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**THE HEARING EXAMINER OF THE CITY OF BELLINGHAM
WHATCOM COUNTY, WASHINGTON**

IN RE:

HE-21-PL-016

**KATHLEEN LAX, JAKE BURRY,
SKIP and ALEXIS WILLIAMSON,
Appellants**

**FINDINGS, CONCLUSIONS, AND
DECISION**

MCKENZIE FUNK, Property Owner

**Appeal of Notice of Decision
PBW2021-0697 approving driveway
installation at 1112 18th Street
and the consolidated appeal of
CAP-2021-0052**

SHARON A. RICE, HEARING EXAMINER

SUMMARY OF DECISION

The evidence and argument submitted fail to demonstrate that the 1993 variance has expired or is otherwise invalid as the basis of street obstruction permit PBW2021-0697 or that critical area permit CAP-2021-0052 was issued in error. The appeal of both permits is denied.

SUMMARY OF RECORD

Request:

Neighbors Kathleen Lax and Jake Burry and Skip and Alexis Williamson (Appellants) appealed the City’s approval of PBW2021-0697, a street obstruction permit that authorized construction of a driveway to access the existing residence at 1112 18th Street. On the stipulated request of all parties, the timely filed appeal was placed on hold pending outcome of subsequent critical areas review of the proposed driveway. When on March 8, 2022 the City later issued approval of critical areas permit CAP2021-0052, related to the same driveway, Appellants also timely appealed that approval and moved for consolidation. The two appeals were consolidated.

Hearing Date:

Following consideration and denial of a City motion to dismiss and an Appellant motion for summary judgment, the Bellingham Hearing Examiner convened a virtual hearing on the

FINDINGS, CONCLUSIONS, AND DECISION

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1 consolidated appeal on August 8, 2022. Testimony was not able to be completed in one day and
2 the hearing reconvened on August 13, 2022, on which date it was completed. On the record, the
3 parties agreed to a post-hearing closing argument submission schedule and a decision issuance
4 date of September 6, 2022.

4 **Testimony:**

5 At the hearing, the following individuals presented testimony under oath:

6 Lax, Burry, Williamson (Appellants) Witnesses:

7 Anne McGreevy
8 Kathleen Lax, Appellant
9 Dan McShane, Engineering Geologist, Stratum Group

9 McKenzie Funk (Property Owner's) Witnesses:

10 Mark Asmundson
11 Charles "Tip" Johnson
12 John Gillaspay, Engineering Geologist, Element Solutions
13 Steven Sundin, Senior Planner, City of Bellingham
14 Brent Baldwin, Development Manager, City of Bellingham Public Works
15 Jennifer Woo, Property Owner's spouse
16 McKenzie Funk, Property Owner

14 **Attorney Representation:**

15 Dannon C. Traxler, Langabeer & Traxler, P.S., represented Appellants.
16 Jeffrey D. Sawyer, Belcher Swanson Law Firm, PLLC represented the Property Owner.
17 Matthew Stamps, Senior Assistant City Attorney, represented the City of Bellingham
18 Planning and Community Development and Public Works Departments.¹

18 **Exhibits:**

19 Due to the number of documents, the exhibits admitted in the record of these proceedings are
20 listed at the end of this decision.

21 **Issues on Appeal:**

22 Appellants alleged the following errors in the approvals:

- 23 1. The 1993 variance on which the street obstruction permit is based has expired and
24 is no longer valid as a matter of law.

25 _____
26 ¹ At hearing, the City offered neither witness testimony nor exhibits beyond those already submitted as attachments
27 to its pre-hearing briefing and motion to dismiss.

- 1 2. The 1993 variance was obtained based on erroneous information and is therefore
2 invalid.
- 3 3. The 1993 variance has terminated pursuant to conditions of approval imposed by
4 City Council.
- 5 4. The critical areas permit fails to satisfy requirements of BMC Chapter 16.55 related
6 to erosion control and should be remanded for further study and review.

7 On these grounds, the Appellants asked that both permits be remanded to the appropriate City
8 departments with instructions to deny.

9 After considering the testimony and exhibits submitted, the Hearing Examiner enters the
10 following findings and conclusions:

11 **FINDINGS**

12 *Procedural Background*

- 13 1. On September 8, 2021, the City of Bellingham (City) Public Works Department issued
14 street obstruction permit PBW2021-0697 (street obstruction permit) authorizing
15 construction of a driveway in the unimproved 18th Street right-of-way connecting the
16 existing residence addressed as 1112 18th Street (subject property) to Knox Avenue.
17 Issued to AVT Consulting LLC on behalf of Scott Wicklund, then-owner of the subject
18 property, the street obstruction permit effectuated a variance that had been issued by the
19 Bellingham City Council in 1993 approving construction of a driveway in lieu of a
20 minimum standard street. While the street obstruction permit was being processed,
21 Wicklund transferred the subject property to McKenzie Funk (property owner) and the
22 street obstruction permit was therefore corrected on September 10, 2021, to reflect Funk
23 as the owner. *Exhibit O1*.
- 24 2. The unimproved 18th Street right-of-way connects with Knox Avenue between two
25 single-family residential properties that front Knox. Skip and Alexis Williamson, who
26 own 1708 Knox Avenue, and Kathleen Lax and Jake Burry, who own 1800 Knox
27 Avenue, timely appealed the street obstruction permit on September 17, 2021, alleging
28 three errors: (1) that the 1993 variance had expired as a matter of law; (2) that the 1993
variance was obtained based on erroneous and/or false information regarding alternate
available access routes, OR that the 1993 variance was conditioned to require
abandonment if an alternate route became available, AND an alternate route is available,
and therefore the 1993 variance is invalid; and (3) that the City should have required
critical areas review prior to issuing the street obstruction permit. With agreement of all
parties, the street obstruction permit appeal was stayed so that critical areas review could
be conducted. On March 8, 2022, the Planning and Community Development
Department issued approved critical areas permit #CAP2021-0052, which was also

1 timely appealed by the Williamsons and the Lax/Burrys (Appellants), and the two
2 appeals were consolidated. *Exhibits O2, A12, A13, R2, R3, and R4.*

3 *Subject Property and Surroundings*

4 3. The subject property and Appellants' properties are situated south of Knox Avenue, west
5 of 21st Street, north of Mill Avenue, and east of 15th Street. The subject property, which
6 is known as 1112 18th Street despite the street not being developed, is rectangular in
7 shape and is approximately 11,246 square feet in area.² Although it has been developed
8 with an approximately 408 square foot single-family residential structure since 1939,
9 there is no developed vehicular access to the subject property. Available City records
10 include a statement by the former owner indicating that there was once a driveway
11 extending to the structure from Knox Avenue; however, its use had been abandoned by a
12 previous owner.³ Access to the structure in 1993 was reported to be acquired "by
13 wheelbarrow on a goat trail through [the] neighbors' property ..." with "all building
14 materials [...] hand carried to the site." *Exhibit O12*. The structure is connected to
15 public water and sewer utilities located in the 17th Street right-of-way. There are existing
16 public storm utilities south of the property, along Mill Avenue. Aside from the existing
17 structure, the rest of the property is densely vegetated with trees, shrubs, and grasses.
18 Within its boundaries, the subject property gradually slopes down from the north
19 property line to the south property line. Adjacent to the north is the Appellant parcel at
20 1720 Knox Avenue. The unimproved 18th Street right-of-way abuts the east lot line.
21 Two vacant lots are adjacent to the south, south of which is a residence addressed as
22 1715 Mill Avenue. The subject property's west boundary abuts an unimproved alley
connecting Knox and Mill Avenues. West of this alley are additional single-family
residential uses. *Exhibits A1, A5.1, O3, O19, and O21; Google Maps site view.*

17 4. Topography in this portion of the South Hill Neighborhood is characterized by a broad
18 south-facing hillside that trends east-west between Knox and Mill Avenues between 15th
19 and 21st Streets. As reported in the property owner's geologic hazard review, study, City
20 GIS mapping indicates grades are commonly between 15% and 30% across this hillside;
21 however, in the immediate vicinity of the proposed driveways, portions of the slopes
22 exceed 30% or 40% in grade. In the project corridor, the unimproved 18th Street right-
of-way slopes steeply down from Knox Avenue to the subject property, levels off
slightly, and then continues to slope down steeply to Mill Avenue. Only the section
immediately above Mill Avenue is improved with roadway, from which a driveway

23 ² The legal description of the subject property is a portion of Section 01, Township 37 North, Range 02 East, W.M;
24 also known as Tax Parcel 370201-354158. *Exhibits O2 and O3.*

25 ³ Mr. Wicklund stated in his 1993 appeal to City Council that the use of the former driveway to the subject property
26 had been overtaken by former owners of the properties fronting Knox Avenue and that a previous owner of the
27 subject property had not been able (due to age, finances, health) to take steps necessary to maintain its driveway
access. He also stated that the 18th Street right-of-way had originally been 80 feet wide, and 20 feet of its width had
been vacated in favor of the properties fronting Knox Avenue. *Exhibit O12.*

28 *FINDINGS, CONCLUSIONS, AND DECISION*

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1 extends north to one or two residences. A Google Maps view of the vicinity shows that
2 16th, 17th, 18th, 19th, and 20th Streets are all interrupted by this section of steep slope;
3 none of the streets is improved for the full distance between Knox and Mill Avenues.
4 Total elevation change from Knox to Mill Avenue through the project area is
approximately 120 feet. *Exhibits O3 and O5; Google Maps site view.*

5. Driveways that access both Appellants' residences share a curb cut from the south side
6 of Knox Avenue located in the 18th Street right-of-way. From review of available aerial
7 photos, the curb cut appears to be shifted towards the west edge of the right-of-way,
8 rather than in the middle. Across Knox Avenue, uphill from unopened 18th Street, an
9 improved street named Highland Drive travels up hill in a straight line, connecting with
10 the street network in the vicinity. The existing Appellants' curb cut is very slightly off-
11 set from being directly across from Highland Drive. Vehicles traveling downhill on
12 Highland Drive towards Knox Avenue see a "stop ahead" sign and there is a stop sign at
Knox, and across from Highland there is a double arrow sign warning drivers that the
street turns either right or left but does not go straight. The proposed/approved driveway
would enter from the existing curb cut and head down the hill essentially between the
two Appellant driveways, sharing the driveway for 1800 Knox Avenue for a short
distance. *Exhibits O21, O33, and O45; Google Maps site view.*

13 *1993 Variance and Current Street Obstruction Permit for the Proposed Driveway*

- 14 6. As a result of the topography, the former owner of the subject property applied for and
15 was granted a variance by the City Council that allowed construction of a private
16 driveway, rather than a minimum standard street, to access 1112 18th Street in the 18th
17 Street right-of-way. The City Council review and approval process are addressed in
18 more detail in later sections of this document. For reasons not elucidated during the
19 instant appeal, no action to construct the driveway was undertaken until the owner
applied for the instant street obstruction permit in September 2021. Upon review of the
permit application, the City's Public Works Development Services Manager determined
that the 1993 variance approved by City Council was still valid. In a response to an
inquiry by the current Owner in August 2021, Mr. Baldwin stated in an email,

20 "You are correct that the variance did not have an expiration date with it and you
21 can apply for a permit to install the driveway. Please make sure you address the
22 conditions listed in the decision. I would strongly encourage you to make sure the
two neighboring properties adjacent to the new driveway are contacted about your
planned construction.

23 *Exhibit O18.* Based on the still-valid variance, street obstruction permit PBW2021-0697
24 was issued, allowing construction of a driveway approximately 190 feet long and 10 feet
25 wide extending south from Knox Avenue within the 18th Street right-of-way, or
26 approximately 2,000 square feet, in a sinuous path around existing improvements and
trees within the 60-foot unimproved right-of-way, extending south and down the hill
from Knox to the existing residence. It requires construction of a stormwater dispersion

1 trench at the south (downhill) end of the driveway, which is in an erosion hazard area
2 regulated pursuant to the City's critical areas ordinance. Construction of the driveway
3 would include enhancing/building a berm and installation of a hedge and/or monumental
4 tree along Knox Avenue to clearly demarcate that the driveway is not an extension of
5 Highland Drive. Some grading of adjacent slopes would be conducted as needed to
6 meet topography. *Exhibits O3 and O18; Brent Baldwin Testimony.*

7 7. Of note, there is no variance "decision" or "permit." While Appellants appear to
8 maintain that a 1993 variance "decision" or "permit" that was at some point extant is
9 either being withheld, or is lost (*Exhibit R24, page 2*), credible testimony at hearing
10 established that no party was able to produce "the variance," because in 1993, it was not
11 the practice to issue a permit or decision document following City Council approval of
12 such variances. According to testimony offered by City Staff and by a former
13 Bellingham City Councilmember who participated in the 1993 variance proceedings,
14 approval of the variance – and any and all conditions imposed – were memorialized in
15 the Council meeting minutes without issuance of a separate "permit" or "decision."
16 *Testimony of Brent Baldwin and Mark Asmundson.*

17 8. Addressing the "conditions listed in the decision" referenced in Mr. Baldwin's August
18 2021 email, the following conditions are found in the record of materials related to
19 Council's approval of the variance. As reflected in the June 21, 1993 City Council
20 meeting minutes relating to the former owner's appeal of the initial denial of the variance
21 request, additional conditions were contemplated by a City Council subcommittee that
22 considered the appeal, as follows:

- 23 1. To require a legal survey by a licensed surveying including adjacent property
24 lines;
- 25 2. Require a [professional] design including materials and buffering which meets
26 the standards of the Public Works Department and City Engineer, Tom
27 Rosenberg; and
- 28 3. On-site staking and ribboning of driveway borders by the Wednesday packet
deadline for the meeting in which a PUBLIC HEARING would be scheduled.

Exhibit O12 (EMPAHSIS in the original). These conditions were voted upon by the
committee and adopted by a vote of five to one. The public hearing on the appeal was
scheduled for August 9, 1993, on which date "approval of the plan as proposed by staff"
was adopted by unanimous vote, granting the former owner's appeal. *Exhibit O12.*

9. In reaching the ultimate position of recommending conditional approval of the variance
Public Works Staff, in February 1993 the City Engineer and Assistant Director of Public
Works had imposed two conditions, as follows:

1. That the driveway be made safe. We are concerned that vehicles traveling
south on Highland Drive are not confused by the driveway. The driveway

1 must not appear to be an extension of Highland Drive. If you do not alter the
2 opening as it [exists]. Our concerns will be satisfied; however, if you modify
3 the opening, you must have it approved by the Public Works Department.
4 The term modify refers not only to the physical entrance, but includes visual
5 changes from what now exists.

- 6
- 7 2. Obtain consent from abutting property owners. Currently two property
8 owners obtain access from Knox Avenue. The property owners have placed
9 driveway improvements and have also placed vegetative improvements in the
10 right-of-way. We are concerned that whatever you propose to do in effecting
11 your driveway is acceptable to the property owners; therefore we require
12 written consent from each of the property owners.

13 ... If you decide not to comply with these two conditions, we will forward a
14 response to City Council that recommends denial of the appeal.

15 *Exhibit O11.* In his 1993 appeal statement, Mr. Wicklund stated that he had
16 attempted to obtain consent of the then-owners of the Appellants' properties, but
17 that they had not been able to be persuaded. *Exhibit O12.*

- 18
- 19 10. The proposed driveway construction plans apparently considered by Council in their
20 August 9, 1993 vote to approve the variance, dated "Received Bellingham City Council
21 August 4, 1993," contain the following notes on the face of the plan set, which function
22 as conditions.

23 General Notes

- 24 1. All work and materials shall be done in accordance with 1991 Standard
25 Specifications for Road, Bridge and Municipal Construction by Washington
26 State Department of Transportation and Standard Plans and Specifications
27 provided by the city of Bellingham. All work shall be subject to approval of
28 the City Engineer.
2. Contractor shall obtain a Public Work Project Permit prior to the
commencement of construction. Contractor shall schedule construction
conference prior to beginning work and shall contact the Office of the City
Engineer 24 hours prior to commencing work in the City right of way.
3. Contractor shall restore all public and private property disrupted by the
project.
4. Contractor shall submit a list of item costs to the City Engineer covering all
costs of construction and submit a one year maintenance bond covering
[defects] in materials and workmanship prior to City acceptance of the project.
5. Contractor shall inform the Engineer of any proposed changes in plan prior to
construction of that change. Contractor shall keep record of deviations and
forward to Engineer. Engineer will provide City with a certified As-Built
mylar at the completion of the street and utility improvements.

29 *FINDINGS, CONCLUSIONS, AND DECISION*

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- 1 6. Contractor shall contact Utilities Coordinating 48 hours in advance of
2 construction (1-800-424-5555).
- 3 7. All tree and organic overburden will be removed prior to placing subgrade
4 embankment.
- 5 8. All subgrade embankment and trench backfill including sanitary sewer lines,
6 side sewers, water mains, water services, storm drains material compacted to a
7 minimum of 95 percent of maximum density and backfill surrounding catch
8 basins shall be Engineer approved as determined by a Modified Proctor Test
9 (AST D1559).
- 10 9. A bond in the amount determined by the city (but not less than 150% of the
11 project cost) shall be submitted prior to beginning construction. A one-year
12 maintenance bond, in an amount to be determined by the City (but not less
13 than 25% of the project cost), shall be submitted prior to acceptance of the
14 project.

15 Street And Storm Drain Specifications

- 16 1. Stripped organic material and excess excavation shall become the property of
17 the Contractor and shall be disposed of at the contractor's expense off site, or
18 as directed by the owner.
- 19 2. All cut and backfill slopes shall be seeded with grass and fertilized for erosion
20 control. Contractor shall be responsible for slope erosion until vegetation is
21 firmly established.
- 22 3. Contractor shall institute practices for prevention of erosion during
23 construction as outlined in "Waste Disposal & Erosion / Sedimentation
24 Control Methods" published by the Associated General Contractors of
25 Washington.
- 26 4. Grading and subgrade preparation shall meet the requirements of Section 2 of
27 the Standard Specifications.
- 28 5. Subgrade must be certified in writing by developer's engineer prior to paving.
6. Storm pipe shall be PVC D3034 or equal with rubber gasket joints. Bedding
shall be free draining pea gravel for a minimum of 6" above and below pipe.
7. Catch basins shall be Type 1 precast concrete. Grates shall be according to
DOT Plan B-2A.
8. Portland Cement Concrete pavement shall meet the requirements of Drawing
ST-19, City of Bellingham Public Works, Development Guidelines. This item
will include material, longitudinal and transverse joint details and joint
spacing, as well as concrete properties specifications (but does not include the
driveway cross-section, which is to be constructed as per this plan).
9. Drain rock shall be 1/4" to 2" in size, well graded, washed, bank run gravel.

1 *Exhibits O15/O45.*

2 *Appeal Issue 1: Is the 1993 Variance Expired as a Matter of Law*

3 11. The Appellants contended that the 1993 variance has necessarily expired as a matter of
4 law and was no longer valid when the street obstruction permit was issued. As spelled
5 out in detail in Appellants' motion for summary judgment, in argument at hearing, and
6 again in their pre- and post-hearing briefing, counsel for Appellants argued that
7 September 27, 2004 adoption of Ordinance No. 2004-09-065 regarding the
8 administration of development regulations, which included the initial adoption of BMC
9 21.10.260 governing vested rights (and vesting timeframes) for land use applications,
10 applied retroactively to the 1993 variance upon its adoption. The ordinance establishes a
11 two-year limit to the vesting of approved permits unless a longer time frame is
12 established by ordinance elsewhere. Because no other ordinance establishes an alternate
13 vesting duration for variances from street improvements, and because the 1993 variance
14 does not fit into any of the enumerated vesting exceptions in Ordinance No. 2004-09-
15 065, Appellants contend that the 1993 variance expired two years after its publication on
16 October 1, 2004, meaning it expired on October 1, 2006, by application of BMC
17 21.10.260.C(1). Citing caselaw, counsel argued that procedural enactments, such as
18 BMC Chapter 21.10, are the type of legislation that is applied retrospectively and not
19 merely prospectively.⁴ Counsel argued that because the street standards in question in
20 the 1993 variance (BMC Chapter 13.12) were enacted to protect public safety,
21 reasonable time limits are vital for Public Works variances and that it is inherently
22 inimical to the public interest to allow permits for deviations from public safety
23 standards to last forever. *Exhibits R7, R13, and R24; Dannon Traxler Argument.*

24 12. During the pre-hearing motions process, the City argued that the 1993 variance was not a
25 land use decision or permit of the same nature as those subject to BMC 21.10.260.C(1).
26 This argument was rejected in the ruling on pre-hearing motions, which concluded that
27 street standard variances are in fact land use permits. However, in its post-hearing brief,
28 the City clarified its position that the fact that the 1993 variance was issued by the City
Council, rather than as a Type III-A land use decision by the Examiner with no appeal to
Council, distinguishes the instant 1993 variance and other such City Council approvals
that predate adoption of the hearing examiner system and/or Ordinance No. 2004-09-065
from the decisions subject to vesting under BMC 21.10.260.C(1). Pointing out that
BMC 21.10.040.A classifies land use decisions into seven review process types based on
who makes the decision, the City argued that the 1993 variance (and other similar
approvals) decided by City Council prior to the adoption of BMC Chapter 21.10 are not
properly categorized together with Type III-A decisions by the Examiner. *Exhibit R26.*
A City Public Works Official called as a witness by the Property Owner testified that it is

⁴ Counsel cited the following among other authorities: *In re Flint*, 174 Wash.2d 539, 546, 277 P.3d 657 (2012) and
Graham Neighborhood Ass'n v. F.G. Associates, 162 Wash.App. 98, 252 P.3d 898 (2011).

1 a standard practice for the Public Works Department to acknowledge older approvals
2 issued by City Council as still valid even if many years have passed and the pertinent
3 procedures have been amended in the Code. *Brent Baldwin Testimony.*

- 4 13. In response to this argument, the Property Owner agreed with the City’s position that the
5 decision-making body establishes type of process, and that because the 1993 variance
6 was decided by City Council, it is not subject to expiration pursuant to BMC
7 21.10.260.C(1). They further argued that because the 1993 variance predates the
8 adoption of both Ordinance No. 2004-09-065 and the hearing examiner process, the
9 variance approval cannot be “shoe horned” into the sunset imposed by BMC
10 21.10.260.C(1). *Exhibits R20 and R25.*

11 *Appeal Issue 2: Is the 1993 Variance Voided Either Because It Was Obtained on the Basis of*
12 *False/Erroneous Information or Because of Conditions of Approval Adopted by City Council*
13 *Upon Approval*

- 14 14. If not expired by operation of law, Appellants argued that the 1993 variance was voided
15 on other grounds: 1) because it was obtained through the former owner’s presentation of
16 false or misleading information regarding other available access routes; or 2) because
17 Council intended that the variance be abandoned if an alternate route became available
18 and 3) an alternate – and purportedly safer – route was/is available. *Exhibits R7, R13,*
19 *and R24; Dannon Traxler Argument.*

- 20 15. At Exhibit A1, Appellants presented an aerial view of the subject property and
21 surrounding lots on which they depicted both the proposed driveway (in a blue solid
22 line) in 18th Street and an alleged alternate route currently in use via which the subject
23 property is accessed by vehicle (yellow dashed line) via 19th Street, which they referred
24 to as the “current access.” This alternate route originates at the south segment of 19th
25 Street, proceeds north along 19th, runs west from 19th Street along the property boundary
26 between 1116 and 1122 19th Street, then crosses the parcels addressed as 1115 and 1109
27 18th Street, and then crosses 18th Street to the east boundary of the subject property.
28 *Exhibit A1.* Various witnesses testified that they have personally walked over the
alternate access route and/or personally driven vehicles on it or witnessed others drive
the route to the subject property. *Testimony of Councilmember Tip Johnson, McKenzie*
Funk, and Kathleen Lax.

16. Appellants argued that this alternate route is safer than the proposed driveway, due to
topography that Appellant witnesses characterize as flatter, and because it would avoid
increased potential for conflict at the currently three-way intersection at Highland Drive.
They also contended that traffic volumes on Knox Avenue have increased substantially
since approval of the 1993 variance, escalating the potential for public safety risks at
what they contend would be an awkward and confusing intersection if the proposed
driveway is built in 18th Street. Appellants contended that because three of the
properties crossed by this alternate access route are still owned by Mr. Wicklund, and

1 the fourth is owned by a family member or close friend of Mr. Wicklund, an easement
2 for access could be easily obtained and may already exist by implication, as in a
3 prescriptive easement. *Exhibits A4, A9.1, A9.2, A9.3, A9.4, A9.5, A9.6, A10, A16.1, R7,
R13, and R24; Testimony of Kathleen Lax and Anne McGreevy.*

4 17. Based on the minutes of the August 9, 1993 City Council public hearing on the appeal,
5 Appellants contended that multiple members of Council voted to approve the variance
6 only because no alternative route was available, and that safety at the intersection with
7 Highland Drive was a primary concern. Appellants point specifically to the comments
8 of Councilmember Keenan during Council's discussion after the motion to approve the
9 variance in which the meeting minutes state that she "wanted to make certain the
10 driveway was conditioned to provide access only to that specific residence because of
11 the steep slopes, the curves, and narrowness involved" and that "she wanted to see
12 Council include the abandonment of the driveway if future alternative access were
developed." Appellants' legal counsel argued that these two points were intended to be
included as conditions of approval and must now be read as conditions of approval.
Thus, they contend that because safe and arguably available alternate access exists, the
variance must be abandoned per City Council's conditional approval. *Exhibits A2 (page
5, lines 6 through 9), R7, R13, and R24.*

13 18. Alternatively, Appellants argued that the variance issued in 1993 was invalid at the time
14 of issuance, because it was issued based on incomplete information provided by the
15 then-owner, who they allege failed to disclose that a safer access route was then
16 available via 19th Street through his other real property. They argue that either through
17 omission or intentional deception, the former owner applied for and appealed denial of
18 approval of a variance from minimum standard street construction in 18th Street because
19 he preferred that access over the other access route that was available at the time. They
20 offered a declaration from a former tenant (who rented the subject property for 14 years
21 ending in 2019) of the former owner of the subject property, with attached an email
22 dated 2006 in which Mr. Wicklund discussed driving his four-wheel drive truck to the
23 subject property. *Exhibit A10.* Appellants asserted that long before he applied for the
24 instant street obstruction permit in 2021, Mr. Wicklund regularly used the alternate route
25 to access the subject property by vehicle. Appellants submitted historical photographs
26 of the vicinity in which they assert the alternate access can be seen over time. *Exhibit
A14.* Appellants offered evidence and testimony with the intent of showing that at the
27 time the street obstruction permit was applied for, former owner Scott Wicklund
28 controlled, or had ties to, all of the property underlying the access route. Counsel for
Appellants contended that the sale of the subject property by Mr. Wicklund to the
Owner, which broke the chain of contiguous ownership between the subject property
and the alternate access from 19th Street, and Mr. Wicklund's refusal to grant an access
easement to the Owner over the intervening parcels in his control, are an "end-run"
around Council's "obvious preference that an alternative, safer access be used if it was
available." *Exhibits A5.1 through A5.11, A10, and R24.*

1
2 19. Regarding safety impacts from constructing the new driveway, Appellants offered
3 witness testimony to support their assertion that traffic volumes on Knox Avenue have
4 increased dramatically since 1993, serving to exacerbate the safety concerns Council
5 referenced in their discussion during the variance public hearing. Particularly in the fall,
6 when Western Washington University and Sehome High School reconvene after
7 summer, traffic volumes are very high according to a neighboring property owner who
8 has lived in the area since 2000. Additionally, a short distance west of Appellants'
9 properties, Knox Avenue curves north merging into/becoming 20th Street.⁵ Appellants'
10 witness contended that traffic comes south down 20th Street and proceeds onto Knox
11 Avenue at high rates of speed near to the proposed driveway location, and this proximity
12 between driveway – which would make the existing three-way intersection into a four-
13 way intersection – and curve was forwarded as a concern. Appellant witnesses
14 submitted that they had observed accidents at the existing three-way intersection of
15 Knox and Highland. Appellants also submitted concern that the proposed driveway
16 would not afford emergency vehicle access, thus increasing risk of danger to their
17 properties in the event of a fire at the subject property. *Anne McGreevey Testimony;*
18 *Exhibits A16.1 and A16.2; Google Maps site view.*

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Property Owner Response

20 20. Through legal counsel, the Property Owner disputed that the variance expired due to a
21 condition of approval requiring abandonment if a safer alternate route came to be, noting
22 that no such condition is found in the Council meeting minutes, staff report, or on the
23 approved plans. Legal counsel for the Owner contended that the meeting minutes show
24 that Councilmember Keenan expressed the desire for the “Council include the
25 abandonment of the driveway if future alternative access were developed.” *Exhibit A.2,*
26 *page 5, cited in Exhibit R20.* From the Council meeting minutes and the agenda bill, it
27 appears Keenan made this statement while a motion to approve the variance was being
28 discussed. Of note, Councilmember Keenan seconded the motion to approve. There is
no reference to a motion to include an abandonment condition in the motion to approve.
The original motion passed unanimously. *Exhibits A2, O12, and R25.*

21 21. Former City Councilmember and 1993 Council Chair, Mark Asmundson testified, based
22 both on his personal recollection of the vote and on his current review of the minutes,
23 that abandonment was not imposed as a condition. He stated that if there had been a
24 motion to impose abandonment or any other restriction as a condition, the motion would
25 have been captured in the minutes and it would have been voted on. The usual practice
26 of Council during his tenure was to incorporate conditions into the language of the
27 motion up for vote. He further submitted that his understanding while on Council was

⁵ While this distance was not identified with accuracy in the record, using the on-screen scale provided on Google Maps, the curve from 20th Street into Knox Avenue appears to be approximately 350 to 400 feet west of the 18th Street right-of-way. *Google Maps site view.*

1 that any conversation after the vote is dicta, and statements were often intended to make
2 the losing party feel acknowledged. He also submitted that it was his understanding that
3 the 1993 variance in question did not have an expiration and he recalled no discussion
4 about expiration during the several meetings and hearings on it. Mr. Asmundson
5 testified that, in 1993 and for a long time, the City did not issue a separate decision
6 document from the agenda bill memorializing Council's vote on a given issue.
7 Addressing whether the Council intended to condition the variance approval on its
8 serving only the one residence, Mr. Asmundson testified no, they did not intend to so
9 condition it, as there was no need; it was a variance approving a driveway, which by
10 definition serves one residence and is not a road. *Mark Asmundson Testimony.*

11 22. Addressing Appellants' claim that approval of the 1993 Variance was based on
12 erroneous information by the former owner and is therefore invalid, the Owner noted
13 that Appellants appear to mean that the former owner intentionally mislead the City
14 Council by withholding information about a then-extant "safer" "alternate access"
15 available at the time. However, Mr. Wicklund did not own two of the lots underlying
16 the alternate access route at the time of the variance. *Exhibits A5.7, A5.9, and R25.*

17 23. Regarding Appellants' claim that Council would not have approved the variance for a
18 driveway in 18th Street had they known of alternate routes, counsel for the Owner
19 disputes this characterization of the discussion in the City Council meeting minutes.
20 Citing the staff report for the agenda bill item that was Mr. Wicklund's variance (Exhibit
21 O10), legal counsel for the Owner argued that the 1993 City Council thoroughly
22 considered all of the rights-of-way surrounding the subject property and whether they
23 could provide access and, in the end, determined that there was no alternate route. Of
24 six adjacent or nearby rights-of-way, based on the recommendation of the City Engineer,
25 Council concluded that a driveway sharing an entrance with one of the Knox neighbors
26 in the 18th Street right-of-way was the best option because "[a]t a grade of 22.5%, this
27 point of public access appears to be the most feasible from an engineering perspective."
28 *Exhibit O10, page 2.* The 1993 variance was on the agenda of at least three Public
Works Committee meetings and two City Council hearings prior to its approval.
Exhibits O40, O41, O42, O43, and O44.

29 24. Former City Councilmember Tip Johnson, who was on the Public Works Committee at
30 the time the 1993 variance was considered and who made the motion to approve the
31 variance at the August 9, 1993 hearing, testified at the instant appeal hearing. Mr.
32 Johnson testified that the 1993 proceedings related to the instant variance stand out in
33 his memory because Council agonized about it for months and because the then-owner
34 of 1800 Knox Avenue was well connected politically. In his testimony, he recalled his
35 own recollections, and confirmed that the meeting minutes are consistent with his
36 recollection of events at the time. He recalled that there were multiple Public Works
37 Committee meetings and many site visits, during which he and other Council members
38 personally evaluated other possible means of accessing the subject property including

1 the alternate route called out by Appellants as the yellow dashed line in Exhibit A1. Mr.
2 Johnson testified that he personally walked the alternate access route, knowing at the
3 time that he was crossing private property. Mr. Johnson testified that he recalled the
4 Appellants' yellow dashed alternate route was considered at the time, because he and
5 other Councilmembers knew of it, but that it was rejected because the 1993 Applicant
6 did not control all the private properties it crossed. Mr. Johnson testified that he recalls
7 that Councilmember Keenan did not make a motion to require abandonment if a safer
8 alternate route were to become available. In comparing the two routes as if choosing
9 between them today, Mr. Johnson noted that approved route in 18th Street would better
10 allow the steepness of the slope to be mitigated because the driveway can switchback
11 throughout the full 60-foot width of the right-of-way, which is not possible for the full
12 length of the other route. *Tip Johnson Testimony.*

9 25. The Owner contended that the City Council, in its August 1993 deliberation and
10 decision, recognized that the proposed driveway would enhance safety at the intersection
11 over the then-existing condition and acknowledged that care that had gone into its
12 engineering both for the benefit of public safety and for the benefit of the two adjoining
13 property owners. The Council meeting minutes noted that safety at the intersection of
14 Highland and Knox "may be improved slightly with the driveway and berm, in place"
15 (*Exhibit A2, page 5*) and that "the consensus further recognized that the berm would
16 help to improve the safety at that intersection," concluding that "at least it was well
17 engineered and laid out as carefully as feasible, under these unique circumstances..."
18 and "would not exacerbate the current situation in terms of safety and have the least
19 negative effect on the surrounding properties." *Exhibit A2, page 5.*

16 26. With respect to the current availability of the alternate access, counsel for the Property
17 Owner contended that Appellants' alternate access would require easements across three
18 private properties, and variances from street standards and street obstruction permits in
19 two rights-of way.⁶ Characterizing the alternate access as "theoretical only," counsel for
20 the Property Owner argued that the Owner has no ability to procure the necessary
21 easements and should not be required to incur the additional costs associated with the
22 perfecting legal access along the alleged alternate access. *Exhibit R25; Jeffrey Sawyer*
23 *Argument.*

21 27. Addressing Appellants' claim that the alternate route has been in regular use to access
22 the subject property by the former owner, the Owner submitted additional City of
23 Bellingham aerial photographs of the neighborhood from 2008 and 2013. These photos
24 do not clearly show the alternate access route as being in regular use. *Exhibits O47 and*
25 *O48.* The Owner's spouse Jennifer Woo testified that former owner Mr. Wicklund

26 ⁶ The undersigned notes that permits for improvements would be required in three rights-of-way: 19th Street, the
27 alley east of 18th Street, and 18th Street itself.

1 parks two cars in the driveway at 1116 19th Street (which is the first property west of
2 19th Street on Appellants' dashed line yellow route in Exhibit A1) on a daily basis and
3 that unless you coordinate with him to move his vehicles, cars cannot pass his vehicles
4 to proceed west along the route. *Jennifer Woo Testimony*. Regarding the allegation that
5 the Owner should obtain a prescriptive easement to access the subject property over the
6 yellow route, McKenzie Funk testified that he asked Mr. Wicklund about purchasing an
7 easement, and the response was no, because Wicklund uses the route himself daily; it is
8 the only parking for 1116 19th Street, and Wicklund has no desire to keep it clear for
9 access by others. Even if Mr. Funk could obtain a prescriptive easement, the route is
10 longer and contains critical areas, and his development consultant informed him it would
11 cost much more than the 18th Street driveway. Mr. Funk and his spouse testified that the
12 family has been accessing both 1109 and 1112 primarily on foot, carrying goods by
wagon, and that when they have accessed either property by vehicle, it is with
prearranged permission and coordination and is planned around weather. Larger items
they've had delivered have been hand carried to the house by moving services from the
end of the drivable path. Mr. Funk testified that he has tried to do the right thing all
along, confirming validity of the driveway prior to purchase, and reaching out to the
neighbors. He expressed a hope that the parties can get past this and can enjoy living
next to each other for years. *Testimony McKenzie Funk and Jennifer Woo*.

13 28. Addressing the practical feasibility of the Appellants' asserted alternate access, counsel
14 for the Owner points out that its first leg, upper 19th Street, is narrower than the City
15 minimum street standard width of 20 feet and was paved privately by the previous
16 owner of 1116 19th Street for use as a personal driveway. Its grade is shown on a map
17 included in the 1993 Public Works Staff Report to Council as being 30%, which is
18 significantly steeper than the 22.5% grade the map shows for the 18th Street right-of-way
19 below Knox. *Exhibit O10, .pdf page 3*. The grade of upper 19th Street is likewise the
20 focus of a 1993 letter from a group of 19th Street residents, signed by owners or residents
21 of the properties addressed as 1116 19th Street, 1123 19th Street, 1129 19th Street, 1128
22 19th Street, 1133 19th Street, 1132 19th Street, 1135 19th Street, 1122 19th Street, 1119
23 19th Street, and 1115 18th Street. These neighboring property owners/residents urged
24 approval of Mr. Wicklund's 1993, signing their names to the following statement:

25 We [the] undersigned ... support ... the 18th Street driveway to Knox Avenue to
26 serve [the] existing house west of 18th Street. We also strongly object to the
27 extension of 19th street to serve the properties abutting 18th Street.

28 19th Street does not meet City standards; and the north portion is extremely
dangerous (grade is over 30 percent.) Because of this steep hillside, this dead-end
street should not be selected to handle future hillside development south of Knox
Avenue. Presently 19th Street is maintained by the residents, some of whom have
no access to their homes during adverse weather.

Please consider alternatives such as the proposed driveway to Knox Avenue for
alternative access within the existing platted rights-of-way. We strongly oppose

1 any vacation of the existing rights-of-way and any condemnation or taking of
2 private property to appease two Knox Avenue households who oppose use of the
3 dedicated right-of-way for its intended purpose.

4 *Exhibit O16.* The Owner offered a photograph of a lost US Postal Service truck that got
5 stuck on a portion of the alternate access and had to have metal tracks laid down to get
6 back down to the road. *Exhibit O32.* Regarding the steeper section of the alternate route
7 on the way to their current rental residence at 1109 18th Street, Ms. Woo testified that
8 their minivan could not make the drive and that they have only been able to access 1109
9 and 1112 by truck or four-wheel drive vehicle. *Jennifer Woo Testimony.*

10 29. In addition to its grade, another issue the Owner submitted to be contrary to the
11 feasibility of Appellants' alternate access is the lack of stormwater management for the
12 area draining to 19th Street. The Owner asserted that runoff from the hillside above 19th
13 Street frequently sheetflows across the asphalt surface of the street, which can cause
14 traction problems in rain, ice, and snow conditions, to the point of being impassible to
15 vehicles and dangerous for pedestrians. *Exhibits R20, O28, O29, and O30.*

16 30. Seeking to dispute Appellants' claim that traffic has increased, thus increasing safety
17 risks associated with additional traffic using the existing driveway curb cut, the Property
18 Owner submitted online traffic data counts from City of Bellingham Public Works
19 Department, as well as from the Whatcom Council of Governments website.⁷ Counsel
20 for the Owner argued that these data sources reflect a modest decrease in traffic on Knox
21 Avenue and Highland Drive since 1993. For vehicles traveling southbound down
22 Highland Drive toward the offset Lax/Burry driveway entrance and the 18th Street right-
23 of-way, the intersection at Knox Avenue is marked with signage including a "stop sign
24 ahead" sign, the stop sign itself, and a large yellow sign with a bidirectional arrow
25 directing traffic to turn either west or east on Knox. The signage is visible to all traffic
26 thanks to a streetlight overhead at the intersection. As approved in 1993, the proposed
27 driveway was designed to reduce already existing hazards through installation of a 10-
28 foot wide, 20-foot long, 3.5-foot tall, landscaped berm at the head of the 18th Street
29 right-of-way, physically signaling to drivers that Highland Drive does not south.
30 *Exhibits R20 and O4; Jeffrey Sawyer Argument.*

31 31. Regarding safety related to emergency vehicle access, the Owner questioned why
32 Appellants would prefer to see emergency vehicles reach the subject property via the
33 alternate access route, which the Owner contends is steeper, longer, and less passable in
34 wet and icy conditions than the planned 18th Street driveway and has the same limiting
35 features that make the driveway inappropriate for emergency access, including tight
36 turn radii, a width below the required 12 feet, and sections not engineered to handle

37 ⁷ URLs for this data are provided in the Owner's pre-hearing brief at Exhibit R20, and some data is offered at
38 Exhibits O49 and O50.

1 75,000 pounds of imposed load. In May 2021, prior to the Owner's purchase of the
2 subject property, Mr. Wicklund had a new fire hydrant installed in the 18th Street right-
3 of-way at the southeast corner of Highland and Knox. The Owner submitted an email
4 from the City's Fire Marshal, in which he recognized the benefit of the much closer fire
5 hydrant and identified other potential mitigation measures including sprinklering any
6 newly-constructed/remodeled structures with an NFPA 13D sprinkler system. The Fire
7 Marshal did not share Appellants' concerns about fire hazards on the subject property,
8 stating: "I think it makes a great deal of sense to follow through on the driveway
9 approved in the variance." On this point, the Owner contended through counsel that
10 fire safety concerns would be appropriately addressed at the time of building permit
11 application for new construction or substantial remodel on the subject property.

12 *Exhibits R20 and A7.4.*

- 13 32. Counsel for the Property Owner argued that the variance approved by City Council in
14 1993, which did not expire by its own terms, granted Mr. Wicklund the right to
15 construct a less than minimum standard street within a right-of-way to access his
16 residence, and that approval is a property right capable of being passed to successors in
17 interest. Counsel for the Owner contended that the City, interpreting its own Code,
18 concluded that the variance did not expire, and that the Owner was therefore reasonable
19 to rely on the validity of the variance, which he sought to confirm prior to purchase.

20 *Exhibit R25.*

21 *Appeal Issue 3: Is the Street Obstruction Permit Invalid Because Critical Area Issues Have Still*
22 *Not been Adequately Addressed?*

- 23 33. Following Appellants' initial appeal, City Staff determined that the City had erred in not
24 requiring critical areas review of the proposed driveway. *Steve Sundin Testimony.*
25 Subsequently the Owner obtained critical area assessment of the site by two qualified
26 professional consulting firms. In support of the Owner's critical area permit application,
27 initial geotechnical review was provided by Element Solutions, which firm assessed the
28 project corridor and surroundings for areas regulated pursuant to the City's critical areas
29 ordinance, BMC Chapter 16.55. The initial geotechnical assessment showed that no
30 areas on or within the zone of influence of the proposed driveway construction zone
31 meet the definition of regulated landslide hazard areas at BMC 16.55.420.B. While the
32 project area does contain grades locally exceeding 40%, these are short and
33 discontinuous among more reclined topography of around 30% grade or less. The
34 geotechnical consultants determined that the lower one-third of the driveway area does
35 meet the definition of a regulated erosion hazard, established at BMC 16.55.420.A. The
36 report noted that the off-site slope downhill of the project area is a landslide hazard area
37 due to its total height and grades over 40%; however, based on site reconnaissance, the
38 consultants concluded that there are no active or suspected geologic hazards present on
39 the lower slope. *Exhibit O5.*

1 34. As part of the initial geohazard review, the consultants considered the project stormwater
2 management strategy as proposed in the original design, which entails routing driveway
3 runoff through a catch basin to a 15-foot long, two-foot wide, three-foot deep dissipation
4 trench filled with drain rock for dispersion. The proposed collection and dispersion
5 system avoids unmitigated sheet flow runoff along the driveway at steeper grade uphill
6 areas. Using GIS, the consultants determined that the dissipation trench would be placed
7 approximately 70 feet horizontally away from the delineated steep slope zone downhill
8 and noted that grades between the trench and steep slope are variable but generally under
9 30% and thus are not regulated erosion hazard areas. Based on these findings, the
10 consultant submitted that the dispersion trench siting meets the intent of current DOE
11 requirements in that: 1) it is over 50 feet from the lower slope with steep grades; 2) the
12 downslope potential for erosion is low; and 3) existing vegetation conditions appear to
13 meet “vegetated flow path” requirements. Although tasked with reviewing the project as
14 approved in 1993, the geotechnical consultants opined that in order to satisfy the current
15 Department of Ecology 2019 Stormwater Management Manual for Western Washington
16 (SWMMWW, or DOE Manual) guidance for dispersion design (which recommends a
17 trench length of 10 feet per 700 square feet of impervious area) a trench length of about
18 27 feet long would be required. Based on this, they recommended that the trench length
19 be increased to 27 feet as an additional safeguard to minimize the low risk to downslope
20 areas/properties by distributing the stormwater dispersion over an optimized ground area.
21 Assuming adoption of this recommendation, the consultant opined that the hazard of
22 erosion and slope instability associated with the project site and proposed improvements
23 is low. In addition to lengthening the dispersion trench from 15 to 27 feet, the report
24 included six geotechnical recommendations addressing the following: 1) marking and
25 observing clearing limits; 2) installing temporary erosion control during construction; 3)
26 preserving existing trees and brush to the extent feasible; 4) avoiding discharge of
27 stormwater on or above steep slopes during construction; 5) avoiding stockpiling of any
28 materials on steep slopes during construction; and 6) avoiding landscaping alterations
outside the project area without geotechnical advice. *Exhibit O5*.

19 35. After reviewing the geotechnical report, the City issued a request for additional
20 information, as follows:

- 21 1. Provide rationale for why specific data detailing subsurface conditions was not
22 provided in the assessment such as; soil borings / logs, test pits, etc. (BMC
23 16.55.440.B(2)(b); and
- 24 2. Demonstration and / or clarification that the project is consistent with the design
25 standards for development within an erosion hazard area as specified in BMC
26 16.55.460.A(3)(a-g).

27 *Exhibit O6*. The Owner’s geotechnical consultant submitted a memorandum in response
28 that addressed the two requests in some detail, noting the following. First, the
consultants had recent photos of utility excavation at the top of the driveway and had
recently performed subsurface testing on a property at 1124 18th Street (the adjacent

1 downslope property), giving them an adequate knowledge of subsurface conditions in
2 the vicinity in light of the low-risk erosion hazard and minor scope of construction.
3 Second, because the driveway would not occur within a landslide hazard area and would
4 not encroach within the standard 50-foot buffer from the LHA, based on the geologic
5 conditions mapped/reported/reviewed in the vicinity, and because the grade through the
6 project area averages under 3:1 H:V, the consultants opined that existing conditions in
7 the project area exceed minimum factor-of-safety standards, and that with proper
8 construction and erosion controls, the proposed driveway would result in negligible
9 effect on slope stability. They also noted that the dispersion trench would serve only the
10 driveway directly up-gradient, meaning stormwater released at the dispersion location
11 would not appreciably alter the hydrologic conditions above the off-site slope. *Exhibit
O7*. The Owner's consultant testified that his initial response to the request for
information was comprised of a rationale explaining while soil borings weren't needed,
because that's what he read the request to be for. *John Gillaspay Testimony*. Planning
Staff found the submittal adequately responded to the RFI, concluded that adequate
critical areas assessment had been conducted, and issued CAP2021-0052 on March 8,
2022 requiring the dispersion trench to be extended to 27 feet. *Exhibit O2*.

12 36. Following issuance of the CAP, addressing further concerns raised by Appellants, the
13 Owner's consultant performed site specific subsurface investigations, consisting of: four
14 hand-augered pits ranging from 3.8 to six feet deep at the south end of the driveway;
15 documentation and sampling of soils at/below the proposed dissipation trench, as well as
16 shallow conditions in the down-gradient area; laboratory testing of four representative
17 soil samples (grain size distribution); analysis of design rates per DOE SMMWW (2019)
18 grain-size method; review and interpretation of stormwater hydrologic modeling by a
qualified professional; and preparation of an addendum summarizing the findings of the
additional work. *Exhibit O22*. Mr. Gillaspay testified that the results of the borings
confirmed that subsurface conditions were similar to those anticipated, but more
favorable to infiltration than anticipated. *John Gillaspay Testimony*.

19 37. The Owner's geotechnical consultant relied on additional consultation from another
20 qualified professional to provide hydrologic modeling associated with the proposed
21 driveway. Based on soil characterizations provided by Element Solutions, which
22 recommend a long-term design infiltration rate of 1.5 inches per hour for the site soils,
23 the hydrological technical memorandum concluded that three different configurations of
24 dispersion trench would provide adequate flow dispersion in accordance with the
guidelines in the 2019 SWMMWW.⁸ The hydrologic modeling consultant submitted
that the Manual allows dispersion trenches to be used when the 100-year discharge
would be less than 0.5 cubic feet per second (cfs), while the release rate from any of the

25
26 ⁸ The trench dimensions modeled were: alternative 1: two feet wide x three feet deep x 27 feet long; alternative 2:
27 three feet W x three feet D x 52 feet L; and alternative 3: four feet W x three feet D x 39 feet long. *Exhibit O23*,
page 2.

1 three trench widths would be at most 0.035 cfs. *Exhibit O23*. Based on this modeling,
2 the Owner's geotechnical consultant concluded: that the trench as currently proposed
3 would perform as intended to dissipate and absorb the driveway stormwater loads up to
4 and including the 100-year storm event before reaching the steep slope and would not
5 fundamentally change the fate and transport of stormwater in the project area. The
6 consultant noted that the proposed stormwater management plan would not introduce
7 additional stormwater flow into the project area that does not already occur down-
8 gradient naturally, and that it would allow for a significant area (measuring at least 68 by
9 27 feet) between the facility and the critical area slope for water to dissipate and become
re-naturalized. Based on these results, the Owner's consultant submitted that the design
meets requirements of BMC 16.55.460.A(2) and .A(6), and the modeling were reached
in reliance on modeling of stormwater runoff and discharge using widely accepted
industry-standard methodology (WWHM) with analysis performed by a licensed
professional engineer. *Exhibit O22*.

10 38. Appellants contended that the Owner's consultant's initial response to the City's request
11 for information was inadequately responsive, containing subjective opinion and
12 information about other properties in the vicinity, rather than the specific data required
13 by code, and argued that the City erred in accepting what the consultant characterized as
14 "reconnaissance-level work" instead of the subsurface investigation required in code.
15 Appellants retained their own consultant to review the information submitted by Owner
16 consultants in support of the CAP. Appellants' consultant opined in a written report and
17 in testimony at hearing that the stormwater dispersion location has not been adequately
18 investigated, that it must be assumed the site soils are glacially consolidated, and that
19 without understanding the underlying soils/rock at a stormwater discharge location
20 upslope of a potential landslide and erosion hazard area, it is not possible to know how
21 the proposed stormwater discharge would impact the slopes below the discharge
22 location. From the information submitted, the Appellants' consultant was unable to
23 determine whether all run off would infiltrate and whether the discharge would increase
24 the saturation of the slope; without more specific study, he asserted the trench would
25 need to be 150 feet in length to satisfy the DOE Manual. Appellants contended that the
26 recommendations contained in the Owner's geotechnical and hydrologic modeling
27 reports are not consistent with Stormwater Manual guidance. *Exhibits A8.3, R15, and*
28 *R24; Daniel McShane Testimony.*

29 39. Having heard Appellants' consultants' testimony, Mr. Gillaspay testified that the
30 recommended trench length of 150 feet is based on a prescriptive design standard that is
31 allowed to be used for small projects, which prescriptive standard assumes no modeling
32 and that facilities are not professionally designed. Based on concerns forwarded by the
33 Appellants, Mr. Gillaspay conducted site soil sampling, and using actual soil values,
34 obtained hydrologic modeling that represents a high level of work than that assumed by
35 the prescriptive model that requires a 150-foot trench length. Because he has done the
36 field work and had the calculations run through the Western Washington Hydrologic

1 Model (WWHM), the project is no longer required to meet the prescriptive standards.
2 Additionally, he disagreed that the site soils are glacially consolidated because he was
3 able to hand auger through the sandy soil and found it not particularly dense or
consolidated. *John Gillaspay Testimony.*

4 40. City Planner Steve Sundin testified as the City Staff member responsible for review and
5 issuance of the critical area permit. Mr. Sundin acknowledged that he would normally
6 have received a request for review of the instant street obstruction permit, at which time
7 he would have noticed potential geological hazards triggering critical area review, and
8 that in this case he did not receive the request for review. He conceded this was an
9 oversight. However, once the Owner was apprised of the need for a critical area permit,
10 he submitted the application and the necessary report by qualified professionals. Mr.
11 Sundin acknowledged that the email from Appellants' attorney did cause him to request
additional information and stated that the subsequent request for information is not
uncommon when reviewing critical area permits or other permit types. He clarified that
the RFI specifically asked for explanation, rather than a request for soil sampling and
additional data. *Steve Sundin Testimony.*

12 41. Addressing the Appellants' allegation that it was error to approve the CAP initially
13 without requiring "description of subsurface conditions based on data from site-specific
14 explorations," Mr. Sundin testified that pursuant to BMC16.55.220.B, the Director or
15 designee has authority to excuse elements or to require more than baseline established in
16 code. Acknowledging he didn't cite the provision in the permit, he testified that he
17 relied upon it in accepting the Owner's consultant's response to the RFI. In response to
18 Appellants' counsel's argument that the City did not require the Owner or consultant to
19 expressly request waiver of the requirement to provide description based on site specific
20 sampling, Mr. Sundin explained that it is not atypical for him to exercise the discretion
21 to waive such requirements as BMC 16.55.440.A(2)(b)'s requirement for site soil
22 samples in appropriate circumstances. He submitted that he has authority to exercise
23 that discretion without a formal written request. He testified that the initial and follow
24 up submittals from the Owner's consultant did look at soil encountered in very nearby
25 projects, and given that discharge from 1,900 square feet was proposed upslope from a
26 non-hazard area, he had enough information to issue the critical area permit consistent
27 with the requirements of Code. Mr. Sundin testified that the follow up subsurface
28 exploration and hydrologic modeling were helpful, and that nothing in the additional
materials caused the City to question the project's compliance with critical area review
or stormwater management requirements. Mr. Sundin testified that any subsequent
recommendation to alter the dimensions of the trench can and would be appropriately
imposed without going through a CAP revision process, explaining for example that a
memo to file would be sufficient to track the additional information. Finally, when
asked whether Mr. McShane's testimony caused him to revise his position that critical
area review had been adequately conducted, Mr. Sundin testified that he had heard the

1 testimony and that he still believed that the permit was appropriately issued. *Steve*
2 *Sundin Testimony.*

3 42. As to Mr. Sundin's testimony that he had exercised the discretion conferred in BMC
4 16.55.220.B that allows for modification of the requirements for critical area report,
5 Appellants contended in closing argument that no such discretionary decision was ever
6 referenced or indicated in the record, nor raised as a basis for approval before the
7 hearing. Noting that the Owner submitted no evidence of having consulted with staff
8 prior to or during the preparation of the CAO report seeking permission for report
9 modifications under BMC 16.55.220.B, Appellants asserted that the critical areas
10 provision requires a formal request for modification pursuant to BMC 16.55.220.B, and
11 that "ad hoc" application of the discretion afforded is inconsistent with Code. *Exhibit*
12 *R24.*

13 43. Brent Baldwin, Public Works Development Services Manager who has been with the
14 City for 21 years, testified that in his work for the City he has occasionally come across
15 variances as old as this one and that it is not uncommon for approvals this old not to
16 have written decisions or permit documents that were issued at the time. He has
17 encountered previous City Council approvals that existed in the form of Council meeting
18 minutes only. He also testified that he found nothing in the City records, or in the
19 materials obtained from the Washington State Archives by the City's legal department,
20 that contained an expiration date for the 1993 variance approval; in his experience, these
21 older City Council approvals that are memorialized in Council meeting minutes don't
22 typically have expiration dates. Mr. Baldwin testified the Owner's follow up
23 geotechnical memo and hydrologic modeling report were reviewed and found acceptable
24 by the City Engineer, and that the proposed trench at a two-foot width would comply
25 with City requirements, as would the two alternate trench configurations analyzed.
26 *Brent Baldwin Testimony.*

27 44. Counsel for the Owner argued that while the Appellants' consultant criticized the initial
28 lack of soil samples and then urged the use of a prescriptive method of arriving at trench
size rather than the site-specific measurement method ultimately submitted by Owner
consultants after they conducted the site specific soil sampling he'd said was required,
his criticism of choice of method does not amount to a demonstration that the sampling
and modeling performed by Owner consultants is erroneous. He contended that
Appellants' consultant did not do his own soil sampling, did not perform his own
calculations, and did not present different trench sizing resulting from calculations, and
that a difference in professional opinion between qualified professionals does not amount
to a demonstration of error. Finally, counsel for the Owner argued (for the first time in
the Owner's closing brief) that the Appellants lack standing to challenge the critical area
permit, because they have neither asserted nor provided evidence demonstrating that they
would be negatively affected by impacts to the erosion and landslide hazard areas
downslope from their properties. *Exhibit R25.*

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CONCLUSIONS

Jurisdiction:

Pursuant to BMC 2.56.050.B(5) and (6) and BMC 13.12.110, any action, permit revocation, or denial under BMC Chapter 13.12 and/or BMC Title 13 is appealable to the City's Hearing Examiner in an open record appeal hearing. Pursuant to BMC 16.55.150, BMC 21.10.100.G, and BMC 2.56.050.B(9), appeals of Type I critical area permits are appealable to the City's Hearing Examiner in an open record appeal hearing.

Criteria for Deciding Appeals:

Pursuant to BMC 21.10.250.G, in an appeal of an administrative City decision to the Hearing Examiner, the Hearing Examiner shall issue a written decision to grant, grant with modifications, or deny the appeal. The Hearing Examiner may grant the appeal or grant the appeal with modifications if:

1. The appellant has carried the burden of proof; and
2. The examiner finds that the decision is not supported by a preponderance of the evidence.

Conclusions Based on Findings:

1. Whether the 1993 variance was expired by the subsequent adoption of BMC 21.10.260, which can be interpreted to apply retroactively, is a valid question that results in ambiguity. Appellants' arguments regarding the public interest in expiration, particularly for permits that allow deviations from regulations intended to protect public safety such as the subject street standards, are persuasive. However, the City's argument that the 1993 variance was issued by City Council and cannot be classified as a Type III-A decision subject to expiration under BMC 21.10.260 is also persuasive. According to legal counsel for the City and to the Public Works Development Services Manager, the City has previously treated Council approvals of this type and of approximately this age as not expiring pursuant to BMC 21.10.260. Washington courts have held that in a doubtful case, great weight should be given to the contemporaneous construction of an ordinance by the officials charged with its enforcement. *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). While not without limits, deference extends with particular force to an agency's interpretation of any administrative rules and regulations which the agency itself has promulgated. *Clark v. City of Kent*, 136 Wn. App. 668, 672, 150 P.3d 161 (2007). The undersigned is persuaded that deference to the interpretation of the City, as the agency charged with promulgating and applying BMC Chapter 21.10, is owed in this situation. The 1993 variance did not expire by operation of law following adoption of BMC Chapter 21.10.
2. The record submitted does not succeed in demonstrating that the former owner intentionally withheld information at the time of the City Council meetings/hearing of an

1 available alternate safer route, the revelation of which would have caused the 1993
2 variance to be denied. The claim that the 1993 variance was obtained based on
3 erroneous information and is therefore invalid is not successful.

4 3. Because there is no permit “decision,” as would be issued in a contemporary minimum
5 street standard variance application, there is no document definitively memorializing
6 which, if any, of Staff’s recommendations were selected by Council to be imposed as
7 “conditions” when they voted unanimously to approve “the plan as proposed by staff.”
8 In the absence of certainty, Appellants urge the topics of concern on the parts of
9 individual Councilmembers captured in the meeting minutes to be read and imposed as
10 conditions of approval. According to current / long standing Public Works Staff, as well
11 as according to former Councilmembers involved in the 1993 proceedings, any
12 conditions imposed would have been part of the motion for vote and would have been
13 memorialized in the Council meeting minutes expressly as conditions of approval. No
14 such condition appears in the meeting minutes. The argument and evidence submitted
15 by Appellants has failed to persuade the undersigned that an abandonment condition
16 must be read into the documentation available of the 1993 variance approval.
17 Furthermore, Appellants have shown neither that the City has authority to require the
18 Owner to obtain an easement over the alternate route, nor that the alternate route actually
19 poses fewer risks to the public in terms of critical area impacts and is therefore safer.
20 None of the three necessary elements of this claim (Council condition, availability of
21 alternate route, relative safety of alternate route) have been successfully made on the
22 record submitted.

23 4. The record submitted does not show error in the City’s approval of the critical areas
24 permit. Planning Staff’s testimony - explaining that, according to normal practice,
25 Staff is authorized to implement the discretion afforded in BMC 16.55.220.B to
26 modify requirements for a critical areas report - was credible. Appellants have not
27 shown that an express request by an applicant or critical areas report author for
28 permission to vary from the items enumerated in BMC 16.55.440.B(2)(b) is a
prerequisite to Staff’s exercise of said discretion. Finally, the Owner consultant’s
follow up site specific information, including the requested soil sampling and
calculations based on the WWHM, support the initial approval of the 27-foot-long
trench. Appellants’ evidence of a differing professional opinion on the best method
of arriving at length of trench does demonstrate failure in the sampling and
calculations performed and thus is not sufficient support for their claim that
inadequate critical area review was performed by the City.⁹

⁹ The question of Appellants’ standing in the appeal of the critical area permit was not timely raised; however, the record presented arguably fails to demonstrate that the Appellants have standing.

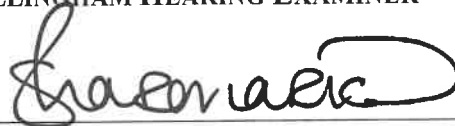
1 5. With respect, evidence and arguments not addressed in these findings were not
2 found to be sufficiently relevant and/or credible to merit inclusion in the instant
3 decision.

4 **DECISION**

5 The record presented failed to show error in the City's approval of either permit. The appeal
6 must therefore be denied.

7 Decided September 6, 2022.

8 **BELLINGHAM HEARING EXAMINER**

9 

10 Sharon Rice

1 **Exhibits:**

2 The following exhibits were admitted in the record of these proceedings.¹⁰

3 *For the Appellants (Appellants exhibits denoted in Findings with prefix "A")*

- 4 1. Vicinity Aerial/Map with Addresses/Ownership, Proposed Access, and
5 Existing/Alternate Access Shown, dated 2019 (county imagery) and June 23, 2022
6 (annotations)
- 7 2. City Council Hearing Minutes (annotated with line numbers), dated August 9, 1993
- 8 3. Photographs of Existing/Alternate Access, dated August 2021 (approximately)
- 9 4. Declaration of Kathleen Lax, dated June 22, 2022
- 10 5.1 Assessor Information for 1112 18th Street, dated July 19, 2022
- 11 5.2.1 Deed from Scott Wicklund to McKenzie Funk for 1112 18th Street (AF 2021-0900191),
12 dated September 1, 2021
- 13 5.2.2 Deed of Trust from McKenzie Funk to Scott Wicklund for \$134,180.85 (AF 2021-
14 0900193), dated September 1, 2021
- 15 5.3 Deed from Corrine Matsukawa to Scott Wicklund for 1112 18th Street (AF 921117221),
16 dated November 16, 1992
- 17 5.4 Assessor Information for 1109 18th Street, dated July 19, 2022
- 18 5.5 Assessor Information for 1115 18th Street, dated July 19, 2022
- 19 5.6 Lot Line Adjustment – 1109/1115 18th Street, AF# 2021-0404152, dated April 13, 2021
- 20 5.7 Deed from Anne Haugen to Scott Wicklund for 1109 18th Street (AF#118054), dated
21 January 14, 1994
- 22 5.8 Deed from Eugene and Carole Hoeraf to Scott Wicklund for 1115 18th Street
23 (AF#1509165), dated June 14, 1985
- 24 5.9 Assessor Information for 1116 19th Street, dated July 19, 2022

25 ¹⁰ During pre-hearing procedural communications, and in writing and verbally at hearing, counsel for Appellants
26 objected to various Owner exhibits, largely on grounds related to relevance and foundation. Counsel specifically
27 challenged Exhibits O10, O11, O12, O13, O14, O15, and O17, arguing the Owner could not adequately authenticate
28 them. In the case of Exhibits O30 through O50, Appellants initially objected due to timeliness of disclosure.
Counsel for Appellants also objected to Exhibits O26 through O30, which were taken by Mr. Wicklund who was not
called as a witness and did not testify, although he apparently attended the virtual hearing. Counsel for both parties
raised hearsay-based objections during testimony. Witnesses were requested to provide testimony based primarily
on first-hand knowledge or observation, and Owner witnesses were allowed to provide testimony detailing
foundation for the challenged exhibits. Counsel for the parties were requested to trust that the undersigned would
accord appropriate weight and assign appropriate credibility to all evidence offered. During the hearing, all exhibits
offered by Appellants and Owner were admitted.

- 1 5.10 Assessor Information for 1122 19th Street, dated July 19, 2022
- 2 5.11 Declaration of Cristy Sears, dated June 24, 2022
- 3 6.1 Two Sheets of Maps/Plans labeled 1) “Driveway & Drainage Plan;” and 2) “Driveway
4 Centerline Profile” both dated August 3, 1993. Contained in .pdf entitled “Final
5 Wicklund Driveway Plans.pdf” emailed to City by Mr. Funk (See Exhibit N-7.2), dated
6 August 3, 1993¹¹
- 7 6.2 Six Sheets of Maps/Plans labeled 1) “Driveway & Drainage Plan,” dated July 20, 1993;
8 2) “Driveway Centerline Profile,” dated August 3, 1993; 3) Untitled Profile/Elevation,
9 dated April 1993 by R.T. Jepson & Assoc; 4) Top-down view of driveway by R.T.
10 Jepson & Assoc. with label/date cut off; 5) “Norman Krebill” plans showing
11 improvements on Mill Avenue end of 18th St. ROW, dated May 11, 1979 by Harrison
12 Surveying; and 6) “Driveway Centerline Profile,” dated August 3, 1993 (appears to be a
13 clearer copy of Sheet 2). All contained in .pdf entitled “Final Wicklund Driveway
14 Plans.pdf” provided by Mr. Funk’s predecessor (See Exhibit N-6.3), dated May 11, 1979
15 – August 3, 1993
- 16 6.3 Email from Scott Wicklund to Jake Burry [rojovapor@gmail.com] transmitting six-page
17 .pdf file entitled “Wicklund driveway blueprints.pdf” (Exhibit N-6.2), dated April 4,
18 2021
- 19 7.1 Email Exchange between Robert Pierce, Brent Baldwin, and Hans Huisman re 1112
20 18th; Attached City Council minutes, dated August 3, 1993 located by Mr. Huisman,
21 September 2-3, 2020
- 22 7.2 Email from McKenzie Funk to Brent Baldwin [Forwarding/including email threads
23 reflected in Exhibits N-7.3 and N-7.1), dated May 14, 2021
- 24 7.3 Email Exchange between B. Baldwin and Ali Taysi regarding 1993 variance conditions
25 [Forwarding/including email threads reflected in Exhibits N-7.2 and N-7.1), September
26 25, 2020 – June 29, 2021
- 27 7.4 Email Exchange Between M. Funk and Ron Richard [Also includes/forwards threads
28 contained in Exhibits N-7.3 and N-7.1], dated May 18- May 19, 2021
- 7.5 Email Exchange between B. Baldwin and Chad Schulhauser forwarding Funk inquiry
[Exhibit N-7.2], discussing prior legal consultation and search for email from Matt
Stamps, dated May 17, 2021
- 7.6 Email exchange between B. Baldwin and H. Huisman confirming Mr. Huisman had not
located any planning board decision, or anything else related to 1993 variance other than
the Council minutes, dated May 18, 2021

¹¹ In Appellant briefing and this exhibit list, any reference to an exhibit starting with an “N” prefix (for Neighbors) should be read as an A (for Appellants) prefix; the A prefix is used exclusively in the findings.

- 1 7.7 Email exchange between B. Baldwin and C. Schulhauser forwarding D. Traxler's August
2 11, 2021 correspondence and discussing prior advice from Matt Stamps, dated August
3 11, 2021
- 4 7.8 Redacted email from Brent Baldwin to Matt Stamps forwarding minutes and prior email
5 exchange, dated September 3, 2020
- 6 8.1 City's Request for Information (RFI), dated February 3, 2022
- 7 8.2 Memorandum Report of John Gillaspay, Element Solutions, in Response to RFI
8 (CAP2021-0052), dated February 16, 2022
- 9 8.3 Report/Memo from Dan McShane of Stratum Group re: CAP2021-0052, dated March
10 21, 2022
- 11 8.4 Curriculum Vitae of Dan McShane, dated July 19, 2022
- 12 9.1 Declaration of Jake Burry (Paragraph 4 figure shows vantage points/directions of
13 Exhibits 9.2-9.6), dated July 27, 2022
- 14 9.2 Still from video taken by Jake Burry showing truck parked at 1109 18th Street, dated
15 July 2018
- 16 9.3 Video of Access Route from 19th Street (Taken by Jake Burry, looking south
17 down/along 19th Street Right-of-Way, and then west at the first leg of the access route),
18 July 22, 2022
- 19 9.4 Photo taken by Jake Burry; looking east along first leg of access route (and showing
20 vehicles parked there), July 25, 2022
- 21 9.5 Photo taken by Jake Burry; looking north along second leg of access route, dated July 25,
22 2022
- 23 9.6 Photo taken by Jake Burry; showing hot tub located on Property, dated July 22, 2022
- 24 10 Declaration of Monica Aebly and attached emails/Exhibits, dated July 26, 2022
- 25 11.1 Appellants' Motion for Summary Judgment, dated June 24, 2022
- 26 11.2 Appellants' Response to Motion to Dismiss, dated July 1, 2022
- 27 11.3 Appellants Reply In Support of Summary Judgment, dated July 8, 2022
- 28 12. Appeal of Critical Areas Permit CAP 2021-0052, including exhibits/attachments, dated
March 21, 2022
13. Appeal of Street Obstruction Permit PBW2021-0697, dated September 17, 2021
including exhibits/attachments
- 14.1 Detail From Historical Aerial Photo – Obtained from Whatcom Conservation District
Website (1943): https://cdn.whatcomcd.org/aerials-historical/1943/L6-372-19_date5-9-43.jpg, dated May 9, 1943

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(360) 778-8399
hearing@cob.org

- 1 14.2 Detail From Historical Aerial Photo – Obtained from Whatcom Conservation District
2 Website (1966): https://cdn.whatcomcd.org/aerials-historical/1966/BBK-2GG-227_date9-19-66.jpg, dated September 19, 1966
- 3 14.3 Detail From Historical Aerial Photo – Obtained from Whatcom Conservation District
4 Website (1976) https://cdn.whatcomcd.org/aerials-historical/1976/17C-78_date6-5-76.jpg, dated June 5, 1976
- 5 14.4 Detail From Bellingham City IQ Map – 1997 photo imagery
- 6 15. Report/Memo from Dan McShane of Stratum Group re CAP2021-0052, dated August 5,
7 2022
- 8 16.1 Second Declaration of Jake Burry, dated August 5, 2022
- 9 16.2 Photos of damage from one-car hit and run accident 1) Taken by Kathleen Lax Mid-
March 2022; 2) and 3) Taken by Jake Burry on August 5, 2022

10 *For the Property Owner (Owner exhibits denoted in Findings with prefix “O”)*

- 11 1. PBW2021-0697, right-of-way improvement permit, City of Bellingham, dated
September 8, 2021
- 12 2. CAP2021-0052, critical areas permit, City of Bellingham, dated March 8, 2022
- 13 3. Exhibit A to CAP, Project Description, dated March 8, 2022
- 14 4. Exhibit B to CAP, Engineered Drawings by Dibble, dated August 3, 1993
- 15 5. Exhibit C to CAP, Critical Area Geologic Hazard Review by Element Solutions, dated
November 19, 2021
- 16 6. Exhibit D to CAP, Request for Information, dated February 3, 2022
- 17 7. Exhibit E to CAP, Memorandum #1 – Response to COB RFI, dated February 16, 2022
- 18 8. Exhibit F to CAP, Traxler email to Sundin, dated January 14, 2022
- 19 9. Exhibit G to CAP, Lax/Bury/Williamson Appeal
- 20 10. Staff Report to City Council, dated April 21, 1993
- 21 11. Public Works Initial Conditions, dated February 11, 1993
- 22 12. City Council Agenda Bill, dated June 15, 1993
- 23 13. Minutes – Regular Meeting, dated June 21, 1993
- 24 14. Minutes – Regular Meeting, dated August 9, 1993

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28 *FINDINGS, CONCLUSIONS, AND DECISION*

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- 1 15. Approved Plans, dated Received August 4, 1993¹²
- 2 16. Letter of Support, dated 1993
- 3 17. Driveway Diagram
- 4 18. Email from Brent Baldwin to McKenzie Funk, dated May 18, 2021
- 5 19. Assessor's Map, dated June 30, 2021 (Taken from Whatcom County web site)
- 6 20. Planning Commission Record of Proceedings, dated October 4, 1954
- 7 21. City IQ Exhibit, dated September 30, 2021 (Taken from City of Bellingham's City IQ
- 8 web site)
- 9 22. Element Solutions Addendum, dated July 25, 2022
- 10 23. PSE Stormwater Memo, dated July 26, 2022
- 11 24. Supposed Alternate Access Exhibit created from City IQ Exhibit by McKenzie Funk
- 12 25. Highland Traffic Pattern Exhibit downloaded by McKenzie Funk (from
- 13 <https://wcog.org/counts/>)
- 14 26. Photo 1 of Ice on 19th Street, Taken by Scott Wicklund on December 31, 2018
- 15 27. Photo 2 of Ice on 19th Street, Taken by Scott Wicklund on December 31, 2018
- 16 28. Photo 3 of Ice on 19th Street, Taken by Scott Wicklund on January 18, 2020
- 17 29. Photo of Snow on 19th Street, Taken by Scott Wicklund on December 11, 2021
- 18 30. Photo of Water on 19th Street, Taken by Scott Wicklund on December 20, 2021
- 19 31. Photo 19th Street grade, Taken by Jennifer Woo on June 27, 2022
- 20 32. Photo of Lost Mail Truck at 1109 18th Street, Taken by McKenzie Funk on March 8,
- 21 2022
- 22 33. Photo of Knox and 18th ROW from Highland Drive, Taken by McKenzie Funk on
- 23 March 25, 2022
- 24 34. Photo of 16th and Knox, Taken by McKenzie Funk on May 24, 2022
- 25 35. Photo of 18th Street Right-of-Way, Taken by McKenzie Funk on September 20, 2021
- 26 36. Photo of 1800 Driveway, Taken by McKenzie Funk on September 20, 2022
- 27 37. Photo of Carport at 1720, Taken by McKenzie Funk in 2021 from Knox Avenue on
- 28 September 20, 2021

¹² According to Owner witness and attorney testimony/comments, the version of the plans at O15 was given to Mr. Funk by Mr. Wicklund, while the version at O45 was obtained by Mr. Funk from the Washington State Archives. *McKenzie Funk Testimony; Jeff Sawyer Argument.*

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38. Photo of 1116 19th Street Driveway, Taken by Jennifer Woo on June 27, 2022
39. BMC 21.10.090 Summary of Process Steps, Downloaded by McKenzie Funk from <https://bellingham.municipal.codes/BMC/21.10.090>
40. Agenda Bill History Item, Downloaded June 28, 2022 by McKenzie Funk from <https://iframe.cob.org/gov/council/abhistory/pages/abitem.aspx?llid=13391>
41. Notice of Public Hearing, dated July 25, 1993
42. City Council PW Committee Meeting, dated March 1, 1993
43. City Council PW Committee Meeting, dated April 12, 1993
44. City Council PW Committee Meeting, dated May 10, 1993
45. Driveway Plans, dated August 3, 1993, Received by McKenzie Funk from WA Archives
46. Letter from Jean Kaufman to Lynn Carpenter, dated August 6, 1993
47. 2008 Aerial Photo, Enlarged portion of photo downloaded from the City of Bellingham GIS at <https://data.cob.org/data/gis/2008airphotos/370201SE.jpg>
48. 2013 Aerial Photo, Enlarged portion of photo downloaded from the City of Bellingham GIS at <https://data.cob.org/data/gis/2013airphotos/370201SE.jpg>
49. 1993 City of Bellingham Traffic Volume Map, Downloaded from <https://cob.org/services/maps/map/traffic-maps>
50. 2018 City of Bellingham Traffic Volume Map, Downloaded from <https://cob.org/services/maps/map/traffic-maps>

Record Documents (Where cited, these items are denoted in Findings with prefix "R") (some but not all of the following were offered as exhibits by the parties and are therefore duplicates)

1. Appeal of PBW2021-0697 with attached exhibits:
 - 1) Dannon C. Traxler appeal letter, dated August 11, 2021 with attached exhibits:
 - A. Council Record of Proceeding, dated August 9, 1993
 - B. Photographs
 - C. City IQ Map printed August 4, 2021
 - D. Ali Taysi, AVT Consulting forwarding May 18, 2021 email from Ron Richard, Fire Marshall, Bellingham Fire Department
 - 2) Permit #PBW2021-0697 for driveway installation, issued September 8, 2021
 - 3) Critical Areas Ordinance Permit (CAP2020-0038) Decision, dated September 3, 2020 (effective September 17, 2020)

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(360) 778-8399
hearing@cob.org

- 1 4) Hearing Examiner Decision in matter of Sean Crosby/VAR2019-0001, issued
2 May 16, 2019
- 3 2. Order Acknowledging Appeal and Placing Appeal on Hold, issued October 11, 2021
- 4 3. Appeal of CAP2021-0052, received March 21, 2022 with attached statement in support
5 of appeal and letter dated March 21, 2022 from Dan McShane, Stratum Group and the
6 following exhibits:
 - 7 A. Public Works Permit Narrative
 - 8 B. Driveway and Drainage Plan, Scott Wicklund, dated August 3, 1993
 - 9 C. Critical Area Geologic Hazard Review, John Gillaspay, Environmental Services
10 Manager, Element Solutions, dated November 19, 2021
 - 11 D. Planning Department's Request for Information, dated February 3, 2022
 - 12 E. Memorandum in Response to Request for Information, Element Solutions, dated
13 February 16, 2022
 - 14 F. Dannon Traxler email to Steven Sundin, dated January 14, 2022
- 15 4. Pre-Hearing Scheduling Order, issued May 16, 2022
- 16 5. City of Bellingham's Motion to Dismiss, dated June 22, 2022 with attached:
- 17 6. Declaration of Matt Stamps in Support of City of Bellingham's Motion to Dismiss, dated
18 June 17, 2022 with attached exhibits:
 - 19 A. City Council Agenda re: proposed amendments to BMC Chapter 2.56, received
20 by City Council Office August 13, 2002
 - 21 B. City Council Record of Proceeding, dated August 9, 1993
 - 22 C. Statutory Warranty Deed, September 1, 2021 (Wicklund to Funk)
 - 23 D. Permit #PBW2021-0697 Right of Way Improvements Driveways, issued
24 September 8, 2021 (to Wicklund as owner)
 - 25 E. Permit #PBW2021-0697 Right of Way Improvements Driveways, issued
26 September 10, 2021 (to Funk as owner)
- 27 7. Appellants' Motion for Summary Judgment, dated June 24, 2022 with attached exhibits:
 - 28 A. Aerial map of proposed driveway location and current alternate access
 - B. City Council Record of Proceeding with annotated minutes, dated August 9, 1993
 - C. Photographs of site
8. Declaration of Cristy C. Sears in Support of Motion for Summary Judgment, dated June
 24, 2022
9. Declaration of Kathleen Lax in Support of Motion for Summary Judgment, dated June
 22, 2022

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- 1 10. City of Bellingham’s Response to Appellants’ Motion for Summary Judgment, dated
2 June 29, 2022
- 3 11. Property Owner’s Response to Appellants’ Motion for Summary Judgment, dated June
4 30, 2022
- 5 12. Appellants’ Response to City of Bellingham’s Motion to Dismiss, dated July 1, 2022
- 6 13. Appellants’ Reply in Support of Motion for Summary Judgment, dated July 8, 2022
- 7 14. Ruling on Pre-Hearing Motions, issued July 20, 2022
- 8 15. Appellants’ Pre-Hearing Memorandum of Law In Support of Appeal, dated July 27,
9 2022
- 10 16. Declaration of Jacob Burry, dated July 27, 2022
- 11 17. Declaration of Monica Aebly, dated July 26, 2022 with attached exhibits:
12 A. Email from landlord, dated July 17, 2006
13 B. Emails from and to landlord, dated January 24 and April 3, 2019
- 14 18. Appellants’ Witness and Exhibit List, dated July 27, 2022
- 15 19. Property Owner’s Witness and Exhibits List, dated July 27, 2022
- 16 20. Property Owner’s Pre-Hearing Brief, dated August 2, 2022
- 17 21. Property Owner’s Supplemental Witness and Exhibits List, dated August 4, 2022
- 18 22. Appellants’ Addendum to List of Witnesses and Exhibits, dated August 5, 2022
- 19 23. Appellants’ Motion to Strike and Memorandum of Law in Reply to Property Owner’s
20 Pre-Hearing Brief and in Support of Appeal, dated August 5, 2022
- 21 24. Appellants’ Closing Brief and Request for Site Visit, dated August 18, 2022¹³
- 22 25. Property Owner’s Closing Argument, dated August 18, 2022
- 23 26. City’s Post-Hearing Brief, dated August 19, 2022

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27 ¹³ The undersigned did not conduct an in-person site visit.

28 *FINDINGS, CONCLUSIONS, AND DECISION*

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(360) 778-8399
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