

CITY OF BLACK DIAMOND
July 7, 2016 Regular Business Meeting Agenda
25510 Lawson St., Black Diamond, Washington

7:00 P.M. – CALL TO ORDER, FLAG SALUTE, ROLL CALL

APPOINTMENTS, ANNOUNCEMENTS, PROCLAMATIONS AND PRESENTATIONS: CONSENT

AGENDA:

- 1) Claim Checks – July 7, 2016 - No. 43655 through No.43711 and EFTs in the amount of \$219,684.65
- 2) Payroll – June 30, 2016 - No. 19157 through 19174 (void 19156) and ACH Payments in the amount of \$274,615.88

PUBLIC COMMENTS: Persons wishing to address the City Council regarding items of new business are encouraged to do so at this time. When recognized by the Mayor, please come to the podium and clearly state your name. Please limit your comments to 3 minutes. If you desire a formal agenda placement, please contact the City Clerk at 360-886-5700. Thank you for attending.

PUBLIC HEARINGS:

- 3) AB16-034B – (Continuation) 2017-2022 Six Year Transportation Improvement Plan Mr. Boettcher

TIME-CRITICAL COUNCIL BUSINESS:

- | | |
|---|----------------------|
| 4) Resolution For Interim City Attorney Via Legal Services Contract | Councilmember Morgan |
| 5) Resolution Revising Council Rules of Procedure | Councilmember Morgan |
| 6) Resolution Revising Committee Membership | Councilmember Morgan |
| 7) Resolution Regarding Absences by Councilmembers | Councilmember Morgan |

UNFINISHED BUSINESS:

- | | |
|---|----------------------|
| 8) AB16-016C – Resolution Accepting Dept. of Ecology Grant for 2015 – 2017
Stormwater Capacity Grant | Councilmember Weber |
| 9) AB16-021C – Resolution Confirming Mayor's Appointment to Civil Service Commission | Councilmember Morgan |
| 10) AB16-038A – Resolution Regarding Labor Policy and Grievance Review | Councilmember Morgan |
| 11) AB16-039A – Resolution Regarding Mediation | Councilmember Morgan |

NEW BUSINESS:

MAYOR'S REPORT:

COUNCIL REPORTS:

- Councilmember Deady
- Councilmember Morgan
- Councilmember Edelman
- Councilmember Weber
- Councilmember Pepper

PUBLIC COMMENTS:

EXECUTIVE SESSION:

ADJOURNMENT:

BLACK DIAMOND CITY COUNCIL MINUTES

July 7, 2016

Council Chamber, 25510 Lawson Street, Black Diamond, Washington

CALL TO ORDER, FLAG SALUTE:

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

ROLL CALL:

PRESENT: Councilmembers Deady, Morgan, Edelman, Weber and Pepper

ABSENT: None

Staff present: Seth Boettcher, Public Works Director; Jamey Kiblinger, Police Chief; David Linehan, City Attorney; Barbara Kincaid, Community Development Director and Brenda L. Martinez, City Clerk.

Councilmember Pepper requested the floor at the completion of roll call.

A **motion** was made by Councilmember Pepper and **seconded** by Councilmember Morgan to amend the agenda to the agenda that was passed out in front of you and sent out on Friday, the approved council agenda and the information was sent out on Sunday.

Councilmember Edelman called point of order; regarding the procedure for revising the agenda.

Councilmember Pepper called for the vote.

Mayor Benson called for a consultation with the attorney. She further stated that the Attorney addressed the agenda on Tuesday to all Councilmembers.

There was Council discussion around this with the Attorney on the process.

Councilmember Pepper called point of order, that we still have a motion on the floor and it's a motion to accept the approved Council agenda.

Council discussion continued the amended agenda.

Councilmember Weber called point of order.

Council discussion continued.

Mayor Benson called Councilmember Morgan out of order as she was off topic.

A **motion** was made by Councilmember Edelman and **seconded** by Councilmember Deady to approve the consent agenda. (no vote taken on this)

Councilmember Weber and Pepper called point of order as there is already a motion on the floor to accept the approved Council agenda.

Council discussion continued regarding the amended agenda.

Councilmember Pepper called the question.

VOTE: Motion on accepting the approved Council agenda **passed** 3-2 (Edelman, Deady).

Mayor Benson noted all memos from Talmadge are posted to the website for public view under public notices.

APPOINTMENTS, ANNOUNCEMENTS, PROCLAMATIONS AND PRESENTATIONS: None

CONSENT AGENDA

- 1) **Claim Checks** – July 7, 2016 - No. 43655 through No.43711 and EFTs in the amount of \$219,684.65 (excluding 43661 – Yvonne Ward Voucher)
- 2) **Payroll** – June 30, 2016 - No. 19157 through 19174 (void 19156) and ACH Payments in the amount of \$274,615.88

A **motion** was made by Councilmember Edelman and **seconded** by Councilmember Deady to accept the consent agenda.

A **motion** was made by Councilmember Pepper and **seconded** by Councilmember Morgan to table item number 43661 (Yvonne Ward Voucher) until the finance committee makes a recommendation.

There was Council discussion on this.

VOTE: Motion to table item 43661 (Yvonne Ward Voucher) **passed** 3-2 (Edelman, Deady).

Council discussion continued.

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Morgan to accept the amended consent agenda. Motion **passed** 3-2 (Edelman, Deady). The consent agenda as amended was passed as follows:

- 1) **Claim Checks** – July 7, 2016 - No. 43655 through No.43711 and EFTs in the amount of \$219,684.65 (excluding 43661 – Yvonne Ward Voucher)
- 2) **Payroll** – June 30, 2016 - No. 19157 through 19174 (void 19156) and ACH Payments in the amount of \$274,615.88

PUBLIC COMMENTS:

Mira Hoke, Black Diamond spoke to Council.

Robbin Taylor, Black Diamond spoke to Council.

Bod Edelman, Black Diamond spoke to Council.

Kristen Bryant, Bellevue spoke to Council.

PUBLIC HEARINGS:

3) AB16-034B - (Continuation) 2017-2022 Six Year Transportation Improvement Plan

Public Works Director Boettcher reported that the public comment period has been held open for the last two meetings. He noted making amendments from the work session and the public and highlighted the changes. He also noted supplying a map showing what has been accomplished over the past six years.

Mayor Benson opened the public hearing at 7:41 p.m. There was no public comment and Mayor Benson closed the public hearing at 7:41 p.m.

There was Council and staff discussion on this item.

A **motion** was made by Councilmember Edelman and **seconded** by Councilmember Deady to adopt a resolution approving the 2017-2022 Transportation Improvement Program.

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Morgan to amend the motion to postpone this item to the next Council meeting.

Council and staff discussion continued this item.

VOTE; the amended motion **passed** 3-2 (Edelman, Deady).

There was a procedural question regarding comments received timely by Councilmember Weber. It was noted by Attorney Linehan that those comments need to be made part of the record.

Mayor Benson noted the public hearing will remain open so those comments can be addressed.

VOTE; Main motion as amended **passed** 3-2 (Edelman, Deady).

TIME-CRITICAL COUNCIL BUSINESS

4) Resolution for Interim City Attorney Via Legal Services Contract

Councilmember Morgan stated this resolution regarding Interim City Attorney services for 3 three months and would like to bring this resolution back for reconsideration as she voted on the prevailing side.

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Weber to waive the rules of the timely and urgent matter. Motion **passed** by 3-2 (Edelman, Deady).

Councilmember Morgan discussed this item.

Mayor Benson stated you have no authority to hire an Attorney.

Point of order was called by Councilmembers Pepper and Weber; Councilmember Morgan has the floor.

Councilmember Morgan continued to discuss this item.

Councilmember Deady addressed Council.

Mayor Benson called Councilmember Morgan out of order; Councilmember Deady has the floor.

Councilmember Deady continued to address Council.

Mayor Benson called Councilmember Pepper out of order.

Councilmember Deady continued to address Council.

Councilmember Pepper called point of order; Councilmember Deady is being accusative.

Mayor Benson stated you (Councilmember Pepper) cannot call point of order, Councilmember Deady still has the floor.

Councilmember Deady continued to address Council.

Mayor Benson called Councilmember Pepper out of order as Councilmember Pepper stated she did not hire the Attorney.

Discussion between Councilmembers continued this item.

Councilmember Pepper addressed the Council.

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Pepper to adopt a Resolution for the City of Black Diamond to hire an Interim Attorney via Legal Services Contract, Mr. Vancil.

Attorney Linehan noted the privileged memo he sent to Councilmembers and the Mayor on his opinion about the hiring of a City Attorney. He noted it is not his job to waive privilege on that memo. If the Council authorizes the release of that privileged document, he will release it. He shared that the client meaning the City, the Mayor and the Council together are the client and it is up to the client whether they take or reject his advice.

VOTE; motion passed 3-2 (Edelman, Morgan).

Mayor Benson noted she will be denying this and calling Mr. Vancil.

A **motion** was made by Councilmember Edelman and **seconded** by Councilmember Deady that the privileged memo from Kenyon Disend be released to the public.

VOTE; motion passed with all voting in favor (5-0).

City Attorney Linehan noted the document addresses many items and sought clarification on the motion. He asked if the motion was meant to be for the entire document or just the portion regarding the hiring of a City Attorney. There was Council consensus, it was for the whole document.

City Attorney Linehan read an excerpt from his memo, which is attached, and incorporated into the minutes.

5) Resolution Revising Council Rules of Procedures

Councilmember Morgan discussed suspending the Council rules once again to adopt these few eight changes to the Council rules that were adopted in January. She noted there being eight simple recommended clarifications from the Talmadge memo. She discussed the rules being impugned and the need to have these changes adopted.

Mayor Benson asked Councilmember Morgan to please speak to the facts.

Councilmember Pepper called point of order.

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Pepper to make these eight simple changes, they are marked in the rules that are in the packet, you can find them easily, there is a mark on the left side there to see where they are.

Mayor Benson stated there are no rules in the packet.

Councilmember Edelman discussed the different versions she received and the document not addressing all the needed changes.

There was Council discussion on this.

City Attorney Linehan read the excerpt from his memo regarding the proposed Council rule changes. He did note that he did not see all the proposed changes prior to writing this memo and it is limited to what he could review over the weekend.

VOTE; motion passed 3-2 (Edelman, Deady).

Mayor Benson noted these rules will be denied and will be using the 2015 rules.

6) Resolution Revising Committee Membership

Councilmember Weber discussed the attendance at the committee meetings and feels they are there to allow the public to come in if they so choose.

There was Council and Mayor discussion on this item.

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Pepper that we revise the Committee membership as stated in our resolution here, the Finance Committee will have two members; they will be Councilmember Weber and Councilmember Morgan and Councilmember Weber will retain as Chair of that Committee. The Growth Management Land Use Committee will have three members; Councilmember Weber, Councilmember Pepper and Councilmember Edelman; and the Government Operations Committee will have three members; Councilmember Morgan will be the Chair, Councilmember Pepper and Councilmember Deady will be on that committee.

Councilmember Edelman went on record and stated that if there is a quorum at these meetings, she will not attend.

Councilmember Deady concurred with Councilmember Edelman and stated she will not be at those meetings per legal advice.

City Attorney Linehan read the excerpt in his memo regarding the proposed committee establishment and assignment.

VOTE; motion passed 3-2 (Edelman, Deady).

Mayor Benson noted she will not be recognizing these meetings or sending staff and Council will need to do this on their own.

7) Resolution Regarding Excused Absences by Councilmembers

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Weber to suspend the rules to adopt this resolution tonight.

Councilmember Morgan addressed Council on this item.

VOTE; motion **passed** 3-2 (Edelman, Deady).

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Pepper to adopt the resolution of the City of Black Diamond regarding absences by Councilmembers.

There was Council discussion on this.

VOTE; motion **passed** 3-2 (Edelman, Deady).

City Attorney Linehan read the excerpt from his memo (attached) regarding the resolution.

UNFINISHED BUSINESS:

8) AB16-016C-Resolution Accepting Department of Ecology Grant for 2015-2017 Storm Water Capacity Grant

Councilmember Weber discussed Agenda Bill AB16-016C still being in committee and the need to adopt AB16-034 an ordinance to revise the city code to adopt the 2012 code manual.

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Pepper to postpone AB16—016C until the AB16-034 ordinance revised city code 2012 code manual can be brought to Council.

Mr. Boettcher noted with this item being postponed he is not able to do his job to get the code revised regarding low impact development as there is no money to get it done.

There was Council discussion on this.

Councilmember Weber called the question.

VOTE; Motion **failed** 2-3 (Edelman, Deady, Pepper).

Councilmember Pepper wanted to change her vote. Mayor Benson noted the vote has already been taken.

Councilmember Weber called for a roll call vote. Mayor Benson said he (Councilmember Weber) can't call for a roll call vote; she (Mayor) can call for a roll call vote. The Mayor stated there were three no votes and it didn't pass.

Councilmember Weber asked the parliamentarian about a roll call vote and who has the authority to call for one.

City Clerk Martinez commented she didn't know the answer off hand and would need to look it up in Robert's Rules of Order.

City Attorney Linehan stated he didn't have an answer for that as well.

9) AB16-021C-Resolution Confirming Mayor's Appointment to Civil Service Commission

City Attorney Linehan said there is no rule against two members of the Commission working at the same company if they are not conducting Commission business.

There was Council discussion on this.

A **motion** was made by Councilmember Edelman and **seconded** by Councilmember Deady to adopt a resolution authorizing the Mayor's Civil Service Commission appointment of Becky Arnold to the Black Diamond Civil Service Commission Position #3.

Councilmember Weber addressed Council on this item.

VOTE; Motion failed 2-3 (Morgan, Weber, Pepper).

City Clerk Martinez read into the record an excerpt from Robert's Rules of Order about a Councilmembers right to change their vote. It can be made by unanimous consent.

Mayor Benson stated there needs to be a unanimous vote and there will be no unanimous vote.

10) AB16-038A-Resolution Regarding Labor Policy and Grievance Review

Mayor Benson shared that our Labor Attorney Peter Altman couldn't be here this evening. However, he has addressed this prior to the meeting and his recommendation was to not pass the resolution.

There was Council and Mayor discussion on this.

A **motion** was made by Councilmember Pepper and **seconded** by Councilmember Morgan to adopt a resolution regarding labor policy and grievance review, I support this item

because it makes it simple and clear that the Mayor should deal with the grievances as part of the requirements of the Union contract, it saves City time and possibly money.
Motion **passed** 3-2 (Edelman, Deady).

11) AB16-039A-Resolution Regarding Mediation

Councilmember Morgan **moved** to adopt the resolution regarding mediation. (No second)

Mayor Benson stated there is no information in the packet around mediation.

There was Council discussion on this item.

A **motion** was made by Councilmember Morgan and **seconded** by Councilmember Edelman to withdraw this resolution regarding mediation now. Motion **passed** with all voting in favor (5-0).

NEW BUSINESS:

Claim Check (Yvonne Ward)

There was Council discussion on this.

Councilmember Morgan stated she would like to go into executive session to discuss with legal counsel potential litigation regarding this issue.

Councilmember Weber called point of order; he asked who has the floor.

Councilmember Weber **moved** to postpone this voucher 43661 (Yvonne Ward) to the next scheduled meeting and asked the City Attorney to follow up with Councilmember Morgan with the RCW for the executive session she's requesting at our next meeting.

Council discussion continued.

Councilmember Weber **withdrew** his motion.

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Morgan to hold an executive session based on the potential litigation and the RCW. (No vote taken).

Mayor Benson stated you cannot have an executive session if you don't know what it's about.

Mayor Benson called for a recess at 9:33 p.m. for Councilmember Morgan to discuss with City Attorney Linehan whether an executive session is needed for this item.

Mayor called the session back to order at 9:35 p.m.

City Attorney Linehan determined that based on what Councilmember Morgan shared with him there is no need for an executive session.

Councilmember Morgan addressed her concerns with this item.

A **motion** was made by Councilmember Pepper and **seconded** by Councilmember Weber to postpone item 43661 Yvonne Ward Voucher until the next meeting. Motion **passed** 3-2 (Edelman, Deady).

DKS CLAIM VOUCHER

Community Development Director Kincaid reported bringing forward at the last meeting a resolution to hire DKS to complete their work on the transportation element of the comp plan update. She noted this was voted down at the last meeting and DKS was sent an invoice for the \$10,000 the City paid. She distributed an email that she wrote to Council and noted she is looking for direction from Council on next steps. She stated if DKS is not approved to continue with this work the City will need to start over and lose that investment the City made with DKS, plus there is no budget to start over.

Mayor Benson called a recess at 9:52 p.m.

The meeting was called back to order at 9:57 p.m.

City Clerk Martinez clarified action still needs to be taken on the Stormwater Capacity Grant.

A **motion** was made by Councilmember Deady and **seconded** by Councilmember Edelman to adopt a resolution accepting Dept. of Ecology Grant for 2015-2017 Stormwater Capacity Grant. Motion **failed** 2-3 (Weber, Pepper, Morgan).

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Morgan to postpone items 8 (DKS claim check) & 9 (resolution authorizing a contract with DKS Associates) on the published agenda until the July 21, regular scheduled Council meeting. Motion **passed** 3-2 (Edelman, Deady).

DEPARTMENT REPORTS: None

MAYOR'S REPORT: None

COUNCIL REPORTS: None

ATTORNEY REPORT: None

PUBLIC COMMENTS:

Terry Yankovich, Black Diamond spoke to Council.

Andy Williamson, representing Teamsters 116 spoke to Council.

Robbin Taylor, Black Diamond spoke to Council.

EXECUTIVE SESSION: None

ADJOURNMENT:

A **motion** was made by Councilmember Weber and **seconded** by Councilmember Pepper to adjourn the meeting. Motion **passed** with all voting in favor (5-0).

The meeting ended at 10:15 p.m.

ATTEST:

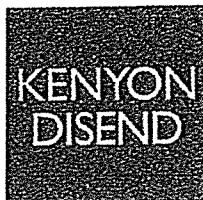


Carol Benson, Mayor



Brenda L. Martinez, City Clerk

Michael R. Kenyon
Rachel B. Turpin
Ann Marie J. Soto
Kim Adams Pratt
Robert F. Noe
David A. Linehan
Amy S. Mill
Charlotte A. Archer
Alexandra L. Kenyon



Bruce L. Disend
Doug F. Mosich
Of Counsel

Shelley M. Kerslake
1967 - 2014

**CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
NOT SUBJECT TO PUBLIC DISCLOSURE**

TO: Mayor and Councilmembers
FROM: David A. Linehan
DATE: July 6, 2016
RE: July 7, 2016 City Council Meeting Agenda Items

This memo serves to advise Councilmembers and the Mayor of legal issues regarding certain items put forward for potential action at the City Council Meeting scheduled for July 7, 2016.

I. Agenda Posted on July 1, 2016

With respect to the agenda posted by City Clerk Brenda Martinez on Friday, July 1, 2016, we address only one item: The resolution referenced in Item 6, "Resolution Regarding Labor Policy and Grievance Review." I understand from the Mayor that this is a held-over item from the previous meeting. I have not seen the text of the resolution and do not really have a clear idea of its purpose, but I would be happy, upon request, to review the proposed resolution before the meeting. I would also note, merely as a reminder, that discussion of sensitive employment matters may be more appropriately conducted in Executive Session, when appropriate under RCW 42.30.110(f) (to receive and evaluate complaints or charges brought against a public officer or employee), or 42.30.110(g) (to review the performance of a public employee); and discussions of strategies or positions to be taken in a grievance proceeding may be exempt from OPMA altogether under RCW 42.30.140(4).

II. Agenda Items Proposed by Councilmembers Pepper and Morgan on July 1st

I understand that Councilmembers Pepper and Morgan forwarded four additional agenda items, with supporting documentation, late in the afternoon of Friday, July 1st, as the official agenda notice was being finalized and posted by the Clerk. While those items may not have arrived in sufficient time to be posted with the preliminary agenda, a majority of the Council retains the prerogative to amend the agenda to add or remove items from consideration at the meeting. I offer the following advice and observations concerning these four additional agenda

items in the event that the Council chooses to amend the agenda and consider them at the July 7th meeting.

A. Resolution on Interim Legal Services

This resolution, if adopted, would be invalid *ab initio* (that is, invalid from its inception rather than later voidable). State law is clear that the power to appoint and contract for City Attorney services lies with the Mayor in a mayor-council form of government. The City Council has no authority to independently appoint a City Attorney or retain contract legal services for general City Attorney services. As I mentioned in a previous e-mail before the June 16th Council Meeting, Washington courts have, on rare occasion, recognized a city council's ability to retain legal counsel in narrow, discrete circumstances—e.g., when there was a separation-of-powers dispute wherein the court recognized that it would be appropriate for the council to have its own, independent legal representation to advise it on matters in which the council's interests were directly adverse to the interests of the mayor. But this narrow exception does not apply to retention of general legal counsel to represent the City as a whole. In Black Diamond, only the Mayor has the power to appoint a City Attorney or retain contract City Attorney services for the City. The Council has no authority to appoint or contract with a City Attorney not approved by the Mayor, just as the Council has no authority to hire other members of the City Staff or to independently select and contract with other professional consultants for geotechnical or traffic studies not put forward by the Mayor.

Accordingly, the proposed resolution for interim legal services is invalid, and the Mayor would be under no obligation to use the services of any attorney with which the Council has purported to contract, nor would the City be obligated to pay for services rendered thereunder.

B. Resolution Revising Council Rules of Procedure

Without offering any opinion on the manner in which the new Council Rules were adopted or the validity of their adoption, I have only one legal concern with the substance of the proposed amendments proposed by this resolution. Specifically, the proposed change to Rule 18.1.4(b), which the "Summary of Rule Changes for the Agenda Bill" describes as follows:

Revise 18.1.4(b): Add clarifying language that the Growth Management Committee would consider quasi-judicial matters where it pertains to city policies or code. (A clause was already included that the committee would not consider matters prohibited by law.)

This proposed "clarification" of Rule 18.1.4(b) is problematic because it is (a) vague in its intent, and (b) may conflict with specific provisions of the Black Diamond Municipal Code relating to quasi-judicial decisions—specifically, BDMC 18.08.030, .060, and .070. These Code provisions spell out precisely which types of land-use decisions are quasi-judicial and they direct that such decisions be made by the Hearing Examiner (Type 3), or by the City Council following a recommendation by the Hearing Examiner (Type 4). Again, it is unclear what the intent is for saying in the Council Rules that the Growth Management Committee "would consider quasi-

judicial matters where it pertains to city policies or code.” But any intent to modify the existing BDMC provisions governing quasi-judicial processes (such as by requiring some sort of interim review by a committee) could only be enacted, if at all, through a duly adopted ordinance, not a change to the Council Rules.

C. Resolution Regarding Absences of Councilmembers

I have no legal concerns about Section 1 of this resolution. The relevant statute, RCW 35A.12.060, provides that failure to attend a regular council meeting may be “excused by the council,” which clearly indicates that the determination of whether a Councilmember’s absence should be excused is one that the Council is authorized to make. Here, Council Rule 5.1.1 provides that if a Councilmember gives prior notice of an absence to the Clerk or the Mayor, the absence will be recorded as “excused.” While this seems to be a rather “low bar” for excusing absences, I am aware of no provisions of state law that prevents the Council from setting the bar wherever it sees fit on this issue.

I offer no opinion regarding Section 2 of this resolution, as it merely applies the Council’s excused-absence rule to particular facts occurring on particular dates, about which I have no personal knowledge.

D. Resolution Revising Committee Membership

As a general rule, city councils have the authority to “organize and regulate [their] internal affairs,” RCW 35A.11.020, and to “determine [their] own rules,” RCW 35A.12.120. Accordingly, establishing committees and setting rules for determining the composition of those committees are generally within the Council’s purview so long as the committee structure and composition do not violate other state or local laws. That said, as I have previously advised on another occasion, any committee structure that contemplates having a quorum of sitting Councilmembers in regular attendance—which the proposed “Growth Management, Land Use and Community Services” and “Government Operations and Administration” Committee memberships both clearly would have—is problematic for a number of reasons.

First, if a committee meets regularly on a pre-set schedule (established by ordinance, resolution, or rule) and that committee contains a quorum of Councilmembers, that committee meeting arguably constitutes a regular meeting of the Council under the OPMA. This means that the Mayor would then be required to attend and preside over all such committee meetings per RCW 35A.12.110 (“Meetings of the council shall be presided over by the mayor . . .”), in addition to other state statutory and local code requirements for regular meetings of the legislative body of the City (e.g., keeping of minutes, etc.). Indeed, it is likely that standing committees holding regular meetings with a quorum of Councilmembers would violate BDMC 2.04.010, which provides for regular Council meetings only on the first and third Thursdays, and Council work sessions on the second Thursday of each month. No other regular meetings of Council are authorized under the Code. Any change to BDMC 2.04.010 would require adoption of a new ordinance, not a mere resolution affecting the Council Rules.

Second, as you know, Open Public Meeting Act ("OPMA") requirements would require giving public notice of either a regular or special meeting, including preparation of an agenda, and an opportunity for public attendance at every Committee meeting where a quorum is present. This may require coordination with the Clerk and expenditures of City funds or use of other resources that may or may not be available. Further, at a practical level, the hours of operation of the City are set by local Code, and my understanding is the Mayor will not authorize Staff overtime to attend after-hours Committee meetings due to, among other things, budgetary impacts. Council lacks authority to compel Staff to attend such meetings, which may diminish their utility.

Third, even if all procedural requirements for public meetings are acknowledged, having a quorum of Councilmembers present at a Committee meeting significantly increases the risk of mistakes and misunderstandings, even with the best of intentions. All manner of substantive remarks, discussions, proposals, agreements, deliberations, and recommendations at such meetings could easily be construed – rightly or wrongly – as *de facto* final actions, taken without proper notice and without input from or deliberation by the full Council at a regular or special meeting. Indeed, it would not be hard to see how a complainant could make an argument that the contemplated committee meetings may effectively turn a five-member City Council into a three-member City Council, in violation of numerous laws. In short, in my view, this committee structure is inviting litigation, with liability being very difficult to predict or contain. Conceivably, every one of these Committee meetings could spawn lawsuits, the outcome of which may not be known until finally resolved after a fact-intensive—and therefore costly—trial.

Most of these potential lawsuits are likely to arise under the OPMA. In addition to the legal and other fees that the City would expend on such lawsuits, a successful plaintiff is also entitled to recover his or her attorney fees. RCW 42.30.120(2). Councilmembers, as members of the City's "governing body," who are found to have violated the OPMA "shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars." RCW 42.30.120(1).¹

Finally, in my view, the Council should not be too confident that adding a textual disclaimer in Council Rule 18.13(c) saying that "A committee recommendation does not constitute enactment of any ordinance or resolution" will insulate the City from liability if litigation ensues. While this proposed language may be persuasive as a first line of defense, determined plaintiffs will likely argue that this language is mere "window dressing," designed to mask, rather than prevent, the taking of final action at committee meeting. Ultimately, it will be up to a court of law to decide whether, in a particular set of circumstances, this disclaimer is valid and shields the City or Councilmembers from liability.

Please let me know if you would like to discuss any of the above issues in further detail.

¹ The OPMA applies only to members of an agency's "governing body." RCW 42.30.020(2). A mayor, as the chief executive of a city, is not a member of the "governing body" and accordingly cannot be personally liable under the OPMA.