

67877-9

67877-9

NO. 67877-9-I

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

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

Appellants,

vs.

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

Respondent.

BRIEF OF APPELLANT CITY OF BELLINGHAM

Alan A. Marriner, WSBA No. 17515
Assistant City Attorney
City of Bellingham
210 Lottie Street
Bellingham, WA 98225
Telephone (360) 778-8270
Fax (360) 778-8271

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 22 AM 10:29

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR..... 3

ASSIGNMENT OF ERROR..... 4

2.1 The Superior Court erred by entering the Order on LUPA Hearing on the Merits on October 10, 2011 reversing the Hearing Examiner's decision denying Lind's lot line adjustment and wetland/ stream permit applications and SEPA appeal..... 4

ISSUES PERTAINING TO ASSIGNMENT OF ERROR. . . . 4

2.1.1 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 2. because the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment. 4

2.1.2 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application further infringes on the City's land Use Development ordinance in violation of BMC 18.10.020 B. 3. because all of Lot A is located within the 50-foot front yard setback for residential development. 4

2.1.3 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots. 4

2.1.4 Whether the Hearing Examiner correctly concluded that denial of Lind's lot line adjustment application required summary

	denial of Lind's wetland/stream permit application and makes Lind's SEPA appeal issues moot.	4
III.	STATEMENT OF THE CASE.....	5
IV.	SUMMARY OF ARGUMENT	12
V.	ARGUMENT	13
5.1	BURDEN OF PROOF.....	13
5.2	LOT LINE ADJUSTMENT.....	16
5.2.1	The Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 2. because the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment.....	20
5.2.2	The Hearing Examiner correctly concluded that Lind's lot line adjustment application further infringes on the City's Land Use Development Ordinance in violation of BMC 18.10.020 B. 3. because all of Lot A is located within the 50-foot front yard setback for residential development. .	27
5.2.3	The Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots.....	31
5.3	WETLAND/STREAM PERMIT AND SEPA CONDITIONS	35
5.3.1	The Hearing Examiner correctly concluded that denial of Lind's lot line adjustment application	

requires summary denial of Lind's wetland/stream permit application and makes Lind's SEPA appeal issues moot. 35

VI. CONCLUSION37

VII. APPENDIX A-1 through A-9

BMC 18.10.020.A-1

Existing Lots.A-2

Proposed Lots.A-3

Setbacks Existing Lots.A-4

Setbacks Proposed Lots A-5

Right-of-way Dedication Existing Lots. A-6

Right-of-way Dedication Proposed LotsA-7

Access Existing LotsA-8

Access Proposed LotsA-9

TABLE OF AUTHORITIES

Cases

<i>Abbey Road Group, LLC v. City of Bonney Lake</i> , 141 Wn.App. 184, 192, 167 P.3d 1213 (2007), <i>affirmed</i> , 167 Wn.2d 242, 218 P.3d 180 (Oct. 8, 2009).....	3
<i>Chelan County v. Nykreim</i> , 105 Wn.App. 339, 349, 20 P.3d 416 (2001), <i>reversed on other grounds</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	17
<i>Cingular Wireless</i> , 131 Wn.App. at 768.....	15
<i>Cingular Wireless, LLC v. Thurston County</i> , 131 Wn.App. 756, 768, 129 P.3d 300 (2006).....	14
<i>City of Federal Way v. Town & Country Real Estate, LLC</i> , 161 Wn.App. 17, 37, 252 P.3d 382 (2011).....	14
<i>City of Federal Way</i> , 161 Wn.App. at 17	34
<i>Cox v. City of Lynnwood</i> , 72 Wn.App. 1, 7, 863 P.2d 578 (1993)	17
<i>HJS Development, Inc. v. Pierce County</i> , 148 Wn.2d 451, 473 fn 95, 61 P.3d 1141 (2003).....	18
<i>Mason v. King County</i> , 134 Wn.App. 806, 811-813, 142 P.3d 637 (2006).....	19
<i>Quality Rock Products, Inc. v. Thurston County</i> , 139 Wn.App. 125, 134, 159 P.3d 1 (2007).....	3
<i>R/L Assocs., Inc. v. Klockars</i> , 52 Wn.App. 726, 729, 763 P.2d 1244 (1988).....	17

<i>SEIU Healthcare 775NW v. Gregoire</i> , 168 Wn.2d 593, 602 229 P.3d 774 (2010).....	36
<i>Wolfe v. Bennett v. PS & E, Inc.</i> , 95 Wn.App. 71, 77-78, 974 P.2d 355 (1999).....	25

Statutes

RCW 36.70C.130 (1).....	3, 14
RCW 36.70C.130 (1) (b)	26
RCW 36.70C.130 (1) (c).....	26
RCW 36.70C.130 (1) (d)	26
RCW 58.17.040	16
RCW 58.17.040 (6).....	16, 17, 18, 19

Ordinances

BMC 13.04.070.....	32
BMC 13.04.070. B.....	28
BMC 13.08.030.....	32
BMC 18.04.100.....	10
BMC 18.08.245.....	21, 22, 23
BMC 18.08.265.....	17, 18
BMC 18.10.020 B	17
BMC 18.10.020 B. 1.....	19
BMC 18.10.020 B. 2	4, 20, 26
BMC 18.10.020 B. 3.....	4, 27, 29, 31
BMC 18.10.020 B. 4.....	4, 31, 35

BMC 18.36.....	20
BMC 18.36.020.....	20
BMC 18.36.020 E.	23, 32
BMC 20.00.190.....	20
BMC 20.04.010.....	27
BMC 20.10.080 E.	28
BMC 20.30.040 F.	28, 29
BMC 21.10.040 B. and C.....	22
BMC Chapter 16.50.....	6, 30
BMC Chapter 16.55.....	7
BMC Chapter 18.10.....	22
BMC Chapter 18.36.....	20
BMC Title 20.....	30

Regulations

WAC 197-11-350.....	11
---------------------	----

I. INTRODUCTION

Lind Bros. Construction, LLC (“Lind”) submitted lot line adjustment and wetland/stream permit applications to the City of Bellingham (“City”) to change the configuration of two substandard-sized lots containing wetlands and steep slopes. The City denied the applications and Lind appealed the decision to the City of Bellingham’s Hearing Examiner. After a two-day hearing on the matter, the Hearing Examiner issued a 26-page decision that contained detailed findings of fact and conclusions of law affirming the City’s decision on every issue.

The Hearing Examiner upheld that the City’s decision to deny the lot line adjustment because Lind’s lot line adjustment application failed to meet three of the four requirements for approval. (CP 1559, Conclusion of Law (“COL”) 9). The Hearing Examiner also affirmed the City’s decision to deny Lind’s wetland/stream permit application finding that denial of the lot line adjustment must also result in the denial of the wetland/stream permit because the activities proposed in the wetland/stream permit could not be undertaken without approval of the lot line adjustment. (CP 1561-1562, COL 15). The site plan for Lind’s wetland/stream permit application showing the location of the proposed building envelopes, drainfields, driveways, and other infrastructure is dependent on the City’s approval of the proposed lot configuration. *Id.*

At the hearing before the Hearing Examiner, Lind also challenged a number of conditions contained in the Revised MDNS issued by the City. Because the underlying permits were properly denied on other grounds, the Hearing Examiner found that the conditions imposed in the Revised MDNS were moot. (CP 1562, COL 18).

Lind appealed the Hearing Examiner's decision by filing a Land Use Petition Act (LUPA) appeal in Whatcom County Superior Court. The hearing on the merits in the LUPA appeal before Whatcom County Superior Court Judge Ira J. Uhrig took place on September 13, 2011. Judge Uhrig took the matter under advisement, and on October 10, 2011, the City received Judge Uhrig's order reversing the Hearing Examiner's decision. (CP 20-21). Judge Uhrig did not provide an oral or written basis for his decision. *Id.* Thus, the City does not know which of the Hearing Examiner's findings of fact or conclusions of law Judge Uhrig found in error.¹ The City now appeals Judge Uhrig's order reversing the Hearing Examiner's decision denying Lind's lot line adjustment and wetland/stream permit applications and SEPA appeal to this Court.

¹ On October 10, 2011, the City also received a decision from Judge Uhrig in another LUPA appeal involving Lind. The LUPA hearing in that case occurred on August 25, 2011. Like the present case, Judge Uhrig also reversed the Hearing Examiner without providing an oral or written basis for this decision. The City's appeal of that case is also presently before the Court of Appeals. *Lind Bros. Constr., LLC, Respondent v. City of Bellingham, et al., Appellant*, Case # 67878-7-I.

II. ASSIGNMENTS OF ERROR

Although Lind won in Superior Court, this Court reviews the Hearing Examiner's decision, not the Superior Court's. "Under LUPA, we stand 'in the shoes of the superior court' and limit our review to the record before the hearing examiner." *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wn.App. 184, 192, 167 P.3d 1213 (2007), *affirmed*, 167 Wn.2d 242, 218 P.3d 180 (Oct. 8, 2009). Lind continues to carry the burden of proof on appeal. "On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130 (1), even if that party prevailed on its LUPA claim at the superior court." *Quality Rock Products, Inc. v. Thurston County*, 139 Wn.App. 125, 134, 159 P.3d 1 (2007).

As noted above, the Superior Court Judge did not provide an oral or written basis for reversing the Hearing Examiner's decision. Thus, the City is unable to provide a detailed assignment of error. Instead the City assigns error to the Superior Court's global reversal of the Hearing Examiner's decision as an erroneous interpretation of law, not supported by substantial evidence in the record, and a clearly erroneous application of the law to the facts.

ASSIGNMENT OF ERROR

- 2.1 The Superior Court erred by entering the Order on LUPA Hearing on the Merits on October 10, 2011 reversing the Hearing Examiner's decision denying Lind's lot line adjustment and wetland/stream permit applications and SEPA appeal.**

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 2.1.1 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 2. because the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment.**
- 2.1.2 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application further infringes on the City's Land Use Development Ordinance in violation BMC 18.10.020 B. 3. because all of Lot A is located within the 50-foot front yard setback for residential development.**
- 2.1.3 Whether the Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots.**
- 2.1.4 Whether the Hearing Examiner correctly concluded that denial of Lind's lot line adjustment application required summary denial of Lind's wetland/stream permit application and makes Lind's SEPA appeal issues moot.**

III. STATEMENT OF CASE

On December 5, 2005, Lind submitted lot line adjustment and wetland/stream permit applications for two lots located west of 30th Street between Star Court to the north and Harrison Street to the south (hereafter the “Lind property”) in Bellingham. (CP 1538, Finding of Fact (“FOF”) 1). Both Star Court and Harrison Street are unimproved rights-of-way. (CP 1550, FOF 52-53).

The Lind property is located in Area 9 of the City’s South Neighborhood which is zoned single-family residential with a 20,000 square foot minimum lot size. (CP 668; 1538-1539, FOF 2). Both lots are significantly smaller than the required 20,000 square foot minimum lot size required in Area 9. (CP 666). The larger lot is approximately 8,368 square feet in area, and the smaller lot is approximately 5,578 square feet in area. (CP 668; 1539, FOF 6).

Lind submitted its lot line adjustment and wetland/stream permit applications to obtain approval for the development of two single-family residences on the property with street access from Harrison Street. (CP 1540, FOF 9). The lot line adjustment application proposed to alter the boundary between the two existing lots from a north/south orientation with both lots abutting Star Court to the north and Harrison Street to the south to an east/west orientation with

proposed Lot A abutting only Harrison Street and proposed Lot B abutting Star Court on the north side and having a 20-foot wide pipestem along the easterly side of Lot A extending to Harrison Street. (CP 852; 854; 1539-1540, FOF 6).²

The lots and abutting rights-of-way contain regulated wetlands. (CP 205-207, 217, 788; 922; 954; 1539, FOF 4; 1541, FOF 11). The development proposed by Lind included impacts to wetlands and required buffer areas. *Id.* The proposal located septic drainfields within the wetland buffer area, as well as the access portion of one lot within the wetland. (CP 216-217; 954; 1542, FOF 19; 1555, FOF 67; 1558, COL 8). Lind's wetland/stream permit application proposed onsite and offsite mitigation for these impacts. (CP 946; 1555, FOF 67).

Lind filed the lot line adjustment and wetland/stream applications with the City on December 5, 2005 to vest to the City's Wetland Stream Ordinance (Bellingham Municipal Code (BMC) Chapter 16.50).³ (CP 204; 1540, FOF 8). The City's Critical Areas Ordinance (BMC Chapter 16.55) which replaced the Wetland Stream

² Site plans for the existing lots (CP 852) and the lots proposed by Lind's lot line adjustment application (CP 854) are attached as Appendix A-2 and A-3.

³ The Wetland Stream Ordinance, BMC Chapter 16.50, is included in the record at CP 856-877. All other Bellingham Municipal Code (BMC) sections cited in this brief are included in the record at CP 66-98.

Ordinance took effect on the next day, December 6, 2005. *Id.* The City processed Lind's wetland/stream permit application pursuant to the Wetland Stream Ordinance. (CP 216-223; 244; 1540, FOF 8).

Lind's consultant Bruce Ayers testified that he had only a week to put the applications together to meet the December 5, 2005 deadline (CP 490-491), and that Lind's representatives were building the application file as they proceeded. (CP 503). As City Planners Kathy Bell and Kim Weil testified, Lind's applications lacked adequate information for the City to evaluate Lind's proposal for its consistency with the City's development standards and its potential environmental impacts. (CP 205-206; 700). Lind's applications did not include any requests for variances from the City's development or subdivision standards. (CP 236; 1545, FOF 31).

Because the applications lacked adequate information to evaluate Lind's proposal for compliance with the City's development and environmental codes, City staff made repeated requests for more information over the course of three years. (CP 209). Early in the process, on January 10, 2006, the City notified Lind that the applications did not provide enough information to prepare a Notice of Application or a SEPA determination and requested that Lind "provide a detailed SEPA checklist for the entire project, including road

construction, lot development, utilities, and stormwater management (if required by the Public Works Dept.).” (CP 878; 1541, FOF 12).

On February 16, 2006, the City notified Lind that it had not yet received the information requested on January 10, 2006, that approval of a Wetland/Stream permit was required to develop the property as proposed in the Lot Line Adjustment application and that concurrent review of the lot line adjustment and wetland/stream permit would occur. (CP 881; 1541, FOF 13). The City notified Lind that “further review of the Lot Line Adjustment application will continue upon staff completing a preliminary environmental review.” *Id.*

On October 10, 2006, City Planners Kim Weil and Kathy Bell met with Lind Bros. Construction, LLC’s owner John Lind and Lind’s wetland biologist Vikki Jackson. (CP 235-235; 1364; 1541, FOF 15). At that meeting, City staff expressed concern about how the proposal would meet City development standards and informed Mr. Lind that he needed to show how his project would meet City code given the zoning setbacks, wetland setbacks, and siting of the septic system. *Id.* City staff recommended that Lind’s wetland biologist and a qualified engineer work on a potential variance package. *Id.* Mr. Lind did not act on staff’s recommendation and never applied for variances. (CP 236; 1545, FOF 31).

On March 13, 2007, at the request of Lind's representative John Cox from Jones Engineering, City staff met with Mr. Cox and John Lind to review the status of Lind's applications. (CP 236-237). In a follow up letter to Mr. Cox dated March 29, 2007, the City described in detail the information it needed to continue its review of Lind's lot line adjustment and wetland/stream permit applications, including a completed SEPA checklist, verification of the Harrison Street right-of-way width and centerline, a copy of the Whatcom County Health Department septic permit allowing two septic systems or a plan to connect to the City sewer service, an engineering analysis showing construction feasibility of the road, a preliminary stormwater plan, a fire truck turnaround plan, and plans for fully abutting public water, sewer, and a minimum standard street. (CP 236-237; 883-884). The letter stated that information about the Harrison Street right-of-way width and centerline was **"necessary to determine if the proposed lot configuration yields buildable lots after considering zoning setbacks from the platted centerline, road improvement requirements, and compliance with Bellingham Municipal Code (BMC) 13.04.070 which requires a 60-foot right-of-way for residential access streets."** (CP 883-884, emphasis added). The letter also stated that if the abutment to public water, sewer, and minimum

standard street requirements could not be met, Lind needed to submit variance applications to the Public Works Department for processing. *Id.* Again, Lind did not act on staff's recommendation and never applied for variances. (CP 236; 1545, FOF 31).

Almost three years passed before Lind provided the information that the City originally requested on January 10, 2006, requested a second time on February 16, 2006, and a third time on March 29, 2007. (CP 205-206). On December 5, 2008, one day before its lot line adjustment application was due to expire under BMC 18.04.100, Lind's representative David New from Jones Engineering provided the City a complete SEPA checklist and detailed information regarding its development proposal. (CP 205-206; 940-969; 1004-1014; 1367; 1542-1543, FOF 18-21).

On February 27, 2009, the City requested that Lind pay its SEPA fee and supply a SEPA mailing list. (CP 237-238; 886; 1543, FOF 22). Lind complied with this request over two months later on May 8, 2009. *Id.*

On June 12, 2009, City Planner Kim Weil sent John Lind a letter stating that the City had "completed the project and environmental analysis of his lot line adjustment and wetland/stream permit applications and have prepared a list of conditions for a SEPA

Mitigated Determination of Non-Significance (MDNS), in accordance with WAC 197-11-350.” (CP 210; 1122; 1543-1544, FOF 24). The letter further stated: “Prior to issuing the MDNS, Kathy Bell and I would like to meet with you to discuss the conditions. In general, the conditions require better protection of the wetlands, verification that development setbacks will be met, and others that address impacts we believe have not been mitigated adequately.” *Id.* Lind failed to respond to the City’s invitation to meet. (*Id.* and CP 221; 232).

On June 27, 2009, the City issued the MDNS for Lind’s development proposal. (CP 1045-1046; 1544, FOF 25). The MDNS was subject to a 14-day comment period, and the City accepted public comment through July 10, 2009. *Id.*

Public comments received in response to the MDNS and an earlier Notice of Application raised the issue of whether the wetland on the Lind property was a mature forested wetland that would be classified as a Category I wetland with a 100-foot buffer. (CP 124; 126; 221-222; 231; 1024-1044; 1048-1054; 1544, FOF 25). On August 28, 2009, the City issued a Revised MDNS addressing the mature forested wetland issue. (CP 1055-1056; 1544, FOF 27). Lind appealed both MDNS and the Revised MDNS to the City Hearing Examiner. (CP 1545, FOF 29).

On January 13, 2010, the City issued decisions denying Lind's lot line adjustment and wetland/stream permit applications. (CP 1057-1060; 1546, FOF 32-33). Lind appealed both of these decisions to the City Hearing Examiner. (CP 1546, FOF 34). All of Lind's appeals were consolidated into one case with the Hearing Examiner.

The two-day hearing before the Hearing Examiner took place on September 28 and October 8, 2010. (CP 1538). In a written decision dated December 10, 2010, the Hearing Examiner affirmed the City's decisions denying Lind's lot line adjustment and wetland/stream permit applications. (CP 1537-1568). On December 30, 2010, Lind filed a LUPA appeal in Whatcom County Superior Court, seeking reversal of the Hearing Examiner's decision. The matter was heard by Superior Court Judge Uhrig on September 13, 2011, and in an order received by the City on October 10, 2011, Judge Uhrig reversed the Hearing Examiner's decision. (CP 20-22).

IV. SUMMARY OF ARGUMENT

Lind's lot line adjustment application proposes to modify lot lines on two existing substandard lots to create two new lots – one of which could not be developed at all and the other which could be developed only with significant adverse impacts to regulated wetlands

and buffers.⁴ The City's lot line adjustment approval criteria prohibit the City from approving a lot line adjustment proposal like Lind's which makes substandard lots more substandard or creates unbuildable lots.

Lind minimizes the problems with its lot line adjustment proposal by stating that "[t]he city cites the 'size of the lots' as a basis for the LLA denial." (CP 180). As described below, the Hearing Examiner denied Lind's lot line adjustment application on multiple grounds, any one of which was sufficient to deny the application. The record shows that prior to Lind filing his appeals with the Hearing Examiner, the City communicated its multiple concerns regarding the proposed lot line adjustment in person and in writing to Lind Bros. Construction, LLC's owner John Lind and Lind's representatives on multiple occasions from October 2006 through June 2009.

V. ARGUMENT

5.1 BURDEN OF PROOF

Lind, as the Petitioner in the LUPA proceeding, carries the burden of establishing that the Hearing Examiner erred under one of the LUPA's six standards of review:

⁴ The City acknowledges that under the existing lot configuration development of the larger lot may have wetland and buffer impacts. (CP 1558, COL 8).

(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).

“Standards (a), (b), (e), and (f) present questions of law the Court reviews de novo.” *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006). Although standard (b) presents questions of law that the Court reviews de novo, deference is given to the construction of local land use regulations by Hearing Examiner based on her specialized knowledge and expertise. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn.App. 17, 37, 252 P.3d 382 (2011).

“Standard (c) concerns a factual determination that the Court reviews for substantial evidence supporting it.” *Cingular Wireless*, 131 Wn.App. at 768. “Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted.” *Id.* The appellate court’s deferential review requires it “to consider 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.” *Id.* Since the City prevailed before the Hearing Examiner which was the highest forum exercising fact-finding authority, this Court should consider the evidence and reasonable inferences in the light most favorable to the City.

Standard (d)’s clearly erroneous test involves applying the law to the facts. *Id.* Under that test, the court determines “whether we are left with a definite and firm conviction that a mistake has been committed.” *Id.* “Again, we defer to factual determinations made by the highest forum below that exercised fact-finding authority” -- the Hearing Examiner. *Id.*

This case involves alleged errors by the Hearing Examiner under LUPA standards of review (b), (c), and (d). As shown below, Lind has failed to meet its burden of establishing that the Hearing Examiner erred under any of these three standards of review.

5.2 LOT LINE ADJUSTMENT

RCW 58.17.040 sets forth exemptions from the state subdivision regulations and requirements. Subsection (6) relates to boundary line adjustments. Specifically, subsection (6) provides that the requirements of chapter 58.17 RCW do not apply to:

(6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division **nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site.**

RCW 58.17.040 (6) (emphasis added). Thus, a boundary line adjustment is exempt from the state subdivision laws as long as it does not create additional lots nor lots which contain insufficient area and dimensions to meet minimum requirements for width and area for a building site.

The procedures for approving boundary line adjustments are not defined by chapter 58.17 RCW; instead, local authorities must establish their own procedures for the consideration and review of requests for boundary line adjustments. Case law provides that boundary line adjustments will be evaluated based on the type of procedure adopted by the local authorities. See *Chelan County v. Nykreim*, 105 Wn.App. 339, 349, 20 P.3d 416 (2001), *reversed on other grounds*, 146 Wn.2d

904, 52 P.3d 1 (2002); *R/L Assocs., Inc. v. Klockars*, 52 Wn.App. 726, 729, 763 P.2d 1244 (1988); *Cox v. City of Lynnwood*, 72 Wn.App. 1, 7, 863 P.2d 578 (1993).

The City of Bellingham has adopted regulations governing the approval of boundary line adjustments. These regulations use the term “lot line adjustment” instead of “boundary line adjustment.” The City’s definition of “lot line adjustment” mirrors RCW 58.17.040 (6)’s definition of “boundary line adjustment.” BMC 18.08.265 defines a “lot line adjustment” as “a revision made for the purpose of adjusting boundary lines which does not create any additional lot, tract, parcel, site or division **nor create any lot, tract, parcel, site or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site.** (Emphasis added; CP 73). BMC 18.10.020 B. provides four requirements that must all be met for the City to approve a lot line adjustment:

1. No new lots are created;
2. Each parcel as proposed meets minimum lot standards as specified in Chapter 18.36, or that each parcel if already less than the required minimum is not further reduced as a result of the proposed lot line adjustment;
3. The lot line adjustment does not further infringe on any applicable section of the City Land Use Development Ordinance; **and**

4. The lot line adjustment improves the overall function and utility of the existing lots.

(Emphasis added; CP 74).⁵

Consistent with the City's interpretation of this BMC section, the Hearing Examiner held that all four requirements must be met. (CP 1059, COL 2; 1559, COL 9). Despite Lind's claim that all four requirements need not be met (CP 188), the interpretation that all four requirements must be met is supported by plain wording of the code section as requirement #3 ends with "and" and not "or".⁶ Ordinarily the word "and" does not mean the word "or" unless there is clear legislative intent to the contrary. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 473 fn 95, 61 P.3d 1141 (2003). Statutory phrases separated by the word "and" generally should be construed in the conjunctive. *Id.*

The Hearing Examiner agreed with the City's decision that Lind's lot line adjustment proposal met the first requirement found at

⁵ A copy of BMC 18.10.020 is attached as Appendix A-1.

⁶ In its Closing Brief to the Hearing Examiner, Lind admitted that all four requirements must be met. (CP 1451, line 12). Lind reversed its position in its appeal to Superior Court and argued that not all four requirements need to be met. Under Lind's reasoning, the City could approve a lot line adjustment that fails to meet City lot line adjustment requirement #1 and creates new lots in violation of BMC 18.08.265, BMC 18.10.020 B. 1. and RCW 58.17.040 (6).

BMC 18.10.020 B. 1. as it does not create new lots. (CP 1059, COL 2; 1556, COL 1). It adjusts the lot lines of two existing lots. However, for the reasons described below, the Hearing Examiner affirmed the City's decision that Lind's proposal violates the other three requirements for City approval of a lot line adjustment. (CP 1059, COL 2-8).

Essentially, these three requirements prohibit the City from approving lot line adjustments which make lots that currently meet the City's minimum lot standards substandard or make existing substandard lots even more substandard. This is a requirement of state law. See RCW 58.17.040 (6) and *Mason v. King County*, 134 Wn.App. 806, 811-814, 142 P.3d 637 (2006) (Court held that King County wrongly approved a lot line adjustment that would transform a legally created lot into a substandard, undersized lot in violation of King County's applicable requirements for minimum width and area for a building site).

In its Brief to Superior Court, Lind states that its "Project requires variances from some sections of the Land Use Development Ordinance and BMC 18.36". (CP 190. Line 1-3). **This statement is an admission that Lind's lot line adjustment proposal fails to meet the City's lot line adjustment requirements of BMC 18.10.020 B.**

5.2.1 The Hearing Examiner correctly concluded that Lind’s lot line adjustment application violates BMC 18.10.020 B. 2. because the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment.

BMC 18.10.020 B. 2. requires that each parcel in a lot line adjustment proposal “meets minimum lot standards as specified in BMC Chapter 18.36, **or that each parcel if already less than the required minimum is not further reduced as a result of the proposed lot line adjustment.**” (Emphasis added).⁷

The Hearing Examiner found that Lind’s lot line adjustment application was inconsistent with BMC 18.10.020 B. 2. as the existing lots do not meet the minimum density requirement and are further reduced in size by the proposed lot line adjustment. (CP 1556, COL 2). Under BMC 20.00.190, the minimum density requirement for lots in Area 9 of the South Neighborhood is 20,000 square feet. (CP 82; 668; 1556, COL 2). Lind’s lot line adjustment application proposed two lots which are less than the minimum site area of 20,000 square feet, and it further reduced the site area of each of the lots from that currently

⁷ BMC Chapter 18.36 provides the City’s minimum standards for the design of lots. BMC 18.36.020 includes standards for minimum site area, and minimum width, depth and frontage requirements. BMC 18.36.020 is included at CP 76-80.

existing. (CP 670-671; 1556, COL 2).

The smallest existing lot is approximately 5,578 square feet and would be reduced by the lot line adjustment proposal to approximately 5,332 square feet (Lot A). (CP 668-669; 1556, COL 2). Although the total amount of the land contained within the boundaries of proposed Lot B would increase in size from the existing approximately 8,368 square feet to approximately 8,615 square feet, the site area of the lot as defined by BMC 18.08.245 would be reduced to approximately 7,644 square feet. (CP 670-672; 1556-1567, COL 2). BMC 18.08.245 requires that the pipestem portion of a lot be excluded in determining the area of a pipestem lot. (*Id.* and CP 72)⁸

The decision to design a lot with a pipestem was Lind's, as it is not a code requirement. The use of a pipestem enabled Lind to provide street frontage for both lots on Harrison Street and allowed Lind to avoid having to construct both Harrison Street and Star Court. (CP 690-691; 1559, COL 10). However, under BMC 18.08.245, a lot with a pipestem will always result in a smaller lot than the same lot without a pipestem, as the pipestem portion of the lot is excluded in determining the area of the lot.

⁸ A site plan for the lots proposed by Lind's lot line adjustment application showing the Lot B pipestem (CP 854) is attached as Appendix A-3.

At the appeal hearing before the Hearing Examiner, Lind presented a number of options for modifying the size of the proposed lots which were not included in its original application or in any revisions or amendments to the application prior to its denial by the City. (CP 1551, FOF 55; 1557, COL 4). The options were not reviewed by City staff for compliance with lot line adjustment or development standards. *Id.*

BMC 21.10.040 B. and C. provide that a lot line adjustment is a Type I process unless it requires a SEPA threshold decision, and then it is a Type II process requiring public notice. (CP 90-91). Both Type I and II processes are an administrative review and decision by the Planning Department Director subject to an appeal to the Hearing Examiner. *Id.* The Hearing Examiner correctly found that she lacked the authority to approve proposals for lot line adjustments that have not been properly submitted pursuant to the procedures specified in BMC Chapter 18.10 for administrative review and approval by the Planning Department Director. (CP 1557, COL 4).

However, the Hearing Examiner also found that even if she had the authority to consider the options submitted by Lind for the first time at the appeal hearing to correct the lot area deficiency, none of the options submitted result in both proposed lots maintaining at least the

site area now existing. (CP 1557, COL 3). The Hearing Examiner found that these options may increase the size of proposed Lot A so that it is approximately the same size (or slightly larger) than the smallest existing lot, but the exclusion of the area of the pipestem of proposed Lot B, as required by BMC 18.08.245, would result in a smaller site area for Lot B than for the larger of the existing lots. *Id.* Also, the Hearing Examiner found that two of the options may reduce the depth of Lot B below that required by BMC 18.36.020 E. (*Id.* and CP 78). The existing larger lot meets the dimensional requirements of this section. *Id.*

Before the Hearing Examiner and in Superior Court, Lind argued that the City placed its lot line adjustment application on hold and then summarily denied it based on an “easily fixable”, “minor error in a mathematical calculation.” (CP 176; 180). First, as described above, the reduction in lot size was not a readily fixable error. Second, the City did not place the lot line adjustment application on hold and then summarily deny it without allowing Lind to correct errors in its application or apply for variances

As described above in the Statement of the Case, the City communicated its multiple concerns regarding Lind’s lot line adjustment proposal in person and in writing to Lind’s representatives

on multiple occasions from October 2006 through June 2009. (CP 235-236; 700-702; 883-884; 1122; 1364; 1541, FOF 15; 1543-1544, FOF 24). Additionally, Lind ignored the City's repeated recommendation to apply for variances if its proposal could not meet the City's relevant development standards. (CP 235-236; 700-702; 883-884; 1364; 1541, FOF 15). Finally, John Lind ignored the City's June 12, 2009 letter notifying him that the City had "completed the project and environmental analysis of his lot line adjustment and wetland/stream permit applications" and requesting a meeting to discuss the conditions for the project which will require better protection of the wetlands, verification that development setbacks will be met, and further mitigation of the proposal's impacts. (CP 221; 1122; 1543-1544, FOF 24). Seven months later, on January 13, 2010, the City issued its decision denying Lind's lot line adjustment application. (CP 1057-1060).

The Hearing Examiner rejected Lind's argument that the City put its lot line adjustment application on hold and that the City never notified it of the deficiencies in the application. (CP 1560-1561, COL 12). The City notified Lind on February 16, 2006 that it would conduct a concurrent review of Lind's lot line adjustment and wetland/stream permit applications, and it would continue further review of the lot line

application after it had completed preliminary environmental review. (CP 1560, COL 12). The City completed preliminary environmental review and issued a MDNS and a Revised MDNS. *Id.* The City contacted Lind on June 12, 2009 indicating that it had completed review of the applications and that it wanted to discuss possible conditions with Lind. *Id.* Lind did not respond to this request. *Id.*

An applicant is responsible for submitting an application that meets approval criteria. *Id.* The Hearing Examiner found that the record indicates that the City informed Lind and its representatives on multiple occasions of the problems presented by the applications and recommended that it consider submitting a variance package as far back as October 10, 2006. (CP 1560-1561, COL 12). Ultimately, the responsibility for compliance with procedural requirements and approval standards is the applicant's. (CP 1561, COL 12). See *Wolfe v. Bennett v. PS & E, Inc.*, 95 Wn.App. 71, 77-78, 974 P.2d 355 (1999). The Hearing Examiner found that Lind had not shown that the City failed to process its application in accordance with applicable regulations. (CP 1561, COL 12).

Lind has failed to prove that the Hearing Examiner erred in holding that Lind's lot line adjustment application violates BMC 18.10.020 B. 2. because the existing lots do not meet the minimum

density requirement and are further reduced in size by the proposed lot line adjustment. First, Lind has failed to show that the Hearing Examiner's decision that Lind's lot line adjustment application violates BMC 18.10.020 B. 2. is based on an erroneous interpretation of the law under RCW 36.70C.130 (1) (b), after allowing for such deference as is due the construction of this development regulation by the Hearing Examiner who has expertise in interpreting the City's development regulations. Second, Lind has failed to show that the Hearing Examiner's decision is not supported by substantial evidence under RCW 36.70C.130 (1) (c) after considering all of the evidence and reasonable inferences in the light most favorable to the City who was the prevailing party before the Hearing Examiner, the highest forum that exercised fact-finding authority in this case. Finally, Lind has failed to show that the Hearing Examiner's decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130 (1) (d) after deferring to factual determinations made by the Hearing Examiner as the highest forum below that exercised fact-finding authority.

5.2.2 The Hearing Examiner correctly concluded that Lind's lot line adjustment application further infringes on the City's Land Use Development Ordinance in violation of BMC 18.10.020 B. 3. because all of Lot A is located within the 50-foot front yard setback for residential development.

BMC 18.10.020 B. 3. prohibits a lot line adjustment proposal from further infringing on any applicable section of the City Land Use Development Ordinance.⁹ The existing platted lots have a depth of approximately 110 feet (CP 852; 1557, COL 6), and after application of the zoning setbacks, they provide a legally sufficient building envelope under the City's Land Use Development Ordinance. (CP 674-675; 852; 1557-1558, COL 6).

Unlike the existing lots, the lots proposed by Lind's lot line adjustment application fail to provide a legally sufficient building envelope under the City's Land Use Development Ordinance for the smaller proposed Lot A. In fact, proposed Lot A has no buildable area at all after application of the City's zoning setbacks.

Under the proposed lot line adjustment, Lot A has a depth of approximately 50 feet. (CP 854; 1557, COL 6). The minimum standard right-of-way for a residential street is 60 feet. BMC 13.04.070. B. (CP

⁹ Per BMC 20.04.010, Title 20 of the Bellingham Municipal Code is known as the "Land Use Development Ordinance". (CP 83).

66; 1557, COL 6). Because Harrison Street has a right-of-way width of approximately 33 feet, less than the required standard 60 feet, BMC 20.10.080 E. provides that the centerline for setback purposes is the farthest edge of the existing right-of-way that was dedicated by the subject property. (CP 84; 674; 1557-1558, COL 6). Harrison Street was dedicated entirely by the Happy Valley Plat to the south of the Lind property. (CP 673-674; 1558, COL 6). None of the right-of-way was dedicated from the Lind property, so the centerline for setback purposes is the southern property line of the Lind property. *Id.*

BMC 20.30.040 F. requires a minimum front yard setback of 50 feet from the centerline of the abutting street. (CP 88; 675; 1558, COL 6). Application of the front yard setback requirement leaves no buildable area on proposed Lot A. (*Id.* and CP 891). However, application of the front and side yard (five feet on each side) setback requirements to the existing smaller lot leaves a buildable area of approximately 40 feet by 40 feet. (*Id.* and CP 889).¹⁰

Lind's lot line adjustment proposal seeks to modify an existing lot that has sufficient dimensions to comply with the front yard setback

¹⁰ Site plans comparing the impact of the front yard setbacks on the existing lots (CP 889) and the lots proposed by Lind's lot line adjustment application (CP 891) are attached as Appendix A-4 and A-5.

requirements of the Land Use Development Ordinance, BMC 20.30.040 F., creating a lot that cannot comply with these requirements.

Id. The Hearing Examiner found that this lack of buildable area on Lot A results in further infringement of the provisions of the City's Land Use Development Ordinance in violation of BMC 18.10.020 B. 3. (CP 1557-1558, COL 6).

The City has a strong interest in ensuring that its lot line adjustment process does not reconfigure lot lines in a manner that makes one or more of the lots unbuildable or unable to be developed under current development regulations. BMC 18.10.020 B. 3.'s requirement that a lot line adjustment proposal not further infringe on any applicable section of the City Land Use Development Ordinance prevents such a result.

Lind argues that the Hearing Examiner erred in finding that its lot line adjustment proposal "further infringes" on the City's Land Use Development Ordinance because the existing lots require the construction of a residence in a wetland. (CP 190). There are at least three problems with this argument. First, as noted above, Lind's lot line adjustment proposal results in one lot (Lot A) being unbuildable under the City's development standards.

Second the "further infringement requirement" applies to the

City's Land Use Development Ordinance codified at BMC Title 20 and not the City's wetland regulations (Wetland Stream Ordinance) codified at BMC Chapter 16.50. Environmental considerations are irrelevant to the analysis as to whether the proposal further infringes on the City's Land Use Development Ordinance.

Third, Lind has never submitted a development proposal based on the existing lot configuration, so the City never evaluated such a development proposal and how it would be regulated under the City's Wetland Stream Ordinance. The City's decision in this case was based on the one proposal submitted by Lind. Essentially, Lind's argument is that the Court should ignore the City's lot line adjustment approval criteria because Lind claims its proposed lot line adjustment will have less environmental impacts than an undefined and unevaluated development on the existing lot configuration. (CP 265-268).

Lind has failed to prove that the Hearing Examiner erred in holding that Lind's lot line adjustment application further infringes on the City's Land Use Development Ordinance in violation BMC 18.10.020 B. 3. because all of proposed Lot A is located within the 50-foot front yard setback for residential development. Lind has failed to show that the Hearing Examiner's decision that Lind's lot line adjustment application violates BMC 18.10.020 B. 3. is based on an

erroneous interpretation of the law, not supported by substantial evidence, or based on a clearly erroneous application of the law to the facts.

5.2.3 The Hearing Examiner correctly concluded that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots.

The Hearing Examiner held that Lind's lot line adjustment proposal failed to improve the overall function and utility of the existing lots because it creates one unbuildable lot and another lot that will require substantial impacts to a wetland and buffer area for development. (CP 1558-1559, COL 8). BMC 18.10.020 B. 4. requires that a lot line adjustment proposal improve the overall function and utility of the existing lots. The Hearing Examiner found that Lind's lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots. (CP 1558-1559, COL 7-8).

Proposed Lot Depths

Lind proposes to use Harrison Street as the sole access to Lind's property. (CP 511; 788; 1540, FOF 9). As previously stated, Harrison Street is an unimproved right-of-way that is substandard as to right-of-

way width. (CP 501; 677; 1539, FOF 4; 1558, COL 7). The platted Harrison Street right-of-way varies, having an average width of approximately 33 feet. (CP 678; 1058, FOF 11 and 16; 1558, COL 7). With development of the site, the construction of Harrison Street to a minimum standard street within a 60-foot right-of-way will be required pursuant to BMC 13.04.070 and BMC 13.08.030. (*Id.* and CP 66). Lind will need to dedicate up to an additional 30 feet of right-of-way to provide the required 60-foot right-of-way necessary to develop the subject site. (CP 679; 895; 1058, FOF 16; 1558, COL 7).

The existing lots could dedicate the necessary land for additional right-of-way on Harrison Street and still maintain function and utility by providing the required 60-foot lot depth required by BMC 18.36.020 E. (CP 78; 678-679; 893). Dedication of up to an additional 30 feet of right-of-way needed for Harrison Street under the proposed lot configuration would result in Lot A having a 20-foot lot depth. (CP 679; 895; 1558, COL7).¹¹ This circumstance, combined with the application of setback requirements to proposed Lot A leaves it without

¹¹ Site plans comparing the impact of the dedication of additional right-of-way for Harrison Street on the existing lots (CP 897) and the lots proposed by Lind's lot line adjustment application (CP 899) are attached as Appendix A-6 and A-7.

function and utility. (CP 1558, COL 7).

Septic Systems and Access Plan

Although the existing configuration of the larger lot may not be ideal with respect to avoidance of wetland and buffer impacts, the Hearing Examiner found that the Planning Department Director's determination that Lind's lot line adjustment proposal does not improve the overall function and utility of the existing lots due to the wetland and buffer impacts was not erroneous. (CP 1558-1559, COL 8). The proposal locates septic drainfields within the wetland buffer area and the access portion of Lot B within the wetland. (CP 679-680; 899; 1058, FOF 18-19; 1558-1559, COL 8).¹² The Hearing Examiner found that the proposal does not improve the function and utility of the existing smaller lot which is currently located almost entirely outside the wetland and buffer areas that are shown on the site plan. (CP 852; 1558-1559, COL 8). Because of the lot depth deficiencies previously noted with respect to proposed Lot A, the Hearing Examiner found that the proposal creates one unbuildable lot and another that will require substantial impacts to a wetland and buffer area for development. *Id.*

¹² Site plans comparing the access provisions for the existing lots (CP 897) to the access provisions for the lots proposed by Lind's lot line adjustment application (CP 899) are attached as Appendix A-8 and A-9.

The Hearing Examiner determined that the proposed lot configuration does not appear to be an improvement to the function and utility of the existing lots. *Id.*

Lind argues that the Hearing Examiner erred by failing to consider “the economic function and utility to the homeowners of the new lot configuration”. (CP 190). As described above, the Hearing Examiner’s decision was limited to an analysis of the code requirement that the lot line adjustment “improves the overall function and utility of the existing lots” with regard to the relevant City development and environmental regulations. Given that the regulation does not mention “economic function and utility to the homeowners”, the Hearing Examiner’s interpretation of the term “improves the overall function and utility of the existing lots” is not 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. *City of Federal Way*, 161 Wn.App. at 17.

Lind has failed to prove that the Hearing Examiner erred in holding that Lind’s lot line adjustment application violates BMC 18.10.020 B. 4. because the proposed lot depths, access plan, and septic systems fail to improve the overall function and utility of the existing lots. Lind has failed to show that the Hearing Examiner’s decision that

Lind's lot line adjustment application violates BMC 18.10.020 B. 4. is based on an erroneous interpretation of the law, not supported by substantial evidence, or based on a clearly erroneous application of the law to the facts.

5.3 WETLAND/STREAM PERMIT AND SEPA CONDITIONS

5.3.1 The Hearing Examiner correctly concluded that denial of Lind's lot line adjustment application requires summary denial of Lind's wetland/stream permit application and makes Lind's SEPA appeal issues moot.

The Hearing Examiner affirmed the City's decision to deny Lind's wetland/stream permit application finding that denial of the lot line adjustment must also result in the denial of the wetland/stream permit because the activities proposed in the wetland/stream permit could not be undertaken without approval of the lot line adjustment. (CP 227; 954; 1059, COL 9; 1561-1562, COL 15). The site plan for Lind's wetland/stream permit application showing the location of the proposed building envelopes, drainfields, driveways, and other infrastructure is dependent on the City's approval of the proposed lot configuration. (CP 954; 1561-1562, COL 15). The Hearing Examiner rejected Lind's argument that denial of the lot line adjustment was not an appropriate basis for denial of the wetland/stream permit. *Id.* The Hearing Examiner

found that the regulated activity for which Lind sought the wetland/stream permit is the construction of infrastructure for two residences to be located on lots that have been rejected. *Id.* The Hearing Examiner noted that Lind cited no authority that would require continued processing of an application for an activity that has been denied under a separate, but concurrently reviewed, permit application. *Id.*

Most of Lind's oral and written argument before the Hearing Examiner and the Superior Court Judge focused on wetland issues regarding Lind's property, including the City's denial of Lind's wetland/stream permit and conditions in the Revised MDNS. (CP 174-177; 182-188). However, these arguments are not relevant to review of the Hearing Examiner's decision denying the lot line adjustment application which was based on the application's lack of compliance with the City's land use and subdivision ordinances, rather than wetland issues.

At the hearing before the Hearing Examiner, Lind also challenged a number of conditions contained in the Revised MDNS issued by the City. Because the underlying permits (the lot line adjustment and the wetland/stream permit) were properly denied on other grounds, the Hearing Examiner found that the conditions imposed in the Revised MDNS were moot. (CP 1562, COL 18). *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602 229 P.3d 774 (2010) (A case is moot if a

court can no longer provide effective relief).

Lind failed to prove that the Hearing Examiner erred in holding that denial of Lind's lot line adjustment application requires summary denial of Lind's wetland/stream permit and makes Lind's SEPA issues moot. Lind has failed to show that the Hearing Examiner's decision is based on an erroneous interpretation of the law, not supported by substantial evidence, or based on a clearly erroneous application of the law to the facts.

VI. CONCLUSION

The Court should deny Lind's LUPA appeal, as Lind has failed to meet its burden of proof for reversing the Hearing Examiner's decision denying its lot line adjustment application. To obtain approval of its lot line adjustment application, Lind had to meet all four requirements for approval. However, Lind has failed to show that the Hearing Examiner erred in holding that the application failed to meet three of the four requirements for approval.

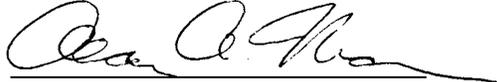
If the Court affirms the Hearing Examiner's decision to deny Lind's lot line adjustment application, the Court should also affirm the Hearing Examiner's decisions to deny Lind's wetland/stream permit and Lind's appeal of the conditions contained in the City's Revised

MDNS. Both Lind's wetland/stream permit application and the Revised MDNS are specific to Lind's lot line adjustment application. Thus the Hearing Examiner's denial of Lind's lot line adjustment application must also result in the denial of its wetland/stream permit because the activities proposed in the wetland/stream permit could not be undertaken without approval of the lot line adjustment. Because the Hearing Examiner properly denied the lot line adjustment and wetland/stream permit applications on other grounds, the conditions imposed in the Revised MDNS are moot.

If the Court affirms the Superior Court's reversal of the Hearing Examiner's decision denying the lot line adjustment, it should remand the wetland/stream permit and Revised MDNS to the City for staff to issue a wetland/stream permit consistent with the Court's decision and for the Hearing Examiner to issue a decision regarding Petitioner's appeal of the conditions in the Revised MDNS.

Respectfully submitted this 21 day of February 2012.

CITY OF BELLINGHAM



Alan A. Marriner, WSBA #17515
Assistant City Attorney

APPENDIX

18.10.010 - Approval Required

Any action which will result in a lot line adjustment as defined in this title shall be submitted to the Planning and Community Development Department for administrative approval prior to recording.

[Ord. 19833 §1, 1997; Ord. 9135 §3(part), 1982]

18.10.015 - Scope

The lot line adjustment process shall only be used to alter the location of a boundary line between existing lots. Such alteration shall not increase the number of lots.

18.10.020 - Procedure

A. Lot line adjustment applications shall follow the procedures in BMC 21.10. The proposal shall be submitted to the Department of Planning and Community Development for review on forms provided by that department. Two copies of a scaled and dimensioned drawing showing the existing and proposed lot lines and structures on the property shall accompany the application.

B. The Department of Planning and Community Development shall give preliminary approval to the applicant within 30 days of the date of application if it finds that:

1. No new lots are created;
2. Each parcel as proposed meets minimum lot standards as specified in Chapter 18.36, or that each parcel if already less than the required minimum is not further reduced as a result of the proposed lot line adjustment;
3. The lot line adjustment does not further infringe on any applicable section of the City Land Use Development Ordinance; and
4. The lot line adjustment improves the overall function and utility of the existing lots.

C. Upon receiving preliminary approval, the applicant(s) shall have prepared a mylar as described in Section 18.10.030. Five blue-line copies of the mylar (checkprints) shall be submitted to the Planning and Community Development Department for review along with a plat certificate or subdivision guarantee to verify legal ownership and lot closures. Review comments shall be returned to the surveyor for final mylar preparation.

D. After final approval and signature by the City, the mylars shall be recorded with the County Auditor at the applicant's expense.

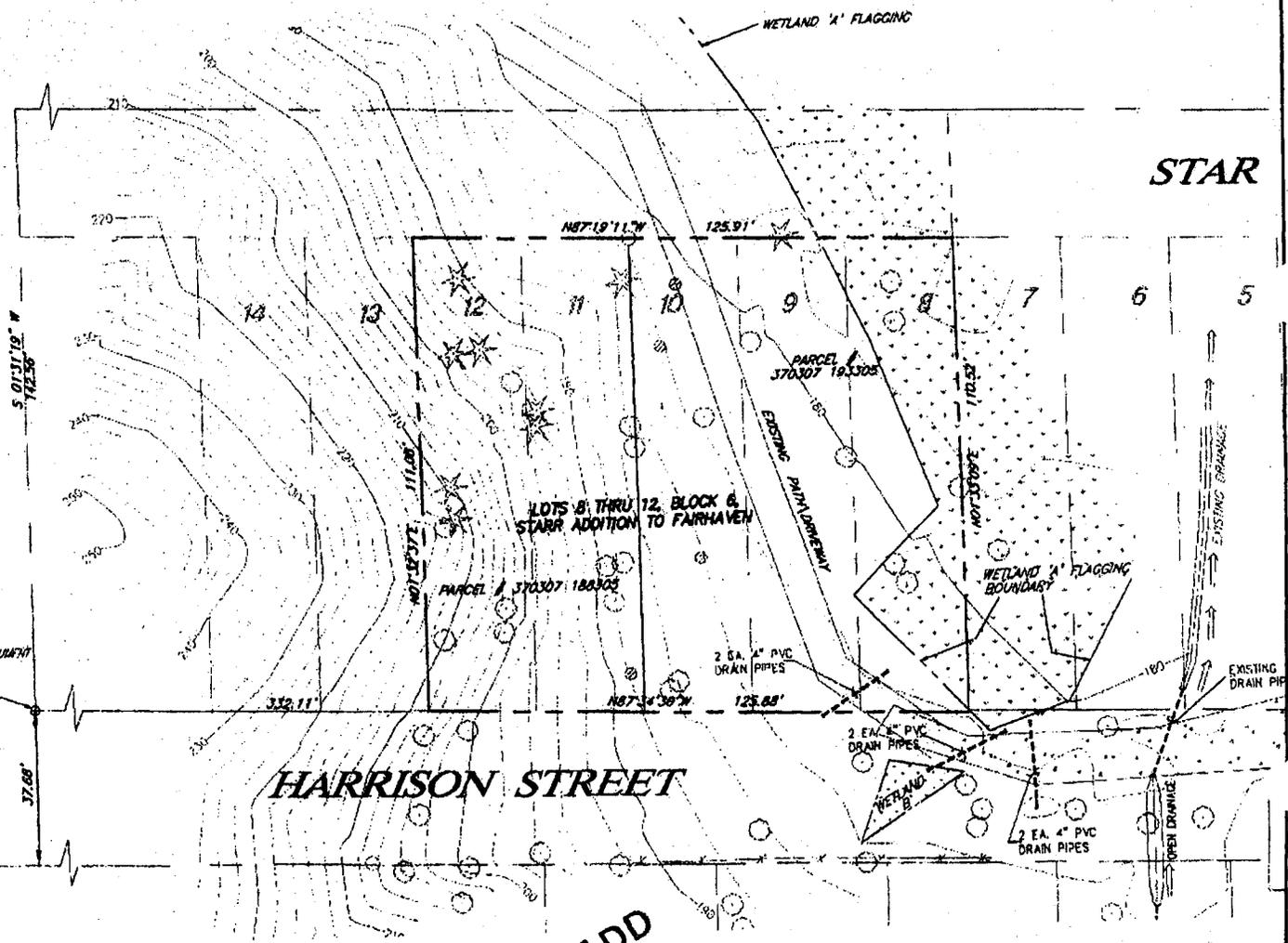
E. A mylar copy of the recorded lot line adjustment shall be submitted to the City within one day after recording.

Exhibit A Existing Lots

STAR ADD TO
FAIRHAVEN

28TH STREET

THE STONE MONUMENT
INTERSECTION OF
YSDON AND 28TH
ST AS PER R.O.S.
040500841.



HAPPY VALLEY ADD
TO FAIRHAVEN AM

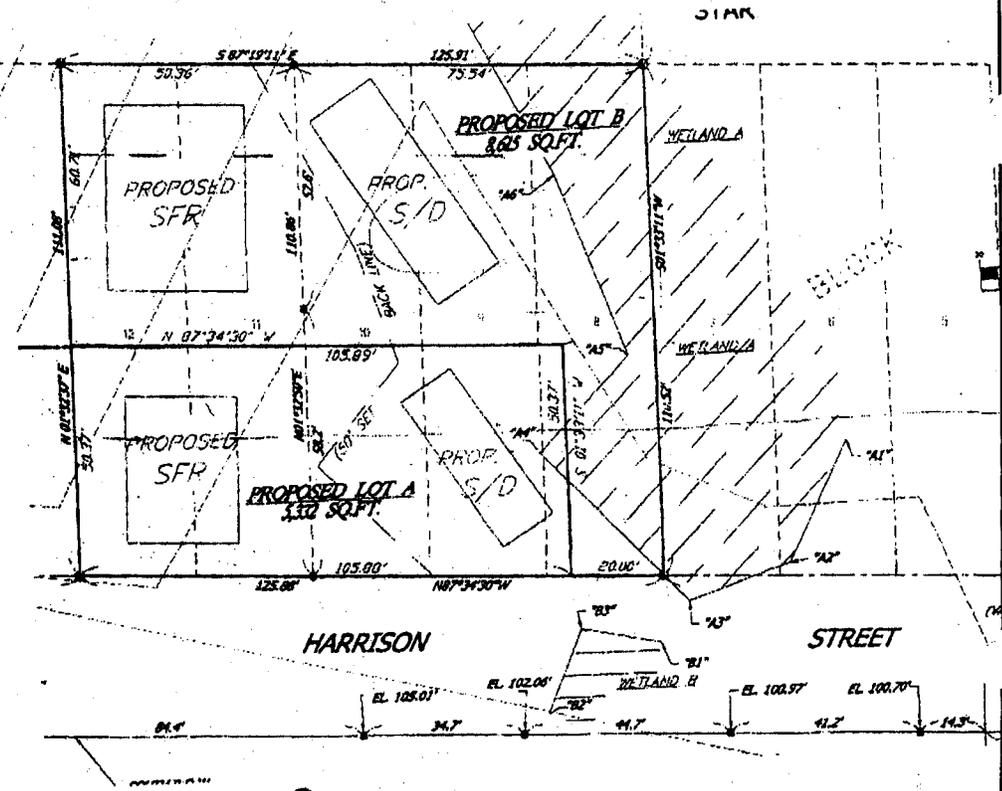
0853

A-2

110

Exhibit B
Proposed Lind-Star LLA

STAR ADD TO
 FAIRHAVEN

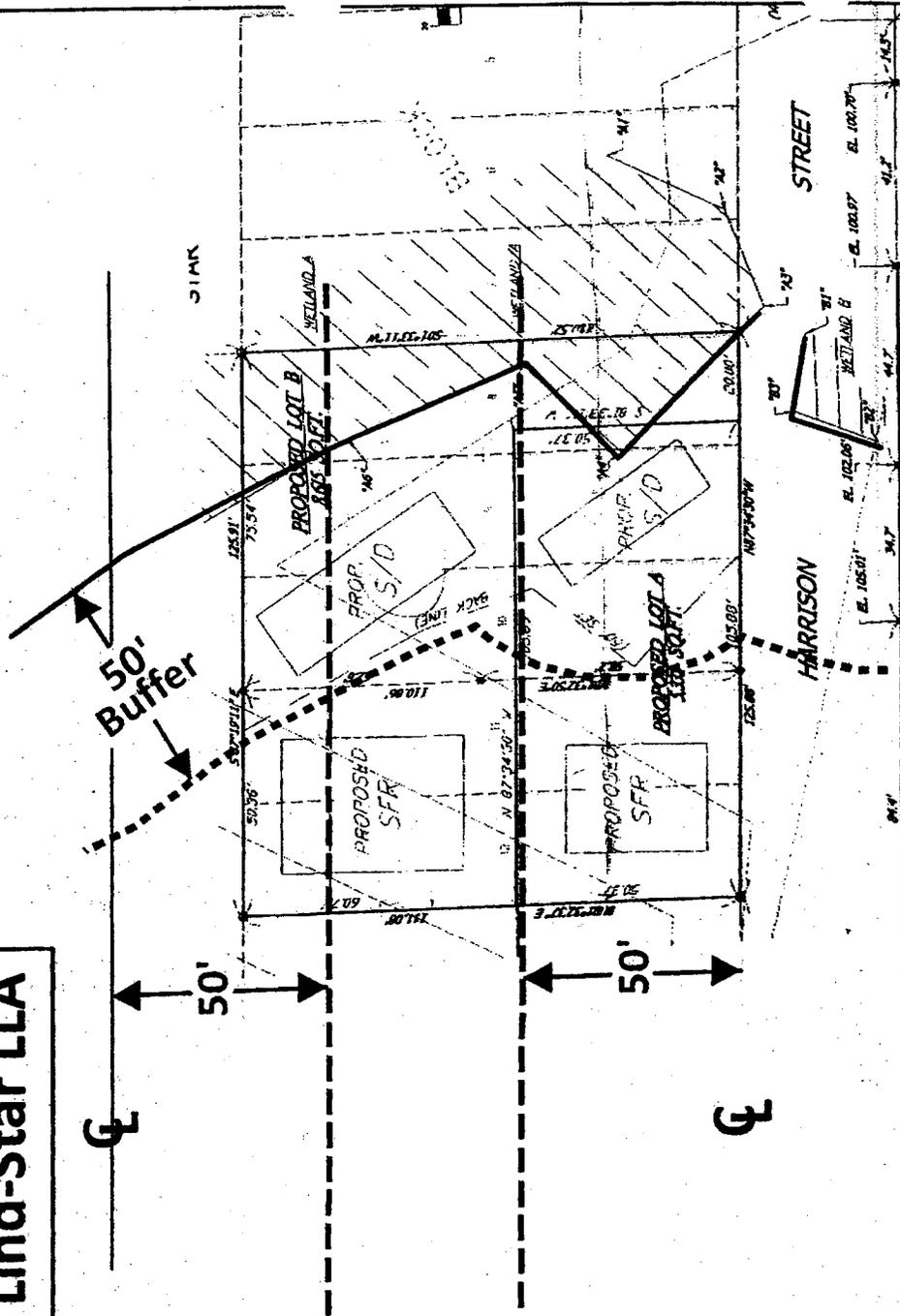


HAPPY VALLEY ADD
 TO FAIRHAVEN AM

0854

Exhibit I

Setbacks - Proposed Lind-Star LLA



HAPPY VALLEY ADD
TO FAIRHAVEN AM

STAR ADD TO
FAIRHAVEN

Exhibit J

Dedication - Existing Lots

STAR ADD TO
FAIRHAVEN

28TH STREET

THE STONE MONUMENT
INTERSECTION OF
150M AND 28TH
ST AS PER POS.
040320071.

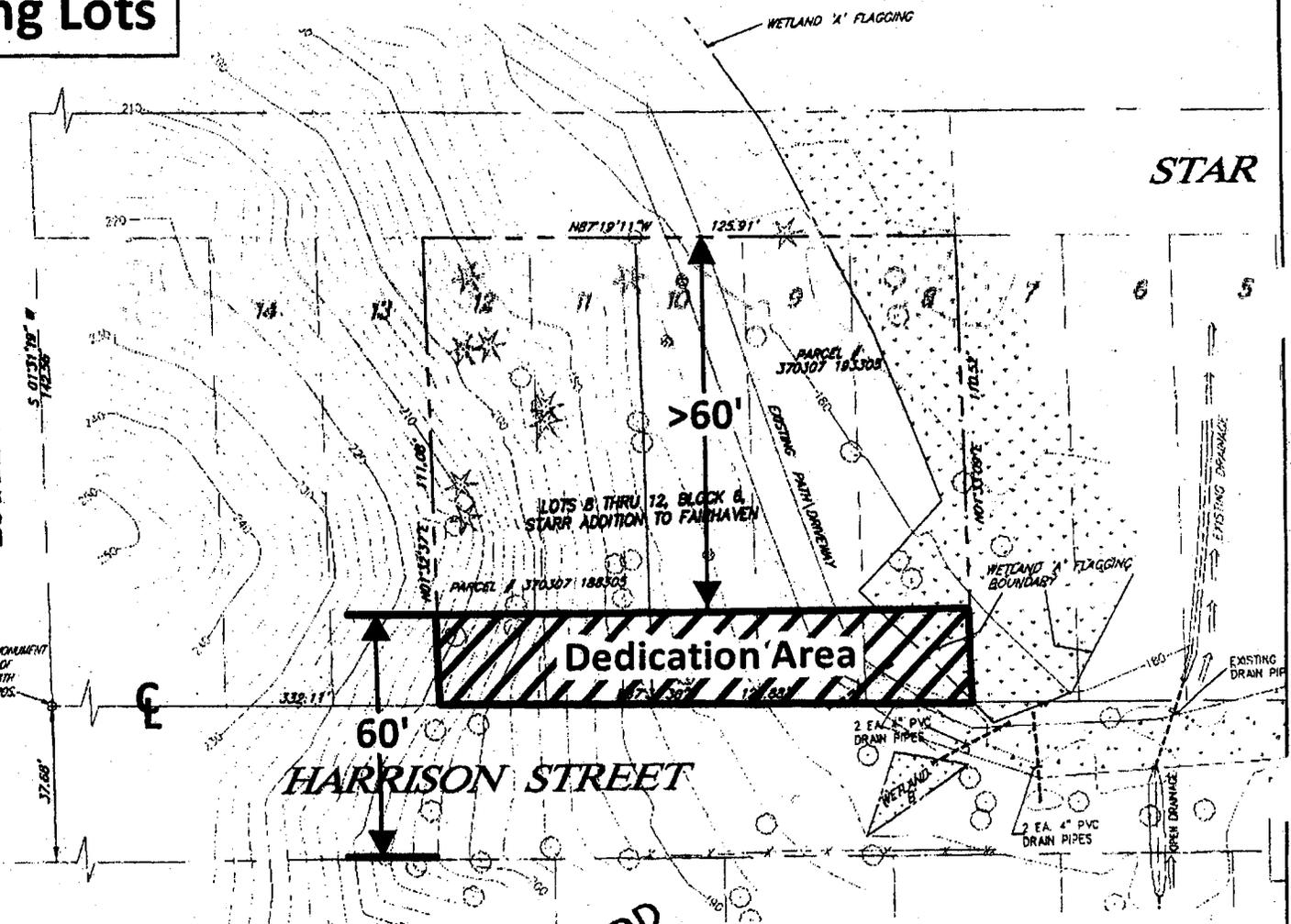
5 01'31.78" W
142.56'

37.60'

€

HARRISON STREET

HAPPY VALLEY ADD
TO FAIRHAVEN AM



STAR

(893)

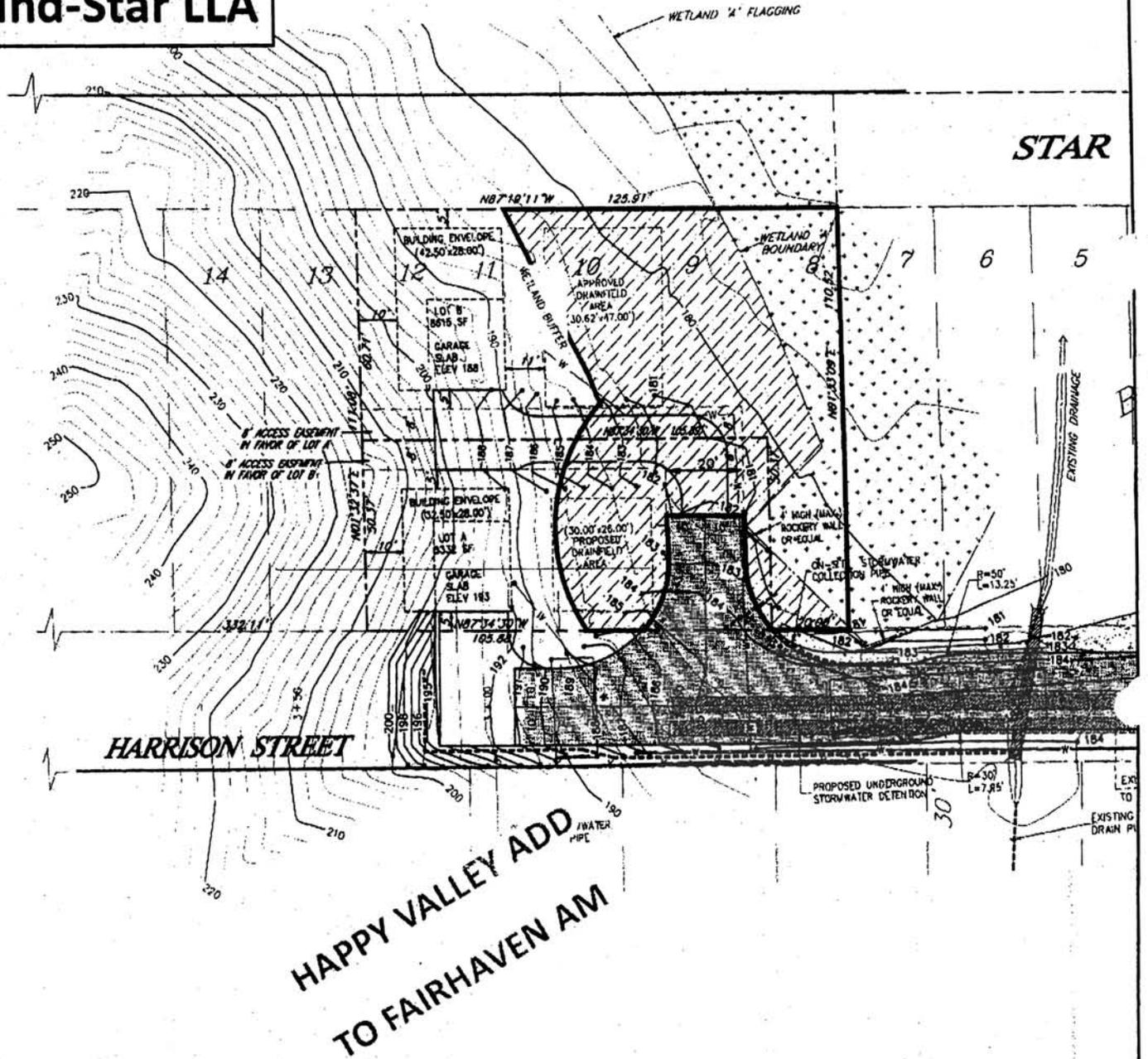
9-A

15

Exhibit M

Access - Proposed Lind-Star LLA

STAR ADD TO
FAIRHAVEN



6899

A-9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

Appellants,

vs.

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

Respondents.

No. 67877-9

CERTIFICATE OF SERVICE

2012 FEB 22 AM 10:28

**FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON**

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

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On February 21, 2012, I served a true and correct copy of the following documents to be delivered as set forth below:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1. **Brief of Appellant City of Bellingham; and**
- 2. **Certificate of Service.**

On the 21st day of February, 2012, I addressed said documents and deposited them for delivery as follows:

Peter Frye	<input checked="" type="checkbox"/>	By United States Mail
2402 30 th Street	<input type="checkbox"/>	By Facsimile
Bellingham, WA 98225	<input type="checkbox"/>	By E-mail
PeterF@lummi-nsn.gov	<input type="checkbox"/>	Hand Delivery

Peter Dworkin	<input checked="" type="checkbox"/>	By United States Mail
Hugh Klinedinst	<input type="checkbox"/>	By Facsimile
Belcher Swanson Law Firm, PLLC	<input type="checkbox"/>	By E-mail
900 Dupont Street	<input type="checkbox"/>	Hand Delivery
Bellingham, WA 98225		
prd@belcherswanson.com		

DATED this 21st day of February, 2012.

CITY OF BELLINGHAM

Kerry Messer
 Kerry Messer
 Legal Administrative Assistant