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May 5, 2010

Steve Pilcher
Community Development Director
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010

Re: Black Diamond - Lawson Hills and The Villages SEPA Appeals
REVISED Lawson Hills Hearing Examiner Decision with Exhibits A - D

Dear Mr. Pilcher:

At the request of Phil Olbrechts, enclosed is the original of the REVISED Lawson Hills Hearing Examiner Decision with Exhibits A - D as well as a Declaration of Mailing in the above-referenced matter.

Sincerely,

OGDEN MURPHY WALLACE, P.L.L.C.

N. Kay Richards, Legal Assistant to
Phil A. Olbrechts

/nkr
Enclosures

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DECLARATION OF MAILING
Lawson Hills/The Villages Master Planned Developments
City of Black Diamond

I, N. Kay Richards, make the following declaration: I am a resident of the State of Washington, over the age of 18 years, not a party to this action, and competent to be a witness herein.

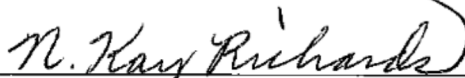
On the 5th of May, 2010, I mailed, via U.S. First Class Mail, a true and correct signed copy of the REVISED Lawson Hills Hearing Examiner Decision with Exhibits to the following individuals who were not served on May 4, 2010, by the email sent by me, at the request of Phil A. Olbrechts, at 4:49 p.m.

Michael and Annette L. Smith
24319 SE Green Valley Road
Auburn, WA 98092

Steve Sundqvist
24713 SE Green Valley Road
Auburn, WA 98092

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, this 5th day of May, 2010.



N. Kay Richards, Legal Assistant to
Phil A. Olbrechts, Hearing Examiner for the
City of Black Diamond

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MAY 06 2010

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BEFORE THE CITY OF BLACK DIAMOND HEARING EXAMINER

IN RE: MASTER PLANNED
DEVELOPMENT APPLICATION
FOR LAWSON HILLS, PLN09-
0016

SEPA APPEAL NOS. PLN09-0039,
PLN09-0042, PLN 09-0043

REVISED HEARING EXAMINER
DECISION

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I. EXECUTIVE SUMMARY

The Lawson Hills Final Environmental Impact Statement (LH FEIS) is adequate. An EIS is adequate if it contains a reasonably thorough discussion of probable significant adverse environmental impacts. The LH FEIS satisfies this standard. To be sure, the LH FEIS could be improved. The appellants of the LH FEIS ("SEPA¹ Appellants") have identified several shortcomings in the LH FEIS. Many of these shortcomings will be addressed through enhanced mitigation of the Master Plan Development

¹ "SEPA" stands for the Washington State Environmental Policy Act, Chapter 43.21C RCW. SEPA requires the LH FEIS that is the basis of the EIS appeals subject to this decision.

1 permit ("MPD"), including mitigation regarding noise, traffic and Green Valley
2 Road. Overall, however, the LH FEIS provides a more than adequate analysis of
3 environmental impacts.

4 The writers of the FEIS² were faced with a monumental challenge. They had to
5 address all of the impacts of the largest development ever proposed in King County in
6 a manner that did not overwhelm and confuse the reader with an overload of
7 information and complex technical analysis. The writers met the challenge by
8 preparing a fairly easy-to-read document that is backed by hundreds of pages of
9 technical reports and data. For the vast majority of impacts, the FEIS successfully
10 alerts the reader to the most significant and vital information on environmental
11 impacts.

12 The SEPA Appellants established a few instances where the FEIS failed to provide
13 this vital information. This vital information was either not disclosed in the main text
14 of the FEIS, or the text and appendices both failed to identify and/or adequately
15 assess vital information on probable significant adverse environmental impacts.
16 However, the adequacy standard does not require perfection. It requires
17 reasonableness. This fairly broad standard allows the Examiner to assess the
18 significance of shortcoming in the context of the entire scope of the FEIS and the
19 benefits of requiring the FEIS or portions of it to be redone. Under this
20 reasonableness analysis, all of the issues raised by the SEPA Appellants were
21 relatively minor ("unfortunate but not fatal" under the case law) or there was little
22 benefit found in additional FEIS review.

23 The most difficult issue by far in the FEIS was the adequacy of the Lake Sawyer
24 water quality analysis. Development in the Lake Sawyer watershed has the potential
25 to exact devastating consequences upon Lake Sawyer. Phosphorous from the
stormwater runoff of development can result in blue-green algae blooms, which in
turn can result in the release of toxins, closure of beaches, aesthetic blight through
production of a green surface scum and harm to endangered fish. Due to past water
quality issues, the US Environmental Protection Agency has designated Lake Sawyer
an impaired water body under the Clean Water Act. This has triggered years of study
and modeling with the input of a wide array of stakeholders, including Lake Sawyer
residents, state agencies and representatives of the City of Black Diamond ("City").
One of the many documents to come out of these efforts was the Lake Sawyer
Management Plan ("LSMP").

26 Much of the debate during the SEPA appeals concerned the adequacy of the LSMP
27 phosphorous mitigation. The Applicant based its FEIS Lake Sawyer water quality
28 analysis upon the LSMP. The LSMP includes years of data collection on Lake

29 ² Reference to the "FEIS" as opposed to the Villages FEIS or Lawson Hills FEIS encompasses both the
30 Villages and Lawson Hills FEIS.

1 Sawyer water quality, a detailed assessment of phosphorous generation from future
2 development and a comprehensive list of mitigation measures. However, the SEPA
3 Appellants successfully established that the LSMP makes no assurance that its
4 mitigation measures will prevent the adverse impacts of phosphorous contamination,
5 despite the erroneous belief of the Applicant's consultant that it would. The SEPA
6 Appellants also established that under the modeling used in the LSMP to predict
7 future phosphorous levels, there was a reasonable chance that the Lawson Hills and
8 Villages MPD proposals alone could "tip" Lake Sawyer into producing the blue-
9 green algae blooms and all associated adverse impacts. The SEPA Appellants call the
10 phosphorous levels at which the algae begins to wreak havoc the "tipping point."

11 If the LSMP was the final word on the issue, the City would be tasked with drafting a
12 new FEIS. However, the LSMP was released in 2000 and based upon data from
13 1995. In 2009 the Washington State Department of Ecology ("DOE") released a
14 Water Quality Implementation Plan ("Implementation Plan"), designed to implement
15 measures to protect Lake Sawyer water quality. In that document DOE concluded
16 that if specified mitigation measures were followed, new development would not
17 jeopardize Lake Sawyer water quality. DOE employed a standard that prohibits
18 phosphorous levels from exceeding a 5% risk of reaching the tipping point. The
19 Applicant provided unrefuted testimony that the MPDs do incorporate the standards
20 required by DOE to meet the 5% risk standard. The Implementation Plan also reveals
21 that Lake Sawyer water quality has improved dramatically since 1995, the base year
22 for LSMP data. Lake Sawyer is no longer anywhere near the tipping point and it
23 appears unlikely that the MPD proposals would exceed the tipping point, given that
24 the Villages and Lawson Hills MPDs³ only take up 10% of the land area and 4% of
25 the developable area of the Lake Sawyer watershed.

16 The Implementation Plan provides no analysis or modeling to show how DOE
17 determined that its recommended conditions for new development would preserve
18 Lake Sawyer water quality. The modeling in the LSMP was left unchanged in the
19 Implementation Plan. There is certainly a gap of information in the record that could
20 be of use in assessing the phosphorous impacts of the project. However, the purpose
21 of the LSMP and Implementation Plan is to provide a watershed-wide uniform
22 standard to address phosphorous impacts. Any additional analysis required of the
23 Applicant would necessarily entail new modeling based on full build-out in order to
24 determine the Applicant's proportionate allocation of phosphorous loading to Lake
25 Sawyer. If the Applicant's analysis finds that build-out will not preserve water
quality as concluded by DOE, the Applicant would be subject to a proportionate
allocation that differs from those used by the government agencies and developers
relying upon the conclusions of the Implementation Plan. Subjecting the Applicant to

³ The Lawson Hills and Villages MPDs will frequently be referred to as "the MPDs"
in this decision.

1 this disparate treatment ultimately does little to preserve water quality and would be
2 an unreasonable requirement given the watershed-wide standard set by DOE.

3 Although it would not be reasonable and be of limited benefit to have the Applicant
4 redo the LSMP, the SEPA Appellants have raised valid questions about the utility of
5 the LSMP and the gap between the modeling results of the LSMP and DOE's
6 conclusions that development can proceed in the Lake Sawyer watershed without
7 jeopardizing water quality. Information outside the record of this proceeding may or
8 may not be readily available to these questions. The MPD conditions of approval will
9 encourage the City Council to investigate these issues and to promote a reevaluation
10 of the LSMP and Implementation Plan if necessary to protect Lake Sawyer water
11 quality.

12 Despite the adequacy of the FEIS Lake Sawyer mitigation and analysis, there was a
13 serious shortcoming in the identification of potential impacts in the text of EIS. The
14 FEIS text mentions that Lake Sawyer has phosphorous problems, but it does not
15 identify the consequences of those problems, i.e., blue-green algae blooms, toxins,
16 beach closures etc. Absent this paragraph the Examiner has to conclude that the FEIS
17 is still adequate given the overall thoroughness of the document and the analysis of
18 Lake Sawyer that is included. The reference to phosphorous problems in the text and
19 technical assessment in the appendices would at least put the reader on notice that
20 water quality is an issue for Lake Sawyer. The extensive discussion of phosphorous
21 impacts in the FEIS appeals provided the public a detailed accounting of phosphorous
22 impacts and this decision provides that information to the Council.

23 Another deficiency unique to the LH FEIS was the failure to identify development
24 that is proposed within severe mining hazard areas. The LH FEIS contains a highly
25 informative discussion on mine hazards. This discussion identifies that the
Applicant's proposal involves development in a severe mine hazard area. No
development in the severe mining area will be necessary for any of the other FEIS
alternatives. The discussion on mine hazards does not identify what the Applicant
proposes to build within these severe mine areas or explain why that development is
necessary. The City's Sensitive Areas Ordinance will ultimately provide adequate
protections for development in these severe hazard areas, but more information on
this subject would be of obvious use to the decision maker.

21 As with any large development project, traffic is a major issue with the MPDs. Most
22 of the issues raised by the SEPA Appellants highlight reasonable differences of
23 professional opinion. The traffic expert hired by the City, John Perlic, was highly
24 credible and qualified to take charge of the City's traffic analysis. Despite Mr.
25 Perlic's expertise, there are three areas in the traffic analysis that did not hold up
particularly well. The first was the use of a regional traffic model to project local
traffic impacts. Maple Valley raised this issue, asserting that its local traffic model
was more accurate than the Puget Sound Regional Council ("PSRC model") used by
Black Diamond. Maple Valley and Black Diamond both had good reasons for the use

1 of their respective models. Ultimately, the Examiner must provide substantial weight
2 to the determination of the SEPA Responsible Official that the EIS is adequate, and
3 this burden of proof requires ruling in favor of Black Diamond's traffic engineer.
4 However, there are definite advantages to using a more localized traffic model and
5 the Examiner will address this in the conditions of approval recommended for the
6 MPD.

7 The second area of concern was Mr. Perlic's use of a 0.97 "peak hour factor"
8 ("PHF"). This factor is used to measure variability during peak hour traffic and
9 ultimately influences the amount of traffic projected for a project. The SEPA
10 Appellants established that the PHF used by Mr. Perlic was at the outer boundaries of
11 accepted professional judgment. The PHF was inflated and served to underestimate
12 traffic impacts within intersections. Even so, the SEPA Appellant's traffic expert
13 admitted that in some cases a PHF of 0.97 would be appropriate, but that would be
14 extremely rare. Use of a lower PHF would probably have been more accurate, but its
15 use does fall within the outer limits of professional judgment. The PHF used by Mr.
16 Perlic does not affect the overall adequacy of the EIS, but sufficient evidence has
17 been provided to require the use of a more mainstream factor as a condition of MPD
18 approval.

19 The third traffic issue that needs greater attention is the traffic impacts to Green
20 Valley Road. The Road has Heritage Status under the King County Historic
21 Preservation Program. Testimony from several citizens makes it clear that this road is
22 a historic, aesthetic and recreational resource. The road is frequently used by
23 bicyclists, horses and farm equipment. The MPDs will add 300-400% more traffic to
24 this community resource. As a condition of MPD approval, further analysis should
25 be undertaken to find ways to discourage MPD traffic from using Green Valley Road,
such as the use of traffic calming devices like medians and speed bumps. The factors
that merit special treatment of Green Valley Road are subjective and it is within the
parameters of a "reasonable discussion" that the FEIS failed to single out Green
Valley Road for additional analysis.

Another traffic issue that probably does not rise to the level of an EIS deficiency but
is still worth addressing is SEPA Appellant Judith Carrier's concerns regarding Plass
Road. Ms. Carrier believes that traffic congestion on SR 169 would lead some people
to bypass a portion of SR 169 by using Plass Road. This road is undeveloped and
does not have the capacity to handle large volumes of traffic. The City's traffic
expert, John Perlic, testified that it is unlikely that persons would choose to use Plass
Road due to its low speed limit (20 mph verses 45 mph on SR 169) and because it is
undeveloped. This may be the case but there is little doubt that traffic will increase
on Plass Road if there is any congestion on SR 169. The Applicant has offered to
support a vacation of Plass Road if the adjoining property owners and the City and
King County do not object. The MPD will be conditioned to require the Applicant to
pursue a street vacation and/or to work with the City Council in creating a cul de sac
on Plass Road.

1 The FEIS Fact Sheet also failed to identify that the project would necessitate a
2 hydraulic permit ("HPA") to address impacts to fish-bearing streams. This omission
3 was a clear violation of SEPA procedural rules. The Washington State Department of
4 Fish and Wildlife ("WDFW") did not comment on the FEIS until after the close of
5 the FEIS comment period, when the SEPA Appellants notified them of the project.
6 HPAs are administered and issued by WDFW. WDFW may well have failed to
7 provide timely comments because it did not see that its jurisdiction would be invoked
8 under the HPA process. However, the comments that WDFW did finally provide
9 failed to reveal anything of substance that pertained to the nonproject level of the
10 FEIS. WDFW merely stated that HPA and other permits would be required for those
11 portions of the project that affect fish-bearing streams and wetlands. Nothing in the
12 WDFW comments or anything else in the record suggests that more timely comments
13 from WDFW would have resulted in a need to consider any significant design
14 changes to the MPD proposals. The omission ultimately does not affect the overall
15 adequacy of the FEIS.

16 Many of the SEPA Appellants and persons who testified on the MPD proposals raised
17 concern over the poor audio recording on the public hearing held on the Draft EIS.
18 There were approximately 300 gaps in the audio recording of the hearing. No
19 evidence was presented to show that any of this missing information would have
20 made a difference in the FEIS analysis. The Examiner's review is limited to
21 determining whether the EIS is adequate. The gaps in the Draft EIS audio recording
22 are only relevant to the adequacy standard if they relate to the adequacy of FEIS
23 analysis. Had someone testified that they made some comments on significant
24 impacts during an audio gap and the substance of these comments had never been
25 considered by the FEIS drafters, this could have made a difference. In the same vein,
there were portions of the technical appendices that were missing in versions of the
Draft EIS distributed for public comment. Since there was no evidence presented that
these missing documents affected the adequacy of the FEIS, the missing documents
also do not affect FEIS adequacy.

The paragraphs above represent the sum total of all deficiencies that the Examiner
found in the LH FEIS. Taken together, they do not justify a finding of inadequacy.
Given the broad range of impacts that were thoroughly discussed in the LH FEIS, the
deficiencies identified above are relatively minor in comparison. Overall, the LH
FEIS provides a reasonably thorough discussion of environmental impacts.

Although the SEPA Appellants successfully identified the above LH FEIS
deficiencies identified above, there were several instances where their concerns did
not reveal any FEIS deficiency. The most significant of these issues was schools.
The FEIS do not provide any detailed analysis on school impacts. The FEIS assume
that schools will be located within the MPD project areas, even though the most
recent information suggests that it is fairly likely some of the schools will be located
outside of the project area. The SEPA rules clearly provide that only a general

1 discussion of mitigation measures such as schools is required for an EIS. Within this
2 general discussion a priority should be placed upon cumulative impacts, i.e., impacts
3 that build upon the impacts generated by the MPD proposals. Many of the school
4 impacts the SEPA Appellants raise, such as impacts on wells outside the MPD, are
5 not cumulative and can be addressed in the environmental review of a specific school
6 proposal without detracting from the effectiveness of the FEIS in its discussion of
7 overall impacts. The traffic and other cumulative impacts were addressed in the
8 FEIS. It is unclear, but possible, that some of this traffic analysis was premised upon
9 an erroneous understanding of the location of the schools. Given that the location of
10 the schools has been a moving target and their final location and number is still not
11 certain, the Applicant's general assessment of school impacts is reasonable and meets
12 EIS requirements of adequacy.

13 The SEPA Appellants raised several other EIS issues in addition to those identified
14 above. Most of those remaining issues the SEPA Appellants did not pursue beyond
15 mentioning them in their appeal statements. Insufficient evidence was presented to
16 support most of those issues or, as a matter of law, those issues were not germane to
17 an EIS adequacy appeal. All of those remaining issues are addressed in more detail
18 below or in the Order on Dismissal, Email Ex. 300.

19 II. TESTIMONY

20 A comprehensive summary of all testimony will be provided with the MPD
21 permitting decisions. As required by SEPA consolidation rules, all testimony in The
22 Lawson Hills hearing, including testimony related to the MPD as opposed to SEPA
23 issues, can be considered for the decision on SEPA adequacy.

24 III. EXHIBITS

25 There were several hundred exhibits admitted into evidence. The Exhibit lists are
attached and summarized as follows:

- 26 A. Index of "H" Documents: These exhibits were admitted during the hearings.
- 27 B. Black Diamond MPD Hearing Exhibits: These documents, primarily
28 composed of written comments from citizens, were submitted during the hearing and
29 admitted at the end of the hearing process.
- 30 C. Index of Prehearing Documents: These documents were identified in pre-
31 hearing exhibit lists submitted by the SEPA Appellants.
- 32 D. Black Diamond Emails for the Villages-Lawson Hills MPDs: These were
33 emails that the SEPA Appellants and Examiner exchanged on SEPA appeal issues.

IV. PROCEDURAL ISSUES

A. Findings of Fact:

1. Issuance of FEIS: The City of Black Diamond ("City") issued the FEIS on December 11, 2009.

2. Appeals. The SEPA Appellants filed three appeals on the LH EIS on December 28, 2009. The Appellants are as follows:

- a. Chris Clifford, along with several co-appellants, Ex. CBD-13.
- b. Melanie Gauthier, Ex. CBD-12.
- c. Cynthia and William Wheeler, Ex. CBD-11.

The Exhibits identified above (CBD-11, 12 and 13) will be referenced as the "Appeal Statements." The parties to the appeals identified above will be referenced as the "SEPA Appellants."

3. Applicant. The Applicant is BD Lawson Partners.

4. Proposal Description: BD Lawson Partners is requesting approval of a Master Planned Development (MPD) pursuant to Black Diamond Municipal Code 18.98, for the Lawson Hills MPD. Proposed uses include low, medium and high density residential; retail, commercial, office; light industrial; educational, recreational and open space. The requested entitlement is for 1,250 dwelling units and 390,000 square feet of retail, offices and light industrial on 371 acres. The request also involves the rezoning of portions of the property from the current R4 Single Family Residential and MDR8 Medium Density Residential zones to MPD.

The Lawson Hills project consists of two subareas, the Main Property and the North Triangle. The "Main Property" is located between the SR 169/Roberts Road intersection to the west and extends to King County to the east. The "North Triangle" is located on the west side of SR 169, approximately one mile north of the SR 169/Roberts Drive intersection.

The details of the Lawson Hills MPD are outlined in the MPD application, dated 5/11/09. Subsequent to the issuance of the FEIS, the Applicant revised its Lawson Hills application on 12/31/09. The assessment of EIS adequacy in this appeal decision only relates to the proposal as detailed in the 5/11/09 application. The Examiner also finds that the 5/11/09 application sufficiently describes the project for environmental review.

5. Hearing. The hearing on the Lawson Hills MPD exceeded 50 hours in length. The hearing was continued day to day, starting on March 6, 2010. The verbal testimony concluded on March 22, 2010. The record was left open for written

comment from the City, Applicant and Maple Valley on the adequacy of the traffic modeling used in the FEIS and the different modeling advocated by Maple Valley. Final written comments on the traffic issue were due from the City on April 12, 2010. The record was also left open indefinitely to allow the SEPA Appellants an opportunity to review and voice any objections to exhibits that had not been entered into the record. The same documents were made available at City Hall for any other interested citizens. The Examiner asked the hearing audience if there were any objections to addressing the admission of exhibits in this fashion and no objections were made. After the close of the verbal portion of the hearing the deadline for objections to exhibits was set for 4/13/10. No objections were filed by the SEPA Appellants.

6. Not Enough Time: The greatest procedural concern for project opponents was the timeframe. Many citizens, the SEPA Appellants in particular, felt that there was not enough time to consider the FEIS or MPD applications. The MPD hearings were scheduled to begin on March 6, 2010. The FEIS for the projects were issued on December 11, 2009. The SEPA appellants were given almost three months to prepare their appeals. The draft EIS were issued on September 1, 2009, giving the SEPA Appellants advance notice of the major issues they would be confronting. Although this may appear to be a lot of time, the Council should recognize that the FEIS contained hundreds of pages of technical analysis and the SEPA Appellants are for the most part lay persons with no technical or legal expertise to even have a remote understanding of how to begin their appeals. The SEPA Appellants were fortunate enough to have hired probably the best legal representation available for their type of issues. This attorney was skilled enough to mount a comprehensive attack with what probably amounted to limited resources. His strategy included using the threat or actual use of the Examiner's subpoena authority to compel attendance of government expert witnesses. Overall it appears that the SEPA Appellants were able to address all of the significant issues related to the FEIS. However, there is no question that all parties and the Examiner himself were under intense pressure to meet the decision deadlines imposed by local code and state law.

B. Conclusions of Law:

1. Not Enough Time. State and local permit processing deadlines mandated the March 6, 2010 deadline. Before the hearings commenced, the City was legally required to issue a final decision on the SEPA appeals (from the Examiner) by March 28, 2010, and a final decision on the MPD applications (from the City Council) by the end of April 2010. The Applicant had the authority to waive these deadlines (or at least absolve the City of liability), but declined to do so at the request of the Examiner before the hearings commenced. *See Email Ex. 156* (Examiner to applicant: "If the applicant provides a written waiver to objection over extending review periods, I will continue the hearing dates. The applicant is strongly encouraged to waive."); *Email Ex. 159* (Applicant concurring with City that hearing dates should not be rescheduled).

1 Permit processing deadlines are to be taken very seriously. They can serve as a
2 source of significant liability for the City. See *Westmark v. Burien* 140 Wn. App. 540
3 (2007). In the Burien case, the trial court awarded a \$10.7 million dollar judgment
4 against the City for taking too long to make a permitting decision on a 175-unit
5 apartment building. The delay in that case was three-and-a-half years, which is
6 probably not the type of additional time that the SEPA appellants had in mind.
7 However, the MPDs are obviously several magnitudes greater in scale than a 175-unit
8 apartment building. A delay of even a few months for a project this size could
9 conceivably result in significantly more liability than a delay in years for a relatively
10 small apartment building.

11 The strict deadlines that applied to the master plan applications originated in state law
12 and were incorporated into the Black Diamond Municipal Code. RCW
13 36.70B.080(1) generally requires decision makers to issue a final permit decision
14 within 120 days of the filing of a complete application. BDMC 18.08.100(C)(2)
15 incorporates this state mandate by requiring staff to set processing deadlines for MPD
16 applications that do not exceed 120 days. The master plan applications for this case
17 were deemed complete in late December. BDMC 18.08.220 provides that decisions
18 on EIS appeals must be issued within 90 days from the date an appeal is filed, which
19 is March 28, 2010, for the subject appeals.

20 At the time that the Applicant vested its permit applications, there was no exception
21 to these deadlines. This was unfortunate because RCW 36.70B.080(1) allows local
22 jurisdictions to provide for longer processing deadlines for EIS appeals and permit
23 applications that involve special circumstances. Given that the subject applications
24 comprise the largest development project in King County, the Council would have
25 been well justified in adopting extended permit processing deadlines⁴ for master plan
applications.

26 The Council is no doubt aware that it did adopt an ordinance allowing for extended
27 deadlines. There are two reasons the Examiner was unable to take advantage of this
28 ordinance to postpone the March 6, 2010 hearing date. The first reason is that there is
29 substantial legal uncertainty that the Examiner could apply the ordinance to permits
30 that have already vested. Under Washington's vested rights doctrine, cities cannot
31 change the permitting criteria once the applicant has filed a complete permit
32 application. See, e.g., *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d
33 242 (2008)⁵. In lay language, the permit is "grandfathered in" once the applicant has

34 ⁴ RCW 36.70B.80(1) can be interpreted as allowing the Council to make project specific deadline
35 extensions without any code amendment, even after a permit had vested. In any event, the Council did
36 not adopt any findings allowing for an extended MPD review period prior to the MPD hearing dates.

37 ⁵ The Bonney Lake case is the most recent case on vested rights and there the court specifically
38 declined to extend the vested rights doctrine to site plan review. However, the courts have extended

1 submitted all the required information. The courts have not directly addressed
2 whether the vested rights doctrine applies to procedural requirements such as
3 permitting deadlines. However, the only law journal article addressing the issue
4 concludes that the courts have at least indirectly concluded that vesting does apply to
5 procedural requirements. See, *Wynn*, Seattle University Law Review, V. 24, p. 851
6 with the procedural vesting discussion at pages 879-882. The City Council adopted
7 Ordinance 10-935, which extended the due date for SEPA appeal decisions, on
8 February 18, 2010, well after the two MPD applications had vested. Given the legal
9 uncertainty of the applicability of the ordinance to the MPD applications, the
10 Examiner could not take the risk of applying it given the huge liability involved if the
11 gamble proved wrong.

12 The second reason the Examiner did not apply Ordinance 10-935 to extend the
13 March 6, 2010 deadline is because the Black Diamond City Attorney's Office advised
14 that the Council did not adopt the ordinance with the intent of extending the March 6,
15 2010 hearing date. When the SEPA appellants notified the Examiner about
16 Ordinance 10-935, the Examiner advised the Applicant that they were "strongly
17 encouraged" to waive the decision deadline and agree to an extended hearing date.
18 The Applicant and the City Attorney's Office both objected to an extended hearing
19 date. The City Attorney's Office sent an email to the Examiner providing as follows:

20 *Black Diamond opposes any continuance of the hearings, now*
21 *scheduled to begin on March 6. While we recognize that Mr. Bricklin*
22 *was brought into this matter only recently (as were we), the hearing*
23 *dates had been set with the input of his clients, as well as all other*
24 *parties. In reliance on that schedule, the City has secured facilities*
and audio equipment for the hearings, and public notice has been
provided. The public notice includes approximately 1,850 mailed
notices, advertisement in three separate newspapers, posting of notice
boards, and posting at City facilities and on the City's website. All
parties have also (or should have) confirmed the availability of
witnesses for the hearings as scheduled.

25 *In addition, after speaking earlier this morning with the Mayor and*
City management, I can advise that the intent of the ordinance adopted
by the City Council last night is not to confer upon the Examiner the
ability to extend the existing 90 day limitation set forth in BDMC
18.08.220.B to hear any appeal. Rather, and as originally requested
of the City Council by appellants Proctor and Wheeler (the original
citizen-sponsors of this ordinance), the intent of the ordinance is to
provide the examiner with additional time to render his decision, upon

the vested rights doctrine to a wide range of other permits including conditional use permits, grading permits, septic tank permits, and shoreline permits.

1 entry of the necessary findings. That intent is clearly identified in the
2 Council Agenda Bill attached to Mr. Bricklin's e-mail.

3 The ordinance attached to Mr. Bricklin's e-mail will not become
4 effective, pursuant to state law, until February 28. If necessary, the
5 Mayor is prepared to call a special meeting of the City Council next
6 week in order to amend this ordinance to expressly reflect this
7 clarification...

8 2. Separate Hearings: The SEPA Appellants argued that the Lawson
9 Hills and Villages MPD applications should have been consolidated into one hearing.
10 BDMC 18.08.130 and RC 36.70B.120 allow for the consolidation of multiple permit
11 applications for single projects. However, these provisions do not authorize the
12 consolidation of permit applications from different projects. Further, RCW
13 36.70B.120 only authorizes consolidation of permit applications if requested by the
14 applicant. In this case the Applicant objected to consolidation of its permit
15 applications. The City has no authority to require consolidation over the objection of
16 the Applicant.

17 3. Consolidation of SEPA Appeals with MPD Applications: Although
18 the City does not have the authority to require the consolidation of the Villages and
19 Lawson Hills MPD applications, it is required to consolidate the Lawson Hills EIS
20 appeal into the hearing on the Lawson Hills MPD application. WAC 197-11-
21 680(3)(a)(v) provides that the EIS appeal must be consolidated with the MPD hearing
22 in a single simultaneous hearing before one officer.

23 4. Segregation of SEPA Testimony from MPD Testimony: Although the
24 Examiner must consolidate the LH FEIS hearing with the Lawson Hills MPD
25 hearing, this does not deprive the Examiner of the authority to segregate EIS
26 testimony from MPD testimony. The Examiner also has the authority (which was
27 exercised in this hearing) to limit EIS testimony to the SEPA Appellants. Black
28 Diamond, like most if not all other cities and counties, imposes strict requirements for
29 the filing of administrative appeals – time limits are enforced, filing fees are required
30 and the appeals must identify appeal issues. None of these requirements would have
31 much significance if people can circumvent them by showing up at a hearing and
32 testifying on an appeal filed by someone else.

33 5. All Evidence Available for Decision: As previously mentioned, WAC
34 197-11-680(3)(a)(v) requires a single “simultaneous” hearing when an EIS appeal is
35 consolidated with an MPD hearing. In construing legislation (and regulations) no
36 word should be treated as surplusage. Every word must be given meaning.
37 “Simultaneous” must mean something different than “single.” The only additional
38 meaning that “simultaneous” can be interpreted to add to the “single” hearing
39 requirement is that all of the evidence in the hearing must be “simultaneously”
40 available for any of the land use decisions subject to the hearing. This is consistent

1 with the Regulatory Reform Act, Chapter 36.70B RCW definition of a hearing, where
2 the focus in the definition of a hearing is the evidence submitted in the hearing. RCW
3 36.70B.020(3) defines an "open record hearing" as a hearing conducted by a single
4 hearing body that "creates the local government's record through testimony and
5 submission of evidence and information."

6 The combination of the "simultaneous" hearing requirement with the filing
7 requirements for SEPA appeals has created some confusion amongst the public. The
8 ground rules are actually not that complicated. Only EIS Appellants may testify on
9 EIS appeal issues, but the entire record is available to the Examiner to review EIS
10 adequacy and compliance with the MPD criteria. Consequently, even though Maple
11 Valley was excluded from the EIS appeal, the Examiner may use its testimony on
12 transportation-related MPD criteria relating to transportation issues to review the
13 transportation adequacy issues raised by the SEPA Appellants. Similarly, the
14 evidence presented during the SEPA appeals can be used to craft conditions for MPD
15 approval to the extent that the SEPA testimony is relevant to MPD approval criteria.

16 Some may question why testimony had to be segregated if the simultaneous hearing
17 requirement mixes all the evidence anyway. A quick review of the transcripts should
18 reveal a ready answer. EIS Appeal proceedings are highly legalistic, with an
19 emphasis upon expert witnesses, cross-examination, evidentiary objections and
20 lawyers. Unlike the MPD portion of the hearing in which the Applicant has the
21 burden of proof, the SEPA Appellants have the burden of proof in a SEPA Appeal.
22 Under procedural due process, this burden of proof gives the SEPA Appellants the
23 right to have the first and final word on their appeal issues. Segregation of the
24 hearing facilitates the accommodation of that right. By contrast, MPD hearings are
25 not dominated by lawyers or evidentiary objections. The emphasis is upon making it
easy for people to express their opinion, without intimidating them by threats of cross
examination and objections. Segregation of an EIS appeal from the testimony on the
underlying permit application is a common strategy employed by hearing examiners
to address the procedural differences between a permit decision and a SEPA appeal.
The MPD hearings serve as a good example of why that segregation is necessary.

6. Jurisdiction/Authority/Review Process: The jurisdiction of the
Hearing Examiner to hear the appeals on EIS adequacy was subject to extensive
discussion in the Examiner's Second Revised Prehearing Order, Email Ex. 165. As
determined in the Order, the Examiner has jurisdiction to hear the EIS Appeals. The
Examiner's decision is final, appealable to superior court.

7. Consideration of Revisions to MPD after FEIS Issuance: Any
substantial revisions to the MPD application after issuance of the FEIS require
additional environmental review to precede or accompany the staff recommendation
on the application to the Examiner and City Council.

1 WAC 197-11-055(3)(a) provides that a final FEIS or threshold determination shall
2 normally precede or accompany a final staff recommendation in a quasi-judicial
3 proceeding. WAC 197-11-600(3)(b) provides that a new threshold determination or
4 supplemental EIS shall be required for any substantial changes to a proposal that are
5 likely to have significant adverse environmental impacts. Consequently, any of the
6 12/31/09 revisions that would trigger additional environmental review cannot be
7 considered by the Examiner or City Council, since the additional environmental
8 review did not accompany the staff report on the Lawson Hills MPD.

9 The SEPA Responsible Official is responsible for determining whether the 12/31/09
10 revisions require additional environmental review. The SEPA Responsible Official
11 has subjected the 12/31/09 revisions to the MPD staff report, suggesting that he did
12 not find a need for additional environmental review.⁶ The decision of the SEPA
13 Responsible Official to not require additional environmental review is not subject to
14 administrative appeal. See WAC 197-11-680(3)(a)(iii). Consequently, it is not
15 within the Examiner's authority to consider the issue. The City proceeds at its own
16 risk in considering the 12/31/09 revisions without further environmental review.
17 Since the issue is not subject to administrative appeal, the absence of environmental
18 review can be brought up for the first time during judicial review.

19 V. Standard of Review/Overall Adequacy

20 A. Standard of Review:

21 The standard of review for EIS adequacy is the "rule of reason," defined as "a
22 reasonably thorough discussion of significant aspects of the probable environmental
23 consequences." *Klickitat County Citizens Against Imported Waste v. Klickitat
24 County*, 122 Wn.2d 619, 633 (1994). Under the broad rubric of a "reasonable"
25 analysis, the courts have highlighted what is meant by the rule of reason as follows:

1. The rule of reason is "in large part a broad, flexible cost-effectiveness
standard." *Id.* " ...the EIS need include only information sufficiently beneficial to the
decision making process to justify the cost of its inclusion." *Id.* at 641.

2. Under the rule of reason, "an EIS need not list every remote,
speculative, or possible effect or alternative." *Id.* at 631.

3. "Impacts or alternatives which have insufficient causal relationship,
likelihood, or reliability to influence decision makers are "remote" or "speculative"
and may be excluded from an EIS." *Id.*

⁶ For future reference, the SEPA Responsible Official could have issued a SEPA addendum on the
revisions, making it clear that he found no additional environmental review necessary.

1 4. Challenges may not “flyspeck” an EIS; omissions in analysis may be
2 “unfortunate, but not fatal.” *Mentor v. Kitsap County*, 22 Wn. App. 285, 290 (1978).

3 5. The “comprehensive review envisioned by SEPA is to be detailed and
4 does not invite a lackadaisical approach.” *Leschi Improvement Council v.*
5 *Washington State Highway Commission*, 84 Wn.2d 271, 280 (1978).

6 6. SEPA requires agencies to take a “hard look” at environmental factors.
7 *PUD No. 1 of Clark County v. PCHB*, 137 Wn. App. 150, 158 (2007).

8 **B. Programmatic Review v. Project Review:**

9 The parties appear to agree that the MPD review is a nonproject as opposed to project
10 action. The Examiner also agrees that MPD review qualifies as nonproject action
11 because it involves “regulations that contain standards controlling use or modification
12 of the environment” as opposed to “a construction or management activity located in
13 a defined geographic area.” See WAC 197-11-704(2)(a) and (b). An agency has
14 more flexibility in preparing an EIS on a nonproject action “because there is normally
15 less detailed information available on their environmental impacts and on any
16 subsequent project proposals.” WAC 197-11-442. The SEPA Appellants have
17 pointed out that the MPD does have some characteristics of a project action due to the
18 specificity of improvements proposed and, in a broader sense, because the review is
19 treated as a quasi-judicial proceeding. This is quite true, but hybrid actions are
20 covered in the nonproject regulations that specify that the level of detail must be
21 appropriate “to the scope of the nonproject proposal and to the level of planning for
22 the proposal.” *Id.* Given these requirements, the level of detail is expected to be
23 comparatively high for project specific impacts.

24 **C. Burden of Proof**

25 The hearing examiner must give “substantial weight” to the Responsible Official’s
determination that the EIS is legally adequate. RCW 43.21C.090; BDMC
19.04.250(E). BDMC 18.08.220(D) provides further that the decision of the
responsible official shall only be overturned if it is clearly erroneous. BDMC
18.08.220(D) also provides that the appellant shall carry the burden of proof in the
appeal and that the burden of proof shall be met by a preponderance of the evidence
in order for the appellant to prevail.

26 **D. Overall Adequacy.**

The adequacy of each issue raised by the SEPA Appellants is discussed in detail
below. However, the reasonableness standard is also broad enough to encompass an
assessment of deficiencies in light of the overall thoroughness of an EIS. The
Executive Summary provides an overview of all of the significant EIS deficiencies
within the context of the overall thoroughness of the EIS. The number of deficiencies

1 is fairly minor within the context of the extensive review of environmental impacts in
2 the EIS. The deficiencies can be remedied by further analysis and mitigation under
3 the MPD conditions of approval without depriving the decision maker of significant
4 information to assist in the decision making process. Given these circumstances, it
would certainly not be cost effective, as referenced to require the entire review
process to commence anew to address problems that can be resolved under MPD
conditions of approval. Overall, the FEIS is adequate.

5 **VI. EIS APPEAL ISSUES**

6 **A. Lake Sawyer Water Quality**

7 Due to the complex nature of Lake Sawyer water quality, this topic will be presented
8 in narrative format. Section headers should be considered findings and conclusions
9 in addition to all of the findings and conclusions made in the text as well.

10 The SEPA Appellants have described Lake Sawyer water quality as at a "tipping
11 point" between ecological health and devastation. Lake Sawyer also serves as a
12 tipping point on the adequacy of both the FEIS. Determining the adequacy of the
13 Lake Sawyer water quality analysis was by far the most difficult decision to make on
14 the FEIS appeals. The SEPA Appellants presented a compelling case that the MPDs
15 could indeed tip the quality of Lake Sawyer into a condition where blue-green algae
16 would bloom and create health hazards, beach closures, aesthetic blight and harm
17 endangered fish. However, DOE has identified conditions that, if followed by new
18 development, would meet TMDL. TMDL is a limit on phosphorous loading and
19 concentration to Lake Sawyer that if followed, creates a 5% or less chance of
20 surpassing the tipping point. The DOE conclusions are based upon a series of
21 scientific studies that assess Lake Sawyer water quality. These studies are based
upon years of data, collaborative efforts from a broad array of stakeholders and
extensive modeling and assessment of impacts. The MPD proposals are consistent
with the conditions DOE has imposed for TMDL compliance. The Applicant has
adopted the recommended mitigation of these studies to mitigate its water quality
impacts. The studies used and prepared by DOE serve as a standard of water
protection for the entire Lake Sawyer watershed. Any additional information
required of the Applicant, short of subjecting it to a different standard than that
prepared by DOE, would not provide any useful information.

22 **1. Lake Sawyer is a Significant Water Body**

23 Lake Sawyer is the fourth largest lake in King County, covering 280 acres. Ex. NR-
24 TV-11, p. ES-1. Its watershed encompasses 8,300 acres. Ex. H-9, p. vii. Over 200
25 people live upon its shorelines. The lake is used extensively for recreational purposes
such as sailing, water skiing, scuba diving, swimming, picnicking, wildlife
observation and aesthetic enjoyment. Ex. NR-TV-11, p. ES-1. Public access is
provided by two city parks, one on the northwest side of the lake and another on the

southern end of the lake. The lake provides habitat for three federally listed species: steelhead, Coho and Chinook salmon. Ex. CBD-2-5 at 4-71, 4-73.

2. Phosphorous Poses a Significant Threat to Lake Sawyer Water Quality

The role that phosphorous plays in the water quality of a lake was well summarized in the Implementation Plan, which provides at p. 6 as follows:

Phosphorus is a basic element found in nature, and is also a primary nutrient that all living organisms need to survive. Lakes typically build up phosphorus levels as they age, and ultimately fill in with vegetation and sediment, a process that usually takes thousands of years. This process is called eutrophication. Increased amounts of phosphorus due to human activity can accelerate eutrophication and be detrimental to a lake's water quality and its beneficial uses. Higher levels of phosphorus from sediment, fertilizers, waste, and other sources can cause excessive plant and algae growth, which in turn may have unfavorable impacts to water clarity, aquatic habitat, fish survival, swimming, boating, and aesthetic enjoyment (Murphy et al. 2002). Human activities, such as home building, road construction, and deforestation, can drastically speed up a lake's aging process and adversely affect lake uses.

In lakes of the Puget Sound Lowlands, phosphorus is often the nutrient in least supply, meaning that biological productivity is often limited by the amount of available phosphorus (Abella, 2009). Thus, for lakes such as Lake Sawyer, phosphorus is usually the main nutrient that drives the eutrophication process. Though other nutrients, such as potassium and nitrogen, can affect surface water quality, the amount of phosphorus being transported through various sources and pathways, such as human and animal waste, fertilizers, and stormwater in the watershed, often limits the amount of algal growth and aquatic plants (Minnesota Department of Agriculture, 2004). Nutrient levels generally determine a lake's level of biological activity or trophic state.

Lakes with low levels of biological activity are classified as oligotrophic. Those with moderate biological activity are mesotrophic. When lakes get older, or when they are polluted with excessive levels of nutrients and have high biological activity, they are considered eutrophic. Lakes with lower levels of biological activity have better water clarity and are more desirable for swimming and boating activities.

1 When a lake reaches a eutrophic state the consequences are serious. Blue-green algae
2 bloom creating toxics that are lethal to aquatic life, birds and shore animals, including
3 cats and dogs. The blue-green algae form a scum over lake surfaces, causing beach
4 closures. Tr. at 555. The toxins are also under study as a cause for liver ailments in
humans. *Id.* A eutrophic state also harms coldwater fish. Coldwater fish need to
stay in the lower, colder layers of a lake. A eutrophic state deprives the lower waters
of necessary oxygen and leaves it in the warmer upper layers. Tr. at 72-73.

5 Lake Sawyer has an unfortunate history of problems associated with elevated
6 phosphorous levels. In the 1970s, evidence of failing septic systems in the Lake
7 Sawyer watershed resulted in a decline in water quality in Lake Sawyer and the rivers
8 that feed into it. To correct this problem the City of Black Diamond constructed a
9 sewage treatment plant in 1981. A unique feature of the treatment plant was that its
10 treated effluent was discharged into a natural wetland, which ultimately discharged
11 into Lake Sawyer. Implementation Plan, p. 1. The treated effluent caused a
12 significant degradation of Lake Sawyer water quality. As phosphorous levels went
13 up, algae blooms occurred. A green scum covered the lake, rendering the lake
14 virtually unusable for all recreational and other public activities. Tr. at 3647-3648.
15 Due to the water quality problems caused by the treated sewer water, the Department
16 of Ecology required the diversion of the effluent from the natural wetland to a
secondary treatment plant in Renton via a King County sewer line. Implementation
Plan, p. 1. This diversion was completed in 1992. *Id.* Despite the diversion, Lake
Sawyer water quality took several years to recover, finally reaching what DOE
considered to be acceptable (consistent with TMDL as discussed below) levels in
1998. Implementation Plan, p. 11-12. Lake Sawyer had phosphorous concentrations
of 12 to 23 micrograms/L from 1990 to 1998. From 1999 to 2007 the phosphorous
levels have been in the 8 to 16 microgram/L range. *Id.*

17 As a result of Lake Sawyer's water quality problems, DOE listed Lake Sawyer as an
18 "impaired water body" pursuant to the requirements of the Clean Water Act. The
19 Clean Water Act requires a total maximum daily load (TMDL) to be developed for
20 impaired water bodies. The TMDL is subject to approval by the US Environmental
21 Protection Agency. The TMDL sets a limit to the amount of phosphorous that is
22 allowed into a water body. Implementation Plan, p. 3. EPA approved a phosphorous
loading capacity TMDL for Lake Sawyer at 715 kilograms of phosphorous per year.
Wheeler Ex. 20, p. 1. This means that all external sources of phosphorous may not
exceed a total of 715 kilograms per year. This corresponds to an in-lake
concentration of 16 micrograms/L. Implementation Plan, p. 5.

23 **3. The Lake Sawyer Management Plan and 2009 Lake Sawyer Water**
24 **Quality Implementation Plan Provide a Highly Credible and**
25 **Thorough Review of Phosphorous Impacts and Control for**
Development in the Entire Lake Sawyer Watershed; the
Management Plan does not Conclude or Warrant that its
Recommended Mitigation will Satisfy TMDL.

1 In 2000 King County prepared the Lake Sawyer Management Plan ("LSMP"). Ex.
2 NR-TV-11. It is considered a supporting document of the Lake Sawyer TMDL.
3 Implementation Plan, p. 1. The purpose of the LSMP was to complete a Phase 1
4 study initiated in 1989-90. LSMP, p. 1-5. The primary purpose of the Phase 1 Study
5 is to assess the impact of the water treatment plant diversion on water quality, update
6 the lake's nutrient and water budgets, and to evaluate and recommend restoration
7 alternatives that will maintain and protect Lake Sawyer's water quality and beneficial
8 uses. *Id.* The LSMP was based upon years of data collection and employed the input
9 of several stakeholders representing public and private organizations. It included a
10 detailed projection of phosphorous levels at full build-out of the Lake Sawyer
11 watershed, with and without recommended mitigation⁷.

12 The LSMP makes no assurance that its recommended mitigation will achieve TMDL
13 and the Examiner does not find that the recommendations were made for that
14 purpose. The LSMP lists several lake management goals at Table 6-1 and the LSMP
15 expressly states that "these goals were used in the analysis of management strategy
16 alternatives to develop the plan [LSMP] recommendations." The management goals
17 include maintaining the mesotrophic status of the lake but none mention meeting
18 TMDL. The LSMP identifies several mitigation measures directed at the Lake
19 Sawyer watershed to control phosphorous loading. LSMP, Chapter 6. If these
20 measures fail to reach or maintain lake management goals, the LSMP identifies
21 "contingency in-lake measures" to improve water quality. LSMP at 6-22. These
22 measures consist of buffered alum treatment (treating the lake with alum) and
23 hypolimnetic aeration and circulation (pumping oxygen into the lake through a piping
24 system). Notably, the LSMP was not even confident that the watershed and in-lake
25 measures combined would meet the general water quality goals: "Prior to
implementation, the City of Black Diamond, King County and Ecology will want to
confirm that some combination of in-lake and watershed controls will be able to
achieve water quality goals." Wheeler Ex. 20(e), Appendix I of LSMP, p. 7. Table
6-3 of Appendix I shows a lake phosphorous concentration of 31 micrograms/L for
build out with "watershed controls" and 37 micrograms/L for build out with "internal
load control." It is unclear, but likely, that these categories of mitigation measures
encompass all the mitigation measures recommended in the LSMP. The resulting
concentrations are significantly above the 16 microgram/L TMDL limit.

21 In 2009 DOE released the Lake Sawyer Total Phosphorous Maximum Daily Load
22 Water Quality Implementation Plan, Ex. 9 ("Implementation Plan"). It is considered
23 the follow up document to the Lake Sawyer Total Phosphorous TMDL. Ex. H-9, p.
24 2. It provides a framework for corrective actions to address sources of phosphorous
25 pollution in Lake Sawyer and the surrounding watershed. Unlike the LSMP, it did

⁷ This document will use "restoration" -- the term used in the LSMP -- interchangeably with
"mitigation." Technically the "restoration" measures include "mitigation" of future development, such
as the MPDs.

not include any modeling of future lake conditions. Like the LSMP, the Implementation Plan was based upon the input of several stakeholders participating in the Lake Sawyer Steering Committee, consisting of representatives of DOE, King County, City of Black Diamond, King County Conservation District, Washington Department of Fish and Wildlife, the Muckleshoot Indian Tribe, and local watershed residents.

The corrective actions identified in the Implementation Plan largely mirrored the mitigation recommended in the LSMP, with the important distinction that the Implementation Plan also contemplated the City's adoption of the 2005 Stormwater Management Manual for Western Washington. The Implementation Plan concluded that with the adoption of the 2005 DOE Manual and a monitoring program for the implementation projects that the City of Black Diamond would meet TMDL.

Based upon the above and the plans themselves, the Examiner finds that the LSMP and the Implementation Plan build upon years of research and hundreds of pages of scientific analysis. The plans are the result of significant collaboration of all major stakeholders. The conclusions on TMDL compliance are made by the Department of Ecology, whose primary mission and expertise is the protection of environmental resources, such as Lake Sawyer.

4. The Villages and Lawson Hills FEIS fail to adequately disclose potential phosphorous impacts to Lake Sawyer

As previously determined, Lake Sawyer is a significant environmental and recreational resource for the Black Diamond community. The impacts of phosphorous on this resource have also been an on-going significant concern for the Black Diamond community. Black Diamond constructed a sewage treatment plant in 1981 due to the water quality impacts of failing septic systems on Rock Creek, Grinder Creek and Lake Sawyer. Lake Sawyer water quality once again became an issue when water quality problems forced the City to divert treated effluent from a wetland feeding into Lake Sawyer to a sewer line connecting to King County treatment facilities in Renton in 1992. Implementation Plan, p. 1. As discussed in both the LSMP and the Implementation Plan, volunteers in the area over the last several years have participated in lake monitoring programs and are active in assessing and recommending implementation projects. City of Black Diamond staff and the Black Diamond City Council have been active in assessing and implementing phosphorous control measures.

Despite the thoroughness of the scientific analysis conducted in the LSMP and the Implementation Plan, it is clear from those documents that there is still a great deal of uncertainty in predicting phosphorous loading. The LSMP acknowledges this uncertainty by recommending contingency measures should recommended mitigation fail to protect water quality. The modeling in the LSMP falls far short of predicting the current phosphorous concentrations in Lake Sawyer; the baseline in the model is

84% above the 715 kg/yr TMDL while the most recent data in 2007 shows that Lake Sawyer could be as much as 50% below the lake concentration TMDL. *See* Wheeler, Ex. 20; Implementation Plan, p. 12. The 1992 diversion of effluent highlights the shortcomings of predicting phosphorous loading; the initial drainage of the effluent into a natural wetland, termed an "innovative project" was based upon the erroneous conclusion that the natural wetland would prevent phosphorous contamination of Lake Sawyer. Implementation Plan, p. 1. The TMDL itself only presents a risk of eutrophic status. It is set at a 5% risk of eutrophication. *See* LSMP, Appendix F, 2/11/93 Wong Memo.

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 does not 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. The appendices to both EISs also fail to identify specific impacts. These omissions are difficult to justify given that 65% of the Village and 100% of Lawson Hills drains into Lake Sawyer.

Given the prominence that Lake Sawyer water quality plays in the Black Diamond community, the significance of phosphorous impacts and the uncertainty in the science backing Implementation Plan, it was unreasonable for the EIS to fail to warn of the specific problems that could arise from phosphorous contamination of Lake Sawyer. Given the large amount of development involved in the MPD proposals, the information on specific impacts could spur decision makers into advocating for updated modeling the LSMP or a greater commitment to implementing the regional mitigation measures identified in the Implementation Plan. Given the overall scope and context of the EIS, the failure to include these specific impacts cannot by itself justify a finding of inadequacy for the entire document, especially given that the reference to eutrophication in both documents does provide inquiry notice to persons concerned about water quality.

1 **5. The Villages and MPD projects are within the phosphorous**
2 **loading assumptions employed by the LSMP.**

3 The Applicant has not chosen to conduct its own analysis of how much phosphorous
4 the MPDs will discharge to Lake Sawyer. Instead, it relies upon the phosphorous
5 loading estimates of the LSMP. Through extensive analysis and testimony, the
6 Applicant has established that the MPD projects are consistent with the assumptions
7 used by the LSMP in predicting phosphorous loading. In point of fact, the
8 preponderance of evidence in the record establishes that the LSMP significantly
9 overstates the amount of phosphorous generated by the proposed development.

10 The record of this proceeding conclusively establishes there are three factors that
11 result in an overstatement of phosphorous loading in the LSMP model. The first
12 factor is that the LSMP overstates the amount of the MPD development area that
13 drains to Lake Sawyer. The Applicant's geotechnical consultants performed 110 test
14 borings to determine the location of impermeable surfaces and the resultant
15 subsurface flows of stormwater. Tr. 2641. Through this geotechnical analysis the
16 Applicant determined that 30% of the Villages MPD does not drain into Lake Sawyer
17 as assumed in the LSMP. Tr. at 2032-2033.

18 The second factor is that the LSMP overstates the amount of the development in the
19 MPD project area. As shown in Exhibit H-8 and as testified by Al Fure, the LSMP
20 overstates development of the MPDs by 25%. Tr. at 2007.

21 The third factor is the baseline used for the phosphorous concentration of the lake.
22 The LSMP model was based upon in-lake phosphorous concentrations from March
23 1994 through April 1995. See Wheeler Ex. 20(e), Appendix C, Figure E6. The
24 concentrations during this base period ranged from 20 to 60 micrograms/L,
25 significantly higher than the TMDL concentration of 16 microgram/L. As shown at
26 p. 12 of the Implementation Plan, the 2007 phosphorous concentration was 8 or 9
27 micrograms/L. *Id.* The "typical year" baseline used in the LSMP model was 84%⁸
28 over TMDL. Wheeler Ex. 20. The significant disparity in current phosphorous
29 concentrations and those used in the baseline of the LSMP model is probably due to
30 the five year recovery period of the lake from the treatment plant diversion in 1992.
31 *Id.* Table 6-7 of the LSMP, which provided the projections on future phosphorous
32 loading, noted that "it is assumed that internal loading will not change in the future."

33 A fourth factor may be the City's adoption of the 2005 DOE Stormwater Manual.
34 The LSMP was based upon the application of the 1992 stormwater manual and the
35 MPDs will use the 2005 manual. Tr. at 558. As noted in the testimony of Sally
36 Abella, a SEPA Appellant witness, the 2005 manual provides "better by far"

37

38 ⁸ The LSMP phosphorous loading baseline was based on kg/L, so the Examiner was only able to
39 provide a % over TMDL as opposed to a conversion to micrograms/L.

1 phosphorous safeguards than the 1992 manual. Tr. at 564. However, the benefits of
2 the 2005 Manual may already be integrated into the LSMP model. One of the
3 recommended stormwater controls in the LSMP is the adoption of the 1998 King
4 County Surface Water Design Manual. LSMP, p. 6-6 to 6-7. In the alternative the
5 LSMP recommends adoption of the "Lake Protection Standard," a component of the
6 King County Surface Water Design Manual. In recommending these standards, the
7 LSMP focuses upon the fact that they have a phosphorous treatment reduction goal of
8 50%, which is the same standard required under the 2005 DOE Manual. If the 2005
9 DOE Manual does not provide any level of phosphorous protection better than the
10 1998 King County Manual, the City's adoption of the 2005 DOE Manual is simply an
11 adoption of one of the LSMP mitigation measures and its actions fall squarely within
12 the LSMP modeling. However, if the 2005 DOE Manual provides better protection
13 than the 1998 King County Manual, as is probably the case, then the LSMP model
14 can be said to overstate phosphorous levels of future build out.

15 There is no evidence in the record that identifies any factors that would result in an
16 underestimation of phosphorous loading in the LSMP. Sally Abella testified that the
17 LSMP was outdated, but from that factor Ms. Abella could only conclude an updated
18 LSMP could "go either way" in changing the outcome of phosphorous loading
19 predictions. Tr. at 558. Ms. Abella testified that the LSMP is based upon data and
20 development regulations from 1995. *Id.* She noted that development projections in
21 the LSMP may not be accurate, due to possible changes in Black Diamond
22 comprehensive plan policies and development regulations and Black Diamond
23 annexations that occurred subsequent to 1995. *Id.* The Applicant addressed Ms.
24 Abella's concerns about projected MPD development in the preparation of Ex. H-8
25 and the testimony of Al Fure, who as noted previously concluded that the LSMP
actually overestimates development within the MPD project areas.

In short, the record identifies three factors and potentially one more factor that
markedly skew the LSMP assumptions to overstate MPD phosphorous loading. No
factor was offered into the record to that understates phosphorous loading. The
evidence in the record conclusively establishes that the LSMP overstates the amount
of phosphorous loading from the MPDs. Consequently, the MPDs are well within the
LSMP assumptions for phosphorous loading.

6. The Villages and Lawson Hills MPDs Adequately Mitigate Phosphorous Impacts to Lake Sawyer

The Washington State Department of Ecology has concluded that mitigation
measures recommended in the LSMP will satisfy the TMDL for Lake Sawyer. The
SEPA Appellants do not dispute the data or methodology used in the LSMP to assess
the effectiveness of mitigation. They point out that the data and methodology shows
that the MPD projects will load phosphorous in excess of TMDL and that this
phosphorous loading will approach (but not exceed on its own) the eutrophication

1 point for Lake Sawyer. This information is insufficient to refute the conclusions of
2 DOE.

3 The conclusions of DOE are expressed in the Implementation Plan. DOE published
4 the Implementation Plan in 2009. The Implementation Plan implements the LSMP
5 by providing a framework for corrective actions to address ongoing and future
6 sources of phosphorous pollution in Lake Sawyer and the surrounding watershed.
7 Implementation Plan, p. v. DOE concludes at p. 31-32 of the Implementation Plan
8 that the City will establish compliance with the TMDL under the following
9 conditions: compliance with the Western Washington Phase II Municipal Stormwater
10 Permit, compliance with the 2005 Ecology Western Washington Stormwater Manual
11 and the continuation of a water quality monitoring program in coordination with
implementation projects. Dr. Kindig testified that, as designed, the MPD projects
meet the DOE conditions for consistency with the TMDL. Dr. Kindig's testimony on
this point was unrefuted. Robert Zisette, the Appellant's water quality expert, agreed
that the mitigation implementation measures identified in the Implementation Plan are
incorporated into the MPD proposals. Zisette testimony, 3/19/10. The Examiner
finds that the Master Plan proposals meet the conditions for DOE's finding of TMDL
compliance.

12 The SEPA Appellants assert that compliance with the mitigation measures outlined in
13 the LSMP (and presumably the Implementation Plan) are not sufficient to comply
14 with the Lake Sawyer TMDL or to prevent Lake Sawyer from reaching eutrophic
15 status. As to TMDL compliance, Mr. Zisette did an interpolation of the modeling
16 used to predict phosphorous loading for total build-out to determine that the
17 phosphorous loading attributable to the MPD proposals, with LSMP stormwater
18 controls, would generate an additional 353 kg/yr above the 715 TMDL limit. See
19 Wheeler Prehearing Ex. 20. In making this calculation Mr. Zisette roughly used the
same MPD area calculated by the Applicant as draining into Lake Sawyer, employing
the area outlined in Exhibit H-7. Had Mr. Zisette used the higher developable area
assigned by the LSMP model to the MPD proposals, his phosphorous loading results
would have been higher.

20 Mr. Zisette's TMDL calculations did not reveal any new information that was not
21 readily apparent to DOE when it found TMDL compliance in the Implementation
22 Plan. It is important to note that beyond adjusting downward for development area,
23 Mr. Zisette's calculations did not alter any of the assumptions used in the LSMP
24 model. The LSMP model predicted a total phosphorous load of 2,255 kg/yr at build-
25 out, which is 1,540 kg/yr above TMDL. Mr. Zisette's calculation merely showed that
the MPD's proportionate share of this excess phosphorous is 353 kg/yr. All of this
information is easily predictable from the LMSP. The baseline "typical year" in the
LMSP model was already 627 kg/yr above TMDL. Given this context and the
presumed assumption in the LSMP model that all nonpoint source development
contributes phosphorous, any new development would increase the phosphorous load
to somewhere between the baseline and the 2,255 kg/yr build out amount.

1 Mr. Zisette's calculations touch upon the most difficult issue of the Lake Sawyer EIS
2 appeal issues: how could DOE conclude that the Lake Sawyer 715 kg/yr TMDL
3 would be reached when the LSMP model predicted 2,255 kg/yr at full build-out? The
4 LSMP and the Implementation Plan do not provide any explanation. As noted by the
5 SEPA appellants, the mitigation measures in the LSMP do not get you there; Table 6-
6 7 of the LSMP reveals that all mitigation measures combined attain an annual
7 phosphorous loading of 1,793 kg/yr, still well above the 715 kg/yr. These mitigation
8 measures include public improvements that cost eight to twelve million dollars to
9 implement. See LSMP, p. 6-24 and 6-26. Nothing in the record suggests that these
10 improvements have occurred and, in fact, the Implementation Plan states generally
11 that most mitigation measures have not been funded. Implementation Plan, p. 12.

8 Balanced against the gap between the LSMP build-out phosphorous loading
9 projections and the TMDL is the fact that this gap was apparent in the LSMP and
10 DOE still found TMDL compliance. DOE has the expertise and authority to oversee
11 TMDL on behalf of the EPA. There is nothing in the record to suggest that DOE
12 would have any self-interest or political reason to find TMDL compliance when that
13 was not the case. The Applicant raised the issue of DOE approval prior to the
14 Appellants' rebuttal and nothing was offered by the Appellants to explain why DOE
15 would reach such a conclusion if there was no reasonable basis for it. It is
16 noteworthy that DOE placed emphasis upon compliance with the City's NPDES
17 permit and the 2005 Stormwater Manual for compliance with TMDL. The 2005
18 Stormwater Manual was not used in the LSMP and, as testified by the Appellant's
19 expert, the 2005 Manual is significantly more effective in controlling phosphorous
20 than the 1992 Manual that was used in the LSMP. Tr. at 564. The Implementation
21 Plan also noted at p. 12 that the TMDL target of 16 micrograms/L has been met since
22 1998, down to 8 or 9 micrograms/L in 2007. This is a substantial improvement over
23 the "typical year" baseline used in the LSMP model, which was 84%⁹ over TMDL.
24 Also, as identified in Mr. Zisette's analysis, Wheeler Pre-hearing Exhibit 20, these
25 recently low figures are probably the result of a five-year recovery period from the
diversion of sewage treatment plant effluent. Consequently, the low numbers are
probably not a temporary state of the lake (setting aside the impacts of future
development). Given the objectivity and expertise of DOE, the use of the 2005 DOE
stormwater manual, the significant improvement in Lake Sawyer water quality that
was not factored into the LSMP modeling, and the substantial weight that the
Examiner must provide to the determination of the SEPA responsible official, the
Examiner finds that the DOE's conclusions on TMDL compliance provide reasonable
assurance on the adequacy of the mitigation measures incorporated into the MPD
proposals.

⁹ The LSMP phosphorous loading baseline was based on kg/L, so the Examiner was only able to
provide a % over TMDL as opposed to a conversion to micrograms/L.

1 In addition to stating that the MPD projects will exceed TMDL, the SEPA Appellants
2 also assert that the proposals may cause Lake Sawyer to exceed 24 micrograms/L, the
3 "scientific dividing line between a mesotrophic and eutrophic lake." Bricklin post-
4 hearing brief, p. 16. The SEPA Appellants found this dividing line in Table 4-10 of
5 the LSMP, which provides that under the "Carlson's Trophic State Index" lakes reach
6 eutrophic status at 24 micrograms/L. The meaning of this "dividing line" is not
7 explained in the LSMP. The TMDL is set at a point where there is a 5% chance of
8 reaching eutrophic status. See LSMP, Appendix F, 2/11/93 Wong Memo. The
9 eutrophic risk associated with 24 micrograms/L is not identified in the LSMP,
10 although one has to conclude it is significantly more than the TMDL, which at 16
11 micrograms/L has a 50% less phosphorous concentration. The SEPA Appellants then
12 point to Table 6-3 of Appendix I to the LSMP, which provides that the current
13 condition of Lake Sawyer is at 23 micrograms/L and that build-out of the watershed,
14 with watershed controls, will reach 31 micrograms/L.

15 Table 4-10, if reflective of current conditions, does show that Lake Sawyer is at the
16 "tipping point," just one microgram/L from eutrophic status. If Lake Sawyer is indeed
17 this close to eutrophic status, there is a reasonable chance that the MPD proposals
18 could tip the balance into eutrophic status. Under this scenario, additional EIS
19 analysis study would be merited. However, Table 4-10 does not reflect current
20 conditions. As discussed previously, the Implementation Plan shows the current state
21 of the lake at 8 or 9 micrograms/L and these levels are anticipated to be stable, absent
22 further development. The lake concentration has been under 16 micrograms/L since
23 1998. There is nothing to suggest in the record that the MPD proposals, alone, will
24 push the phosphorous concentration beyond the 24 micrograms/L given the current
25 conditions of Lake Sawyer. Mr. Zisette testified that as little as a 5% increase could
push Lake Sawyer into eutrophic status, but he did not explain the basis of this
conclusion or identify whether he had taken into consideration the current state of the
lake as identified in the Implementation Plan. Tr. at 3640. All of Mr. Zisette's
calculations (e.g., Wheeler Ex. 20) had been based upon the "current" status of the
lake as identified in the LSMP, which was set at 23 micrograms/L.

19 In reaching these conclusions it is not lost on the Examiner that the Applicant must
20 discredit data in the LSMP at the same time that it relies upon it as its EIS analysis. A
21 final and important inquiry on the LSMP is whether, given the apparent shortcomings
22 of the LSMP, the Applicant should have updated and/or refined the LSMP for its
23 analysis. Under the broad adequacy standard of a "reasonable" discussion of
24 environmental impacts, it is pertinent to evaluate the utility of any additional
25 information. As shall be discussed, any additional information that could be
reasonably required of the Applicant would not yield any useful information. The
Applicant could only provide a useful analysis if it essentially rewrote the LSMP,
which is not a reasonable requirement.

On the utility of additional information, Mr. Zisette testified that the Applicant failed
to determine how much phosphorous the MPDs would add to Lake Sawyer. He noted

1 that the Applicant could have easily made this determination since it had data on both
2 projected stormwater volumes and phosphorous concentrations. The Applicant did
3 not rebut this testimony and the Examiner finds that the phosphorous loading would
4 not have been unreasonably difficult to compute. However, this additional
5 information would not have provided anything of significant use to the decision
6 maker. As ably demonstrated by Mr. Zisette, there is no question that under the
7 modeling of the LSMP that the MPD phosphorous loading would exceed TMDL, no
matter what amount of phosphorous was generated by the projects. Similarly, these
computations would not be of much use in an assessment of the EIS alternatives.
Any reduction in phosphorous loading, unless it is to zero, would exceed TMDL.
TMDL would be exceeded in both the 24% development reduction in Alternative 3
and the more than 50% reduction in Alternative 4.

8 Of course, with more work¹⁰ the Applicant could recalibrate the LSMP model to
9 include current lake conditions, the Applicant's adjustments to the drainage basins
10 and the benefits of the 2005 stormwater manuals. In short, the Applicant would
11 prepare its own LSMP. The resulting information could indicate how close the MPDs
12 will bring Lake Sawyer to TMDL and what the Applicant's proportionate share of
13 phosphorous loading would have to be in order to keep full build-out below TMDL.
14 The price of this additional information is to hold the Applicant to a different standard
15 than the watershed standards developed in the LSMP and the Implementation Plan.
16 Along these lines, any proportionate share analysis would be meaningless unless
17 other development and regional watershed implementation measures are held to the
same standard. The only watershed standard is the LSMP and Implementation Plan.
Further, any conclusion that the MPDs would fail to meet TMDL would be directly
contrary to the findings of DOE, made in 2009, that the MPDs would satisfy TMDL.
Given these factors, the reliance of the Applicant upon the LSMP, instead of its own
calculations, provides a reasonably thorough discussion of stormwater impacts to
Lake Sawyer as required for an adequate EIS.

18 **7. Dr. Kindig's Conclusions on Stormwater Phosphorous**
19 **Concentrations and Treatment Efficiencies are Adequate.**

20 The SEPA Appellants presented a considerable amount of argument and testimony
21 challenging the assumptions made by the Applicant in concluding that its proposed
stormwater facilities would reduce phosphorous in stormwater by 50%. They also

22 ¹⁰ In its closing brief the Applicant asserts that requiring it to prepare its own management plan would
23 be unreasonable given that the MPDs only take up a fraction of future build-out. There was no
24 testimony on this issue so the Examiner has insufficient information to draw any conclusions.
25 Certainly, it would be unreasonable to require the Applicant to take hundreds of test borings
throughout the watershed to reevaluate the contours of the drainage basins. However, it does appear
that useful and more accurate information could be derived by relatively simple refinements to the
LSMP modeling, by measures such as using current lake conditions for a baseline.

1 challenge the phosphorous concentrations assumed by Dr. Kindig for untreated
2 stormwater.

3 As to the untreated stormwater, Dr. Kindig used data from only one development
4 project when data is readily available from numerous other projects in a national data
5 base. See Bricklin Closing Brief, p. 26-27. Dr. Kindig testified that he preferred to
6 rely upon the one project utilized in his study because it is local and takes into
7 account the unique weather of the Pacific Northwest, which results in phosphorous
8 concentrations that differ from other regions in the country. However, as noted by
9 the SEPA Appellants, the data in the national data base can be tailored to only reflect
10 projects in the Pacific Northwest. *Id.*

11 As to treatment efficiencies, the Dr. Zisette testified that Dr. Kindig did not take into
12 account stormwater that bypasses stormwater ponds during storm events. Mr. Zisette
13 also testified that studies finding a 50% treatment rate are based upon much higher
14 phosphorous influent concentrations than those that will occur in the MPDs.
15 Treatment efficiencies go down with lower influent concentrations. Finally Mr.
16 Zisette testified that the 50% rate is based upon peak performance of new facilities
17 and that this rate will go down for a facility with time. *Id.* at p. 27-29. Dr. Kindig
18 responded that the overflow is a relatively rare occurrence accounting for only 5% of
19 stormwater. The Applicant also asserts that the influent concentrations are higher
20 than those assumed by Mr. Zisette, because Mr. Zisette allegedly did not take into
21 account that influent into the facilities came from multiple sources, such as roads,
22 where phosphorous concentrations are high. The record is unclear as to whether Mr.
23 Zisette took this into consideration or not. The MPDs also include a monitoring plan
24 to ensure that they are designed to meet the 50% treatment requirements of the 2005
25 DOE Stormwater Manual. If not already proposed, the MPD should be conditioned
to require an improvement to the stormwater facilities if monitoring reveals less than
50% removal. It is also noteworthy that the DOE Stormwater Manual requires 50%
treatment, at least creating an implication that DOE considers this level of treatment
achievable.

19 The disagreements between Dr. Kindig and Mr. Zisette fall squarely within
20 differences in professional judgment. Both experts are highly qualified and both have
21 a side to advocate – Mr. Zisette was hired to find problems with the stormwater/water
22 quality analysis and Dr. Kindig was hired by and works for the Applicant. The SEPA
23 responsible official has determined that the stormwater analysis is adequate and the
24 Examiner must give substantial weigh to this determination. Consequently, the
25 Examiner finds the analysis, discussion and mitigation measures adequate. Dr.
Kindig's use of one data source for influent concentrations when additional data is
readily available is a little troubling. The Examiner may recommend as an MPD
condition of approval that a broader range of data be employed in designing
stormwater facilities.

B. Transportation

Findings of Fact:

1. Several witnesses testified regarding transportation impacts. Witnesses for the SEPA Appellants included:

a. Mr. Ramin Pazooki, Local Agency and Development Services Manager, Washington State Department of Transportation,

b. Mr. Matthew Nolan, Traffic Engineer, King County Department of Transportation,

c. Dr. Natarajan Janarthanan, Transportation Planning Engineer, the consulting firm Fehr and Peers, and

d. Mr. Ross Tilghman, Principle, the consulting firm Tilghman Transportation Planning.

Witnesses for the City included John Perlic, Transportation Division Manager, the consulting firm Parametrix, and Steve Pilcher, SEPA Responsible Official, City of Black Diamond.

Each of these witnesses is well-qualified and highly credible.

2. In addition to the expert testimony, several SEPA Appellants and lay witnesses also testified regarding transportation issues during the EIS portion of the hearing. These included SEPA Appellant Judith Carrier and local residents Robert Taeschner, Susan Ball and Lori Seaman.

3. During the Master Planned Development public hearings, information relevant to the transportation portion of the EIS was introduced. Information with bearing on the EIS decision criteria is considered herein.

4. The City hired the third party consulting firm Parametrix to produce the environmental impact statement review of transportation impacts.

5. Parametrix employed an unusually extensive scoping process to gather input from the stakeholders and design the methodology, size and parameters of the study area. King County, Washington Department of Transportation, and SEPA responsible officials and transportation professionals from neighboring jurisdictions were invited to participate. Representatives from Maple Valley, Covington, Auburn and Washington Department of Transportation participated. Participants provided input and concurred with the size of the study area, scope of the review, intersections

1 to be studied, and the broad methodology and assumptions of the analysis including
2 trip generation, distribution and assignment. At these scoping meetings, Parametrix
3 supplied preliminary data on trip distribution and project traffic Tr. pages 1,487-
4 1,493.

5 6. Significant transportation related issues raised during the SEPA EIS
6 hearing and MPD hearings included:

- 7 a. The choice of transportation demand model used;
- 8 b. Methodological assumptions including the background traffic
9 projections, the analysis of queue lengths from intersections and cycle timing, the
10 choice of projected peak hour factor, the internal trip capture rate, the analysis of
11 mode split and others;
- 12 c. Impacts to roads within the City of Black Diamond including
13 Railroad Avenue;
- 14 d. Safety issues and impacts to area rural roads;
- 15 e. The level of detail and type of information presented in the
16 EIS;
- 17 f. The determination of appropriate impacts and mitigation
18 measures; and
- 19 g. The timing of mitigation and the assignment of financial
20 responsibility for those impacts.

21 7. In preparing the transportation analysis, Parametrix used two models –
22 the Puget Sound Regional Council demand model and a modified version of the City
23 of Black Diamond's transportation model. The City of Maple Valley's representative
24 Mr. Natarajan Janarthanan testified that because the PSRC model is regional in
25 nature, the use of the PSRC regional model was inappropriate for the purposes of
determining local impacts and mitigation due to the lack of local validation and the
coarse structure of the model with regard to the size of transportation analysis zones.
Exhibit 15, Janarthanan First Declaration, pages 10-13 and Exhibit 67, Janarthanan
Second Declaration pages 1-2. Dr. Janarthanan noted the PSRC model was created to
identify systems level impacts at freeways and major arterial networks and is more
fully developed in some parts of the region than others. He stated the unmodified
PSRC model does not contain a level of detail sufficient to be appropriate for
measuring the local development impact of analysis for these projects. He further
noted the PSRC model is not validated for use in this region. Exhibit 15, Janarthanan
First Declaration, page 11. Mr. Perlic agreed Parametrix had not re-validated the
model for use in this area Tr. at 1,582.

1 Dr. Janarthanan suggested the appropriate model to use would be the City of Maple
2 Valley's model because it has been validated recently and contains fine grained
3 information for the communities of Black Diamond, Covington, Kent, Maple Valley
4 and Auburn. Exhibit 15, Janarthanan First Declaration pages 17, and 23-25. Mr.
5 Perlic testified the City of Maple Valley model, being a local model, would not be
6 sufficient to determine regional impacts. Mr. Perlic also noted the City of Maple
7 Valley model would be inaccurate for trips going south to Enumclaw because of the
8 gross assumptions about the external zones. Perlic Declaration page 16. Janarthanan
9 testified that the PSRC and Black Diamond models together are not capable of
10 accurately estimating the impact on Maple Valley. Exhibit 15, Janarthanan First
11 Declaration page 17. Dr. Janarthanan also testified he would rather see the analysis
12 use one single model to analyze all the impacts within the study area Tr. at 1,438.
13 The PRSC model is superior for determining regional impacts and does provide high
14 level impacts analysis data. The Maple Valley model provides a better picture of the
15 very localized impacts of the projects.

16 8. In analyzing increases in traffic volume, Parametrix assumed a 1.5%
17 growth rate in background traffic over the next 15 years, based on 5-10 years of
18 traffic counts and predictions from the PSRC model. Tr. 1,494. Dr. Janarthanan
19 testified that due to the expected length of build-out of the project and the variability
20 of growth over a long time frame, they would have used land use models to estimate
21 future growth rather than recent growth trends. Exhibit 15, Janarthanan First
22 Declaration pages 9. Dr. Janarthanan testified that in the case when the future
23 analysis year is more than five to six years beyond the current year, one should not
24 simply use a historical annual growth rate to estimate the background growth. It
25 would be advisable to use a travel demand model. Exhibit 15, Janarthanan First
Declaration page 8. Dr. Janarthanan agreed that the model used by Parametrix would
provide a conservative analysis with respect to total future traffic by overstating the
need for future infrastructure improvements. However, by estimating a higher
number of total trips, this method would also reduce the pro-rata contribution from
the developments and would influence both the calculation of impacts and necessary
mitigation measures with respect to the development. The calculation advocated by
Dr. Janarthanan would result in higher contribution by the Applicant toward
mitigation projects in Maple Valley Exhibit 15, Janarthanan First Declaration pages
23-25.

26 9. The FEIS did not include a detailed analysis of potential queue lengths
27 resulting from increased traffic. Mr. Tilghman testified that long queues at
28 intersections posed a safety hazard from motorists coming upon an unexpected back-
29 up due to queues and that queues from adjacent intersections overlapping might cause
30 gridlock. Tr. at 594-600. Mr. Pazooki testified that WSDOT provided a standard
31 request as part of the DEIS a queue analysis and an analysis of volume over capacity
32 at individual intersection legs as part of an EIS. Tr. at 1,444-1,445. Mr. Perlic
33 testified that queue analyses are more appropriately done at the project level, because
34 the determination of whether there is a significant adverse impact analysis will occur

1 in conjunction with construction, rather than trying to guess what will happen 15
2 years from now. A queue analyses at the project level will allow consideration of
3 signal timing, actual volumes, intersection design, and will more accurately predict
4 what the specific mitigation needs would be, such as whether a left turn lane is
needed to be added, and the necessary length of that left turn lane. Tr. at 1,472-1,512.
Mr. Pazooki stated WSDOT felt this information was needed now rather than later in
the MPD process. Tr. at 1,447.

5 10. The FEIS did not address individual turning-movement failures at the
6 various "legs" of each intersection. The FEIS concluded that all proposed
7 alternatives would result in increased traffic volumes and delays, some resulting in
8 failing levels of service. The Transportation Technical Report analyzed individual
9 turning movements, but the FEIS itself only addressed failing intersections.
10 Appellants assert that while concurrency regulations only require analysis of delay
11 averages for the entire intersection, a full analysis should have been done addressing
12 legs of each intersection to determine impacts of individual turning movements. Tr.
at 1,443. Both Mr. Perlic and Mr. Tilghman testified that it is standard practice to
analyze the entire intersection because mitigation is tied to failure of the whole
intersection. Tr. at 1,030 and 1,527. Mr. Pazooki testified that WSDOT requested
information about individual legs of intersections and that that information was a
standard EIS item for inclusion. Tr. at 1,444-1,447.

13 11. The peak hour factor measures the variability of traffic flow within
14 that particular hour. The peak hour factor is the total hour's volume divided by the
15 peak 15-minute volume times four. The more aberrant any given 15-minute period is,
16 the smaller that ratio becomes, indicating a greater intensity of traffic due to delays.
17 The lower the peak hour factor, the lower the level of service rating. In urban and
18 near-urban situations, peak-hour ratios are frequently about 0.85 to 0.94. A factor
19 approaching 1.0 indicates either wide open traffic conditions with no delays and an
20 absolutely uniform flow, or severe congestion where cars are unable to move. As
21 volumes increase, the factor will have an ever greater influence and may result in a
22 lowering of level of service rating. When transportation impacts are analyzed as part
of an FEIS, an increased peak hour factor is applied to reflect build-out or increased
traffic over a particular horizon period. According to Mr. Perlic's Declaration, a peak
hour factor default value of 0.92 is reasonable when there are greater than 1,000
vehicles expected to enter an intersection while a more conservative peak hour factor
below 0.90 is likely to occur when entering volumes are lower than 1,000 vehicles.
Perlic Declaration, Attachment C, page 49, and paragraph 3.

23 12. At dispute is the proper increased peak hour factor to apply.
24 Parametrix applied a peak hour factor of 0.97, on the premise that 85% of the 39
25 intersections addressed in the FEIS had peak hour factors of 0.92 or more, and an
adjustment of 0.05 would be warranted to reflect the reality of additional congestion
and volumes in traffic projected to occur in a 15- to 20-year period. Tr. pages 1,529-
1,524. The Appellants argue that a peak hour factor of 0.97 is too high, and

1 artificially improves conditions, resulting in fewer failing intersections. Tr. pages
2 584-587. The Highway Capacity Manual, on which the level of service procedures
3 are based, recommends a fault value of 0.92. Perlic Declaration, Attachment C, page
4 49. A recent National Cooperative Highway Research Program report that looked at
5 a variety of analysis factors and determined that the 0.92 peak-hour factor is a
reasonable assumption to make. Perlic Declaration, Attachment D, page 14. While
Mr. Tilghman would not rule out ever using a peak hour factor of 0.97, he said it was
extremely rare. Tr. 585-587.

6 13. The internal trip capture rate is a measure of the number of trips that
7 would be generated by the project and stay within the project rather than access the
8 roadway system. An example of this would be a resident who travels to work at an
9 office site within the project. Mr. Perlic testified Parametrix had used the Institute of
10 Traffic Engineers manual to determine internal capture. Perlic Declaration,
11 Attachment C, page 7. He testified and Mr. Nolan of King County Tr. page 520-523,
12 agreed this is the standard method for determining trip generation. In the City's
13 comments to the DEIS, Maple Valley expressed concern that the internal trip capture
rate would be too low and understate impacts from the project. Matt Nolan from
King County testified the County was concerned the rate was overly optimistic and
requested the analysis include studies of trip capture rates from recent, local master
planned developments including Snoqualmie Ridge, Redmond Ridge, Issaquah
Highlands and others. Tr. page 520-523.

14 14. The FEIS did not identify safety concerns as a probable significant
15 adverse impact. Mr. Nolan testified King County was concerned about safety on the
16 rural roads including Southeast Green Valley Road. Tr. 389. Mr. Nolan identified
17 concerns including safety issues and issues related to the physical geometry of the
18 roads, problems with site distances, and curves in the roads. Tr. 427. Mr. Nolan
19 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.

20 Ms. Carrier introduced the Department of Transportation accident history detail
21 report, showing reported collisions that occurred on Southeast Green Valley Road
22 from Auburn/Black Diamond Road to State Route 169, January 1, 2001 through
23 October 31, 2009 Exhibit IJ. Mr. Clifford introduced an updated version of the
24 report, which includes details of all reported accidents in that area from 2001 through
25 2009. Exhibit H22. The Department of Transportation accident history detail report
included a period during 2008, during which traffic volumes increased substantially
due to a detour resulting from a bridge closure. Ms. Carrier also raises additionally
concerns regarding the failure of the FEIS to analyze an additional eastern outlet to
SR-169 from the Villages. She stated that many of the proposed projects are not
going to be funded, and that there will be no highway capacity improvements for a
very long time on SR 169. Without these projects, the existing roads will simply not

1 be safe enough for increased travel, nor will they be able to maintain the necessary
2 levels of service regarding traffic. Tr. pages 199 & 205.

3 Mr. Perlic testified that he would have expected the number of accidents to increase
4 as traffic volumes increase in conjunction with the project. In spite of the increased
5 traffic during that period, the number of accidents did not increase from the average
6 for this nine-year reported period. Tr. pages 1,541-1,543.

7 Mr. Perlic stated that in his traffic analysis, he found no high incident intersections;
8 the accidents in the study area were random and not tied to any particular hazards on
9 the roads. Mr. Perlic noted while some of the safety impacts are mitigated by the
10 improvements called for in the FEIS, the randomness of the accidents makes it
11 difficult to predict and impose more specific mitigation that would decrease the risk.
12 He further testified there is no known way to analyze safety impacts except to
13 evaluate the particular configuration of a high-accident location. Tr. pages 1,541 -
14 1,543.

15 15. The FEIS addressed levels of service and included a reasonable
16 discussion of the impacts resulting from increased traffic volumes and decreased
17 levels of service. The FEIS generally describes mitigation measures in general and in
18 more extensive terms in the body and technical appendices. The Applicant has also
19 proposed a monitoring plan and a mid-point review condition to analyze
20 transportation impacts and ensure the mitigation measures are effective. The
21 mitigation measures proposed by the FEIS did not discuss whether funding exists to
22 implement the measures or whether such measures are feasible. Forty-six
23 intersections were identified for review in the scoping process, an unprecedented
24 number for a non-project FEIS. In accordance with standard practice and the City of
25 Black Diamond code, entire intersections (rather than portions thereof) were studied
at PM peak hours, to address the most congested time of day. When the levels of
service become unacceptable, mitigation is identified to reduce delays and return to
acceptable levels of service. Additional review and potential additional mitigation
will be done in conjunction with specific projects. Appellants also argue that the
FEIS analysis should have included a review of other times, such as morning
commutes, in addition to the PM peak hour analysis. (Exhibit 211, Janarthanan Third
Disclosure, page 10.) Mr. Perlic explained that it is customary to use the highest
travel hour so mitigation is imposed for the worst-case traffic scenarios. Perlic
Declaration, page 24. Dr. Janarthanan testified that a full disclosure of impacts would
indicate failing intersections during the AM peak hour as well Exhibit 211,
Janarthanan Third Disclosure, page 10.

The FEIS did not include an analysis or estimate of anticipated increases in travel
times. The Appellants assert that the FEIS should have included a discussion of how
the projects would impact travel times, arguing that such a discussion would be more
meaningful to the decision-makers than LOS analyses. Tr. 594. Mr. Perlic testified

1 that travel time analyses are not typically provided in a programmatic FEIS.
2 Tr. 2,467-2,468.

3 16. It is anticipated that traffic on the Green Valley Road will increase by
4 as much as 300 – 400%. Tr. 476. Green Valley Road currently has very low traffic
5 volumes, and the anticipated increase in traffic volumes resulting from the project
6 will not exceed Green Valley Road's capacity. Testimony from Mr. Perlic indicated
7 that intersections along Green Valley Road can handle the projected increase in
8 traffic. Tr. 476-478. Green Valley Road has been designated under King County's
9 Historic Heritage Corridor. It is a historical, aesthetic and recreational resource of the
10 City. The anticipated increases in traffic on Green Valley Road will most likely
11 impact the rural nature of the road. Tr. 388-389. SEPA's required environmental
12 review must include aesthetics, recreation and historic preservation. See WAC 197-
13 11-448(2)(b)(iv)-(vi). Testimony was also presented that bicyclists and pedestrians
14 may also face safety hazards, especially on Green Valley Road. Tr. 466, 611. The
15 FEIS does not address these impacts.

16 Green Valley Road also is a major concern of Ms. Carrier. She states that it has
17 limited or no roadway shoulders, has trees and fences in very near proximity to the
18 roadway, and very curvilinear alignment. Additionally, Green Valley Road has a
19 high number of large animals that regularly cross the road, and increased traffic on
20 the road creates a higher likelihood of accidents and also threatens the general
21 livelihood of the animals in regards to safety and habitat. There is also a high volume
22 of bicyclists on the road, as well as hikers, joggers, tubers, swimmers, outdoor
23 groups, and fishermen using the shoulder, and only one-tenth of a mile of legal
24 passing zone. Tr. 209-212. In addition to safety concerns on Green Valley Road, Ms.
25 Carrier is also concerned about its historic and aesthetic qualities. It is a designated
Heritage Corridor and goes back to 1884. There are also many historical homes and
sites, as well as an agricultural district and farmland, which King County has
designated as a significant area in need of protection. The farm areas have their own
safety issues regarding farm equipment crossing the road. Additional traffic on the
road will require mitigation factors that would disrupt the nature of the historic and
agricultural areas to an irreversible degree. Tr. 213-215.

20 17. The City's Comprehensive Plan designates Railroad Avenue as a
21 collector road, with a level designation of C, and whose purpose is to collect and
22 distribute traffic between local roads and arterial system. Mr. Perlic testified that
23 Railroad Avenue has sufficient capacity to handle projected increases in traffic. Tr.
24 1,535-1,536. Railroad Avenue is part of the City's Old Town historic district overlay.
25 The Comprehensive Plan policies state that the historical character "should be
retained and enhanced, and this area should become the focus of tourist and
specialized retail activities." (Black Diamond Comprehensive Plan, *Commercial and
Mixed Use Development Policies* Old Town Mixed Use.) The Comprehensive Plan's
objectives and policies look to "Maintain those historical qualities in the environment
that bring value to the community." (Black Diamond Comprehensive Plan, 5.6.8.

1 Historic Preservation Objective, Policies and Concept Historic Preservation Objective
2 and Policies, Objective LU-7). The Appellants are concerned that increased traffic
3 will destroy the historical character of Railroad Avenue. Tr. 1,015-1,016. However,
4 Mr. Perlic named several other roads in the area, such as the main roads through
5 North Bend and Snoqualmie, with historical characteristics similar to Railroad
6 Avenue that have been able to retain their rural character in spite of development and
7 increases in traffic. Mr. Tilghman testified the specific section of Railroad Avenue is
8 being reconfigured to have head-in parking and that under the City's design standards
9 the volume for a collector assumes there is no parking lane. These are two very
10 different scenarios here. Tr. 1,015. Mr. Tilghman also noted that despite the road's
11 designation, it functions like a local access street due to the head-in parking and is
12 therefore not functionally capable of safely handling the proposed project traffic. Tr.
13 1,015-1,016.

14 18. Judith Carrier, one of the SEPA Appellants, has raised concerns that
15 the FEIS did not adequately address and disclose the environmental impacts arising
16 from the potential for increased traffic along Plass Road/257th Ave. SE. Tr. 201-222;
17 2269-2276. Plass Road can serve as a bypass to traffic on SR 169 through a
18 connection between SR 169 and Green Valley Road. John Perlic testified that there is
19 no mention of Plass Road within the EIS. Tr. 2543. Mr. Perlic stated that it is
20 possible that some small portion of traffic may reroute onto Plass Road in order to
21 avoid increased traffic on surrounding roads, but that no studies have been done to
22 look into the matter. Vol. VIII pgs. 2545-2546. Mr. Perlic states that he does not
23 believe a reroute is likely due to the current state of Plass Road, which is just gravel
24 in parts, has potholes, and can be travelled at only 20 miles per hour; whereas SR169
25 is in much better condition, and although it may be more congested, the posted speed
is 50 miles per hour. Tr. 2702 & 2707. Mr. Perlic points out that even if a small
number of drivers do choose to use Plass Road as an alternative that will not result in
a probable significant adverse impact. Tr. 2702. Finally, Mr. Perlic stated that a
further reason Plass Road is not a feasible alternative route is due its absence from the
Comprehensive Plan list for road improvements, which results in the road remaining
in its current condition. Tr. 2737. On behalf of the Applicant, Nancy Rogers states
that the Applicant has no intention of using Plass Road and would agree to vacate a
portion of the road to assure no use if there is support from Plass Road residents, the
City of Black Diamond and King County Applicant's Rebuttal to Additional Public
Testimony, pg. 7; Applicants' Closing Brief in Support of EIS Adequacy, pg. 35.

19 19. The FEIS did not go into great detail with regards to Alternatives 3
20 and 4; it merely noted the percentage increase posed by each alternative.

21 20. Jeff Dixon, Principle Planner, City of Auburn, testified that the
22 analysis does not adequately depict mode split and does not characterize the impacts
23 of development on the Auburn Regional Transit Station's parking garage or overflow
24 parking onto adjacent city streets Exhibit 16.

Conclusions of Law:

1. Although many facets of the transportation analysis could have been better, the choices made by Parametrix are all within the parameters of reasonably justified professional judgment, especially given the substantial weight that must be given to the SEPA Responsible Official's determination that the analysis is adequate. The FEIS contains a reasonably thorough discussion of significant adverse transportation impacts of the proposed project at the programmatic level of analysis. However, the use of a regional model to project local traffic impacts, the divergence in the effect of modeling assumptions, along with concern related to the effect of the choice of models on potential impacts and mitigation will lead the Hearing Examiner to recommend additional mitigation measures in the MPD.

2. 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 beneficially addressed at this programmatic level of review. It is reasonable to conclude that decision-makers would recognize that vehicle accidents will increase proportionately with increased traffic volumes.

3. It was not necessary that the FEIS discuss the anticipated increases in travel times resulting from increased traffic. The FEIS addressed levels of service and contained a reasonable discussion of the impacts resulting from increased traffic volumes and decreased levels of service. The LOS analysis is the more customary manner to address traffic issues. The Growth Management Act requires an LOS analysis to gauge the performance of local transportation systems. RCW 36.70A.070(6)(a)(iii)(B). City and County elected officials deal with level of service on a regular basis in their review of planning documents required by the Growth Management Act and their review of land use applications. Mitigation is based on level of service; thus, a discussion of LOS is more meaningful than increased travel times. It is reasonable to conclude that decision-makers are familiar with LOS analysis; additional analysis of anticipated increases in travel time was not necessary. This information was sufficient to inform the City of the environmental impacts associated with making a reasoned decision regarding MPD approval and allow its officials to make reasoned decision.

4. Use of the PM peak hour analysis was sufficient to establish necessary mitigation for traffic increases. While Appellants would have the FEIS address other times, including AM peak hours, as Mr. Perlic testified it is customary to use the highest travel hour so mitigation is imposed for the worst-case traffic scenarios. The FEIS is not intended to be a compendium of every conceivable effect or alternative. The information presented was sufficient to enable the decision-makers to understand the effects of the traffic. Moreover, Appellants have not met their burden of showing evidence of an impact not addressed.

1 5. Analysis of whole intersection failure was sufficient to establish
2 necessary mitigation. The City's LOS standard for intersections applies to the whole
3 intersection, and Mr. Perlic and Mr. Tilghman both testified that it is standard practice
4 to analyze the entire intersection because mitigation is tied to failure of whole
5 intersection. While Appellants would have the FEIS also examine the various legs of
6 each intersection, such detail is inappropriate for the FEIS itself; this analysis is
7 included in the Transportation Technical Report. Analysis of the LOS at intersections
8 contained a reasonably thorough discussion of significant aspects of probable
9 environmental consequences

10 6. Green Valley Road contains aesthetic, recreational and historic
11 elements that are not addressed in the FEIS. While Green Valley Road's
12 designation under King County's Historic Heritage Corridor program has no
13 regulatory significance, an environmental review under SEPA must include
14 aesthetics, recreation and historic preservation. See WAC 197-11-448(2)(b)(iv)-(vi).
15 King County's designation supports the conclusion that Green Valley Road is an
16 aesthetic, recreational and historic resource. However, it is recognized that this is
17 ultimately a subjective determination. As Mr. Perlic testified, analyzing impacts to
18 "rural character" would be speculative and subjective. Consequently, it would not be
19 reasonable to find the EIS inadequate on impacts that cannot be objectively assessed
20 and could be subject to reasonable differences of interpretation. However, the
21 Examiner will recommend added mitigation in MPD to control traffic on Green
22 Valley Road, potentially including features such as traffic calming devices and
23 bicycle lanes.

24 7. Railroad Avenue is characterized in the City's Comprehensive Plan as
25 a collector arterial. The Appellants raised issues regarding the ability of Railroad
26 Avenue to safely carry the additional traffic due to the projects given its existing
27 physical function as a head-in parking local access street. The Appellants suggested
28 this road is misclassified giving the impression it can handle more traffic than it can.
29 While there is concern regarding the safety, capacity and historical aspects of
30 Railroad Avenue that are designated for preservation by the City's Comprehensive
31 Plan, testimony indicated that the historic nature could be retained in spite of
32 increased traffic impacts. Moreover, analyzing impacts to "rural character" would be
33 speculative and subjective. The EIS is not responsible for potential errors in the
34 City's roadway classification system. As labeled, Railroad Avenue is a collector
35 arterial, a designation that suggests the road is able to carry a greater traffic capacity
36 than is proposed from the projects. Appellants have not met their burden of showing
37 evidence of an impact that could be addressed in the FEIS.

38 8. Although Mr. Perlic testified that it is unlikely that there will be much
39 traffic generated on Plass Road by the MPD projects, it is very possible this could
40 occur if congestion becomes a problem on SR 169. As noted in the Standard of
41 Review section of this decision, an EIS is not required to address every conceivable
42 impact of a project. The off-chance that SR 169 will become congested enough to

1 motivate drivers to use Plass Road to by-pass traffic probably falls under the "every
2 conceivable" category and does not affect the adequacy of the EIS. However, Ms.
3 Carrier and the Applicant have proposed some reasonable solutions to this problem in
4 case Ms. Carrier's fears do materialize. For this reason, the Examiner will
5 recommend some MPD conditions along the lines recommended by the Applicant
6 and Ms. Carrier.

7 9. While the FEIS gave short shrift to Alternatives 3 and 4, merely noting
8 the percentage increase posed by each alternative, failure to go into more detail is not
9 fatal to the validity of the FEIS. The SEPA Responsible Official made a
10 determination that the FEIS adequate. The FEIS provided sufficient information to
11 enable the decision-makers to making a reasoned choice among alternatives. The
12 issues that Appellants claim should have been addressed in more detail with regard to
13 each alternative, such as safety, hours of commute analyzed, character and travel
14 times, are discussed elsewhere herein and were not necessary for the validity of the
15 FEIS.

16 10. It was not necessary that the FEIS address the feasibility of
17 implementing mitigation measures. SEPA requires the FEIS to discuss reasonable
18 mitigation measures that would significantly mitigate impacts and indicate what the
19 intended environmental benefits of mitigation measures are for significant impacts.
20 WAC 197-11-440. The FEIS *may* discuss the economic practicability of mitigation
21 measures *if* there is concern about whether a mitigation measure is capable of being
22 accomplished. *Id.* It *need not* analyze mitigation measures in detail unless they
23 involve substantial changes to the proposal causing significant adverse impacts, and
24 those measures will not be subsequently analyzed under SEPA. *Id.* In this case, the
25 measures will be subsequently analyzed, and it would be premature to attempt to
analyze the feasibility of implementation of mitigation measures at this juncture.
Such an analysis is of limited use given the multitude of other factors that could derail
the project. Cost-sharing arrangements may be addressed by development
agreements entered into between the developer and City.

These issues are more appropriately addressed later as part of the review of the
specific project pieces when the City has the permitting authority to condition the
project on implementation of mitigation measures. If level of service impacts
mandate mitigation, any development can only proceed if mitigation is actually
implemented. While SEPA does not require the FEIS to discuss mitigation measures
in detail in all instances, mitigation but must be reasonable and capable of being
accomplished. If mitigation is determined to be unfeasible at the time the project will
be built, then GMA concurrency will prevent the development from proceeding.
Consequently, any feasibility analysis at this point would only speculate on whether
the development will proceed to completion if approved.

11. It was not necessary for the FEIS to analyze queue lengths. Review of
queue lengths is more appropriately done at the project level, rather than the

1 programmatic stage. Such analysis should be done when looking at specific
2 improvements in the construction phase, so that determinations of significant adverse
3 impacts can occur in conjunction with construction, rather than trying to guess what
4 will happen 15 years from now. The FEIS contained a reasonably thorough
5 discussion to inform the City of the environmental impacts of traffic while
6 recognizing that more detailed information on environmental impacts will be
7 available with subsequent project proposals. However, the Hearing Examiner will
8 recommend additional conditions for this topic as part of the MPD.

9 12. Application of the 0.97 peak hour factor does not make the FEIS
10 inadequate. While there was testimony that a 0.92 peak hour factor is the accepted
11 standard, applying that factor to an intersection already at 0.92 or higher would be
12 appropriate. The City should have done an individual analysis of each intersection
13 under consideration and applied a factor appropriate to that intersection. However,
14 the analysis is still adequate since the 0.97 peak hour factor does not fall beyond the
15 range of professional judgment and substantial deference must be given to the SEPA
16 Responsible Official's determination that FEIS is adequate. Although the 0.97 PHF
17 falls within the realm of adequacy, it was clearly not the most accurate assumption
18 that could have been employed. The Hearing Examiner will recommend more
19 accurate PHF use for the MPD conditions of approval.

20 13. Parametrix's use of a 1.5% growth rate in background traffic based on
21 recent growth trends was within the bounds of professional judgment. The
22 background rate of growth is subject to change, and a straight line projection based on
23 historical trends may under- or overstate total background traffic and therefore affect
24 the calculated share of pro-rata project impacts. A high background growth is
25 conservative with respect to total impacts in that it will increase apparent impacts and
required mitigation. A higher rate is not conservative with respect to the project's
pro-rata contribution to those impacts because higher background traffic figures
would reduce the project's perceived pro-rata contribution to the impact and reduce
the project's share of mitigation proportionately to the increase in background traffic
assumptions. Although the Applicant's projections may not be the most accurate
methodology, they are reasonable, within the bounds of professional judgment and
suffice under the substantial weight standard. Appellants did not meet their burden of
showing the calculation was erroneous or why the SEPA responsible official's
judgment should be overruled. However, the Hearing Examiner will recommend
additional conditions for this topic as part of the MPD.

14. As is evident from the findings above, the EIS traffic analysis is
adequate but in several instances there are more accurate methodologies and
assumptions available to ensure more complete mitigation. The Examiner will
recommend conditions on the MPD that incorporate the better methodologies and
assumptions.

1 **C. Faulty Audio Recording of DEIS Hearing**

2 **Findings of Fact:**

3 1. Page 3 of the Gauthier Appeal Statement, p. 5 of the Clifford Appeal
4 Statement, p. 2 of the Wheeler Appeal Statement, and p. 2 of the Harp Appeal
5 Statement all express concern over the poor audio recording of the hearing on the
6 Draft EIS for both MPD projects.

7 2. A transcription of the audio recording identifies over 300 "inaudible"
8 gaps in the recording. See Transcript attached to Harp Appeal Statement. The
9 testimony from at least one individual is completely missing from the recording.

10 **Conclusions of Law:**

11 1. There is no legal requirement for the recording of a hearing on a Draft
12 EIS.

13 2. Procedural errors occurring during the EIS process are reviewed under
14 the rule of reason. Where such errors are not consequential, they must be dismissed
15 as harmless. *Klickitat County Citizens Against Imported Waste v. Klickitat County*,
16 122 Wn.2d 619, 637 (1993).

17 3. As noted in the Examiner's Order on Motions to Dismiss, Email Ex.
18 300, p. 10-11, the gaps in the recording are relevant to a determination of adequacy if
19 they reveal that significant impacts presented by the citizens were not considered in
20 the FEIS. No evidence was presented that this occurred. The record fails to establish
21 that the audio recording had any relevance to the adequacy of the FEIS.

22 **D. Schools**

23 **Findings of Fact:**

24 1. Page 12 of the Clifford Appeal Statement asserts that the FEIS
25 inadequately addresses school impacts, including the impacts caused by the
26 construction of new schools to serve the project.

27 2. Mr. Clifford has raised concerns that because of the schools' location
28 outside of the UGA, certain impacts related to school construction were not
29 accounted for in the FEIS. Namely, the FEIS did not account for the increase in
30 traffic in rural King County and for the effects related to an increase in impervious
31 surfaces on nearby wells and septic systems. Tr. at 13.

32 3. Mike Nelson, the Superintendent of the Enumclaw School District,
33 testified that in August 2006, the Enumclaw School District began negotiations with

1 the City of Black Diamond and Yarrow Bay Development to develop a three-party
2 Comprehensive School Mitigation Agreement. Tr. at 850-51.

3 4. According to the testimony of Mr. Nelson, the parties to the
4 Comprehensive School Mitigation Agreement "firmed up" the location of the
5 elementary and middle schools identified in Finding of Fact No. 1 in April 2009 and
6 the location of the high school in late August or early September 2009. Tr. at 878-79.
7 These sites were not made known to the public before October 8, 2009, and Mr.
8 Nelson gave a PowerPoint presentation at a public meeting on October 26, 2009,
9 describing the details of the Agreement. Tr. at 852.

10 5. Additional public meetings were held on November 5, 2009, and
11 November 12, 2009, at which time, a map of the location of the schools was
12 distributed to the public. The map distributed at these public meetings depicted four
13 schools, one elementary, two middle, and one high school to be located outside of the
14 UGA and Black Diamond City limits. Tr. at 853-54. A middle school and
15 elementary school will be located south of the Villages development, directly north of
16 SE Green Valley Road. In the testimony, this site was described as the "twin school
17 site." Another middle school has been proposed to be located to the west of the
18 Villages, and a high school has been proposed to be located north of the Villages near
19 Lake Sawyer. Ex. GB-15.

20 6. The Comprehensive School Mitigation Agreement has not yet been
21 signed by the respective parties and remains in draft form. Tr. at 527.

22 7. The "Summary of the Comprehensive School Mitigation Agreement,"
23 contained in Appendix K of the FEIS, provides that Yarrow Bay shall convey
24 property for school sites upon the occurrence of three events: (1) The District must
25 secure construction financing; (2) Yarrow Bay must receive final plat approval for
various stages of the development; and (3) Mr. Paul Reitenbach of the King County
Department of Development and Environmental Services testified that the District
would have to obtain a conditional use permit to locate the school in rural King
County. See Tr. at 518. As Mr. Nelson stated, the schools will be owned and
operated by the Enumclaw School District. Tr. at 889.

8. The Comprehensive School Mitigation Agreement contains provisions
to locate the schools within the UGA and the City of Black Diamond in the event that
King County denies conditional use permits for rural schools. Tr. at 890.

9. With respect to possible impacts on wells and septic systems, Mr. Gil
Bortleson, a water chemist and a SEPA Appellant of this action (on Mr. Clifford's
appeal team), testified that building the twin school sites south of the Villages along
Green Valley Road would create a "high risk" of drying out approximately ten
shallow wells serving neighboring residents in rural King County. Tr. at 137. In
addition, Mr. Bortleson indicated that increased runoff from the school sites would

1 drain to the west, potentially flooding septic systems located in that area. Tr. at 144.
2 Mr. Bortleson also expressed concern over the transport of sediments to Green River
3 from the school sites. Mr. Bortleson has a Ph.D. in water chemistry. He has worked
4 in the Water Resources Division of the US Geological Survey for 30 years, where he
5 has developed extensive experience in analyzing impacts to lakes, estuaries, streams
6 and groundwater.

7
8 10. Mr. Bortleson did not review any site plan for the proposed school
9 construction prior to giving his testimony and assumed that the entire twin school site,
10 70 acres of land, would be paved or graded, creating 70 acres of new impervious
11 surface. Tr. at 148.

12
13 11. Mr. Bortleson was not able to give any testimony with respect to the
14 quantity of water that currently infiltrates to the wells that would not infiltrate to the
15 wells after the project. Tr. at 153. He also was not able to answer any question
16 regarding the amount of surface water infiltration needed to sustain the operation of
17 the at-risk wells. Tr. at 154.

18
19 12. With respect to the potential traffic impacts created by locating schools
20 outside of the UGA, Mr. John Perlic, a Parametrix employee who drafted the
21 transportation sections of the FEIS, testified for the City of Black Diamond that the
22 schools were considered to be located within the project sites for the traffic analysis.
23 Tr. at 1580, 2540. On March 11 during cross-examination, Mr. Perlic stated that he
24 did not have specific site locations for schools when he conducted his trip generation
25 analysis: "We didn't have specific site locations, but we knew generally within upper
Lawson versus lower Lawson or which part of the Villages but not specific sites." Tr.
at 1579. On cross-examination on March 16, however, Mr. Perlic stated that he did
have particular school locations in mind, at least for the high school, though he could
not recall exactly where the location was. Tr. at 2535. Appendix B to the FEIS also
does not indicate exactly where the schools were assumed to be located for purposes
of traffic analysis. Mr. Perlic did indicate, however, that the high school was located
in the main Villages property for purposes of the traffic study. Tr. at 2535.

13
14 13. Mr. Perlic testified that locating the high school outside of the project
15 site would not significantly change the traffic analysis if the same access road were to
16 be used. Tr. at 2540-41. Mr. Perlic also stated that the location of the high school
17 would generally only affect the AM Peak Hours analysis, which was conducted on a
18 limited basis. AM Peak Hours analysis was conducted at only 6 intersections within
19 the project area because traffic is heaviest during the PM Peak Hours. Tr. at 2541-42.

20
21 14. Appendix B of the FEIS regarding transportation appears to only
22 examine AM Peak calculations for a total of four schools: one elementary school
23 with 800 students in Lawson Hills, one elementary school in the Villages with 1,500
24 students, one middle school in the Villages with 550 students, and one high school in
25 the Villages with 1,200 students. *See, e.g.,* TV FEIS Table 10 Appendix B; LH FEIS

1 Table 6 Appendix B. However, Susan Graham, also employed by Parametrix,
2 indicated that at the time the DEIS and FEIS were drafted, it was known that the
3 projects, if completed, would create the demand for a total of seven schools. Tr. at
4 907. Ms. Graham also indicated that for purposes of the DEIS FEIS, Parametrix
5 identified the need for seven school facilities, but did not address where those schools
6 would be located. Tr. at 936.

7 **Conclusions of Law:**

8 1. WAC 197-11-660(2) provides: "EISs are not required to analyze in
9 detail the environmental impacts of mitigation measures, unless the mitigation
10 measures: (a) Represent substantial changes in the proposal so that the proposal is
11 likely to have significant adverse environmental impacts, or involve significant new
12 information indicating, or on, a proposal's probable significant adverse environmental
13 impacts; and (b) Will not be analyzed in a subsequent environmental document prior
14 to their implementation." (Emphasis added.) The new schools serve as mitigation by
15 satisfying the demand for school facilities created by the MPDs. The testimony of
16 Mr. Reitenbach clearly indicates that, in order for the schools to be built outside of
17 the UGA, conditional use permits must be obtained from King County. Tr. at 518. A
18 "subsequent environmental document," namely an environmental checklist or EIS,
19 will be required under SEPA as part of the future process of obtaining such a permit.
20 Accordingly, the environmental impacts of school construction in specific locations
21 did not need to be analyzed in detail in the EIS.

22 2. WAC 197-11-660(2) only exempts the City from conducting a detailed
23 analysis of the environmental impacts of schools. It still requires a general
24 discussion. The FEIS comply with this requirement by identifying the level of
25 service (LOS) standards for school facilities in the Enumclaw School District,
calculating student generation caused by the development, identifying possible school
mitigation fees to ensure that the availability of school facilities will not lag behind
the demand for those facilities, and deferring to the City's MPD regulations (BDMC
18.98.080.A.14), which allow school impacts to be mitigated at the time of MPD
approval by the City Council through a separate agreement. FEIS, pp. 3-80 through
3-85. Because the City's regulations allow such a procedure, the discussion of school
impacts meets the standard of WAC 197-11-660(2), requiring a general discussion of
environmental impacts of mitigation measures.

3. The Appellants argue that the failure to disclose and discuss the
location of schools outside of the UGA equates to a failure to address the cumulative
environmental impacts of the project. The SEPA Rules require that an EIS must
analyze "cumulative impacts." WAC 197-11-060(4)(e); WAC 197-11-792(2)(c)(iii).
A focus upon cumulative impacts early in the review process assures the most
efficient design and use of infrastructure. A discussion of cumulative impacts is an
appropriate part of the "general" discussion required for mitigation under WAC 197-
11-660(2). While there is no definition of a "cumulative impact" in the SEPA Rules,

1 “cumulative impacts seem to be the combined effects of the proposal along with those
2 of other actual or potential proposals.” Richard L. Settle, *The Washington State*
3 *Environmental Policy Act: A Legal and Policy Analysis* § 14.01[1][c][iii] (21st ed.
4 2009). Additional projects do not require review in an EIS for cumulative impacts if
5 they are either substantially independent from the proposed action or are not
6 necessary to meet the project's purpose and need. *Gebbers v. Okanogan County PUD*
7 *No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324 (2008).

8 Although the schools are clearly dependent upon the MPDs in the sense that they
9 would probably not be built within the near future without them, they do have
10 independent characteristics to the extent that environmental impacts do not build
11 upon those of the MPD projects. An assessment of independence in this manner is
12 consistent with the Settle conclusion that cumulative impacts are the “combined
13 effects of the proposal” with other proposals. A focus upon impacts that build upon
14 each other is also consistent with the goals of environmental review from a practical
15 standpoint, since no benefits are lost by segmenting environmental review of impacts
16 that are independent from each other.

17 a. The FEIS address the cumulative traffic impacts of the schools.
18 According to Mr. Perlic's testimony, he assumed that all schools would be located
19 within the project sites and inside the UGA for purposes of his traffic analysis, though
20 the testimony is inconclusive with regard to whether Mr. Perlic conducted the traffic
21 analysis with a particular site in mind, and if he did, where that site was located. Tr.
22 at 1580, 2540. Nevertheless, Mr. Perlic calculated the trips that would be generated
23 by school traffic and considered this when he evaluated the AM peak numbers at six
24 different intersections within the project site. Tr. at 2535. The Appellants have not
25 demonstrated that this analysis was deficient. Thus, if the schools are located within
the UGA boundary, the FEIS adequately evaluated the cumulative traffic impacts that
will be caused by school construction.

18 b. Even assuming that the schools will be located outside of the
19 UGA boundary, which according to the testimony is not by any means certain, the
20 Appellants have failed to sustain their burden of proving that the Applicants'
21 discussion of cumulative impacts was inadequate. The record is devoid of evidence
22 suggesting that aspects of the current MPD construction and planned road
23 improvements will be rendered inadequate or that a waste of resources will occur if
24 the planned infrastructure improvements are constructed without consideration of
25 school impacts. Mr. Perlic stated that only AM peak traffic calculations could change
if different access roads are used, specifically to access the high school. Tr. at 2541-
42. However, appellants did not provide evidence suggesting which, if any, of Mr.
Perlic's calculations would be rendered inadequate and how that may affect the
proposed MPD construction and the associated planned road and intersection
improvements.

1 c. The traffic impacts on rural King County are cumulative. As
2 discussed in the traffic section of this decision, traffic generated by the MPDs will
3 increase traffic on Green Valley Road by 300-400%. It was further found that these
4 anticipated increases in traffic (presumably not including school traffic) will not
5 exceed the capacity of the road, so no road improvements are anticipated as a result of
6 the MPDs. It would have been useful to know if the additional traffic generated by
7 the proposed schools would exceed the capacity of Green Valley Road and trigger
8 improvements. However, the burden is on the SEPA Appellants to provide some
9 evidence that traffic generated from the proposed schools could exceed capacity.
10 Since no such evidence was provided, the Examiner must conclude that traffic added
11 by the schools would not create a significant cumulative impact.

12 d. The impacts identified by Gil Bortelson, the Appellants' water
13 chemist, are not cumulative because they are independent of the MPD development.
14 The only impacts Mr. Bortelson identified are to wells and septic systems outside of
15 the MPD site. These impacts can be effectively evaluated when a specific proposal
16 for school construction is submitted for permit review.

17 4. The general discussion of impacts of mitigation measures required by
18 WAC 197-11-660(2) is also qualified by the limitation that this discussion does not
19 need to include impacts that are remote and speculative. WAC 197-11-060(4)(a);
20 WAC 197-11-782.

21 a. The impacts of school construction are too remote and
22 speculative to warrant detailed environmental review in the MPD EIS. First,
23 testimony is conflicting with respect to whether the location of the schools outside of
24 the UGA has actually been conclusively determined and when school construction
25 will occur. The Comprehensive School Mitigation Agreement is still in draft form,
and in fact provides for measures to locate the schools within the development site if
King County denies the necessary conditional use permits. Tr. at 527, 890.
Furthermore, it is unknown whether the population growth will warrant the school
construction at issue, when final plat approval will be granted for multiple stages of
development for Lawson Hills and the Villages, and whether the necessary funding
will be secured. See "Summary of the Comprehensive School Mitigation
Agreement," contained in Appendix K of the FEIS. As Mr. Nelson testified, these
schools will not be owned and operated by Yarrow Bay. Tr. at 889. Thus, despite the
fact that Mr. Nelson testified the school sites were "firmed up" by April and late
August/early September of 2009, there are many conditions that have yet to occur
before the schools will be built, which may take years.

26 b. The impacts identified by Mr. Bortleson were also speculative.
27 Though Mr. Bortleson identified a "high risk" that surrounding wells would dry out
as a result of the twin-site school construction, he was unable to identify the level of
water necessary to sustain the wells and had assumed 100% impervious surface
without any knowledge on the general design of schools. Tr. at 148, 154.

1 5. With respect to sediment impacts to Green River testified by Mr.
2 Bortleson, the record is unclear as to whether the sediment would create significant
3 impact or that it would add to any other sediment generated by the MPDs. Given the
4 substantial weight that must be given to the SEPA Responsible Official, the Examiner
cannot find that sediment impacts would be cumulative or significant to qualify for
the general discussion required of mitigation measures.

5 **E. Wildlife**

6 **Findings of Fact:**

7 1. Page 14 of the Clifford Appeal Statement, p. 15 of the Wheeler Appeal
8 Statement and p. 11 of the Harp Appeal Statement all express concern over
development impacts upon wildlife.

9 2. Appellant Clifford has raised concerns that the FEIS were prepared
10 without the benefit of site investigations and that they are superficial and erroneous.
11 Tr. at 13-14.

12 3. Appellants Wheeler, et. al., raised concerns that the FEIS fail to
13 disclose elk herd impacts and do not provide adequate analysis on the effectiveness of
proposed wildlife corridors. See Wheeler Post-Hearing Brief at 54.

14 4. Appellants Wheeler offered the testimony of Bruce Richards, a Dept.
15 of Fish and Wildlife (DFW) employee, as their expert on wildlife. Tr. at 46.

16 5. Having assisted in preparing other EISs on wildlife in nearby regions
17 and having a degree in biology, Appellant Clifford offered his own testimony as an
expert on wildlife. Tr. at 164.

18 6. Applicant offered the testimony of Jason Knight, a wildlife biologist
19 with Wetland Resources, as its expert on wildlife. Tr. at 2406.

20 7. According to the testimony of DFW employee Richards, there are elk
21 groups at both the Villages and Lawson Hills sites. Being residential elk groups, they
do not migrate in and out of this region. Mr. Richards thought that the FEIS were
22 well written, professionally done and contained a lot of information, but he also
thought it did not speak to what was going to happen as a result of the projects. He
23 felt that the FEIS lacked effort in translating loss of habitat to impact on wildlife. He
was adamant that any development, regardless of size, permanently impacts wildlife.
24 Mr. Richards also opined that there was no way to mitigate those impacts. He did not
feel that protecting a portion of the land that already serves as habitat was mitigation.
25 He added that the corridors proposed already serves as elk habitat. He noted that elk
are listed by the state as game species. He also noted that with habitat's landscape

1 changes, there is always the possibility that protected species, like a bald eagle, will
2 take up residence. He felt that the EIS were deficient because they do not mention
3 which species will survive and which will be lost despite mitigation and open spaces.
4 He opined that elk would disburse into different areas as a result of development. He
5 noted that band tailed pigeons migrate past the area in late summer, but neither they
6 nor bald eagles nest at the subject sites. He also noted that there is the possibility of
7 elk tearing down fences, invading yards and causing property damage. He added that
8 bears do not move as a result of development and will be a problem to deal with, as
9 will mountain lions. Finally, he noted that the EIS correctly addressed the impact of
10 development on wildlife, which was that detrimental impact will occur. Tr. at 46-68.

11 8. According to the testimony of Mr. Clifford, band tailed pigeons do
12 nest in the area if one looks closely during mating season. He noted that there are a
13 lot more species on the subject sites than those considered in the EIS. He opined that
14 no survey was conducted for the EIS and the species listed were based on habitat
15 wildlife profile prepared by other organizations like the DFW. He was adamant that
16 thorough site survey should be required for an EIS. He concluded that the EIS is
17 superficial and does not address each site specifically. Tr. at 164-191.

18 9. According to testimony of Knight, about thirty days of site
19 investigations were conducted in 2005, 2007 and 2008 for the EIS. He noted that the
20 FEIS text contains a summary of species and that the FEIS appendix contains a
21 detailed list of all species. He also noted that band tailed pigeons need mineral
22 springs at their breeding site, which are not found at the subject sites. He added that
23 no endangered or threatened species were found at the sites, which is also consistent
24 with the findings by the DFW. He opined that development may benefit elk
25 population because elk feed on landscape that is more likely to be present as a result
of development. He also thought the contiguous corridors would provide adequate
passage for wildlife. He noted that the corridors were sufficiently wide and met state
guidelines. According to him, the EIS describes the impact of development on elk,
discusses the impact of development on wildlife and proposes mitigation in the form
of contiguous wildlife habitat corridors, road design, landscaping and open space.
Finally, he added that the wildlife section of the EIS was prepared and based on
findings from site investigations, records from DFW, PHS maps and knowledge
acquired from similar sites in the region. Tr. at 2406-66.

21 10. In order to determine the types of wildlife and habitat present on the
22 sites, a resource study was conducted, which involved multiple site investigations
23 throughout several different months and years, in addition to research of records and
24 documents from DFW and other agencies. Tr. at 178-180 and 2407.

25 11. Though a detailed catalog of species was prepared for the FEIS, the
sites were not found to be habitat for any threatened, endangered or sensitive species
of wildlife. Tr. at 60-61 and 2410-11.

12. The Davidson family put together a detailed journal spanning several years (since 2001) of their observations of wildlife around their home, see Exhibit H-6. Some of the wildlife they observed is not identified by the Applicant's consultant. However, the Davidson observations do not establish that any threatened, endangered or sensitive wildlife species nests or resides in the project area.

13. Appellants failed to prove that any threatened, endangered, or sensitive wildlife species are present at the sites. While the band tailed pigeons may be found during their migration, evidence presented support the findings that they do not inhabit or nest at the sites. Tr. at 60-61 and 2410-11.

14. The FEIS contains discussions of elk and other wildlife that is present at the sites, the probable impacts of the projects, and offers mitigation (primarily through the Sensitive Areas Ordinance) in the form of wildlife corridors and wetland and river buffers to lessen the impacts. It also acknowledges that certain detrimental impacts as a result of development are inevitable. See FEIS at 4-69 through 79.

15. The width of the wildlife corridors will be between 300 and 900 feet. The King County's network biologist's minimum recommended width for wildlife corridor is 150 feet. The width is wide enough for wildlife to traverse through the corridors even in places where natural barriers such as flooded wetlands are located. Tr. at 2410-16 and 2454.

16. Even though the FEIS may have left out certain species, it is clear that those that are threatened, endangered or sensitive were considered. As noted above, the FEIS also contains discussion on impacts on elks by the projects and proposed corridors and open space. Tr. at 2410-16.

17. Contrary to Appellants' claims, extensive site visits were conducted for the FEIS. The Applicant also utilized records from DFW, PHS maps and knowledge acquired from similar sites in the region. Tr. at 178-180 and 2407.

Conclusions of Law Regarding Wildlife:

1. The FEIS, for both the Villages and Lawson Hills, contain a reasonably thorough discussion of probable significant adverse impacts on wildlife as a result of the proposed projects as required under SEPA's "rule of reason." Even though the FEIS may have left out certain species, it is clear that those that are threatened, endangered or sensitive were considered. As noted in the findings of fact, the FEIS also contains discussion on impacts on elk by the projects and of proposed corridors and open space. Although Appellants would have preferred these discussions to be more extensive, SEPA does not require every conceivable impact or alternative to be considered. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993).

2. As noted in the findings of fact, wildlife inhabiting the sites was cataloged, and impacts on them and proposed mitigation measures were disclosed and discussed sufficiently in the FEIS to aid the decision maker. The projects' impacts on species not present on the sites may be considered "remote" and "speculative," and therefore the FEIS was not required to address them in order to be adequate. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993).

3. Appellants failed to prove that the FEIS was inadequately prepared. The Applicant established that site investigations, records from DFW, PHS maps and knowledge acquired from similar sites in the region, were all utilized in preparing the EIS, which is consistent with requirements of "rule of reason" for preparing an EIS.

4. The width of the wildlife corridors is adequate because it is at least double the minimum recommended by the King County's network biologist and provides sufficient space for wildlife to travel around spots where natural barriers such as wetlands are present. The FEIS contains a reasonably thorough discussion of wildlife corridors, including their design and impacts, to assist the City Council in the decision making process and therefore is adequate under the "rule of reason."

5. Appellants failed to prove that impact on wildlife as a result of the projects was not reasonably disclosed, discussed, and substantiated by the FEIS. The FEIS recognizes that there will be an inevitable loss of wildlife habitat as the result of development of the Master Plan and the FEIS recommends mitigation measures which address the creation/preservation of open space and contiguous wildlife corridors. The discussion, disclosure, and documentation of wildlife impacts in the FEIS are reasonable and adequate. The FEIS is therefore adequate on wildlife impacts.

F. Responses to DEIS Comments

Findings of Fact:

1. In his closing brief, Mr. Bricklin asserts that the FEIS did not adequately respond to comments made on the DEIS. See Bricklin Post-Hearing Brief, p. 61-66. In this discussion, Mr. Bricklin summarizes numerous letters, including some addressing issues that were not included in the Appeal Statements of the SEPA appellants, most notably sewer.

2. The adequacy of FEIS response to DEIS comments were not included in any of the SEPA appellant appeal statements.

3. There is nothing in the record to suggest that the City failed to address DEIS comment letters that raised significant adverse environmental impacts that were not adequately addressed in the FEIS. One notable exception is the Maple Valley

1 DEIS comment letter, p. 248-251, Appendix R, FEIS. Maple Valley did raise the
2 issue of using the PRSC model for local traffic. The adequacy of the PRSC model
3 was highlighted as one of the deficiencies of the FEIS in the Examiner's analysis of
4 traffic, *supra*.

5 **Conclusions of Law:**

6 1. BDMC 18.08.210(G) provides that "no new substantive appeal issues
7 may be raised or submitted after the close of the time period for filing of the original
8 appeal." Consequently, the failure to respond to DEIS comments on its own is not
9 within the scope of the appeals of this decision.

10 2. Although the inadequacy of FEIS response is not sufficient on its own
11 to qualify for review, it can be a factor if related to an appeal issue that has been
12 timely presented. Procedural errors occurring during the FEIS process are reviewed
13 under the rule of reason. Where such errors are not consequential, they must be
14 dismissed as harmless. *Klickitat County Citizens Against Imported Waste v. Klickitat*
15 *County*, 122 Wn.2d 619, 637 (1993). An inadequate FEIS response could be
16 consequential if it reveals a failure to address a significant environmental impact that
17 is within the scope of a properly filed appeal. A permitting agency can find itself in a
18 much more difficult position to argue a reasonably thorough discussion if it is given
19 notice of a significant impact through a DEIS comment and still fails to address it.
20 During the course of this appeal the SEPA Appellants have raised the adequacy of
21 FEIS responses related to issues that they have properly appealed, such as
22 transportation and Lake Sawyer water quality. See Bricklin Post-Hearing Brief, p.
23 61-62. Except for the Maple Valley comment identified in Finding of Fact No. 3,
24 nothing in the record establishes that the DEIS comments on properly appealed issues
25 were inadequately addressed in the EIS.

3 The failure of the City to use a more localized model after hearing
4 from Maple Valley on this issue certainly detracts from the reasonableness of its
5 discussion, but not enough to render it inadequate. Black Diamond did, in fact, use a
6 local model for internal traffic. Further, its transportation engineer was highly
7 qualified, worked for the City instead of the applicant and had good reason to use the
8 PSRC model, i.e., its accuracy in regard to regional travel.

9 **G. Missing Technical Appendices**

10 **Findings of Fact:**

11 1. In his post-hearing brief, Mr. Bricklin asserts that technical appendices
12 were missing and not made available to the public. During the hearing it was readily
13 apparent that appendices were still missing, most notably diagrams in the LH FEIS
14 Appendix D Associated Earth Sciences technical report. In his post-hearing brief Mr.
15 Bricklin asserts that "Triad" reports were also missing, but he did not identify in

1 which appendix that report should have been located so the Examiner was unable to
2 verify that fact.

3 **Conclusion of Law:**

4 1. Under the Rule of Reason the missing appendices would be a problem
5 if their absence deprived the EIS of a reasonably thorough discussion of significant
6 adverse environmental impacts. There is nothing in the record to suggest that the
7 missing appendices materially affected the analysis of the EIS.

8 **H. Joint Review and Cumulative Impacts**

9 **Findings of Fact:**

10 1. In their appeal statements Clifford, Gauthier and Wheeler assert that
11 the Villages and Lawson Hills MPDs should have been reviewed together. They also
12 assert that the impacts of other projects in the area should have been considered.

13 2. The Villages EIS and the Lawson Hills EIS contain a significant
14 amount of cumulative impact review regarding joint impacts. Many of the impacts
15 are assessed jointly from both projects, such as traffic, stormwater, air quality, water,
16 sewer and schools. *See* FEIS Appendices; LH FEIS Chapter 5.

17 3. In its post-hearing brief the Applicant asserts that the Villages and the
18 Lawson Hills MPD projects are independent from each other – that one could be built
19 without the other. *See* Applicant Closing Brief, p. 7-10. There is no evidence to the
20 contrary in the record. The Examiner finds that the MPDs can be built independently
21 of each other.

22 4. Although the projects can be built independently of each other, their
23 joint development is reasonably foreseeable and is not remote or speculative. The
24 MPDs are under simultaneous permit review and have the same development time
25 frame, completion by 2025. The public hearings for each project are almost
indistinguishable. The Applicant has also taken advantage of the efficiencies of joint
mitigation by basing mitigation upon joint impacts upon capital facilities such as
schools and roads. Impacts upon the water quality of Lake Sawyer are also assessed
jointly from both projects¹¹.

Conclusions of Law:

¹¹ The Applicant is not being “punished” for being proactive enough to consider joint impacts and mitigation. For the most part, the joint analysis and mitigation prepared by the Applicant is in the Applicant’s interest. Both the Applicant and the public benefit from the cost savings involved in this joint review. The Applicant’s self interest in joint mitigation and analysis substantiates the interdependence of the projects and the need for cumulative review.

1. WAC 197-11-060(3)(a) and -060(3)(b)(i) provide that development projects must be reviewed together under SEPA when they are "related to each other closely enough to be, in effect, a single course of action," which means the projects either (i) "cannot or will not proceed" unless the other projects "are implemented simultaneously with them" or (ii) the projects are "interdependent parts of a larger proposal that depend on the larger proposal as their justification or for their implementation." Since the MPDs can be built independently of each other, they can be subject to separate environmental review. Although joint mitigation is involved, this mitigation can be "paired down" should only one project proceed to completion.

2. An EIS must address cumulative impacts. WAC 197-11-060(4)(d)-(e). The scope of SEPA review includes "cumulative harm that results from its [the project's] contribution to existing adverse conditions or uses in the affected area." *Narrowsview Preservation Ass'n. v. City of Tacoma*, 84 Wn.2d 416, 423 (1974). Cumulative impacts apparently include the impacts of the proposal along with the impacts of other actual or potential projects. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Section 14.01(2)(a). Additional projects do not require review in an EIS for cumulative impacts if they are either substantially independent from the proposed action or are not necessary to meet the project's purpose and need. *Gebbers v. Okanogan County Public Utility District No. 1*, 144 Wn. App. 371, 380 (2008). The National Environmental Policy Act, which can be used to help interpret SEPA issues, define a "cumulative impact" as "the impact from the environment which results from the incremental impact of the action when added to past, present and reasonably foreseeable future actions." *Id.*

3. The EIS must address cumulative impacts since the projects are reasonably foreseeable and take advantage of joint mitigation and environmental analysis. Cumulative analysis for the MPDs should be limited to areas of "cumulative harm" as identified in the *Narrowsview* decision, *infra*. As noted in Finding of Fact No. 2, the FEIS do address a wide range of cumulative impacts. There is nothing in the record to suggest that any area of cumulative harm is missing from this analysis. The Examiner concludes that the EIS adequately addresses cumulative impacts between the two MPDs.

4. The record does not establish any degree of dependence necessary for cumulative review of impacts.

I. Reliance Upon Technical Appendices

Findings of Fact:

1. The SEPA Appellants have raised the issue of over-reliance upon technical appendices on several occasions. *See, e.g.*, Bricklin Post-Hearing Brief, pp. 6-8. This issue was not specifically raised in any of the SEPA appeal statements, but

1 is sufficiently linked to the adequacy of issues that were raised in the SEPA appeal
2 statements, such as traffic and Lake Sawyer water quality.

3 2. The FEIS overall do a fairly good job in summarizing significant
4 impacts in the main text of the document. For example, on traffic the FEIS identify
5 all intersections that will fail to meet LOS under the different EIS alternatives. LOS
6 is a commonly used measure of transportation performance for City and County
7 decision makers and is used in the City's comprehensive plan to measure adequacy of
8 transportation facilities. The FEIS sections on noise identify the maximum noise
9 levels that will be reached through construction and build-out. The sections on water
10 and sewer identify the demand that will be created by the MPDs and capital
11 improvements needed to meet this demand. The section on stormwater identifies the
12 regional facilities that will be needed for stormwater treatment and detention. The
13 SEPA appellants have shown that the EIS does fail to disclose significant impacts in a
14 couple of areas. As discussed for Lake Sawyer impacts, the most egregious lack of
15 disclosure in the EIS concerns the potential impacts on Lake Sawyer water quality.
16 The noise assessment doesn't identify the duration of noise impacts, which should be
17 a key consideration in assessing the reasonableness of any noise mitigation. Overall,
18 however, the FEIS disclose the most significant and vital information regarding
19 environmental impacts and alternatives.

12 **Conclusions of Law:**

13 1. WAC 197-11-425(1) requires that an EIS shall be readable and allow
14 the reader to understand the most significant and vital information concerning the
15 proposed action, alternatives and impacts "without turning to other documents."
16 WAC 197-11-425(5) provides that if the lead agency determines that additional
17 descriptive material or supporting documentation may be useful, it may place this
18 "background" information in appendices or separate documents. Given the interplay
19 of WAC 197-11-425(1) and WAC 197-11-425(5), the Examiner concludes that
20 "vital" information regarding impacts and alternatives must be placed in the body of
21 an EIS and not in its appendices. As determined in Finding of Fact No. 2, overall the
22 EIS meets this standard.

20 **J. King County Comprehensive Plan**

21 **Findings of Fact:**

22 1. The Clifford Appeal Statement at page 8 asserts that the MPDs fail to
23 comply with the King County Comprehensive Plan and the Growth Management Act
24 ("GMA"). The Wheeler Appeal statement, in an assessment of wildlife impacts at p.
25 16, asserts that the project will exceed the growth targets in the "comprehensive plan"
(whether the King County or Black Diamond comprehensive plan is not specified).

2. Testimony was provided during the hearing that the project would
exceed King County growth targets. There was no evidence presented that any

inconsistencies with King County Comprehensive Plan Policies or GMA revealed significant adverse environmental impacts.

Conclusion of Law:

1. In the "Order on Motions to Dismiss," Ex. 300, p. 2-3, the Examiner ruled that compliance with the King County Comprehensive Plan and the Growth Management Act could be considered in the EIS appeals to the extent that these inconsistencies revealed significant adverse environmental impacts. Since no such evidence was presented, the inconsistencies are not germane to the SEPA appeals.

K. Landslide Hazard

Findings of Fact:

1. Page 14 of the Clifford Appeal asserts that the EIS fails to adequately address landslide hazards for both MPDs.

2. There was no evidence presented on landslide hazards other than photographs of landslides. Most, if not all, of these photographs depict landslides in or near the Villages MPD.

3. There was no evidence presented on whether the City of Black Diamond's Sensitive Areas Ordinance is inadequate to address landslide hazards.

4. The LH FEIS identifies landslide hazard areas and notes that relatively small areas that are hazard areas are located in open spaces. *See* LH FEIS p. 4-11 to 4-12. The LH FEIS also references the Sensitive Areas Ordinance and its mitigation requirements. *Id.* Appendix D to the LH FEIS references a detailed landslide analysis in a "2008 Golder Memo," but the memo itself does not appear to be included in the appendix¹². *See* LH FEIS, Appendix D, 2/6/09 Icicle Creek Memo, p. 4, 5 and 9. There was no evidence presented to show this analysis was inadequate, even with the absent 2008 Golder Memo.

Conclusion of Law:

1. Under the Rule of Reason, the LH FEIS provides a reasonably thorough discussion of development impacts, mitigation and alternatives regarding landslide hazards.

¹² The on-line appendix did not include the 2008 Golder memo and the disc supplied to the Examiner also did not contain the memo, although several documents in appendix D were damaged and could not be accessed from the disc.

1 **L. Mine Hazard**

2 **Findings of Fact:**

3 1. Pages 13-14 of the Clifford Appeal, p. 16, of the Wheeler Appeal
4 Statement and p. 6 of the Gauthier Appeal assert that the EIS fails to adequately
5 address mine hazards. It should be noted that the Clifford Appeal is primarily
6 concerned with the dumping of toxic waste at mine sites.

7 2. There was no evidence presented on mine hazards by the SEPA
8 Appellants or any evidence in the record to suggest that the EIS was inadequate on its
9 analysis of mine hazards, including toxic waste issues at mine sites. Several people
10 testified about mine hazard issues during the MPD portion of the hearing, but there
11 was no evaluation provided of the adequacy of the EIS on this issue.

12 3. There was no evidence presented on whether the City of Black
13 Diamond's Sensitive Areas Ordinance is inadequate to address mine hazards.

14 4. The LH FEIS identifies mine hazard areas. LH FEIS 4-14 through 4-
15 17. The Lawson Hills project area includes low, moderate and severe mine hazard
16 areas. The Applicant proposes development in all three categories of mine hazard
17 areas, including severe. Mine hazards were subject to a detailed geotechnical study
18 issued on June 2005 by Golder Associates, which was updated by a supplemental
19 technical report in 2009 prepared by Icicle Creek Engineers. See LH FEIS, Appendix
20 D. These studies generally identify the location of mine hazard areas and
21 recommended mitigation to safely construct within them. *Id.*

22 5. The LH FEIS states that the Applicant proposes development within
23 severe mine hazard areas but does not identify what this development will include.
24 LH FEIS 4-17. However, recommended mitigation limits development to roads and
25 utilities. LH FEIS 6-13. The LH FEIS also states that the majority of severe mine
26 hazard areas will be located within open space. LH FEIS 4-17. The LH FEIS
27 identifies that of the four FEIS alternatives, only the Applicant's proposal
28 (Alternative 2) would involve development in a severe mine hazard area. *Id.*

29 6. The LH FEIS identifies the hazards of constructing within mine
30 hazards, i.e., sinkholes and sags. LH FEIS 4-15.

31 7. The LH FEIS identifies that further assessment of mine hazards is
32 "very expensive," risky (drilling can apparently destabilize mines), and is to a certain
33 extent speculative.

1 **Conclusion of Law:**

2 1. Chapter 19.10 of the City's Sensitive Areas Ordinance ("SAO")
3 requires comprehensive assessment and mitigation of mine hazards for development.
4 At the time of development permit review, the SAO will ensure that mine hazard
5 risks are adequately assessed and mitigated. Since the majority of the severe mining
6 hazard areas will be located in open space areas, the deferral of more in-depth
7 analysis to the development stage of review will not deprive the decision-makers of
8 information necessary for a reasoned choice amongst alternatives at this stage of
9 review. It is reasonable to defer further assessment given the high costs of mine
10 hazard assessment; the somewhat speculative nature of the assessment, and the fact
11 that the FEIS provides a "worst case" assessment by discussing the consequences of
12 building within mine hazard areas. *See, also*, WAC 197-11-080(3).

9 2. The LH FEIS should have identified what development is proposed
10 within severe mine hazard areas in its discussion of mine hazards. This information
11 could have been of significant use in assessing the EIS alternatives as well as
12 determining whether project modifications were in order to avoid development within
13 severe mine hazard areas.

12 3. The failure to provide more detail on development plans within severe
13 mining hazard areas does not render the LH FEIS inadequate. The SAO will
14 ultimately provide adequate protection against mine hazards. The development
15 proposed within the high mining hazard will be apparently (due to the recommended
16 mitigation) limited to road and utilities, which is a preferred use in the SAO. *See*,
17 BDMC 19.10.430 (D)(2)(b)(ii).

16 **M. Health Services**

17 **Findings of Fact:**

18 1. Appellant Chris Clifford has raised concerns in his appeal that Black
19 Diamond has been identified by King County Public Hospital District #1 as an
20 "underserved" area for health care. Clifford Appeal, p. 13. Specifically, Mr. Clifford
21 has alleged that the FEIS documents fail to indicate where or how emergency and
22 regular medical needs would be met for the over 8,000 new potential residents.
23 Clifford Appeal, p. 13.

22 2. The FEIS locate medical facilities on the map in Exhibit 3-39.

23 3. The FEIS indicate at page 3-89 that existing medical facilities serving
24 Black Diamond are three hospital/medical care facilities operate near the City of
25 Black Diamond, including Enumclaw Community Hospital in Enumclaw, Valley
Medical Center in Renton, and Auburn General Hospital in Auburn. Advanced Life
Support services are provided by King County Medic and are funded through a

1 separate county-wide tax assessment. In addition, emergency medical care is
2 provided by Mountain View Fire and Rescue (also known as King County Fire
3 District No. 44).

4 4. The FEIS do provide an analysis of how the proposed MPDs will
5 affect the LOS for fire protection and emergency medical services and also provide
6 that new development and increased population will enlarge the service area for
7 providers, possibly requiring updated facilities as well as increases in staff and
8 infrastructure to provide services. FEIS, pp. 3-89 - 3-91.

9 5. There was no additional testimony or evidence presented on health
10 services other than the assertion in the Clifford Appeal that the FEIS was inadequate
11 with respect to health services.

12 **Conclusions of Law:**

13 1. The FEISs adequately discuss existing medical facilities and the
14 impacts of the MPD development on the availability of medical facilities, stating that
15 additional fire fighters or volunteer EMTs will be required and that updated facilities
16 as well as increased staff and infrastructure may be required for other medical
17 facilities. Lawson Hills FEIS and the Villages FEIS, p. 3-90 - 3-91.

18 **N. Historic and Cultural Resources**

19 **Findings of Fact:**

20 1. Page 12 of the Clifford Appeal Statement asserts impacts to historic
21 and cultural resources, specifically a collapsed mine site that still contains the remains
22 of some miners and the potential for some Native American archaeological sites.

23 2. The SEPA Appellants did not pursue these claims during the hearing
24 beyond traffic impacts to historic downtown areas, dealt with elsewhere in this
25 decision. There is no evidence in the record to establish that the development project
would create any significant adverse impacts in relation to cultural and historic
resources.

26 **O. Open Space and Recreation**

27 Page 85 of the Applicant's Post Hearing Brief asserts that the Wheeler Appeal
28 Statement addresses parks and recreation, focusing upon development plans for the
29 Lake Sawyer Park. The Examiner finds no mention of these impacts in the Wheeler
30 Appeal Statement or in any other appeal statement. Consequently this issue is outside
31 the scope of the SEPA appeals. The Wheeler Appeal Statement does broadly
reference open space preservation in the webpage quote at page 9 of the statement.
However, even if this were sufficient to raise an appeal issue, there is no evidence in

the record to show that impacts upon parks and open space have been inadequately addressed.

P. Greenhouse Gases

Findings of Fact:

1. Page 13 of the Wheeler Statement of Appeal raises the issue of EIS adequacy on greenhouse gases.

2. Vehicle emissions are a significant source of greenhouse gases. TV FEIS Appendix Q, "Air Quality", p. 10. The EIS estimates the volume of vehicle emissions by using the average number of vehicle miles per day in Washington State per person. TV FEIS, Appendix Q, "SEPA GHG Emissions Worksheet", p. 10. The SEPA Appellants argue that this state-wide average grossly understates the average mileage of MPD residents because the MPDs are far from employment and commercial centers. Bricklin Post Hearing Brief, p. 58-60. However, as noted by the Applicant, use of the state wide average is required by King County for assessment of green house gases in King County unincorporated areas. Applicant Closing Brief, p. 77-78. It is also not necessarily intuitive that average daily trips for Black Diamond residents would be significantly higher than the state-wide average. Due to the long distance from commercial and employment centers, Black Diamond residents are probably more likely to carpool, take transit, telecommute, otherwise work from home or not work at all. The statewide average also includes all the other rural areas of the state, including Eastern Washington, where distances to commercial and employment centers exceed those of Black Diamond. The Appellants have presented no evidence of what average daily trips Black Diamond residents would take. Given the substantial weight to be given to the SEPA responsible official and the burden of proof on the Appellants, the record does not support the assertion that the state-wide vehicle mileage used in the greenhouse gas estimates is significantly less than the average mileage of future Black Diamond residents.

3. In cross-examination of Steve Pilcher, the SEPA Appellants also asserted that the greenhouse gas analysis was not consistent with the peer review requirements of Parametrix. Tr., p. 3342-3344. Specifically Mr. Bricklin referenced a Parametrix statement that no alternative land use scenario was analyzed in the air quality analysis. The TV FEIS now does examine air quality impacts under an alternative land use scenario. See TV FEIS, p. 4-93 – 4-95, *alternative 3*. The concerns of Parametrix in this regard have been adequately addressed.

4. The SEPA appellants identify several mitigation measures they suggest should be required to reduce greenhouse emissions. See, Wheeler Prehearing Ex. 19. Many of these recommended measures are already identified in the TV FEIS, both in the text of the TV FEIS and the technical appendices. See LH TV FEIS p. 6-12; TV FEIS p. 6-14; Appendix Q, "Air Quality", p. 14-15. The project design

1 already incorporates several elements that will help reduce greenhouse gases, such as
2 an emphasis upon mixed use; bicycle and pedestrian trails; low impact development
3 and Built Green and LEED certified/Energy Star homes. Appendix Q, "Air
4 Quality", p. 14. As noted in the TV FEIS technical discussion on greenhouse
5 impacts, there is no standard for greenhouse emissions associated with development
6 projects and the extent to which a single project affects climate change is unknown.
7 Given this context, the mitigation outlined in the TV FEIS and technical appendices
8 for green house gases is reasonable and adequate.

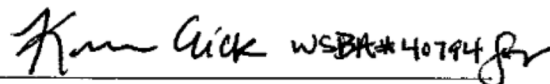
9 **Conclusions of Law:**

10 1. The TV FEIS contains a reasonably thorough discussion of greenhouse
11 gases, alternatives and mitigation. As noted in the Findings of Fact, the record does
12 not contain any evidence that the probable significant adverse impacts of the
13 Village's greenhouse gas emissions have not been adequately addressed, that
14 alternatives have not been adequately assessed or that reasonable mitigation measures
15 have not been proposed.

16 **VII. CONCLUSION**

17 The Lawson Hills EIS is adequate. The City and the Applicant hired the best experts
18 they could find and put a substantial investment into the analysis that comprises the
19 EIS. It shows. The fact that the SEPA Appellants found so many problems with the
20 EIS has more to do with Appellants' skill and diligence than the short-comings of the
21 EIS. No document could survive unscathed the multi-pronged attack levied by the
22 SEPA Appellants. The monumental work of the SEPA Appellants was not wasted in
23 the least. Their efforts will result in substantial improvements to the MPDs by
24 exposing areas that need further attention and mitigation. The SEPA Appellants have
25 done much to better their community through these appeals. They and everyone else
who participated in these appeals are to be congratulated for work well done.

DATED this 4th day of May, 2010.

 WSBA # 40794

Phil Olbrechts

City of Black Diamond Hearing Examiner