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

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

Appellants,

v.

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

Respondent.

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**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 two legal lots of record in the City of Bellingham, originating out of a plat that was recorded in the late 1800’s. The lots are oriented in an east-west configuration. One lot is completely upland, and the other lot is almost entirely encumbered by wetlands and buffers.

Rather than apply to build homes on the existing lots, Lind proposed a Lot Line Adjustment (“LLA”) to re-configure the lots so each lot 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.

The City put the LLA application on hold to review environmental issues—primarily wetland and buffers. Those environmental issues were evaluated pursuant to the City’s 1991 Wetland-Stream Ordinance, Bellingham Municipal Code Chapter 16.50 (“WSO”), under which Lind’s applications had vested.

For several years, Lind worked with the City to address the concerns and issues the City raised. Wetland experts provided their evaluations and mitigation plans in 2005 and again in 2008. During this time, virtually no discussions took place between the City and Lind concerning the details of the LLA. In fact, the evidence shows that the City was ready to issue a wetland-stream permit and LLA for the project, even having created draft permits. From Lind's perspective, based on what the City had told Lind, the environmental issues were being addressed, and even though the LLA was on hold, both permits appeared to be on their way towards approval.

However, rather than addressing any wetland and buffer concerns through the applicable WSO, the City used the substantive authority of the State Environmental Policy Act, RCW Chapter 43.21C *et seq* ("SEPA"). In 2009, years after the wetland reports and mitigation plans had been submitted and accepted by the City, the City issued a Mitigated Determination of Non-Significance ("MDNS") and sought public comment on the two-lot proposal. The City received scores of form letters from neighbors and citizens who raised issues about the wetlands and alleged impacts two houses would have. In response, the City issued a revised MDNS requiring Lind to perform even more wetland analysis.

Then, without ever discussing the substantive LLA issues with Lind or his representatives, much less informing them it was no longer on hold, the City issued a complete denial of the LLA. The denial was based on relatively minor issues that could have been resolved had the City communicated with Lind about them. At the same time, the City also denied the Wetland-Stream permit application; not based on the actual wetland and buffer issues, but instead based on the denial of the LLA.

The City denied the LLA on a strained interpretation of its own ordinances, minor miscalculations, and without seeking comment from the applicant to correct the problems. It then used the denial of the LLA as a basis to deny the wetland-stream permit, appeasing the strong but unjustified citizen opposition, without having to ever analyze the actual merits of the citizen opposition. The Superior Court rightly reversed, and this Court should as well.

## **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. Challenged Findings of Fact.**

#4: This finding is challenged to the extent that it finds there are “mature trees” on any of the Lind property. Further, to the extent it is a conclusion of law, it is clearly erroneous.

#11: This finding is challenged to the extent that it finds the Lind Proposal will create impacts to wetlands. The proposal will only impact buffers, not wetlands.

#15: This finding is challenged insofar as it finds “Variances were mentioned at that meeting and a recommendation was made that the wetland biologist and an engineer work on a potential variance package.”

#16: This finding is challenged in that it says a “second request ... was made by the City to Lind Bros.” Bruce Ayers was the only authorized representative of Lind and the notice referenced in Finding #16 was not sent to Ayers.

#19: This finding is challenged inasmuch as Bruce Ayers was the designated representative. David New was an engineer on the project, but not the applicant’s representative.

#24 and 26: These findings are challenged in that they are misleading and not supported by substantial evidence. The findings that “no response” to each communication “is evident from the record” is misleading, as the City provided insufficient time to respond.

#28: This finding is challenged in its entirety. At most, there was citizen speculation that the wetland was a Category I, but three wetland analyses proved it was a Category III.

#38-49, 56-63: These findings are challenged in their entirety. To the extent they are conclusions of law, they are clearly erroneous.

#55: This finding is challenged inasmuch as it states “none of these options have been reviewed by the City for compliance with lot line adjustment or development standards.” The Hearing

Examiner was presented with these options and gives the final administrative word of “the City.” The Hearing Examiner had an obligation to, at a minimum, remand them to the City for good faith review in light of the facts.

#66: This finding is challenged inasmuch as the size of the wetland is incorrect. The size of the wetland is on the record in the expert reports.

#67: This finding is challenged inasmuch as it finds that any wetland fill occurring within the Harrison Street ROW is regulated. Testimony and evidence on the record demonstrates that those wetlands are not regulated due to size.

#68: This finding is challenged because Kim (Spens) Weil is not qualified in this case to make the determinations she is alleged to have made because she never visited the site, but instead, only conducted a document review. Testimony from Lind’s experts demonstrate that the proposed mitigation is adequate for any impacts on the subject property. Finally, offsite mitigation is allowed under the code.

#69 and 70: These findings are challenged in their entirety. This information was outside the scope of Peter Frye’s intervention. It was not proffered by the City. It was improperly admitted by the Hearing Examiner and should be stricken and not considered.

- B. Challenged Conclusions of Law.** The basis for challenging the various conclusions below is stated within the briefing.

#2-12; 14-8: Challenged in their entirety.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A.** Whether the Hearing Examiner erred in affirming the City’s denial of Lind’s LLA application?
- B.** Whether the City improperly used a Mitigated Determination of Non-Significance to solicit public comment and impose conditions

on the project when existing development regulations already addressed any potential adverse environmental impacts?

- C. Alternatively, whether the conditions imposed in the Mitigated Determination of Non-Significance were valid?

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural Background.**

Lind applied to the City of Bellingham for an LLA and a Wetland-Stream Permit. (CP 784-788). The City of Bellingham issued an MDNS and revised MDNS, both of which were administratively appealed by Lind. (CP 751-759). The City also denied Lind’s applications for LLA and Wetland-Stream Permit which Lind also administratively appealed. (CP 760-774; 775-783). All of the above appeals were consolidated for hearing and decision by the City of Bellingham Hearing Examiner (“Hearing Examiner”).

The Hearing Examiner denied Lind’s appeals on various grounds, including declaring the appeal of the MDNS as “moot.” (CP 1537-1562).

Lind filed a Land Use Petition Act petition in Whatcom County Superior Court. (CP 1569–1600). After significant briefing and oral argument, the Superior Court reversed the Hearing Examiner, ordering:

- (1) The decision denying the LLA is reversed and the City shall grant the LLA;

(2) The Wetland-Stream permit and Revised MDNS are remanded, and the City staff shall issue a wetland-stream permit consistent with the Court's decision

(3) The Hearing Examiner shall issue a decision regarding Petitioner's Appeal of the conditions in the MDNS.

The City and Intervenor have now appealed to this Court.

**B. Factual Background**

Appellant, Lind Bros. Construction, LLC ("Lind") owns two legal lots of record in the City of Bellingham, located between Harrison Street and Star Court west of 30<sup>th</sup> Street (the "Property"). The easterly lot is encumbered by wetlands and buffers, while the westerly lot is mostly upland. To build on the lots under this current configuration, one house would be constructed completely on uplands, while the other house would be constructed almost completely in either wetland or its buffer.

Recognizing the undesirability of the original lot configuration, from both a difficulty of construction and environmental protection perspective, Lind applied to the City for a lot line adjustment and wetland-stream permit (the "Project"). The proposed new configuration of the lot lines changes the boundary line between the lots from an east-west orientation to a north-south orientation. This would allow homes to be built on the uplands of both new lots, rather than on wetlands and buffer,

thereby significantly reducing negative impacts on critical areas. (CP 505-506; 539).

Lind's applications were submitted on December 5, 2005, vesting the Project under the rules contained in the City's 1991 Wetland and Stream Ordinance (Bellingham Municipal Code (BMC) 16.50) (the "WSO").<sup>1</sup> (CP 244). On December 6, 2005, the City's new critical areas ordinance went into effect. This ordinance is more restrictive than the WSO.

Bruce Ayers, PLS, Ayers Consulting, LLC is listed on the Project applications as the contact person for the Project; the application itself states "this is the single point of contact that should receive all notices, mailings, information, etc." (CP 769; 772). Ayers remained as the contact person throughout the entire Project; the City was never told otherwise. (CP 401, 404-405, 415-416).

In support of its application, Lind submitted a Wetland Delineation Report (CP 971-998) as well as a Wetland Buffer Impact Assessment and Mitigation Plan (CP 901-938), both dated November 2005. The Delineation declared that under the WSO, all wetlands on site were "Category III" requiring a 25 foot buffer. (CP 977). The City accepted the wetland delineation and categorization pursuant to BMC 16.50.060.

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<sup>1</sup> The WSO is found in the record as part of Lind's hearing exhibits, at CP 1222-1246.

(CP 246). The City did not request any changes to that delineation and categorization pursuant to BMC 16.50.060. (CP 247).

On February 16, 2006, Kathy Bell (the City's planner in charge of the LLA) notified Bruce Ayers that the LLA was dependent upon approval of the Wetland-Stream Permit, and informed Ayers that review of the LLA application was suspended until after completion of "preliminary environmental review". (CP 503-504). The LLA was put "on hold" by the City at that point. (CP 403; 685). At no point after February 16, 2006, did the City ever notify Bruce Ayers or John Lind that it would recommence review of the LLA. (CP 403-404).

On October 10, 2006, City representatives met with John Lind of Lind Bros. Construction and Lind's wetland consultant, Vikki Jackson. At that time, the City may have discussed the idea of a potential variance package (CP 240-243), but there was no specific discussion of the criteria, a time limit for submitting a variance, or the fact that the City would deny the application without a variance being submitted. (CP 685; 702). With the LLA application still on hold, and the focus on the environmental review, Bruce Ayers delegated the road design, State Environmental

Policy Act (“SEPA”) checklist, and stormwater<sup>2</sup> study to Jones Engineering. (CP 405).

On March 13, 2007, John Lind and one of Lind’s engineers met with Kathy Bell and Kim Weil, requesting a more detailed explanation of the City’s environmental requirements. (CP 1311). On March 29, 2007, Kim Weil provided the engineers with a more detailed list of needed information. (CP 883-884). While working in good faith with the City’s long list of requirements, as communicated to Lind by the City, Lind spent tens of thousands of dollars on engineering, surveying, wetland scientists and other consultants along with many thousands of dollars in carrying costs to obtain the Permit. (CP 405).

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 1172-1201).<sup>3</sup>

On February 27, 2009, over three years after original submittal, the City requested Lind provide a required mailing list and SEPA checklist. Both were provided by May 8, 2009. (CP 1302). On May 22, 2009,

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<sup>2</sup> Throughout the record, Bruce Ayers incorrectly refers to the wetland-stream permit as a “stormwater” permit, which was ultimately clarified at CP 527.

<sup>3</sup> Katrina Jackson is not related to Vikki Jackson, Lind’s first wetland biologist, whose delineation was submitted and accepted, and whose mitigation plan was also submitted in 2005 (CP 1134).

pursuant to SEPA, the City posted and sent a Notice of Application for the Permit to those on the mailing list. (CP 1063). Neighbors, prompted by the Appellant/Intervenor and neighbor, Mr. Frye, then engaged in a form-letter writing campaign against Lind's Project. (CP 1250-1294). Most letter writers pressed the same issue: speculation that the project may contain "mature forested wetlands" under 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 and apply the new Critical Areas Ordinance. (CP 1267; 1273; 1278).

Prior to this unjustified letter writing campaign, the City planned on approving both the Wetland/Stream Permit and LLA, with mitigating conditions. This fact was conclusively established through the testimony of both Kathy Bell and Kim Weil, who both admitted that permit approvals for the LLA and Wetland-Stream permit had actually already been drafted. (CP 703; 261; *see also* 1304-1308 (draft wetland-stream permit)). In fact, the Appellant/Intervenor Peter Frye and others had been notified by email from the city that the permits would be issued soon. (CP 1301).

On June 12, 2009, the City sent a letter to John Lind and Jones Engineers stating that the City had "completed the project and

environmental analysis” of the LLA and Permit applications and had “prepared a list of conditions” for a SEPA Mitigated Determination of Non-Significance (MDNS). (CP 1122). In the letter, the City stated the conditions would generally require “better protection of the wetlands, verification that development setbacks will be met, and others that address impacts [the City believes] have not been mitigated adequately.” While the letter requested a response, the letter was not sent or even copied to the designated project representative, Bruce Ayers.

Upon receiving the MDNS, Lind contacted its agent, Bruce Ayers. Ayers recommended Lind hire an attorney to address any response or appeal of the MDNS, as there was a limited window of time to do so. (CP 417) As far as Lind or Ayers knew, the LLA application was still “on hold” for environmental review. Lind’s attorney immediately filed an appeal of the MDNS so as to preserve all rights.

On July 22, Kim Weil met with Planning Director Tim Stewart to discuss the neighbors’ concerns. The City began researching whether or not it could modify the MDNS in response to the comments received, which, in Ms. Weil’s own words were “speculating that one of the site wetlands may meet the recently refined definition of mature forested wetland and therefore be a Category I wetland.” (CP 1298-1299).

On August 7, 2009, Kim Weil emailed John Lind regarding the speculation around the mature forested wetland, stating she wanted to require Lind Bros. to again re-analyze the wetland to determine if it qualifies as a “mature forested wetland.” (CP 1366).<sup>4</sup> Weil gave Lind two “alternatives”: (1) hire a wetland biologist to do 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, and appeal. The email, which was sent on a Friday, was not sent to Brue Ayers or Lind’s attorney (the first MDNS had been appealed by his counsel). Instead, Weil gave Lind five calendar days to respond, which included a weekend.

On August 12, 2009, the Whatcom County Health Department revoked Lind’s septic system permit “because City regulations prohibit location of a drainfield within a wetland buffer, as was proposed by [Lind]”. (CP 1202-1203). According to the letters, the City apparently represented to the Health Department that City regulations prohibited a drainfield in a wetland buffer, when in fact, City regulations do not. (CP 257-258).

On August 28, 2009, the City issued a Revised MDNS with a new condition 10 related to the mature forested wetland re-analysis. (CP 757-

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<sup>4</sup> Up to this point, two previous wetland analyses had been performed on the site, with an additional independent review of the 2008 mitigation plan by Kyle Legare of the Jay Group (CP 1218).

758). Lind immediately amended his appeal to include the Revised MDNS.

That same day, Kim Weil wrote an email to Peter Frye and Mark Quenneville<sup>5</sup> to tell them that the Wetland/Stream Permit would be issued next, with the mitigating conditions from the Revised MDNS incorporated. (CP 1301). At that time, the environmental issues were not resolved: the City had issued an MDNS and a Revised MDNS, and Lind appealed both of them. (CP 404-411). The LLA application was still “on hold”. (CP 417).

By September 22, 2009, the City had prepared draft approvals for both the Wetland/Stream Permit and LLA. (CP 1303). The draft Wetland/Stream Permit included the newly conceived mature tree re-analysis requirement. (CP 1304-1308). The LLA was also drafted as an approval. (CP 703-704). On September 23, and October 1 and 6, City staff “met to discuss draft decisions.” (CP 1303). The City never notified Lind that the LLA application was actively being reviewed and no longer “on hold.” (CP 401-407).

Then, without advance notice or a discussion of any of the technical issues, on January, 13, 2010, the City summarily denied the LLA application (CP 765-768). As written, the formal denial of the LLA was

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<sup>5</sup> Mark Quenneville is an appellant in a concurrent appeal of a second Lind Bros. project, Division I Case No: 67878-7-1

based on technical setback and alleged dimensional deficiencies in the lot design. However, when questioned about why the City changed its mind from approving the LLA to denying it, Ms. Bell testified:

A lot of it was the evidence that was presented from the environmental review and we did not believe that after further consideration we did not want to put the applicant in a position where they would have a lot that necessitated a variance, that would be putting the applicant into a very burdensome situation. (CP 704).

According to the City, it denied the LLA to avoid putting Lind in a “burdensome situation.” The City formally denied the Wetland/Stream Permit application on the sole basis that the LLA had been denied and it was therefore essentially, moot. (CP 789).

## V. STANDARD OF REVIEW

Judicial review of a land use decision is governed by LUPA.<sup>6</sup> 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.<sup>7</sup> 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;

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<sup>6</sup> *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008).

<sup>7</sup> *Id.* at 54-55.

(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).

Standards (a), (b), (e), and (f) present questions of law, which the Court reviews *de novo*.<sup>8</sup> However, deference is afforded to a local authority's construction of its own ordinances to the extent they are within its expertise.<sup>9</sup>

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

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<sup>8</sup> *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).

<sup>9</sup> *Id.*; see also RCW 36.70C.130(1)(b).

reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.<sup>10</sup>

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.”<sup>11</sup>

## VI. ARGUMENT

### A. **The Hearing Examiner Erred in Affirming the City’s Denial of the LLA**

The City argues here that the LLA was properly denied due to technical failures in the application—size of the lots, interpretation of double setback provisions in the code, and a subjective judgment as to the “utility” of the proposed LLA. However, upon review of the evidence presented at the hearing as well as the applicable ordinances, a different picture emerges. This picture is one of the City Planning Department choosing who to do battle with: Lind Bros. Construction, or a large group of highly influential neighbors. The City favored the neighbors and appeased them by denying the permits on untenable grounds that were never discussed during the four year life of the Project.

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<sup>10</sup> *Id.*

<sup>11</sup> *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)).

**1. The City Never Gave Lind a Chance to Fix the Problems.**

The City originally chose to approve the LLA. It only changed its mind at the last moment, in response to the neighbors' comments and "environmental concerns" they raised. It is uncontroverted that on September 22, 2009, a draft approval of the LLA was ready to be issued. (CP 703-704). The City staff met the next day, September 23 as well as October 1 and October 6, 2009 to "discuss the draft decisions." (CP 1303). The LLA was then denied in January 2010.

Bruce Ayers was the lead and only official contact for the LLA. The application states as such and the City treated him as such, until the LLA application was placed on hold for "environmental review." Bruce Ayers delegated the environmental review to Jones engineers and Katrina Jackson, but Ayers never withdrew as the authorized representative for Lind. (CP 405; 411).

As far as Mr. Ayers was concerned, the LLA was still on hold, even after the MDNS had been issued, because environmental issues were still being dealt with. Ayers testified: "I did not receive a single notice that the lot line adjustment was back under consideration because when the MDNS came out it was immediately appealed, so the environmental issues were still being resolved." (CP 404). Ayers went on to testify

about how Lind had spent thousands in engineering, design, and wetland consulting in response to the environmental review, all the while believing the lot line adjustment was on hold. (CP 405). Ayers also stated that there was no discussion of the additional dedication in the Harrison Right of Way, 50 foot setbacks, or the fact that the City wanted to apply the setback from the southern line of the plat rather than the center line of Harrison Street. (CP 407).

Bruce Ayers, a land surveyor with over 30 years experience in Bellingham (CP 490), expressed his frustration on the entire process of this Project:

“This particular application and the process that we’ve been involved with, is probably the least constructive process I’ve had with the city. It – it – it hasn’t been an effort to solve problems. It seems to have been an effort to ask for more information, require expensive detail and design, push the project into [sic] and then eventually deny the project.” (CP 513).

“I understood I was the authorized representative for the project. Then we got an MDNS, it was appealed. We go [sic] and amended MDNS, it was appealed and then we got a denial for the lot line adjustment. The issues of environmental impacts are still unresolved, we’re still spending what, two days now speaking to those issues. They’re still unresolved. I don’t understand how we got to a lot line adjustment denial. And then to use the lot line adjustment denial to – to then turn around and say we’re not going to deal with the wetland stream permit, it’s kind of taken- getting the benefit out of both sides of that argument. So here again, final [sic] – one minute we’re

saying the lot line adjustment is on hold due to environmental, next minute we're saying environmental's on hold due to lot line, I'm confused." (CP 408).

It is within this context that all of the arguments of the City and affirmation by the Hearing Examiner must be considered.

**2. Lot Line Criteria – BMC 18.10.020(B)(1) – No Additional Lots**

The City and Lind agree that BMC 18.10.020(B)(1) is satisfied because Lind owns two legal lots of record, and the proposed LLA is not creating any new lots.

**3. Lot Line Criteria 2 – BMC 18.10.020(B)(2) – Minimum Lot Standards**

The Hearing Examiner held that BMC 18.10.010(B)(2) is not met because the proposed resultant lots are more non-conforming (i.e. smaller) than the original lots. The Hearing Examiner and City asserts two bases for this position: (1) the pipe stem portion of the proposed lot cannot be "counted" as part of the lot; and (2) the lot calculations are smaller than the original lots.

**(a) Pipestem Must Be Counted in Lot Size.**

The City argues that the pipestem cannot be counted and thus, proposed Lot B is reduced in size. This argument requires this Court to interpret portions of the Bellingham Municipal Code. Local ordinances

are interpreted in the same way as statutes.<sup>12</sup> This Court should look first to the text of an ordinance to determine its meaning, and importantly, “may also discern plain meaning from related provisions and the statutory scheme as a whole.”<sup>13</sup> Here, reviewing the ordinances in question as a whole is important in interpreting them.

The two lots of record comprising the Project are below current City zoning size, however, they are legal lots of record that were created years ago and are exempt from those requirements. (CP 666). BMC 18.10.020(B)(2) cross references BMC Chapter 18.36. The City’s regulations appear to require a pipestem for Lot B, so it could have frontage on Harrison Street<sup>14</sup>. The City argues that a pipestem cannot be counted as part of the lot size, and as such the lot is “reduced” in size, even though in reality, it is the same size. This argument is based wholly on BMC 18.08.245:<sup>15</sup>

“**Lot area**” means the total horizontal area within the boundary of the lot lines of a parcel and expressed in terms of square feet or acres. For the purposes of determining the area in a “pipestem lot”, the area shall be defined as the square footage of the lot exclusive of the pipestem portion of the lot.

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<sup>12</sup> *Griffin v. Thurston County*, 165 Wn. 2d 50, 55, 196 P.3d 141 (2008)

<sup>13</sup> *Id.*

<sup>14</sup> Lind chose to use Harrison rather than Star Court to avoid impact to the wetlands located in Star Court. (CP 691-692).

<sup>15</sup> CP 72.

The Hearing Examiner’s reliance on the above definition in the context of this lot line adjustment is clearly erroneous. BMC 18.08.245 is found in the definitional section of Bellingham Municipal Code Title 18, and contains over 50 definitions of specific terms.<sup>16</sup> The definitions found therein apply to all of BMC Title 18, not just BMC Chapter 18.10. BMC Title 18 is entitled “Subdivisions” and governs both short and long subdivisions of land as well as binding site plans. The specifically defined term used here—“Lot area,” is found in at least three sections of BMC Title 18: BMC 18.32.040; BMC 18.32.050 and BMC 18.36.020.

The specifically defined term “Lot area” is, however, conspicuously absent from BMC 18.10.020. Particularly, it is not found within BMC 18.10.020(B)(2), the provision the City argues Lind has failed to comply with. Rather, the provision at issue only requires: “each parcel, if already less than the required minimum is not further reduced as a result of the lot line adjustment;”<sup>17</sup> This phrase from BMC 18.10.020(B)(2) cannot be reasonably interpreted to mean anything other than what it says—that the adjusted lots cannot be larger or smaller than the originals.

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<sup>16</sup> The entirety of BMC Title 18 was not submitted into the record, but it is not an evidentiary exhibit; rather, it is applicable law. Portions of the code were submitted as exhibits for ease of reference to the trial court and this Court. However, the entire Code is available online, or excerpts will be provided at the Court’s request. <http://www.cob.org/web/bmcode.nsf/CityCode?OpenView>

<sup>17</sup> BMC 18.10.020(B)(2).

The specific term “Lot area” is not used at all in the applicable section of the code. “Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.”<sup>18</sup> The absence of the term “Lot area” from the applicable code section is important. In interpreting an ordinance, this Court must assume the city council means exactly what it says, and further, when an ordinance uses different terms this Court must deem the city council to have intended different meanings.<sup>19</sup>

Moreover, lot line adjustments are completely exempt from this minimum lot size requirement. The City’s Lot Design section, BMC 18.36.020(A),<sup>20</sup> provides, in pertinent part:

All lots shall be of sufficient size to meet the site area requirements specified within the area's land use designation under "density" found within the applicable Neighborhood Plan in which the property is located; provided, however, that this minimum shall not be required in the following instances:

....

3. Lot line adjustments pursuant to Section 18.10.010 for lots presently having less site area than the required minimum lot size[.]

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<sup>18</sup> In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn. 2d 834, 842, 215 P.3d 166, (2009).

<sup>19</sup> *Id.*

<sup>20</sup> CP 76.

The ordinance is specifically intended to address this situation in a lot line adjustment and it is dispositive of the issue. Here, we have a “non conforming” lot—smaller than the zoned 20,000 square feet required. BMC 18.36.020 exempts these smaller lots from any site area requirements.

These different sections of the ordinance can be read in harmony, to give each section and phrase its intended meaning. However, even if read to be contradictory, BMC 18.36.020(A)(3) and BMC 18.10.020(B)(2) must be read in the context of the subdivision code as a whole. Contradictory ordinances must be read in a harmonizing manner,<sup>21</sup> and ultimately, any discrepancies or ambiguities must be resolved in favor of the property owner.<sup>22</sup>

Here, the actual physical size of the proposed lots will be the same as the original. No subdivision is occurring, and one lot is not being made larger than the other. The purpose and intent of the ordinance scheme is satisfied.

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<sup>21</sup> *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”).

<sup>22</sup> See e.g. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007).

**(b) Lot Size Calculations – Red Herring**

The City also argues the LLA does not satisfy BMC 18.10.020(B)(2) because the proposed lots are not the same size as the original lots. This issue was ferreted out in detail at the hearing, and it is a perfect example of how the City has refused to address even minor issues with Lind. Bruce Ayers testified that he was never once told by the City that the lot size calculations were a problem, until the written denial was issued. (CP 403-404). He was completely surprised by this, so he went back to his office to figure out the problem. (CP 401).

Ayers testified that in just a few hours, he had come up with three options of how to deal with the issue. (CP 406). The only reason the application “failed” to meet this technical requirement (a mistake of 255 square feet) is because the City issued the denial of the LLA without ever once notifying Ayers of the mistake. This can easily be fixed on remand.

**4. Lot Line Criteria 3 – BMC 18.10.020(B)(3)**

The City alleges BMC 18.10.020(B)(3) is not satisfied because the new lot configuration would “further infringe” on the City’s Land Use Development Ordinance. The Hearing Examiner agreed. The City claims Lot A would be a non-buildable lot because the front yard setback would

cover the entire lot.<sup>23</sup> The City reaches this conclusion because it argues that Lot A is a “through lot” and pursuant to BMC 20.08.020(L)(9)(a)(iii). It must therefore have two “front” lot lines and attendant “front yard setbacks” (one side abuts Star Court ROW and the other abuts Harrison ROW, neither of which are improved streets). The City’s interpretation is incorrect.

A “through lot” is “A lot, other than a corner lot, which abuts upon two streets.”<sup>24</sup> A “street” is defined as “A right of way having a width of 30’ or more which provides the principal means of access to abutting property. . . .”<sup>25</sup>

The Harrison ROW is not a street as defined by the BMC, and therefore, Lot A cannot be a “through lot.” The Harrison ROW was dedicated as part of the plat to the south, the Amended Happy Valley Addition to Fairhaven. Harrison was not originally intended to be used as access for the Lind Lots. (CP 501-502).<sup>26</sup> Lind’s lots are within the Star Addition to Fairhaven, which was originally intended to be accessed by Star Court, a 60 foot ROW.<sup>27</sup> Thus, Harrison was not and is not the

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<sup>23</sup> The City establishes the front yard setback line based on BMC 20.10.080(E).

<sup>24</sup> BMC 20.08.020(L)(12).

<sup>25</sup> BMC 20.08.020(S)(19).

<sup>26</sup> These pages of testimony provide a comprehensive explanation of the history behind the two subject plats and why Harrison is not 60 feet.

<sup>27</sup> Lind cannot use Star Court because a wetland is located in the middle of the right of way.

“principal means of access to abutting property” and it is not a “street” under the code definition. If Harrison is not a street, Lot A cannot be a through lot requiring two front yard setbacks.

Even if the City is correct regarding the setbacks, nothing prevents Lind from obtaining a variance *applied for at building permit stage*. Lind has proposed the lot line adjustment to avoid and/or minimize any environmental impacts thereto. He did so in good faith. The City allowed Lind to proceed with his application, reviewing environmental concerns for years, when this issue could have easily been ferreted out early on.

The need for variances and mitigation could occur whether or not the LLA was done. It is a question of which type of variance and/or mitigation is better for the City and Lind: a variance to reduce a setback for a road that will never be built (e.g. Star Court), or, much greater impacts on wetlands and buffers. The existing lots are in contradiction to city ordinances as well—so to argue that the proposed configuration “further” infringes on city ordinance is not correct. At best, they both equally have potential to “infringe.”

If the Hearing Examiner is affirmed and the Lot Line Adjustment is denied, the City code will be applied to an absurd result: requiring Lind to construct one of the two houses in the middle of a wetland, rather than constructing both houses on upland. If variances are in fact required, they

can be sought in conjunction with a building permit. BMC 18.10.020(B)(3) is met; the Hearing Examiner erred in finding otherwise.

**5. Lot Line Criteria 4 – BMC 18.10.020(B)(4)**

The Hearing Examiner ruled that BMC 18.10.020(B)(4) is not satisfied, because the new lot configuration does not improve the “overall function and utility of the existing lots.” In reaching this conclusion the Hearing Examiner failed to review the Project as a whole, including analysis improved function and utility to the applicant and the public. The word “overall” in “overall function and utility” cannot be ignored.

The Hearing Examiner and City focus their analysis on the right of way dedication requirements, septic and access. When considered in context of the entire Project, these issues fail to support the Hearing Examiner’s decision.

Relating to the right of way dedication requirements, as argued above, these issues were *never* brought to Ayer’s or Lind’s attention before the denial. Nonetheless, these issues can all be dealt with at the building permit stage; the *overall* function and utility of the lot is actually increased despite the potential need to dedicate. As existing, major wetland and other impacts would occur. It is undisputed that assuming two houses are built on the two lots, the proposed LLA reduces direct impacts to wetlands and buffers.

Regarding septic systems, the Bellingham Municipal Code specifically allows septic systems if the proposed development is located more than 200 feet from an existing gravity sewer main. There is no evidence on the record that sewer is available within 200 feet.<sup>28</sup> Lind had septic approval until it was revoked due to the City's erroneous comments. Regardless, unless the City can show that sewer is available, septic will be necessary to put a home on each lot of record. Thus, under the current lot configuration, each home will require a septic system, one of which would be located in a wetland. Septic function and utility is increased by the LLA.

Finally, and perhaps most poignantly, the City's lot line adjustment denial and testimony by Kathy Bell both indicate that the City only considered environmental issues in analyzing whether the "overall function and utility of the existing lots" is improved. Ms. Bell testified that she did not consider (nor did the Hearing Examiner consider) economic function and utility at all, and she admitted that the LLA was denied due to environmental reasons. (CP 722; 704).

The phrase "overall function and utility of the existing lots" means what it says: the City must consider *all* functions and *all* utility of the *lots*, including economic function and utility as well as function and utility to

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<sup>28</sup> The only witness to testify about location of Sewer was Kathy Bell, who said she did not know how far away it was. CP 705

the end user—the homeowner. The Hearing Examiner and City failed to engage in that complete analysis as required by BMC 18.10.020(B)(4) and thus committed clear error.

**6. Variances are Premature and Lack of Them is an Erroneous Basis to Deny LLA.**

The City argues, and the Hearing Examiner agreed, that Lind should have applied for variances to address the setback and other reasons the City now cites for denying the LLA. The City cites no legal authority for this proposition and nothing in the LLA ordinance indicates it is required. The LLA process merely changes the location of lot lines. The LLA ordinance speaks to “further infringing” on the code, but does not prevent a lot with code challenges from being adjusted into a lot with a similar level of code challenges. Building setbacks and other regulations can be dealt with at building permit stage.

Instead of relying on law, the City asserts that the October 10, 2006 meeting was the point in time when Lind was told that “potential variance package” was encouraged. Reliance on this fact is misplaced.

The LLA was “on hold” for environmental review. It is unrealistic to expect Lind to expend thousands applying for a variance package while environmental review was still pending. In March 2007, five months after the meeting the City relies upon, Lind’s engineer requested information

about the lot line adjustment application. Kim Weil wrote in response that review of the LLA application was “discontinued until completion of the environmental review.” (CP 883).

The City never notified Lind of the potential need for variances in a manner which made it clear the permits would be denied without them. Surely, had Lind or Ayers known that the permits would be denied and the thousands of dollars put into the project lost without such variances, some action would have been taken. The fact that action was not taken is corroboration of the testimony in the record.

When queried about why the City never told Ayers about the issues, the City replied:

“It is not the City of Bellingham’s responsibility to inform the applicants what the requirements are, it is the due diligence of the applicant to supply sufficient compliant information.”

This statement epitomizes the mindset with which the City approached this Project. As confirmed by Bruce Ayers’s 30 years of experience—this project was handled like no other he had ever dealt with. The City did virtually nothing to assist or inform him or Lind as to the process or the potential problems with the project, and as a result, we are presented with this appeal.

**B. The City Improperly Used SEPA to Impose Permit Conditions through an MDNS.**

Lind appealed both the first MDNS and the Revised MDNS. These appeals were dismissed as “moot” by the Hearing Examiner. (CP 1562). The Superior Court ordered the case remanded to the Hearing Examiner to decide these issues. (CP 9). The issues are not moot if this Court grants Lind’s appeal on other issues. Since this Court stands in the shoes of the Superior Court, it is appropriate for it to consider the original relief requested by Lind in that forum.

The regulation of the wetlands at issue in this case is governed by the 1991 Bellingham Wetland-Stream Ordinance, also known as the Wetland and Stream Regulatory Chapter, Ordinance, 10267 (“WSO”).<sup>29</sup> The WSO provides the City with all the tools necessary to impose conditions or mitigate impacts to wetlands and buffers. Rather than use the powers it has 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. Thus, under RCW 43.21C.240, the MDNS in this case should not have addressed wetland issues, nor should it have addressed water and sewer issues.

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<sup>29</sup> A complete copy of this ordinance is found at CP 1222-1246.

**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. 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.<sup>30</sup>

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 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*

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<sup>30</sup> See the recitals of the WSO (Ordinance 10267) at CP 1223.

*through local development regulations and other local, state, and federal environmental laws.*<sup>31</sup>

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—impose SEPA conditions addressing environmental issues when GMA adopted development regulations addressing impacts were already in place. 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.<sup>32</sup>

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 section, the GMA county/city *shall not require additional mitigation* under this chapter for those impacts.<sup>33</sup>

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<sup>31</sup> *Moss v. City of Bellingham*, 109 Wash.App. 6, 14, 31 P.3d 703 (Div. 1, 2001) (emphasis added) (quoting Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, Appendix E, p. 505 (1995)).

<sup>32</sup> RCW 43.21C.240(3)

<sup>33</sup> WAC 197-11-158(5) (emphasis added).

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.<sup>34</sup>

The WSO is a “development regulation” adopted under RCW 36.70A (the Growth Management Act). The City, through the WSO, has identified the specific adverse environmental impacts, e.g. impacts to wetlands and buffers. The City, through the WSO, has adopted land use designations, development standards and land use planning, pursuant to

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<sup>34</sup> RCW 43.21C.240(4) (Emphasis added).

RCW Chapter 36.70A to deal with and mitigate those impacts. As a result, the City was required to make a determination under RCW 43.21C.240 that the WSO addressed 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.<sup>35</sup> 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 nonsignificance<sup>36</sup>...

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 task force, provision of workshops and public meetings all resulting in recommendations for developing this regulatory chapter”.<sup>37</sup>

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<sup>35</sup> See CP 1223, City of Bellingham Ord. 10267 (recitals of BMC 16.50).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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 Use of SEPA instead of the WSO Prejudiced Lind.**

The WSO provides all the public notice, mitigation and measures necessary to adequately protect the wetlands in this case. Reviewing that ordinance in total is important to understanding Lind's position in this case. The ordinance provides a comprehensive procedure for applying for, analyzing, and making determinations under the Wetland Stream Ordinance. In fact, the City has never asserted that the WSO fails to sufficiently mitigate all potential adverse environmental impacts. As such, the City is bound by it, and cannot use SEPA to avoid it.

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. Once the City reviews this and conducts whatever due diligence 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 was accepted and never challenged through the WSO. (CP 246-247).

BMC 16.50.100.D governs the procedure to be used in a permit application under the ordinance. Notice must be given to specified persons, depending on the category of wetland at issue, and those persons presumably have an opportunity to respond. Here, public notice was not sent out in 2005, 2006, 2007 or 2008. Instead, it was sent out in 2009, as part of the SEPA process, and even then, was sent out to a much greater group of people than required by the WSO.

Instead of following WSO procedures, the City ignored them and years later, tried to use SEPA to fix its mistake. Aside from being contrary to state and local law, this practice prejudiced Appellant Lind. Lind followed the applicable ordinance and submitted a delineation, the November 2005 Vicki Jackson wetland delineation report.<sup>38</sup> The City did not engage in the process under BMC 16.50.060 to “challenge” or otherwise change this delineation.<sup>39</sup> 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

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<sup>38</sup> CP 1134-1171

<sup>39</sup> CP 246-247.

dollars on developing a site plan and infrastructure engineering in accord with these accepted environmental documents.

For several years, the City encouraged Lind to continue site development under these accepted environmental documents, as evidenced by the complete record. Only when public comment was received in response to the MDNS did the City look to unwind its previous acceptance of the wetland reports. The City knew the only way it could even attempt to do this would be through SEPA, since the reports were already accepted under the WSO.

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 make a 180 degree turn after four years by issuing an MDNS requiring additional wetland study.

**C. In the Alternative, if the Revised MDNS was properly issued, conditions 1, 2, 3, 4, 8, 9, and 10 are substantively improper.**

Alternatively, if this Court holds that the Revised MDNS conditions are procedurally valid despite RCW 43.21C.240, they are still improper based on the facts of the project known to the City at the time

the MDNS was issued. The conditions challenged below all arise out of the Revised MDNS.<sup>40</sup>

An MDNS can be issued only if the underlying jurisdiction finds that the proposal is likely to cause a “probable significant adverse environmental impact.”<sup>41</sup>

**Conditions 1 and 4.** The wetland delineation and categorization demonstrating this was submitted years ago, and accepted by the City. As outlined above, the City has conceded that they never challenged the delineation or categorization under the WSO. The wetlands on the Property are category III,<sup>42</sup> which require a 25’ buffer.<sup>43</sup> Despite this, the City imposed a 50’ averaged buffer (with minimum buffer width of 35’) on the Project. This was done without justification, and there is no evidence on the record to support it.

According to the condition, the wetland buffer can be as narrow as 35’, but must average 50’, meaning the buffer will be greater than 50’ in some places. Despite only needing a 25’ buffer under the CAO, Lind tried to work with the City’s requirement and provided a mitigation plan using the City’s overreaching buffer requirement.

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<sup>40</sup> CP 757-758.

<sup>41</sup> WAC 197-11-330.

<sup>42</sup> CP 977 (2005 Delineation Report); CP 1137 (2005 Mitigation Plan, Table 1 “Summary of Existing Wetlands”).

<sup>43</sup> BMC 16.50.080.B (CP 1229 “B. Buffer Standards”).

Moreover, offsite mitigation is allowed. Katrina Jackson testified that offsite mitigation is permitted under the DOE manual and other applicable regulations. Kyle Legare reviewed Katrina Jackson's plan and agreed it adequately mitigated any proposed impacts.<sup>44</sup> BMC 16.50 allows for offsite mitigation. No valid reason was given at any point as to why offsite mitigation is not allowed, other than that the City does not "prefer" it.

This Court should also consider the fact that the City never raised this issue before issuing the MDNS and never addressed it in detail until the actual appeal hearing. The City had appropriate procedures within the WSO to address this issue, but chose to do it through SEPA. Had the city complied with its own ordinances and imposed these conditions pursuant to a wetland-stream permit, specific findings and conclusions justifying the condition would have been included. However, raising the issue as one sentence in an MDNS and then arguing it for the first time at the hearing<sup>45</sup> is improper. The City cannot now challenge the November 2008 mitigation plan in other aspects as it tried to do at the hearing.<sup>46</sup>

**Condition 2.** The City cites BMC 16.50.080(D) for its authority to limit uses within a wetland buffer. Contrasting that with BMC

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<sup>44</sup> CP 1218.

<sup>45</sup> CP 572 (Testimony of Katrina Jackson, stating that her mitigation plan had never been questioned as it was in the Hearing).

<sup>46</sup> The City failed to even raise these issues in its opening brief in this Court.

16.50.100(E), development may occur in wetlands so long as the impact is fully mitigated. The City's position (and its interpretation of the ordinance) makes no sense. 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 and confirmed by Kyle Legare adequately address all impacts to buffers.

**Condition 3.** BMC 16.50.120 specifically allows wetland mitigation offsite in situations where onsite mitigation is not possible. The City argues, again without authority, that offsite mitigation is not allowed in this project. This constrained site is a prime candidate for offsite mitigation, and such mitigation should be allowed. The evidence from Katrina Jackson was undisputed that the offsite proposed site is in the same watershed and overall function would be improved. (CP 532-537). The City had no evidence to rebut this. Instead, the City simply relied on Kim Weil's testimony that on-site mitigation is "preferred."

**Condition 8 and 9.** The City's argument that these conditions, which require access from a standard improved street within a 60 foot right of way and require 8 inch water and sewer to be extended across the full frontage of the property, belong in a SEPA MDNS is unfounded. The City's development standards, which are cited in the MDNS anyhow, take precedence over these ad-hoc SEPA conditions. The development standards govern these issues and will dictate all requirements as to sewer, water and frontage and right of way. These conditions do not belong in an MDNS.

**Condition 10.** This condition is again, inappropriate in light of the procedures under the WSO and the subsequent approval of Lind's original delineation. Kim Weil testified that the delineation was accepted and not challenged under the WSO. Yet, Condition 10 seeks to make an end-run around the WSO and impose additional wetland evaluation requirements through SEPA.

Weil admitted that this SEPA 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 260). This alone is inappropriate, as the delineation was approved and accepted years before the comments came in. No physical on-site conditions had changed and the City itself did not investigate the allegations. Instead, the condition

was prompted by scientifically and factually unsupported speculation. (CP 1298).<sup>47</sup>

An MDNS condition such as this can only be imposed if it is necessary to avoid a “probable significant adverse environmental impact.” 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*.”<sup>48</sup> This Court must look at what the City knew when it imposed this condition.

The only information the City had regarding this issue was a stack of speculative citizen form letters and a comment from Susan Meyer at DOE alleging an unsubstantiated belief that there was a “mature forested wetland” on the property. (CP 1298). Instead of looking into the situation itself, or doing any on-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 Category III, not I.<sup>49</sup>

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<sup>47</sup> An email by Kim Weil to then Planning Director Tim Stewart characterizing the citizen letters regarding the new “mature forested wetland” issue as “speculating.”

<sup>48</sup> WAC 197-11-782.

<sup>49</sup> Lind has had *three* different wetland consultants reach the same conclusion: that the wetlands are category III. NES, LLC prepared the delineation report in 2005. NWC, LLC prepared the mitigation plan in 2008. Habitat Ecology and Design, Inc. reviewed the site and prepared analysis in 2010 (See CP 1327-1330). *All three* analyses concluded that the wetlands are category III under the WSO.

It was clear error for the City to impose this condition in light of the speculative nature of the information and the multiple reports already confirming its non-existence. Requiring Lind to again “re-prove” his original analysis was unsupported by law or fact.

**D. The Wetland-Stream Permit Should Be Issued.**

In light of the above arguments, along with the LLA being approved, the Wetland Stream Permit should be approved.

**VII. CONCLUSION**

The City’s Hearing Examiner erroneously entered Findings of Fact and Conclusions of Law that are not supported by the record. Further, the Hearing Examiner committed clear error in upholding the City’s determinations, as outlined above. As a result, Lind requests this Court reverse the Hearing Examiner and award the following relief:

- A.** Remand the case to the Hearing Examiner with instructions that the Hearing Examiner shall direct the City to approve Lind’s Lot Line Adjustment as proposed, finding all 4 elements of BMC 18.10.020(B) satisfied and instructing the City that variances of any kind may be applied for in the future, as necessary.

- B. Hold as a matter of law that the issuing the Revised MDNS was improper under RCW 43.21C.240, or alternatively, that Conditions 1, 2, 3, 4, 8, 9, and 10 were improperly imposed.
- C. Hold as a matter of law that Harrison Street Right of Way is not a “street” requiring two front yard setbacks, and the only front yard setback faces Star Court.
- D. Hold as a matter of law that Harrison Street may remain at 30’ wide.
- E. Remand the case to the Hearing Examiner with instructions that the Hearing Examiner shall direct the City to Issue a Wetland-Stream Permit with the following conditions:
  - i. 25’ Buffers on all wetlands must be observed as they are Category III;
  - ii. The November 2008 Mitigation Plan is approved as presented;
  - iii. Construction of a Septic drainfield in the Buffer is permitted if County Health Department otherwise approves the proposed OSS systems.

RESPECTFULLY submitted this 18<sup>th</sup> day of April 2012.

BELCHER SWANSON LAW FIRM, PLLC



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

No. 67877-9-I

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

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

Appellants,

v.

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

Respondent.

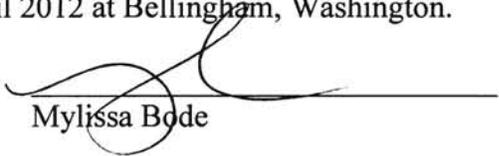
DECLARATION OF  
SERVICE

FILED  
COURT OF APPEALS, DIV I  
STATE OF WASHINGTON  
2012 APR 19 AM 11:49

I, Mylissa Bode, hereby certify that today I served Brief of Respondent and this Declaration of Service via hand deliver to Alan Marriner at City of Bellingham, 201 Lottie Street, Bellingham, WA 98225 and regular mail to Peter Frye, 2402 30<sup>th</sup> Street, Bellingham, WA 98225, 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 18<sup>th</sup> day of April 2012 at Bellingham, Washington.

  
Mylissa Bode