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

IN RE: RKS DEVELOPMENT LLC, Applicant 119 Ashley Street CAP2024-0055 and VAR2024-0010 / Critical Area Permit, Variance from Critical Areas Ordinance, and Variance From Zoning Ordinance	HE-24-PL-027 FINDINGS, CONCLUSIONS, AND DECISIONS SHARON A. RICE HEARING EXAMINER
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SUMMARY OF DECISIONS

The requested critical area permit, critical area variance, and zoning variance to develop a single-family residence at 119 Ashley Street are **APPROVED** with conditions.

SUMMARY OF RECORD

Request:

Trent Slusher of RKS Development LLC (Applicant) requested a critical area permit, a variance from the minimum stream setback established by the critical areas ordinance (CAO) to reduce the Lincoln Creek stream buffer to approximately 23 feet, and a variance from the zoning ordinance to reduce the front yard setback to five feet. The approvals would allow construction of a single-family residence at 119 Ashley Street in Bellingham, Washington.

Hearing Date:

The Bellingham Hearing Examiner conducted a virtual open record hearing on the request on January 22, 2025. The record was held open two business days to allow for public comment, with additional days for responses by the parties. No post-hearing public comment was submitted, and the record closed on January 24, 2025.

1 No in-person site visit was conducted, but the Examiner viewed the subject property
2 and its surroundings on Google Maps.

3 **Testimony:**

4 At the virtual hearing the following individuals presented testimony under oath:

5 Amy Dearborn, Environmental Planner II, City of Bellingham

6 Steve Sundin, Senior Planner, City of Bellingham

7 Trent Slusher, RKS Development LLC, Applicant

8 Ed Miller, Senior Biologist, Miller Environmental Services, LLC

9 Michael Feerer

10 Randi Sanders

11 Scott Sanders

12 George Sanders

13 Joseph Paquette

14 **Exhibits:**

15 Through the open record hearing process, the following exhibits were admitted in the
16 record:

17 Exhibit 1 Staff Report to the Examiner, dated November 9, 2022, with the following
18 attachments:

19 A. Proposed Site Plan

20 B. Vicinity Map

21 C. Samish Neighborhood Zoning Map

22 D. CAP and Variance Application Type III

23 E. Miller Environmental Critical Area Report (CAR), including critical area
24 variance justification

25 F. GeoTest Geohazard and Infiltration Feasibility Report (GEO)

26 G. Tree Inventory

27 H. Landmark Tree Removal Request

28 I. Zoning Exemption Request

29 J. Notice and Posting Information

30 K. Public Comment

1 L. Mitigation Plan Site Plan

2 Exhibit 2 Public comment submitted after preparation of Staff Report

- 3 a. Alaina Bixon email, dated January 15, 2025
- 4 b. Jane Rosenfeld email, dated January 15, 2025
- 5 c. Thea Posch email, dated January 15, 2025
- 6 d. Harvey Schwartz email, dated January 19, 2025
- 7 e. Kelsey Barnett letter, dated January 20, 2025
- 8 f. Michael Feerer, Whatcom Million Trees Project letter, dated January 21,
9 2025
- 10 g. Alexandra Wiley email, dated January 21, 2025
- 11 h. Randi Sanders letter, dated January 22, 2025
- 12 i. Joseph R. Paquette, P.E. email, dated January 22, 2025
- 13 j. Steve Abell, letter dated January 12, 2025
- 14 k. George Sanders email with PowerPoint slides, dated January 15, 2025;
15 email with PowerPoint slides, dated January 16, 2025; and email with
16 PowerPoint slides, dated January 22, 2025
- 17 l. K. Murray letter, dated January 9, 2025

18 Exhibit 3 Staff Response to Public Comment, dated January 24, 2025

19 After considering the testimony and exhibits submitted, the Hearing Examiner enters
20 the following findings and conclusions:

21 **FINDINGS**

- 22 1. Trent Slusher of RKS Development LLC (Applicant) requested a critical area
23 permit, a variance from the minimum buffer required by the critical areas
24 ordinance to reduce the Lincoln Creek stream buffer to approximately 23 feet,
25 and a variance from the zoning ordinance to reduce the front yard setback to five
26 feet. The requested approvals are sought in conjunction with a proposal to
27 construct a single-family residence at 119 Ashley Street in Bellingham,
28 Washington.¹ *Exhibits 1, 1.A, and 1.D.*

29 ¹ The legal description of the property is Lots 14-16 of Block 2, Jameson's 2nd Bay View Addition to
30 Fairhaven. The Assessor Parcel Number is 380332025095-0000. *Exhibit 1.* Based on CityIQ data, the

- 1 2. The subject property is 7,911 square feet in area, is undeveloped, and is
2 currently in a forested condition. *Exhibits 1 and 1.E; Trent Slusher Testimony.*
- 3 3. The subject property is within Area 3 of the Samish Neighborhood and is zoned
4 Residential – Multi with a Planned use qualifier and Medium density
5 designation. *Exhibits 1 and 1.C; Bellingham Municipal Code (BMC) 20.00.150.*
6 Although this designation would normally require development of at least two
7 multi-family dwelling units on the subject property, BMC 20.32.040.B.3.c.
8 provides an exception to the minimum density requirement for sites that are
9 wholly or substantially encumbered by a critical area or a critical area buffer.
10 The exception decision is a Type 1 administrative decision. The Planning and
11 Community Development Department has approved the exception to allow
12 development of a single-family residence as proposed. *Exhibits 1 and 1.I.*
- 13 4. The subject property is located on the east side of Ashley Street, south of
14 Consolidation Avenue and north of Byron Avenue. Surrounding properties to
15 the north, south, and east are within the same zone as the subject property and
16 are developed with single-family residences. The property to the west is within
17 Area 1A of the Samish Neighborhood, is zoned Commercial, and is developed
18 with an apartment complex. *Exhibits 1.A and 1.C; Google Maps site view.*
- 19 5. The purpose of the CAO (BMC Chapter 16.55) is “to designate and classify
20 environmentally sensitive and hazardous areas as critical areas and to protect,
21 maintain, and restore these areas and their functions and values, while also
22 allowing for reasonable use of public and private property.” *BMC 16.55.010.A.*
23 The CAO “is to be administered with flexibility and attention to site-specific
24 characteristics” and not to “make a parcel of property unusable by denying its
25 owner all reasonable economic use of the property.” *BMC 16.55.010.F.*
- 26 6. The Applicant submitted critical areas reports that evaluated the subject property
27 for wetlands and habitat conservation areas (Exhibit 1.E) and geologic hazards
28 (Exhibit 1.F). The reports were prepared by qualified individuals and included
29 the information required by the CAO. *Exhibits 1, 1.E, and 1.F.*
- 30 7. The subject property contains a stream – Lincoln Creek – that is regulated under
the CAO as a fish and wildlife habitat conservation area. The subject property
also provides potential habitat for the big brown bat, although no bats were

Jameson’s 2nd Bay View Addition to Fairhaven was platted in 1890
(https://docs.cob.org/subdivisions/?OBKey_119_1=PL-22A).

1 observed during the critical areas field investigation. Based on the critical areas
2 assessment, there are no wetlands on the subject property. *Exhibit 1.E.*

3 8. Lincoln Creek crosses the eastern portion of the subject property, separating the
4 northeast portion of the site from the remainder. Because Lincoln Creek is
5 potentially fish bearing, the CAO requires a standard buffer of 75 feet. The 75-
6 foot buffer encompasses the entire parcel. *Exhibits 1, 1.E, and 1.L.*

7 9. Although BMC 16.55.500.D.3.b would allow an administration reduction of the
8 buffer by 25% (to 56.25 feet), in this case the reduction would not be sufficient
9 to create a building envelope. The potential building area would be
10 approximately 248 square feet, most of which would be within the front and side
11 yard building setbacks at the southwest corner of the property. A variance from
12 the CAO is therefore required for residential development. *Exhibits 1, 1.E, and
13 1.L.*

14 10. The Applicant proposes to construct the residence in the southwest corner of the
15 property, with a reduced front yard setback from Ashley Street, to maximize the
16 distance between the residence and the stream. The distance from the stream
17 would be further maximized by the proposed building design, which would be
18 roughly wedge shaped to confine development to the property corner. The
19 proposed building footprint of 931 square feet would be smaller than the
20 building footprints of other residences in the vicinity, including some on lots
21 that abut Lincoln Creek.² *Exhibits 1 and 1.A; Trent Slusher Testimony.*

22 11. The overall development envelope proposed (including the driveway and
23 landscaping around the building perimeter) would be 2,043 square feet. The
24 distance between the edge of the development envelope and the stream would be
25 23.5 feet at its closest point. The reduced buffer would be demarcated with a
26 split-rail fence and signs. The residence would be set back at least five
27 additional feet from the reduced buffer edge. While the CAO requires a
28 standard 15-foot building setback from the buffer edge, BMC 16.55.500.D.7
29 allows the setback to be administratively reduced. The reduced setback would
30 maximize the width of the buffer, thereby increasing opportunities for tree
preservation and planting. All area outside of the development envelope within
the subject property would be preserved through a recorded conservation
easement. *Exhibits 1 and 1.L; Trent Slusher Testimony.*

² The surrounding residences on the east side of Ashley Street that abut Lincoln Creek were developed prior to the City's adoption of the 75-foot stream buffer requirement. *Exhibit 1.*

- 1 12. Permanent impact to the stream buffer of 2,043 square feet would be mitigated
2 by enhancing 5,514 square feet of buffer (an amount exceeding the 1:1 ratio
3 required by the CAO) throughout the remainder of the site excluding the stream
4 bed. The enhancement project would include removing non-native invasive
5 species (such as English ivy) and planting 45 new trees (including western
6 hemlock, grand fir, and/or western red cedar) and 10 shrubs. The mitigation is
7 expected to improve the habitat and screening functions of the buffer as
8 compared to the existing conditions and to offset water quality impacts from the
9 reduced width. Planning Staff submitted that implementation of the mitigation
10 plan should result in a net ecological benefit. *Exhibits 1, 1.E and 1.L; Amy
11 Dearborn Testimony.*
- 12 13. The reduced stream buffer proposed, while approximately one-third of the
13 standard buffer width, is not significantly narrower than the buffers approved for
14 residential developments to the north and south of the subject property under
15 previous ordinances (15 to 25 feet and 25 feet, respectively). *Exhibit 3.*
- 16 14. Although the southwest corner of the subject property, where development is
17 proposed, is relatively flat, the central portion of the property slopes steeply
18 down towards Lincoln Creek and meets the CAO criteria for landslide and
19 erosion hazard areas. Based on the submitted geohazard evaluation, the risk of
20 landslide is low on the site and would be adequately mitigated by a 10-foot
21 setback from the top of slope, with five-foot encroachments permissible with
22 additional foundation depth. The proposed building setbacks are consistent with
23 this recommendation. *Exhibits 1.F and 1.A.*
- 24 15. The geohazard report included an evaluation of the infiltration potential of the
25 subject property. The conclusion was that infiltration is not feasible.
26 Consequently, stormwater runoff from the roof and other hard surfaces would be
27 collected and discharged into the City stormwater system in Ashley Street. With
28 such stormwater management, the project would not increase surface water
29 discharge to adjacent properties or decrease slope stability. *Exhibits 1.F and
30 1.A.*
16. The subject property does not contain a FEMA flood hazard area. *Exhibit 1.*
Although evidence was submitted through public comment regarding flooding
along the Lincoln Creek corridor (see e.g., Exhibit 1.K), the flooding is caused
by backwatering from an undersized culvert beneath Ashley Street. On the
subject property, the stream channel is deep and incised, containing flood
volumes. The lower floor of the residence would be 13 feet higher in elevation
than the creek. *Trent Slusher Testimony; Ed Miller Testimony.*

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17. There are 49 significant trees on the subject property (i.e., trees with a diameter at breast height of six inches or greater), including six Douglas fir, 11 western red cedar, 21 bigleaf maple, four paper birch, two red alder, and five cherry trees. *Exhibit 1.G.* Development of the subject property as proposed would require the removal of 18 trees, including one that is classified as a landmark tree (i.e., a tree with a diameter at breast height of 36 inches or greater). The landmark tree proposed for removal is a 42-inch big leaf maple that has been determined to be in poor condition by a certified arborist (tree number 31 on the mitigation plan). The tree is within the footprint of the proposed residence. As mitigation for proposed tree removal, 45 trees would be planted within the stream buffer, resulting in an overall mitigation ratio of 2.5 replacement trees for each tree removed. The Landmark Tree Committee, consisting of the City Arborist, and members of the Planning and Community Development Department and Natural Resources Division of the Public Works Department, reviewed the request against the criteria of Ordinance 2024-07-022 and recommended that the Hearing Examiner approve the request. *Exhibits 1 and 1.L; Trent Slusher Testimony; Steve Sundin Testimony.*
18. Ashley Street is classified as a Neighborhood Collector. The west half of the street is fully improved, including sidewalk, but the east half abutting the subject property contains a gravel shoulder. The City’s transportation improvement plans do not provide for any future widening of Ashley Street, and frontage improvements would not be required in conjunction with the residential building permit. However, the City considers the current level of infrastructure to be adequate because the subject property is the last lot on the street segment to be developed and there are existing improvements on the west side. The likelihood that the City would undertake a project widening Ashley Street is unlikely due to the location of the stream and associated conservation easements. *Steve Sundin Testimony; Amy Dearborn Testimony; Exhibit 1.A.*
19. The Applicant proposes to reduce the front yard setback from Ashley Street to a minimum of five feet (from the required 20 feet) to maximize the Lincoln Creek buffer. Although adjacent residences were constructed consistent with the 20-foot setback standard, these residences were constructed prior to the City’s adoption of the 75-foot stream buffer requirement. *Exhibits 1 and 1.A.*
20. The off-street parking required for the proposed residence would be within the garage, although driveway parking might also be possible. Due to the width of right-of-way between the subject property’s west property line and the edge of the pavement, the actual distance between the front of the garage and the edge of

1 the pavement would range from approximately 19 to 24 feet.³ Thus, the
2 variance would still allow room for vehicle maneuvering and parking outside of
3 the traveled roadway. *Exhibits 1 and 1.A; Steven Sundin Testimony.*

- 4 21. Planning Staff submitted that the proposal would be consistent with the
5 following goals and policies of the Bellingham Comprehensive Plan:

6 Land Use

7 Goal LU-5: Support the Growth Management Act's goal to encourage
8 growth in urban areas.

9 Policy LU-66: Encourage design flexibility (e.g. clustering and low impact
10 development) to preserve existing site features, including trees,
11 wetlands, streams, natural topography, and similar features.

12 Environment

13 Goal EV-3: Protect and restore ecological functions and habitat.

14 Policy EV-10: Incorporate sustainable land use and design elements into
15 projects early in the planning stages to avoid impacts to critical
16 areas (see Land Use and Community Design Chapters).

17 Policy EV-12: Safeguard the long-term functions and values of critical areas
18 through effective mitigation measures when avoidance is not
19 feasible.

20 *Exhibit 1.*

- 21 22. Notice of the application and public hearing was mailed to property owners
22 within 500 feet of the site on January 3, 2025. Notice of the public hearing was
23 again mailed to property owners within 500 feet of the site on January 9, 2025.
24 *Exhibits 1 and 1.J.*

- 25 23. Public comment was generally opposed to granting the variances and included
26 the following concerns: that tree removal would negatively affect the creek;
27 allegation that the CityIQ database incorrectly maps the location of the creek;
28 concerns regarding traffic and parking congestion on Ashley Street; concern that
29 the future homeowner/occupant would cut the trees within the buffer or cross the
30 creek to/from an alley that abuts the eastern property line; concerns regarding
existing and potentially increased flooding; a request that the City purchase the
property to serve as a park; argument that the building footprint could be further

³ The undersigned takes note that while page 13 of the staff report indicates the distance between garage and curb would be 10 feet, this is not consistent with the measurement lines on Exhibit 1.A.

1 reduced; concern that the mitigation plantings would not survive; concern that
2 the proposal would be harmful to wildlife and water quality; and argument that
3 the Applicant caused the need for the variances by purchasing the property.
4 *Exhibits 1.K and 2; Testimony of Michael Feerer, Randi Sanders, Scott Sanders,
George Sanders, and Joseph Paquette.*

5 24. With respect to the CityIQ issue, CityIQ provides general information and was
6 not relied on to establish the Lincoln Creek boundaries. The creek location
7 shown on the plans was based on a survey and determination of the ordinary
8 high-water mark by a professional biologist. *Testimony of Trent Slusher and
Amy Dearborn.*

9 25. With respect to the health of proposed plantings, the new trees would be flagged
10 to aid in monitoring. Monitoring would be performed for five years to
11 determine whether the performance standards of the plan are satisfied, which
12 include a 90% survival rate in the first year and an 80% survival rate through the
13 fifth year. Trees would be replaced as needed to achieve required benchmarks.
Exhibit 1.E; Ed Miller Testimony.

14 26. Addressing parking, a two-car garage is proposed to ensure consistency with
15 City off-street parking requirements. *Trent Slusher Testimony.*

16 27. Regarding the concern regarding residents crossing the creek to reach the alley,
17 Planning Staff recommended a condition of approval that would prohibit
18 pedestrian or vehicular access to the alley. *Exhibit 1.M.*

19 28. Planning Staff submitted that the proposal is consistent with the intent of the
20 CAO and recommended approval of the critical areas permit, critical areas
21 variance, and zoning variance subject to the conditions stated in the Staff Report
22 and Attachment 1.M. *Exhibits 1 and 1.M; Amy Dearborn Testimony.* The
23 Applicant waived objection to the recommended conditions. *Testimony of Trent
24 Slusher and Ed Miller.*

25 CONCLUSIONS

26 Jurisdiction

27 The Hearing Examiner is granted authority to hold hearings and make decisions on
28 zoning and variance permit applications pursuant to BMC 20.18.020.A and BMC
29 16.55.120.A.

1 The Hearing Examiner has jurisdiction to decide the associated landmark tree removal
2 request pursuant to Section 9.a of Ordinance No. 2024-07-022, which requires the
3 decision to be consolidated with other required permits and reviewed under the process
4 required for the permit with the highest process type.

4 **Criteria for Review**

5 Pursuant to Bellingham Municipal Code 16.55.120.B, a variance from the critical area
6 ordinance may be granted only if an applicant demonstrates that the requested action
7 conforms to all of the criteria set forth as follows:

- 8 1. Special conditions and circumstances exist that are peculiar to the land, the lot,
9 or something inherent in the land, and that are not applicable to other lands in
10 the same district;
- 11 2. The special conditions and circumstances do not result from the actions of the
12 applicant;
- 13 3. A literal interpretation of the provisions of this chapter would deprive the
14 applicant of all reasonable economic uses permitted to other properties in the
15 vicinity and zone of the subject property under the terms of this chapter, and the
16 variance requested is the minimum necessary to provide the applicant with such
17 rights;
- 18 4. Granting the variance requested will not confer on the applicant any special
19 privilege that is denied by this chapter to other lands, structures, or buildings
20 under similar circumstances;
- 21 5. The granting of the variance is consistent with the general purpose and intent of
22 this chapter, and will not have a significant adverse impact on functions and
23 values of the associated critical area or otherwise be materially detrimental to
24 the public welfare or injurious to the property or improvements in the vicinity of
25 the subject property;
- 26 6. The decision to grant the variance includes the best available science and gives
27 special consideration to conservation or protection measures necessary to
28 preserve or enhance fish habitat; and
- 29 7. The granting of the variance is consistent with the general purpose and intent of
30 the comprehensive plan and adopted development regulations.

26 Pursuant to Bellingham Municipal Code 21.18.020.A, a variance from land use
27 development may be approved if all of the following are demonstrated:

- 28 1. Because of special circumstances, not the result of the owner's action, applicable
29 to the subject property (including size, shape, topography, location, or
30 surroundings), the strict application of the provisions of this ordinance is found

1 to deprive the property of rights and privileges enjoyed by other property in the
2 area and under the identical land use classification; and

- 3 2. That the granting of the variance will not be unduly detrimental to the public
4 welfare nor injurious to the property or improvements in the vicinity and subarea
5 in which the subject property is located.
- 6 3. That the subject property cannot be reasonably used under the regulations as
7 written.

8 Pursuant to BMC 16.55.090.B, a critical area permit may be granted if the City can
9 make all of the following findings:

- 10 1. Require a critical area report from the applicant that has been prepared by a
11 qualified professional, to be reviewed and evaluated;
- 12 2. Determine whether the development proposal conforms to the purposes and
13 performance standards of this chapter, including the criteria in BMC 16.55.200,
14 Review criteria;
- 15 3. Assess the potential impacts to the critical area and determine if they can be
16 avoided or minimized; and
- 17 4. Determine if any mitigation proposed by the applicant is sufficient to protect the
18 functions and values of the critical area and public health, safety, and welfare
19 concerns consistent with the goals, purposes, objectives, and requirements of
20 this chapter.

21 **Applicable Code Provisions**

22 **BMC 16.55.200 Review criteria**

23 A. Any alteration to a critical area, unless otherwise provided for in this chapter, shall
24 be reviewed and approved, approved with conditions, or denied based on the
25 proposal's ability to comply with all of the following criteria:

- 26 1. The proposal minimizes the impact on critical areas in accordance with
27 mitigation sequencing (BMC 16.55.250);
- 28 2. The proposal does not pose an unreasonable threat to the public health, safety, or
29 welfare on or off the development proposal site;
- 30 3. The proposal is consistent with the general purposes of this chapter and the
public interest;
4. Any alterations permitted to the critical area are mitigated in accordance with
mitigation requirements in BMC 16.55.240 and 16.55.260 and additional
requirements as outlined in specific critical area sections;

- 1 5. The proposal protects the critical area functions and values consistent with the
2 best available science and results in no net loss of critical area functions and
3 values; and
- 4 6. The proposal is consistent with other applicable regulations and standards.
- 5 B. The city may condition the proposed activity as necessary to mitigate impacts to
6 critical areas and to conform to the standards required by this chapter.
- 7 C. Except as provided for by this chapter, any project that cannot adequately mitigate
8 its impacts to critical areas in the sequencing order of preferences in BMC
9 16.55.250 shall be denied.

10 *BMC 16.55.250 Mitigation sequencing*

11 Applicants shall demonstrate that all reasonable efforts have been examined with the
12 intent to avoid and minimize impacts to critical areas and buffers. When an alteration to
13 a critical area is proposed, applicants shall follow the mitigation sequential order of
14 preference below:

- 15 A. Avoiding the impact altogether by not taking a certain action or parts of an action;
- 16 B. Minimizing impacts by limiting the degree or magnitude of the action and its
17 implementation, by using appropriate technology, or by taking affirmative steps,
18 such as project redesign, relocation, or timing, to avoid or reduce impacts;
- 19 C. Rectifying the impact to wetlands, critical aquifer recharge areas, frequently flooded
20 areas, and habitat conservation areas by repairing, rehabilitating, or restoring the
21 affected environment to the historical conditions or the conditions existing at the
22 time of the initiation of the project;
- 23 D. Minimizing or eliminating the hazard by restoring or stabilizing the hazard area
24 through engineered or other methods;
- 25 E. Reducing or eliminating the impact or hazard over time by preservation and
26 maintenance operations during the life of the action;
- 27 F. Compensating for the impact to wetlands, critical aquifer recharge areas, frequently
28 flooded areas, and habitat conservation areas by replacing, enhancing, or providing
29 substitute resources or environments; and
- 30 G. Monitoring the hazard or other required mitigation and taking remedial action when
necessary.

Landmark Tree Ordinance (No. 2024-07-022)

Subsection 6(a) allows removal of a landmark tree if the following is satisfied:

1 The removal, damage, impact, or harm is necessary to enable construction on or
2 reasonable use of the property, and the applicant has demonstrated that all
3 reasonable efforts have been examined with the intent to avoid and minimize the
4 removal of the Landmark Tree. When removal is proposed, applicants shall follow
the mitigation sequential order of preference below:

- 5 i. Avoiding the impact altogether by not taking a certain action or parts of an
6 action;
- 7 ii. Minimizing impacts by limiting the degree or magnitude of the action and its
8 implementation, by using appropriate technology, or by taking affirmative
9 steps, such as project redesign, relocation, reducing driveways or other
10 impervious areas, or relocating utilities, to avoid or reduce impacts; and
- 11 iii. Compensating for the removal or impact at a ratio as determined by the
12 director.
- 13 iv. Mitigation for individual actions may include a combination of the above
14 measures. Additionally, in order to preserve or minimize the impacts
15 associated with preserving a Landmark Tree, the director shall have the
16 authority to reduce other development standards, such as setbacks, lot
17 coverage, open space, and minimum parking requirements, upon a finding
18 that the reduction will not create significant impacts.

17 **Conclusions Based on Findings**

18 A. Addressing the criteria established in BMC 16.55.120.B for approval of a critical
19 area variance, the following conclusions are entered.

- 20 1. Special conditions and circumstances exist that are peculiar to the site. The
21 special circumstances include the location of Lincoln Creek, the buffer of which
22 encompasses the entire parcel, and the landslide hazard slopes in the central
23 portion of the site. The Applicant is affected differently by the stream buffering
24 requirement because surrounding properties that are also along the stream
25 corridor were developed under more permissive regulations. *Findings 7, 8, 9,*
26 *10, 13, and 14.*
- 27 2. The special conditions and circumstances are not the result of the Applicant's
28 actions. The Applicant did not create the stream or steep slopes, and did not
29 subdivide the land. The Applicant's mere purchase of the subject property did
30 not create the special circumstances; any prior or subsequent owner would also
have been entitled to seek a variance to allow reasonable use. *Findings 1, 8, and*
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3. A literal interpretation of the CAO would deprive the Applicant of all reasonable economic uses permitted to other properties in the vicinity and zone. The subject property is zoned for medium density multi-family residential uses, and all other properties in the vicinity are developed with single-family and multi-family residences. Because the site is entirely encumbered by critical areas, a literal interpretation of the CAO would prevent any residential development of the property. The proposed building footprint and development envelope represent the minimum variance needed for residential development. The building footprint would be extremely modest in scale and could not reasonably be reduced and, with approval of the zoning variance, would be placed as far from the critical areas as possible. The development envelope would also be modest in scale, as it would allow for only a narrow setback (as narrow as five feet) between the demarcated buffer edge and the residence. *Findings 3, 4, 8, 9, 10, 11, and 13.*

4. Granting the variance would not confer on the Applicant any special privilege. All surrounding properties are developed despite similar environmental constraints. The building footprint would be smaller than others in the area. The proposed development density would be less than that specified for the zone. *Findings 3, 4, 10, and 13.*

5. With implementation of the mitigation plan, granting the variance would be consistent with the purpose of the CAO to protect, maintain and restore environmentally sensitive areas while allowing for reasonable use of private property (BMC 16.55.010.A), would not have a significant adverse impact on the functions and values of the critical areas on site, and would not be materially detrimental to the public welfare or injurious to property in the vicinity. Stormwater would be managed consistent with City standards to maintain slope stability and prevent downstream stormwater impacts. No evidence presented succeeded in showing that the development as conditioned would exacerbate flood conditions on or off the site. Significant tree removal would be mitigated through replanting. *Findings 5, 10, 11, 12, 14, 15, 16, and 17.*

6. The decision to grant the variance is based on site-specific study using best available science and gives special consideration to conservation or protection measures necessary to preserve or enhance fish habitat. The critical areas report and the mitigation plan were prepared by a qualified professional and include enhancement plantings designed to improve the functions of the stream buffer. *Findings 6 and 12.*

1 7. Granting the critical area variance would be consistent with the general purpose
2 and intent of the comprehensive plan and adopted development regulations. The
3 variance would protect the ecological functions of Lincoln Creek while
4 facilitating residential development consistent with Growth Management Act
5 goals. *Findings 12 and 21.*

6 B. Addressing the criteria established in BMC 20.18.020.A for approval of a zoning
7 variance, the following conclusions are entered:

8 1. Because of special circumstances applicable to the property that are not the
9 result of the owner's action, strict application of the setback standard would
10 deprive the Applicant of rights and privileges enjoyed by other properties in the
11 area and land use classification. The special circumstances include the location
12 of the stream and landslide hazard slopes on the subject property, which confine
13 development to the southwest corner of the subject property. The Applicant did
14 not create these features or the lot lines. The reduced front yard setback would
15 allow for a modest building footprint, smaller than surrounding buildings but
16 with enough area to meet off-street parking requirements, while meeting the
17 minimum setbacks specified in the geohazard analysis and maximizing
18 protection of the stream. *Findings 1, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 26.*

19 2. Granting the variance would not be unduly detrimental to the public welfare nor
20 injurious to the property or improvements in the vicinity. Reducing the front
21 yard setback would allow the flattest portion of the subject property to be
22 developed and ensure the required setbacks from the landslide hazard slope are
23 maintained. Due to the width of right-of-way in front of the subject property,
24 the reduced setback would still provide space for vehicle maneuvering outside
25 of the traveled roadway. Because future road widening is improbable, the
26 reduced setback is unlikely to conflict with future improvements. *Findings 14,*
27 *18, and 20.*

28 3. The subject property cannot be reasonably used under the regulations as written.
29 Development of the subject property is constrained by both zoning setbacks and
30 critical areas buffers, with the critical areas buffers constraining the entire
parcel. Reducing both as proposed is necessary for reasonable use of the
property. *Findings 8, 9, and 10.*

C. Addressing the critical area permit criteria for approval established at BMC
16.55.090.B, the following conclusions are entered:

- 1 1. The Applicant submitted critical areas reports that were prepared by qualified
2 professionals and evaluated by City Staff for compliance with the relevant
3 criteria. *Findings 6 and 28.*
- 4 2. The proposal conforms to the purposes and performance standards of the critical
5 areas ordinance, including the criteria in BMC 16.55.200, Review criteria, as
6 follows:
- 7 a) The proposal minimizes the impact on critical areas in accordance with
8 mitigation sequencing. Specifically, the record demonstrates the proposal
9 does the following: avoids direct impacts to Lincoln Creek and the hazard
10 slopes; minimizes impacts to buffers by locating the development footprint
11 as far from the critical areas as possible; minimizes hazard by maintaining
12 slope setbacks and managing stormwater; reduces impacts by preserving
13 most of the property within a fenced and signed conservation easement;
14 compensates for stream buffer impacts by enhancing the buffer at a ratio
15 exceeding the 1:1 ratio required by the CAO of impacts to mitigation; and
16 provides for monitoring of the mitigation plantings. Concerns raised in
17 public comment regarding the viability of the plantings are addressed
18 through the performance standards of the mitigation plan. This decision
19 incorporates the condition recommended by Planning Staff that would
20 minimize the potential for future creek impacts by preventing access to the
21 alley. *Findings 10, 11, 12, 14, 15, 16, 25, and 27.*
- 22 b) As concluded in A.5 above, the proposal does not pose an unreasonable
23 threat to the public health, safety, or welfare on or off the site. The
24 development would meet the minimum setbacks from the landslide and
25 erosion hazard slopes recommended in the geohazard report. The site is not
26 within a FEMA-designated flood hazard zone. Stormwater runoff from the
27 new residence and associated hard surfaces would be conveyed to the
28 municipal stormwater system and not directed down the slope into the creek.
29 The proposed mitigation plantings would help with water quality. *Findings
30 12, 14, 15, and 16.*
- 30 c) As concluded in A.5 and A.7 above, the proposal is consistent with the
general purposes of the critical areas ordinance and the public interest.
Findings 5, 10, 11, 12, 14, 15, 16, and 17.
- d) As conditioned, the permitted buffer reduction would be mitigated consistent
with BMC 16.55.240 and 16.55.260 and other relevant provisions. The
conditions of approval address financial surety requirements, as-built and
annual monitoring report requirements, fencing, and signage. *Finding 12.*

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e) The proposal protects the critical area functions and values consistent with the best available science and results in no net loss of critical area functions and values as concluded in A.5 and A.6 above. *Findings 6 and 12.*

f) With approval of the zoning variance and with approval of the landmark tree removal request, the proposal is consistent with all applicable regulations and standards. *Findings 17, 18, 19, 20, and 26.*

3. The reports submitted by the Applicant’s critical areas consultants demonstrate code-compliant assessment of the critical areas and of the potential impacts of the proposed development. The proposal avoids impacts to Lincoln Creek and the landslide and erosion hazard slopes area and minimizes impacts to the stream buffer. As concluded in A.3 above, the proposal represents the minimum buffer encroachment needed to make reasonable use of the property. *Findings 3, 4, 8, 9, 10, 11, and 13.*

4. Based on the determination of qualified professionals, with the concurrence of Planning Staff, the proposed mitigation is sufficient to protect the functions and values of the critical area and public health, safety, and welfare concerns consistent with the CAO. *Findings 6, 12, 14, 15, 16, and 28.*

D. Addressing the landmark tree removal request, the request is granted as recommended by the Landmark Tree Committee. The criteria for removal of the tree are similar to the mitigation sequencing applied to the critical area permit. Due to critical area constraints, the only feasible place to develop a residence is in the southwest corner of the subject property where the landmark tree is located. The tree could not be retained while still allowing reasonable use of the property. The mitigation ratio proposed for tree removal is appropriate compensation. *Findings 8, 9, 10, 11, and 17.*

DECISIONS

Based on the preceding findings and conclusions, the requested critical area permit, critical areas variance, landmark tree removal request, and zoning variance to allow construction of a single-family residence at 119 Ashley Street are **APPROVED** subject to the following conditions:

- 1. Prior to issuance of a building permit, the project shall be reviewed for compliance with Bellingham Municipal Code sections for stormwater, traffic, and fire.

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2. Prior to issuance of a building permit, a tree retention and removal plan with BMP's for critical tree root protection shall be submitted for review and approved with the project plan set.

3. Prior to the issuance of a building permit, a pre-construction site visit shall be scheduled. Said site visit shall include a representative from the Planning and Community Development Department, a Public Works stormwater inspector, the property owner, qualified biologist, and the contractor developing the site. The purpose of the site visit is to specify the location and extent of the site work and to specify the mechanism for demarcation of the boundary between the construction area and the buffer enhancement area.

4. Prior to the issuance of a building permit, a permanent conservation easement for the prescribed stream buffer area shall be recorded with the Whatcom County Auditor. The easement area shall be shown as the stream and geohazard buffer area east of the proposed location of the split rail fence and is intended for preservation and mitigation, according to a city-approved mitigation plan. To prepare the conservation easement, a legal description of the property (labeled Exhibit A), a legal description of the conservation easement (labeled Exhibit B), and a legal drawing of the conservation easement area (labeled Exhibit C) shall be prepared by a licensed surveyor.

5. Prior to the issuance of a building permit, a financial surety that is generally consistent with section 9.7.4 of the mitigation plan or as modified shall be fully executed. The surety (assignment of funds or surety) shall be provided on the surety form provided by the City. The party initially providing the surety shall remain responsible for maintaining the surety through the duration of the five-year mitigation maintenance and monitoring period unless the city approves, in writing, the transfer of the responsibility for maintaining the surety to another party. The surety shall remain in place for the required five years of monitoring or until the performance standards for Year 5 are met.

6. Prior to the final building inspection, a mitigation as-built report prepared by the project wetland biologist shall be submitted within 30 days of completion of the mitigation installation, and in no case later than December 31 of the development year. The as-built report shall include color photos of the mitigation planting area, fence and NGPA signs. It shall also include the list of plants installed, the installer, and the type and source of mulch used. A site visit with the staff planner shall be scheduled by the applicant within 30 days of submittal of the as-built report. There shall be no release of financial surety for

1 amount specified for installation until after the inspection the City finds that the
2 mitigation was properly installed.

- 3 7. Prior to the final building inspection by the Planning and Community
4 Development Department, a “native growth protection area” (NGPA) sign shall
5 be installed in one visible location at the buffer edge.
- 6 8. Prior to the final building inspection by the Planning and Community
7 Development Department, a permanent wooden split-rail fence shall be installed
8 along the entire stream buffer/conservation easement boundary on the subject
9 property as approved by the Planning and Community Development
10 Department.
- 11 9. Annual monitoring reports from the project wetland biologist shall be submitted
12 to the staff planner by November 30th for five consecutive years. The first
13 monitoring report shall be submitted the year after the first full growing season
14 that has occurred after the mitigation planting has been completed.
- 15 10. Maintenance of the mitigation areas shall be conducted in accordance with the
16 Mitigation Plan specifics including maintenance activities, and needed
17 corrections, both of which shall be reported in the annual monitoring report.
- 18 11. A tree management plan for retention and removal of trees in the building area
19 pursuant to BMC 16.60.080 B 4 and the landmark tree ordinance shall be
20 submitted with the building permit for review and approval. This shall include
21 critical root zones for all effected trees, and BMPs for construction protection.
- 22 12. The Landmark Tree Committee reviewed and recommends approval for removal
23 of one multiple stemmed maple tree in poor condition, labeled Number 31 on
24 site plan. The Committee’s recommendation for approval is adopted.
- 25 13. No vehicular or pedestrian access shall be allowed to or from the alley abutting
26 the eastern property line of the subject site or over Lincoln Creek. Such
27 language shall be incorporated into the conservation easement.

28 DECIDED this February 7, 2025.

29 **BELLINGHAM HEARING EXAMINER**

30 

Sharon A. Rice