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NO. 67878-7

COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON

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

Appellants,

vs.

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

Respondent.

BRIEF OF APPELLANT CITY OF BELLINGHAM

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A. INTRODUCTION

Lind Bros. Construction, LLC, (Lind) submitted a development proposal to construct three single-family residences on three lots with slopes that are impacted by wetlands and wetland buffers in the City of Bellingham (City).

The proposal was based, in part, on a wetland delineation report prepared for Lind categorizing the main wetland onsite as a Category II wetland.

The proposal was subject to public notice requirements. The City provided public notice and received numerous comments stating that the main wetland onsite meets the criteria of a Category I “mature forested wetland.”

A major issue in this case is whether the wetlands on Lind’s property are Category I wetlands or Category II wetlands. However, that is not the issue before this Court. The issue on appeal is whether the Hearing Examiner correctly concluded that the City can require Lind to provide the information necessary to properly categorize the wetlands on its property.

The City requested additional field analysis of the wetlands after receiving public comments on Lind’s proposal. Lind did not provide the

required analysis. Four months later, the City's Planning and Community Development Director approved Lind's proposal based on the report categorizing the main wetland as a Category II wetland. The Director approved the proposal subject to numerous conditions including one requiring Lind to demonstrate that the main wetland on its property does not meet the criteria of a Category I "mature forested wetland."

Lind appealed to the City's Hearing Examiner (the Examiner) arguing that the City could not request additional information about the wetlands. A neighboring landowner, Mark Quenneville, also appealed arguing that Lind's proposal should be remanded for additional review. The City argued that the condition on the proposal requiring Lind to conduct more wetland analysis before moving forward was allowed under local land use regulations.

The Examiner determined that the City could request additional information needed to determine the category of the wetlands, but the Director erred by issuing a decision before reviewing that information. The Examiner therefore remanded the proposal for further review.

Lind then appealed to the Whatcom County Superior Court (trial court) under RCW 36.70C (LUPA). The trial court reversed the decision of the Examiner. The trial court judge, Ira Uhrig, provided no rationale

for his decision either in an oral ruling or in his written order. The City appealed from the trial court.

This case has an unusual procedural posture. The City appealed the trial court's order and must file the opening brief pursuant to RAP 10.1(b). However, Lind has the burden on appeal because Lind challenged the Hearing Examiner's decision. RCW 36.70C.130. This Court reviews the Examiner's decision *de novo*, without regard to the trial court's ruling. *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150 19 P.3d 453 (2001). Therefore, Lind must demonstrate that it is entitled to relief regardless of the trial court's order.

The Examiner's order was based on a correct interpretation of the law and is supported by substantial evidence.

The trial court erred because Lind failed to meet its burden under RCW 36.70C.130.

The City respectfully requests that the trial court's order be reversed and the Examiner's order be affirmed.

B. ASSIGNMENT OF ERROR

The trial court erred by entering the Order on LUPA Hearing on the Merits. CP 18-20.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court erred because the Hearing Examiner correctly interpreted the applicable law? *See* RCW 36.70C.130(1)(b).
 - a. Does the Municipal Code give the Director the authority to request additional information about a wetland? *See* BMC 16.50.060 (repealed Dec. 6, 2005).
 - b. Does the Municipal Code require the Director to review all pertinent information before issuing a decision on a wetland/stream permit? *See* BMC 16.50.100(D)(repealed Dec. 6, 2005).
 - c. Do the SEPA rules allow the responsible official to modify a threshold determination in response to public comments? *See* WAC 197-11-330(2)(f).
 - d. Does RCW 43.21C.240 prohibit the lead agency from using SEPA to inform the applicant about the applicable development regulations? *See* RCW 43.21C.240.
 - e. Does the Municipal Code allow the Director to issue lot line adjustment with conditions insuring that all required criteria are met? *See* BMC 18.10.020.
2. Whether the trial court erred because the Examiner's decision is supported by evidence? *See* RCW 36.70C.130(1)(c).

3. Whether the trial court erred because the Hearing Examiner correctly applied the law to the facts of this case? *See* RCW 36.70C.130(1)(d).
4. Whether the trial court erred because the Examiner's decision does not violate Lind's constitutional rights? *See* RCW 36.70C.130(1)(f).
5. Whether the trial court erred by issuing an order granting variances because the City made no "land use decision" on variances? *See* RCW 36.70C.020(2).
6. Whether the trial court erred by reviewing materials outside the administrative record? *See* RCW 36.70C.120(1).

D. STATEMENT OF FACTS

Lind submitted a development proposal to construct three homes on forested property with steep slopes that is impacted by wetlands and wetland buffers on December 5, 2005. *See* Appendix A, p. 2¹ Lind submitted the proposal on that day with the intent to "vest" to the existing wetland and stream regulations. Lind's Ex. 17, CP 1303-05.

The City repealed the existing wetland regulations, the Wetland and Stream Regulatory Ordinance (herein the WSO), BMC 16.50, in November 2005 but the repeal did not take effect until the day after Lind

¹ Appendix A includes color copies of exhibits from the administrative hearing. City's Ex. R (the 2005 NES Delineation report) includes an aerial photograph of the project site.

submitted its proposal. Importantly, the City treated Lind's proposal as vested to the regulations in effect on December 5, 2005, i.e. BMC 16.50. This is not a vesting case.

Lind's proposal indicated that it was "a Type I permit" application. Lind's Ex. 17, CP 1303-05. However, Lind also submitted a partially completed SEPA checklist with the proposal. *Id.*

The BMC classifies land use applications based on the decision maker, the amount of discretion exercised by the decision maker, and the level of public input sought. BMC 21.10.040. Type I applications are the simplest and generally do not require a SEPA checklist and fee. *Id.* While Lind described its proposal as a Type I application (generally exempt from SEPA), it also included a partially completed SEPA checklist. Lind's Ex. 17, CP 1303-05.

Lind's proposal included applications for a lot line adjustment and a wetland/stream permit. CP 1843-46. The application for the wetland/stream permit was based on a "Wetland Delineation for Parcel #370307169163" prepared by Vikki Jackson of Northwest Ecological Services, LLC (herein the NES delineation report). City's Ex. R, CP 1029-74. Vikki Jackson categorized Wetland A (the largest wetland on-site) as a Category II wetland which requires a 50-foot minimum buffer. CP 1035, 1037.

There are three different categories of wetlands in the WSO. BMC 16.50.050(repealed Dec. 6, 2005). Each category has a minimum required buffer with the more valuable wetlands receiving more protection. BMC 16.50.080(repealed Dec. 6, 2005).

Category I wetlands have a high resource value based on ecological diversity, the presence of rare wetland communities, and are sensitive to disturbance. BMC 16.50.050(A)(2)(repealed Dec. 6, 2005). Category I wetlands include “mature forested wetlands.” *Id.* A “mature forested wetland” is at least one acre in size and contains eight or more mature trees, i.e. a tree that is either 21” diameter at breast height or at least 80 years old. City’s Ex. I, CP 963. Category I wetlands require a 100-foot minimum buffer. BMC 16.50.080(B)(repealed Dec. 6, 2005), CP 929.

Category II wetlands are “not included in Category I wetlands, but still have a moderate resource value based on their functions.” BMC 16.50.050(B)(repealed Dec. 6, 2005) CP 927. Category II wetlands require “a minimum 50 foot buffer.” BMC 16.50.080(B)(repealed Dec. 6, 2005), CP 929.

Category III wetlands are all wetlands not included in either Category I or Category II. BMC 16.50.050(C)(repealed Dec. 6, 2005), CP 927.

Kim Weil is an environmental planner for the City. CP 117:20-22. Ms. Weil has a B.S. degree in freshwater ecology. CP 117:22-24. She helped create the City-wide wetland inventory in 1990-91. CP 118:2-4. She also co-authored the Critical Areas Ordinance, BMC 16.55, which replaced the WSO on December 6, 2005. CP 118:16-18. Ms. Weil has administered the City's environmental regulations with respect to wetlands for almost twenty years.

Ms. Weil reviewed Lind's wetland/stream permit application and determined that additional information was required. Over the next three years, Ms. Weil made numerous requests for information to process the wetland/stream permit. CP 123:3-8. Ms. Weil requested additional information needed "to analyze the potential impacts to wetlands, streams and their buffers" on June 21, 2006. City's Ex. D, CP 948-49. Ms. Weil requested, among other things, a site plan showing a 100-foot buffer for Wetland A. *Id.* Ms. Weil's letter explained that BMC 16.50 allows for an increase in buffer widths when the wetlands need greater protection to preserve their functions. *Id.* Ms. Weil wrote that an increase in the buffer was warranted based on the identified functions of the wetland, specifically the habitat functions. *Id.*

Ms. Weil also requested a completed SEPA checklist in order to determine "the potential environmental impacts" and whether the project

would trigger a SEPA review. CP 359:11-360:8. Lind did not submit the requested information for two and a half years.

Ms. Weil met with Bruce Ayers, one of Lind's consultants, on August 9, 2006 to discuss the proposal in more detail. CP 123:16-22. Ms. Weil wrote to Mr. Ayers on August 10, 2006 re-iterating the need for a 100-foot buffer on Wetland A and reminding him that the City needed more information to process Lind's application. City's Ex. E, CP 951-52.

Ms. Weil met with John Lind and Vikki Jackson on October 10, 2006 to discuss the outstanding information request. CP 124:22-26.

Ms. Weil met with Mr. Lind and a representative from Jones Engineers (a new consultant on the project) on March 13, 2007 to discuss the request for information and application deficiencies. CP 125:1-6.

Lind did not provide the requested information until December 5, 2008. City's Ex. Y, CP 1140. Lind submitted a "Preliminary Critical Areas Review: Wetland Delineation Mitigation Plan for Wilkin Road Properties" (herein the NWC mitigation plan), a completed SEPA checklist, a plat certificate, and four sheets of plans. *Id.*

The NWC mitigation plan was prepared by Katrina Jackson who is not related to Vikki Jackson, the author of the 2005 NES delineation report. City's Ex. S, CP 1076-1107. Importantly, Katrina Jackson did not re-delineate Wetland A (the main wetland onsite). CP 700:25-701:7.

The cover letter states: “The plans also show the proposed street and utility improvements including the proposed building envelopes and septic drain fields, and direct impacts to stream and wetlands both on and off-site.” City’s Ex. Y, CP 1140. These modifications were significant because they elevated the review process from a Type I process to a Type II process requiring public notice. BMC 21.10.040(C). These modifications to the proposal also triggered a full SEPA review.

The City sent Lind another request for information on February 27, 2009 requesting a mailing list for the required public notice under BMC 21.10.200 and the now applicable SEPA fee. City’s Ex. F, CP 954-55. Lind did not respond until May 8, 2009. Ex. Q34, CP 1697.

The City issued a Notice of Application on May 22, 2009 with a 14-day public comment period pursuant to BMC 21.10.200. City’s Ex. G, CP 957. Peter Frye, a concerned citizen, submitted a comment to Kim Weil on June 4, 2009 questioning the accuracy of the 2005 NES delineation report. Ex. Q43, CP 1728.

The City’s SEPA official² issued a Mitigated Determination of Non-Significance (MDNS) on June 27, 2009 which triggered another 14-day public comment period. City’s Ex. H, CP 959-61. A MDNS is a

² The City’s designated responsible official for SEPA is the Planning and Community Development Director. BMC 16.20.050.

DNS³ that includes mitigation measures as a result of the process specified in WAC 197-11-350. WAC 197-11-766. The MDNS included the following condition: “1. The buffer for the main wetland onsite shall be no smaller than an averaged 100-foot buffer and in no location shall it be less than 75 feet wide.” City’s Ex. H, CP 959.

The City received numerous public comments in response to the MDNS. City’s Ex. Q, CP 998-1027. Mark Quenneville, a neighbor with personal knowledge of the site, submitted numerous comments including a “Mature Tree Inventory.” CP 998-1004, 1007-1027. Mr. Quenneville wrote that the environmental information relied on by the City, including the NES delineation report, was contrary to his knowledge of site conditions and contained “errors and omissions.” CP 998. Mr. Quenneville’s comments included the following observations: (1) the main wetland on Lind’s property is part of one large, contiguous wetland extending off-site; (2) the wetland was improperly categorized as Category II wetland (rather than a Category I); and (3) the City should require an independent wetland analysis of Lind’s property. CP 998-99.

The South Neighborhood Association wrote a letter stating that Wetland A meets the criteria for a Category I “mature forested wetland”

³ A Determination of Non-significance or DNS means the written decision by the responsible official for the lead agency that a proposal is not likely to have a significant adverse environmental impact, therefore an EIS is not required. WAC 197-11-734.

and requires a 100-foot minimum buffer. CP 1005-06. The Association requested “an independent evaluation of this wetland in order to provide an accurate classification and rating.” CP 1006.

Nick Sky is a trained ecologist with personal knowledge of the site. Ex. Q4, CP 1559-60. Mr. Sky sent an email to the City on July 9, 2009 stating that the NES delineation report severely underrates this high quality forested wetland. *Id.* Mr. Sky questioned the accuracy of the NES wetland delineation and requested that the City obtain more information about the wetland so that a “more informed decision” can be made. *Id.*

Susan Meyer, a wetland specialist with the Washington State Department of Ecology, phoned Kim Weil to discuss the developing “mature forested wetlands” issue. CP 526:13-24. While not personally familiar with the site, Ms. Meyer is familiar with the analysis needed to determine whether a wetland is a “mature forested wetland.” Ms. Meyer did not think the City had enough information at that time to determine whether the wetlands on Lind’s property met the criteria for “mature forested wetlands.” CP 527:5-19. Ms. Meyer and Ms. Weil also discussed the recent re-categorization of wetlands on the nearby Fairhaven Highlands site.

Shortly before the MDNS was issued on Lind’s proposal, wetlands on the nearby Fairhaven Highlands property were re-categorized from

Category II wetlands to Category I “mature forested wetlands.” Vikki Jackson, Lind’s wetland biologist, was the same wetland biologist who performed the initial analysis on the Fairhaven Highlands site. Vikki Jackson conducted a follow-up analysis on those wetlands at the request of the City that resulted in the re-categorization of those wetlands. Ex. Q10, CP 1575-77 and Ex. Q29, CP 1683.

The City determined based on the public comments received that field analysis was needed to determine whether Wetland A was a “mature forested wetland.” CP 128:13-129:21. Kim Weil informed Lind about the need for the field analysis on August 7, 2009. City’s Ex. I, CP 963. Lind did not submit the requested analysis or contact the City. CP 129:14-21.

The SEPA official issued a Revised MDNS on August 28, 2009 adding the following new condition:

10. Prior to the submittal of a building permit application submittal [sic], a tree analysis shall be performed, in accordance with protocol approved by the Dept. of Ecology, to determine if the wetlands present meet the criteria for “mature forested wetland,” as defined by the Dept. of Ecology’s Wetland Rating System for Western Washington (DOE 2004). City’s Ex. J, CP 966

Again, Lind failed to submit the field analysis or contact the City.

The SEPA official issued a Second Revised MDNS on January 21, 2010 modifying two conditions. City’s Ex. K, CP 969-71. Consistent with Lind’s demands for a smaller buffer, the SEPA official reduced the

buffer on Wetland A from a 100-foot buffer to a 50-foot minimum buffer. CP 969. Kim Weil explained that the SEPA official reduced the buffer on Wetland A to a 50-foot minimum buffer based on the NES delineation report. CP 130:5-15. While he reduced the buffer based on the information previously provided by Lind, the SEPA official also included the following condition:

10. Prior to any development permit application or site disturbance, demonstrate that Wetland A (Wetlands B is part of Wetland A) is not a mature forested wetland as defined by the Dept. of Ecology's Wetland Rating System for Western Washington (DOE 2004) in accordance with protocol approved by the Dept. of Ecology. CP 970.

The Director then approved the wetland/stream permit on January 22, 2009 with eighteen conditions. City's Ex. M, CP 979-90. Condition No. 1 on the wetland/stream permit is identical to Condition No. 10 on the Second Revised MDNS. CP 982. The Director also approved the lot line adjustment on January 22, 2010 with five conditions. City's Ex. L, CP 973-77. The lot line adjustment was expressly conditioned on Lind's compliance with the conditions on the wetland/stream permit. CP 974.

Lind appealed to the City's Hearing Examiner.⁴ CP 1807-28.

Lind argued that the Director could not require additional field analysis of

⁴ Lind initially filed an appeal following the SEPA official's issuance of the MDNS in July 2009. CP 1790-96. Lind then amended the notice of appeal twice to include the subsequent revisions. CP 1797-1806, CP 1807-28.

the wetlands. *Id.* Lind argued that the City improperly used SEPA to divest Lind of its vested rights. Lind also argued that the Director erred by approving the lot line adjustment with a condition requiring Lind to comply with the wetland stream permit. *Id.* Lind requested that the challenged conditions on the wetland/stream permit, the Second Revised MDNS, and the lot line adjustment be stricken and that the proposal be approved based on the information Lind already provided. *Id.*

Mark Quenneville also appealed to the Hearing Examiner. CP 1829-46. Mr. Quenneville argued that the City improperly treated Lind's wetland/stream permit application as vested to BMC 16.50. *Id.* Quenneville requested that the wetland stream/permit and the lot line adjustment be vacated and the matter remanded to the planning department for review under the Critical Areas Ordinance, BMC 16.55. *Id.*

The City was caught between a developer who argued that the City's attempt to protect the wetlands went too far and a neighbor who felt the City's efforts did not go far enough. The City argued that the Director followed the law and that he could issue the permits with conditions to insure that there was no net loss of regulated wetland and wetland functions.

The Examiner rejected Lind's argument that the City could not require additional wetland analysis. See Findings of Fact, Conclusions of Law, and Order, CP 2030-61. The Examiner concluded that the Director has the authority to request additional information to properly categorize a wetland. Conclusion of Law No. 13, CP 2051-52. The Examiner expressly rejected Lind's arguments that the City improperly applied SEPA. Conclusion of Law No. 17, CP 2053.

However, the Examiner also concluded that the Director erred by failing to review the required field analysis and determining the category of Wetland A (and the required minimum buffer) before issuing a decision on Lind's application. Conclusion of Law No. 14, CP 2052. The Hearing Examiner therefore remanded the permit for additional review. CP 2055-56.

E. ARGUMENT

1. STANDARD OF REVIEW

Lind challenged the Hearing Examiner's decision, therefore Lind has the burden on appeal. The Court may grant relief only if Lind establishes that one of the six standards in RCW 36.70C.130 has been met. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 175, 4 P.3d 123 (2000). Lind has argued for relief based on the following standards under RCW 36.70C.130(1):

(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; and

(f) The land use decision violates the constitutional rights of the party seeking relief. *See* CP 89-111.⁵

The City argues that Lind has failed to establish any of those standards.

In reviewing a LUPA decision, this Court stands in the shoes of the superior court and reviews the Examiner's decision on the basis of the administrative record. *Wells v. Whatcom County Water Dist. No. 10, supra*. The proper focus of this Court's inquiry is the Examiner's rejection of Lind's arguments and remand of the permits, rather than the trial court's decision. *Id.* Therefore, the City's brief is primarily focused on the Examiner's decision and the administrative record.

2. THE HEARING EXAMINER CORRECTLY INTERPRETED THE APPLICABLE LAW.

Lind argued that the Examiner's decision was based on an erroneous interpretation of law under RCW 36.70C.130(1)(b). CP 103-04.

⁵ Citations to Lind's arguments are based on the Lind Bros. Construction, LLC's Opening Brief in Support of its Land Use Petition filed in the trial court.

Challenges under subsection (b) are legal questions that this Court reviews de novo, but only “after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.” *City of Federal Way v. Town and Country Real Estate, LLC.*, 161 Wn. App. 17, 37, 252 P.3d 382 (2011), citing RCW 36.70C.130(1)(b). The Examiner’s interpretation of local land use regulations, including the WSO, is entitled to deference under *City of Federal Way*.

Lind has failed to demonstrate that the Examiner’s interpretation of the law was erroneous.

a. Overview of the Wetland Stream Ordinance.

The City enacted the Wetland and Stream Regulatory Chapter (herein the WSO) in December 1991 after a multi-year educational, fact finding, and consensus building process. CP 921.⁶ The stated purposes of the WSO were to:

- (1) protect, preserve, restore, enhance, and maintain the overall functions of regulated wetlands and streams within the City;
- (2) adhere to a policy of “no net loss of regulated wetland and stream functions;”

⁶ The WSO is part of the administrative record, therefore citations to the WSO also include a citation to the CP.

(3) require appropriate planning, prior to site disturbance, to avoid further net loss of regulated wetland and stream functions; and

(4) establish a fair and consistent permit process that will prevent further net loss of regulated wetland and stream functions. BMC 16.50.030(A)(repealed Dec. 6, 2005), CP 923-24.

The Director has the authority to enforce the WSO and the permits issued under the WSO. BMC 16.50.090(D)(repealed Dec. 6, 2005), CP 931. Therefore, the Director determines when a wetland/stream permit application is required and “what additional information may be necessary” for determining the wetland boundary and category. BMC 16.50.060(A)(repealed Dec. 6, 2005), CP 927. The Director “may require additional information, including, but not limited to...any other information deemed necessary to verify compliance with the provisions of this chapter or to evaluate the proposed use in terms of the purposes of this chapter.” BMC 16.50.100(C)(7)(d)(repealed Dec. 6, 2005), CP 933.

“After review of all pertinent information, the Director shall determine if the proposal is in conformance with the intent and regulations of this chapter and if it is in the public interest to issue a permit.” BMC 16.50.100(D)(repealed Dec. 6, 2005), CP 934.

(1) Does The Municipal Code Give The Director The Authority To Request Additional Information About A Wetland?

The Director issued the wetland/stream permit with a condition requiring Lind to provide additional information about Wetland A. Lind argued that the Director could not request additional information about the wetland because the Director failed to follow the procedure in the WSO for challenging a wetland delineation. The Examiner correctly concluded that the Director determines what additional information may be necessary to properly delineate and categorize a wetland. Conclusion of Law No. 13, 2051-52.

The WSO states: “The Director shall determine when a permit is required and what additional information may be necessary” for the determination of a wetland boundary and category. BMC 16.50.060(A)(repealed Dec. 6, 2005)(emphasis added), CP 927. The Director determined that additional information was necessary to categorize the wetlands on Lind’s property after reviewing public comments about the proposal. The Examiner applied the plain language of the law to the facts.

The Examiner correctly interpreted BMC 16.50.060(A)(repealed Dec. 6, 2005).

(2) Does The Municipal Code Require The Director To Review All Pertinent Information Before Issuing A Decision On The Wetland/Stream Permit?

The Director issued the wetland/stream permit before reviewing the analysis required to accurately categorize Wetland A. Lind argued that no additional information could be required because the City did not “challenge” the information Lind previously provided. CP 100. The Examiner concluded that the Director was required to review “all pertinent information” prior to issuing a decision on the permit and that his failure to do so in this case required a remand. Conclusion of Law No. 14, CP 2052.

The WSO states: “After review of all pertinent information, the Director shall determine if the proposal is in conformance with the intent and regulations of this chapter and if it is in the public interest to issue a wetland permit.” BMC 16.50.100(D)(repealed Dec. 6, 2005)(emphasis added). Pertinent means “pertaining to the issue at hand; relevant.” Black’s Law Dictionary (7th Ed. 1999).

The field analysis is pertinent information because it may affect the category of Wetland A. Lind did not provide the field analysis, therefore, the Director did not review it before approving Lind’s wetland/stream permit (a permit with a condition requiring Lind to provide more

information about the wetland). Again, the Examiner applied the plain language of the law to the facts and concluded that the Director erred by issuing the permit *before* reviewing the required field analysis.

The Examiner correctly interpreted BMC 16.50.100(D)(repealed Dec. 6, 2005).

b. Overview Of SEPA And The SEPA Rules.

The State Environmental Policy Act (SEPA) was enacted in 1971 to “promote the policy of fully informed decision making by government bodies when undertaking major actions significantly affecting the quality of the environment.” *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (citation omitted).

The City has adopted an Environmental Protection Ordinance to implement SEPA. BMC 16.20.010.⁷ The City’s SEPA official makes the threshold determination and issues a DNS, MDNS or DS. The SEPA official may issue an MDNS based on conditions attached to the proposal by the official or based on changes to, or clarifications of, the proposal made by the applicant. BMC 16.20.120(A). An MDNS may be issued under WAC 197-11-340(2) which requires public notice and a 14-day comment period. BMC 16.20.120(F).

⁷ The City has attached the relevant portions of the BMC as Appendix B.

The City has incorporated the notice provisions from the SEPA rules. BMC 16.20.150. The SEPA rules require the City to use reasonable methods to inform the public and other agencies that an environmental document is being prepared. WAC 197-11-510. Members of the public are encouraged to comment on the proposal:

Recognizing their generally more limited resources, members of the public shall make their comments as specific as possible and are encouraged to comment on methodology needed, additional information, and mitigation measures in the manner indicated in this section. WAC 197-11-550(7).

The SEPA official “shall reconsider the DNS based on timely comments and may retain or modify the DNS.” WAC 197-11-340(2)(f).

A governmental agency’s SEPA threshold determination is reviewed under the “clearly erroneous” standard. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001), citing *Assoc. of Rural Residents v. Kitsap Co.*, 141 Wn.2d 185, 195-96, 4 P.3d 115 (2000). A decision is clearly erroneous when the court is left with the definite and firm conviction that a mistake has been committed. *Id.*

(1) Do The SEPA Rules Allow The Responsible Official To Modify A Threshold Determination In Response To Public Comments?

The City’s SEPA official revised the MDNS in response to public comments received about the development proposal. Lind argued that the

City improperly conditioned the proposal under SEPA. The Examiner concluded that the SEPA rules expressly allow the SEPA official to revise a MDNS in response to public comments. Conclusion of Law No. 17, CP 2053.

A MDNS may be issued under WAC 197-11-340(2) which outlines the notice provisions for a DNS. BMC 16.20.120(F). Any person may submit comments on the proposal within fourteen days. WAC 197-11-340(2)(c). The SEPA official shall reconsider a DNS based on timely comments and he may retain or modify the DNS. WAC 197-11-340(2)(f).

Modifications to Lind's proposal in December 2008, including construction with direct wetland impacts, triggered a full SEPA review. The City's SEPA official issued a MDNS on June 27, 2009 triggering a 14-day public comment period. The City received numerous public comments based on personal knowledge claiming that the NES delineation report was inaccurate and that Wetland A meets the criteria for a Category I "mature forested wetland" requiring a 100-foot minimum buffer. The City's SEPA official then revised the MDNS in response to the public comments adding a new condition requiring a field analysis of Wetland A. The revision was expressly permitted by the SEPA rules, i.e. WAC 197-11-340(2)(f).

The Examiner correctly interpreted the applicable SEPA rules.

(2) Does RCW 43.21C.240(3) Prohibit The Lead Agency From Using SEPA To Inform An Applicant About The Applicable Development Regulations?

The Second Revised MDNS includes ten mitigating conditions based on different provisions of the BMC, including the WSO. City's Ex. K, CP 969-71. Lind argued that the City improperly imposed "additional mitigation" prohibited by RCW 43.21C.240(3) because the City's existing development regulations adequately addressed all adverse impacts from the proposal. CP 106-07. The Examiner disagreed with Lind's contention that the City imposed "additional mitigation" through SEPA. Instead, she found that conditions in the MDNS were based on the existing development regulations and were intended to provide full environmental information about the proposal. Conclusion of Law No. 17, CP 2053.

During the hearing, Kim Weil explained that each condition in the Second Revised MDNS is based on one or more policies pursuant to BMC 16.20.190. CP 131:7-146:22. There was no competing testimony or evidence. The Examiner therefore determined that each condition in the MDNS was based on an applicable development regulation, including the WSO. CP 2053. Rather than impose "additional mitigation" through

SEPA, the City merely repeated the requirements of existing development regulations to inform the applicant and the public. *Id.*

As the Examiner noted, the conditions complained about in the MDNS were also present in the wetland/stream permit itself. *Id.* The Examiner correctly concluded that the City's actions did not violate the spirit and intent of RCW 43.21C.240(3).

c. Does The Municipal Code Allow The Director To Issue A Lot Line Adjustment With Conditions To Insure That All Required Criteria Are Met?

The Director issued the lot line adjustment with a condition requiring Lind to comply with the conditions in the wetland/stream permit. Lind argued that the condition should be stricken. The Examiner correctly concluded that the Director has the authority to issue a permit with conditions to insure compliance with the BMC. Conclusion of Law No. 21, CP 2054-55.

A "lot line adjustment" is a revision made for the purpose of adjusting boundary lines which does not create any additional lot, tract, parcel, site or division. BMC 18.08.265. An application for a lot line adjustment is a Type I permit, i.e. an administrative decision made by the Director that does not require public notice. BMC 21.10.040(B)(9). The

Director may approve an application, approve an application with conditions, or deny an application. BMC 21.10.100(D).

A proposed lot line adjustment application must meet four criteria for approval. BMC 18.10.020(B). For purposes of this appeal, the proposed lot line adjustment must improve “the overall function and utility of the existing lots.” BMC 18.10.020(B)(4).

Lind’s proposal included applications for both a lot line adjustment and a wetland/stream permit. CP 1843-46. The applications were processed concurrently. As explained above, the Director approved the wetland/stream permit on January 22, 2010. City’s Ex. M, CP 979-90. The Director also approved the lot line adjustment with five conditions. City’s Ex. L, CP 973-77. The Director made the following conclusion of law:

7. Compliance with BMC 18.10.020(B)(4) has been demonstrated through the issuance of a Wetland/Stream Permit associated with this application. Therefore, the approval of the lot line adjustment application shall be conditioned accordingly to ensure that all conditions of the Wetland/Stream Permit are met prior to final approval of this lot line adjustment application. CP 974.

As a result, the Director approved the lot line adjustment subject to the following condition: “1. The City issuing written verification that all conditions of the associated Wetland/Stream Permit (WET2005-00041) are met.” *Id.*

Kathy Bell has reviewed lot line adjustments for the City for 17 years. CP 560:15-23. She is very familiar with the sub-division ordinance and co-authored some of its provisions. *Id.* She testified as follows: “The conditions in the wetland/stream permit are an integral part of the City’s approval of the lot line adjustment application, and without these permit conditions, the lot line adjustment would not have been approved by the City.” CP 571:21-572:6.

The Examiner concluded that the Director could approve Lind’s lot line adjustment with a condition that insured the adjustment would improve the overall function and utility of the lots, i.e. by locating the proposed building envelopes in areas not encumbered by wetlands or buffers. Conclusion of Law No. 21, CP 2054-55.

The Examiner remanded the wetland/stream permit for further review including a determination of the category of Wetland A. Conclusion of Law No. 14, CP 2055. As the Examiner explained, if the wetland/stream permit is modified on review (i.e. an increase in the required minimum buffer for Wetland A), the lot line adjustment may also need to be modified. Conclusion of Law No, 15, CP 2052-53. Therefore, the Examiner remanded the lot line adjustment along with the wetland/stream permit. CP 2056.

The Examiner correctly interpreted BMC 18.10.020 and BMC 21.10.100(D).

3. THE HEARING EXAMINER FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A challenge to the Examiner's findings of fact is a factual question. This Court will uphold a challenged finding if there is "substantial evidence" to support it or "evidence that would persuade a fair minded person of the truth of the statement asserted." *City of Federal Way, supra*, 161 Wn. App. at 37.

Lind challenged numerous findings of fact by the Examiner, including 43, 44-57⁸, 59, 63, 64, 65, 66 and 68. CP 94-95. Each finding of fact challenged by Lind is based on evidence (testimony, exhibits or both) that would persuade a fair minded person of the truth of each statement asserted.⁹

a. Finding of Fact No. 43.

The Examiner found that neither of the wetland delineation and mitigation studies submitted by Lind included the field investigation

⁸ Findings of fact 44-57 are recitations of the BMC code provisions that the Hearing Examiner reviewed in reaching her decision.

⁹ The record before the Hearing Examiner is over 1100 pages long, including close to 100 exhibits offered into evidence by the City, Lind, and Mark Quenneville. Additionally, the verbatim report of proceedings for the three-day hearing contains almost 800 pages of testimony from numerous witnesses.

necessary to determine whether Wetland A meets the criteria of a “mature forested wetland.” CP 2040. Lind argued that its experts “performed the necessary investigation to categorize the wetland areas.” CP 94. However, the record shows that Lind’s experts did not perform the required analysis.

The NES delineation report and the NWC mitigation plan are in the record. City’s Ex. R, CP 1029-74 and City’s Ex. S, CP 1076-1111. Neither report includes the field analysis necessary to determine if Wetland A is a “mature forested wetland.”

Kim Weil described the necessary field analysis in a letter to Lind on August 7, 2009:

The field analysis is conducted by an ISA-certified arborist and a wetland biologist who together determine if there are at least 8 trees/acre within the wetland boundary (only for wetlands one acre in size or larger) that are 80 years old or 21” at diameter breast height (dbh). City’s Ex. I, CP 963.

Vikki Jackson delineated Wetland A in 2005 for the NES delineation report. Vikki Jackson did not determine whether Wetland A was at least one acre in size. Nor did Ms. Jackson consult with an ISA-certified arborist to determine if there were at least eight trees within Wetland A meeting the definition of “mature trees.”

Wetland A is a large wetland, only a portion of which is located on Lind's property. See Appendix A, p. 1,3.¹⁰ Vikki Jackson described Wetland A as follows:

The majority of Wetland A is located **off-site** on property to the west-northwest and includes Hoag's Pond...[there] is connectivity between the wetland, the creek, and Hoag's Pond. The wetland is also well connected to quality upland habitat, additional wetlands and a larger tract of undeveloped forested land to the north, which provides an open space in a developing area. CP 1036 (emphasis added).

Vikki Jackson did not determine the size of Wetland A which is the first step in determining whether the wetland meets the criteria of a "mature forested wetland." However, Vikki Jackson's report does state that red alder and western red cedar were located within Wetland A. CP 1033.

Katrina Jackson performed additional field work for Lind and drafted the NWC mitigation plan in 2008. But Katrina Jackson testified that she did not re-delineate Wetland A. CP 700:25-701:7. She admittedly performed no analysis of Wetland A, let alone the specific analysis needed to determine whether the wetland is a "mature forested wetland."

Finding of Fact No. 43 was supported by substantial evidence.

¹⁰ City's Ex. R, Figure 2, CP 1043 and City's Exhibit V, CP 1115.

b. Finding of Fact No. 59.

The Examiner found that the rating form for Wetland A in the NES delineation report shows no indication of wetland type. CP 2045. The Examiner also found that Wetland A is rated with maximum points for habitat function in nearly all categories. *Id.* Lind challenged this finding arguing that the form “expressly states that none of the special characteristics (including mature forested wetland characteristics) are present for the wetland areas.” CP 94. The form is in the record and it directly contradicts Lind’s argument.

The “Wetland Rating Field Data Form – Western Washington” was completed as part of the NES delineation report. City’s Ex. R, CP 1055. The bottom section of the form instructs the wetland specialist to check the appropriate type and class of wetland being rated. *Id.* There are eight options for wetland type, including “mature forest” and “none of the above.” *Id.* As the Examiner noted, no box is checked. *Id.*

Wetland A scored 30 out of a possible 36 points in the “Habitat Functions” section of the rating sheets for the NES delineation report. CP 1059-63. Ms Weil said that was the highest score she had seen at the time. CP 146:10-22. That is significant because habitat function is the wetland function that requires the widest buffers. CP 147:19-148:6.

Finding of Fact No. 59 is supported by substantial evidence.

c. Finding of Fact No. 63.

The Examiner found that Mark Quenneville “conducted an informal survey of trees on or near the subject property and counted and measured about 18 trees that were at least 21-inches diameter at breast height.” CP 2045. Lind challenged this finding because Mr. Quenneville’s observations were “contradicted by the 2005 NES Wetland Delineation Report and the testimony of Katrina Jackson.” CP 94. The record supports this finding.

Mark Quenneville has lived next door to the subject site for over 19 years. CP 1012. He submitted numerous comments to the City about Lind’s proposal based on his personal knowledge including a “Mature Tree Inventory.” City’s Ex. Q, CP 997-1027. Mr. Quenneville identified and documented 18 trees with a diameter at breast height of at least 21” in and around the wetland area for a “Mature Tree Inventory.” CP 1011-26. Mr. Quenneville recommended the City require “an independent assessment” of the wetlands before issuing a decision. CP 1013.

While Lind argues that Mr. Quenneville’s observations were contradicted by Lind’s experts, that contradiction illustrates why additional analysis is necessary. As explained above, Vikki Jackson did

not conduct the field analysis necessary to determine whether Wetland A meets the criteria for a “mature forested wetland.” See discussion *infra* Section E(2)(a). The record also shows that Katrina Jackson did not perform any analysis of Wetland A. CP 700:25-701:7.

Finding of Fact No. 63 was supported by substantial evidence.

d. Finding of Fact No. 64:

The Examiner found that John McLaughlin, a conservation biologist, has observed the subject site and concluded that a 50-foot buffer is not adequate for any wetland function. CP 2046. Lind challenged this finding because Dr. McLaughlin could not tell “where the property boundaries are or whether he was actually on Lind’s Property.” CP 94. However, the evidence shows that Dr. McLaughlin did visit the site and observe the wetlands and watercourses.

Dr. John McLaughlin has an undergraduate degree, master’s degree, and PhD in biological sciences. CP 894:15-16. He also has expertise in conservation biology and wildlife ecology. CP 894:17-22. Dr. McLaughlin said he visited the subject property a couple of times with both Mr. Quenneville and Dr. Sarah Cooke. CP 894:23-895:23.

Dr. McLaughlin also provided his opinion, based on the scientific literature he has reviewed, that a 50-foot buffer is not adequate for these

wetlands. CP 897:3-12. Importantly, the Examiner did not determine the appropriate buffer width for Wetland A.

While Lind argues that Dr. McLaughlin could not identify the property boundaries, that is not why he visited the site. Dr. McLaughlin has a documented expertise in wetlands and he visited the site to assess the value of the wetlands. It is undisputed that the wetlands cover a significant portion of Lind's property, i.e. over 10,500 square feet. CP 1037.

Finding of Fact No. 64 was supported by substantial evidence.

e. Finding of Fact No. 65.

The Examiner found that Nick Sky, an ecologist familiar with the wetlands on Lind's property, commented on the MDNS and provided information about the NES delineation report and the need for additional analysis. CP 2046. Lind challenged this finding because Mr. Sky "could not even identify the boundaries of the Lind property." CP 95. But the record shows that Mr. Sky is very familiar with the wetlands onsite.

Mr. Sky has a B.S. degree from the University of Oregon in environmental studies with an emphasis in forest ecology. CP 461:17-23. Mr. Sky visited the site several times before Lind submitted his proposal because of his interest in forest ecology and the area being "a large

contiguous block of forest” about a quarter mile from his house. CP 462:8-19. Mr. Sky found the area very interesting and he visited it several more times after hearing about Lind’s proposal to explore and take notes. CP 462: 15-19.

Mr. Sky sent an email to the City commenting on Lind’s proposal in July 2009 that states in pertinent part:

“The Wetland Delineation for Parcel #370307169163, Nov 2005 by Northwest Ecological Services LLC submitted as part of the above referenced applications contains errors and omissions related to the delineation, vegetation and wildlife that severely underrate this high quality, forested wetland that forms a contiguous hydrological connection to Hoag Pond.” Ex. Q4, CP 1559-60.

Mr. Sky, like Dr. McLaughlin, was more concerned with accurately categorizing the wetlands than with identifying Lind’s property boundary. As Mr. Sky said, adverse impacts to wetlands “don’t stop at property boundaries.” CP 473:16-474:2.

Finding of Fact No. 65 was supported by substantial evidence.

f. Finding of Fact No. 66.

The Examiner made the following findings with respect to Dr. Sarah Cooke: Dr. Sarah Cooke visited the subject site and concluded that the entire hillside is a forest mosaic slope, with the smaller wetlands part of the larger, connected system. CP 2046. Dr. Cooke indicated that a 50-

foot buffer would not adequately protect the wetland functions. *Id.* Dr. Cooke described a problem with the wetland delineations flags that were placed on the site by Vicki Jackson. *Id.* Lind challenged this finding because Dr. Cooke could not identify the property boundaries for Lind's property and because Katrina Jackson testified that Dr. Cooke may have been disoriented when conducting her site visit. CP 95. The testimony of Dr. Cooke supports this finding.

Dr. Sarah Cooke has two Master's degrees: one in Forestry and Geobotany and another in Botanical Taxonomy. CP 488:5-9. Dr. Cooke also has a PhD in Forestry and Geobotany. CP 488:9-12. Dr. Cooke is a fellow of the International Society of Wetland Scientists. CP 488:13-16.

Dr. Cooke described a problem with the wetland delineation flags placed by Vikki Jackson on Wetland A:

When I was standing right at the flag I was noticing the soils on either side of the flag, in theory one side of the flag should have upland soils and upland vegetation and the other side of the flag should have wetland soils and wetland vegetation because the flagging is supposed to be marking a boundary and time and time again, especially with respect to the two small wetlands and then the larger one down the hill, B, D and -- B, C -- sorry. C, D and then the one downhill, B, I found the soils on both sides of the flag virtually identical both being hydric and the vegetation on both sides of the flagging being identical, both being wetland indicator species. So I -- I disagreed with the mapping, I found wetlands pretty much in the area that I've identified with the exception of that spur that you can see that isn't marked with the orange hatching, I found wetlands everywhere. And these are corroborated -- these boundaries are corroborated by the city's own

GIS that I found online which show a very large wetland system throughout that area that wasn't identified on the Vicky Jackson delineation flagging. CP 497:9-498:5.

Lind challenged this finding because Dr. Cooke could not identify Lind's property boundary. Dr. Cooke is a wetlands expert and she was on-site to evaluate the wetlands, not to determine property boundaries. Again, it is undisputed that Wetland A extends onto Lind's property.

Katrina Jackson was not present when Dr. Cooke visited the property and her suggestion that Dr. Cooke was "disoriented" during her site visit is entirely speculative. More importantly, the Examiner found Dr. Cooke's testimony more credible than the competing testimony of Katrina Jackson. When reviewing the record in a LUPA appeal, this Court defers to the Examiner's assessment of "the credibility of witnesses and the weight to be given reasonable but competing inferences." *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 641, 234 P.3d 214 (2010).

Finding of Fact No. 66 was supported by substantial evidence.

g. Finding of Fact No. 68.

The Examiner made two findings based on Kim Weil's testimony. Kim Weil determined that a 100-foot buffer was appropriate to protect the wetland functions. CP 2046. Ms. Weil also indicated that the wetland

classification for the nearby Fairhaven Highlands property was changed to Category I because of the presence of a “mature forested wetland.” CP 2047. Lind challenged this finding because it discusses “the Fairhaven Highlands project, which has no factual or legal bearing on the Hearing Examiner’s scope of review.” CP 95. Lind also argues that this finding “purports to give credence to Ms. Weil’s personal opinion regarding buffer widths in direct contradiction to the Director’s decision (which is the subject of this appeal).” CP 95. There is sufficient evidence to support the Examiner’s finding.

Kim Weil testified about the re-categorization of wetlands on the nearby Fairhaven Highlands property. CP 142:10-143:7. Vikki Jackson conducted the field work on the Fairhaven Highlands property. She initially categorized some wetlands on that property as Category II wetlands. CP 142:22-143:7. The City received public comments suggesting that Ms. Jackson’s categorization was wrong because the wetlands met the criteria of “mature forested wetlands.” Vikki Jackson then conducted a follow-up analysis at the request of the City and ultimately changed the categorization of some wetlands on Fairhaven Highlands to Category I because they met the criteria of “mature forested wetlands.” Ex. Q10, CP 1575-77 and Ex. Q29, CP 1683.

This fact was relevant because: (1) there is connectivity between the wetlands on Lind's property and the wetlands on the Fairhaven Highlands property and (2) Vikki Jackson conducted the field analysis on both the Fairhaven Highlands property and Lind's property. Moreover, the Examiner did not find that Lind's property contained "mature forested wetlands." That issue was not before the Examiner. The Examiner found that the City's experience on Fairhaven Highlands was one factor the Director considered before requiring further analysis of the wetlands on Lind's property.

The record also shows that Ms. Weil recommended a 100-foot buffer for Wetland A in June 2006 based on the description of Wetland A in NES report. CP 123:16-124:21 and City's Ex. D, CP 948-49. The WSO sets a minimum required buffer for each category of wetlands, but the buffer may be increased to protect an identified function. BMC 16.50.080(repealed Dec. 6, 2005). Ms. Weil's recommendation was based on the description of Wetland A in the NES delineation report. Vikki Jackson wrote that Wetland A was performing at "a high level overall" with a habitat function score of 30 out of a possible 36 points. As Ms. Weil wrote: "habitat functions are particularly sensitive to disturbance." CP 948-49. Therefore, Ms. Weil recommended a 100-foot buffer for

Wetland A. However, Ms. Weil's recommendation was overruled by the Director. See City's Ex. M, CP 978-90.

Finding of Fact No. 68 was supported by substantial evidence.

4. THE HEARING EXAMINER CORRECTLY APPLIED THE LAW TO THE FACTS.

Lind has also alleged that the Examiner clearly and erroneously applied the law to the facts under RCW 36.70C.130(1)(d). A decision is clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made. *City of Medina v. T-Mobile USA, Inc*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). Lind contends that the Examiner erroneously applied the law to the facts by (1) concluding that the City could require Lind to re-evaluate the wetland categorization years after the NES delineation report was submitted and; (2) by remanding the wetland/stream permit. CP 103-06.

The Director has the authority to determine "what additional information may be necessary" to determine the boundary and category of a wetland. BMC 16.50.060(A)(repealed Dec. 6, 2005). The Examiner applied the plain language of the WSO to the facts and concluded that the Director could require additional field analysis. Conclusion of Law No. 13, CP 2052. While Lind argues the Director could not require Lind to re-categorize the wetland years after the original analysis was submitted,

Lind cites no authority for that argument. Moreover, Lind caused the delay by waiting two and half years to provide the information requested by the City in June 2006.

Lind also argues that the Examiner erred by remanding the wetland/stream permit. CP 103-06. The WSO explicitly states that the Director must review “all pertinent information” about a wetland stream permit *before* issuing a decision on an application. BMC 16.50.100(D)(repealed Dec. 6, 2005), CP 1135. Lind did not provide the field analysis, therefore the Director did not review it before issuing the permit (a permit that explicitly required Lind to provide additional information about the wetland). Therefore, the Examiner correctly remanded the wetland/stream permit so that Lind could provide the required analysis and the Director could review it *before* issuing a decision. Conclusion of Law No. 14, CP 2052.

The Examiner correctly applied the law to the facts of this case.

5. THE HEARING EXAMINER’S DECISION DID NOT VIOLATE LIND’S CONSTITUTIONAL RIGHTS.

Lind contends that the Examiner’s decision violated Lind’s due process rights by denying Lind a meaningful opportunity to have its permit processed under BMC 16.50. CP 106-07. This echoes Lind’s argument before the Examiner that the City improperly used SEPA to

apply the Critical Areas Ordinance, BMC 16.55, to Lind's proposal. The Examiner expressly rejected Lind's arguments because the facts do not support it. As stated above, all of the conditions in the Second Revised MDNS were based on applicable land use development regulations in the BMC, including the WSO. None of the conditions in the MDNS are based on the Critical Areas Ordinance.

Lind submitted its application for a wetland/stream permit on December 5, 2005 with the intent to vest to the regulations in effect on that day. Lind's Ex. 17, CP 1303-05. The City treated the application as vested to the WSO. The Examiner made the following unchallenged finding of fact:

No. 9. The City did not provide notice to Lind Bros. that the applications were complete or not complete. The City processed the wetland/stream application as vested under the WSO. CP 2033.

An unchallenged finding of fact is considered a verity on appeal. *City of Medina v. T-Mobile USA, Inc*, 123 Wn. App. at 29. The Examiner also made the following unchallenged conclusion of law: "No. 5. The applications for the proposal vested under the WSO and were not subject to the provisions of the CAO." CP 2049.

Lind cited no evidence in support of this argument before the Examiner or the trial court. The fact is the City processed Lind's permits

under the regulations in effect on the day the proposal was submitted, BMC 16.50 (repealed Dec. 6, 2005).

Lind has failed to demonstrate that its constitutional rights were violated.

6. THE TRIAL COURT COMMITTED OTHER ERRORS IN REVIEWING THIS CASE.

The crux of the City's argument is that Lind failed to carry its burden before the trial court under RCW 36.70C.130. The City also argues that the trial court made two other obvious errors that merit this Court's consideration.

a. Whether the trial court violated its statutory authority in a LUPA appeal by granting variances because Lind did not apply for any variances?

Lind did not apply for any variances for this project, therefore the City did not review any applications for variances or make a final decision on any applications for variances. There was no "land use decision" on variances for the trial court to review. However, Judge Uhrig's order states: "Any variances required for Lind to construct three homes on the subject property are hereby granted." See Order on LUPA Hearing on the Merits. CP 18-20. Judge Uhrig erred by granting relief on an issue not before the trial court.

LUPA defines a “land use decision” as the final determination by a local jurisdiction on an application for a project permit. RCW 36.70C.020(2). The superior court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. RCW 36.70C.140. Lind did not apply for variances. There was no land use decision to affirm, reverse, or remand with respect to variances. Judge Uhrig clearly and erroneously exceeded the statutory authority of the trial court in a LUPA appeal by granting Lind “any variances required” to construct three homes on the subject property.

b. Whether the trial court erred by reviewing materials outside the administrative record?

RCW 36.70C.120(1) states in relevant part: “judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or office.” The trial court erred by reviewing documents filed in a separate case while reviewing this case, i.e. *Lind Bros. LLC. v. City of Bellingham, Responsible Development, and Peter Frye* (Whatcom County Case No.10-2-03292-1).¹¹

¹¹ *Lind Bros. LLC v. City of Bellingham, Responsible Development, and Peter Frye* (Whatcom County Case. No. 10-2-03292-1) is also on appeal before this Court in Case Nos. 68777-9-I and 67973-2-I.

Lind submitted two separate development proposals for different properties on December 5, 2005. One proposal was related to property near Wilken Street and is the subject of this appeal; the other proposal was related to property near Star Court. The applications were processed separately by the Planning and Community Development Dept. The Director issued separate decisions with respect to each proposal. The Wilken Street proposal was approved with conditions; the Star Court proposal was denied.

Lind appealed the separate decisions to the City's Hearing Examiner. The Examiner held separate hearings on the two appeals. The hearing for the Wilken Street case was held on January 5, 2011, January 7, 2011, and January 28, 2011. The hearing for the Star Court case was held on September 29, 2010 and October 8, 2010. The Hearing Examiner issued a separate order in each case: HE-10-PL-004-007 for this case (entered March 16, 2011) and HE-09-PL-024 for the Star Court case (entered on December 10, 2010). Lind appealed both of those decisions to Whatcom County Superior Court. Both cases were assigned to Judge Uhrig.

Oral arguments in this case were held on August 25, 2011. During that hearing, Judge Uhrig asked about the date for the oral argument in the Star Court case. Mr. Pete Dworkin, counsel for Lind, indicated that the

hearing in the Star Court case was scheduled for September 13, 2011. The following exchange ensued:

Judge Uhrig: I might even have a quick peek at that file before I make a decision to make sure to see if any of the issues overlap and might even be wise to issue both decisions at the same time.

Mr. Dworkin: I think the Court should look at everything. I think they are related but I think the city has a different opinion.

Mr. Erb: Respectfully, while we think the issues may be similar, these are two separate cases, two separate pieces of property, two separate wetlands that we are talking about. While the procedures as followed by the city are arguably the same, we are not talking about the same thing. The other case is a lot line adjustment and that was the only issue raised on appeal in that case. In this case we are dealing with issuing of permits. The issues are very different.

Judge Uhrig: I'll have a quick look at the documents filed with respect to the appeal for that, only not the transcripts or anything. And are there any, I know everybody wants a decision as quickly as reasonably possible, are there any time constraints. VRP 59:4-23.¹²

Judge Uhrig indicated that he would be taking the matter under advisement. Before adjourning the hearing, Judge Uhrig added the following thought:

I have been frustrated at times personally from property owners near me, you know, availing themselves of the right to vesting and it's always frustrating for the property owner, the neighboring property owner, but I reluctantly acknowledge the right of the person who is vesting under whatever city of county ordinance you are talking about. VRP 60:17-24.

¹² The Court Reporter filed an Amended Page 59 of the proceedings on January 10, 2012.

Judge Uhrig's statement is troubling. Judge Uhrig provided no rationale for his decision therefore the parties can only speculate as to his reasoning. Based on the statement above, it appears that Judge Uhrig based his decision on vesting. That would be clearly erroneous because this is not a vesting case. See discussion *infra* Section E(5).

The oral argument in the Star Court case was held on September 13, 2011. Judge Uhrig also took that matter under advisement.

Judge Uhrig then issued orders in both this case and the Star Court case at the same time on October 10, 2011. Judge Uhrig indicated during the oral argument in this matter that he might review both files and then issue his decisions at the same time. He then did exactly that. Judge Uhrig reversed the decisions of the Hearing Examiner in both cases without providing a legal basis for either decision.

Judge Uhrig's review should have been confined to the administrative record in this case pursuant to RCW 36.70C.120(1). Judge Uhrig erred by admittedly reviewing documents filed with respect to the Star Court case while making his decision in this matter.

F. CONCLUSION

Judge Uhrig's order may result in a loss of regulated wetlands and wetland functions within the City because it allows Lind to proceed with

development based on a wetland study that is clearly incomplete and arguably inaccurate. That result is contrary to both the letter and spirit of the WSO, the stated purpose of which is to “adhere to a policy of no net loss of regulated wetland and stream functions” within the City. BMC 16.50.030(A)(2)(repealed Dec. 6, 2005).

The issue before the Examiner was whether the City could require Lind to provide additional analysis of a wetland in response to deficiencies highlighted in public comments. The Examiner answered that question in the affirmative concluding that the Director had the authority pursuant to both SEPA and the WSO to request additional information about the wetlands in response to public comments. Conclusion of Law No. 13, CP 2051-52.

The Examiner also determined that the Director failed to follow the procedures in the WSO by issuing the permits *before* reviewing all pertinent information. Conclusion of Law No. 14, CP 2052. The Director did not review all pertinent information, i.e. the required field analysis of Wetland A, because Lind did not provide it. Therefore, the Examiner remanded the permit to allow the Director to review all pertinent information *before* making a decision. *Id.*

The Examiner correctly interpreted the land use regulations in the Bellingham Municipal Code (including the WSO) and SEPA. The

Examiner's findings of fact were supported by substantial evidence. And the Examiner correctly applied the law to the facts.

The trial court erred because Lind failed to meet its burden under RCW 36.70C.130(1). The trial court erred by granting relief on an issue not before the court, i.e. variances. The trial court also erred by admittedly reviewing the materials from a different case while making his decision in this matter. Therefore, the City requests that Judge Uhrig's Order on LUPA Hearing on the Merits be reversed.

The City requests that the Hearing Examiner's Findings of Fact Conclusions of Law and Order be affirmed and that Lind's wetland/stream permit and lot line adjustment be remanded to the Director for further review.

Respectfully submitted this 16th day of February, 2012.

City of Bellingham


James Erb, WSBA #40128
Assistant City Attorney

APPENDIX A

Color photos

1. City's Exhibit R, 2005 NES Delineation Report, Figure 2 Existing Conditions with Wetland Survey Overlay;
2. City's Exhibit R, 2005 NES Delineation Report, Figure 3. 2002 Aerial Photograph; and
3. City's Exhibit V, Lind Wilkin Wetland Delineation, 1992 City-Wide Wetland Inventory, & Drainage.

APPENDIX B

BMC PROVISIONS

1. BMC 16.20.010 - Authority;
2. BMC 16.20.050 – Designation of Responsible Official;
3. BMC 16.20.120 – Mitigated Dns;
4. BMC 16.20.150 – Comments and Public Notices – Adoption by Reference;
5. BMC 16.20.190 – Sepa Decisions – Substantive Authority
6. BMC 18.10.020 – Procedure;
7. BMC 21.10.040 – Types of Land Use Decisions;
8. BMC 21.10.100 – Type I Process: Minor Administrative Decisions; and
9. BMC 21.10.200 – Notice of Application.

16.20.010 - Authority

This chapter may be cited as the City of Bellingham Environmental Procedures Ordinance. The City of Bellingham adopts this chapter under the State Environmental Policy Act (SEPA), RCW 43.21C.120, and the SEPA Rules, WAC 197-11-904. This chapter contains this City's SEPA procedures and policies. The SEPA Rules, Chapter 197-11 WAC, must be used in conjunction with this chapter.

[Ord. 2004-09-064]

16.20.050 - Designation Of Responsible Official

- A. For those proposals for which the City is a lead agency, the responsible official shall be the Planning and Community Development Director or such other person as the Director may designate in writing.
- B. For all proposals for which the City is a lead agency, the responsible official shall make the threshold determination, supervise scoping and preparation of any required EIS and perform any other functions assigned to the lead agency or responsible official by those sections of the SEPA Rules (Chapter 197-11 WAC) that have been adopted by reference.
- C. The responsible official shall be responsible for preparation of written comments for the City in response to a consultation request prior to a threshold determination, participation in scoping, and reviewing a DEIS.
- D. The responsible official shall be responsible for the City's compliance with WAC 197-11-550 whenever the City is a consulted agency and is authorized to develop operating procedures that will ensure that responses to consultation request are prepared in a timely fashion and include data from all appropriate departments of the City.
- E. The responsible official shall retain all documents required by the SEPA Rules and make them available in accordance with Chapter 42.17 RCW.

[Ord. 2004-09-064]

16.20.120 - Mitigated Dns

- A. As provided in this section and in WAC 197-11-350, the responsible official may issue a DNS based on conditions attached to the proposal by the responsible official or on changes to, or clarifications of, the proposal made by the applicant.
- B. An applicant may request in writing early notice of whether DS is likely under WAC 197-11-350. The request must:
1. Follow submission of a permit application and environmental checklist for a nonexempt proposal for which the City is lead agency; and
 2. Precede the City's actual threshold determination for the proposal.
- D. As much as possible, the City should assist the applicant with identification of impacts to the extent necessary to formulate mitigation measures.
- E. When an applicant submits a changed or clarified proposal, along with a revised or amended environmental checklist, the City shall base its threshold determination on the changed or clarified proposal and should make the determination within 15 days of receiving the changed or clarified proposal:
1. If the City indicated specific mitigation measures in its response to the request for early notice, and the applicant changed or clarified the proposal to include those specific mitigation measures, the City shall issue and circulate a DNS under WAC 197-11-340(2).
 2. If the City indicated areas of concern, but did not indicate specific mitigation measures that would allow it to issue a DNS the City shall make the threshold determination, issuing a DNS or DS as appropriate.
 3. The applicant's proposed mitigation measures, clarifications, changes or conditions must be in writing and must be specific. For example, proposals to "control noise" or "prevent storm water runoff" are inadequate, whereas proposals to muffle machinery to X decibel" or "construct X type and size of stormwater detention facility at Y location" are adequate.
 4. Mitigation measures which justify issuance of a mitigated DNS may be incorporated in the DNS by reference to agency staff reports, studies or other documents.
- F. A mitigated DNS is issued under either WAC 197-11-340 (2), requiring a 14-day comment period and public notice, or WAC 197-11-355, which may require no additional comment period beyond the comment period on the notice of application.
- G. Mitigation measures incorporated in the mitigated DNS shall be conditions of approval of the permit an may be enforced in the same manner as any conditions of the permit, or in any other manner as prescribed by the City.
- H. If the City's tentative decision on a permit or approval does not include mitigation measures that were incorporated in a mitigated DNS for the proposal, the City should evaluate the threshold determination to assure consistency with WAC 197-11-340(3)(a) relating to the withdrawal of a DNS.
- I. The City's written response under subsection © of this section shall not be construed as a determination of significance. In addition, preliminary discussion of clarifications or changes to a proposal, as opposed to a written request for early notice, shall not bind the City to consider the clarifications or changes in its threshold determination.

[Ord. 2004-09-064]

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16.20.150 - Comments And Public Notices - Adoption By Reference

The City adopts the following sections, as now existing or hereinafter amended, by reference as supplemented in this chapter:

WAC

197-11-500	Purpose of this part
197-11-502	Inviting comment
197-11-504	Availability and cost of environmental documents
197-11-508	SEPA register
197-11-510	Public notice
197-11-535	Public hearings and meetings
197-11-545	Effect of no comment
197-11-550	Specificity of comments
197-11-560	FEIS response to comments
197-11-570	Consulted agency costs to assist lead agency

[Ord. 2004-09-064]

16.20.190 - Sepa Decisions - Substantive Authority

- A. The City may attach conditions to a permit or approval for a proposal so long as:
1. The policies and goals set forth in this section are supplementary to those in the existing authorization of the City of Bellingham
 2. Such conditions are in writing; and
 3. The mitigation measures included in such conditions are reasonable and capable of being accomplished; and
 4. The City has considered whether other local, State, or Federal mitigation measures applied to the proposal are sufficient to mitigate the identified impacts; and
 5. Such conditions are based on one or more policies in BMC 16.20.200 and cited in the permit, approval, license or other decision document.
- B. The City may deny a permit or approval for a proposal on the basis of SEPA so long as:
1. A finding is made that approving the proposal would result in probably significant adverse environmental impacts that are identified in a FEIS or final supplemental EIS; and
 2. A finding is made that there are no reasonable mitigation measures capable of being accomplished that are sufficient to mitigate the identified impact; and
 3. The denial is based on one or more policies identified in BMC 16.20.200 and identified in writing in the decision document.

[Ord. 2004-09-064]

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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 blueline 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.

[Ord. 2004-09-065; Ord. 10833 §1, 1997; Ord 10169 §2, 1991; Ord. 9630 §1, 1986; Ord. 9352 §5 (part), 1984; Ord. 9135 §3 (part), 1982]

7/14

21.10.040 - Types Of Land Use Decisions

A. Land use decisions are classified into seven review process types based on who makes the decision, the amount of discretion exercised by the decision maker and the amount and type of public input sought.

B. **Type I.** A Type I review process is an administrative review and decision by the Director. It is exempt from notice requirements. If a Type I decision is not categorically exempt from SEPA and the SEPA review has not been completed with a prior permit, the Type II process shall be used. Appeals of Type I decisions are decided by the Hearing Examiner unless the rules for a specific permit or decision specify that no administrative appeal is available. The following are a Type I decision when the application does not require a SEPA threshold decision:

1. Billboard relocation permit;
2. Clearing permit;
3. Design review for projects that are not required to use a Type II process;
4. Grading permit;
5. Exempt home occupation;
6. Final short plat;
7. Land use approval for building permits, occupancy approvals, demolition permits and sign permits;
8. Interpretation of development regulations;
9. Lot line adjustment;
10. Nonconforming use status determination;
11. Over-height fence;
12. Parking waiver or joint parking;
13. Shoreline statement of exemption;
14. Preliminary Short plat of 1-4 lots; EXCEPT "cluster" subdivisions and applications that include a request to round up the next higher number of lots when dividing the combined area of two or more lots of record by the allowed density results in a fractional lot between .5 and .75;
15. Site area exception (BMC 20.30.040 (B)(1)(d));
16. Specific binding site plan;
17. Temporary use;
18. Use approvals for permitted uses;
19. Vision clearance waiver;

20. Critical Area permits and approvals without a variance that are not a Type II process;
21. Wireless communication facility that does not require either a planned development approval or conditional use permit; and
22. Certificates of alteration under BMC 17.90.060.C.2.a.
23. All other decisions that specify use of the Type I process.

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

1. Accessory dwelling unit;
2. Design review for projects that:
 - a. Require a SEPA threshold decision; or
 - b. Include construction of a new building; or
 - c. Include an exterior non-residential addition to an existing building; or
 - d. Include an exterior addition of one or more residential units.
3. General binding site plan;
4. Grading permits requiring a SEPA threshold decision;
5. Home occupation permit;
6. Institutional site plan;
7. Land use approval for building, demolition and sign permits for projects requiring a SEPA threshold decision if the SEPA review was not previously completed;
8. Land use approval for public facility construction permits for streets, storm water facilities sewer and/or water facilities requiring a SEPA threshold decision if the SEPA review was not previously completed;
9. Planned development;
10. Shoreline substantial development permit or variance;
11. Preliminary Short plats consisting of 5-9 Lots that are not using cluster subdivision provisions; and cluster short plats of 1-4 lots without a density bonus (unless the Director requires Process III-A) but EXCLUDING any short plats rounding up the number of lots from a fraction of less than .75 when dividing the combined area of two or more lots of record by the required minimum lot size;
12. Critical Area permit requiring a SEPA threshold decision; and
13. Infill housing projects under BMC Chapter 20.28; and
14. Type I decisions that require a SEPA threshold decision and all other decisions specifying a Type II process.

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

1. Co-housing;
2. Conditional use;
3. Nonconforming building reconstruction when over 50% destroyed;
4. Nonconforming use expansion, reconstruction when over 50% destroyed or change in use;
5. Shoreline conditional use;
6. Preliminary Short plat that is not a Type IIIB decision and is rounding up the number of lots from .5 but less than .75 when dividing the combined area of two or more lots of record by the allowed density;
7. Variance as provided in BMC Section 18.48.010 for a short plat, lot line adjustment, binding site plan or preliminary plat that is not being reviewed under Process Type IIIB;
8. Variance from Land Use Development Code and/or Lake Whatcom Reservoir Regulatory Chapter 16.80;
9. Critical Area variance;
10. Cluster short plats of 1-4 lots without a density bonus if the Director requires Process III-A; and
11. All other decisions specifying a Type IIIA process.

E. Type IIIB. A Type IIIB review process is a quasi-judicial review and decision made by the Hearing Examiner that may be appealed to the City Council. The following are Type IIIB decisions:

1. Preliminary plats, plat alterations and plat vacations, including any variances;
2. Short plats consisting of 1-4 cluster lots with a density bonus or 5-9 cluster lots, including any variances; and
3. All other decisions specifying a Type IIIB process.

F. Type IV. A Type IV review process is a City Council quasi-judicial decision on a final plat, a final amended plat or final vacated plat. There is no opportunity for administrative appeal.

G. Type V-A. A Type V-A review process is a quasi-judicial decision made by the City Council after recommendation by the Planning Commission. The following are Type V-A decisions:

1. Quasi-judicial rezones as described in BMC 20.19.020.A.2; and
2. Institutional master plans and amendments that are consistent with the comprehensive plan.

H. **Type V-B.** A Type V-B review process is a quasi-judicial decision made by the Historic Preservation Commission regarding a designation of a property on the City of Bellingham's Register of Historic Places under BMC 17.90.

I. **Type VI.** A Type VI review process is a legislative decision made by the City Council after review and recommendation by the Planning Commission. The following are Type VI decisions:

1. Comprehensive plan and neighborhood plan amendments;
2. Development regulation amendments;
3. Institutional master plans and amendments that require a concurrent amendment to the comprehensive plan;
4. Planned action adoption as authorized by BMC 16.20;
5. Legislative rezones as described in BMC 20.19.020.A.1;
6. Historic district designations as described in BMC 17.90.050; and
7. Establishment of annual comprehensive plan amendment docket.

J. **Type VII.** A Type VII review process is a quasi-judicial decision by the Historic Preservation Commission on a Certificate of Alteration for a property listed on the City of Bellingham's Register of Historic Places. An appeal of a Type VII decision is decided by the Hearing Examiner.

[Ord. 2009-08-047; Ord. 2009-08-051; Ord. 2006-06-060; Ord. 2005-12-094; Ord. 2005-11-092; Ord. 2005-08-066; Ord. 2004-12-088; Ord. 2004-12-088; Ord. 2004-09-065]

11/17/14

21.10.100 - Type I Process: Minor Administrative Decisions

- A. **Pre-Application Conference** . A pre-application conference is required for certain projects as provided in BMC 21.10.170.
- B. **Application** . An application shall be reviewed to determine whether it is complete under the procedures of Section 20.10.190.
- C. **Fairhaven Design Review** . Applications for projects in the Fairhaven Design Review District shall have an optional review and recommendation by the Historic Preservation Commission. The procedure in Section 21.10.110 C. shall be used to determine whether the Commission will review the application.
- D. **Decision** . A written record of the decision shall be prepared. The record may be in the form of a staff report, letter, permit, or other written document and shall indicate whether the application has been approved, approved with conditions or denied. With the exception of Critical Area permits, a decision shall be effective on the date the written decision is issued and is presumed valid unless overturned by an appeal decision. Critical Area permits shall be effective after the close of the appeal period, or if an appeal is filed, until the withdrawal of, or final decision on an administrative appeal. Project activity not requiring a Critical Area permit that is commenced prior to the end of any appeal period, or withdrawal of, or final decision on, an appeal, may continue at the sole risk of the applicant.
- E. **Shoreline Statement of Exemption** . Whenever a development is determined by the City to be exempt from the requirement to obtain a shoreline substantial development permit and a letter of exemption is required under the provisions of WAC 173-27-050, the City shall issue a letter of exemption in compliance with WAC 173-27-050.
- F. **Appeal of Type I Decisions** . Type I decisions may be appealed to the Hearing Examiner unless otherwise specified by state statutes or City ordinance. The Hearing Examiner shall conduct an open record hearing.

[Ord. 2008-08-079; Ord. 2006-06-060; Ord. 2005-12-094; Ord. 2005-11-092; Ord. 2004-09-065]

12/2/14

21.10.200 - Notice Of Application

A. This section applies to applications requiring a Type II, III-A, III-B or VII process.

B. Within 14 days after the City has made a determination of completeness for a permit application, the City shall issue a notice of application. The date of notice shall be the date of mailing. Except for a determination of significance under the State Environmental Policy Act (SEPA), the City shall not issue its SEPA threshold determination or issue a decision or recommendation on a permit application until the expiration of the public comment period on the notice of application. If an optional determination of nonsignificance (DNS) process is used, the notice of application and DNS comment period shall be combined.

C. The notice of application shall include:

1. The date of the application, the date the application was determined to be complete and the date of the notice of application;
2. The name of the applicant;
3. The description and location of the project;
4. The requested actions and/or permits and any other required permits known by the City;
5. A list of any required studies;
6. The date, time, place and purpose of any required public meeting or hearing, if it has been scheduled;
7. Identification of environmental documents that evaluate the project;
8. A statement of the minimum public comment period;
9. A statement of the right of any person to comment on the application, to receive notice of and participate in any hearings, to request a copy of the decision once made, and a statement specifying any appeal rights;
10. A statement of the preliminary determination of consistency, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and of consistency as provided in RCW 36.70B.040;
11. The location where the application and other listed materials can be viewed;
12. The City staff contact and phone number; and
13. Any other information determined appropriate by the City.

D. **Mailed Notice .**

1. The applicant is responsible for obtaining the list of property owners from the Whatcom County Assessor's records. The Director may establish procedures under which the applicant and City may agree that the City will provide this mailing list or that the applicant will conduct the mailing. A U.S. Postal Service Certificate of Mailing shall be provided to the Director if the applicant conducts the mailing.

13714

2. The Director may increase the notification radius or notification method for any specific application. The validity of the notice procedure shall not be affected by whether the Director uses this option.

3. The Planning and Community Development Department, or applicant if authorized under this section, shall mail notice of application to:

- a. The applicant;
- b. The owner of the property as listed on the application;
- c. Owners of property within 500' (100' for home occupations) of the site boundary of the subject property as listed by the Whatcom County Assessor records;
- d. The Mayor's Neighborhood Advisory Commission representative and any neighborhood association registered with the Planning and Community Development Department for the neighborhood in which the project is proposed, and for any neighborhood within 500' of the project site boundary; and
- e. Any person or organization that has filed a written request for notice with the Planning and Community Development Department.

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

E. Posted Notice .

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

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

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

[Ord. 2004-12-088; Ord. 2004-09-065]

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

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

No. 67878-7

Appellants,

CERTIFICATE OF SERVICE

vs.

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

Respondents.

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 16, 2012, I served a true and correct copy of the following documents to be delivered as set forth below:

- Brief of Appellant City of Bellingham; and**

CERTIFICATE OF SERVICE -1

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2012 FEB 17 9 AM 10:02

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270
Fax (360)778-8271

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2. **Certificate of Service.**

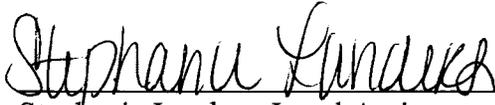
On the 16th day of February 2012, I addressed said documents and deposited them for delivery as follows:

Dave Bricklin	<input checked="" type="checkbox"/>	By United States Mail
Bricklin & Newman, LLP	<input type="checkbox"/>	By Facsimile
1001 Fourth Avenue, Suite 3303	<input type="checkbox"/>	By E-mail
Seattle, WA 98154	<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 16th day of February, 2012.

CITY OF BELLINGHAM


 Stephanie Landers, Legal Assistant