

ORDINANCE NO. 15-1058

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, TO ASSUME THE EXCLUSIVE RIGHT TO PROVIDE WATER SERVICE TO APPROXIMATELY 98 ACRES LOCATED ON THE CITY'S WEST SIDE PURSUANT TO CH. 35.13A RCW AND TO CONFORM THE 1989 COORDINATED WATER SYSTEM PLAN SERVICE AREA MAP TO THE CITY'S 2009 STATE DEPARTMENT OF HEALTH APPROVED WATER SERVICE AREA AND CITY ANNEXATION.

WHEREAS, under the Growth Management Act, Ch. 36.70A RCW ("GMA"), cities are the preferred providers of urban services; and,

WHEREAS, the State Department of Health approved the City's Water System Plan and retail service area in 2009; and,

WHEREAS, the City of Black Diamond plans to provide water service throughout its entire water service area, which is located within its corporate boundaries; and,

WHEREAS, GMA charges the City with coordinating its land use plans, including its zoning and Comprehensive Plan, with its Water System Plan; and,

WHEREAS, in 1989 King County adopted a Coordinated Water System Plan ("CWSP") which includes a map showing certain property within the City being located within the Covington Water District's future service area, and,

WHEREAS, some of this property is within the City's State Department of Health approved retail service area; and,

WHEREAS, it is inconsistent with GMA and inefficient for multiple service providers to attempt to serve the same properties as duplicative infrastructure is constructed, and property owners and rate payers must then bear the burden of those additional costs; and,

WHEREAS, the 1989 CWSP map should be conformed to the City's State Department of Health approved retail service area and the 2005 annexation; and,

WHEREAS, the City finds it is in the public interest, consistent with GMA's purpose to ensure the efficient provision of urban services and infrastructure to urban development, for it to be sole water service provider within its existing water service area, given the inefficiencies associated with multiple providers attempting to provide water service to the same properties.

THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, ORDAINS AS FOLLOWS:

Section 1. The City Council makes the following findings to support the actions described herein:

A. BACKGROUND

1. The property ("Property") that is the subject of this assumption, pursuant to Ch. 35.13A RCW, is the approximately 98 acres shown in the map of the Property and as legally described in Attachment A, which is incorporated by this reference.

2. The Property is part of a master planned development covering 1,196 acres. The City plans to provide water service to the entire development, which surrounds the Property on three sides. The City is presently providing water for construction purposes within the master planned development. The entire master planned development is within the City's water service area approved by the State Department of Health in 2009.

3. The Property was annexed to the City in 2005. As part of the annexation, the City was identified as the water provider to the Property.

4. As a result of these and other decisions, the City has secured the exclusive right to supply water to the Property. Specifically, these actions include: (a) King County's inclusion of the Property in the City's designated urban growth area ("UGA"); (b) King County actions under the GMA and agreements entered into with the City and Property owner to implement the UGA designation; (c) the City's annexation of the Property; and (d) the 2009 Washington State Health Department approval of the City's Water System Plan and retail service area including the Property.

5. Covington Water District wishes to provide water service to the Property. In a decision issued on May 1, 2015, in an appeal brought by the Covington Water District, the King County UTRC (Utilities Technical Review Committee) found that the City has statutory authority to assume the Property and that "an assumption should be pursued" by the City under Ch. 35.13A RCW. Covington Water District did not appeal the UTRC's finding or conclusion as to assumption. The UTRC also found that the Property was within the City's approved water service area and City service is "timely and reasonable." The District did not appeal these holdings.

6. The UTRC also determined that the 1989 CWSP service area map needed to be amended to identify the City as the sole service provider to the Property and that assumption would accomplish that.

7. The City has appealed the UTRC decision as assumption is not necessary given past planning decisions and the lack of Covington Water District facilities on the Property, and given the Property is outside the District's corporate boundaries. However, completing assumption may reduce litigation and lead to a more efficient resolution of the matter.

8. The City published notice of a public hearing on July 21, 2015 and July 28, 2015 in the Voice of the Valley Newspaper.. The draft ordinance was posted on the City website. The public hearing was held before the City Council on August 6, 2015. During the hearing, the City heard public testimony and has also reviewed written comments.

B. DISTRICT RESPONSIBILITIES, PROPERTY, FACILITIES, AND/OR EQUIPMENT

9. The City is authorized to "assume by ordinance, jurisdiction of the District's responsibilities, property, facilities and equipment within the corporate limits of the City." RCW 35.13A.050. The Property is located within Black Diamond corporate limits.

10. The Property is not within the corporate boundaries of the Covington Water District,¹ and the District has no authority to impose and has not imposed any taxes or assessments on the Property.

11. The Covington Water District does not own, control, or operate any property, facilities, or equipment in the Property. Specifically, the District does not have any water supply pipelines or transmission mains or other water pumping or conveyance facilities in the Property. The District does not own any real property within the Property. The District does not have any customers in the Property. In sum, the District does not own or hold any property, facilities, equipment or any other assets in the Property. As a result, there are no District contractual obligations secured by the Property for which the City or owners/occupants bear any liability under RCW 35.13A.050.

12. Accordingly, the City's assumption of the District's remaining "responsibilities" in the Property, if any, is repetitive and redundant of the City annexation of the Property in 2005.

13. Following City assumption, RCW 35.13A.050 provides for the District to make certain "serving facilities" available to the City. "Serving facilities" means i) any facilities serving or designed to serve any portion of the District outside the corporate limits of the City, and ii) any facilities serving or designed to serve territory included within the City.

a. Assuming without conceding that the District's three water pipe lines that are located immediately west of the Property are "serving facilities" under RCW 35.13A.050, the City has the right to make use of available capacity in the District's three water pipelines.

b. RCW 35.13A.050 requires the District, for the economically useful life of any "serving facilities," to "make available sufficient capacity" in the serving facilities to meet the water requirements of the Property at a reasonable rate to all parties.

¹ CWD 2007 Water System Plan, Ex. 1-1. Absent limited exceptions, including agreement with another water district serving the area, "[t]he District will not extend water service to any area that has not been formally annexed to the District's corporate boundaries." CWD Admin. Reg. 1.08.020.

c. The City finds that the District's three water pipelines are not useful to meeting water requirements in the Property because they cannot alone deliver water at adequate pressure. CH2MHill, *Review of Technical Data Related to Water Service Area Dispute in The Villages MPD, Black Diamond* (January 19, 2015), pgs. 5-6; Hearing Examiner's Preliminary Pat Conditions of Approval re: The Villages (December 10, 2012). These water pipelines are not affected by the City's assumption under this Ordinance.

d.

C. CITY SERVICE AND GMA CONSISTENCY

14. Under GMA, cities are the primary providers of urban services, which include urban water utility service.² The King County Countywide Planning Policies are consistent. "The Urban Growth Area is completely located within cities, which are the primary providers of urban services."³

15. The Property was originally located outside the City's Urban Growth Area or UGA, so was not slated for urban development. However, in 1996, King County, the City, and the Property owners executed the Black Diamond Urban Growth Area Agreement, or BDUGGAA, which charges the City with annexation and water utility planning for the Property.⁴

16. Several years later, in 2003, the City and Property owners executed the Water Supply Facilities and Funding Agreement. In return for infrastructure improvements, City water service to the entire 1,196 acre master planned area was provided for.⁵

17. Two years later, in 2005, the City annexed the Property. Notice was provided to the King County Boundary Review Board ("BRB") of the annexation.⁶ In the annexation petition filed with the BRB, the City was identified as the service provider. Covington Water District did not contest or otherwise appeal annexation.

18. The annexed area was then subjected to extensive public review. Following City moratoria, in 2008, the City commenced work on updating comprehensive planning documents, engineering, municipal codes, and construction standards for the master planned development, with multiple hearings held from 2008-2010. This process resulted in a series of utility and land use decisions.

² RCW 36.70A.110(4); *see also* RCW 57.04.020 (City consent required for utility district to provide service within the city).

³ Countywide Planning Policies, pg. 7. *See also* pg. 46, Policy PF-7 ("Plan and locate water systems in the Rural Area that are appropriate for rural uses and densities and do not increase the development potential of the Rural Area."); County Comprehensive Plan, pg. 8-5, Policy F-209 ("In the Rural Area, services provided by agencies should support a rural level of development and not facilitate urbanization").

⁴ Black Diamond Urban Growth Area Agreement, App. A, ¶¶ 6.5 and 8.1, *see also* Maps 1 and 7. The Agreement is also at Appendix B to the City's Water System Plan.

⁵ City Water System Plan, App. N, *see e.g.*, Section Four - Agreement Purpose (agreement intended to provide infrastructure funding and guarantee water supply).

⁶ Black Diamond Urban Growth Area Agreement, App. A, ¶¶ 6.5 and 8.1, *see also* Maps 1 and 7. The Agreement is also at Appendix B to the City's Water System Plan.

19. The State Department of Health approved the City Water System Plan in 2009 following Covington Water District review and approval by King County. The Water System Plan includes the Property within the City's Service Area and provides detail on City service.⁷

20. The City's Water System Plan was subject to extensive public review. Both Covington Water District and King County, including the King County Utilities Technical Review Committee, reviewed and commented on the City's Water System Plan.

21. Following this review, the King County Council adopted Ordinance 16774, approving the City' Water System Plan and finding the City's Water System Plan is:

consistent with other pertinent county adopted plans and policies, with the exception of the existing South King County Coordinated Water System Plan, which will need to be modified as provided for by law.⁸

22. The South King County Coordinated Water System Plan, or SKCCWSP, was adopted in 1989, and has never been formally updated. King County's more recent legislative actions supersede the CWSP's 1989 map of future service areas.

23. The City's approved water service area includes the Property, which consists of approximately 98 vacant, partially graded, but unimproved acres located on the City's western side. *See* Attachment A. The Property is part of a larger 1,196 acre development,⁹ which the City will be serving consistent with its Water System Plan and GMA planning documents.

24. Also in 2009, the City updated its Comprehensive Plan. The City's Plan makes note of the annexation and, consistent with past planning, provides for City water service to the Property.¹⁰

25. The County Comprehensive Plan is consistent with City water service,¹¹ as are the Countywide Planning Policies, which identify the City UGA and boundaries.¹²

⁷ RCW 36.70A.103 ("State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to" GMA.).

⁸ King County Ordinance 16774, Finding e.

⁹CH2MHill Technical Memo, section two, Fig. 3 and Fig. 5; *see also* City Water System Plan, Fig. 2.7, pg. 2-21 (City's water service area).

¹⁰ City's 2009 Comprehensive Plan, *see e.g.*, pgs. 8-35-36 (Fig. 9.1a and 9.1b provide detail on City water service), *see generally*, 8-28-8-32. Long-standing plans for Property development are described at pgs. 1-9, 2-1-2-2, with the master plan development requirements described at pg. 1-11, and the UGA shown at Fig. 2-1, and the 2005 annexation noted on pg. 2-11.

¹¹ County Comprehensive Plan, *see* maps of City/UGA at end of Chapters 1 and 2, note policy commitment to implementation of Black Diamond Urban Growth Area Agreement, pg. 10-37, Policy C-1104. *See also* City Comprehensive Plan, pg. 2-18, UGA Policy U-9 ("Sewer and water facilities extended to the UGA will not serve adjacent rural or resource lands."), and pg. 2-6 ("Efficient use of resources will result from the appropriate location of development so that public water, sewer, storm drainage, police and fire protection service costs are minimized.").

¹² CWPP, pg. 50, *see also* PF-7 ("Plan and locate water systems in the Rural Area that are appropriate for rural uses and densities and do not increase the development potential of the Rural Area.")

26. A series of development approvals followed. The City approved Yarrow Bay's Master Planned Development in 2010, the Yarrow Bay Development Agreement in 2011, and then a preliminary plat for the first phase of development.

D. SEPA REVIEW

27. This assumption action is the same proposal as the City's adoption of its 2009 Water System Plan, which included the Property within the City's water service area. SEPA was completed on that proposal. A SEPA Checklist was prepared and the City issued a DNS (determination of non-significance). Those documents are attached to the City's Water System Plan and were circulated as part of the Plan update. No appeals were filed. SEPA review has been completed on this proposal.

28. In any event, this action to amend the CWSP map is exempt from SEPA as it is procedural in nature. The Property is already within the City's Water Service Area, which the State Department of Health has approved, and within the City's corporate boundaries. The action contains no substantive standards and does not modify the environment. Such a matter is an exempt procedural action, as defined by SEPA.

The proposal, amendment or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program shall be exempt if they are: (a) Relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment. (b) Text amendments resulting in no substantive changes respecting use or modification of the environment.¹³

29. Even if the action being taken was an actual annexation of property or altered the City's municipal boundaries, those types of actions are also exempt. "All agency organization, reorganization, internal operational planning or coordination of plans or functions"¹⁴ are exempt. More broadly, annexations are exempt from SEPA review¹⁵ as are city consolidations and incorporations.¹⁶

30. Development planned on the Property, including City water utility service to the Property, has undergone extensive SEPA review, including preparation of an environmental impact statement, or EIS. The Villages Master Planned Development EIS, City of Black Diamond (December 2009). The Court of Appeals decision upheld the City's EIS, and no further litigation over that document is pending. *Toward Responsible Development v. City of Black Diamond*, ___ Wn. App. ___ (Div. I, January 27, 2014), unpublished. A water line serving the entire master planned development has also undergone SEPA review. The MDNS was issued on March 31, 2015 and not appealed (File No. PLN 14-0037). The City's 2009 Comprehensive Plan which addresses City water service also underwent SEPA review and that

¹³ WAC 197-11-800(19)(a)and (b).

¹⁴ WAC 197-11-800(14)(h).

¹⁵ RCW 43.21C.222.

¹⁶ RCW 43.21C.225; *see also* RCW 43.21C.227; WAC 197-11-800(5)(a) and (b) (acquisition of real property rights exempt, as are inter-governmental transfers of real property).

review was not appealed.

E. ENGINEERING AND COST CONSIDERATIONS

31. The City's Water System Plan, dated 2009, as approved by the State Department of Health, as well as the EIS prepared for the master planned development, addresses water service and outlines in detail the approach to providing water service to the Property. In addition, the City retained independent consultants to further evaluate water service. CH2MHill prepared an engineering analysis which provides further detail on water service. *Review of Technical Data Related to Water Service Area Dispute in The Villages MPD, Black Diamond* (January 19, 2015).

32. The CH2MHill engineering analysis compared the City's approach to service to that proposed by Covington Water District. As the City will be serving the surrounding urban development, City service is logical and more efficient than the District's approach which would extend water pipes from rural areas to provide urban utility service. The District has no infrastructure on the Property. Three pipes within the unincorporated County terminate adjacent to the Property but the pipes are not necessary for service and present engineering concerns. In general, the engineering analysis concluded that the District's service approach would require the construction of 4,250 additional feet of 12" pipeline and \$5.2 million of additional costs.¹⁷ There are no hook-up fees associated with City service.

33. There are additional issues with Covington Water District service, as the District cannot meet fire flow requirements.¹⁸ This is not an issue with City service.

34. Costs to the City associated with assumption are minimal. The developer of the Property (Yarrow Bay Holdings) will be installing the extension to the area and the distribution and service lines, and will cover City costs to inspect and install meters and set up customer accounts. After construction of the facilities, they will be turned over to the City for ownership and maintenance.

35. The City's actual service costs will start upon service to the new customers. Initial operational costs will involve slight increases, such as more chlorine, pumping additional water, using more sodium hydroxide, sending out additional bills, and additional water quality testing. Eventually, as the system grows, the City anticipates hiring additional staff. However, these operational cost increases are minimal in comparison to the increased revenue from the additional City customers on the basic existing system. The 98 acres is a small portion of the approximately 4,800 acres the City either is presently serving or plans to serve throughout its entire service area, which includes the 1,196 acre master planned development.

¹⁷ CH2MHill Technical Memo (January 19, 2015), pg. 14, bullets two and three and Fig. 7, sections six and eight of the Memo provide additional detail.

¹⁸ *Id.*, see pgs. 4, 6, 13-14 (Table 8).

Section 2. Assumption of Exclusive Right to Provide Water Service to Conform 1989 CWSP Service Area Map with 2009 State Department of Health's Approval of City's Water System Plan Service Area and the 2005 Annexation.

a. The City hereby assumes the sole right to provide water service to the Property pursuant to RCW 35.13A.050.

b. This assumption is taken to address a recommendation of the King County Utilities Technical Review Committee to undergo assumption to achieve map conformance. With this action, the City does not concede assumption is in fact necessary.

c. Even though the City finds that the District has no assets whatsoever in or on the Property, for avoidance of doubt, the City hereby assumes any and all "responsibilities, property, facilities, and/or equipment" on the Property pursuant to RCW 35.13A.050.

Section 3. No Assumption of Assets or Indebtedness. With this action, the City is not taking ownership of any Covington Water District assets or assuming any indebtedness with respect to the Property. There are no Covington Water District assets, facilities, or indebtedness on the Property, which is vacant, lacks any District infrastructure, and is located outside the District's corporate boundaries.

Section 4. Transmittal. The City Mayor or her designee shall transmit this ordinance to the King County Utilities Technical Review Committee to take the ministerial action of conforming the 1989 Coordinated Water System Plan mapping with this action.

Section 5. No Waiver. The City expressly disclaims any waiver of its rights and authority separate and independent of RCW 35.13A.050, to provide retail water service in the Property and to continue to implement plans and authority to be the exclusive water purveyor to the Property.

Section 6. Severability. If any section, sentence, clause or phrase of this Ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

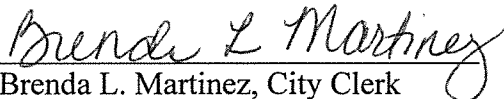
Section 7. Publication and Effective Date. This Ordinance shall be published by an approved summary consisting of the title. This ordinance shall be effective five days after publication, as provided by law.

PASSED by the Council and approved by the Mayor of the City of Black Diamond,
this 3rd day of September, 2015.

CITY OF BLACK DIAMOND


Mayor Carol Benson

ATTEST/AUTHENTICATED:


Brenda L. Martinez, City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

Carol A. Morris, City Attorney

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