

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BURLINGTON**

In the Matter of the Application of)	No. CUP 1-23
)	
The Engineering Department)	East-West Connector Road Project CUP
of the City of Burlington)	
)	
)	FINDINGS, CONCLUSIONS,
<u>For a Conditional Use Permit</u>)	AND DECISION

SUMMARY OF DECISION

The request for a conditional use permit to extend E McCorquedale Road from its current western terminus with S Walnut Street approximately 1,000 feet to the west, to the intersection of Burlington Boulevard and Costco Drive, is **APPROVED**. Conditions are necessary to address specific impacts of the proposed development.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on April 19, 2023. The record was left open until April 21, 2023, to allow for the submission of additional materials identified at the hearing.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Brad Johnson, City Community Development Director
Marv Pulst, City Public Works Director
Michael Fohn

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated March 23, 2023
2. Site Plans
3. Zoning Map
4. Notice of Application, dated January 20, 2023
5. Notice of Complete Application, dated January 20, 2023
6. Notice of Application ad copy for publication in the *Stanwood Camano News*, dated January 24, 2023
7. Wetland Site Assessment and Buffer Mitigation Plan, Bachman Environmental, LLC, dated July 1, 2020

Findings, Conclusions, and Decision
City of Burlington Hearing Examiner
East-West Connector Road Project CUP
No. CUP 1-23

8. SEPA Mitigated Determination of Nonsignificance, dated July 2, 2021
9. La Quinta Development and Road Dedication Agreement, dated January 29, 2018
10. Recommended Changes
11. Vicinity Map
12. Notice of Public Hearing, dated April 3, 2023
13. Notice of Public Hearing ad copy for publication in the *Stanwood Camano News*, dated April 5, 2023
14. Public Comments:
 1. Comment from Joey Launceford, dated January 30, 2023
 2. Comment from Michael Fohn, dated February 1, 2023
 3. Comment from Michael Fohn, dated February 1, 2023
 4. Email Thread between Brad Johnson and Michael Fohn, dated February 1, 2023
 5. Comment from Darayl Taylor, dated March 25, 2023
 6. Email Thread between Marv Pulst and Michael Fohn, dated January 29, 2021, to March 27, 2023
 7. Email Thread between Marv Pulst, Michael Fohn, and Brad Johnson, dated January 29, 2021, to March 27, 2023
 8. Email Thread between Marv Pulst, Michael Fohn, and Brad Johnson, dated January 19, 2021, to April 18, 2023
 9. Email Thread between Marv Pulst, Michael Fohn, and Brad Johnson, dated January 29, 2021, to April 18, 2023, with Spring Meadows, LLC, Meeting Notes with Meeting with COB, dated April 18, 2023
15. Additional Materials:
 1. Comment from Spring Meadows, LLC, dated April 19, 2023
 2. Email Thread between Marv Pulst, Michael Fohn, Brad Johnson, and Kim O'Hara, dated January 29, 2021, to April 20, 2023
 3. Aerial Photograph and Site Plans with Annotations
 4. Easement Agreement, dated October 31, 1990
 5. Amendment to Easement Agreement, dated January 15, 1993
 6. Kmart Short Plat, dated September 20, 1988
 7. Spring Meadows, LLC, Binding Site Plan, dated January 12, 2000

The Hearing Examiner enters the following findings and conclusions based upon the testimony and admitted exhibits:

FINDINGS

Application and Notice

1. The Engineering Department of the City of Burlington (Applicant) requests a conditional use permit (CUP) to construct an extension of E McCorquedale Road from its current western terminus at S Walnut Street, to the intersection of Burlington Boulevard and Costco Drive, approximately 1,000 feet to the west. The proposed road extension would include two general purpose travel lanes, a center left turn lane, sidewalks, and a multi-

*Findings, Conclusions, and Decision
 City of Burlington Hearing Examiner
 East-West Connector Road Project CUP
 No. CUP 1-23*

use path along the southern side of the street. Associated work would also include installation of streetlights, utilities, and landscaping and involve approximately 55,555 square feet of clearing, 2,000 cubic yards of excavation, and placement of 2,000 yards of fill. The road extension right-of-way would cross seven parcels and, ultimately, provide an east-west connection at a point generally equidistant between E George Hopper Road to the south and Pease Road to the north.¹ *Exhibit 1, Staff Report, pages 1, 2, and 4; Exhibit 2; Exhibit 3; Exhibit 10; Exhibit 11.*

2. The City of Burlington Community Development Department (CDD) determined that the application was complete on January 20, 2023. On January 20, 2023, the CDD provided notice of the application consistent with the requirements of Burlington Municipal Code (BMC) 14A.05.090 by mailing notice to surrounding property owners and publishing notice on-site, with a comment deadline of February 3, 2023. On January 25, 2023, CDD published notice in the *Skagit Valley Herald*. On April 5, 2023, CDD provided notice of the open record hearing associated with the application by publishing notice in the *Skagit Valley Herald* and by mailing notice to interested parties consistent with municipal code requirements. *Exhibit 1, Staff Report, pages 2 and 3; Exhibits 4 through 6; Exhibit 12; Exhibit 13.*
3. Michael Fohn, of Spring Meadows, LLC, provided comments in response to the notice and expressed the following concerns about the proposed development:
 - Review of the application is premature. Approval of the CUP should be deferred until additional information can be provided.
 - Review of the application did not include all of the impacted parcels.
 - The final design of the proposed roadway will be impacted by how much of parcel No. P116513 the City is able to acquire through other processes currently under way. If only a portion of the parcel is acquired, other property owners may be adversely impacted. Specifically, Driveway 6, which is important to property owners of Lots 1, 2, 3, and 4 of Binding Site Plan (BSP) 1-00, an existing site development within the area of and/or adjacent to the route of the proposed road extension.
 - A CUP should not be approved based on a conceptual design that would likely require material revisions that could have an adverse impact on neighboring property owners.
 - If the City does not require all of parcel no. P116513, the City will not have the area to implement the mitigation plan.

Exhibit 14; Exhibit 15.

¹ The parcels are identified by Skagit County Tax Parcels Nos. P116513, P105310, P116512, P24256, P24257, P24246, and P24245. *Exhibit 1, Staff Report, page 1.*

State Environmental Policy Act

4. CDD acted as lead agency and analyzed the environmental impacts of the project as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). After analyzing the Applicant's environmental checklist and other available information, CDD determined that, with mitigation measures, the project would not have a probable significant adverse impact on the environment. Accordingly, CDD issued a Mitigated Determination of Nonsignificance (MDNS) on July 2, 2021. The same day, CDD provided notice of the MDNS by mailing or emailing notice to interested parties. CDD did not receive any comments on the MDNS, and the MDNS was not appealed. The MDNS requires the Applicant to implement the following mitigation measures:
- Property and right-of-way acquisition shall comply with all applicable platting laws and Burlington Municipal Code (BMC) requirements, including but not limited to Chapter 58.17 RCW and BMC Title 16. All land divisions or boundary line adjustments shall be approved by the Community Development Department prior to recording.
 - This project is located in a floodplain. The National Marine Fisheries Service has determined that development in floodplains can negatively impact species protected by the Endangered Species Act (ESA). In order to mitigate any fish and wildlife impacts to a level of non-significance the development shall comply with the following conditions:
 - A floodplain habitat assessment shall be submitted in conjunction with the required conditional use permit application.
 - The habitat assessment and mitigation plan shall be prepared in accordance with the guidelines and recommendations identified in the following document: "Floodplain Habitat Assessment and Mitigation, Regional Guidance for the Puget Sound Basin, 2013, FEMA Region 10."
 - The floodplain habitat assessment shall include appropriate mitigation measures for any increase in impervious surface coverage, floodwater displacement, or loss of native vegetation.
 - The conditional use permit application and all project plans and documents shall incorporate, and fully comply with, any mitigation measures, design specifications, or management practices identified in the floodplain habitat assessment and mitigation plan. All such mitigation measures, design specifications, and mitigation measures shall be incorporated into the CUP as conditions of approval.
 - The project area includes a regulated wetland (Walnut Pond). Under Chapter 14.15 of the Burlington Municipal Code this wetland is classified as a category III wetland and requires a protective buffer 150 feet in width. The proposed road construction would impact a portion of the required buffer. A wetland report and mitigation plan were submitted in conjunction with the SEPA checklist. Wetlands provides important water quality, flood control, storm-water management, and

habitat functions. In order to ensure any impacts to these functions are mitigated to a level of non-significance the following conditions shall apply:

- The wetland report and mitigation plan does not quantify the total area of the wetland buffer that will be impacted by the proposed development. The Burlington Municipal Code requires that wetland buffer impacts be mitigated at a 1:1 ratio. In order to ensure compliance with applicable Burlington Municipal Code requirements the project proponent shall submit a revised mitigation plan that clearly identifies the total square footage of wetland buffer impacted by the proposed development. The revised mitigation plan must also demonstrate how the required 1:1 buffer mitigation ratio will be met.
- The perimeter of the proposed wetland buffer shall be surveyed, and a conservation title notice shall be recorded that encompasses all portions of the wetland and wetland buffer owned or controlled by the City.
- Open rail fencing shall be installed between edge of the proposed road and the wetland buffer, and around all other portions of the wetland buffer owned or controlled by the City. Enamel coated signs shall be installed at intervals of 50 feet around the buffer and shall include the following message: “protected wetland area – no dumping – no vegetation removal – do not disturb – thank you.”
- This project is located in a floodplain and has the potential to redirect and alter the flow of surface water. In order to ensure any human safety, property, and hydrological impacts associated with the proposed development are mitigated to a level of non-significance full compliance with the Flood Development standards identified in the Chapter 14.15 of Burlington Municipal Code is required and a floodplain development permit shall be obtained.
- A cultural resources assessment for the proposed development was completed by a qualified archeologist. The assessment states that the proposed development does not appear to have the potential to impact cultural or historic resources and recommends that the project proceed subject to the implementation of standard inadvertent discovery protocols. In order to ensure any potential impacts to cultural, historical, or archaeological resources are mitigated to a level of non-significance the project proponent shall provide a copy of the inadvertent discovery protocols to any contractors or personnel involved in ground disturbing activities and take all necessary measures to ensure the protocols are properly implemented.
- A conditional use permit (CUP) and public hearing before the City of Burlington Hearing Examiner shall be required. No CUP shall be approved until the floodplain habitat assessment, revised wetland mitigation plan, floodplain development permit required by the conditions of this determination have been submitted.

- A grading permit shall be required and shall be obtained prior to beginning any clearing, grading, filling, construction, or other development activities. No grading permit shall be approved until the conditional use permit required by this determination has been approved.
- In order to ensure any potential impacts to surface and groundwater resources are mitigated to a level of non-significance the following conditions shall apply:
 - An engineered storm-water plan shall be prepared for the proposed development and shall comply with all applicable Washington State and City of Burlington storm-water management requirements. All development activities shall be consistent with the approved storm-water plan.
 - A temporary erosion and sedimentation control and storm-water pollution prevention plan shall be prepared and fully implemented and adhered to.
- The bike shop relocation component of the proposed development shall require a land use (site plan review) permit and shall fully comply with all applicable Burlington Municipal Code requirements.

Exhibit 1, Staff Report, pages 3, 4, and 8; Exhibit 8.

Comprehensive Plan, Zoning and Surrounding Uses

5. The City Comprehensive Plan designates the parcels that contain the road extension right-of-way as “Commercial-Business.” The Commercial-Business designation is intended to accommodate a mix of commercial and high-density residential uses. The City identified the following Comprehensive Plan policies as relevant to the proposal:
 - Provide opportunities for infill development of market rate housing in a variety of housing types to meet the needs of different income levels, different age groups, and life styles. [Housing Policy 4.B]
 - Pedestrian and transit links shall be encouraged to provide good public access to open space, parks, and recreation areas. [Housing Policy 10.B]
 - Development and redevelopment of vacant and underutilized land shall be encouraged and guided to complement the existing land use base where the land is fully utilized. [Business, Commercial, and Industrial Policy 1.A]
 - Street trees shall be encouraged as part of new development and changes in existing development. Trees shall be carefully selected to enhance rather than detract from businesses. Detailed standards for species selection, planting and maintenance shall ensure that there are no problems with roots under streets and sidewalks and that the trees area of an appropriate height and shape for the location. [Business, Commercial, and Industrial Policy 3.D]

Exhibit 1, Staff Report, page 7; Exhibit 3.

6. The road extension right-of-way is located within the General Commercial District (C-1). Parcels north, south, and west of the road extension area are also zoned C-1. Parcels south of the existing portion of East McCorquedale Road, which is located east of the proposed extension, are zoned Heavy Commercial District (C-2). Parcels north of the existing East McCorquedale Road are located within the Industrial District (M-1). The purpose of the C-1 zoning district is to provide for the location of a grouping of uses which are considered compatible uses having common or similar performance standards in that they represent types of enterprises involving the rendering of services, both professional or to the person, or on-premises retail activities. This zone represents the prime commercial designation for small to moderate scale commercial activities and should be developed in a manner which is consistent with and attracts pedestrian oriented activities. This zone encourages leisure shopping and provides amenities conducive to attracting shoppers.

BMC 17.50.030.

Public streets are not listed as a permitted or conditional use in the C-1 zoning district. *BMC 17.50.050; BMC 17.50.060; BMC 17.50.070.* Uses that are not listed as permitted or conditional in any zone are considered conditional uses. *BMC 17.05.090.E. Exhibit 1, Staff Report, page 2; Exhibit 3.*

Existing Site, Surrounding Uses, and Critical Areas

7. The majority of the proposed area involved with the right-of-way extension is vacant, level, and covered with grass, gravel, and small areas of pavement. A bike shop, Skagit Cycle Center, is located near the western end of the right-of-way and is being demolished and reconstructed south of the right-of-way as part of a related project. Surrounding uses include retailers, eating and drinking establishments, a church, a laboratory, and a hotel. A small City-owned park, which surrounds Walnut Pond, is located toward the eastern end of the right-of-way (as proposed) and to the south. The park also contains regional stormwater infrastructure and a walking path. The entire project site is located within the A-7 flood zone and has a base flood elevation of approximately 30 feet, as depicted by the applicable FEMA Flood Insurance Rate Map (FIRM) associated with the area. *Exhibit 1, Staff Report, page 2.*
8. As noted above, Walnut Pond is located near the eastern end of the proposed road extension, adjacent to South Walnut Street. Bachman Environmental, LLC, submitted a Wetland Site Assessment and Buffer Mitigation Plan (Wetland Report) on behalf of the Applicant on July 1, 2020. The Wetland Report identified Walnut Pond as a Category III wetland. Category III wetlands on lands with high-intensity use require a dedicated 150-foot buffer. *BMC 15.15.205.* The road right-of-way would be sighted along the north side of Walnut Pond, within portions of the requisite 150-foot buffer. As the alignment is

currently designed, a minimum buffer width of approximately 60 feet would result from development.

The impacted buffer consists of an asphalt parking lot, graveled areas, two mature Douglas fir trees, and a patch of invasive Himalayan blackberry. The Wetland Report indicates that the proposed road extension would require removal of the Douglas fir trees and patch of Himalayan blackberry and that no direct impacts to the wetland or fish and wildlife habitat conservation areas are expected. The Wetland Report states that Best Management Practices (BMPs) for erosion control would be installed and inspected before construction to ensure the protection of water quality functions. The Applicant would also enhance 3,600 square feet of buffer area by planting various native species, including four new Douglas fir trees, and removing invasive Himalayan blackberry. New runoff would be directed to the existing regional detention facility. The Wetland Report determined that anticipated impacts from development are expected to be relatively minor and recommends mitigation measures proportional to the level of expected impacts. In addition, City critical area regulations also require the Applicant to install signs, permanent edge markers, and fencing, where appropriate, to properly protect the wetland and its (remaining) buffer. *BMC 14.15.185.E.2; BMC 14.15.185.E.3*. The critical areas, buffers, and mitigation sites must also be identified and permanently protected through a recorded "Protected Critical Area" (PCA) notice. *BMC 14.15.160*. As discussed in further detail above, the MDNS would require the Applicant to install open rail fencing, signage, and record the PCA notice. Landscaped bio-retention areas would be provided to manage stormwater, in compliance with the low impact development (LID) requirements required by the City's adopted stormwater manual. *Exhibit 1, Staff Report, pages 1 through 4; Exhibit 7; Exhibit 8*.

Conditional Use Permit

9. As noted above, the Applicant requests a conditional use permit to construct an extension of E McCorquedale Road. CDD staff analyzed the proposal and determined that it would meet the specific criteria for approval of a CUP under BMC 14A.05.080, noting:
- The Applicant is proposing to construct an extension of an existing city street to connect South Walnut Street to Burlington Boulevard. The proposed street would include two general purpose travel lanes, a center left turn lane, sidewalks, and a multi-use path along the southern side of the street alignment. The street is consistent with other streets and public infrastructure located in the immediate vicinity of the project site and throughout the City.
 - The purpose of the proposed street is to provide access to developable land located south and east of South Walnut Street and to balance traffic volumes between Burlington Boulevard and other north-south travel routes. The project is consistent with the City's objective to shorten travel distances by improving accessibility, reducing circuitry, and enhancing street network densities. The City's long range transportation planning policies suggest projects like this should

help to limit, or reduce, per-capita vehicles miles traveled by reducing trip distances. The project would also provide an important bicycle/pedestrian connection between Burlington Boulevard, where frequent transit service is available, and potential development sites east of South Walnut Street.

- When the La Quinta hotel, which borders the proposed road to the north, was developed, the La Quinta developer was required to provide pedestrian access stub-outs to the northern edge of the proposed road right-of-way. The La Quinta developer and the City of Burlington executed a development agreement which obligated to the City to extend these stub-outs to connect with the sidewalk along the proposed road. The stub-outs and connections are necessary in order to address the pedestrian access requirements of BMC 17.54.090.A. The required pedestrian access connection points are not shown on civil plans. The Applicant's plans should be revised to include the required pedestrian access points.
- Electrical power would be extended along the right-of-way. In accordance with the Skagit County Coordinated Water Plan and the City's fire code, hydrants and fire supply lines would be required at various points along the street. The plans are unclear with respect to hydrant locations and water line routing. Under BMC 12.28.085, fiber optic communications conduit and vaults are required along all street frontages. No fiber optic conduit or vaults are shown on the plans. Fire hydrants, water supply lines, and fiber optic conduit and vaults must be provided and shown on revised plans prior to further permit approvals or the commencement of ground-disturbing activity.
- A landscaping plan was included with the application. The landscaping plan was prepared by a licensed landscape architect in accordance with BMC 17.80.070.E. The City's landscaping code includes a number of specific exemptions under BMC 17.80.020, that may obviate the need for a landscape plan or, alternatively, emphasize the need for protection from whoever it is offered. Public streets are not among the listed exemptions; however, with the exception of the street tree planting requirements in BMC 17.80.080, the landscaping code does not include provisions that can be easily applied to linear transportation projects.
- In most cases the right-of-way not used for travel lanes or sidewalks has been used for bio-retention cells, which are landscaped with a robust assortment of groundcover, shrubs, and grasses. The bio-retention cells also have slopes that may make the installation of traditional street trees problematic. Street trees are shown along the southeastern portion of the right-of-way, but in other locations trees are located on private property and labeled as "conceptual." Despite the limitations posed by the bio-retention cells, there are several areas where street trees can be installed. Specifically, adequate area exists for street tree plantings along the northwestern extension of the right-of-way, immediately south of the La Quinta property.
- A significant amount of landscaping has been provided; however, additional landscaping and street trees are needed in order to comply with the terms of the

La Quinta development agreement, the intent of the City's street tree code (Chapter 12.20 BMC), the street frontage landscaping requirements in BMC 17.80.080, and to provide shade, minimize aesthetic impacts, and reduce urban heat island effects.

- The proposed street will increase localized noise, light, fume, and vibration impacts associated with vehicle travel. However, all of the impacted properties are also adjacent to South Walnut Street and Burlington Boulevard where heavy traffic volumes are present, suggesting that the relative increase would be minor. Provided adequate landscaping is provided, these impacts can be minimized.
- The proposed street would serve an associated housing development abutting the southern edge of the right-of-way. This infill site could not be developed absent the proposed street. By improving access, the proposed street would provide opportunities for infill housing.
- Frequent transit service is currently available along Burlington Boulevard. Skagit Transit is planning on initiating a circulator route that will serve South Walnut Street. The proposed street would provide pedestrian and bicycle connections between these two transit lines and will provide pedestrian and transit access to abutting properties and developments located south and east of Walnut Street.
- The proposed street would facilitate the development of vacant properties that cannot be developed without access improvements and would improve access to other undeveloped parcels south and east of Walnut Street.
- The proposal complies with all applicable code requirements or can comply with all applicable code requirements through the application of reasonable conditions of approval.
- The properties surrounding the development site are zoned for a variety of mixed-use residential, commercial, and light industrial uses including apartment buildings, stores, eating and drinking establishments, hotels storage buildings, etc. The proposed road is similar to other arterial streets in the vicinity of the projects site and incorporates additional landscaping and design features to ensure compatibility with surrounding properties.
- Provided the required fire supply lines, hydrants, and fiber optic conduit and vaults are provided the project would not adversely affect the public infrastructure.

Exhibit 1, Staff Report, pages 4 through 8.

Testimony

10. City Community Development Director Brad Johnson testified generally about the proposal and how, with conditions, it would comply with the City Comprehensive Plan and zoning ordinances and would satisfy the specific criteria for approval of a CUP. He clarified that public roads are an unlisted use, so a CUP is required for the proposal under the City code. He noted that the MDNS issued for the proposal had not been appealed. Mr. Johnson explained that the Michael Fohn has expressed concern that the right-of-way

would overlap with (or disrupt) a portion of the routing of an easement that connects to four lots owned by Mr. Fohn, and accordingly, impact Mr. Fohn's property rights. Mr. Johnson stated, however, that the easement issue falls outside the scope of the permit review because it is related to property acquisition and just compensation for that acquisition and does not implicate the applicable code requirements or CUP criteria. He explained that a portion of the right-of-way is already in the City's possession and a portion of the right-of-way has been obligated to be conveyed to the City through a development agreement. He also noted that acquisition of one property is currently being processed through the eminent domain process. Mr. Johnson explained that the development agreement with the La Quinta property obligates the City to do certain things with respect to road design, including closing a temporary access point that was granted to them to enable their development to move forward and construct a permanent access point. He stated that the City granted the La Quinta property temporary access point to Burlington Boulevard and agreed to close that access point and construct a new access point connected to the new City road once it was completed. Mr. Johnson commented that a similar development agreement was made with the property owner to the south.

In response to comments on the proposal from members of the public, Mr. Johnson explained that the MDNS and recommended conditions of approval would require acquisition of a specified mitigation area in order for the proposal to move forward. He noted that such mitigation area would entail acquisition of a portion of the "Wallace property" (Parcel no. P1116513 or "Lot 5"), south of the right-of-way extension.

Testimony of Mr. Johnson.

11. City Public Works Director Marv Pulst testified (on behalf of the Applicant) that the proposal is for approximately 1,100 feet of new roadway that would contain 12-foot travel lanes and an 11-foot center turn lane that terminates at a roundabout at the east end and a new traffic signal at the west end. He explained that the proposed roadway would serve as an arterial road for the City and would take some traffic load off of Burlington Boulevard. He noted that the proposed extension would allow construction of a 120-unit apartment complex on a property that would be otherwise inaccessible, for instance.

Mr. Pulst noted that Mr. Fohn owns several properties north of the proposed roadway extension that have access to Walnut Street, but that Mr. Fohn wants the properties to connect to the new roadway as a backdoor access point. Mr. Pulst stated that he has been working with Mr. Fohn to establish access, but that access is dependent on the City's acquisition of Lot 5, which is currently being processed through the eminent domain process. He stated that the owner of Lot 5 was unwilling to negotiate with the City, so the City now had to move forward through the court system (and eminent domain process). Mr. Pulst explained that he had cautioned Mr. Fohn that the City may not end up with the entire Lot 5 property as had been originally imagined, and that Mr. Fohn may

have to negotiate with the Lot 5 property owner to make an arrangement to access roadway over Lot 5. He noted that Mr. Fohn stated that he felt he had a legal right to go from the backside of his property through the Kmart property to the proposed roadway under an existing easement. Mr. Pulst explained that the City is not opposed to Mr. Fohn being able to connect his properties to the proposed roadway, but that he may not be able to do so exactly as he envisions without changes to the subject proposal. *Testimony of Mr. Pulst.*

12. Michael Fohn of Spring Meadows, LLC testified that he is the developer of a subdivision north of the proposed roadway and he supports construction of the proposed roadway connector. He testified, however, that the binding site plan for the subdivision states that the lots should have access to the Kmart easement and that the current proposal threatens the property rights of Lots 1, 2, and 3 of the subdivision. Mr. Fohn explained that the property owners of these lots and Lot 4 would not support approval of the proposal without a development agreement addressing the easement. He expressed concerns that the City had not acquired all of the Wallace property (Lot 5), which the City would need to acquire in order to preserve the easement rights. He stated that if the City was only able to obtain a portion of the Wallace property, the City would have to change its design of the proposed roadway, would not be able to accommodate the easement, and would not have the area necessary to implement the mitigation plan. *Testimony of Mr. Fohn.*

Staff Recommendation

13. City staff reviewed the proposal and determined that, with conditions, it would comply with all applicable code requirements and would meet the specific criteria for CUP approval. *Exhibit 1, Staff Report, pages 8 through 11.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is vested with the duty and authority to hold public hearings and render decisions on Type III land use decisions, including conditional use permit requests. *BMC 14A.05.060.C.7; BMC 14A.05.140; BMC 17.120.120.*

Criteria for Review

The Hearing Examiner shall only approve a request for a conditional use permit if it is consistent with the following criteria:

1. The use will have no more adverse effect on the health, safety or comfort of persons living or working in the area, and will be no more injurious, economically or otherwise, to property or improvements in the surrounding area, than would any use generally permitted in the district. Among matters to be considered are traffic flow and control, access to and circulation within the property, off-street parking and loading, refuse and service areas, utilities, screening and buffering,

- signs, yards and other open spaces, height, bulk and location of structures, location of proposed open space uses, hours and manner of operation, and noise, lights, dust, odor, fumes and vibration; and
2. The proposal is in accordance with the goals, policies and objectives of the comprehensive plan; and
 3. The proposal complies with all the requirements of this title; and
 4. The proposal can be constructed and maintained so as to be harmonious and appropriate in design, character, and appearance with the existing or intended character of the general vicinity and provides a high quality of development; and
 5. The proposal will not adversely affect the public infrastructure.

BMC 14A.05.140.D.

The criteria for review adopted by the City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **With conditions, the use would have no more adverse effect on the health, safety or comfort of persons living or working in the area, and be no more injurious, economically or otherwise, to property or improvements in the surrounding area, than would any use generally permitted in the C-1 zoning district.** CDD provided reasonable notice and opportunity to comment on the proposal. CDD received comments on the proposal from one member of the public in response to its notice materials. This commenter expressed support for the proposed road extension but expressed concerns about access to their own lots in the vicinity (through existing agreements and/or easements), a concern outside the Hearing Examiner’s jurisdiction in this permitting process.

CDD reviewed the proposal and its potential environmental impacts, as required by the State Environmental Policy Act, and determined that—with mitigation measures—the proposed development would not have a probable significant adverse impact on the environment. Accordingly, CDD issued an MDNS for the proposal, which was not appealed, as detailed above.

The proposed road extension would help balance traffic volumes between Burlington Boulevard and other north-south travel routes. CDD staff determined that the City’s long range transportation planning policies suggest that projects like this should help to limit, or reduce, per-capita vehicles miles traveled by reducing trip distances. The proposed road extension would also provide a bicycle and pedestrian connection between

Burlington Boulevard, which contains transit services, with potential development sites east of South Walnut Street.

Electrical power would be extended along the right-of-way to serve the proposed right-of-way. The Applicant would also be required to provide fire hydrants, water supply lines, and fiber optic conduit and vaults. Landscaped bio-retention areas would be provided to manage stormwater, in compliance with the City's low impact development (LID) requirements. The bio-retention areas would be landscaped with an assortment of groundcover, shrubs, and grasses. The bio-retention areas limit the number of street trees that can be installed along the extension. The Applicant, however, would be required to install street trees where possible.

The proposed road extension would extend through the 150-foot buffer associated with Walnut Pond, a Category III wetland. The Applicant provided a wetland report and mitigation plan, which indicates that the Applicant would mitigate for impacts to the buffer by utilizing BMPs for erosion control, removing invasive plant species, and enhancing 3,600 square feet of degraded buffer by planting native species, including four Douglas fir trees. In light of this, the report determined that the proposal would not result in detrimental impacts to Walnut Pond or the surrounding environment.

Finally, CDD determined that the proposal would have no more impact on public infrastructure than other uses established in the area, which include retailers, eating and drinking establishments, a church, a laboratory, and a hotel. The Hearing Examiner concurs with this assessment.

Conditions are necessary to ensure that the Applicant completes the development in a timely manner and complies with the approved plans, MDNS, requirements of the municipal code, and all applicable grading, landscaping, wetland, fire, and safety code requirements. *Findings 1, 4 – 13.*

2. **The proposal will be in accord with the goals, policies, and objectives of the City's Comprehensive Plan.** The Comprehensive Plan designates the subject property and all adjacent properties as Commercial-Business. The proposed road extension would be consistent with Comprehensive Plan housing and commercial policies encouraging the provision of opportunities for infill development of housing; pedestrian and transit links to provide good public access to open space, parks, and recreation areas; development and redevelopment of vacant and underutilized land; and the installation of street trees. *Findings 1, 5, and 9.*
3. **With conditions, the proposal would comply with all the requirements of the municipal code.** CDD provided reasonable notice of the proposal and, ultimately, public comment was received by a single property owner in the vicinity. That owner conveyed

(in testimony and through written comments) a strong belief that the current request should be denied or, at a minimum, delayed pending the ultimate outcome of concurrent eminent domain proceedings that are underway and being used by the City to acquire property applicable with the current request. In response, City staff stressed that the results of any such proceedings will have minimal impacts on the current road extension proposal and that Mr. Fohn's concerns involve issues beyond the scope of the Hearing Examiner's jurisdiction. The Hearing Examiner concurs with this and notes that, should Mr. Fohn be prescient and accurately predict that major alterations to the road alignment are necessary following various proceedings in other forums, this particular CUP would—by default—become invalid. Nevertheless, nothing under review and within the scope of the Hearing Examiner's jurisdiction has convinced the Hearing Examiner that delay is necessary.

As conditioned, the proposed road extension would meet all development standards applicable to the C-1 zoning district, including standards related to parking. As noted in Conclusion 1, the proposed development would comply with landscaping and stormwater management requirements. *Findings 1 – 12.*

4. **The proposal would be constructed and maintained so as to be harmonious and appropriate in design, character, and appearance with the existing or intended character of the general vicinity and would provide a high quality of development.** The area surrounding the subject property is characterized by a wide range of mixed-use residential, commercial, and light industrial uses, including apartment buildings, retailers, and eating and drinking establishments. The proposed road extension would provide increased vehicle, bicycle, and pedestrian access to these uses and between transit service areas. Accordingly, when completed, the proposed road extension would be harmonious with the design, character, and appearance of the surrounding area. *Findings 1, 5 – 12.*
5. **The proposal would not adversely affect the public infrastructure.** Provided the Applicant complies with conditions to provide fire supply lines, hydrants, and fiber optic conduit and vaults, the proposed road extension would not adversely affect the public infrastructure. *Findings 1, 9.*

DECISION

Based on the preceding findings and conclusions, the request for a conditional use permit to reconstruct an extension of East McCorquedale Road from South Walnut Street to the intersection of Burlington Boulevard and Costco Drive is **APPROVED**, with the following conditions:

1. This approval shall not be construed to authorize any development or site modifications beyond those described in the application and shown on the approved plans. The approved plans shall be the plans and other project documents attached to, or referenced in, this decision.

2. Except as otherwise required by the conditions of approval identified in this decision and the associated SEPA threshold determination dated July 2, 2021, all work, construction, and development activities shall conform to the approved plans. The approved plans shall be the plans and other project documents attached to, or referenced in, this decision. Minor modifications necessary to implement any changes requested by the Building Official, Fire Marshall, or City Engineer are permitted when necessary to ensure compliance with established regulatory requirements.
3. This approval shall expire two years from the date of approval (i.e., the date of signature of this decision).
4. The permit holder and all contractors conducting work for the permit holder shall be responsible for complying with all applicable laws and regulations pertaining to erosion control and water quality, including obtaining a Washington State Department of Ecology Construction Storm-Water General Permit. Any additional erosion control or construction management practices prescribed by the City Engineer or Building Official shall be immediately implemented.
5. A grading permit is required prior to beginning any clearing, filling, excavation, building, construction, or other site development work.
6. Prior to the issuance of a grading permit civil engineering plans shall be submitted to, and reviewed by, the City for compliance with applicable stormwater, site development, and engineering requirements. The civil engineering plans must include the following specific information:
 - a. The civil plans shall depict the temporary access closure the associated curbing, sidewalk, landscaping restoration described in the approved development agreement between the City of Burlington and the owner La Quinta/Bigfoot Java property, including providing a connection between the onsite pedestrian path and sidewalk running along Burlington Boulevard as shown on attached exhibit “10”; and
 - b. The civil engineering plans shall clearly depict the location of all existing and proposed fire hydrants and associated water lines consistent with Burlington Fire Marshal requirements and the Skagit County Coordinated Water System plan; and,
 - c. Details shall be provided for the open rail fencing and signage required around the Walnut Pond buffer and mitigation areas as specified in the SEPA MDNS issued July 2, 2021 (exhibit “8”); and,

- d. Fiber optic conduit and vaults shall be provided along all street frontages consistent with the requirements of BMC 12.28.095; and,
 - e. Connections shall be provided between the pedestrian path stub-outs on the La Quinta property and the sidewalk running along the northern edge of the proposed street as shown on attached exhibit "10".
 - f. The plan sheets depicting the proposed wetland mitigation shall include a notation referencing the mitigation report, including the author's name, they are based on or shall otherwise clearly identify the name of wetland professional responsible for the plans.
7. No grading permit shall be approved or issued until a final landscaping plan has been submitted to, and approved by, the Community Development Department. The final landscaping plan shall be consistent with, and incorporate, any of the changes made to the final civil engineering plans and shall specifically address the following:
 - a. At least four additional street trees shall be included along the northwestern portion of the right-of-way as shown on attached exhibit "10"; and,
 - b. Consistent with the approved La Quinta development agreement the landscaping plans shall show how the street frontage landscaping will be restored once the temporary "right-in-right-out" access is removed. The landscaping in this area should be consistent with conceptual plans provided by the La Quinta developer.
8. A revised wetland report or report addendum shall be provided that quantifies the total area, in square feet, of the wetland buffer impacted by the road construction project. This document shall also verify, or cross-reference, the plan sheets included in the civil engineering plans showing the mitigation work.
9. Civil engineering "as-built" drawings shall be submitted to, and approved by, the City.
10. No as-built drawings shall be approved until Community Development and Public Works have inspected the completed work and verified that all of the infrastructure and improvements shown on the approved plans or otherwise required by the conditions of this permit have been completed or installed including, but not limited to, sidewalks, crosswalks, landscaping, pedestrian access connections, and fiber optic communications conduit.

11. No as-built drawings shall be approved until all of the following actions have been completed:
- a. All of the wetland mitigation plantings and mitigation activities identified in the approved mitigation plan shall be completed and inspected by the Community Development Department.
 - b. Open rail fencing shall be installed between the road right-of-way and the wetland buffer or mitigation areas as more particularly shown on the approved plans.
 - c. Enamel coated metal signs with the following language shall be installed at intervals of 50 feet around the perimeter of the wetland buffer and/or mitigation area:

Protected Wetland Area
No Dumping – Do Not Disturb
Thank you
 - d. A protected critical area (PCA) notice, approved by the Community Development Department, shall be recorded with the Skagit County Auditor. The PCA notice shall include a survey or drawing accurately depicting the location and delineated boundaries of the wetland, buffer, and mitigation area.
12. No as-built drawings shall be approved until the Fire Marshal as inspected and approved any fire hydrants or associated fire supply lines.
13. A boundary line adjustment (BLA) shall be submitted to the Community Development Department for review and recording. The required BLA shall combine the individual right-of-way conveyances and merge them with an existing City-owned property so that no additional parcels are created.

DECIDED this 13th day of June 2023.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center