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**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

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

Appellants,

v.

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

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal arises out of a Lot Line Adjustment application and a Wetland-Stream Permit application submitted by Lind Bros. Construction, LLC (“Lind”) to the City of Bellingham (“City”) in 2005. Lind owns three legal lots of record in the City of Bellingham, originating out of a plat that was recorded in the late 1800’s. Two of the lots are encumbered by wetlands; one is not.

Rather than apply to build homes on the existing lots, Lind proposed a Lot Line Adjustment (“LLA”) to re-configure the lots so all three would have a portion of upland and a portion of wetland and buffer. The new configuration improves the function and utility of the lots by reducing the environmental impacts and increasing the economic viability of the parcels, e.g. requiring less environmental mitigation and construction costs.

Lind’s application vested under the City’s 1991 Wetland-Stream Ordinance, Bellingham Municipal Code Chapter 16.50, Ordinance 10267 (“WSO”). Lind submitted no less than three expert evaluations of the wetlands on site, beginning with his original delineation and mitigation plan submitted in 2005, which was accepted by the City. For several years, Lind worked with the City to address any concerns and issues the City raised. The WSO provided the City with the procedures and

authority to mitigate any potential environmental impacts of Lind's project.

On June 24, 2009, the City unlawfully invoked its substantive authority under the State Environmental Policy Act, RCW Chapter 43.21C *et seq.* ("SEPA") to issue a Mitigated Determination of Non-Significance ("MDNS") imposing numerous improper conditions on the project. The City also sought comments from the public on the MDNS. In response, Appellant Mark Quenneville ("Quenneville"), and others provided many comments in opposition. Most of these were based on alleged environmental concerns relating to "mature forested wetlands."

Based solely on Quenneville's and others' purely speculative comments, on August 28, 2009 the City issued a 1st Revised MDNS, and on January 21, 2010 the City issued a 2nd Revised MDNS. Both of these MDNS's imposed an additional condition requiring Lind to hire another wetland expert to conduct a fourth wetland evaluation. The purpose: to disprove that there were "mature forested wetlands" on the property.

On January 22, 2010, the City issued Lind's Wetland-Stream Permit as well as approved Lind's LLA application. The Wetland-Stream Permit and LLA approvals incorporated the unlawful MDNS conditions. Lind and Quenneville both appealed.

The Hearing Examiner remanded the permits for further environmental consideration and denied Lind's appeal. Lind filed a LUPA petition. The superior court reversed the Hearing Examiner in all respects. The City and Quenneville appealed.

II. ASSIGNMENTS OF ERROR

While Lind is the named Respondent in this appeal, because the appeal originates from a Land Use Petition Appeal (RCW Chapter 36.70C), Lind acknowledges the standard of review here is the same as it was in the superior court below. As a result, Lind makes the following Assignments of Error.

A. Erroneous Findings of Fact. The following Findings of Fact entered by the Hearing Examiner are not supported by substantial evidence in the record: Nos. 43, 44-57, 59, 63, 64, 65, and 66.

B. Erroneous Conclusions of Law. The following Conclusions of Law were entered in error by the Hearing Examiner: Nos.13-14, 16, 17, and 20-22. The basis for challenging each conclusion differs and is stated within the briefing.

C. Erroneous Order. The entire order of the Hearing Examiner is erroneous, except for striking Conditions 8 and 9 from the MDNS and Conditions 17 and 18 from the Wetland-Stream Permit.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Were Quenneville's vesting arguments waived because he did not file a LUPA Petition appealing their denial?
- B. Alternatively, if Quenneville's vesting arguments are timely, do they have merit?
- C. Whether the City improperly used SEPA to impose conditions on the project when existing development regulations already addressed any potential adverse environmental impacts?
- D. Whether substantial evidence supports the challenged Findings of Fact.
- E. Whether the conditions of MDNS and the Wetland-Stream Permit were substantively proper?
- F. Whether the City illegally conditioned the LLA approval on the conditions of the Wetland-Stream Permit.

IV. STATEMENT OF THE CASE

Lind Bros. Construction, LLC is a small three-man operation owned by John Lind, who started the business with his brother in 2004. (CP 341). Lind was looking to showcase its potential as a new construction company and build its business by building a few homes. (CP 341-342). Lind purchased property in order to do this, which is the subject of this appeal. (CP 342).

Lind owns three legal lots of record in the City of Bellingham located on Wilkin Street at 30th Street (the "Property") (CP 918; 973).

The northern and western portions of the Property contain wetlands and buffers, while the southern portion is primarily uplands. (CP 1251-1253).

Lind recognized the undesirability of this scenario, from both a difficulty of construction and environmental protection perspective. In an effort to solve the problem, Lind made an application to the City for a lot line adjustment. The proposed new configuration of the lot lines changes the boundary line between the lots. (CP 920). This would allow homes to be built on the uplands of the new lots, rather than on wetlands and buffer, thereby significantly reducing negative impacts on critical areas. (CP 973).¹

On December 5, 2005, Lind submitted the LLA application along with a Wetland-Stream Permit application to the City of Bellingham Planning Department. (CP 1303-1304; CP 2097).² The protection of critical areas in the Project is vested to the rules contained in the City's 1991 Wetland and Stream Ordinance (the "WSO").³ On December 6, the City's new critical areas ordinance went into effect. (CP 2098, Finding 6).

In support of its application, Lind submitted a Wetland Buffer Impact Assessment and Mitigation Plan dated November 2005, which

¹ LLA Permit Finding of Fact No. 7.

² This is the Hearing Examiner's decision below. Numerous Findings of Fact were not appealed to the Superior Court under LUPA by Lind, and neither Quenneville nor the City filed a Land Use Petition challenging those findings.

³ The WSO is codified as *former* Bellingham Municipal Code ("BMC") 16.50.010 *et. seq.* and can be found at CP 1272-1296.

included a wetland delineation and categorization. (CP 1190-1234). At that time, the City accepted the wetland delineation pursuant to the WSO, as it did not request a third party review, as allowed under BMC 16.50.060. (CP 187; 190-191).

On June 21, 2006, the City requested Lind provide, among other things, additional information regarding “the full range of impacts” from the project. (CP 948-949). The City requested additional information on August 10, 2006 (CP 951-952) and February 27, 2009 (CP 954). Not once, through all these requests, did the City challenge the wetland delineation and classification.

On December 5, 2008, Lind’s engineers submitted the completed SEPA checklist to the City. Lind also submitted a new wetland Mitigation Plan prepared by Katrina Jackson of NWC, LLC, dated November 2008. (CP 1235-1268).

On February 27, 2009 the City requested Lind provide a mailing list and SEPA checklist fees. (CP 954). Both were provided by May 8, 2009. (CP 563-564). On May 22, 2009, the City issued a Notice of Application for the Permit to those on the mailing list. (CP 957).

On June 27, 2009, the City issued an MDNS. (CP 1152-1153). The City received public comments on that MDNS. Neighbors to the Project site, who had recently organized themselves in opposition to a

corporate developer's massive and unrelated project called the "Fairhaven Highlands" development (which was located in another part of this urban neighborhood) engaged in a form-letter writing campaign against Lind's Project.⁴

Most letter writers pressed the same issue they created with the Fairhaven Highlands development: that the project may involve the newly re-defined classification of "mature forested wetlands", which would impose greater land use restrictions. The neighbors wanted the City to ignore the Project's vested status, apply the new Critical Areas Ordinance, and limit the Project to one single family residence total. (CP 1730-1733).

On August 7, 2009, Kim Weil,⁵ the City employee charged with environmental review of the Project, contacted John Lind regarding the neighbors' speculation, stating she wanted to require Lind. to have an expert re-analyze the wetland to determine if it qualifies as a "mature forested wetland". (CP 963). This requirement was in direct response to the public comment on the June 27, 2009 MDNS. (*Id.*).

Despite the fact that two prior wetland studies by two separate wetland biologists and a third document review determined there was no

⁴ Numerous documents in the record show the voluminous materials submitted related to the Fairhaven Highlands, which is completely unrelated to this project. See CP 1306-1518 ("Citizen's Environmental Impact Statement"); CP 1559-60; CP 1703-1744; 1752-1789.

⁵ Kim Weil is also referred to in the record as Kim Spens.

mature forested wetland,⁶ Weil gave Lind two “alternatives” in proceeding: (1) hire a wetland biologist to do yet a third analysis before issuance of a Revised MDNS, or (2) allow the Revised MDNS to be issued with a third analysis listed as a condition, which Lind could then appeal. (*Id.*). Lind chose to allow the revised MDNS to be issued with the re-analysis as a condition, and then appeal. (CP 1790-1796).

On August 28, 2009 the City issued a Revised MDNS, adding Condition 10, requiring Lind perform a “tree analysis” to determine whether the wetland met the criteria for “mature forested wetland.” (CP 1154-1155) Lind immediately filed an amended appeal of the Revised MDNS, dated September 11, 2009. (CP 1797-1806).

On January 21, 2010 the City issued a Second Revised MDNS. (CP 1156-1157). This amended Condition 10 of the First Revised MDNS; Lind was now required to affirmatively “demonstrate” that the wetland was not a “mature forested wetland” before any “development permit application or site disturbance.” (*Id.*).

On January 22, 2010 the City approved the lot line adjustment (CP 973-977) and the Wetland-Stream Permit (CP 1158-1169), subject to a number of conditions. The Wetland-Stream Permit incorporated the

⁶ The 2005 Accepted Delineation did not find a “mature forested wetland” (CP 1190-1234), nor did the 2008 updated Mitigation Plan (CP 1235-1268), nor did the 2008 third independent evaluation (CP 1269-70).

SEPA requirement that Lind perform another wetland study focusing on mature forested wetlands. Lind objected to this and other conditions.

On February 4, 2010, Lind appealed the conditions of the LLA, Wetland-Stream Permit, and the Second Revised MDNS to the Bellingham Hearing Examiner. (CP 1807-1828). Mark Quenneville and Responsible Development (“RD”) appealed the permit approvals, but not the MDNS’s. (CP 1829). A 3 day hearing was held in January 2011.

Many witnesses testified at the hearing, including John Lind. Mr. Lind told the Hearing Examiner that he had three different wetland biologists analyze the site, to the cost of thousands of dollars. (CP 343). He said he tried to move the Project along as fast as possible, because it cost him money every month it was incomplete. (CP 345). Early on in the Project, Mr. Quenneville came up to Mr. Lind and told him that “he was going to do everything possible to make [the] project not happen.” (CP 343). This situation has brought Mr. Lind to the brink of bankruptcy. (CP 343).

On March 16, 2011, the Hearing Examiner entered Findings of Fact, Conclusions of Law and an Order. (CP 2030-2056). That decision upheld the LLA approval but essentially revoked the Wetland-Stream Permit, remanding it to the City and requiring Lind to perform the mature

forested wetland analysis.⁷ This went against even what the City had requested, which was to uphold the permits, with the conditions that were issued.

The Hearing Examiner denied Quenneville's vesting challenge. (CP 2047-2049, Conclusions of Law 1 – 5). The Hearing Examiner also denied Quenneville's challenge to the approval of the LLA. (CP 2049-2051, Conclusions of Law 6-11).

Quenneville filed a motion to reconsider the Hearing Examiner's ruling on the vesting issue. (CP 2062-2066). The City opposed Quenneville, (CP 2068-2074), as did Lind. The Hearing Examiner denied the motion to reconsider on April 6, 2011. (CP 2080-2082).

Lind was the only party that timely filed and served a Land Use Petition of the Hearing Examiner's ruling, pursuant to RCW Chapter 36.70C *et seq.*, the Land Use Petition Act ("LUPA"). (CP 2083-2122). In that petition, Lind raised specific challenges to portions of the Hearing Examiner's ruling, but not others. (CP 2090-2092). Specifically, Lind did not appeal the Hearing Examiner's ruling on Vesting or the approval of

⁷ The Hearing Examiner agreed with Lind's arguments in part and ordered removed Conditions 8 and 9 from the Second Revised MDNS and Conditions 17 and 18 from the Wetland-Stream Permit. (CP 2056). These conditions dealt with street and right-of-way width, and sewer and water main requirements. (MDNS, CP 1157; Wet-Strm Permit, CP 1163-64).

the LLA. The superior court reversed the Hearing Examiner (CP 18-20), and the City and Quenneville now appeal.

V. STANDARD OF REVIEW

Judicial review of a land use decision is governed by LUPA.⁸ This Court sits in the same position as did the superior court, applying the LUPA standards directly to the administrative record before the Hearing Examiner, giving no deference to the superior court's findings.⁹ In this case, Lind must establish one of the following errors:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) 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;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

⁸ *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008).

⁹ *Id.* at 54-55.

Standards (a), (b), (e), and (f) present questions of law, which the Court reviews de novo.¹⁰ However, deference is afforded to a local authority's construction of its own ordinances to the extent they are within its expertise.¹¹

Under standard (c), “substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. This Court must give deferential review, considering all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.¹²

Under standard (d), “An application of law to the facts is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹³

VI. ARGUMENT

A. **Quenneville Has Waived the Ability to Challenge the Hearing Examiner’s Rulings on Vesting.**

Quenneville’s only independent argument on appeal asks this Court to reverse the Hearing Examiner’s ruling that Lind’s LLA and

¹⁰ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).

¹¹ *Id.*; see also RCW 36.70C.130(1)(b).

¹² *Id.*

¹³ *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotation marks omitted) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)).

Wetland-Stream Permit were vested under the 1991 WSO.¹⁴ The City, on the other hand, agrees with the Hearing Examiner and Lind that the project was vested. Quenneville did not properly preserve this issue for appeal.

Quenneville is barred from addressing any issues other than those raised by Lind in his LUPA petition, because he did not timely file and serve his own LUPA petition on issues he wished to challenge. LUPA is the exclusive means of appealing or challenging a land use decision.¹⁵ The Hearing Examiner's decision was a "land use decision"¹⁶ and must have been appealed pursuant to LUPA. A LUPA petition is timely only if filed and served within 21 days of the issuance of the land use decision.¹⁷

A party's failure to timely file and serve a LUPA Petition in a scenario such as this has been addressed by Division II in *Lakeside Industries v. Thurston County*.¹⁸ There, Lakeside Industries applied for a special use permit to construct an asphalt plant.¹⁹ As part of the permit process, the county issued an "MDNS" despite local citizen's skepticism about whether the project complied with local planning policies. A citizen

¹⁴ See Brief of Appellant Mark Quenneville.

¹⁵ RCW 36.70C.030 (RCW Chapter 36.70C is the "exclusive means of judicial review of land use decisions."). See also, *Holder v. City of Vancouver*, 136 Wn. App 104, 108, 147 P.3d 641 (2006).

¹⁶ RCW 36.70C.020(2)(a).

¹⁷ RCW 36.70C.040(3).

¹⁸ *Lakeside Industries v. Thurston County*, 119 Wn. App 886, 83 P.3d 433 (2004).

¹⁹ *Id.* at 890.

group appealed the MDNS to the Hearing Examiner who upheld the MDNS and granted Lakeside the permit.²⁰

The citizen group then appealed to the county board of commissioners. The board of commissioners reversed the Hearing Examiner, but on grounds unrelated to the MDNS.²¹

Lakeside filed a LUPA petition in superior court challenging the Board's reversal. That petition was filed on October 24, day 20 of the appeal period.²² Two citizen groups filed an answer to the LUPA petition, one on November 9, (15 days after the 21 day appeal period had run) and the other on November 14, (20 days after the 21 day appeal period had run).²³ The superior court summarily denied the citizen groups' challenges as untimely under LUPA,²⁴ holding that the citizen groups "cross-appealed the non-significance determination within 21 days of Lakeside's LUPA petition, but not within 21 days of the Board's decision."²⁵

The *Lakeside* court affirmed the trial court. In so doing, the court noted the general rule that counterclaims are not permitted in administrative appeals, and the 21 day filing period found in RCW

²⁰ *Lakeside*, 119 Wn. App at 892.

²¹ *Id.* 892-893.

²² *Id.* at 900.

²³ *Id.* at 893.

²⁴ *Id.* at 900-901.

²⁵ *Id.* at 901-902

36.70C.040(3) is unambiguous and, more importantly, jurisdictional. The court explained how the citizen groups could have easily filed a timely appeal within 21 days of the issuance of the decision.

Here, Quenneville never filed a LUPA petition to the superior court, despite having “lost” on some issues before the Hearing Examiner. As a result, he did not preserve any of his potential challenges to those adverse rulings. Lind was the only party to file a LUPA petition, and that petition specifically sets forth the rulings being appealed. Lind did not appeal the Hearing Examiner’s ruling on vesting.

Since Quenneville did not file a LUPA petition to superior court, the superior court had no jurisdiction to grant any affirmative relief to him on issues not appealed by Lind. This Court now stands in the same position of the superior court below, and only obtains the same jurisdiction the superior court had. To hold otherwise, would reduce certainty and finality in land use decisions, and no participant in the original administrative decision could consider an issue finalized.²⁶

B. On the Merits, the Project Was Vested to the 1991 WSO

If this Court reaches the merits of the vesting issue raised by Quenneville, Lind still prevails and the Hearing Examiner is affirmed. Quenneville generally alleges two bases for “unvesting” the project: (1) he

²⁶ *Lakeside*, 119 Wn. App at 901.

argues that the application was not “complete” and therefore not vested; and, (2) he argues that the application did not comply with existing zoning and land use ordinances. These arguments can be re-titled more accurately as follows: (1) this court should adopt a strained interpretation of the Bellingham Municipal Code; and, (2) this Court should apply an incorrect common law analysis to vesting, rather than the Bellingham Municipal Code. For the reasons stated below, both of these arguments fail.

1. The Project Vested Under the Bellingham Municipal Code

Bellingham Municipal Code (“BMC”) Title 21 is titled “Administration of Development Regulations” and BMC Chapter 21.10 is titled “Procedures and Administration.” BMC 21.10.030²⁷ states “The provisions of this title supersede all other procedural requirements that may exist in other sections of the Bellingham Municipal Code. When interpreting and applying the standards of this Code, its provision shall be the minimum requirements.”

²⁷ BMC Chapter 21.10 was first adopted in 2004, by Ordinance 2004-09-065. This is the version that was in effect on December 5, 2005, the date Lind filed his applications. The relevant excerpt of Ordinance 2004-09-065 is attached here as Appendix A for reference. Because some of the provisions of Chapter 21.10 have been amended since Lind’s application submittal, references in this brief to Chapter 21.10 will be to those sections found in Ordinance 2004-09-065 and appended hereto.

BMC 21.10.260 is entitled “Vesting” and states in pertinent part:

A. Vesting of Land Use Applications. Unless provided otherwise by this section, an application for a land use permit or other project permit **shall be considered under the development regulations in effect on the date of filing of that complete application as defined in BMC 21.10.120A....**²⁸

A “project permit” is defined in BMC 21.10.020.F as

“[A]ny land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, bindings site plans, planned unit developments. . . site plan review, permits or approvals required by critical area ordinances”

The Wetland-Stream Permit is a “project permit” because it is a “permit or approval required by critical area ordinances.” Further, the broad nature of the definition of “project permit”, e.g. “including but not limited to” coupled with the edict that Title 21 supersedes all other procedural rules in the BMC, means that the Wetland-Stream Permit vests under this statutory scheme.

a. Complete Application

BMC 21.10.260 cross references BMC 21.10.120.A for the definition of “complete application.” This is an obviously incorrect cross

²⁸ Emphasis added.

reference.²⁹ Instead, BMC 21.10.190.B is the applicable provision titled “Determination of Complete Application” and provides

1. This subsection applies to applications requiring a Type I, II, III, or IV process
2. Within 28 days after receiving a permit application, the City shall mail, fax or otherwise provide to the applicant or his authorized representative a written determination which states either that the application is complete or that the application is incomplete and what is necessary to make the application complete. If the Director does not provide a written determination within the 28 days, the application shall be deemed complete as of the end of the 28th day.

The ordinance goes on to state that an application is complete when it meets the requirements established by the Director and is sufficient for continued processing, even though additional information may be required.

The evidence is undisputed that Lind filed his LLA and Wetland-Stream Permit application on December 5, 2005. (CP 1303-1304). The evidence is undisputed that the application was reviewed at the counter to make sure all submittal requirements were included. (CP 480). The

²⁹ Quenneville argues in a footnote to his brief that this obvious scrivener's error somehow means the Hearing Examiner and this court should ignore the applicable code sections. This proposition runs afoul of principles of statutory construction. *See, Prince v. Savage*, 29 Wash. App. 201, 206, 627 P.2d 996 (1981) (“[i]n interpreting a statute, a single sentence of a statute cannot be considered in isolation. It is our duty to consider all of the provisions of the act in relation to one another and attempt to harmonize the various provisions in order to insure proper construction of each”).

evidence is further undisputed that Lind paid the application fees for the permit applications on December 5, 2005. (CP 1304; 563; 480).³⁰ Finally, the evidence is undisputed that the City did not issue a written determination regarding the completeness of the application. Thus, the application was “deemed complete” by operation of law on January 2nd.³¹

b. Date of Vesting.

Quenneville argues that the phrase “shall be deemed complete as of the 28th day” means that the application vests on the 28th day rather than the date the application was filed. This interpretation ignores the plain language of the ordinance (BMC 21.10.260), would end in an absurd result, and violate the principles behind vested rights.

BMC 21.10.260 states that the application is vested and “shall be considered under the development regulations in effect **on the date of filing** of that complete application.”³² If Quenneville’s argument prevails, the phrase “on the date of filing” would be given no meaning. However giving the phrase its plain meaning makes sense: an application is “deemed complete” by operation of law 28 days after it was filed, but it

³⁰ The SEPA fee was paid later once the City determined it was required.

³¹ Quenneville was aware of the December 5, 2005 application as early as January 19, 2006. He could have appealed the “completeness” determination back then had he chosen to.

³² Emphasis added.

vests to the development regulations in effect on the date the application was filed.

Quenneville's argument would also give the City unfettered authority to "unvest" projects; this is an absurd result in light of the purpose of the ordinance and the vested rights doctrine.³³ The City could intentionally not issue a written determination on completeness on any application it wanted to "unvest." Under Quenneville's theory, that alone would bump up the vesting date 28 days from the date the permit was filed. The City could do this regardless of whether the permit was in fact complete on the date filed. This is an absurd result, particularly in light of the purpose of vesting.

The policy behind vesting is to create a "date certain" upon which an applicant can rely to analyze the laws applicable to the project.³⁴ Take December 5, 2005 as an example. Kathy Bell testified that the City received many applications on this date, the last day the 1991 WSO was effective. She also testified that many of those applications were deemed complete by operation of law. Under Quenneville's argument each and every one of those applications is not vested. This goes against the policy behind vesting.

³³ Washington courts have long recognized that the vested rights doctrine is in large part to provide fairness and certainty to applicants in planning their projects. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 280, 943 P.2d 1378 (1997).

³⁴ *Noble Manor*, 133 Wn.2d at 280.

Finally, this proposed interpretation violates state law. RCW 58.17.033 (subdivision vesting ordinance) and RCW 19.27.095 (building permit vesting ordinance). Both of these vesting statutes indicate that an application vests “at the time” of application. Both statutes go on to state that the requirements of a complete application shall be defined by “local ordinance.”³⁵ Interpreting BMC 21.10.290 to mean anything other than that an application vests on the date it is filed would be to interpret the ordinance in conflict with state law. That result is improper.³⁶

2. Elements of Common Law Vesting are Inapplicable.

Quenneville spends much of his time arguing that Lind’s application was actually “incomplete” by citing facts such as an incomplete SEPA checklist or no subdivision guarantee. As authority for his proposition, he cites *Valley View Industrial Park v. City of Redmond*³⁷ to demonstrate the “elements” of vesting.

Quenneville incorrectly cites the authorities on vesting. *Valley View* is a case which analyzes the state’s common law vesting doctrine.³⁸ That doctrine is the basis of the three “elements” Quenneville cites as

³⁵ RCW 58.17.033(2) and RCW 19.27.095(2).

³⁶ *Davis v. Taylor*, 132 Wn.App. 515, 720, 132 P.3d 783 (2006) (Courts attempt to interpret county ordinances so that they do not conflict with state law. County ordinances conflict with a state statute when they permit what is forbidden by state law or prohibit what state law permits).

³⁷ *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987).

³⁸ *Noble Manor Co. v. Pierce County*, 81 Wash. App. 141, 143-44, 913 P.2d 417 (1996) aff’d, 133 Wash. 2d 269, 943 P.2d 1378 (1997).

authority for the majority of his arguments— (1) Sufficiently complete application; (2) Complies with existing zoning and building codes; and, (3) Filed during applicable period of zoning or building code.³⁹

The common law vesting elements are not applicable here. The doctrine was used prior to 1987, when the common law vested rights doctrine applied only to building permits.⁴⁰ In 1987, the legislature chose to codify and expand vesting rights, the culmination of which was RCW 58.17.033 and RCW 19.27.095.⁴¹

As long as the City’s vesting ordinance scheme does not: (1) run afoul of the common law purpose of vesting; (2) grant rights prohibited by state law; or (3) restrict rights granted by state law it is applicable:

We agree with Erickson that our prior cases apply the vested rights doctrine in other contexts besides building permits. However, none of these cases prevent a municipality from developing a vesting scheme like the one in place in Seattle. Our vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit review. Instead, the doctrine places limits on municipal discretion and permits land owners or developers “to plan their conduct with reasonable certainty of the legal consequences”. *West Main Assocs.*, 106 Wash.2d at 51, 720 P.2d 782. **Within the parameters of the doctrine established by statutory and case law, municipalities are**

³⁹ *Noble Manor*, 81 Wash. App at 143-44.

⁴⁰ *Id.*

⁴¹ *Noble Manor*, 133 Wn.2d at 275.

free to develop vesting schemes best suited to the needs of a particular locality.⁴²

Here, the state legislature chose to delegate authority to local jurisdictions to determining when an application is complete for purposes of vesting, but stated they shall vest on the date of filing. BMC 21.10 does what state law allows it to do—nothing more, nothing less. The elements of common law vesting as argued by Quenneville do not control this case.

3. SEPA Checklist.

This argument was addressed adequately by the City in its response to Quenneville’s motion for reconsideration before the Hearing Examiner (CP 1151 – 1157), as well as the Hearing Examiner’s ruling (CP 1163-1165). These arguments are incorporated herein by reference because Quenneville has raised nothing new on appeal nor stated why the Hearing Examiner was wrong. The definition of “lands covered by water” encompasses only “lands underlying the water areas of the state below the ordinary high water mark.”⁴³ The application submitted on December 5, 2005 did not propose any construction or development below the ordinary high water mark.

⁴² *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 872-73, 872 P.2d 1090 (1994) (emphasis added).

⁴³ WAC 197-11-756.

C. The City Improperly Used SEPA to Impose Permit Conditions Through an MDNS.

Lind appealed all three MDNS's, alleging that the City improperly imposed conditions through an MDNS which should have been administered through the WSO. The Hearing Examiner avoided the issue, simply concluding that "the City did not impose additional mitigation under SEPA. It merely repeated the requirements of applicable development regulations." (CP 2053; Conclusion 17). This was an erroneous interpretation of the law and an erroneous application of the law to the facts.

The wetlands at issue in this case are regulated by the 1991 WSO.⁴⁴ The WSO provides the City with all the tools necessary to impose conditions or mitigate impacts to wetlands and buffers. Rather than use the authority it had under the WSO, the City chose to engage in a SEPA process, issuing an MDNS that contained conditions related to items that were already adequately addressed by the WSO and other existing development regulations. It did this because, frankly, it failed to use the WSO procedures early on.

Under RCW 43.21C.240, the MDNS in this case should not have addressed wetland issues, nor should it have addressed right of way, street

⁴⁴ CP 1272-1296.

width, or water and sewer issues. The Hearing Examiner agreed with the latter, and struck MDNS conditions 8 and 9. (CP 2054; 2056).

1. RCW 43.21C.240 Prohibits Use of SEPA to Mitigate Wetland Impacts in this Case.

SEPA is a gap-filler, used only to supplement project review when potential adverse environmental impacts *were not considered* by the municipality.⁴⁵ The Legislature intended SEPA to have limited applicability when a city or county planning under the Growth Management Act (the “GMA”) has already implemented development regulations addressing the potential adverse environmental impacts of a project.

Bellingham is a GMA planning city, and enacted the WSO to specifically regulate development activities involving wetlands and streams pursuant to the GMA.⁴⁶

The Legislature did not intend for SEPA to override local development standards, including environmental development regulations like the WSO. In 1995, the Legislature made this intent clear when enacting the Integration of Growth Management and Environmental Review Act, which:

[S]eeks to avoid duplicative environmental analysis and substantive mitigation of development projects *by*

⁴⁵ *Moss v. City of Bellingham*, 109 Wn. App. 6, 22, 31 P.3d 703 (2001).

⁴⁶ See the recitals of the WSO (Ordinance 10267) at CP1273.

assigning SEPA a secondary role to (1) more comprehensive environmental analysis in plans and their programmatic environmental impact statements and (2) *systematic mitigation of adverse environmental impacts through local development regulations* and other local, state, and federal environmental laws.⁴⁷

The WSO is a “local development regulation” that provides for “systematic mitigation of adverse environmental impacts.”

RCW 43.21C.240 specifically makes illegal what the City did here—use SEPA to impose conditions addressing environmental issues already addressed by GMA adopted development regulations. RCW 43.21C.240 provides that cities may not impose additional mitigation measures for probable specific adverse environmental impacts that have been adequately addressed elsewhere:

If a county, city, or town’s comprehensive plans, subarea plans, and development regulations adequately address a project’s probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the county, city or town shall not impose additional mitigation under this chapter during project review.⁴⁸

This statutory language is bolstered in the administrative code:

If a GMA county/city's comprehensive plan, subarea plan, or development regulations adequately address some or all of a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this

⁴⁷ *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (emphasis added) (quoting Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Appendix E, p. 505 (1995)).

⁴⁸ RCW 43.21C.240(3)

section, the GMA county/city *shall not require additional mitigation* under this chapter for those impacts.⁴⁹

The question of whether the WSO “adequately addresses a project’s probable specific adverse environmental impacts” or “adequately addresses some or all” of the probable specific adverse environmental impacts of the proposed project is not a subjective determination. It does not involve an analysis of the newer 2005 Critical Areas Ordinance currently in effect or “best available science.” Instead, RCW 43.21C.240(4) expressly dictates when a local ordinance “shall” be considered to have “adequately addressed” an environmental impact:

(4) A comprehensive plan, subarea plan, or ***development regulation*** shall be considered to adequately address an impact if the county, city, or town, through the planning and environmental review process under chapter 36.70A RCW and this chapter, has identified the specific adverse environmental impacts and:

(a) The impacts have been avoided or otherwise mitigated; or

(b) ***The legislative body of the county, city, or town has designated as acceptable certain*** levels of service, land use designations, ***development standards, or other land use planning*** required or allowed by chapter 36.70A RCW.⁵⁰

The WSO is a “development regulation” required under RCW 36.70A (the Growth Management Act). The City, through the WSO, has identified the specific adverse environmental impacts, e.g. impacts to

⁴⁹ WAC 197-11-158(5) (emphasis added).

⁵⁰ RCW 43.21C.240(4) (Emphasis added).

wetlands and buffers. The City has adopted land use designations, development standards and land use planning, pursuant to RCW Chapter 36.70A to deal with and mitigate those impacts—namely, the WSO. As a result, the City was required pursuant to RCW 43.21C.240, to use the WSO to address all environmental impacts related to wetlands.

The City sufficiently considered a huge amount of information regarding the potential environmental impacts of any project on a wetland or stream when it enacted the WSO.⁵¹ The recitals to the WSO demonstrate the work, public process, breadth of information, and public input that went into the drafting of it. The WSO recitals specifically state that the potential impacts on wetlands received a considerable degree of scrutiny in the process of adopting it:

...WHEREAS, the potential impacts of this chapter on human and environmental health, public benefit, private property ownership and future growth patterns have been considered and this chapter has received a SEPA determination of environmental nonsignificance⁵²...

The WSO is a complete and comprehensive wetland and stream regulatory chapter that involved a community “multi-year, educational, fact finding and consensus building process through formation of a citizen advisory

⁵¹ See CP 1273, City of Bellingham Ord. 10267 (recitals of BMC 16.50).

⁵² *Id.*

task force, provision of workshops and public meetings all resulting in recommendations for developing this regulatory chapter”.⁵³

The WSO represents the City’s best attempt to protect wetlands and streams as required by the GMA while at the same time balancing property rights. RCW 43.21C.240 was created in part to streamline and protect land use applicants’ rights to certainty and fairness by ensuring environmental project review was not used to impose barriers amounting to ad-hoc development “regulations” which are not vetted through the GMA planning process.

2. The MDNS Was Used to Skirt the WSO Procedures, Prejudicing Lind.

The first MDNS was issued in June 2009, three and half years after the permit was submitted and six months before the Wetland-Stream Permit was issued in January 2010. (CP 1152-1153). This is not insignificant. The use of SEPA and an MDNS was the trigger which invoked massive public opposition and comment to the project. That public comment came three and a half years after the original wetland delineation had already been accepted by the City. (CP 246-247). It is this public comment that the City then used to impose Second Revised

⁵³ *Id.*

MDNS Condition 10 regarding mature forested wetlands. (CP 47). The mature forested wetland issue was new to the City in 2009. (CP 196).

The WSO provides all the public notice, mitigation and measures necessary to adequately protect the wetlands in this case. Using SEPA was unnecessary. The ordinance provides comprehensive procedures for applying for, analyzing, and making determinations under the WSO. The City has never asserted that the WSO fails to sufficiently address all potential adverse environmental impacts, in fact, the City argues that the MDNS conditions were actually based on the WSO. (CP 193; see also City's Brief). If that is the case, an MDNS should never have been issued with conditions related to wetlands.

BMC 16.50.100 details the Wetland-Stream Permit application process. Lind submitted a permit application pursuant to BMC 16.50.100(C), with all required documentation. Lind's permit application was complete upon the expiration of 28 days after it was submitted.

BMC 16.50.100.D requires notice be given to specified persons, depending on the category of wetland being used, and those persons presumably have an opportunity to respond. When the City deems an application complete, it must follow BMC 16.50.100(D). Lind's application was complete on January 2, 2006. Submitted with that application was a Wetland Delineation Report which the City accepted.

That triggered the City's duty under the WSO to provide notice to interested agencies (ie. the Department of Ecology) and interested individuals (ie. Quenneville). However, the City did not do this in 2006.

Instead, the City did not post a notice of the Wetland-Stream Permit application until 2009 when the City did so through the SEPA process. (CP 957). Even then, with the property being posted and the neighbor Mr. Quenneville closely monitoring this application, very few comments were submitted by the June 5, 2009 deadline.⁵⁴ The majority of comments arrived in response to the MDNS.

The Hearing Examiner blames Lind for the failure to initiate the public notice and comment period until 2009. (CP 2055; Finding 22). But the "delay" in providing a mailing list was related only to the SEPA notice, not the notice required under the WSO. The obligation to initiate public notice for the Wetland-Stream Permit was triggered when Lind's permit application was deemed complete. Under the WSO, that obligation resided with the City, not Lind.

BMC 16.50.060.A governs the delineation and classification of wetlands. The ordinance specifically states that a field survey by a "wetland specialist" shall be submitted to the City. Lind did this. (CP

⁵⁴ See generally the written comments submitted. CP 1703-1744. The lion's share of these comments were received after the June 5, 2009 deadline provided in the notice, including comments from anyone with qualifications to speak on the issue of mature forested wetlands.

1190-1234; 1171-1189). Once the City reviews this and conducts whatever due diligence is necessary, it has the option of “requiring adjustments to the boundary delineation.” If the applicant contests any proposed adjustment, a joint wetland specialist will be hired at the cost of the applicant to delineate the “disputed boundary.” Here, the City concedes that the 2005 delineation and classification was accepted and never challenged through the WSO. (CP 187; 190-191).

Instead of following WSO procedures, the City ignored them and years later, tried to use SEPA to fix its mistake. Lind followed the applicable ordinance and submitted a delineation, the November 2005 Vicki Jackson Wetland Delineation Report. The City did not engage in the process under BMC 16.50.060 to “challenge” or otherwise change this delineation. Lind also submitted the November 2008 mitigation plan by Katrina Jackson which was never rejected. Lind relied on these approvals, and the WSO, spending tens of thousands of dollars on developing a site plan and infrastructure engineering in accord with these accepted environmental documents.

Had the City followed its own rules established by the WSO, it is likely that any additional issues relating to wetlands would have been investigated early on in the project, before engineering and other expensive investments were made by Lind. Instead, the City approved the

2005 delineation and encouraged Lind to invest in the project, only to use SEPA four years later to issue an MDNS requiring additional wetland study. This was improper, inequitable, and contrary to law.

D. There Was Not Substantial Evidence to Support Findings of Fact 43, 44-57, 59, 63-66, and 68.

Findings of Fact 43, 44-57, 59, 63-66, and 68 all deal in some measure with the issue of “mature forested wetlands” which is found as Condition 10 in the Second Revised MDNS and Condition 1 of the Wetland-Stream Permit. Pursuant to RAP 10.4(c) the above-challenged findings of fact are set forth verbatim in Appendix B, which contains excerpted portions of the Hearing Examiner’s Decision at CP 2030-2056.

1) **Finding #43.** This finding is challenged in its entirety. The process of delineating a wetland includes inquiry into whether a mature forested wetland exists. Lind’s experts performed the investigation necessary to delineate and categorize the wetland areas. Vikki Jackson is a wetland expert who determined that two classes of wetlands were present on site—“depressional” wetlands (CP 1215) and “slope” wetlands. (CP 1225). For both of these classes of wetlands, she had the opportunity to indicate whether they contained “mature forests.” (CP 1223; CP 1232). Instead of checking those boxes, Vikki Jackson noted that they were

“Riparian” and “Urban Natural Open Space.” (*Id.*) Her mitigation report also found no mature forested wetlands. (CP 1171-1189).

Katrina Jackson is a second wetland biologist expert who reviewed the site. (CP 697-698). She has visited the subject site at least four times over two years. (CP 699). She actually conducted her own limited delineation as well as reviewed that of Vikki Jackson.⁵⁵ (CP 700). Katrina Jackson testified that the mitigation and avoidance plan in this project is “picture perfect” because it moves the buildings and infrastructure as far away from critical areas as possible. (CP 702). She further testified that any of the large trees on the Lind site were not rooted in the wetlands. (CP 738).⁵⁶ Katrina Jackson was adamant that she walked the property several times and would have noticed if it had the attributes of a mature forested wetland. (CP 741).

Moreover, a third expert, Kyle Legare of the Jay Group, submitted a report analyzing the propriety of both Vikki Jackson and Katrina Jackson’s evaluations of the wetlands on site. He agreed with them both. (CP 1269-1270). He mentions nothing about mature forested wetlands.

Each of the experts had an opportunity to analyze the site for mature forested wetlands and found none on site. The Hearing

⁵⁵ Katrina Jackson did not re-delineate the wetlands that Vikki Jackson had delineated in 2005.

⁵⁶ Under the City’s definition of mature forested wetlands, the “mature” trees must be located in the wetland, not just on the site. CP 963.

Examiner's finding that none of the experts "engaged in the field investigation necessary to determine the potential existence of a mature forested wetland" on site is not supported by evidence in the record. The only evidence in the record is that the neighbors opposing the project asserted there was a mature forested wetland, and the experts who actually visited and analyzed the site found there was not.

2) **Findings #44-57.** These findings are challenged in their entirety. These findings essentially re-state applicable provisions of the Bellingham Municipal Code. The Bellingham Municipal Code is a formally adopted ordinance scheme which speaks for itself. The Hearing Examiner's factual findings on what the Code says are irrelevant and superfluous. They should be stricken.

3) **Finding #59.** This asserts the 2005 Vikki Jackson delineation report "shows no indication of wetland type". The finding implies that the report never touches on mature forested wetland or categorization, which is not a correct characterization of the report. While the finding is correct in that that the box under "wetland type" is not checked, including "none of the above," the report expressly states that none of the special characteristics, including mature forested wetland characteristics, are present for the wetland areas. (CP 1215; 1225).

“Does not apply” is purposely checked and indicates the absence of a mature forested wetland.⁵⁷

The finding read as a whole does not accurately reflect the evidence in the report itself or the entire record. As a result, as phrased, it is not supported by substantial evidence.

4) Finding #63. Quenneville’s lay opinion and “informal survey of trees” is directly contradicted by professionals in the 2005 NES Wetland Delineation Report and the testimony of Katrina Jackson. (CP 738; 741). This finding is also misleading as it fails to state that Quenneville’s “informal survey of trees” on Lind’s property was performed without Lind’s permission to enter upon its land. Finally, this finding misleadingly characterizes Quenneville’s professional qualifications as having relevance to the issues in this appeal.

Quenneville admits he has no training or employment as a wetland or stream specialist or biologist. (CP 831). Quenneville has an engineering degree and has worked in the software industry, for Microsoft and Boeing Space and Defense. (CP 832). He has zero knowledge or experience in evaluating wetlands or identifying mature forested wetlands. (CP 832-833). The Finding should be stricken to the extent it implies in

⁵⁷ See CP 741-742 (testimony of Katrina Jackson explaining Vikki Jackson’s forms).

any way that Quenneville is qualified to perform a tree survey or that the tree survey is evidence of a mature forested wetland.

5) Finding No 64. This finding is not supported by substantial evidence that McLaughlin “observed the subject site and looked at the watercourses on the site”. To the contrary, McLaughlin testified that he could not tell where the property boundaries are or whether he was actually on Lind’s Property: “I was visiting there for the first time and I was looking at the wetlands and I wasn’t always sure of which property I was on and which property boundaries.” (CP 904). It is improper for the Hearing Examiner to find that he observed the site and looked at the watercourses on the site when his own testimony proves he did not even know where he was.

6) Finding No 65. This finding is not supported by substantial evidence. Nick Sky did not become “familiar with the subject property” nor is he qualified to comment on the “subject proposal”. Sky testified that he had “wandered around” the area of “hoag pond.” (CP 462). Hoag Pond is *not* on or part of the subject property. Sky also testified that he could not even identify the boundaries of the Lind Property: “I’m not sure that I have ever walked on the—on the Lind property itself.” (CP 473). He did not formally delineate the wetlands on the property. (CP 469). His experience is in forest ecology, not wetlands. (CP 469). Finally, Mr.

Quenneville is Mr. Sky's landlord. (CP 471). His conclusions are merely speculative and not supported by substantial evidence in light of the fact he did not know if he was on the Lind property or not.

7) **Finding No. 66.** Dr. Cooke could not identify if she had actually "visited the subject site". Further, her testimony regarding the location of wetland flags is at best questionable, and not supported by substantial evidence. Dr. Cooke testified⁵⁸ "it can be very hard to tell" what property she visited. (CP 508-509). She used city GIS maps and relied on her identification of landmarks on those maps to orient herself. (CP 509). She also admits that she placed no actual flags on site, nor did she have a formal survey of those flags done. (CP 511-512).

Katrina Jackson testified that Dr. Cooke's observations regarding the delineation flags led Jackson to believe that Cooke could have been disoriented. (CP 332-335). Jackson testified that in 2010 when she was at the site most of the flags were still present. (CP 332-333). Dr. Cooke, who had only visited the site once, testified that there were many flags missing, which raised concern for Katrina Jackson, who had visited the site at least four times and seen most the flags. (CP 333-334).

This finding is also not supported by substantial evidence to the extent it is misleading. The finding fails to state that if Cooke "visited the

⁵⁸ It is worthy to note that Dr. Cooke testified via telephone and not in person.

subject site” on Lind’s property, she did so without Lind’s permission to enter upon its land. The Hearing Examiner committed error by refusing to allow Lind’s counsel to ask Dr. Cooke whether she had Lind’s permission to enter its land. (CP 509-511). That information is directly related to Cooke’s credibility and whether Cooke followed proper wetland rating protocol.⁵⁹

The finding is not supported by substantial evidence in light of all the evidence presented. Instead, it merely mirrors Ms. Cooke’s testimony without taking into consideration the other evidence. As a result, it is not supported by substantial evidence.

8) Finding No 68. This finding is not supported by substantial evidence (and is erroneous application of law) insofar as it discusses the Fairhaven Highlands project. The Fairhaven Highlands project has no factual or legal bearing on the instant project, as it is offsite and unrelated. The fact that the wetlands in that project were changed to a Category I has no bearing on the wetland analysis here.

⁵⁹ The Washington State Wetland Rating Manual, section 4.3, indicates that “it is important to obtain permission from the land owner(s) before going on their property.” CP 1646-1647. This exhibit is incomplete. Quenneville introduced only a portion of this manual at the hearing. The manual is public information, was cited throughout the case and available online. *Washington State Wetland Rating System for Western Washington Revised*, Ecology Publication # 04-06-025 (August 2004) (<http://www.ecy.wa.gov/pubs/0406025.pdf>).

Further, the finding is not supported by substantial evidence and is erroneous to the extent it purports to give credence to Ms. Weil's personal opinion regarding buffer widths in direct contradiction to the Director's decision. The Wetland-Stream Permit sets forth a 50 foot averaged buffer. (CP 983; Paragraph 3). Ms. Weil testified that this was the City's decision, although she personally disagreed with it. (CP 267-268). Her personal opinion is not relevant because her superior, the planning director at the time, Tim Stewart, was "the City" and the decision was for a 50 foot buffer. Ms. Weil agreed that the City's decision was appropriate under the regulations and classification of the wetland. She cannot now "throw the game."

E. Are the Challenged MDNS and Wetland-Stream Permit Conditions Substantively Improper?

This Court will also be required to analyze whether the conditions in the Wetland-Stream Permit are properly imposed. Further, if this Court denies Lind's threshold SEPA argument above, it will need to address the substantive propriety of the MDNS conditions. The conditions challenged below all arise out of the Second Revised MDNS, (CP 1156-1157),⁶⁰ and the Wetland-Stream Permit. (CP 982-985)⁶¹. Because these respective conditions are essentially identical, they are addressed together below.

⁶⁰ The Hearing Examiner struck conditions 8 and 9 and that issue was not appealed.

⁶¹ The Hearing Examiner struck conditions 17 and 18 and that issue was not appealed.

Moreover, the above challenged findings of fact are relevant to these determinations. The evidence cited therein should be considered here as whether the information in the possession of the City supported the conditions.

1) Legal Basis Required to Impose Conditions.

Conditions in an MDNS can be issued only if the underlying jurisdiction finds that the proposal is likely to cause a “probable significant adverse environmental impact.”⁶² As used in SEPA, “probable” “is used to distinguish likely impacts from those that merely have a possibility of occurring, but are *remote or speculative*.”⁶³

Under the WSO, the Director may attach conditions to a Wetland-Stream Permit “as deemed necessary to carry out the purposes of this chapter.” BMC 16.50.100.A. The ordinance then goes on to provide an example list of conditions which the permit “may include but are not limited to.” It is worth noting requiring additional wetland studies is not listed as an example condition.

The purposes of the WSO are found at BMC 16.50.030.A. The first three purposes iterate the protection of wetlands. The fourth purpose of the WSO is very relevant here:

⁶² WAC 197-11-330.

⁶³ WAC 197-11-782.

4. Establish a fair and consistent permit process that will prevent further net loss of regulated wetland and stream functions.

2) Mature Forested Wetland Conditions. Condition 10 of the Second Revised MDNS (CP 1157) and Condition 1 of the Wetland-Stream Permit (CP 982-983) address this issue. While their language is slightly different, they substantively impose the same requirement: that Lind perform a fourth wetland analysis almost four years after his initial delineation was accepted. This condition is, again, inappropriate in light of the procedures under the WSO, the approval of Lind's original delineation, and the substantive standards under which conditions can be imposed in either an MDNS or a Wetland-Stream Permit.

Kim Weil testified unequivocally that the 2005 delineation was accepted and not challenged under the WSO. Thus, it is improper to impose it as a condition of a Wetland-Stream Permit, because it is neither "fair" nor "consistent" as required by BMC 16.50.030.A.

In an email dated August 7, 2009, Weil admitted that this condition was imposed solely as a result of the public comment, and that the City did not do its own independent investigation into the issue. (CP 963). Weil also admits in the e-mail that Susan Meyer's input was critical in making this decision. The email states that the City's reliance on Ms. Meyer's analysis and previous involvement on a "multi-disciplinary team

that conducted a tree analysis within wetlands on another site” was integral in justifying the condition. We now know that other site was the Fairhaven Highlands.

Susan Meyer is a wetland biologist with the Department of Ecology, who had heard from a citizen on the issue. (CP 524; 526). During her telephonic testimony, it became clear she had no idea what specific project she was speaking about. She was confused and indicated that the only citizen she spoke with was Peter Frye, not Mr. Quenneville. (CP 532-539).⁶⁴ Meyer also testified that Weil told her she was going to use SEPA to mitigate wetland impacts. (CP 537-538).

Based on the unreliability, confusion, and significant likelihood that Ms. Meyer was testifying about a project completely different from the one in the instant case, relying on her to impose the conditions at issue was and is improper.

The only information the City had to justify imposing the onerous condition was a stack of speculative citizen letters, most of which were form letters. Instead of looking into the situation itself, or doing any on-

⁶⁴ Lind encourages this court to read the testimony found in these pages. It appears that Susan Meyer was referring to a completely separate permit proposal by Lind Brothers, which is also under appeal in this Court (Case No. 67877-9-1). As context, the lot line adjustment in that case was denied, whereas the one here was granted. Ms. Meyer testified that this case was the one where Ms. Weill was going to deny the lot line adjustment. We know that the LLA was denied in the Frye case but not here. These factors all point to her obvious confusion and that her testimony was unrelated to this case.

site investigation into the credibility of the comments, the City chose to put the onus on Lind and condition his project on this issue. The City did this despite having accepted the delineation, two mitigation reports, and a third independent evaluation, each of which confirmed the Wetlands were not mature forested wetlands. That action is anything but fair and consistent.

Even more perplexing is that the Hearing Examiner ignored the fact that there was, and still is, zero credible evidence on the record that any of the alleged “large” or “mature” trees on site are located *within the wetland* as required by the City’s own concept of a mature forested wetland. The layperson’s “mature tree inventory” conducted by Quenneville and his wife does not locate the root systems of the trees, nor place them anywhere in the wetland. (CP 1519-1533). Rather, it was an exercise by unqualified individuals to measure and count trees. As testified to by their own experts, and as the City told Lind: in order for a wetland to be a “mature forested wetland” it must have mature trees *in the wetland*. (CP 963). Without any evidence that the mature trees on site are located in the wetland, under the circumstances of this case, it was improper to require Lind to go and disprove that fact with a fourth expert.

3) Septic Drainfields in Buffer. The City says septic drainfields cannot be in the buffer. (Wetland-Stream Permit Condition 4,

at CP 1162, and Second Revised MDNS Condition 2 at CP 1156). This is improper. The City relies on BMC 16.50.080.D for its authority to limit uses within a wetland buffer. Contrasting that with BMC 16.50.100.E, development may occur in wetlands so long as the impact is fully mitigated. As interpreted by the City, the Wetland-Stream Ordinance would purport to allow more development in a *wetland* than it would in a *buffer*. What makes more sense for the overall protection of the wetland on-site is what Lind is proposing—that the only impacts will be to the buffers, not the wetlands, and, further, that those impacts will be fully mitigated.

Septic and other impacts are permitted in a buffer so long as they are mitigated. The mitigation plans offered by Lind adequately address all impacts to buffers.

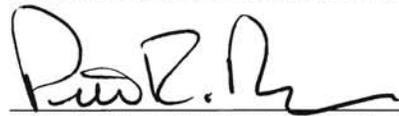
F. The Lot Line Adjustment was Improperly Conditioned on the Wetland-Stream Permit.

The City conditioned the LLA approval on verification that all conditions of the Wetland-Stream Permit were met. (CP 58). This is improper. A lot line adjustment *shall* be granted if it meets the four elements set forth in BMC 18.10.020, summarized as follows: (1) No New Lots are created; (2) Minimum lot standards are met, or if already non-conforming, not further reduced; (3) the LLA will not further infringe

- A. Reverse the Hearing Examiner and Affirm the issuance of the LLA, but with Condition 1 removed.
- B. Reverse the Hearing Examiner and Vacate the MDNS.
- C. Reverse the Hearing Examiner and Affirm the issuance of the Wetland-Stream Permit but with Condition 2 and Condition 10 removed.
- D. Affirm the Hearing Examiner on all issues not appealed by Lind.
- E. Order that the November 2008 Mitigation Plan by Katrina Jackson was and is approved for the mitigation of the project.

RESPECTFULLY submitted this 4th day of May 2012.

BELCHER SWANSON LAW FIRM, PLLC



PETER R. DWORKIN, WSBA# 30394
Attorney for Lind Bros. Construction, LLC

ORDINANCE NO. 2004-09-065

AN ORDINANCE RELATING TO THE ADMINISTRATION OF DEVELOPMENT REGULATIONS, AMENDING CHAPTER 16.40 SHORELINE MASTER PROGRAM REGULATORY PROCESS, THE SHORELINE MANAGEMENT MASTER PROGRAM, CHAPTER 16.50 WETLAND AND STREAM REGULATORY CHAPTER, CHAPTER 16.60 CLEARING, CHAPTER 16.70 GRADING, CHAPTER 17.80 LANDMARK PRESERVATION, TITLE 18 SUBDIVISION AND TITLE 20 LAND USE DEVELOPMENT ORDINANCE; REPEALING BELLINGHAM MUNICIPAL CODE CHAPTER 21.01 AND ADOPTING A NEW CHAPTER 21.10 PROCEDURES AND ADMINISTRATION.

WHEREAS, it is the intent of the City of Bellingham to maintain fair, efficient and predictable regulatory procedures that are consistent with the State of Washington Growth Management Act and RCW Chapter 36.70B; and

WHEREAS, this ordinance consolidates the procedures for land use decisions and permits in one chapter of the municipal code and provides standard procedures for each process type in order to improve the clarity, efficiency, fairness and predictability of these procedures; and

WHEREAS, as required by RCW 36.70A, notice of the City's intent to adopt a new ordinance for the administration of development regulations and amendment to the Shoreline Master Program was filed with the Department of Community, Trade and Economic Development on June 23, 2004, and sent to other reviewing agencies, including the Department of Ecology, at least 60 days prior to the final adoption of this ordinance; and

WHEREAS, after mailed and published notice, the Planning Commission held a public hearing on the proposed ordinance on July 22, 2004 and a work session on August 5, 2004; and

WHEREAS, the Planning Commission considered the staff report and the comments received and recommends that this ordinance be adopted; and

WHEREAS, after mailed and published notice, the City Council held a public hearing on the proposed ordinance on September 13, 2004; and

WHEREAS, the City Council has considered the recommendation of the Planning Commission, the staff report and public comment and hereby adopts the findings and conclusions of the Planning Commission with the exception that the deadline for submitting requests for comprehensive plan amendments should be December 1 and the minimum comment period for short subdivisions containing five or more lots should be kept at 20 days;

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NOW THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN:

Section 1. Bellingham Municipal Code Chapter 16.40.020 is hereby amended as follows:

**16.40.020 - Permit Procedure For Shoreline Substantial Development Permits,
Variances And Conditional Use Permits Under The Shoreline
Management Master Program.**

Shoreline permit, conditional use and variance applications shall follow the procedures in BMC 21.10.

Section 2. The Bellingham Shoreline Management Master Program, as adopted by Ordinance No. 9887, Sections 12 and 13 are hereby amended as follows:

Section 12: PERMIT PROCEDURE:

- A. Applicant shall obtain Shoreline Permit applications from the City of Bellingham Planning and Community Development Department.
- B. Shoreline permit, conditional use and variance applications shall follow the procedures in Bellingham Municipal Code Chapter 21.10.

Section 13: CONDITIONAL USES:

- A. The purpose of the Conditional Use provision is to provide more control and flexibility for implementing the regulations of the Master Program. It is realized that many activities, if properly designed and controlled, can exist on the shorelines without detriment to the shoreline area.
- B. All applications for conditional uses shall comply with the provisions of the Washington Administrative Code 173-14-140.
- C. An applicant for a Substantial Development Permit which requires a Conditional Use Permit shall submit applications for both permits simultaneously.
- D. Conditional use applications shall follow the procedures in Bellingham Municipal Code Chapter 21.10.
- E. Prior to the granting of a Conditional Use Permit the Hearing Examiner must find that:
 - 1. The conditions spelled out in the Master Program have been met.
 - 2. The use will cause no unreasonable adverse effects on the environment or other uses.

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- B. Applications shall follow the procedures in BMC 21.10.
- C. **Building Permits.** Any Building Permit issued must be in compliance with the restrictions and conditions of the institutional site plan approval.

Section 67. Bellingham Municipal Code Chapter 21.01 regarding administration of development regulations is hereby repealed.

Section 68. A new Bellingham Municipal Code Chapter 21.10 is hereby added as follows:

Chapter 21.10 Procedures and Administration

21.10.010 Purpose and Scope

This title establishes standard procedures for land use and development permit decisions made by the City of Bellingham. The procedures are designed to promote timely and informed public participation, eliminate redundancy in the application, permit review, and appeal processes, minimize delay and expense, and result in development approvals that further City goals as set forth in the Comprehensive Plan. They are also intended to be consistent with the provisions of RCW 36.70B. These procedures provide for a consolidated land use permit process and integrate the environmental review process with the procedures for review of land use decisions.

21.10.020 Definitions

- A. "Administrative appeal" means an appeal to a City body or officer, such as the Hearing Examiner or City Council.
- B. "City" means the City of Bellingham.
- C. "Closed record appeal" means an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.
- D. "Director" means Director of Planning and Community Development Department.
- E. "Open record hearing" means a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the local government by ordinance or resolution. An open record hearing may be held prior to a local government's decision on a project permit to be known as an "open record predecision hearing." An open record hearing may be held on an appeal, to be known as an "open record

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appeal hearing," if no open record predecision hearing has been held on the project permit.

- F.** "Project permit" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.
- G.** "Public meeting" means an informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the City's decision. A public meeting does not include an open record hearing. The proceedings at a public meeting may be recorded and a report or recommendation may be included in the local government's project permit application file.

21.10.030 Administration

The provisions of this title supersede all other procedural requirements that may exist in other sections of the Bellingham Municipal Code. When interpreting and applying the standards of this Code, its provisions shall be the minimum requirements. If a process type is not specified for a project permit or land use decision, the Director shall determine the process that shall apply.

21.10.040 Types of Land Use Decisions

- A.** Land use decisions are classified into seven review process types based on who makes the decision, the amount of discretion exercised by the decision maker and the amount and type of public input sought.
- B. Type I.** A Type I review process is an administrative review and decision by the Director. It is exempt from notice requirements. If a Type I decision is not categorically exempt from SEPA and the SEPA review has not been completed with a prior permit, the Type II process shall be used. Appeals of Type I decisions are decided by the Hearing Examiner unless the rules for a specific permit or decision specify that no administrative appeal is available. The following are a Type I decision when the application does not require a SEPA threshold decision:
1. Billboard relocation permit;
 2. Clearing permit;

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3. Design review for projects that are not required to use a Type II process;
4. Grading permit;
5. Exempt home occupation;
6. Final short plat;
7. Land use approval for building permits, occupancy approvals, demolition permits and sign permits;
8. Interpretation of development regulations;
9. Lot line adjustment;
10. Nonconforming use status determination;
11. Over-height fence;
12. Parking waiver or joint parking;
13. Shoreline statement of exemption;
14. Preliminary Short plat of 1-4 lots; EXCEPT "cluster" subdivisions and applications that include a request to round up the next higher number of lots when dividing the combined area of two or more lots of record by the allowed density results in a fractional lot between .5 and .75;
15. Site area exception (BMC 20.30.040 (B)(1)(d));
16. Specific binding site plan;
17. Temporary use;
18. Use approvals for permitted uses;
19. Vision clearance waiver;
20. Wetland permits and approvals without a variance that are not a Type II process;
21. Wireless communication facility that does not require either a planned development approval or conditional use permit; and
22. All other decisions that specify use of the Type I process.

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C. Type II. A Type II review process is an administrative review and decision by the Director. Public notice is required. Appeals of Type II decisions are decided by the Hearing Examiner. The following are Type II decisions:

1. Accessory dwelling unit;
2. Design review for projects requiring a SEPA threshold decision, adding one or more dwelling units, consisting of the construction or exterior addition to a non-residential area of a mixed use or non-residential building or Fairhaven Design Review applications that require review by the Landmark Review Board;
3. General binding site plan;
4. Grading permits requiring a SEPA threshold decision;
5. Home occupation permit;
6. Institutional site plan;
7. Land use approval for building, demolition and sign permits for projects requiring a SEPA threshold decision if the SEPA review was not previously completed;
8. Land use approval for public facility construction permits for streets, storm water facilities sewer and/or water facilities requiring a SEPA threshold decision if the SEPA review was not previously completed;
9. Planned development;
10. Shoreline substantial development permit or variance;
11. Preliminary Short plats consisting of 5-9 Lots that are not using cluster subdivision provisions; and cluster short plats of 1-4 lots without a density bonus (unless the Director requires Process III) but EXCLUDING any short plats rounding up the number of lots from a fraction of less than .75 when dividing the combined area of two or more lots of record by the required minimum lot size;
12. Wetland permit requiring a SEPA threshold decision; and
13. Type I decisions that require a SEPA threshold decision and all other decisions specifying a Type II process.

D. Type IIIA. A Type IIIA review process is a quasi-judicial review and decision made by the Hearing Examiner that has no administrative appeal, with the exception that a Shoreline conditional use decision may be appealed to the State Shoreline Hearings Board. The following are Type IIIA decisions:

1. Co-housing;

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2. Conditional use;
 3. Nonconforming building reconstruction when over 50% destroyed;
 4. Nonconforming use expansion, reconstruction when over 50% destroyed or change in use;
 5. Shoreline conditional use;
 6. Preliminary Short plat that is not a Type IIIB decision and is rounding up the number of lots from .5 but less than .75 when dividing the combined area of two or more lots of record by the allowed density;
 7. Variance for a subdivision that is not being reviewed under Process Type IIIB;
 8. Variance from Land Use Development Code and/or Lake Whatcom Reservoir Regulatory Chapter 16.80;
 9. Wetland variance; and
 10. All other decisions specifying a Type IIIA process.
- E. Type IIIB.** A Type IIIB review process is a quasi-judicial review and decision made by the Hearing Examiner that may be appealed to the City Council. The following are Type IIIB decisions:
1. Preliminary plats, plat alterations and plat vacations, including any variances;
 2. Short plats consisting of 1-4 cluster lots with a density bonus or 5-9 cluster lots, including any variances; and
 3. All other decisions specifying a Type IIIB process.
- F. Type IV.** A Type IV review process is a City Council quasi-judicial decision on a final plat, a final amended plat or final vacated plat. There is no opportunity for administrative appeal.
- G. Type V.** A Type V review process is a quasi-judicial decision made by the City Council after recommendation by the Landmark Review Board regarding a local landmark designation under BMC 17.80.
- H. Type VI.** A Type VI review process is a legislative decision made by the City Council after review and recommendation by the Planning Commission. The following are Type VI decisions:
1. Comprehensive plan and neighborhood plan amendments;

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2. Development regulation amendments;
3. Institutional master plans (as part of the neighborhood plan); and
4. Planned action adoption.

I. **Type VII.** A Type VII review process is a quasi-judicial decision by the Landmark Review Board on a landmark certificate of alteration. An appeal of a Type VII decision is decided by the Hearing Examiner.

21.10.050 Concurrent Review of Multiple Land Use Permits

- A. All Type II applications for a project, excluding land use approval for construction permits (building, grading, clearing and street and utility construction), shall be processed concurrently unless the Director approves separate processing. An application for a shoreline permit which requires a shoreline conditional use permit or shoreline variance shall be submitted and processed concurrently.
- B. A single report shall be provided for all Type II applications included in the project review. The report shall include all recommendations and decisions as of the date of the report, including any mitigation required or proposed through a SEPA Mitigated Determination of Nonsignificance or through an Environmental Impact Statement. The report may be the permit.

21.10.060 Optional Consolidated Permit Process

Applicants for a project involving more than one project permit from Type I, II, III and/or VII may request to have the review and decision consolidated into one process. Consolidated Type I, II and III permits shall be reviewed under the process required for the permit with the highest process type number. If any permit requires a review by a board or commission, that body shall conduct a public meeting and provide a recommendation to the decision maker. If the timeframes for permit review differ among consolidated permits, the applicant must agree to the longest period.

21.10.070 Exemptions

- A. Process Type VI decisions are City Council legislative decisions exempt from the procedural provisions of RCW 36.70B.
- B. Multifamily residential tax exemption decisions under BMC 17.82 and Landmark Special Valuation decision under BMC 17.80 are not project permits and are exempt from the procedural provisions of RCW 36.70 B.
- C. As authorized by RCW 36.70B.140 (1) the following actions are exempt from the requirements of RCW 36.70B.060 through 36.70B.080 and RCW 36.70B.110 through 36.70B.130:

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1. Local landmark designations (Type V);
2. Street vacations;
3. Temporary right of way use permits;
4. Street tree permits;
5. Sidewalk café approvals;
6. Sidewalk vendor cart approvals; and
7. Final plats (Type IV).

D. As authorized by RCW 36.70B.140 (2) the following actions are exempt from the requirements of RCW 36.70B.060 and RCW 36.70B.110 through 36.70B.130 when categorically exempt from SEPA environmental review under BMC 16.20 or for which environmental review has been completed in connection with other project permits;

1. Building and construction permits (including but not limited to public facilities construction permits, sign permits, clearing permits and grading permits) and
2. Process Type I decisions.

21.10.080 Timeframes for Review

A. RCW 36.70B.070 and 36.70B.080 require that permit processing timeframes be established. Decisions on Type I, II, III and VII applications shall be made within 120 days from the date of a determination that the application is complete unless a shorter time is required by city ordinance or state statute. No timeframes are established for Type V or VI applications. Exceptions to the 120-day time period are:

1. Substantial project revisions made by an applicant, in which case the 120 days will be calculated from the time the City determines the revised application to be complete.
2. A mutual agreement by the applicant and Director to an extension of time.
3. Applications that require an amendment to the comprehensive plan or a development regulation.
4. Applications for a project requiring an approval for siting of an essential public facility as provided in RCW 36.70A.200.

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5. Applications for which the city makes written findings that a specified amount of additional time is needed for processing of specific complete project permit applications or project types. (RCW 36.70B.080 (1)).

B. The time limit does not include:

1. Any period of time during which the applicant has been requested by the City to correct plans, perform required studies, or provide additional required information. The period shall be calculated from the date the City notifies the applicant of the need for additional information until the earlier of the date the City determines whether the additional information satisfies the request for information or 14 days after the date the information has been provided to the City. If the City determines that the information submitted by the applicant is insufficient, it shall notify the applicant of the deficiencies and the procedures under BMC 21.10.190 B. shall apply as if a new request for studies had been made.
2. The time required to prepare and issue a draft and final Environmental Impact Statement (EIS) in accordance with the State Environmental Policy Act.
3. Any period for administrative appeals of project permits, if an open record appeal hearing or a closed record appeal, or both, are allowed. The time period for consideration and decision on appeals shall not exceed:
 - a. 90 days for an open record appeal hearing; and
 - b. 60 days for a closed record appeal.

C. Preliminary Plats. Pursuant to RCW 58.17.140, preliminary plats of any proposed subdivision and dedication shall be approved, disapproved, or returned to the applicant for modification or correction within 90 days from the date of filing thereof unless the applicant consents to an extension of such time period or the 90-day limitation is extended to include up to 21 days as specified under RCW 58.17.095(3). The 90-day period shall not include the time spent preparing and circulating an environmental impact statement by the local governmental agency.

D. Final Plats (Type IV) and Short Plats. Pursuant to RCW 58.17.140, final plats and short plats shall be approved, disapproved, or returned to the applicant within 30 days from the date of filing a complete application, unless the applicant consents to an extension of such time period.

21.10.090 Summary of Process Steps by Review Type

- A.** Sections 21.10.100 through 21.10.250 describe the process steps listed in Table 21.10.090.A as set forth in Exhibit "A" attached hereto and included in this Section.

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21.10.100 Type I Process: Minor Administrative Decisions

- A. **Application.** An application shall be reviewed to determine whether it is complete under the procedures of Section 20.10.190.
- B. **Fairhaven Design Review.** Applications for projects in the Fairhaven Design Review District shall have an optional review and recommendation by the Landmark Review Board. The procedure in Section 21.10.110 C. shall be used to determine whether the Board will review the application. If Board review is required, the application shall use a Type II review process.
- C. **Decision.** A written record of the decision shall be prepared. The record may be in the form of a staff report, letter, permit, or other written document and shall indicate whether the application has been approved, approved with conditions or denied. With the exception of wetland permits, a decision shall be effective on the date the written decision is issued and is presumed valid unless overturned by an appeal decision. Wetland permits shall be effective after the close of the appeal period, or if an appeal is filed, until the withdrawal of, or final decision on an administrative appeal. Project activity not requiring a wetland permit that is commenced prior to the end of any appeal period, or withdrawal of, or final decision on, an appeal, may continue at the sole risk of the applicant.
- D. **Shoreline Statement of Exemption.** Whenever a development is determined by the City to be exempt from the requirement to obtain a shoreline substantial development permit and a letter of exemption is required under the provisions of WAC 173-27-050, the City shall issue a letter of exemption in compliance with WAC 173-27-050.
- E. **Appeal of Type I Decisions.** Type I decisions may be appealed to the Hearing Examiner unless otherwise specified by state statutes or City ordinance. The Hearing Examiner shall conduct an open record hearing.

21.10.110 Type II Process: Administrative Decisions

- A. **Pre-Application Neighborhood Meeting.** A pre-application neighborhood meeting as described in Section 21.10.180 shall be conducted for planned developments, institutional site plans, general binding site plans, and design review. Upon request of the applicant, the Planning Director may waive this requirement for minor amendments and for industrial and commercial projects which do not abut or have significant impacts on residential areas, provided that such amendments and industrial and commercial projects do not, in the discretion of the Planning Director, involve significant land use issues.
- B. **Application.** An application shall be reviewed to determine whether it is complete under the procedures of Section 20.10.190.

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C. Public Meeting.

1. The Planning Commission Shoreline Committee shall hold a public meeting and make recommendations to the Director on shoreline permits.
2. An optional public meeting and review by the Planning Commission shall be available for planned development, general binding site plan and institutional site plan applications.
3. An optional public meeting and review by the Landmark Review Board shall be available for projects requiring design approval in the Fairhaven Core Area and for new buildings or structures in other areas of the Fairhaven Design Review District.
4. If an application provides for an optional public meeting, staff shall send a notice of optional meeting together with the project plan to members of the applicable board or commission. The notice shall be sent no later than the date of the notice of application. For projects in the Fairhaven Design Review District Influence and Approach areas, only the Planning Director may require review by the Landmark Review Board. For all other applications that provide for an optional review meeting, the Planning Director or the board or commission chair may require a meeting of the board or commission for review and recommendation on the application if they believe the proposal is likely to raise substantial planning issues or is a matter of public interest. A decision to conduct a public meeting must be made within 10 days from the mailing of the notice of optional meeting. If a public meeting is required, the proposal shall be scheduled for a meeting date. The Board or Commission shall transmit its recommendations to the Planning Director following the public meeting.
5. If a public meeting has been required, notice of the meeting shall be mailed at least 10 days prior to the hearing in the same manner as provided in BMC 21.10.200.D and shall also be published in a newspaper of general circulation at least 10 days prior to the meeting date.

D. Notice of Application. The procedures in Section 21.10.200 apply to a Type II process.

E. Minimum comment period. The procedures in Section 21.10.210 apply to a Type II process.

F. Environmental review. When a threshold decision is required under BMC 16.20, the procedures in Section 21.10.220 apply to a Type II process.

G. Decision. The City shall not make a decision or recommendation on a permit application until the expiration of the minimum comment period stated in the notice of application. A written record of the decision shall be prepared. The record may be in

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the form of a staff report, letter, permit, or other written document and shall indicate whether the application has been approved, approved with conditions or denied.

- H. **Notice of Decision.** The procedures in Section 21.10.230 apply to a Type II process.
- I. **Appeal of Type II Decision.** A Type II decision may be appealed to the Hearing Examiner with the exception of a shoreline permit and/or shoreline variance. The Hearing Examiner shall conduct an open record appeal.
- J. **Appeal of a Shoreline Permit or Shoreline Variance.**
 - 1. A shoreline permit decision may be appealed to the State Shoreline Hearings Board. Any appeal shall be filed within 21 days of the "date of filing" the City's decision with the Dept. of Ecology as provided in RCW 90.58.180 and defined in RCW 90.58.140 (6).
 - 2. A shoreline variance must also be approved by the Dept. of Ecology. A shoreline variance decision by the Dept. of Ecology may be appealed to the State Shoreline Hearings Board. Any appeal shall be filed within 21 days of the "date of filing" the Dept. of Ecology decision with the City, as set forth in RCW 90.58.180 and defined in RCW 90.58.140 (6).

21.10.120 Type IIIA and IIIB Processes: Hearing Examiner Decisions

- A. **Pre-Application Conference.** A pre-application conference as described in BMC 21.10.170 is required for co-housing and preliminary plat applications.
- B. **Pre-Application Neighborhood Meeting.** A pre-application neighborhood meeting as described in Section 21.10.180 shall be conducted for co-housing, conditional use, nonconforming building and nonconforming use decisions and Type IIIB decisions. Upon request by the applicant, the Planning Director may waive this requirement if the project does not abut or have significant impacts on residential areas; does not, in the discretion of the Planning Director, involve significant land use issues; and consists of one of the following:
 - 1. Applications for minor amendments;
 - 2. Proposals associated with a single family residence; or
 - 3. Industrial or commercial projects.
- C. **Application.** An application shall be reviewed to determine whether it is complete under the procedures of Section 21.10.190.

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D. Notice of Application. The procedures in Section 21.10.200 apply to a Type IIIA or Type IIIB process.

E. Additional notification requirements for preliminary plats.

1. Notice of application and hearing for a subdivision preliminary plat adjacent to or within one mile of the municipal boundaries of a city or town, or which contemplates the use of any city or town utilities, shall be given to the appropriate city or town authorities.
2. Notice of application and hearing for a subdivision preliminary plat adjoining the municipal boundaries of the city shall be given to the appropriate County officials.
3. Notice of application and hearing for a subdivision preliminary plat located adjacent to the right-of-way of a State highway or within two miles of the boundary of a State or municipal airport shall be given to the Secretary of Transportation.

F. Minimum comment period. The procedures in Section 21.10.210 apply to a Type IIIA or IIIB process.

G. Environmental review. When a threshold decision is required under BMC 16.20, the procedures in Section 21.10.220 apply to a Type IIIA or IIIB process.

H. Notice of Public Hearing.

1. The public hearing shall be scheduled for a date no sooner than 15 days after the notice of application and no sooner than 15 days after the issuance of a SEPA determination of nonsignificance. Staff recommendations and the SEPA decision shall not be issued until after the close of the minimum public comment period, provided that the optional DNS process in BMC16.20.070 and 16.20.080 may be used.
2. Notice of the public hearing for the application shall be published in a newspaper of general circulation at least 10 days prior to the hearing date.
3. Notice of the hearing shall be mailed at least 10 days prior to the hearing in the same manner as provided in BMC 21.10.200.D.
4. The notices shall contain a brief description and the general location of the proposal, the time, date and location of the hearing and information about the availability of the staff report.

I. Hearing.

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1. The Hearing Examiner shall conduct an open record public hearing on the proposal. Any person may participate in the hearing by submitting written comments to the Planning and Community Development Department prior to the hearing or by submitting written comments or making oral comments at the hearing.
2. The Planning and Community Development Department shall transmit to the Hearing Examiner a copy of the department file on the application including all written comments received prior to the hearing. The file shall also include the SEPA threshold decision and records regarding public notice of the application.
3. The Hearing Examiner shall create a complete record of the public hearing including all exhibits introduced at the hearing and an electronic sound recording of each hearing.

J. Hearing Examiner Decision.

1. The Hearing Examiner shall approve a project or approve with conditions if the applicant has demonstrated that the proposal complies with the applicable decision criteria in the Bellingham Municipal Code. The applicant carries the burden of proof and must demonstrate that a preponderance of the evidence supports the conclusion that the application merits approval or approval with conditions. In all other cases, the Hearing Examiner shall deny the application.
2. Following the close of the record, the Hearing Examiner shall distribute a written report supporting the decision. The report shall contain:
 - a. The decision of the Hearing Examiner;
 - b. Any conditions included as part of the decision; and
 - c. Findings of fact upon which the decision, including any conditions, was based and the conclusions derived from those facts.

K. Notice of Decision. The procedures in Section 21.10.230 apply to a Type IIIA or IIIB process.

L. Reconsideration.

1. Any person who participated in the hearing may file a written motion for reconsideration of the Hearing Examiner's decision.
2. Reconsideration of a Hearing Examiner decision may be granted by the Hearing Examiner on a showing of one or more of the following:

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- a. Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
 - b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
 - c. Error in the computation or any monetary element of the decision;
 - d. Clear mistake as to a material fact; or
 - e. Clear error as to the law, which should be corrected in the interests of justice.
3. Motions for reconsideration must be filed and served on other parties within 10 days of the date of the Hearing Examiner's decision. The filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiner's decision. A motion for reconsideration that is not scheduled for consideration or otherwise acted upon by the Examiner within 10 days of filing of the motion shall be deemed denied.

M. Appeal of Type IIIA Decision. A Type IIIA decision by the Hearing Examiner, with the exception of a shoreline conditional use, may be appealed to Superior Court by filing a land use petition which meets the requirements set forth in Chapter 36.70C RCW. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW 36.70C.040. Requirements for fully exhausting City administrative appeal opportunities must be fulfilled.

N. Appeal of a Shoreline Conditional Use. A shoreline conditional use decision must also be approved by the Dept. of Ecology. A decision of the Dept. of Ecology may be appealed to the State Shoreline Hearings Board. Any appeal shall be filed within 21 days of the "date of filing" the Dept. of Ecology decision with the City, as set forth in RCW 90.58.180 and defined in RCW 90.58.140 (6).

O. Appeal of a Type IIIB Decision to the City Council. A Type IIIB decision may be appealed to the City Council under the procedures in BMC 1.26 and as follows:

1. Who may appeal: Any aggrieved party or City Department.
2. Form of appeal: A person appealing the decision must submit a completed appeal form to the Planning and Community Development Department which sets forth:
 - a. The action or decision appealed, including the date thereof;
 - b. Facts demonstrating that the person is adversely affected by the decision;

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- c. A concise statement identifying each alleged error and the manner in which the decision fails to satisfy the applicable decision criteria;
 - d. The specific relief requested; and
 - e. Any other information reasonably necessary to make a decision on the appeal.
3. Time to appeal: The written appeal and the appeal fee, if any, must be received by the Planning and Community Development Department office as specified on the appeal form no later than 5:00 PM on the fourteenth day following the date the notice of decision was issued.
 4. Notice of appeal: A City Council closed record hearing date shall be set. The City shall provide written notice of the hearing to the appellant, applicant, Hearing Examiner, Director and City Attorney. Notice shall be mailed or sent no less than 10 days prior to the appeal hearing.
 5. City Council closed record hearing: The City Council shall conduct a closed record hearing on the appeal consistent with the procedures in BMC 1.26. The appellant, the applicant, and the City shall be designated parties to the appeal.
 6. City Council Decision on Appeal. The City Council shall prepare findings and conclusions and issue a written decision to grant, grant with modifications, or deny the appeal within 60 days from the date the original appeal period closed. The City Council may take any action provided in BMC 1.26.020.
- P. Appeal of City Council Decision.** A final decision by the City Council on appeal may be appealed to Superior Court by filing a land use petition which meets the requirements set forth in Chapter 36.70C RCW. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW 36.70C.040. Requirements for fully exhausting City administrative appeal opportunities must be fulfilled.

21.10.130 Type IV Process: Final Plat

- A. Application.** The applicant shall submit an application for final plat approval in conformance with the submittal requirements established by the Director.
- B. Review and recommendation.**
 1. An application shall be sent for review and approval to all departments and agencies whose approval is required under BMC 18.20.
 2. If the Director finds that the plat meets all applicable requirements, the Director shall forward the final plat and the Director's recommendation to the City Council.

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C. Decision.

1. The City Council shall review the plat to determine whether the plat conforms to the terms of preliminary approval, the requirements of applicable state laws and all other applicable City ordinances. If the plat conforms to these requirements, the City Council shall approve the final plat. If the Council does not approve the final plat, the applicant shall be provided a written notice of the decision and the conditions for compliance.
2. An application for a final plat shall be approved, disapproved or returned to the applicant within the time frame required under BMC 21.10.080.D.

D. Appeal of Type IV Decision. A final decision may be appealed to Superior Court by filing a land use petition which meets the requirements set forth in Chapter 36.70C RCW. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW 36.70C.040.

21.10.140 Type V Process: City Council Quasi-Judicial Decisions

A. Nomination of Landmark Designations. The property owner, Landmark Review Board or the City Council may nominate and make application to designate a landmark under the provisions of BMC 17.80. If nominated by the Landmark Review Board or City Council, the application shall not be processed unless the written consent of the property owner is obtained.

B. Notice of Landmark Review Board Public Hearing.

1. Notice of the hearing shall be published in a newspaper of general circulation at least 10 days prior to the hearing date.
2. Notice of the hearing shall be mailed at least 10 days prior to the hearing in the same manner as provided in BMC 21.10.200 D.
3. The notice shall contain a brief description and the general location of the proposal, the time, date and location of the hearing and information about the availability of the staff report.

C. Landmark Review Board Public Hearing.

1. The Landmark Review Board shall conduct an open record public hearing on the proposal. Any person may participate in the hearing by submitting written comments to the Planning and Community Development Department prior to the hearing or by submitting written comments or making oral comments at the hearing.

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2. The Planning and Community Development Department shall provide the Landmark Review Board with a staff report on the application and transmit all written comments received prior to the hearing.
 3. The Landmark Review Board shall create a complete record of the public hearing including all exhibits introduced at the hearing and an electronic sound recording of the hearing.
- D. Landmark Review Board Recommendation.** The Landmark Review Board shall make a written recommendation to approve, approve with modifications or deny the application based on the applicable criteria in BMC 17.80. The recommendation shall be transmitted to the City Council for a final decision.
- E. City Council Decision.** The City Council shall take action on the application at a public meeting and shall approve, approve with modifications or deny the landmark designation based on the record and the applicable criteria in BMC 17.80. The Council's action shall be in the form of a resolution or ordinance.
- F. Record of Designation.** Within two weeks following the decision by the City Council, the property owner shall sign a covenant declaring the property a designated landmark pursuant to and subject to the provisions of BMC 17.80, and record it with the Whatcom County Auditor. The covenant shall be the form as provided by the Director and shall be recorded at the expense of the property owner.
- G. Appeal of the City Council Decision.** A final decision by the City Council may be appealed to the Superior Court by filing a land use petition which meets the requirements set forth in Chapter 36.70C RCW. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW 36.70C.040.

21.10.150 Type VI Process: City Council Legislative Decisions

- A. Pre-Application Procedures.** A pre-application conference is recommended. A pre-application neighborhood meeting shall be conducted under the procedures of BMC 21.10.180 for site specific comprehensive plan amendments, site specific neighborhood plan amendments and institutional master plan adoption or amendments.
- B. Application.** A complete application shall consist of the submittal requirements established by the Director and stated on the application forms.
1. Who may apply:
 - a. The City Council, Planning Commission or Planning Director may initiate consideration of an amendment to the Comprehensive Plan, Neighborhood Plan, Institutional Master Plan or development regulations at any time.

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1. The City Council may suggest amendments to development regulations for consideration by the City Council, Planning Commission or Planning Director.

2. Any person may submit a request for a non-site-specific amendment to the Comprehensive Plan or Neighborhood Plans, no later than December 1 of each year for consideration in the following year. Alternatively, any person may request the City Council to initiate consideration of a non-site-specific amendment to the Comprehensive Plan or Neighborhood Plans at any time.

3. The property owner or authorized agent of the property owner may submit a request for a site-specific amendment to a Comprehensive Plan, Neighborhood Plan or Institutional Master Plan for a property they own, no later than December 1 of each year for consideration in the following year. A property owner or authorized agent of the property owner may ask the City Council to initiate consideration of a site-specific amendment to the Comprehensive Plan or a Neighborhood Plan at any time.

4. **Environmental Review.** When environmental review is required, the procedures of the City shall apply. The determination of nonsignificance or environmental significance shall be provided to the Planning Commission with the staff report.

5. **Planning Commission Public Hearing.** The Planning Commission shall conduct an open record public hearing on the proposal. Notice of the hearing shall be provided as follows:

a. **Newspaper Notice.** The City shall publish notice of the hearing in a newspaper of general circulation at least 15 days and not more than 30 days prior to the hearing date.

b. **Mailed Notice.** For site-specific comprehensive plan amendments, site-specific neighborhood plan amendments or institutional master plan adoption or amendments, the City shall mail a hearing notice no less than 15 days prior to the hearing. Mailed notice shall be provided in the same manner as provided in BMC 21.10.200.D.

c. **Signage.** For site-specific comprehensive plan amendments, site-specific neighborhood plan amendments or institutional master plan adoption or amendments, the City shall post one or more hearing notice signs on the site or immediately adjacent to the site that provides visibility from adjacent streets. The signs shall be posted at least 30 days prior to the hearing. The City shall establish standards for size, color, layout, materials, number, placement, maintenance and removal.

6. For non-site-specific amendments to the comprehensive plan, neighborhood plan or development regulations, the Director shall provide public notice

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and participation appropriate for the proposal and consistent with RCW 36.70A.035.

- E. Planning Commission Hearing.** The Planning Commission shall conduct an open record public hearing on the proposal. Any person may participate in the hearing by submitting written comments to the Planning and Community Development Department prior to the hearing or by submitting written comments or making oral comments at the hearing. All comments received by the Department prior to the hearing shall be transmitted to the Planning Commission no later than the date of the public hearing.
- F. Planning Commission Recommendation.** The Planning Commission shall review the proposal based on the criteria listed in the applicable City code and provide a written recommendation to the City Council containing the following:

 - 1. Finding of fact and conclusions of law; and
 - 2. Recommendation.
- G. Notice of City Council Hearing.** Notice of the City Council public hearing shall be provided in the same manner as for the Planning Commission hearing.
- H. City Council Decision.** The City Council shall hold an open record public hearing on the proposal. The Director shall transmit to the City Council the staff report, Planning Commission recommendation and any written comments received prior to the City Council Hearing. The City Council may confirm, modify or reject the Planning Commission recommendations.
- I. Appeal of Type VI Decision.** An action of the City Council on a Type VI proposal may be appealed together with any SEPA threshold determination by filing a petition with the Growth Management Hearings Board pursuant to the requirements set forth in RCW 36.70A.290. The petition must be filed within the 60-day time period set forth in RCW 36.70A.290(2).

21.10.160 Type VII- Landmark Certificate of Alteration

- A. Application.** An application shall be reviewed to determine whether it is complete under the procedures in BMC 21.10.190.
- B. Notice of Application.** The procedures in Section 21.10.200 apply to a Type VII process.
- C. Minimum comment period.** The procedures in Section 21.10.210 apply to a Type VII process.

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D. Environmental review. When a threshold decision is required under BMC 16.20, the procedures in Section 21.10.220 apply to a Type VII process.

E. Notice of Hearing.

1. The public hearing shall be scheduled for a date no sooner than 15 days after the notice of application and no sooner than 15 days after the issuance of a SEPA determination of nonsignificance. Staff recommendations and the SEPA decision shall not be issued until after the close of the minimum public comment period, provided that the optional DNS process in BMC16.20.070 and 16.20.080 may be used.
2. Notice of the public hearing for the application shall be published in a newspaper of general circulation at least 10 days prior to the hearing date.
3. Notice of the hearing shall be mailed at least 10 days prior to the hearing in the same manner as provided in BMC 21.10.200 D.
4. The notices shall contain a brief description and the general location of the proposal, the time, date and location of the hearing and information about the availability of the staff report.

F. Landmark Review Board Hearing.

1. The Landmark Review Board (Board) shall conduct an open record public hearing on the proposal. Any person may participate in the hearing by submitting written comments to the Planning and Community Development Department prior to the hearing or by submitting written comments or making oral comments at the hearing.
2. The Department shall transmit to the Board a copy of the application, staff report and all written comments received prior to the hearing. The information shall also include the SEPA threshold decision and records regarding public notice of the application.
3. The Board shall create a complete record of the public hearing including all exhibits introduced at the hearing and an electronic sound recording of each hearing.

G. Landmark Review Board Decision.

1. The Board shall approve a project or approve with conditions if the applicant has demonstrated that the proposal complies with the applicable decision criteria in BMC 17.80. The applicant carries the burden of proof and must demonstrate that a preponderance of the evidence supports the conclusion that the application

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merits approval or approval with conditions. In all other cases, the Board shall deny the application.

2. Following the close of the record, a written report shall be issued that contains:
 - a. The decision of the Board;
 - b. Any conditions included as part of the decision; and
 - c. Findings of fact upon which the decision, including any conditions, was based and the conclusions derived from those facts.

H. **Notice of Decision.** The procedures in Section 21.10.230 apply to a Type VII process.

I. **Appeal of Type VII Decision.** A Type VII decision may be appealed to the Hearing Examiner. The Hearing Examiner shall conduct a closed record appeal hearing.

21.10.170 Pre-application Conference

The purpose of a pre-application conference with staff is to assist applicants in preparing development applications for submittal to the City by identifying applicable regulations and procedures. It is not intended to provide an exhaustive review of proposed plans or a staff recommendation on future permit decisions. The Director shall establish the submittal requirements and process for pre-application conferences. A fee may be required if established by the City Council.

21.10.180 Pre-application Neighborhood Meeting

- A. The purpose of the neighborhood meeting is to:
 1. Inform citizens about the potential project at an early stage; and
 2. Foster communication between the applicant and interested citizens regarding potential issues and opportunities for solutions related to the project.
- B. An applicant is required to conduct a neighborhood meeting prior to the submittal of an application and after any required pre-application conference. The Director may provide standard notice formats and guidelines for conducting the meeting. The notice shall include a brief description of the project, date, time and location of the neighborhood meeting and name and phone number of the applicant or their representative. The applicant shall mail the notice at least 10 days prior to the meeting to:
 1. The Planning and Community Development Department with a copy of the mailing list;

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2. The representatives to the Mayor's Neighborhood Advisory Commission for the neighborhood in which the project will be located and any neighborhoods within 500 feet of the project site;
 3. The list of property owners that will be required to be notified of the proposed application;
 4. Neighborhood associations for the project area that have registered a request to receive notice with the Planning and Community Development Department; and
 5. The local newspaper.
- C. The applicant shall also post the notice on the project site at least 14 days prior to the meeting for a Type VI application and at least 7 days prior to the meeting for all other applications.
- D. The proceeding is not invalid if there are minor deficiencies in the mailed or posted notice as required in this section as long as there was a good faith attempt to comply with the notice requirements.

21.10.190 Application

- A. **Submittal requirements.** The Director shall specify submittal requirements for applications and provide official application forms. The Director may waive specific submittal requirements determined to be unnecessary for review of an application. The Director may require additional material such as maps, studies or models when the Director determines such material is needed to adequately assess the proposed project. A complete application consists of an application form together with all required information listed in the submittal requirements and payment of the application fee as may be established by the City Council.
- B. **Determination of Complete Application.**
1. This subsection applies to applications requiring a Type I, II, III or VII process.
 2. Within 28 days after receiving a permit application, the City shall mail, fax or otherwise provide to the applicant or his authorized representative a written determination which states either that the application is complete or that the application is incomplete and what is necessary to make the application complete. If the Director does not provide a written determination within the 28 days, the application shall be deemed complete as of the end of the 28th day.
 3. To the extent known by the City, other agencies with jurisdiction over the permit application shall be identified in the City's determination of completeness.

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4. A project permit application is complete for purposes of this section when it meets the submittal requirements established by the Director and is sufficient for continued processing even though additional information may be required. The determination of completeness shall not prevent the City from requesting additional information or studies either at the time of the notice of completeness or at some later time, if new information is required or where there are changes in the proposed action.
5. Within 14 days after an applicant has submitted information in response to a notice of incomplete application, the Director shall notify the applicant whether the application is complete or specify what additional information is necessary. If the applicant fails to submit additional information within 120 days, the application shall become void.

21.10.200 Notice of Application

- A. This section applies to applications requiring a Type II, IIIA, IIIB or VII process.
- B. Within 14 days after the City has made a determination of completeness for a permit application, the City shall issue a notice of application. The date of notice shall be the date of mailing. Except for a determination of significance under the State Environmental Policy Act (SEPA), the City shall not issue its SEPA threshold determination or issue a decision or recommendation on a permit application until the expiration of the public comment period on the notice of application. If an optional determination of nonsignificance (DNS) process is used, the notice of application and DNS comment period shall be combined.
- C. The notice of application shall include:
 1. The date of the application, the date the application was determined to be complete and the date of the notice of application;
 2. The name of the applicant;
 3. The description and location of the project;
 4. The requested actions and/or permits and any other required permits known by the City;
 5. A list of any required studies;
 6. The date, time, place and purpose of any required public meeting or hearing, if it has been scheduled;
 7. Identification of environmental documents that evaluate the project;
 8. A statement of the minimum public comment period;

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9. A statement of the right of any person to comment on the application, to receive notice of and participate in any hearings, to request a copy of the decision once made, and a statement specifying any appeal rights;
10. A statement of the preliminary determination of consistency, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as provided in RCW 36.70B.040;
11. The location where the application and other listed materials can be viewed;
12. The City staff contact and phone number; and
13. Any other information determined appropriate by the City.

D. Mailed Notice.

1. The applicant is responsible for obtaining the list of property owners from the Whatcom County Assessor's records. The Director may establish procedures under which the applicant and City may agree that the City will provide this mailing list or that the applicant will conduct the mailing. A U.S. Postal Service Certificate of Mailing shall be provided to the Director if the applicant conducts the mailing.
2. The Director may increase the notification radius or notification method for any specific application. The validity of the notice procedure shall not be affected by whether the Director uses this option.
3. The Planning and Community Development Department, or applicant if authorized under this section, shall mail notice of application to:
 - a. The applicant;
 - b. The owner of the property as listed on the application;
 - c. Owners of property within 500 feet (100 feet for home occupations) of the site boundary of the subject property as listed by the Whatcom County Assessor records;
 - d. The Mayor's Neighborhood Advisory Commission representative and any neighborhood association registered with the Planning and Community Development Department for the neighborhood in which the project is proposed, and for any neighborhood within 500 feet of the project site boundary; and

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e. Any person or organization that has filed a written request for notice with the Planning and Community Development Department.

4. No proceeding shall be invalid due to minor deficiencies in the mailed notice as required in this section as long as the other method(s) of notice has met its respective requirements and there was a good faith attempt to comply with the mailed notice requirements.

E. Posted Notice.

1. The applicant shall post one or more signs on the site or in a location immediately adjacent to the site that provides visibility from adjacent streets. The Director shall establish standards for size, color, layout, materials, placement and timing of installation and removal of the signs.

2. No proceeding shall be invalid due to minor deficiencies in the posted notice as required in this section as long as the other method(s) of notice has met its respective requirements and there was a good faith attempt to comply with the posted notice requirements.

F. When feasible, notices of complete application, application, SEPA comment period and public meeting or hearing should be combined into one notice.

21.10.210 Minimum Comment Period

A. This section applies to applications requiring a Type II, IIIA, IIIB or VII process.

B. The minimum comment period shall be 14 days following the date of notice of application, except for shoreline permits, which shall have a minimum comment period of 30 days; and except for short subdivisions consisting of five or more lots, which shall have a minimum comment period of 20 days. The City may accept public comments at any time prior to the close of the open record public hearing, or if there is no public hearing, prior to the decision on the project permit. Except for a determination of significance (DS) under the State Environmental Policy Act and BMC 16.20, the City shall not issue a final SEPA threshold determination or issue a decision or recommendation on a permit application until the expiration of the minimum public comment period.

21.10.220 Environmental Review

A. When environmental review is required under BMC 16.20 for a Type II, IIIA, IIIB, or VII process, the following procedures apply:

1. Threshold Determinations. The responsible official shall issue the threshold determination after the minimum comment period for the notice of application and

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prior to the decision on the application. When public notice of the threshold determination is required (see BMC 16.20.160), the threshold determination and notice of the 14-day comment period shall be mailed and posted in the same manner as the notice of application. The threshold determination shall also be sent to agencies with jurisdiction and the Washington State Department of Ecology (see BMC 16.20.080 and BMC 16.20.160.)

2. **Optional DNS Process.** For projects that are not likely to have a significant environmental impact, a preliminary DNS may be issued with the notice of application (see optional DNS process under BMC 16.20.080). The comment period for the DNS and the Notice of Application shall be combined. The Notice of Application shall state that the City expects to issue a DNS for the proposal and that this may be the only opportunity to comment on the environmental impacts of the proposed project. After the close of the comment period, the responsible official shall review any comments and issue a final threshold determination. When a final DNS is issued, no additional comment period is required.
3. **Determination of Significance.** If a determination of significance is issued and an environmental impact statement (EIS) is required, the Final EIS must be issued at least 7 days prior to issuance of the decision on the application. (See BMC 16.20.130.) If the requirement to prepare an EIS is appealed, the appeal must be resolved prior to issuance of a decision on the application.

21.10.230 Notice of Decision

- A. This Section applies to applications requiring a Type II, IIIA, IIIB or VII process.
- B. A notice of decision shall be mailed to the applicant and to any person who, prior to rendering the decision, requested notice of the decision or submitted substantive comments on the application. The notice shall be mailed within 10 days after the decision.
- C. The notice of decision shall include a statement of any threshold determination made under SEPA (Chapter 43.21C RCW) and the procedures for administrative appeal, if an administrative appeal option is provided.

21.10.240 Effect of Decision

- A. This section applies to Type I, II, IIIA, IIIB or VII decisions.
- B. Unless otherwise provided in BMC 21.10.240.C, the decision is presumed valid and in effect on the date issued unless an administrative appeal is filed. The filing of any administrative appeal shall stay all development activity based on the decision granting the application until such time as the City issues a final decision on the matter. Any applicant receiving approval who engages in any activity based on the

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decision granting the application prior to the filing of any appeal or prior to the expiration of any administrative appeal period, does so at his/her own risk.

C. Exceptions.

1. **Shoreline Permits.** All City decisions on a shoreline permit shall be submitted to the Department of Ecology. Development under a shoreline substantial development permit shall not begin and shall not be authorized until 21 days from the date of filing the City's decision with the Department of Ecology as defined in RCW 90.58.140 (6) and WAC 173-27-130, or until all review proceedings initiated within 21 days from the date of filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b). This restriction shall be stated on the permit.
2. **Shoreline Conditional Use or Variance.** The City's decision on a shoreline conditional use or shoreline variance shall be submitted to the Department of Ecology for a final decision. Development under the variance or conditional use shall not begin and shall not be authorized until 21 days from the date of filing the Department of Ecology decision with City as defined in RCW 90.58.140 (6) and WAC 173-27-130, or until all review proceedings initiated within 21 days from the date of filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b). This restriction shall be stated on the notice of decision sent to the applicant. On receipt of the Department of Ecology decision, the City shall provide timely notice of the decision to the applicant and other interested persons having requested notification, as provided by WAC 173-27-200.
3. **Wetland permits.** Wetland permits shall be effective after the close of the appeal period, or if an appeal is filed, after the withdrawal of, or final decision on an administrative appeal.
4. **Landmark Certificates of Alteration for Demolition.** A certificate of alteration for whole or partial demolition of a landmark shall be effective after the close of the appeal period, or if an appeal is filed, after the withdrawal of, or final decision on an administrative appeal.

21.10.250 Procedures for Appeal to the Hearing Examiner

- A. **Who may Appeal.** Any aggrieved party may appeal.
- B. **Form of Appeal.** A person appealing the decision must submit a completed appeal form to the Planning and Community Development Department which sets forth:
 1. The action or decision being appealed and the date it was issued;
 2. Facts demonstrating that the person is adversely affected by the decision;

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3. A statement identifying each alleged error and the manner in which the decision fails to satisfy the applicable decision criteria;
 4. The specific relief requested; and
 5. Any other information reasonably necessary to make a decision on the appeal.
- C. Time to Appeal.** The written appeal and the appeal fee, if any, must be received by the Planning and Community Development Department office as specified on the appeal form no later than 5:00 PM on the fourteenth day following the date the notice of decision was issued, or following the date of the decision if no notice was issued.
- D. Notice of Appeal.** A hearing date shall be set and the City shall provide notice of the hearing to the appellant, applicant, Director and to any other person granted party status by the hearing body or officer. Notice shall be mailed or sent no less than 10 days prior to the appeal hearing.
- E. Hearing Examiner Open Record Hearing.** The appellant, the applicant, and the City shall be designated parties to the appeal. Each party may participate in the appeal hearing by presenting testimony or calling witnesses to present testimony. Interested persons, groups, associations or other entities who have not appealed may participate only if called by one of the parties to present information; provided, that the Examiner may allow nonparties to present relevant testimony if allowed under the Examiner rules of procedure.
- F. Hearing Examiner Closed Record Hearing.** The appellant, the applicant, and the City shall be designated parties to the appeal.
- G. Hearing Examiner Decision.** The Hearing Examiner shall issue a written decision to grant, grant with modifications, or deny the appeal. The Hearing Examiner may grant the appeal or grant the appeal with modification if:
1. The appellant has carried the burden of proof; and
 2. The Examiner finds that the decision is not supported by a preponderance of the evidence.
- H. Reconsideration.**
1. Any person who participated in the hearing may file a written motion for reconsideration of the Hearing Examiner's decision.
 2. Reconsideration of a Hearing Examiner decision may be granted by the Hearing Examiner on a showing of one or more of the following:

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- a. Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
 - b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing;
 - c. Error in the computation or any monetary element of the decision;
 - d. Clear mistake as to a material fact; or
 - e. Clear error as to the law, which should be corrected in the interests of justice.
3. Motions for reconsideration must be filed and served on other parties within 10 days of the date of the Hearing Examiner's decision. The filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiner's decision. A motion for reconsideration that is not scheduled for consideration or otherwise acted upon by the Examiner within 10 days of filing of the motion shall be deemed denied.

J. Appeal of Hearing Examiner Decision. A final decision by the Hearing Examiner may be appealed to the Superior Court by filing a land use petition which meets the requirements set forth in Chapter 36.70C RCW. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW 36.70C.040. Requirements for fully exhausting City administrative appeal opportunities must be fulfilled.

21.10.260 Vesting

A. Vesting of Land Use Applications. Unless provided otherwise by this section, an application for a land use permit or other project permit shall be considered under the development regulations in effect on the date of filing of that complete application as defined in BMC 21.10.120A. This section does not establish vesting rules for impact fees.

B. Exceptions.

1. If a comprehensive plan amendment or rezone is required, any previously submitted land use permit application shall be considered under the laws, ordinances and standards in effect on the date that such zoning or plan amendment is final.
2. An application for a land use approval may be denied or approved with conditions under the authority of the City to protect and enhance the public safety, health

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and welfare, and under the State Environmental Policy Act (SEPA) and the City of Bellingham's SEPA regulations and policies as of the date of vesting.

C. Expiration of Vested Status.

1. Except for lot line adjustments, short subdivisions, preliminary plats, general binding site plans, planned developments or where a different duration of approval is established by city ordinance, executed development agreement or state or federal law, the vested status of an approved land use permit under Process Type I, II, III or VII shall expire two years from the date of the City's final decision, unless a complete building permit application is filed before the end of the two-year term.
2. Planned development approvals shall expire five years from the date of the City's final decision unless a complete building permit application is filed before the end of the five-year term or the applicant has obtained an extension from the Planning Director. The Director may grant one extension of up to two years.
3. If a complete building permit application is filed prior to the expiration of the land use permit, the vested status of the permit shall be automatically extended for the time period during which the building permit application is pending prior to issuance; provided, that if the building permit application expires or is cancelled, the vested status of the permit or approval shall also expire or be cancelled. If a building permit is issued and subsequently renewed, the vested status of the subject permit or approval under the permit shall be automatically extended for the period of the renewal.

21.10.270 Interpretation

- A. **Applicability.** This section applies to each written request to interpret the provisions of the Land Use Development Code and any other City development regulations administered by the Director.
- B. **Purpose.** An interpretation of the provisions of the code clarifies conflicting or ambiguous wording, or the scope or intent of the provisions of the code as it applies to review of a project. A request for a code interpretation must relate to a specific site, land use district, use or application within the City of Bellingham. An interpretation of the provisions of the code may not be used to amend that code.
- C. **Request for Interpretation.** Anyone may request an interpretation consistent with the provisions of this chapter/section. Any person requesting an interpretation of the code shall submit a written request specifying each provision of the code for which an interpretation is requested, why an interpretation of each provision is necessary

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and any reasons or material in support of a proposed interpretation. The City Council may establish an application fee for interpretation requests.

D. Procedure.

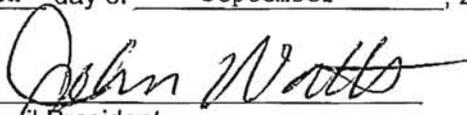
1. The Director shall determine how to process the code interpretation request. The request may be:
 - a. Processed as a Type I decision; or
 - b. Consolidated with the process associated with the review of the application.
2. The Director shall consult with the Department of Ecology regarding any interpretation of the Shoreline Master Program.

E. Factors for consideration. In making an interpretation of the provisions of the code, the Director shall consider the following:

1. The applicable provisions of the code including their purpose and context;
2. The impact of the interpretation on other provisions of the code;
3. The implications of the interpretation for development within the City as a whole; and
4. The applicable provisions of the Comprehensive Plan and other relevant codes and policies.

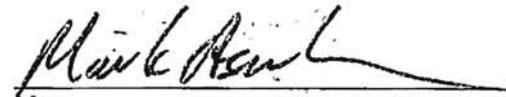
Section 69. This ordinance shall take effect on January 1, 2005, with the exception that any amendments to the Shoreline Management Master Program shall take effect after approval by the State of Washington Department of Ecology as provided by WAC 173-26-120.

PASSED by the Council this 27th day of September, 2004.



Council President

APPROVED by me this 30th day of Sept, 2004.



Mayor

Attest: Therese Hol
Finance Director

Approved as to form:
Alan A. Mariner
Office of the City Attorney

Published: October 1, 2004

EXHIBIT "A" Table 21.10.090.A

	<i>Director Ministerial Decision</i>	<i>Director Decisions</i>	<i>Hearing Examiner Decisions</i>	<i>Hearing Examiner Decisions</i>	<i>City Council Final Plat</i>	<i>City Council Quasi-judicial</i>	<i>City Council Legislative</i>	<i>Landmark Review Board Landmark Certificate of Alteration</i>
	Type I	Type II	Type IIIA	Type IIIB	Type IV	Type V	Type VI	Type VII
Pre-application conference required	No	No	Only for co-housing	Only for preliminary plats	No	No	No	No
Pre-application neighborhood meeting	No	Required for planned developments, institutional site plans, general binding site plans and design review	Required for co-housing, conditional use and non-conforming use or building decisions	Yes	No	No	Required for site specific neighborhood plan or comprehensive plan amendments and for institutional master plans/amendments	No
Determination of complete application process	Yes	Yes	Yes	Yes	No	No	No	Yes
Notice of application	No	Yes	Yes	Yes	No	No	No	Yes
Recommendation by Board, Commission or Hearing Examiner	No	Required or optional for some permits; see BMC 21.10.110.C	No	No	No	Yes; Landmark Review Board for landmark designation	Yes; Planning Commission	No

	<i>Director Ministerial Decision</i>	<i>Director Decisions</i>	<i>Hearing Examiner Decisions</i>	<i>Hearing Examiner Decisions</i>	<i>City Council Final Plat</i>	<i>City Council Quasi-judicial</i>	<i>City Council Legislative</i>	<i>Landmark Review Board Landmark Certificate of Alteration</i>
	Type I	Type II	Type IIIA	Type IIIB	Type IV	Type V	Type VI	Type VII
Open record pre-decision hearing	No	No	Yes, Hearing Examiner	Yes, Hearing Examiner	No	Yes, Landmark Review Board	Yes; Planning Commission and Council	Yes; Landmark Review Board
Decision	Director	Director; Shoreline variances must also be approved by Dept. of Ecology	Hearing Examiner; Shoreline conditional use must also be approved by Dept. of Ecology	Hearing Examiner	Council	Council	Council	Landmark Review Board
Notice of decision	No	Yes	Yes	Yes	No	No	No	Yes
Reconsideration	No	No	Yes	Yes	No	No	No	No
Appeal to Hearing Examiner	Yes; unless otherwise specified by code	Yes; except shoreline permit and shoreline variance appeals are heard by the Shoreline Hearings Board	No	No	No	No	No	Yes, closed record
Closed record appeal to City Council	No	No	No	Yes	No	No	No	No
Judicial appeal	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

1 43. Neither of the wetland delineation and mitigation studies engaged in the field
2 investigation necessary to determine the potential existence of a mature forested
3 wetland on the subject site and adjoining wetland areas.

4 44. BMC 16.50.050 of the WSO established three categories of regulated wetlands,
5 I, II, and III. This section provided that Category I wetlands are those that “have a high
6 resource value based on ecological diversity, the presence of rare wetland communities
7 and are sensitive to disturbance. Category I wetlands have one or more of the following
8 features: 1) Contain documented habitat for endangered, threatened or rare plant, fish
9 or animal species recognized by state or federal agencies; 2) Contain irreplaceable or
10 rare wetland types in the Puget Sound Basin. These types are sphagnum bogs, marine
11 influenced wetlands and mature, forested wetlands; 3) Are comprised of three or more
12 wetland classes, as defined by the Classification of Wetlands and Deep Water Habitats
13 of the United States, published by the U.S. Fish and Wildlife Service, Washington,
14 D.C., 1079, one of which may be persistent open water, and are undeveloped.”

15 45. Category II wetlands are described in BMC 16.50.050 as, “Wetlands not
16 included in Category I, but still have a moderate resource value based on their
17 functions. These wetlands have one or more of the following features: 1) They are
18 contiguous with any regulated stream or lake; 2) Contain documented habitat for
19 sensitive plant, fish or animal species recognized by state or federal agencies; 3)
20 Contain three or more wetland classes, but do not meet Category I criteria; 4) Are
21 abutting designated public open space, park or greenways corridors and are over 10,000
22 square feet in area; and 5) Provide a significant and necessary storm water management
23 function, such as retention/detention, without alteration, thus avoiding the need to
24 construct artificial facilities.”

26 46. BMC 16.50.060 of the WSO provided the method of determining wetland
27 boundaries and category. It provides that collection of information necessary for the
28 determination of wetland boundaries and category is ultimately the responsibility of the
29 property owner and is normally done via a field survey by a wetland specialist applying

1 the wetland delineation method and category types. Delineations must be performed in
2 accordance with the procedures and methodology described in the Federal Interagency
3 Committee for Wetland Delineation. 1989. Federal Manual for Identifying and
4 Delineating Jurisdictional Wetlands. U.S. Army Corps of Engineers, U.S.
5 Environmental Protection Agency, U.S. Fish and Wildlife Service, and U.S. D.A. Soil
6 Conservation Service, Washington D.C Cooperative Technical Publication. The
7 Planning Director determines what additional information may be necessary. The
8 determination of the wetland boundary provided by the applicant is subject to the
9 approval of the Director who may require adjustments. In the event the applicant
10 disputes the adjusted boundary delineation the Director and the applicant jointly select a
11 wetland specialist who will delineate the disputed boundary at the applicant's expense.

12 47. BMC 16.50.080 of the WSO provided for buffers for regulated wetlands and
13 streams. Subsection A, Buffer Criteria, provides, "Buffer width and type should be
14 established based on the individual wetland/stream features, functions and site
15 characteristics in relation to the adjacent land use. In some instances, buffers will be
16 required for development projects even though existing adjacent uses have no buffer at
17 all. The buffer requirement must be applied to provide the most effective protection of
18 the wetland/stream system based on actual site circumstances. When a wetland/stream
19 system does not provide a significant habitat function, all or part of the buffer may
20 include managed landscaping as opposed to strictly natural vegetation."

21
22 48. Buffer standards are provided in Subsection B of BMC 16.50.080: "All buffers
23 shall be measured horizontally from the wetland edge or ordinary high water mark
24 where appropriate. The following are minimum buffer requirements for
25 wetlands/streams, however the buffer requirement may be increased and/or averaged
26 (see definition of averaging) by the Planning and Community Development Department
27 (PCDD) where it is demonstrated that certain areas of the wetland/stream are more
28 sensitive to disturbance than others. Buffer increases may be necessary to protect
29 identified functions. Category I wetlands shall have a 100-foot minimum buffer.

1 Category II wetlands shall have a 50-foot minimum buffer. Category III wetlands shall
2 have a 25-foot minimum structure or impervious surface setback. Regulated streams
3 shall have a minimum 10-foot and maximum 50-foot buffer.”

4 49. Subsection D of BMC 16.50.080 regulates uses within the buffer. It provides,
5 “Low impact uses which are consistent with the purpose and function of the buffer and
6 do not detract from its integrity may be permitted within the buffer depending on the
7 sensitivity of the wetland/stream. Examples of uses which may be permitted include
8 pedestrian trails, interpretive signs, fishing access, conservation and educational
9 activities, gathering berries, bird watching blinds and swimming access.”

10 50. BMC 16.50.090F of the WSO provides that the provisions of the ordinance shall
11 be held to be minimum requirements in their interpretation and application and shall be
12 liberally construed to serve the purposes of the ordinance.

13 51. BMC 16.50.100C of the WSO contains the requirements for a permit
14 application. It also provides that the Director may require additional information,
15 including documentation and evidence of a wetland boundary determination by field
16 survey, documentation of the ecological, aesthetic, economic, or other values of the
17 wetland, a study of flood, erosion, or other natural hazards at the site and examples of
18 any protective measures that might be taken to reduce such hazards, and any other
19 information deemed necessary to verify compliance with the provisions of the
20 ordinance or to evaluate the proposed use in terms of the purposes of the ordinance.

21 52. Subsection D of BMC 16.50.100 of the WSO provides the procedures for
22 processing applications. It states, “Upon receipt of the completed application, the
23 PCDD shall notify the individuals and agencies, including federal and state agencies,
24 having jurisdiction over, or an interest expressed in writing to the PCDD in the matter,
25 to provide such individuals and agencies an opportunity to comment. In those cases
26 where a wetland/stream is directly impacted by an activity, the PCDD shall post notice
27 of said application directly on site in a conspicuous manner, and in the case of Category
28 I or II wetlands, notify property owners within 300 feet of the property as shown on the
29

1 list provided by the applicant. After review of all pertinent information, the Director
2 shall determine if the proposal is in conformance with the intent and regulations of this
3 chapter and if it is in the public interest to issue a wetland permit. Said permit may be
4 conditioned as identified in Section .110 of this chapter. Work may not proceed until
5 after the passage of 15 days from the date of issuance of the wetland/stream permit.”

6 53. Subsection E of BMC 16.50.100 of the WSO provides standards for issuance of
7 wetland permits. It provides, in relevant part, “The following uses may be permitted
8 within each wetland category to the extent that the intent and provisions of this chapter
9 are met and approved mitigation for anticipated impacts is employed: Category I
10 wetlands: Location of essential public transportation corridors, utilities and facilities.
11 Permitted projects must meet the public interest and practicable alternative tests.
12 Category II wetlands: Those uses permitted in Category I above in addition to private
13 projects that meet the public interest test and where no practicable alternative exists.
14 Permitted projects must meet the practicable alternative test.”

15 54. The Practicable Alternative Test is set forth in BMC 16.50.100F of the WSO. It
16 provides, “There is no practicable alternative when all of the following are
17 demonstrated: 1) The basic purpose of the project cannot be accomplished using one or
18 more available alternative sites in the City that would avoid, or result in less adverse
19 impacts on, a wetland/stream; 2) The basic purpose of the project cannot be
20 accomplished by a change in the design, size, configuration, construction technique,
21 seasonal timing or density of the project as proposed in a way that would avoid or result
22 in less adverse effects on a wetland/stream; 3) In cases where the applicant has rejected
23 alternatives to the project as proposed due to constraints such as inadequate zoning,
24 infrastructure, or parcel size, the applicant has made reasonable attempts to remove or
25 accommodate such constraints.”

26
27 55. The Public Interest Test is set forth in Subsection G of BMC 16.50.100 of the
28 WSO. It requires balancing the benefits from a proposed regulated activity against the
29 reasonably foreseeable adverse wetland/stream impacts. To be found contrary to the
30

1 public interest the outcome of the balancing process must show the adverse impacts of
2 the proposal to significantly outweigh its benefits.

3 56. BMC 16.50.110 of the WSO provides that the Director may attach conditions to
4 the granting of a wetland/stream permit as deemed necessary to carry out the purposes
5 of the chapter, including, but not limited to: elevation of structures, imposition of
6 controls on future use, dedication of easements, establishment of buffer zones, erosion
7 control and stormwater management measures, setbacks and restrictions on fills and
8 activities in the wetland, modification of project design for water supply and circulation,
9 restoration, enhancement or creation of a wetland, and development of enhancement
10 plans. Bonds may be required to secure compliance.

11 57. Mitigation may be required in accordance with the provisions of BMC
12 16.50.120 and .130 of the WSO. Ordinarily restoration, creation and enhancement
13 efforts are undertaken on or adjacent to the impacted site. Replacement of the impacted
14 wetland is the preferred alternative unless the applicant demonstrates that such
15 replacement is not feasible due to technical constraints.

16 58. The November 2008 Wetland Delineation and Mitigation Plan prepared by
17 NWC LLC (*Lind Bros. Exhibit 8*) delineates and categorizes the wetland areas
18 associated with the Wilken Street right-of-way. The report concludes that these wetland
19 areas are Category III and are exempt from City regulation due to their small size. The
20 mitigation plan contained in this report proposes mitigation for averaged buffers from
21 Wetland A described in the 2005 delineation. The plan proposes impacts to 4,608
22 square feet of the buffer area, enhancement of 200 linear feet of buffer and a gain of
23 4,608 square feet of averaged buffer. This plan treats Wetlands C and D as unregulated
24 by the City. It does not delineate buffers for these wetland areas. The plan shows
25 Wetland C partially within the building envelope for one of the proposed lots. The
26 mitigation plan shows a buffer that is consistent with the requirements of Second
27 Revised MDNS Condition No. 1 and Condition No. 3 of the Wetland/Stream permit.
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29
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1 59. The Wetland Rating Field Data Form—Western Washington attached to the
2 2005 delineation report in *Lind Bros. Exhibit 7* shows no indication of wetland type.
3 None of the boxes for wetland type, estuarine, natural heritage wetland, bog, mature
4 forest, old growth forest, coastal lagoon, interdunal, or none of the above, are checked
5 in this data form. Wetland A is rated with maximum points for habitat function in
6 nearly all categories.

7 60. The review area for the wetland delineation (*Lind Bros. Exhibit 7*) is stated to
8 be bound by the Wilken Street right-of-way to the south, the College Street right-of-way
9 to the north, the 28th Street right-of-way to the west and property lines on the remaining
10 sides.

11 61. The 2008 mitigation plan relied on the 2005 delineation of Wetlands A, C and
12 D. Katrina Jackson, the author of the 2008 report, did not perform a new delineation of
13 these wetland areas. She concluded, however, that Wetlands C and D were separate
14 from Wetland A and were not regulated by the City, contrary to the conclusion reached
15 in the 2005 delineation report. She did not perform a field investigation to determine
16 whether the wetland was a mature forested wetland for the 2008 report and plan.

17 62. Katrina Jackson concluded that a 50-foot averaged buffer would provide
18 adequate protection for the functions of the wetland. She indicated that it was not clear
19 whether or not an increased buffer would provide greater protection.

20 63. Quenneville owns and resides on the property immediately to the east/southeast
21 of the subject property. He submitted several comments to the City regarding the
22 subject proposal. His comments raised questions regarding the proper classification and
23 delineation of the wetlands on the site. He conducted an informal survey of trees on or
24 near the subject property and counted/measured about 18 trees that were at least 21-
25 inches in diameter at breast height. He is not a wetlands specialist but he is
26 professionally familiar with hydrographic surveying methods and is a software
27 engineer.
28
29
30

1 64. John McLaughlin is a conservation biologist with a PhD. in biological science.
2 He has observed the subject site and looked at the watercourses on the site. He
3 concluded that a 50-foot buffer is not adequate for any wetland function and that some
4 wetlands require a 200-foot buffer to protect plants and wildlife.

5 65. Nick Sky is an ecologist with a B.S. in biology and a specialty of forest ecology
6 who is familiar with the subject property. He commented on the subject proposal
7 stating that the application contained errors and omissions related to the delineation,
8 vegetation and wildlife, that the proposal severely underrates the high quality forested
9 wetland that forms a contiguous hydrological connection to Hoag's Pond.

10 66. Dr. Sarah Cooke has a Masters degree in forestry and a Doctorate in forestry and
11 geobotany.. She is a qualified wetland specialist and a fellow in the International
12 Society of Wetland Scientists. She has visited the subject site and has concluded that
13 the entire hillside is a forest slope mosaic, with the smaller wetlands part of the larger,
14 connected system. She indicated that a 50-foot buffer would not adequately protect the
15 wetland functions, a 300-foot buffer would be appropriate according to her observations
16 and the literature she has reviewed. She indicated that she observed the flags that were
17 placed on the site by Vicki Jackson to designate the wetland delineation in the field, and
18 saw hydric soils and wetland vegetation on both sides of the flagging.

19 67. Susan Meyer is a wetland specialist employed by the Department of Ecology.
20 She provides technical assistance to local governments and citizens regarding wetland
21 regulation. She stated that 50-feet of buffer was not enough to protect a wetland with
22 high habitat value.

23 68. Kim Weil is a City planner with a B.S. in freshwater ecology. She participated
24 in creating the citywide wetland inventory, was on a Department of Ecology team that
25 developed the latest guidelines for wetlands and she coauthored the CAO. She
26 determined during her review of the wetland/stream permit application that a 100-foot
27 buffer was appropriate to protect the wetland functions. She stated that the habitat
28 function requires the largest buffer and that the rating for habitat function for this site is
29

1 the highest she has seen. She stated that Wetlands C and D on the site are Category III
2 wetlands that are under the size threshold for City regulation. She indicated that the
3 wetland classification for the Fairhaven Highlands property, which is located to the
4 west of Hoag's Pond, and not far away from the subject property, was changed to
5 Category I because of the presence of a mature forested wetland. She also indicated
6 that she didn't think that the determination regarding Fairhaven Highlands affected the
7 analysis of the subject site, except that the characterization of the area did inform the
8 City and that the area and connectivity were taken into account. Ms. Weil states that a
9 100-foot buffer is more protective of the high habitat function of the wetland than a 50-
10 foot buffer. She stated that she respected the Director's decision to reduce the buffer to
11 an averaged 50-foot buffer but she was still of the opinion that a 100-foot buffer was
12 warranted.

13 69. The City received numerous comments regarding the proposal and the wetlands
14 on the site. These comments are compiled in *City's Exhibit Q, Quenneville Exhibits*
15 *Q20 – 22, Q38, Q43, and Q45 – 55*. Some of these comments included references to
16 the connectivity of the site to Hoag's Pond and Fairhaven Highlands and mature
17 forested wetlands. Some comments questioned the classification and delineation of the
18 wetlands on the site.

19 70. Condition No.s 8 and 9 of the Second Revised MDNS and Condition No.s 17
20 and 18 of the Wetland/Stream Permit were intended to incorporate the requirements of
21 BMC Titles 13 and 15 relating to street standards and water and sewer services.
22 With minor modifications each of the conditions of the Second Revised MDNS is
23 included in the Wetland/Stream Permit.
24

25 II. CONCLUSIONS OF LAW

26
27 1. BMC 21.10.190 provides that if the Director does not provide a written
28 determination to the applicant stating that the application is either complete or not
29 complete within 28 days after receiving a permit application it is deemed complete as of
30

No. 67878-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondent.

DECLARATION OF
SERVICE

I, Mylissa Bode, hereby certify that today I served Brief of Respondent and this Declaration of Service via regular mail to Alan Marriner and James Erb at City of Bellingham, 201 Lottie Street, Bellingham, WA 98225 and to David Bricklin, Bricklin & Newman, LLP, 1001 - 4th Avenue, Ste 3303, Seattle, WA 98154, and via regular mail (one original and one copy) to the Court of Appeals, Division I, Attention Richard D. Johnson. One Union Square, 600 University Street, Seattle, WA 98101

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

Signed this 4th day of May 2012 at Bellingham, Washington.



Mylissa Bode

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STATE OF WASHINGTON
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