

May 8, 2017

RE: Filing Brief of Black Diamond City Councilmember Pepper

A. Executive Summary

The petitioner has no factual basis for the charges. The petitioner failed to show even one email that constitutes a discussion under the OPMA. There is no evidence of private agreements. There is no evidence of any meetings between a quorum of the Council. This is a repeat of false allegations made based on insinuation.

In Black Diamond, I am part of a common part of democratic politics. I ran on a platform of change consistent with two council members and opposed to two other councilmembers who campaigned for the "status quo". I trust the two other members of the majority and we usually vote the same. The fact that this petitioner tries to make us or our supporters feel there is something wrong with this is an attempt to change our votes, and more importantly is irresponsible with regard to the public's understanding of government. We should keep voting with those we trust and vote consistent with our election goals. If we can be told this is recall-able to vote together with those political allies we trust, sometimes over the opposition of the mayor and her staff and even vocal members of the public, then we have lost our people's right to a representative Council to make decisions.

As a Council member, I exercise discretionary judgment but at all times have taken care to ensure that my actions are legal. This at times has meant seeking basic legal information from Washington's esteemed Municipal Research Services Center, reading the law, and reviewing carefully advice from attorneys on the matter in question.

While the petitioner has a lot of exhibits, NONE of them demonstrate an illegal act or constitute malfeasance.

B. Responses to ballot synopsis items 1-5

Followed by a copy of the ballot synopsis for comparison.

1. There is no sufficient evidence of any alleged OPMA allegations. Some of the issue regarding Committee meetings do not involve a quorum of the council, but simply involve a failure of the Mayor to carry out her duty to post public notice of the committee meetings on the city website as properly requested. The fact that the question of whether the mayor had a duty to issue notice and that the meetings did not involve a quorum of the Council means there is no prima facie case.

The details of some of the questions are the subject of a separate legal action brought against the City and individual Council Members by developer Oakpointe. That suit was brought to harass me and or or other council members into resigning from office. With regard to alleged agreements or email discussions between three council members, there is no evidence provided and the petitioner will not be able to provide any because these allegations are false.

2. Ending a contract for the city attorney is not a recall-able offense. Ending a contract is the Council's prerogative. Further, before the end of the attorney's contract, the Council brought a plan to obtain an attorney, and an attorney to advise the city on certain matters. Further, the city always had a labor attorney throughout whose contract was not affected.

3. Cancelling meetings, postponing approval of minutes pending amendments, and voting against confirmation of proposed appointments by the Mayor are within discretionary legislative authority, and constitute no recall-able acts.

4. The 2017 3-month budget was and is legal, and was enacted in a timely manner. Again, whether or not a budget is voted for is not a recall-able offense, but a normal part of the political process.

5. The actions on the MDRT contracts were done as legal votes in Open Public Meetings. Any allegation otherwise is frivolous and without evidence. The attorney for the city in this matter, Attorney Jane Koler has opined that not only were the council's actions legal, they were correct exercise of the council's contractual authority under RCW 35A.11.010.

Ballot synopsis

BALLOT SYNOPSIS OF RECALL CHARGES AGAINST
PATRICIA PEPPER
BLACK DIAMOND CITY COUNCILMEMBER

Shall Councilmember Patricia Pepper be recalled from office for misfeasance, malfeasance, and violation of the oath of office, based on the following charges:

1. Pepper, as part of a council majority, violated the Washington State Open Public Meetings Act, chapter 42.30 RCW, by convening and conducting closed meetings without public notice and by entering into private agreements to prepare and approve legislation.
2. Pepper, as part of a council majority, hindered the city's ability to receive legal advice by hiring and firing city attorneys.
3. Pepper, as part of a council majority, refused to attend council meetings and failed to approve minutes and enact necessary legislation related to vacancies and comprehensive planning.
4. Pepper, as part of a council majority, failed to enact a 2017 budget in violation of state law and instead enacted a temporary budget containing illegal provisions, impairing the city's ability to provide essential services.
5. Pepper conspired with two other councilmembers to change Master Development Review Team contracts resulting in threatened legal action against the city, forcing the city into arbitration.

C. Introduction - Recall Charges Are Insufficient

Councilmember Patricia Pepper was elected to a Position #5 on the Black Diamond City Council in November 2015, for a four-year term effective January 7, 2016. This position was formerly held by Mr. Ron Taylor, the spouse of petitioner Robbin Taylor.

Each of the charges is either false and the petitioner has either not provided any relevant evidence, or the "charge" is not an improper act at all. The actions in this petition in most cases are examples of proper exercise of the Council's authority and duties under the law.

Additionally, the burden of proof is on the petitioner to show that these are recall-able offenses and that clearly has not been shown.

D. Regarding the Summary of Acts and Omissions Constituting the Charges:

None of the items in the petitioner's four categories constitute recallable acts. There is either no malfeasance in the charges, or no factual basis. This is a summary in answer:

- A. I campaigned on a similar platform to two of the other Council members. We did not "privately agree on a course of action." We publicly agree on the big issues in town, and we often vote the same way.
- B. Every committee meeting I have attended has been either not a quorum of the Council and thus no notice was required, or proper notice was requested under 42.30.080, or usually, both.
- C. The petitioner is used to a former way of operating in Black Diamond where much of the Council's authority under state law was delegated informally to the Mayor. Because most of the Council often disagrees with the mayor on issues, the Council has taken back this authority but the petitioner and the Mayor's supporters don't understand this. I have been told by the mayor my role on Council is to simply vote for the contracts and legislation the mayor and staff put before us.
- D. The allegations in this petition in no way demonstrate dereliction of duty or that the functioning of the City of Black Diamond is impeded.

The petitioner Ms. Taylor does attend the Council meetings. She talks during the meeting proceedings and often calls out in a disruptive manner. Her comments at the public comment period often demonstrate a misunderstanding of the facts and law.

There is no email conversation between the 3 councilmembers and not a single email has ever been produced in any of the exhibits or elsewhere. This kind of false allegation with no evidence is exactly what elected officials are supposed to be free of with the law intended to : "free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuation."

E. Regarding Specific charges:

From the Petition Section V. (A), Allegations Regarding the Open Public Meetings Act and Council Committees

- Ms. Taylor repeats a false charge that is completely without evidence about January 7 and other emails. In every instance regarding email allegations, a simple review of the actual evidence submitted as well as every other email since my time in office will show that I have been part of no emails where a quorum of the city Council was on the email and that quorum was replied to by myself.
- As another easily verifiable falsehood, the June 2nd memo from attorney Ward (petitioners' exhibit 14) makes false statements about a 40-page document from Council member Morgan about the January 7th meeting. Council member Morgan handed out a two pages amending to a Resolution before the Council. When attorney Ward wrote her memos, she failed to ask the Council members anything about the incident in question. Ward was not present at the meeting or at any meeting until May 5, and she did not ask the Clerk for any records of the documents from Ms. Morgan at the January 7 meeting.
- There was a January 8 letter signed by 3 council members was to Cancel a meeting and schedule a meeting. Both of these were and are allowed in our Council Rules of Procedure. The 2015 Council Rules, voted affirmatively for by Ms. Taylor's spouse former council member Ron Taylor include the following:

Rule 2.9 "Cancellation of Meetings. The Mayor, or in the absence of the Mayor the Mayor Pro Tem, or **any three members of Council** may cancel a meeting and upon proper notice given by the City Clerk." [emphasis added]

Rule 2.7: "Special Meetings. In accordance with chapter 42.30 RCW, a special meeting of the City Council may be called by the Mayor or at the request of any three (3) Councilmembers by written notice delivered to each Councilmember."

In addition from the Municipal Research Services Center (MRSC.org) article regarding Canceling meetings:

"Does the mayor or does the city council have the authority to cancel a council meeting in advance?"

Reviewed: 01/14

The city council – not the mayor - has authority to cancel a council meeting in advance. It is not the mayor's meeting – it is the council's meeting and the mayor is just the presiding officer. Although state law does not specifically address the authority to cancel meetings, this is the position of the MRSC legal staff based on the separation of powers between the mayor and the council as set out in the statutes. Though, the council could formally or informally delegate to the mayor the authority to cancel a council

meeting in advance.

If this has become a source of friction, it is advisable to set out a formal process in the council rules of procedure.

[\(Link to this question\)](#)“

And MRSC On Scheduling meetings: <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/June-2012/Can-a-Majority-of-the-Members-of-a-Governing-Body.aspx>

- The emails referenced from January 8-12 do not contain three council members. There are only emails between two council members (Morgan and Pepper) making decisions about a proposed set of Council Rules and committee structure to bring forward to the entire Council. There is no evidence otherwise in any of the email record. Councilmember Weber was not involved in drafting this legislation, and is on record stating this more than once.
- Regarding planning to adopt a substitute agenda, Council member Pepper made the document “a Plan” for herself and her expectations. This document was not shared and no reasonable information that it was. I also object to the insinuation that there was any attempt to hide it. I was putting my papers away after a meeting when the Mayor insisted, with her chief of police watching the door in, that I turn in papers rather than follow the normal process of getting a request from the city’s public records officer and having time to respond. (see “Exhibit-G memo to Pepper and Morgan 6 1 16 RecordsRequests.pdf”)
- The emails and referenced in the other charges do not show any evidence of an OPMA violation. They are about legislation worked on by one or two Council members and presented to the full Council for discussion and possible adoption at a Regular public council meeting.
- Regarding the letters from the city’s insurance policy. The city’s insurance carrier made it clear that they made no judgment as to the facts of the allegations in the suit brought by developer Oakpointe. The city’s insurance policy as written simply does not cover Open Meetings Act suits.

In summary on Council votes: Three members of the Council often vote together because we have similar views on the issues, and in most cases, trust each other’s judgment and work. The petitioner also failed to point out the many instances where the three accused council members have not all voted together.

From the Petition Section V. (B) Regarding Conducting Meetings

- The committees were set up to have three members on each committee. The Council Rules as passed require public notice of committees be issued. I agree with the advice of the attorneys that proper public notice must be provided under the OPMA when three Council members meet as a committee. However, that is irrelevant here. When the mayor refused to issue the meeting notices, only two of the council members attended the committee meeting, thus there was no quorum under the OPMA. This was not difficult because each committee contained as its third member either Council member Edelman or Council member Deady who have refused to attend any committee meetings since January 2016.
- When scheduling committee meetings, I fully complied with every part of the OPMA – preparing an agenda and notifying Council members and requesting that public notice be posted. **The mayor refused to have staff post the notice on the city website, and Council members have no access to update the website.**
- Regarding Committee meetings, petitioner Taylor likely knows that an agenda was prepared, properly given by me (or the requesting council member) to the other members of the Council and called properly under RCW 42.30.080. A proper request for posting of public notice was given to the administrative branch of government including the Mayor and City Clerk. Ms. Taylor likely knew all this because Ms. Taylor has attended almost every single committee meeting despite the fact that the mayor refused to post notice of them on the city’s website.

Special note: The opinions of attorney Yvonne Ward, whose memos are referenced in the petition, conflict with the opinions of any other attorney with municipal experience and are in conflict with the past practices over the years in Black Diamond and other cities regarding meeting scheduling and conduct. Attorney Ward’s public accusations, attacks, and misinterpretations fly in the face of established interpretations of Municipal Law. If Ward had in her “investigation” spoken to any of the Council members accused by Ward to get the facts, and respected her duty to protect the city, she would not have put forth the accusations that are repeated in this recall petition. (See Exhibit H).

From the Petition Section V. (C) Regarding the Authority of the Mayor and Council:

- Three members of the council or more may cancel a meeting upon notice given to the city clerk. While the Clerk reports to the mayor, posting notice of Council meeting cancellations and scheduling is part of her duty and part of the administrations duty to carry out the law. As noted previously, under the Council Rules, the Council may schedule meetings.

- The council has the authority to terminate the city’s contract for legal services. This is clearly recognized in the law and was confirmed by the April 2016 memo by the firm of Talmadge, Fitzpatrick, and Tribe on the subject.
- Regarding the conduct of Council meetings, when the chair of the meeting (the Mayor) does not conduct it properly, it is the Council’s duty under the law to try to conduct council business. I have followed Roberts’ Rules of Order, which is adopted for our meetings by Resolution of the council. Unfortunately, our mayor ignores normal meeting practices including Robert’s Rules, “points of order”, and “appealing the decision of the chair”. The Council’s authority is spelled out in numerous statues, including **RCW 35A.12.120 Council—Quorum—Rules—Voting:**

“... The council shall determine its own rules and order of business, and may establish rules for the conduct of council meetings and the maintenance of order. At the desire of any member, any question shall be voted upon by roll call and the ayes and nays shall be recorded in the journal.”

- Regarding the direction of staff, the Council may vote to request an action by staff, but the Council clearly recognizes that in most cases, the mayor does not have to abide by this. In the case of some appointive officers, the Council does determine their duties (BDMC 2.08.040). The Council has taken into account the advice of attorneys on this matter. Certainly a rule about Council votes to make requests of staff clearly does not constitute malfeasance and the petitioner has not made that case.

From the Petition Section V. (D) Regarding Duties of the Council:

One of the relevant statues ignored by the petitioner is RCW 35A.11.020 “ Powers vested in legislative bodies of noncharter and charter code cities”. Relevant parts describing the broad powers of the Council are:

RCW 35A.11.020

“The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; and to define the functions, powers, and duties of its officers and employees; ...

Such body may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city, and may impose penalties ...

The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. ...

In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title,..."

- The Council followed proper procedure to cancel meetings, which it is allowed to do under council rules and common norms followed by most cities and supported by MRSC. I have followed proper procedures notifying the clerk of my non-attendance.
- On June 2, the mayor, without any reason, ordered the chief of police to have me removed from the meeting. This was an illegal infringement on my rights as a Council member and the people's right to have Council conduct business.. I expected, based on advice from the May 5 meeting by attorney Ward that the Mayor could order a council member removed, that such an order by the Mayor would be coming. The Mayor was attempting to take over a Council vote on June 2, 2016. She had said to King 5 news earlier that day that one of the Council had to go.
- There is no recallable cause of action for not attending an executive session. The attorney in question is not the city attorney, has been voted against by the Council and attending an executive session with him would be improper. He is not under a valid contract with the city.
- Allegations in part (D) are all demonstration of the proper reasonable discretion of the Council. The Council worked to amend the Transportation Improvement Program, Capital Improvement Plan, and Budget document. We did this in a difficult meeting environment where proper motions and discussion were cut off or hampered by the improper behavior of the chair. In particular, motions to postpone items were ignored, and instead votes on items that were not ready were called away. This resulted in votes recorded against items when the vote should have been to postpone for further work.

Votes to postpone or reject an item of business do not constitute an illegal act but are discretionary on the part of the Council. We **did** pass each of the items in question, except a Comprehensive Plan which the administration is still working through the required Planning Commission process before it could even be taken up by Council.

(Council adopted capital improvement plan 5/4/17
Council adopted transportation improvement plan 4/20/17
Council adopted a Budget 12/22/16 and 12/27/16 and 3/2/17)

- Waiting to approve meeting minutes is not an illegal act. The Council can only approve minutes it determines are correct. Regarding meeting minutes, the Mayor had not yet provided draft minutes from April, May, and June 2016 for council consideration at the time this allegation was made. (This allegation is copied from the Oakpointe lawsuit). Many of these minutes are from very chaotic meetings, that included improper votes, and procedural issues. They require hours of scrutiny.
- Regarding the city's Comprehensive Plan, again, there is no recall-able cause of action. The comprehensive plan is still undergoing required planning Commission review.
- Regarding the Building Inspection Service and Enumclaw School District, there is no evidence provided of any delay or any act by the Council that does not constitute reasonable discretion on Council's part.
- Regarding the Planning Commission vacancies, the petition includes a blatant error of fact. Of five vacancies that I recall that have come up on the planning commission during my time in office, the Council approved four of the nominations and rejected one.

More importantly, voting against commission and service nominations is an exercise of reasonable discretion and therefore cannot be the basis for a recall. The Council is not required to vote for candidates the mayor puts forth. If a nominated candidate is not approved by Council, the mayor must propose another candidate until a candidate meets Council approval or the seat will remain vacant.

- Regarding the MDRT, the legal services properly contracted by the city for review of the MDRT arbitration has issued an extensive brief detailing the Council's correct legal position on this item. It is included as an exhibit.

In summary, The allegations in petitioner's section V.(D) are just a list of political issues naming all of the votes by Council that petitioner Taylor disagreed with.

F. Closing Information and Summary:

In my role on Council I have acted within the law and under legal advice. Included with this brief are the following exhibits that have guided or provide support for Council actions:

Exhibit A.....Attorney Kathy George. "letter to Pepper and Morgan 2 4 16.docx"

Exhibit B.....Attorneys Talmadge/Fitzpatrick
“Exhibit B a.Council Opinion Letter”
Exhibit B b.Benson Letter.pdf

Exhibit C.....Attorney Jane Koler “Exhibit C.doc obj to arbitration.doc”

Exhibit D.....MRSC “EXHIBIT D Spring2017 MRSC News Page1.pdf” and
“EXHIBIT D Spring2017 MRSC News Page2.pdf”

Exhibit E.....Jurassic Parliament “Exhibit E. Chair RobertsRules”

Exhibit F..... Rules of Procedure of the City Council of the City of Black
Diamond “Exhibit F.ResAndCouncilRulesJan2017-ExA-PassedFeb02-2017-
FooterDateUpdated.doc”

Exhibit-G Attorney Kathy George “memo to Pepper and Morgan 6 1 16
RecordsRequests.pdf”

Exhibit-H Attorney Jim Doherty “Exhibit-H MRSC From Jim Doherty.doc”

Regarding items disputed by the separate OPMA case brought by developer Oakpointe against the city, those allegations, while false, are being taken up in a separate case, and the cost of defense is to be borne by the city. Until that case is resolved, it should not be part of a recall petition. Regarding this case filed against the city, it is clear that suit constitutes harassment and is an attempt to push a Council member out of office.

I respectfully ask that the judge examine this lack of evidence and conclude there is no sufficient factual basis for recall for any of these claims.

Further, most of the claims do not constitute improper acts. This point is important not just for the council members in question, it is important for the public. Members of the public could be mis-led into thinking that any of the Taylor accusations constitute a recall-able offense. This will perpetuate bad government into the future.

I ran for office on the platform to reform City Hall. The citizens of Black Diamond voted me into office to make decisions and policy in the face of the huge changes facing us as a community now and in the future. These decisions and policy are based on research, best practices, and my duty to uphold the law.

Pat Pepper

I, **Pat Pepper**, declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.