

RESPONSIBLE DEVELOPMENT
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SUPPLEMENTAL COMMENTS
ON THE SCOPE OF THE FAIRHAVEN HIGHLANDS EIS

January 23, 2008

Nicole Oliver, Communication Coordinator
City of Bellingham Planning and Community Development Department
210 Lottie Street
Bellingham, WA 98225

Re: Fairhaven Highlands EIS Scope – Supplemental Comments

Dear Ms. Oliver:

We would like to thank the City of Bellingham for this opportunity to provide comments on the scope of the Fairhaven Highlands EIS. Responsible Development is a non-profit organization whose goal is to ensure that development within Bellingham and Whatcom County satisfies the intent of the Growth Management Act. This letter supplements Responsible Development's previous comments on the EIS scope.

ALTERNATIVES

In our previous comment letter on the scope of the EIS dated January 19, 2008, we requested that a *Prerequisite Conditions Alternative* and a *Non-Prerequisite Condition Lower Density Alternative* be analyzed in addition to the applicant's preferred alternative, improved buffer scenario alternative, and the no action alternative. As you know, in both the preferred and improved buffer alternatives, the applicant presumes that the Fairhaven Highlands Planned Development, Preliminary Plat (Subdivision) and Wetland & Stream applications are vested under the regulations in effect at the time these applications were submitted. Specifically, these alternatives presume that these applications will be regulated under the former Wetland & Stream ordinance (BMC 16.50) rather than the current Critical Areas Ordinance (BMC 16.55). As you know BMC 16.50 was repealed and replaced by BMC 16.55 after Council adopted the Critical Areas Ordinance (CAO) on November 21, 2005, more than two years ago and only three days after the Fairhaven Highlands Wetland & Stream application was submitted.

We assert that these applications do not meet the requirements of the "Vested Rights Doctrine" in the State of Washington (*Noble Manor v. Pierce County*, 133 Wn.2d 269, 1997) and are therefore not vested. Accordingly, we request that an additional *Critical Areas Ordinance Alternative* be analyzed that meets the requirements of the Bellingham CAO (BMC 16.55). The *Critical Areas Ordinance Alternative* should be analyzed under two scenarios, one in which the prerequisite conditions are met and the other in which they are not met and the residential zoning reverts back to single family / low density.

VESTING

The primary issue and sub-issues that determine whether these applications are vested are:

Primary Issue:

Do the Fairhaven Highlands Planned Development, Subdivision, and Wetland & Stream applications meet the conditions of the Washington State Vested Rights Doctrine, which require that permit applications:

- Must be sufficiently **complete**; and
- Must **comply** with existing zoning ordinances and building codes in effect at the time the application is submitted?

Sub-issues:

➤ **Completeness:** Are these applications complete?

- 1) Are the prerequisite considerations under BMC 20.00.19 B: South Neighborhood Table of Zoning Ordinances (Area 4) sufficiently considered and addressed?
- 2) Is the SEPA environmental checklist sufficiently complete and accurate?
- 3) Does the Planned Development Application:
 - a) Contain a declaration of covenants and restrictions as required by BMC 20.38.050 (14)?
 - b) Address the fact that a clearing permit will be required pursuant to BMC 16.60 *et. seq.*?
- 4) Does the Preliminary Plat Application:
 - a) Adequately identify environmentally sensitive areas as required by BMC 18.16.020 (L)?
 - b) Identify existing easements as required by BMC 18.16.020 (C)?
- 5) Is the Wetland Delineation submitted with the Wetland & Stream Application sufficiently complete and accurate?

➤ **Compliance:** Do these applications comply with the existing zoning ordinances and building codes in effect at the time they were submitted?

- 6) Do these applications meet the prerequisite considerations under BMC 20.00.19 B: South Neighborhood Table of Zoning Ordinances (Area 4)?
- 7) Are the mature forested wetlands properly categorized?
- 8) Do the buffers for these mature forested wetlands meet the requirements of BMC 16.50?

Examination of Issues:

➤ **Completeness**

- 1) Are the prerequisite considerations under BMC 20.00.19 B: South Neighborhood Table of Zoning Ordinances (Area 4) sufficiently considered?

Area 4 of the South Neighborhood Table of Zoning Regulations (BMC 20.00.19 B) contains the following Prerequisite Consideration (*Exhibit A*):

“Construction of Chuckanut Valley Parkway collector or widening of Fairhaven Bridge.”

As addressed in Responsible Development’s previous comment letter, the multi-family, high density zoning was allotted to the site in exchange for the developer constructing a connector street between Old Fairhaven Parkway and Chuckanut Drive (SR-11) or widening the Fairhaven/12th Street Bridge over Padden Creek. This prerequisite condition is REQUIRED for development but is not sufficiently considered and addressed in the Fairhaven Highlands applications. Therefore, these applications are not sufficiently complete.

2) Is the SEPA environmental checklist sufficiently complete and accurate?

John McLaughlin, Ph.D. is a professional environmental scientist and professor at Huxley College of the Environment who has a Ph.D. in biological sciences from Stanford University and who has extensive experience involving field studies on public lands adjacent to this property. On May 17, 2005, Dr. McLaughlin submitted a comment letter regarding the Fairhaven Highlands SEPA Environmental Checklist, a copy of which is attached as *Exhibit B*.

In his letter, Dr. McLaughlin identifies at least 20 responses on the SEPA checklist that are incomplete, incorrect, insufficient, contradictory or overly vague. In addition to Dr. McLaughlin’s comments, Responsible Development has learned that the SEPA checklist fails to identify at least two prior landslides on this property in its response to question B.1.d: “Are there surface indications or history of unstable soils in the immediate vicinity?” The applicant’s response was “No.” Based on the errors and omissions identified by Dr. McLaughlin and the applicant’s failure to disclose critical information regarding the history of unstable soils, it is clear that the SEPA environmental checklist is not sufficiently complete.

3) Does the Planned Development Application:

- a) Contain a declaration of covenants and restrictions as required by BMC 20.38.050 (14)?
- b) Address the fact that a clearing permit will be required pursuant to BMC 16.60 *et. seq.*?

4) Does the Preliminary Plat Application:

- a) Adequately identify environmentally sensitive areas as required by BMC 18.16.020 (L)?
- b) Identify existing easements as required by BMC 18.16.020 (C)?

On May 4, 2005, Responsible Development, along with two local residents, filed two appeals challenging the Bellingham Planning Department’s decision that the Fairhaven Highlands Planned Development and Preliminary Plat applications were sufficiently complete. These appeals, which are attached as *Exhibits C and D*, assert that these applications do not meet these requirements. We hereby reassert our position that these applications are not sufficiently complete because they fail to meet these BMC application requirements.

5) Is the Wetland Delineation submitted with the Wetland & Stream Application sufficiently complete and accurate?

On January 16, 2006, John McLaughlin, Ph.D. submitted a comment letter regarding the October 2005 Fairhaven Highlands Wetland Delineation (*Exhibit E*) in which he concludes:

“The Wetland Delineation underestimated rating scores for wetland functions and erred in the classification of at least five Category I wetlands. Delineated areas and extent of hydrologic connectivity described in the report may also underestimate wetland functions, particularly during wet seasons when wetland functions are greatest. These deficiencies may be due to work done during unusually dry conditions, an unreasonably tight schedule, or both. Regardless, omission of data determining wetland boundaries or wetland surveys renders the report incomplete. These information gaps preclude a complete accuracy assessment by City staff. The delineation should be completed and resubmitted, preferably after including delineation work during typically wet conditions.”

Based on Dr. McLaughlin’s findings, it is clear that the Wetland Delineation and the Wetland & Stream Application are not sufficiently complete and accurate.

➤ **Compliance**

- 6) Do these applications meet the prerequisite considerations under BMC 20.00.19 B: South Neighborhood Table of Zoning Ordinances (Area 4)?

The Fairhaven Highlands applications fail to meet with the prerequisite consideration for Area 4 of the South Neighborhood to construct the collector / connector road or widen the Fairhaven/12th Street Bridge¹ and therefore do not comply with the existing zoning ordinances and building codes in effect at the time they were submitted.

- 7) Are the onsite and adjacent mature forested wetlands larger than 5,000 square feet properly classified?

On April 12, 2006, the Army Corps of Engineers issued its determination that seven mature forested wetlands on the Fairhaven Highlands property are regulated by the Corps under Section 404 of the Clean Water Act. A copy of the Corps’ letter is attached as **Exhibit F**. In a section labeled “Additional information” under item 5: *Lateral Extent of Jurisdiction*, the Corps states:

“Wetlands CC, DD, EE, FF, HH, KK and LL are **mature forested wetlands.**” (Emphasis added.)

Of these seven wetlands, five are larger than 5,000 square feet (CC, DD, FF, HH, and KK). According to the pre-CAO Wetland & Stream regulation (BMC 16.50.050), Category I wetlands are those “which have a high resource value based on ecological diversity, the presence of rare wetland communities and are sensitive to disturbance.” Included among Category I regulated wetlands are wetlands larger than 5,000 square feet that “contain irreplaceable or rare wetland types in the Puget Sound Basin. These types are sphagnum bogs, marine influenced wetlands and **mature, forested wetlands.**”² Similarly, the CAO adopted in 2005 states that **mature forested wetlands** greater than 4,356 square feet are Category I wetlands.³

Regardless of whether the Fairhaven Highlands application is regulated under BMC 16.50 or BMC 16.55, the property’s five mature forested wetlands are classified at Category I wetlands under either section of the Code. The Fairhaven Highlands Wetland Delineation and related applications

¹ Exhibit A

² **Exhibit G**, Bellingham Municipal Code (BMC) 16.50.050 A (2),

³ **Exhibit H**, BMC 16.55.280 A (4),

and site maps improperly classify these wetlands as either Category II or Category III, and therefore do not comply with the existing zoning ordinances and building codes in effect at the time they were submitted.

8) Do the buffers for these mature forested wetlands meet the requirements of BMC 16.50?

According to BMC 16.50.080 B, “Category I wetlands shall have a **100 foot minimum buffer**.”⁴ (Emphasis added.) Based on the Fairhaven Highlands site map submitted on April 22, 2005, the Fairhaven Highlands applications provide for buffers of only **50 feet** for these five Category I wetlands. Therefore, the Fairhaven Highlands applications do not comply with the existing zoning ordinances and building codes in effect at the time they were submitted.

CONCLUSION

The Vested Rights Doctrine in Washington State establishes two requirements that must be met in order for a permit application for development to be vested. Based on a review of the primary issue and sub-issues, it is clear that the Fairhaven Highlands applications fail to meet either of these requirements. Accordingly, the Fairhaven Highlands is not vested under the pre-CAO Wetlands & Stream regulations (BMC 16.50) and must comply with the regulations under the Bellingham CAO (BMC 16.55). In particular, the wetland buffers must be increased to satisfy the requirements of BMC 16.55.340 (*Exhibit J*). Most of the regulated wetlands will require **150 foot buffers** rather than the **50 foot buffers** used in the Fairhaven Highlands proposals. According to BMC 16.55.340(C)(2)(A), “the buffer of a Category 1 wetland shall not be reduced.”

In order to achieve an environmental impact statement that is accurate and complete, the EIS must analyze an alternative based on satisfying the requirements of Bellingham’s Critical Areas Ordinance (BMC 16.55). Without such an analysis, the EIS will omit critical information and data and will not meet the EIS requirements of the Washington Administrative Code.

Responsible Development believes it is essential that the Fairhaven Highlands EIS be rigorous and thorough, and we request that the *Critical Areas Ordinance Alternative* be included in the scope of the EIS and specifically addressed in the Draft EIS.

Thank you for the opportunity to provide comment on the scope of the Fairhaven Highlands EIS.

Sincerely,
Responsible Development

Joseph Yaver, President

Cc: Mayor Dan Pike (without exhibits)
Bellingham City Council (without exhibits)
David Bricklin, Bricklin · Newman · Dold, LLP

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⁴ *Exhibit I*, BMC 16.50.080 B