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6 **BEFORE THE CITY COUNCIL OF THE CITY OF BELLINGHAM**
7 **WHATCOM COUNTY, WASHINGTON**

8 In Re The Appeal of:

9 PROTECT MUD BAY CLIFFS

10 Appellant,

11 AVT CONSULTING, LLC; and the JONES
FAMILY

12 Applicant/Property Owners.

13 SUB2022-0011, VAR2022-0002,
CAP2022-0005 / Appeal of the preliminary
14 plat issued on June 5, 2026

APPLICANT'S PRE-HEARING BRIEF

15 The Woods at Viewcrest is a responsible development. Applicant, the Jones Family, has
16 had the subject Property¹ in their family for 60 years. The Jones Family is not a group of greedy
17 developers—they are Bellingham natives who were raised in a home directly adjacent to the
18 Property. They regularly explored the site as children, planted trees there, and played along the
19 shoreline. They have chosen to responsibly develop this Property to give more families the
20 opportunity to enjoy this neighborhood as they did. The Jones Family has also taken preservation
21 seriously by preserving 70-80 percent of the Property's natural tree canopy and placing all critical
22 areas and their buffers into a conservation easement. This includes the more than 200-foot buffer
23 of forest between Mud Bay shoreline and the lot lines of any developed areas of this Project.² In
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25 ¹ Located at 352 Viewcrest Road, Bellingham, Washington.

26 ² The development of approximately 37.7 acres addressed as 352 Viewcrest Road into 38 detached single-
family lots, open space tracts, and associated infrastructure as described in SUB2022-0011, VAR2022-0002,
CAP2022-0005, SHR2022-0007, and SHR2022-0008.

1 most cases, the building envelopes for homes in this Project will be setback by 300-400 feet from
2 the shoreline, well beyond the 200-foot shoreline buffer. Responsible development meant hiring
3 respected professionals who carried out dozens of site visits, drafted numerous reports, and
4 conducted multiple studies in order to create a site layout and design that would ensure all
5 requirements of the preliminary plat and other permits are met. All of these reports, site visits, and
6 studies were completed not only to meet or exceed the requirements of the City code and respond
7 to the Requests For Information (“RFI”), but also to support the Jones Family’s goal of realizing a
8 responsible development.

9 The expansive record for this project encompasses five days of hearing testimony, more
10 than a dozen testifying experts, hundreds of pages of impact-specific reports, a neighborhood
11 meeting, four RFIs created through an iterative public process over the span of three years, four
12 RFI responses (each containing updated reports), 516 public comments, a public hearing, multiple
13 site visits, an extensive SEPA Staff Report, a 208-page Hearing Examiner Decision, 19 mitigation
14 measures, and dozens of permit conditions. Despite the extensive body of information used to
15 review this Project, and the detailed decision provided by the Hearing Examiner, the Appellant,
16 Protect Mud Bay Cliffs (“PMBC”), makes tenuous claims in its appeal brief, stating the Hearing
17 Examiner’s approval of the Woods at Viewcrest preliminary plat was in error because it was
18 approved “before the administrative record demonstrated compliance with multiple applicable legal
19 and technical requirements.”³

20 This could not be further from the truth. In reality, the Hearing Examiner—and City staff
21 before her—thoroughly reviewed each of the areas in which Appellant claims the record lacks
22 compliance. The Hearing Examiner made extensive findings and conclusions on each of the areas
23 discussed in Appellant’s brief, each supported by evidence on the record. While Appellant might
24 disagree with the Hearing Examiner’s decision, “[c]ommunity displeasure cannot be the basis of a
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26 _____
27 ³ PMBC Appeal of the Woods at Viewcrest Decision, at 1.
APPLICANT’S PRE-HEARING BRIEF - 2

1 permit denial.”⁴ The record shows that the decision was supported by the law and substantial
2 evidence and is therefore entitled to deference.

3 Appellant attempts to improperly re-hash many of the issues addressed in the SEPA appeal
4 that PMBC initiated against the Project, and which the Hearing Examiner ultimately denied—a
5 matter that cannot be appealed to City Council. Additionally, Appellant’s brief shows a
6 misunderstanding of the permitting process, City code, and various legal concepts involved in this
7 closed record appeal. Because Appellant has not met, and cannot meet, its burden to prove the
8 Hearing Examiner’s decision is contrary to law and unsupported by substantial evidence, the City
9 Council must deny this appeal and affirm the Hearing Examiner’s decision.

10 I. STANDARD OF REVIEW

11 The Hearing Examiner’s decision is entitled to deference. Bellingham Municipal Code
12 (“BMC” or “City code”) requires that the Hearing Examiner’s decision is “presumed to be sufficient,
13 legal and regular.”⁵ It is Appellant’s burden to prove that the Hearing Examiner’s decision is
14 contrary to law, unsupported by substantial evidence, or inconsistent with the appearance of
15 fairness.⁶ A decision is supported by substantial evidence if “there [is] credible evidence on the
16 record sufficient to support the Hearing Examiner’s decision.”⁷ Appellate review of the Hearing
17 Examiner’s decision by City Council “shall be limited to argument regarding the legality and
18 sufficiency of the record of the proceedings before the hearing examiner and no new evidence
19 shall be considered.”⁸ Moreover, the decision of the Hearing Examiner must be affirmed by City
20 Council “unless the council concludes that the decision is contrary to law, or that it is not supported
21 by substantial evidence on the record, or that the proceedings before the hearing examiner are
22 inconsistent with the appearance of fairness.”⁹

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24 ⁴ *Maranatha Min., Inc. v. Pierce Cnty.*, 59 Wn. App. 795, 804 (1990); *Kenart & Associates v. Skagit Cnty.*, 37
Wn. App. 295, 303, review denied, 101 Wash.2d 1021 (1984).

25 ⁵ BMC 1.26.020.D.

26 ⁶ BMC 1.26.020.D.

27 ⁷ BMC 1.26.020.C.

⁸ BMC 1.26.020.C.

⁹ BMC 1.26.020.C.

II. ARGUMENT

A. Improper Appeal of Hearing Examiner's SEPA Decision.

The City of Bellingham (the "City") issued its SEPA determination—a mitigated determination of non-significance ("MDNS")—on July 25, 2025. Appellant appealed the MDNS on August 7, 2025. A five-day SEPA appeal hearing was held contemporaneously with the preliminary plat (and other permits) hearing from January 12 – January 16, 2026. The Appellant's SEPA appeal, much like this preliminary plat appeal, employed a "throw everything at the wall and see what sticks" approach, appealing nearly every environmental issue available, including geological impacts, wetlands, stormwater, plants and urban forests, flooding, wildlife, transportation, traffic, noise, recreation, light, glare, aesthetics, and more. The Hearing Examiner denied Appellant's SEPA appeal after hearing all testimony from Appellant, the City, and Applicant witnesses, conducting a site visit, and reviewing the lengthy record. Now, Appellant is attempting a second bite at the apple, improperly bootstrapping a SEPA appeal into this appeal of the preliminary plat decision. Appellant states, "Because the administrative record demonstrates that many of the development's most significant engineering and environmental components remain noncompliant, PMBC respectfully requests that Council reverse the Hearing Examiner's Decision." Clearly, this is an attempt to reverse the SEPA appeal denial.

Appellant cites numerous specific SEPA issues as "errors" in the preliminary plat, including a claim that geotechnical review has been deferred. This was specifically addressed in the Hearing Examiner's decision, Conclusion 2.a.i and 2.a.ii on page 118 - 119.¹⁰ Appellant also claims error regarding whether Mud Bay should be considered a wetland and/or a saltwater body, all of which were discussed at length in the SEPA appeal hearing and are addressed in the Hearing

¹⁰ ("The City did not erroneously "defer" geotechnical review until after the SEPA process, and the record contains no evidence of probable significant adverse impacts to Geologically Hazardous Areas (GHAs) on or adjacent to the site. Through the four RFIs, the City required and the Applicant provided detail regarding both i) the stormwater pipe conveyance path down the shoreline bluff and ii) site design choices that minimized alteration of GHAs within the upland development envelope.").

1 Examiner's decision, Conclusion 2.b. and 2.c. pages 119 - 120.¹¹ These are just a few examples of
2 the many issues Appellant raises regarding SEPA issues already addressed by the record and the
3 Hearing Examiner's decision—all of which are not actionable in this closed-record appeal.

4 Appellant's briefing fails to articulate the legal standard for a preliminary plat, or any
5 standard for granting a variance or critical areas permit. Moreover, Appellant provides no
6 identification of factual or legal errors related to the standards for the preliminary plat and variance
7 decisions. Instead, Appellant attempts once again to claim environmental impacts and pretend as if
8 the City—and Hearing Examiner—had not already taken a hard look at these issues. This is an
9 improper attempt to appeal the SEPA decision to City Council in a manner that is contrary to City
10 code.

11 Appellant attempts to impose its own standard: "First demonstrate compliance. Then grant
12 vested development rights." That standard is not consistent with City code or the applicable law.
13 Throughout City code, and throughout testimony provided by City staff in the SEPA appeal
14 hearing, it is clear that the City's code and practice does not require final design-level analyses
15 prior to granting the preliminary plat, but rather a showing that the Project as designed can comply
16 with the City code and can meet the mitigating conditions. It is clear from the record, and the
17 conditions for each of the permits, that the Project will not be granted future permits, including land
18 disturbance and public facilities construction agreements, if that compliance is not proven.

19 Accordingly, Appellant's vague and unsupported standard, together with its claims of
20 unresolved legal, technical, and ecological issues, amounts to nothing more than an attempt to
21 relitigate issues that were already resolved in the SEPA appeal, because Appellant was displeased

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23 ¹¹ Hearing Examiner Decision at 119-120. Conclusion 2.b. ("As covered in the un rebutted testimony and
24 written materials from the Applicant's wetland consultant, the 1987 USACE manual requires a minimum of
25 one positive wetland indicator from each parameter [hydrology, hydric soil, and hydrophytic vegetation] in
26 order to make a positive wetland determination. Site-specific study showed hydrology, but no hydric soils and
27 no vegetation, and therefore Mud Bay along the subject shoreline is not a wetland."); Conclusion 2.c. ("On
the record submitted, the undersigned is persuaded that Mud Bay is appropriately considered a salt
waterbody exempt from Stormwater Manual Minium Requirement 7, flow control. While Appellants'
witnesses universally disagreed, the State Hydraulic Code, at WAC 220-660-030(133), defines "saltwater
area" to expressly include estuaries.").

1 with the result. Appellant's arguments do not hold water, and Appellant's appeal should be denied.

2 **B. Significance of Preliminary Plat Approval, Vesting and Density.**

3 1. Preliminary Plat.

4 Appellant claims that preliminary plat approval allows the Applicant to proceed with
5 infrastructure improvements, excavations, construction, and "more importantly grants vested
6 development rights."¹² This overarching claim shows Appellant's fundamental misunderstanding of
7 City code and the concept of vesting.

8 First, the significance of a preliminary plat approval is specifically outlined in BMC
9 23.16.060.A., which states:

10 The approval of a preliminary plat by the hearing examiner is approval of the
11 general acceptability of the plat layout and its relation to adjoining properties.
12 Engineering detail and fulfillment of conditions of preliminary plat approval remain
subject to the approval of the city.

13 This City code provision makes explicit the "preliminary" nature of the preliminary plat. In
14 fact, infrastructure installment, excavation, and construction *cannot occur* at the approval of a
15 preliminary plat but rather requires public facilities construction agreements for any improvements
16 that will ultimately be dedicated to the City, such as the stormwater conveyance pipe, internal
17 roads, and utilities, and land disturbance permits for any excavation or other work that might
18 disturb soil. All of these permits require compliance with the conditions specified in the preliminary
19 plat approval. As explained in BMC 23.16.060.C., work cannot commence until the public facility
20 construction agreements and other necessary permits are in place:

21 After final approval of the public facility construction agreement and the approval
22 and issuance of any other required permits identified within the preliminary
23 approval, work on the subdivision improvements may be commenced. All such
24 agreements and permits shall be contingent upon compliance with the conditions
specified in the preliminary plat approval, conformance with all applicable
development standards, the payment of all fees, and the submittal of financial
sureties, as may be required.

25 Other requirements at the public facility construction agreement phase include a detailed

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¹² PMBC Appeal of the Woods at Viewcrest Decision, at 1.
27 APPLICANT'S PRE-HEARING BRIEF - 6

1 site plan demonstrating compliance with general landscaping requirements, street tree
2 requirements, retaining wall performance standards, and other infrastructure design components
3 outlined in BMC 23.08.080.G. The plain language of the City code clearly provides that many of the
4 technical aspects of the Project do not require final construction-ready specifications until the
5 public facilities construction agreement phase.

6 2. Vesting.

7 Preliminary plat approval does not grant “vested” development rights. A development vests
8 at the time of a Notice of Complete Application, which in this case was issued on April 5, 2022. The
9 rights “vested” at the time of complete application do not include any specific ability to build
10 *anything*. Rather, vesting indicates the laws and regulations that a project will be subject to.
11 Vesting provides that a project “will be considered only under the land use statutes and ordinances
12 in effect at the time of the application's submission.”¹³

13 Appellant makes much of the Middle Housing Interim Ordinance, claiming that the Project
14 will include 152 units rather than the 38 proposed. However, the Project has always proposed
15 single-family homes, and over the course of City review, the Applicant actually reduced the number
16 of lots from 45 lots to 38. Applicant does not intend to, and does not have the ability to, utilize the
17 Middle Housing Interim Ordinance as suggested by Appellant because of the design of the Project,
18 including (but not limited to) the following design elements:

- 19 1. Each lot has a 54’ x 54’ or 60’ x 60’ building envelope shown on the plans,
20 which is outside of critical areas and buffers. These are reflected on the plans
21 and discussed in the various geohazard reports.¹⁴ These envelopes include
building setbacks. Practically it would be difficult, if not impossible, to fit multiple
housing units in these envelopes.
- 22 2. The existing geo hazards and buffers limit buildable areas outside of the
23 building envelopes. These features make it impractical to expand development
outside the approved building envelope areas.¹⁵
- 24 3. The project proposes, and the City requires, significant tree preservation. As

25 ¹³ *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 275 (1997).

26 ¹⁴ See Application - Ex. C-134 through C-166. And C-10 (Figures 1 and 3), C-11 (Exhibits thereto), C-43
(Sheets 5-7, 10 and 11).

27 ¹⁵ *Id.*

1 such, the project is designed to retain between 70% and 80% of the existing
2 canopy cover, which includes critical areas, buffers and open spaces, as well
3 as land on each lot that is not developed. Appellant has argued that additional
4 “clear cutting” can occur on the individual lots, but the City Municipal code does
5 not permit this, and clearing of significant trees (a defined term meaning 6”
6 dbh¹⁶ or greater) is not permitted outside the building envelope areas without
7 additional permits. Vegetation Management Areas, which limit development,
8 are reflected in the Application materials and the updates thereto.¹⁷

- 9
- 10 4. A conservation easement is proposed over all critical areas, shoreline areas,
11 and other areas not proposed for development. This is a SEPA condition and
12 limits the land area available for development.¹⁸
- 13 5. The utility design, including the size of water and sewer pipes, is based on the
14 number of users. Each lot is not designed to have 4 private utility stubs to serve
15 additional development. Quadrupling the water consumption and sewage from
16 the lots would require re-design of the utilities and potential increase in pipe
17 size. This would also require a new application.¹⁹
- 18 6. The City’s SEPA determination was based on the proposed project, i.e. 38
19 single-family lots. If more than 38 single-family lots were proposed, a new or
20 updated SEPA review and threshold determination would be required.

21 Finally, the Applicant’s “vested rights” do not “expos[e] the City to takings claims if approved
22 lots are later determined to be undevelopable,” as Appellant claims. As outlined above by BMC
23 23.16.060.C, all future permits and approvals are contingent on Applicant’s compliance with the
24 conditions of the preliminary plat and applicable development standards at each phase. During the
25 SEPA appeal, there was significant testimony from City officials, Kurt Nabbefeld and Steve Sundin,
26 on this matter, and the Hearing Examiner fully considered all testimony.²⁰

27 **C. Appellant Misunderstands Various Sections of Municipal Code.**

1. Phasing.

Appellant claims that the conceptual phasing plan provided by the Applicant through the

¹⁶ Diameter at Breast Height.

¹⁷ Ex. C-54 Application Updated in response to RFI, and Ex. C-48 (Exhibit L to Ex. C-54) and Ex. C-134 - C-166 (Ex. 146 specifically).

¹⁸ Exhibit C-4-SEPA MDNS Condition No. 11 - 13.

¹⁹ Ex. C-54, Application Updated in response to RFI, Ex. C-58 (Exhibit A to Ex. C-54) and Exhibit C-84 (Ex T to Ex. C-54) (analysis of water system).

²⁰ Hearing Examiner Decision at 52, Finding No. 75; Kurt Nabbefeld Testimony; Steve Sundin Testimony; Exhibit C-5.

preliminary plat process is proof positive that the preliminary plat application is erroneous. However, BMC 23.16.010 does not require a phasing plan that meets all specific requirements of the code until it is "reviewed and approved by the city concurrently with the public facilities construction agreement for the first phase." Accordingly, even if the conceptual phasing plan had the defects that Appellant claims (which it does not) a final phasing plan is not required until the public facilities construction agreement is signed.

2. Minimum Lot Size and Lot Averaging.

The Project is proposed for Area 7 of the Edgemoor Neighborhood, which is zoned Residential Single with a one unit per 20,000 square feet overall density. Area 7 has no specific minimum lot size or minimum density, and the lot averaging code under BMC 23.08.050 is not applicable. In employing lot averaging, Appellant attempts to view the Project lots as divorced from the overall Project site, which is both incorrect and misleading. Considering the open-space tracts that are included in the Project, all of the lots and all proposed phases meet and exceed the one unit per 20,000 square feet overall density requirement.

3. Landslide Hazard Area Buffer Reductions.

Pursuant to BMC 16.55.460.A(1)(b), the standard 50-foot setback from a GHA may be reduced down to ten feet where this reduction can be shown to be safe. The Applicant's engineering geologist conducted site-specific analysis for the entire plat layout and identified specific setbacks for homesites on lots encumbered by specific GHAs and otherwise concluded that setbacks can be reduced to ten feet for the remaining lots, subject to future site-specific assessment and design recommendations. In fact, this site plan assessment resulted in eliminating one proposed lot and shifting of building envelopes for five other lots.²¹

III. CONCLUSION AND RELIEF REQUESTED

Appellant's appeal is merely an attempt to bootstrap a SEPA appeal in the guise of a preliminary plat appeal and improperly bring such an appeal to City Council. Appellant has not, and

²¹ See C-10 and C-11.

1 cannot, meet its burden to show the decision is contrary to law, or that it is not supported by
2 substantial evidence on the record. The evidence on the record clearly supports the approval of the
3 preliminary plat, variance, and critical areas permit and Appellant's appeal should be denied.
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5 **DATED** this 5th day of August, 2026 at Bellingham, Washington.
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7 CSD ATTORNEYS AT LAW P.S.
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