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NO. 67878-7

COURT OF APPEALS FOR DIVISION 1  
STATE OF WASHINGTON

LIND BROS. CONSTRUCTION, L.L.C.,  
a Washington limited liability company,

Respondent,

v.

THE CITY OF BELLINGHAM,  
a Washington municipal corporation, and  
MARK QUENNEVILLE,  
an individual,

Appellants.

BRIEF OF APPELLANT MARK QUENNEVILLE

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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## I. INTRODUCTION

Appellant Mark Quenneville joins in the brief filed by co-appellant the City of Bellingham with regard to all issues raised by the City. Quenneville agrees with the City's arguments that the City's Hearing Examiner correctly determined that additional information regarding the wetlands was required from Lind before action on Lind's permit applications. Specifically, the Examiner correctly determined that additional information was required and that the permits could not be issued until after that information was obtained and analyzed.

There is one issue on which Quenneville parts ways with the City, though. Quenneville presented an additional argument to the Hearing Examiner as a basis for rejecting Lind's application. Quenneville argued that because Lind had not submitted a complete application before newly adopted critical area regulations took effect, that Lind was not vested to the old regulations and had to demonstrate compliance with the new ones (which he could not do).

The Examiner declined to address the vesting issue, holding that she lacked jurisdiction. The Superior Court did not explicitly address that issue.

The record demonstrates that Lind was aware that new critical area regulations were taking effect on December 6, 2006<sup>1</sup> and hurried to submit an application for this project the day before the new regulations took effect. The record also shows that Lind's hurriedly prepared application was not complete and included inaccurate information. Therefore, it should not have vested to the old regulation.

The record also shows that City staff failed to address the issue of whether the application was complete. Lind argues that because the City did not make an affirmative determination that the application was incomplete in the first 28 days after it was submitted, that the City – and everyone else in the world – is precluded from now addressing whether the application was complete when submitted. We do not address whether the City is precluded from arguing the completeness of the application, but we do contend and demonstrate below that there is no legal basis for using the City staff's inaction as a basis for precluding citizens, including Quenneville, from raising the complete application issue.

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<sup>1</sup> The ordinance had been adopted (after more than a year of public hearings and review) on November 21, 2005 with a December 6, 2005 effective date. See City of Bellingham Ord. No. 2005-11-092 ([http://www.cob.org/web/legilog.nsf/0/251f5581dcccac1f882570c10063e43f/\\$FILE/200511092.pdf](http://www.cob.org/web/legilog.nsf/0/251f5581dcccac1f882570c10063e43f/$FILE/200511092.pdf)).

Furthermore, the prerequisite that an application be complete is distinct from the prerequisite that an application be accurate. There was no 28-day clock running on the “accuracy” determination. That issue was timely raised in any event.

## II. ASSIGNMENT OF ERROR

The Superior Court erred in entering the Order on LUPA Hearing on the Merits (Oct. 10, 2011) (CP 18 – 20).

## III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Quenneville adopts by reference the issues pertaining to the assignments of error in the City of Bellingham’s brief.

2. Whether a failure by a City to determine whether an application is complete bars others from raising the issue of whether the application is complete?

3. Whether Lind’s application was required to include an environmental checklist, a signature, and a filing fee and, if so, whether the lack of those items rendered the application incomplete?

4. Whether Lind’s proposal was not consistent with the laws in effect on the date it was filed?

5. If Lind’s application was incomplete or inconsistent with the laws in effect when it was filed, was it, therefore, not vested to the

regulations in effect on that day and, consequently, should it have been reviewed for compliance with the new wetland regulations that took effect the next day?

6. Is Lind's application inconsistent with the new wetlands regulations?

#### IV. STATEMENT OF THE CASE

Quenneville adopts by reference the City of Bellingham's statement of the case and supplements it with the following additional information, except that Quenneville disagrees with the City's statement that this is "not a vesting case." City Op. Br. at 6. The City does not raise the vesting issue, but Quenneville does.

Following more than a year of public hearings, review, comments, and staff analysis, the Bellingham City Council adopted new, more stringent critical area regulations on November 21, 2005. *See* note 1, *supra*. The new regulations took effect on December 6, 2005. *Id.*

As is typical when new regulations to protect the environment are about to take effect, many developers rushed to file applications before the new regulations took effect. "[T]ypically there will be a flood of applications the day prior to the new ordinance taking effect." TR 493\CP 577. Thus, on "December 6th, 2005, the city received numerous wetland

stream permit applications.” TR 480\CP564. One of those applications was the Lind application at issue here.

It is not disputed that Lind’s application did not include a completed environmental checklist. An environmental checklist is a requirement under the State Environmental Policy Act. *See* WAC 197-11-315. The City Code provides, “a completed environmental checklist shall be filed at the same time as an application for a permit, license, certificate, or other approval not exempted in this ordinance.” BMC 16.20.110(A). (As discussed in the argument below, none of the exemptions apply here.)

Lind claims in this litigation that the application did not need to include an environmental checklist. But on the day the application was submitted, Lind’s consultant, Bruce Ayers, seemed to take a different view. He included an environmental checklist with the application. The problem, though, was that it was incomplete. Some of the information called for by the environmental checklist was provided, but much of it was absent. *See, e.g.*, CP 951, 1698.

It is also undisputed that Lind’s representative failed to include a filing fee with the application on December 5, 2005. Nor was it signed. TR 495/CP 579.

When Lind's consultant, Bruce Ayers, submitted the application, he characterized it as a "Class I" application. Class I applications do not require SEPA environmental checklists or SEPA filing fees. City staff did not immediately recognize that the application was mischaracterized by the applicant. But the City recognized that the environmental checklist was incomplete by June 2006, when city staff requested Ayers to file a completed checklist. CP 1698 (Ex. Q35 (letter from City to Ayers, June 21, 2006)). *See also*, CP 951 (City Ex. E (letter from City to Ayers, Aug. 10, 2006)). In a 2009 letter, the city also called out the lack of a signature and the failure to pay the SEPA filing fee:

The original SEPA checklist submitted on December 5, 2005 was not complete nor was it signed. While it was assigned a case number (SEP2005-00105) at the time of application, the fee was not paid.

CP 954 (City Ex. F, Request for Information, Feb. 27, 2009).

(The City has stated that it did not determine that the application was incomplete until this request for information in 2009, but that is not consistent with the city's letters for additional information—specifically a complete environmental checklist—in 2006.)

During the several years that the City staff was seeking additional information from Lind, Quenneville was arguing, among other things, that

the application was incomplete and not vested. CP 1772 (Ex. Q50); CP 1776 (Ex. Q52). The City staff refused to adopt Quenneville's perspective. During the Hearing Examiner proceedings, Quenneville continued to raise the issue that the application was not complete and not vested. CP 2062. The Hearing Examiner determined that she lacked jurisdiction to review the issue and, therefore, did not rule on it. CP 2080 (Order on Motion for Reconsideration).

Quenneville raised the issue again in Superior Court, CP 30 - 47, but the Superior Court did not address it expressly, CP 18 - 20.

## V. ARGUMENT

### A. Standard of Review

The City's decision to consider the applications vested to the old Wetland and Stream Regulatory Ordinance ("WSO"), ch. 16.50 BMC, was subject to review pursuant to the Land Use Petition Act, ch. 36.70C RCW. Pursuant to that statute, the Court reviews the City's decision subject to six standards of review, three of which are pertinent here:

- (1) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (2) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(3) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)(b)-(d).

No deference to the City's interpretation of state vesting law is required. Local jurisdictions are not deemed to be experts in construing state law. *See, e.g., City of Federal Way v. Town and Country Real Estate, LLC*, 161 Wn. App. 17, 37-38, 252 P.3d 382 (2011); *Short v. Clallam County*, 22 Wn. App. 825, 593 P.2d 821 (1979).

Under subsection (c), "substantial evidence" is such "evidence that would persuade a fair-minded person of the truth of the statement asserted." *Id.*, 161 Wn. App. at 37 (quoting *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.2d 300 (2006)). The "clearly erroneous standard in subsection (d) is met if the court is "left with a definite and firm conviction that a mistake has been committed." *Id.*

#### B. Vesting

Vesting is a vexing issue. Basically, vesting refers to the issue of which regulations apply to a development proposal if those regulations change over time. The basic rule is that a project vests to (*i.e.*, is to be judged by) the regulations in effect when a complete, valid application is

filed. *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994).

The vesting rule addresses competing public policy concerns. On the one hand, early vesting (*i.e.*, the day an application is filed) provides developers with protection against changing regulations. But early vesting also undermines the public interest by authorizing uses that are inconsistent with the laws that exist when the project is approved and/or built:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new non-conforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

*Erickson & Associates, Inc. v. McLerran*, *supra*, 123 Wn.2d at 873-74.

Vesting requires that the applicant satisfy three conditions:

[A] developer's right to develop in accordance with a particular zoning designation vests only if the developer files a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop.

*Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 638, 733 P.2d 182 (1987).

Pursuant to the Bellingham Municipal Code, a “complete application consists of an application form together with all required information listed in the submittal requirements and payment of the application fee . . .” BMC 21.10.190A.

The evidence submitted to the hearing examiner demonstrated that the application was not “complete,” *i.e.*, it did not contain “all” of the required information or the filing fee; nor did it “compl[y] with existing zoning ordinances and building codes.” Failing to satisfy these conditions mandates a finding that the application was not vested.

C. The Application Was Not Complete

1. The application was incomplete when filed

a) The required environmental checklist and filing fee were missing

The Lind-Wilkin lot line adjustment (LLA) application was not complete as of December 5, 2005 because the applicant failed to submit the required environmental checklist and filing fee by that date. Accordingly, the LLA application did not vest under the old Wetland Ordinance and is subject to the new Critical Areas Ordinance (CAO).

The environmental checklist was required because the LLA application was not exempt from SEPA when the application was

submitted. BMC 16.20.110.A states, “A completed environmental checklist shall be filed at the same time as an application for a permit, license, certificate, or other approval not exempted in this ordinance.” Although certain lot line adjustment applications are exempt from SEPA as "minor land use decisions" under WAC 197-11-800(6)(a), the exemption does not apply for applications "upon lands covered by water." The Lind-Wilkin LLA application involves land covered by a regulated creek and wetlands (marshes and swamps),<sup>2</sup> which meets the "lands covered by water" definition under WAC 197-11-756. Therefore, the Lind-Wilkin LLA is not exempt from SEPA.

Compounding the omission, the applicant also failed to submit the SEPA filing fee. *See* BMC 21.10.190A (“complete application consists of . . . payment of the application fee”). That omission was not corrected for three years. *See, e.g.*, CP 1697 (Exhibit Q34).

Because the Lind-Wilkin LLA is not exempt from SEPA (and was not exempt when it was submitted), an environmental checklist and filing fee were required under BMC 16.20.110.A. Because the required environmental checklist and fee were not submitted by December 5, 2005

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<sup>2</sup> Lind’s application shows the creek on the site plan. CP 996 (City Exhibit P). This creek also is documented in the Bellingham Municipal Code. BMC 16.50.180 & Ex. A thereto (Ord. 10267S1, 1991).

(as evidenced by the City's letter dated Jan 21, 2006, City Exhibit D, CP 948) the application was not complete as of that date, it was not vested under the old Wetland Ordinance, and should be subject to the CAO if this matter is remanded to the city for further action. Substantial evidence in the record does not support a contrary finding (if one had been made).

b) The application lacked the required subdivision guarantee

The City requires a subdivision guarantee (evidencing the true owners of the subject lands) as part of an LLA application. Mr. Ayers testified that he did not deliver the required subdivision guarantee from First American until the following day (December 6, 2005) and asked that these documents be added to the existing file. TR 64/CP 691. *See also* CP 1144 (Ex. AA). Therefore, Mr. Ayer's testimony provides the applicant's own admission that the LLA application submitted to the City on December 5, 2005 was materially and substantively incomplete. Substantial evidence in the record does not support a contrary finding (if one had been made).

2. The application was not signed

An application must be signed by the property owner or his designated representative. A failure to sign can be fatal. *See, e.g., Hulo v.*

*City of Redmond*, 14 Wn. App. 568, 544 P.2d 34 (1975) (challenge to local improvement district dismissed because protest filed by one property owner was not signed). Exhibit Q37 (CP 1702) is a Request for Public Records on which a City employee wrote “1/4/06 waiting for complete application from applicant, need signature page will call when received and copied”. (Emphasis supplied.) This is consistent with Kim Weil’s testimony that on December 5, 2005 the subject application was not complete in accordance with BMC 16.50.100. Kim Weil testified that the City made several requests for complete information. City Exhibits D, E, F (CP 948, 951, 954).

Further, there apparently never was a signature provided by the entity that owned the property on December 5, 2005 (per the application, the owner was the Kenneth Nelson Trust). It is not sufficient for the application to be signed only by a contract purchaser (belatedly or otherwise). Legal title resides in the owner, not a contract purchaser. *Snuffin v. Mayo*, 6 Wn. App. 525, 528, 494 P.2d 497 (1972).

Thus, again, there is no substantial evidence to support a finding (if one had been made) that the application was complete. It lacked the requisite signatures.

3. The citizens are not bound by the Planning Staff's failure to make a completeness determination

Lind contends that Quenneville is precluded from raising the completeness issue because City staff did not raise the issue within 28 days of the filing of the application. *See* RCW 36.70B.070(4) (requiring city to assess completeness within 28 days). This raises an issue of state law subject to *de novo* review. RCW 36.70C.130(1)(b); *Short v. Clallam County, supra*; *City of Federal Way v. Town & Country Real Estate, LLC, supra*.

Lind's preclusion claim is legally deficient. Quenneville (and the other citizens raising the vesting issue) never had an opportunity to challenge the completeness of the application. The City's failure to address the completeness within 28 days cannot possibly bind third parties, like Quenneville or any other citizen.

In *Erickson*, the Court admonished that if "vested rights [are] too easily granted, the public interest is subverted." The argument advanced by the applicant would do just that. It would allow developers to submit incomplete applications and obtain vested rights simply because the City failed to address the incompleteness within 28 days. The requirement for a complete application is intended to limit permit speculation by assuring that

the developer has demonstrated a “substantial commitment” to the project. *Erickson, supra* at 874. The cost of preparing complete plans and application materials provides some indication that the application is submitted “in good faith,” and not just to beat the deadline of a new regulation. *Id.* If an incomplete application can be hurriedly put together and filed minutes before a new ordinance takes effect, and the City, for whatever reason, fails to recognize the application as incomplete, vested rights – inimical to the public interest – would be “too easily granted.” *See also Lauer v. Pierce Cy.*, 173 Wn.2d 242, 267 P.3d 988 (2011) (RCW 36.70B.070(4) not a bar where application contains knowing misrepresentations).

The State Supreme Court has held that “the duty to comply with building and land use codes lies within individual permit applicants, builders and developers, rather than local governments.” *Heller Building, LLC v. City of Bellevue*, 147 Wn. App. 46, 61, 194 P.3d 264 (2008). Here, nothing the City did precluded the applicant from filing a complete application before the new regulation took effect. Regardless what the City did or did not do thereafter, if the application was incomplete on the day it was filed, no vested rights were created.

The applicant's argument also overlooks that the 28-day rule for a jurisdiction to determine completeness is related to an issue separate from vesting. The 28-day rule was created in the Local Project Review statute, chapter 36.70B RCW. That statute does not address vesting. Rather, it was adopted to facilitate the application review process. *See* RCW 36.70B.010. Under that statute, the determination of completeness (to be made within 28 days) is not used for purposes of determining vesting, but rather for establishing other deadlines in the permit process. Specifically, absent unusual circumstances, the city or county must make a decision on a permit application within 120 days of when the application has been deemed complete. RCW 36.70B.080(1). The Bellingham Municipal Code includes similar provisions. "RCW 36.70B.070 and 36.70B.080 require that permit processing time frames be established. Decisions on Type I, II, III, and VII applications shall be made within 120 days of the date of a determination that the application is complete . . ." BMC 21.10.080A.

Thus, the staff's failure to make a completeness determination started a 120 day clock running. (The applicant's failure to provide information subsequently caused the clock to be "stopped" several times.) But, under State law, the lack of a completeness determination by City

staff has nothing to do with the vesting determination as to whether the application was, in fact, complete on the day it was submitted.<sup>3</sup>

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<sup>3</sup> We are aware that the City's vesting provision may ineptly attempt to cross-reference the regulatory reform completeness determination for vesting purposes, too. The vesting provision states that the completeness of an application will be determined pursuant to BMC 21.10.120 A. *See* BMC 21.10.260 A. But BMC 21.10.120 A does not address the completeness issue. That subsection deals with the pre-application conference. Perhaps the cross-reference was intended to be to BMC 21.10.110 C which provides that "an application shall be reviewed to determine whether it is complete under the procedures of Section 20.10.190." But the Bellingham Municipal Code does not contain a section numbered 20.10.190. Perhaps this second erroneous cross-reference was intended to cite to BMC 21.10.190. Subsection B.2. of that section provides that if the Director does not provide a written completeness determination within 28 days, the application shall be deemed complete at the end of the twenty-eighth day. Note, however, that pursuant to this "default" provision, the application is not deemed complete as of the date it was submitted. Rather, it is deemed complete "as of the end of the twenty-eighth day." Thus, even if the applicant were to attempt to utilize this default provision, it would do the applicant no good because it would extend the completeness date to a date subsequent to the effectiveness of the new critical areas ordinance (CAO).

Moreover, even if the two mis-citations are overlooked and this Code section construed to mean that the application was complete as of the date of filing (not 28 days later), this Code section would still run afoul of State law that prohibits jurisdictions from further liberalizing the vesting laws. As noted above, *Erickson* establishes that an application must, in fact, be complete on the date it is filed. *Erickson* does not allow an incomplete application to be "deemed" complete based on the failure of City staff to recognize the deficiency. To do so, would be to further liberalize (advance the date of) vesting, which is directly contrary to *Erickson*. In that case and others, the Court has basically stated it has gone as far as it will go in protecting developers' interests. *See, e.g. Lauer v. Pierce Cy., supra; Abbey Rd. Group, LLC v. City of Bonney Lake*, 167 Wn. 2d 242, 218 P.3d 180 (2009). Any ambiguity in the City's vesting provisions should not be construed to create a conflict with controlling case law. Therefore, the Court should reject Lind's claim that the application was irrefutably deemed complete as of the date it was filed.

D. The Application as Originally Filed Did Not Comply With Existing Zoning Ordinances and Other Land Use Controls

Regardless whether the application was complete on December 5, 2005, it did not vest because it did not comply with land use controls in effect on that day.

1. The application did not provide for adequate access

The lot line adjustment as submitted did not provide for adequate access to the proposed lots. Perhaps due to the haste with which it was prepared, the original lot line adjustment application shows no practical access to the site, TR 554/CP 122, obviously a deficient plan. It was only later that Lind's consultant, Mr. Ayers, submitted a plan proposing development of access on the Wilken Street right-of-way, though even then the design was illegal because it cut across a wetland in the right-of-way.<sup>4</sup> But that later submission was too late to cure the omission in the original application. On the day the application was filed, it was incomplete and could not vest.

2. The lots did not meet Code requirements for minimum lot size

Lots created through an LLA must meet minimum lot standards as specified in Chapter 18.36 BMC. *See* BMC 18.10.020. BMC 18.10.010

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<sup>4</sup> The only access shown was an unopened right-of-way that Lind later acknowledged contained wetlands. TR 557/CP 125.

B.2. requires that each lot “as proposed” meets the minimum lot size standards. The proposed lots do not meet that requirement. Therefore, the application was not consistent with the regulations in effect on the day it was submitted and could not give rise to any vested rights.

The relevant facts regarding this issue are not in dispute. By all accounts, at least one of the lots will not meet the applicable 20,000 square foot standard. According to the applicant’s surveyor, new Lot A will only be 19,864 square feet. *See, e.g.*, CP 996 (Permit Ex. C; City Ex. P). Other evidence submitted suggested that the discrepancy is even greater than that, CP 786-789, but that factual dispute is immaterial to resolving the legal issue. The legal issue is whether the application could vest if one of the proposed lots did not meet minimum lot standards per the admission of the applicant. That question must be answered in the negative. There is no allowance in the City Code for an LLA when one of the lots does not meet minimum lot size requirements. The sub-sized lot precluded vesting.

The applicant’s surveyor, Bruce Ayers, provided an elaborate historic account regarding how it came to be that proposed Lot A does not meet minimum lot size requirements. TR 21-34/CP 648-661. That historical account, while interesting, was irrelevant. It does not matter one wit whether surveyors a hundred years ago had less accurate measuring

devices. It does not matter that if these proposed lots had been surveyed a hundred years ago, the surveyors then might have mistakenly believed all of them would have met the 20,000 square foot minimum. The City Code does not allow a deviation from the minimum lot size requirement based on “historic accident.”

The evidence reveals that the *original* plat of these parcels did not encompass 60,000 square feet. CP 996. *See also* CP 1772 (Ex. Q 50). The surveyors then might have *thought* the lines on the plat encompassed 60,000 square feet, but they were mistaken – as Mr. Ayers candidly admits. TR 24/CP 651. Their mistake may have been due to the lack of modern surveying equipment, but the facts remain the facts. There simply was not 60,000 square feet enclosed within the applicable lines then and, thus, there is still not 60,000 square feet within the applicable lines now. Consequently, this area cannot be divided into three new lots of at least 20,000 square feet each as required by BMC 18.10.020. The lot line adjustment application was not consistent with the laws then in effect and could not give rise to vested rights. The Examiner’s conclusion that the City Code did not really require that each lot meet minimum size requirements was an error of law which should be reversed. RCW 36.70C.130(1)(b).

3. The proposed lots are too small to accommodate on-site septic

There was ample evidence introduced at the hearing that the lots are too small to accommodate the on-site septic systems. The shortcoming exists even if one assumes (wrongly) that the wetlands are protected only by a 50 foot buffer per the old critical area regulation. Even then, the site plan (CP 996 (City Exhibit P)) shows that with the appropriate building setbacks, there is no suitable area on Lots A and B for a drainfield meeting health district requirements. CP 1679 -1682 (Ex. Q28); TR 558/CP 685. *See* ch. 24.05 WCC. Lot C shows two undersized drain fields without consideration for the path and elevation of the required drainpipe. Even if they were appropriately sized, no easements were shown or provided for Lots A and B to use drainfields on Lot C. *Id.* The evidence demonstrated that the original site plan included drainfields that would be located on wetland buffers; drainfields within 100 feet of surface water; and drainfields within 50 feet of a regulated stream. The Health District will not approve on-site septic drainfields located in wetlands *or their buffers*. CP 1693.<sup>5</sup>

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<sup>5</sup> Quenneville testified that there is a creek that joins Feeder Creek A from the north (off-site). (TR 147 – 153) CP 774-780. Quenneville also testified that several small but continuous surface flows cut across his property. Specifically, he drew the outflow of a pond on his property which connects to the (regulated stream) Feeder creek A near the proposed drain field. CP 1725 (Exhibit Q41). Bruce Ayers quibbled over the accuracy of Mr. Quenneville's hand sketch, but the drawing shows the creek is clearly within 50 feet of

Likewise, the building envelope encroaches on wetland buffers and even on the main part of Wetland C, as Lind's wetland consultant admitted. TR 122 - 123/CP 749 - 750. *See also* CP 1092, 1093 (City Ex. S, Critical Areas Review: Wetland Delineation and Mitigation Plan). The original application also gave no consideration to the problems associated with the wetlands in the Wilkin Road right-of-way. Instead, the application proposed access right through those wetlands. TR 554/CP 122.

All of these examples of inconsistencies between the original application and the codes in effect at that time preclude any determination that the application vested on the day it was filed. If the court remands, the city should be instructed to review the application utilizing the current CAO.

Moreover, if the Planning Department ultimately concludes (as we think it must) that Wetland A is a Category I wetland, then under the old ordinance the required buffers would be 100 feet and there would be that much more evidence that the proposed lots were not adequately configured to meet setback requirements for on-site septic. Thus, even if the applicant could escape every other flaw in its vesting argument, it is not possible to conclude that the application is vested until after the Wetland A

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the drain field. Indeed, Mr. Ayers acknowledged on the last day of the hearing that he was not confident that he had located all water courses on the property. CP 308-309/TR 740:24 – 741:20.

categorization is completed. Only then can it be determined whether the application filed on December 5, 2005 was consistent with the laws in effect.

## VI. CONCLUSION

For the foregoing reasons and those articulated by the City in its brief, Lind's appeal should be denied in all respects and the matter remanded with instructions that because the application was incomplete, inaccurate and not consistent with the laws in effect on December 5, 2005, the application did not vest at that time.

Dated this 17<sup>th</sup> day of February, 2012.

Respectfully submitted,

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By:



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I am the legal assistant for Bricklin & Newman, LLP, attorneys for Mark Quenneville herein. On the date and in the manner indicated below, I caused the Brief of Appellant Mark Quenneville to be served on:

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DATED this 17<sup>th</sup> day of February, 2012, at Seattle, Washington.

  
ANNE BRICKLIN