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**COURT OF APPEALS FOR DIVISION 1  
STATE OF WASHINGTON**

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CITY OF BELLINGHAM, a Washington municipal corporation and  
PETER FRYE, an individual,

Appellants,

vs.

LIND BROS. CONSTRUCTION, LLC.,  
a Washington limited liability company,

Respondent.

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**REPLY BRIEF OF APPELLANT FRYE**

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## TABLE OF CONTENTS

I.	ARGUMENT .....	3
	A. Lot Line Adjustment.....	3
	1. BMC 18.10.020 B 2.....	3
	2. BMC 18.10.020 B 3.....	4
	3. BMC 18.10.020 B 4.....	5
	B. Variances.....	6
	C. Wetland/Stream Permit and SEPA.....	8
	1. RCW 43.21C.240.....	8
	2. SEPA conditions allowed.....	9
	3. SEPA vs. WSO.....	9
	4. SEPA conditions.....	11
	D. Findings of Fact.....	13
II.	CONCLUSION.....	14

**TABLE OF AUTHORITIES**

**Cases**

*In re King County Hearing Examiner*, 135 Wash.App. 312, 325, 144 P.3d 345 (2006).....8

**Ordinances**

BMC 18.08.245 ..... 2  
BMC 18.08.420 ..... 4  
BMC 18.10.020 B..... 2, 12  
BMC 18.10.020 B. 2..... 2,3  
BMC 18.10.020 B. 3..... 3,4  
BMC 18.10.020 B. 4..... 4,5  
BMC 18.36.020 E..... 3  
BMC 20.08.020..... 4  
BMC 16.20.190 A..... 8  
BMC 16.20.200 ..... 9  
BMC 16.20.200 B 3..... 9  
BMC 16.50 ..... 7, 8, 9,10,11  
BMC 16.50.050 A 2..... 8  
BMC 16.50.050 B 1..... 9  
BMC 16.50.080 D..... 9  
BMC 16.50.100 C 6..... 7  
BMC 16.50.120..... 10,11

## I. ARGUMENT

### A. LOT LINE ADJUSTMENT

As stated in Frye's opening brief, Lind's proposed lot line adjustment does not meet all four of the requirements of BMC 18.10.020 B (CP 74). Frye argues that only requirement number 1 is met, requirements 2, 3 and 4 are not (Frye Opening Brief, pages 8-13).

#### 1. BMC 18.10.020 B. 2

The existing lots are 5,578 and 8,368 square feet in size. Lind argues that the proposed lot line adjustment would not further reduce the size of these lots and therefore comply with BMC 18.10.020 B. 2.

Lind argues that the newly created pipe stem on Lot B should be counted in Lot B's area calculation, yet the exclusion of the pipe stem in area calculation is stated in both BMC 18.08.245 (CP 72) and in BMC 18.36.020 C 2 (CP 77).

Lind's proposed lots are 5,332 (Lot A) and 7,664 (Lot B, not counting the pipe stem) square feet in size. Both are further reduced in size, a violation of BMC 18.10.020 B. 2. Even if the area of the pipe stem was counted for Lot B, the area of Lot A

would still be further reduced. Lind argues that a simple adjustment of the boundary between Lot A and Lot B could resolve this, ignoring that Lot B's minimum width would then be less than 60', violating BMC 18.36.020 E (CP 78). Lind's proposed Lot A also does not meet BMC 18.36.020 E.

Lind also fails to note that if the proposed Lot B used Star Court for access, no pipe stem would be required, and thus both lots would meet the requirements of BMC 18.10.020 B. 2.

**2. BMC 18.10.020 B. 3**

Here Lind appears to be confused. The proposed Lot A only abuts Harrison Street, not Harrison and Star Court, and therefore is not a through lot. The City is correct, however, in determining that the required 50 foot building set-back from Harrison Street covers the entire 50 foot width of Lot A.

BMC 20.10.080 E states that the centerline for setback purposes is the farthest edge of the existing right-of-way that was dedicated by the subject property (CP 84 & 674; CP1557-1558, COL 6). Since Harrison Street was dedicated entirely by the Happy Valley Plat to the south, none of the right-of-way was dedicated from the subject property, therefore the centerline for setback purposes is the southern boundary line of Lind's

property. (CP 673-674; 1558, COL 6).

Lind also argues that Harrison is not a "street " as defined by the BMC, yet BMC 18.08.420 and BMC 20.08.020 both define a street as a right-of-way having a width of 30' or more which provides the principal means of access to abutting property (CP 673 & 1551). Harrison Street is 33 feet wide (CP 673 & 1310; CP 1557, COL 6). Since the proposed Lot A only fronts Harrison Street and not Star Court, Harrison Street would be the principal means of access.

Lind can't have it both ways. The proposed Lot A only abuts Harrison, therefore Harrison would be the principal means of access, and require a 50 foot front yard set-back from the southern boundary of Lot A, making Lot A unbuildable, violating BMC 18.10.020 B 3 by further infringing on the City Land Development Ordinance.

### **3. BMC 18.10.020 B. 4**

Here Lind argues that the proposed lot line adjustment meets the requirements of BMC 18.10.020 B 4 by improving the overall function and utility of the existing lots. Since Lind never submitted a site-plan showing development on the existing lots, this claim cannot be evaluated.

However, one only needs to look at a site-plan of the existing lots (CP 852) to see that while the easterly 25 feet of the existing easterly lot is wetlands, the majority of the lot is dry. Yes the easterly lot is encumbered by the wetland buffer, and those buffers would be impacted by development, but, as stated in Frye's opening brief (pages 7 & 8), Lind's proposed site-plan includes major impacts to the wetland buffer, including a buffer as small as zero feet (CP 899).

Lind argues that septic function and utility is increased by the proposed lot line adjustment, yet the existing lot layout would put one septic drain field outside the 50 foot wetland buffer and the other in the buffer, not in the wetland itself as Lind claims. The proposed lot layout would put both septic drain fields in the wetland buffer.

Lind's proposed lot line adjustment does not improve the overall function and utility of the lots and in fact it may reduce it. The proposed lot line adjustment does not meet the requirements of BMC 18.10.020 B 4.

## **B. VARIANCES**

Lind admits that the Lind property has code challenges and argues that these could be dealt with at the building permit

stage.

The fact is, even with variances, Lind's lot line adjustment would not meet all 4 of the requirements of BMC 18.10.020. Assuming Lind could obtain a variance for building set-backs, Lind's Lot Line Adjustment would still result in reduced lot sizes and not improve overall function and utility.

Lind complains that the City never notified Lind of the potential need for variances in a manner which made it clear the permits would be denied without them. Lind could have, but chose not to, apply for variances at any time. Indeed Lind hired professional consultants who should have been familiar enough with the City's development regulations to inform Lind of the need for variances.

Additionally, the City informed Lind, at least twice, of the possible need for variances (CP 236; CP 1545, FOF 31). Lind choose to proceed without variances and Lind's Lot Line Adjustment Application was rightly denied because Lind's proposal did not meet code.

Finally, the City's variance criteria, BMC 20.18.020 A 1, only allows a variance due to special circumstances "not the result of owner's action" (CP 85). Lind's Lot Line Adjustment is the direct result of owner's action.

### **C. WETLAND/STREAM PERMIT and SEPA CONDITIONS.**

Lind did not file a cross appeal of the Superior Court order. In that order the Superior Court reversed the Hearing Examiner's decision denying the lot line adjustment, remanded the wetland/stream permit and the MDNS conditions back to the City and the Hearing Examiner. Frye contends that this Court should only rule on the lot line adjustment.

In the alternative, should this Court choose to rule on the wetland/stream permit and SEPA conditions, Frye contends that Lind has failed to prove that the Hearing Examiner's decision was in error.

#### **1. RCW 43.21C.240 does not apply**

Lind argues that the City improperly engaged in a SEPA process rather than using the tools in the City's WSO (BMC 16.50, the Wetland/Stream Ordinance). Lind argues that RCW 43.21C.240 prohibits the use of SEPA. This statute allows a city to opt out of SEPA review for a project only if it determines under RCW 43.21C.240 2 a that the specific Impacts of a project are adequately addressed by its development regulations or other local, state or federal rules of law. *In re King County Hearing Examiner,*

135 Wash.App. 312, 325, 144 P.3d 345 (2006).

For Lind's proposed project, the City did not make the optional finding under RCW 43.21C.240 2 that the project's specific impacts are adequately addressed by the Wetland Stream Ordinance. *In re King County Hearing Examiner at 325.*

## **2. SEPA conditions allowed based on WSO or City's development standards**

Lind has appealed SEPA conditions 1, 3, 4, 8, 9 and 10. BMC 16.20.190 A provides that the City can attach SEPA conditions to a permit if "such conditions are based on one or more policies in BMC 16.20.200 and cited in the permit, approval, license or other decision document." BMC 16.20.200 provides the basis for the City's substantive authority to condition a proposal under SEPA. BMC 16.20.200 B 3 states that such regulations include the Bellingham Municipal Code. All of the SEPA conditions challenged by Lind were imposed in accordance with the WSO or the City's codified development standards.

## **3. SEPA vs. WSO**

Lind argues that the use of SEPA instead of the WSO prejudiced Lind and that the City accepted Lind's wetland delineation as required under the BMC 16.50. Lind argues that the

only when public comment was received under SEPA did the City look to unwind its previous acceptance of the wetland reports. What Lind fails to recognize is that the BMC 16.50.100 C 6 also requires public input (CP 867). The input required under the BMC 16.50 would have been the same as under SEPA: considerable concern from area residents, some with more expertise than Lind's consultants, regarding the categorization and protection of the wetland, and the character of the development (CP 1250-1294).

In fact Frye expressed concern for wetland impacts in multiple letters before the SEPA comment period (CP 1384-1393). It is also a fact that the concept of a mature forested wetland is not new, and did not become known simply because of the SEPA comment period. Frye addressed this concept in a letter to the City dated 1-27-09 (CP 1384-1385). Finally, BMC 16.50.050 A 2 specifically recognizes mature forested wetlands (CP 860).

Lind argues that the City's actions were influenced by a large group of highly influential neighbors which engaged in an unjustified form letter writing campaign. As stated above, these letters were not unjustified, but required. The record also shows that this group was hardly highly influential. If it was, the City would have imposed the current Critical Areas Ordinance, not the Wetland Stream

Ordinance that it did. Finally, of the 31 letters received, ten could be considered some sort of form letter, the rest were original letters written by concerned citizens (CP 1250-1294).

Frye, and the neighbors who wrote the City, believe that the City has an obligation to consider public input and a duty to use that input in its decision making process.

#### **4. SEPA conditions**

**Conditions 1 and 4.** Lind argues that the wetlands on the property are Category III, requiring a 25 foot buffer under BMC 16.50. Lind claims that this was done without justification and the record does not support it.

Lind's original consultant rated it a Category II, required under BMC 16.50.050 B 1 since the wetland abuts a regulated stream (CP 861). The record shows that wetland scientists with far more education and experience than Lind's consultants rated it a Category I, due to a high function rating and the presence of mature trees (CP 299-304, 601-604, 1037, 1050 & 1338). BMC 16.50.080 B also allows for an increase of buffers to protect identified functions (CP 863).

**Condition 2.** As stated earlier in this brief, Frye believes that there will be no wetland impacts, but serious wetland buffer

impacts, with either the current lot configuration or Lind's proposed lot line adjustment. The record shows that wetland scientists with far more education and experience than Lind's consultants state the importance of maintaining the integrity of wetland buffers and that a 100 foot buffer is appropriate for this category I wetland (CP 306-314, 605-607, 1050-1052 & 1339-1340).

BMC 16.50.080 D lists the specific allowed uses in wetland buffers. Septic drain fields, driveways and fire truck turn-arounds are not allowed (CP 864).

**Condition 3.** BMC 16.50 does not automatically grant the approval of off-site wetland mitigation. BMC 16.50.120 only allows that the Director may accept an alternative proposal (CP 872). Lind's proposed off-site mitigation area is a wetland already in a natural condition and under a conservation easement (CP 1425). The record shows that wetland scientists with far more education and experience than Lind's consultants state that off-site mitigation will not adequately address the on-site impacts of Lind's proposal (CP 331-334, 606 & 627-629).

**Condition 10.** Lind contends that this condition was prompted by scientifically and factually unsupported speculation and imposed only after SEPA public comment. The record shows

that Frye raised the issue of mature trees in a letter dated January 27, 2009 (CP 1385). The mature tree issue was again raised in a letter from Frye and Dr. John McLaughlin dated July 9, 2009 (CP 1398-1400). Common sense observation by a lay person would discover the obvious mature trees (CP 1355-1361). In fact, the record shows that Lind's own consultants Vikki Jackson, Katrina Jackson and Kyle Legare mention mature trees in their reports (CP 975 & 1409). Finally, Dr. John McLaughlin and Dr. Sarah Cooke, two wetland scientists with far more education and experience than Lind's consultants, conclude that the wetland is a Category I mature forested wetland (CP 299-304,601-604, 1037, 1050 & 1338).

#### **D. FINDINGS OF FACT**

#4: As stated previously in this brief, the record shows that wetland scientists with far more education and experience than Lind's found mature trees (CP 299-304,601-604, 1037, 1050 & 1338).

#28: As stated previously in this brief, the record shows that wetland scientists with far more education and experience than Lind's conclude that the wetland is a Category I wetland due to its high function rating and the presence of mature trees (CP 299-304,601-604, 1037, 1050 & 1338).

#68: As stated earlier in this brief, BMC 16.50 does not automatically grant the approval of off-site wetland mitigation. BMC 16.50.120 only allows that the Director may accept an alternative proposal (CP 872). The record shows that wetland scientists with far more education and experience than Lind's consultants state that off-site mitigation will not adequately address the on-site impacts of Lind's proposal (CP 331-334, 606 & 627-629).

#69 and 70: Although not proffered by the City, this testimony was allowed by the Hearing Examiner (CP 795). These witnesses were introduced by the other Intervenor, Responsible Development, not Frye. However, as an immediate neighbor to the proposed Lind development, Frye has a considerable interest in a project, which, if built as proposed, would seriously, and negatively, impact Frye's property value, quality of life, the neighborhood character and the surrounding natural environment. Frye wrote multiple letters to the City, formally requested intervention with the Hearing examiner and was a party to the Superior Court appeal.

## **II. CONCLUSION**

Frye's opening brief shows that Lind's property is encumbered by wetland, wetland buffers, steep slopes and access issues. Lind's lots are undersized and Lind's proposed lot line

adjustment adds further building set-back, lot size, utility and function complications.

Frye's opening brief also shows that Lind's proposed development is out of character for the neighborhood and severely impacts a significant wetland and its buffer.

If a property is under water or on a cliff it may not be developable. Lind's property is both.

Lind has failed to show that the proposed development meets the requirements of BMC 18.10.020. For this reason the City was correct in their denial of Lind's lot line adjustment and the associated wetland/stream permit, making the MDNS conditions moot. The Hearing Examiner correctly upheld the City's denial.

Frye respectfully requests that this Court reverse the Superior Court decision and uphold the Hearing Examiner's order.

Respectfully submitted this 20<sup>th</sup> day of June 2012.

  
Peter D. Frye

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CERTIFICATE OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age. My address is 2402 30<sup>th</sup> Street, Bellingham, Washington, 98225.

On June 20, 2012, I served a true and correct copy of the following documents to be delivered as set forth below:

1. Reply Brief of Appellant Frye
2. Certificate of Service.

1 On the 20<sup>th</sup> day of June, 2012, I addressed said documents and deposited them for  
2 delivery as follows:

3 Peter R. Dworkin  
4 Belcher Swanson, PLLC  
5 900 DuPont Street  
6 Bellingham, WA 98225

By United States Mail  
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 By E-mail  
 Hand Delivery

7 Alan A. Marriner  
8 Assistant City Attorney  
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11 Bellingham, WA 98225

By United States Mail  
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12 DATED this 20<sup>th</sup> day of June, 2012.

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