

67877-9

67877-9

NO. 67877-9-1

---

**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 FRYE**

---

Peter D. Frye  
2402 30<sup>th</sup> Street  
Bellingham, WA 98225  
Telephone (360) 384-2307  
Fax (360) 380-6331

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 FEB 22 AM 10:31

**TABLE OF CONTENTS**

**I. INTRODUCTION.....3**

**II. ASSIGNMENTS OF ERROR ..... 4**

**III. STATEMENT OF THE CASE ..... 5**

**IV. ARGUMENT..... 8**

**4.1 LOT LINE ADJUSTMENT..... 8**

**4.1.1 Whether Lind failed to prove that the Hearing Examiner’s decision, that Lind’s lot line adjustment application violates BMC 18.10.020 B. 2, was in error..... 9**

**4.1.2 Whether Lind failed to prove that the Hearing Examiner’s decision, that Lind’s lot line adjustment application violates BMC 18.10.020 B. 3, was in error..... 10**

**4.1.3 Whether Lind failed to prove that the Hearing Examiner’s decision that Lind’s lot line adjustment application violates BMC 18.10.020 B. 4, was in error..... 12**

**4.2 WETLAND/STREAM PERMIT AND SEPA CONDITIONS..... 13**

**4.2.1 Whether Lind failed to prove that the Hearing Examiner’s decision that the denial of the lot line adjustment, requiring the summary denial of Lind’s wetland/stream permit, making Lind’s SEPA issues moot, was in error..... 13**

**V. CONCLUSION ..... 14**

## TABLE OF AUTHORITIES

### Ordinances

BMC 13.04.070. B.....	13
BMC 18.08.245 .....	12
BMC 18.10.020 B.....	10
BMC 18.10.020 B. 1.....	11
BMC 18.10.020 B. 2.....	11,12
BMC 18.10.020 B. 3.....	12,14
BMC 18.10.020 B. 4.....	14
BMC 18.36.020 E.....	13
BMC 20.00.190 .....	11
BMC Chapter 16.50 .....	8,10
BMC Chapter 16.55 .....	8

## I. INTRODUCTION

Lind Bros. Construction, LLC (Lind/Respondent) owns two lots (hereafter the "Lind property") adjacent to the Frye (Frye/Appellant) property. At a total of approximately 13,946 square feet, these lots are substantially under the City's (City/Appellant) required 20,000 square foot minimum lot size and contain wetlands, wetland buffers and steep slopes. (CP 1539, Finding of Fact ("FOF") 2; CP 1539-1540, FOF 6). Lind proposes to access these lots from the Harrison Street right-of-way, at 33 feet wide substantially under the City's required 60 foot right-of-way. (CP 1542-1543, FOF20).

The wetland contained on the Lind property is part of a large, significant, City regulated wetland. (CP 1541, FOF11). Lind's proposal includes fire truck turn-arounds, driveways and septic drain-fields located in the wetland buffer. (CP 1555, FOF 67).

Property to the east, north and west of Lind is undeveloped and also seriously encumbered by wetlands, buffers, and steep slopes. Property to the south of Lind is developed at low density with single family homes on large (16,000 to 56,000 square foot) lots. (CP100; CP 1539, FOF 5). Due to wetlands, difficult

topography, access issues and lack of public sewer, only two houses have been built in the vicinity in the last 20 years. (CP 100).

Lind's development proposal would seriously, and negatively, impact Frye's property value, quality of life, the neighborhood character and the surrounding natural environment. Because of this, Frye believes that the City has a responsibility to strictly apply all applicable codes, laws and regulations to Lind's proposed development.

Lind submitted lot line adjustment and wetland/stream permit applications to the City to build two single family homes on these lots. The City denied these applications, Lind appealed the denial and the City's Hearing Examiner upheld the City's denial.

Lind then appealed the Hearing Examiner's decision to Whatcom County Superior Court. On October 10, 2011, Superior Court Judge Ira J. Uhrig issued an order reversing the Hearing Examiner's decision. (CP 20-22). Frye is now appealing Judge Uhrig's order reversing the Hearing Examiner's decision to this Court.

## **II. ASSIGNMENTS OF ERROR**

Lind prevailed in Superior Court. However, this Court

reviews the Hearing Examiner's decision, not that of the Superior Court.

Since Superior Court Judge Uhrig did not provide any written or oral basis for reversing the Hearing Examiner's decision, Frye cannot provide a detailed assignment of error. Frye instead concurs with the City and assigns error to the Superior Court's blanket reversal of the Hearing Examiner's decision. This reversal was as an erroneous interpretation of law. It was not supported by substantial evidence in the record, and it was a clearly erroneous application of the law to the facts.

Frye concurs with the City in that 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 application as Lind failed to meet its burden of proof. (CP 20-22).

### **III. STATEMENT OF THE CASE**

Lind owns two lots of record located 175 feet west of 30<sup>th</sup> Street in Bellingham. The lots border Star Court to the north and Harrison Street to the south. (CP 1538, FOF 1). Both Star Court and Harrison Street are unimproved rights-of-way. (CP 1550,

FOF 52; CP 1550, FOF 54). The adjacent Frye property is located at the southwest corner of 30<sup>th</sup> street and Harrison Street. (CP 1546, FOF 35).

The Lind property is located in Area 9 of the City's South Neighborhood. Area 9 is zoned single-family residential with a 20,000 square foot minimum lot size. (CP 668; FOF 1538-1539, FOF 2). Both lots are significantly smaller than the required 20,000 square foot minimum. (CP 666). The smaller lot is approximately 5,578 square feet in area, and the larger lot is approximately 8,368 square feet in area. (CP 668; CP 1539, FOF 6). Property to the north of Star Court is undeveloped. (CP 100; CP 1539, FOF 5). Property to the south of Harrison Street is developed in large lots, 16,000 to 56,000 square feet in size. (CP 100; CP 1539, FOF 5).

On December 5, 2005, Lind submitted lot line adjustment and wetland/stream permit applications to obtain approval for the development of two single-family residences on the Lind property, with access proposed from Harrison Street. (CP 1538, FOF 1; CP 1540, FOF 9). These applications were submitted one day before the City's new Critical Areas Ordinance replaced the existing Wetland Stream Ordinance. (CP 204; CP 1540, FOF

8). These applications became vested after 28 days. (CP 1540, FOF 10). The City processed Lind's applications pursuant to the Wetland Stream Ordinance. (CP 216-223, 244; CP 1540, FOF 8).

Lind's application for a lot line adjustment proposed to change the orientation of the two existing lots from north/south, with both lots abutting both Star Court to the north and Harrison Street to the south, to east/west, with the proposed Lot A abutting Harrison Street to the south and the proposed Lot B abutting Star Court to the north, along with a 20-foot wide pipe-stem, connecting to Harrison Street, east of the easterly side of Lot A. (CP 1539-1540, FOF 6; additionally CP 852 shows the existing lot layout and CP 854 shows the proposed lot layout).

Lind's proposed development impacts regulated wetlands and wetland buffers that are contained in, and border, the Lind property and the adjacent Harrison Street and Star Court rights-of-ways. (CP 205-207, 217, 788; 922; 954; 1539, FOF 4; 1541, FOF 11). Lind's proposal includes septic drain-fields, fire truck turn-arounds and driveways located within the wetland buffer area. (CP 216-217, 954; CP 1542, FOF 19; CP 1555, FOF 67; CP 1558, COL 8). Lind's wetland/stream permit application

proposes both onsite and offsite mitigation for these buffer impacts. (CP 946; CP 1555, FOF 67). Wetland scientists with far more experience and education than those retained by Lind state that the wetland on and abutting Lind's property is a Category I Mature Forested Wetland, that this wetland requires a minimum of a 100 foot buffer, rather than the 0 to 50 foot buffer proposed by Lind, and that off-site mitigation cannot adequately mitigate the impacts of Lind's development. (CP 303-304, 312, 603, 605-606; CP 1555, FOF 69; CP 1556, FOF 70).

Frye concurs with the City's detailed time-line describing the City's processing of Lind's permit applications, including communication with Lind and Lind's consultants, from submittal on December 5, 2005 to denial on January 13, 2010.

#### **IV. ARGUMENT**

##### **4.1 LOT LINE ADJUSTMENT.**

Frye concurs with the City's interpretation of BMC 18.10.020 B (CP 74). BMC 18.10.020 B includes four requirements that must all be met for approval of 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).

Despite claims by Lind to the contrary, all four requirements must be met. This is supported by the wording of this code section, as requirement number three ends with “and”, not “or”.<sup>1</sup>

Frye concurs with the City that Lind’s lot line adjustment meets the first requirement of BMC 18.10.020 B, no new lots are created. (CP 1556, COL 1).

**4.1.1 Whether Lind failed to prove that the Hearing Examiner’s decision, that Lind’s lot line adjustment application violates BMC 18.10.020 B. 2, was in error.**

BMC 20.00.190 (CP 82) states that the minimum density requirement for lots in Area 9 of the South Neighborhood is

---

<sup>1</sup> In Lind’s Closing Brief to the Hearing Examiner, Lind admitted that all four requirements must be met. (CP 1451, line 12). Lind reversed this position in Lind’s appeal to Superior Court.

20,000 square feet. (CP 668; 1556, COL 2). Lind's proposed lot line adjustment further reduces already undersized lots. (CP 670-671; 1556, COL 2). The smallest existing lot would be reduced from 5,578 square feet to 5,332 square feet (Lot A). (CP 668-669; 1556, COL 2). The larger lot would be reduced from 8,368 square feet to 7,644 square feet approximately 8,615 square feet, since BMC 18.08.245 (CP 72) requires that the pipe stem portion of a lot be excluded in determining the area of a pipe stem lot. (CP 670-672; 1556-1567, COL 2).

Since the existing lots currently do not meet the minimum density requirement, and they are further reduced in size by Lind's proposed lot line adjustment, Lind's proposal is inconsistent with BMC 18.10.020 B. 2. (CP 1556, COL 2).

Frye concurs with the City that Lind failed to prove that the Hearing Examiner erred in her decision holding that Lind's lot line adjustment application violates BMC 18.10.020 B. 2.

**4.1.2 Whether Lind failed to prove that the Hearing Examiner's decision, that Lind's lot line adjustment application violates BMC 18.10.020 B. 3, was in error.**

BMC 18.10.020 B. 3 (CP 74) states that a lot line adjustment not further infringe on any applicable section of the

City Land Use Development Ordinance.<sup>2</sup> BMC 20.30.040 F (CP 88) requires a minimum front yard setback of 50 feet from the centerline of the abutting street. (CP 675; 1558, COL 6). BMC 13.04.070. B (CP 66) states that the minimum standard right-of-way for a residential street is 60 feet. (CP 1557, COL 6). The Harrison Street has a right-of way width of approximately 33 feet, less that the required standard 60 feet. BMC 20.10.080 E (CP 84) states that the centerline for setback purposes is the farthest edge of the existing right-of-way that was dedicated by the subject property. (CP 674; 1557-1558, COL 6). Since Harrison Street was dedicated entirely by the Happy Valley Plat to the south, none of the right-of-way was dedicated from the subject property, therefore the centerline for setback purposes is the southern boundary line of Lind's property. (CP 673-674; 1558, COL 6).

Lind's proposed lot line adjustment shows a depth of approximately 50 feet for Lot A. (CP 854; 1557, COL 6). The application of the City's required front yard setback leaves no buildable area on proposed Lot A.

---

<sup>2</sup> Per BMC 20.04.010, Title 20 of the Bellingham Municipal Code is known as the "Land Use Development Ordinance". (CP 83).

Frye concurs with the City that Lind failed to prove that the Hearing Examiner erred in her decision holding that Lind's lot line adjustment application violates BMC 18.10.020 B. 3.

**4.1.3 Whether Lind failed to prove that the Hearing Examiner's decision that Lind's lot line adjustment application violates BMC 18.10.020 B. 4, was in error.**

BMC 18.10.020 B. 4 (CP 74) requires that a lot line adjustment proposal improve the overall function and utility of the existing lots.

Lind's proposal locates fire truck turn-arounds, driveways and septic drain-fields within the wetland buffer area. (CP 679-680; 899; CP 1058, FOF 18-19; CP 1558-1559, COL 8). Lot A becomes unbuildable because of lot depth deficiencies for building set-backs previously noted. (CP 1557-1558, COL 6).

Lind will also need to dedicate an additional 30 feet of right-of-way to meet the required 60 feet. (CP 1058 FOF 16; CP 1558 COL 7).

Fire truck turn-arounds, driveways and septic drain-fields located in wetland buffer areas along with Lot A's depth deficiencies for set-backs and right-of-ways do not improve the overall function and utility of the existing lots.

Frye concurs with the City that Lind failed to prove that the Hearing Examiner erred in her decision holding that Lind's lot line adjustment application violates BMC 18.10.020 B. 4.

#### **4.2 WETLAND/STREAM PERMIT AND SEPA CONDITIONS.**

##### **4.2.1 Whether Lind failed to prove that the Hearing Examiner's decision that the denial of the lot line adjustment permit, requiring the summary denial of Lind's wetland/stream permit, making Lind's SEPA issues moot, was in error.**

The site plan for Lind's wetland/stream permit application is specific to the lot configuration proposed in the lot line adjustment application, as are the conditions imposed in the Revised MDNS. (CP 227; 954; 1059: COL 9; 1561-1562, COL 15). Denial of the lot line adjustment requires denial of the wetland/stream permit, thereby making the associated SEPA conditions moot.

Frye concurs with the City that Lind has failed to prove that the Hearing Examiner's decision in holding that denial of Lind's lot line adjustment application and summary denial of Lind's wetland/stream permit, making Lind's SEPA issues moot, was in error.

## V. CONCLUSION

Lind is proposing to put two houses, wedged between a significant wetland and a steep slope, on two lots substantially undersized. Lind's development proposal would seriously, and negatively, impact Frye's property value and quality of life, the character of the neighborhood and the integrity of the natural environment.

Lind has failed to prove that the Hearing Examiner erred in her decision to uphold the City's denial of Lind's lot line adjustment and wetland/stream permit applications and the City's strict interpretation of all applicable codes, laws and regulations.

Because of this, Frye asks this Court to deny Lind's LUPA appeal.

Respectfully submitted this 21<sup>ST</sup> day of February 2012.

  
Peter D. Frye

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

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

**FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 FEB 22 AM 10: 31**

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

**No. 67877-9-I**

**Appellants,**

**vs.**

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

**CERTIFICATE OF SERVICE**

**Respondent.**

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

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

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

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