorney initially required that Yarrow Bay sign the PADA as a condition precedent to the South Annexation items being placed on the Council agenda, even

though the City Attorney and City Staff knew that Yarrow Bay objected to the PADA terms regarding Roberts Drive. That condition precedent was eventually, and properly, lifted.

In the future, when matters require Council action and direction to the Mayor or other City Staff, Yarrow Bay believes that a healthier process would be to allow Yarrow Bay the opportunity to present any disagreement regarding the matter to the Council for its review, rather than for Yarrow Bay to be forced to sign an agreement despite disputed terms, just to get a matter onto an agenda before the Council.

The details of communications regarding the City Attorney and Staff disagreement with Yarrow Bay over the Roberts Drive language are:

- By email to Yarrow Bay dated August 10, 2009, 4:24 PM, the City Attorney stated that: “if your client will sign the agreement [PADA] and get it back to the City by this Wednesday, then at next Thursday’s council meeting the last of the preannexation zoning hearings could be held, the City could hold the meeting with the initiating parties, and also authorize circulation of the annexation petition.”
- By email to Yarrow Bay dated August 13, 2009, 9:23 AM, the City Attorney stated that “Timely getting the signed agreement [PADA] from you, as I indicated in my Monday e-mail, was a condition precedent to anything going on the agenda.” Later in that same email, two more references were made to requiring Yarrow Bay to sign the agreement prior to the City Attorney placing the annexation onto the Council agenda.
- By email to Yarrow Bay dated August 14, 2009, 8:41 AM, the City Attorney stated that: “At my meeting at the City yesterday the City had received your email and we discussed your concerns. It was agreed that the City’s draft would go on the agenda, whether or not your client signs it. The resolution has been drafted, and that will be in the packet, will authorize the mayor to sign the agreement after it has been signed by your client.”
- Despite the known disagreement regarding Roberts Drive, the City Council Agenda Bill for the PADA includes as part of the Summary Statement, that: “city staff and the city attorney have been negotiating with BD Village Partners, LG staff and their legal counsel since early June the details of this required agreement. The parties have reached a consensus on the language contents and the agreement is presented for Council’s review and consideration.” Yet, consensus had not been reached as to Roberts Drive.

YARROW BAY'S REQUESTED AMENDMENT To South Annexation Area PADA

9.1 Major Road Access. Village Partners commits to construct and provide major road access to the Villages Property so major road access service for the South Annexation Area can be provided at the time of project completions. The details, timing, and phasing for the construction of said major road access improvements shall be determined during the MPD Permit approval process and shall be incorporated into the MPD Permit and/or approval conditions.

9.2 BDUGAA paragraph 5.2(a)(6), and City Ordinance 05-803 required that the Pipeline Road, as that term is defined in the BDUGAA, would be constructed as part of the development of the West Annexation Area in order to provide a new east-west road connection for the City. The West Annexation Area and the Villages Property are both included in the Villages MPD Application, and it is anticipated that the construction of the Pipeline Road will be a condition of approval for the Villages MPD Application, with the timing of construction being defined within the conditions of approval. ~~The Villages MPD approval will thus provide the needed new east-west connection through the City so that the level of service on Roberts Drive will not be significantly adversely affected as a result of the development of the properties included within the Villages MPD Application, and the number of travel lanes on Roberts Drive will not be increased in order to handle the traffic resulting from the Villages MPD project. If the Villages MPD Application is not approved, or the Villages Property is developed independently of the West Annexation Area, then further analysis may be required to assure that the applicant provides concurrency of off site transportation improvements in order to mitigate the traffic generated in the South Annexation Area, without requiring the increase in the number of travel lanes on Roberts Drive, or degrading the level of service on Roberts Drive in order to mitigate those impacts.~~

9.3 Other Roads. Village Partners shall construct such other roads as are required to adequately serve the development on the Villages Property, as authorized in any MPD Permit approvals.

9.4 Road Design and Construction Standards. The road design and construction standards that will be applied shall be those determined during the MPD Permit approval process. Since road construction may be phased, as determined by the MPD Permit, different road design and construction standards may apply to subsequent road phases.